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Regulations Review Division
Farm Service Agency, United States Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-0570

Docket No. FSA-2026-0430-0001; RIN 0560-AIXX

RE: Public Comments on Proposed Rulemaking regarding Payment Limitation and Payment Eligibility Regulations (7 CFR Part 1400)

This public comment is submitted on behalf of agricultural producers, multi-member Qualified Pass-Through Entities (QPTs), and the great American family farm operators to establish a concrete, redressable injury-in-fact for affected small American farmers.

By declaring under 7 CFR § 1400.100(c) that organizational status as of September 15, 2026 rigidly dictates eligibility, the FSA transforms a procedural reporting mechanism into a substantive forfeiture provision. While it is completely reasonable for the agency to set a strict calendar deadline, however using that deadline as an **irrebuttable presumption of ineligibility** (where missing the filing date strips away a substantive statutory right that Congress explicitly granted) crosses the line from administrative efficiency into unauthorized rulemaking. Under APA § 706, courts will evaluate whether the Secretary exceeded statutory authority by denying statutory benefits to an entity that was substantively a pass-through structure during the crop year but missed a procedural cutoff date.

The contrast between how the USDA (Farm Service Agency) and the IRS handle strict operational deadlines highlights two completely different administrative philosophies regarding corporate and pass-through entity status. Under IRS Revenue Procedure 2013-30, when an LLC or corporation misses the strict 75-day statutory window under IRC § 1362(b) to elect S-Corporation tax status (Form 2553), the IRS does not permanently strip pass-through treatment. Instead, the IRS provides a process to cure a late filing, by submitting a form alongside a basic "reasonable cause" statement explaining why the deadline was missed. In contrast, when the USDA Farm Service Agency enforces deadline rules for agricultural payment limitations under [7 U.S.C. § 1308] and 7 CFR Part 1400, it treats administrative filing dates as rigid, non-negotiable thresholds. USDA should not utilize procedural deadlines as a structural gatekeeping mechanism. By converting an administrative deadline into a hard eligibility barrier, the proposed rulemaking benefits large well-connected farmers who can with insider knowledge about legal details, hurting honest small American farmers who cannot afford lawyers to stay up-to-date about the details of regulatory rulemaking.

The unfair treatment of small farmers is also evident in how USDA proposed rule in treating legal entity restructuring as a presumptive "Scheme or Device" designation. When a farm operation reorganizes from a sole proprietorship into a multi-member LLC to access statutory pass-through multipliers, 7 CFR § 1400.104 (Substantive Change) and § 1400.5 (Denial of

Benefits) treat the restructuring with regulatory skepticism. While it is commendable that these rules were designed around fraud prevention, Congress created the "Actively Engaged in Farming" (AEIF) requirement in 1987 specifically to address this concern. When a farm operation reorganizes from a sole proprietorship into a multi-member LLC to access statutory pass-through multipliers, 7 CFR § 1400.104 (Substantive Change) and § 1400.5 (Denial of Benefits) treat the restructuring with regulatory skepticism. The agency imposes heavy burdens to prove "independent capital" and threatens to penalize operations under "scheme or device" rules, effectively treating the exercise of a statutory right as a presumptively fraudulent attempt to evade payment limits. Under the Statutory Directive, 7 U.S.C. § 1308(e)(5)(C), defines a QPTE in the negative: *"a limited liability company that does not affirmatively elect to be treated as a corporation."* Under tax law (Treas. Reg. § 301.7701-3), multi-member LLCs are automatically pass-through entities by default. Under 7 CFR § 1400.3, the FSA flips this statutory negative presumption. Rather than treating an LLC as a pass-through by default, county offices require small farmers to submit additional tax filings, corporate resolutions, and IRS forms to *prove* they **haven't** elected corporate status. Shifting the evidentiary burden creates an unauthorized administrative barrier for entity validation. True fraud requires intentional misrepresentation as dictated by the False Claim Act (31 U.S.C. § 3729). By converting technical paperwork oversights, such as submitting an updated Form CCC-902 a few days past an arbitrary snapshot date, into an automatic forfeiture of statutory pass-through limits, the agency uses anti-fraud tools to restrict legitimate statutory benefits.

The Farm Service Agency (FSA) has proposed revisions to 7 CFR Part 1400 governing payment eligibility and limitations under Title 7 of the United States Code. While the agency asserts that these revisions rationalize entity evaluations and prevent evasive practices, key structural, procedural, and substantive provisions of the proposed rule exceed statutory authority under 7 U.S.C. §§ 1308, 1308-1, and 1308-3a, and fail to satisfy the standard of reasoned decision-making mandated by the Administrative Procedure Act (APA), 5 U.S.C. § 706. Specifically, the proposed rule:

1. **Imposes Arbitrary Procedural Forfeitures:** Converting the September 15 snapshot cutoff (7 CFR § 1400.100) into a substantive forfeiture of pass-through multipliers for Qualified Pass-Through Entities (QPTEs) penalizes legitimate business reorganizations without statutory authorization under 7 U.S.C. § 1308(e)(5).
2. **Ignores Off-Farm Employment Commitments:** By maintaining a rigid 500-hour active management threshold (7 CFR § 1400.3) without requiring disclosure, auditing, or consideration of external full-time W-2 employment (2,000+ hours/year), the agency has failed to consider an essential operational factor under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), and has violated the statutory "customary area standard" set forth in 7 U.S.C. § 1308-1(b)(2)(D).
3. **Discriminates Against Multi-Member LLCs:** Subjecting 6+ member LLCs to mandatory State Office escalation and approval delays (7 CFR § 1400.2) while exempting identically sized general partnerships violates the statutory equal treatment mandate of 7 U.S.C. § 1308(e)(5)(C).

4. **Creates an Unlawful Net-Zero Risk Loophole:** By permitting guaranteed W-2 wages and internal partner distributions (IRC § 707(c)) to satisfy active contribution requirements without offsetting those guaranteed returns against contributed capital, the proposed rule certifies individuals whose net economic exposure is zero, in direct conflict with the non-delegable "at-risk" command of 7 U.S.C. § 1308-1(b)(2)(A)(iii).
5. **Relies on an Absent Empirical Baseline:** The agency's reliance on informal internal field directives (FSA Handbooks 5-PL and 6-PL) following the abrupt termination of objective agricultural labor survey data in 2025 leaves the proposed management and labor standards wholly unvarnished by empirical evidence.

1. Statutory Parity Requirement for All Pass-Through Entities

Congress enacted 7 U.S.C. § 1308(e)(5) to guarantee equitable treatment for Qualified Pass-Through Entities (QPTEs), including LLCs and S-Corporations, ensuring they receive payment allocations equivalent to general partnerships.

Ultra Vires Overreach of 7 CFR § 1400.100(c): Proposed 7 CFR § 1400.100(c) imposes an absolute September 15 "snapshot" deadline, converting a procedural administrative filing milestone into an absolute substantive forfeiture of statutory payment multipliers. Conversely, general partnerships with 6 or more partners remain subject to standard local County Committee approval. This differential treatment imposes severe administrative friction and capital access delays on LLCs simply for selecting a state-sanctioned corporate structure. Shifting evidentiary burdens and administrative gateposts onto multi-member LLCs directly conflicts with the statutory parity mandate of 7 U.S.C. § 1308(e)(5)(C).

Converting an administrative cutoff into a substantive penalty exceeds USDA's statutory authority under APA § 706(2)(C). Valid corporate transactions and entity formations executed under state law—which operate retroactively under state business codes—cannot be voided or negated by an arbitrary agency gatepost.

2. Creating Empirical Vacuum: Termination of Labor Survey Data and State Farm Arbitrariness

Under 7 U.S.C. § 1308-1(b)(2)(D), determinations of active personal labor or management must evaluate equipment and labor "*normally and customarily provided by farm operators in the area involved.*" Historically, FSA substantiated these regional benchmarks using objective labor data from the National Agricultural Statistics Service (NASS).

Following the termination of NASS farm labor survey collections, USDA began operating in a factual vacuum. Rather than establishing an alternative empirical data stream, the proposed rule codifies quantitative management thresholds (e.g., the 500-hour rule) derived entirely from internal, non-promulgated staff instructions in FSA Handbooks 5-PL and 6-PL. This framework creates a fatal internal inconsistency:

- **The "Best Available Data" Standard:** Under *Center for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018), an agency acts arbitrarily when it ignores recent, highly relevant historical data in favor of zero empirical data. Historical NASS datasets through 2024 represent valid empirical baselines for regional labor allocation. Discarding established 2024 NASS data violates APA § 706(2)(A).
- **The Selective Staleness Paradox:** USDA cannot reject 2024 empirical survey data as "stale" or "discontinued" while simultaneously enforcing sub-regulatory Handbook standards formulated over a decade ago without notice-and-comment.

The agency's empirical void is further demonstrated by its total failure to evaluate published, peer-reviewed literature on agricultural labor dynamics (e.g., National Center for Biotechnology Information, *PMC10200688*). Peer-reviewed studies confirm that operator time allocation, off-farm employment, and management contributions are highly heterogeneous, seasonally variable, and commodity-dependent. Ignoring published empirical studies while enforcing a rigid nationwide management threshold violates *State Farm*.

The "Best Available Data" Standard: Under *State Farm* and established D.C. Circuit precedent, an agency acts arbitrarily under APA § 706(2)(A) when it completely ignores recent, highly relevant historical data in favor of zero empirical data (*Ctr. for Biological Diversity v. Zinke*). Even if USDA ceased active ongoing administration of certain NASS labor surveys, FSA is acting arbitrarily by ignoring old data without replacing it. Discarding established 2024 NASS data in favor of unverified administrative assumptions violates APA § 706(2)(A). Recent historical data cannot be ignored simply because it conflicts with internal agency preference, nor can USDA claim 2024 empirical data is 'stale' while simultaneously enforcing sub-regulatory handbook standards drafted years prior. The agency's departure from reasoned decision-making in establishing an artificially low 500-hours limit is further compounded by its total failure to evaluate published, peer-reviewed empirical literature on agricultural labor dynamics alongside eliminating NASS regional labor baselines and creating an empirical vacuum.

The 25% "Denominator Trap" and Scale Paradox

7 CFR § 1400.6 establishes that non-family joint operation members may satisfy active personal management by contributing at least 500 hours or 25% of total annual management hours. This dual-track framework creates two major operational flaws.

- **The Denominator Trap:** To calculate whether an individual supplied "25 percent of total management," FSA must establish a factual denominator representing 100% of the management required for that specific farm size, crop, and region. Without NASS labor survey data, calculating this denominator is scientifically impossible, rendering every 25% determination an unreasoned administrative guess.
- **The Scale Paradox:** On a mega-farm requiring 10,000 management hours, 500 hours represents just 5% of total management, allowing passive investors to secure full payment limits via minimal paper compliance. Conversely, on a family operation requiring 800 hours, 500 hours demands an impossible 62.5% individual time commitment.

On a mega-farm operation requiring 10,000 management hours, 500 hours represents just 5% of total management, enabling passive investors to secure full payment limits via minimal paper compliance. Conversely, on a small operation requiring 400 total management hours, 25% is only 100 hours, yet FSA field offices routinely reject 100-hour management contributions by demanding 500 hours based on internal agency tradition.

Unlawful Importation into Family Operations: 7 CFR § 1400.6 restricts the 25% / 500-hour mandate to *non-family* joint operations. However, FSA field offices systematically misapply these bright-line rules to family pass-through entities (QPTs) via sub-regulatory Handbooks, violating APA § 553. Under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), courts owe no deference to agency interpretations that contradict codified regulatory text.

Dual Employment Disconnect and Labor Dilution

An individual holding a full-time, off-farm W-2 position allocates 2,080 hours annually to non-farm employment, typically during standard operational business hours. The proposed rule allows off-farm corporate executives to satisfy active management requirements by logging 500 hours of remote, off-hours management tasks without verifying labor dilution.

An individual maintaining a 40-hour per week off-farm W-2 position allocates 2,080 hours annually to non-farm employment, typically during prime operational hours. The agency's assumption that remote management tasks, off-hours phone calls, or intermittent decision-making constitute a "significant contribution" equal to that of a customary full-time farm operator contradicts baseline economic realities of farm management. The agency has conducted zero time-motion studies or empirical audits to evaluate whether a full-time corporate employee can physically and operationally deliver "significant" management under local operational norms. Under *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983), USDA entirely failed to consider the operational reality of **labor dilution**, that a full-time off-farm executive cannot physically or temporally provide "customary" local farm management. The 500-hour benchmark is an unreasoned administrative convenience unsupported by the record, directly conflicting with the plain language of 7 U.S.C. § 1308-1.

FSA has conducted zero time-motion studies to evaluate whether a full-time corporate executive can operationally deliver "customary" local management. The agency's failure to evaluate labor dilution for dual-employed individuals violates *State Farm*.

4. Capital "At Risk" Needs to Subtract Income Compensation

Statutory Directive: 7 U.S.C. § 1308-1(b)(2)(A)(iii) commands that a member's contributions **must be at risk**.

In 7 CFR § 1400.201, FSA allows salary, guaranteed payments under IRC § 707(c), or management draws to satisfy active contribution requirements without performing a net risk offset. When an LLC member contributes \$100,000 in equity capital but simultaneously receives \$100,000 in guaranteed W-2 compensation or fixed management fees payable regardless of crop yield or market prices, that member's net capital at risk should be **zero**.

When a member gets guaranteed draws equal to their capital, their money isn't really at risk. Treating an individual whose financial exposure is fully insulated by guaranteed entity distributions as having capital at risk violates 7 U.S.C. § 1308-1(b)(2)(A)(iii). Under *Loper Bright*, courts will not defer to agency regulations that alter statutory definitions of financial risk.

Proposed Change: For the capital to qualify as at-risk under 7 U.S.C. § 1308-1(b)(2)(A)(iii), any guaranteed salary (especially ones drawing big income) should be subtracted from the at-risk capital, since earned income by definition is **not at-risk**.

Regulatory Flexibility Act (RFA) & Paperwork Reduction Act (PRA)

The agency's Initial Regulatory Flexibility Analysis (IRFA) under 5 U.S.C. § 603 fails to evaluate the cumulative economic impact imposed on small multi-member LLCs by the September 15 snapshot cutoff. Reorganizing equity structures or adjusting operational plans prior to harvest is economically impracticable for small family enterprises.

Additionally, the additional logbooks, timesheets, and operating agreements required under 7 CFR §§ 1400.104 and 1400.105 impose information collection burdens that require valid OMB Control Numbers under the Paperwork Reduction Act (PRA). FSA cannot bypass a formal IRFA by declaring "no significant economic impact on a substantial number of small entities." Failing to quantify the financial losses resulting from forfeited pass-through multipliers constitutes procedural error under the RFA and APA § 706(2)(D).

5. The Inverse Compliance Burden (State Farm Arbitrariness)

Under the Regulatory Flexibility Act, 5 U.S.C. § 603, USDA was required to analyze these cumulative, disproportionate economic burdens on small family pass-through entities. The agency's total failure to evaluate how these intersecting provisions penalize small family farms relative to mega-operations renders the rule arbitrary, capricious, and unlawful under APA § 706(2)(A).

- **Disproportionate Safe-Harbor Access:** The flat 500-hour threshold functions as an extremely low regulatory bar for large-scale operations. On an operation with 10,000 management hours, a participant need only supply 5% of total management to qualify for a full \$125,000 payment limit. On a family operation requiring 800 total hours, a participant must supply an impossible 62.5% of total management to qualify. The rule effectively subsidizes minimal participation in mega-farms while penalizing genuine, shared management in small family operations.
- **Asymmetric Procedural Penalties:** Mega-operations possess the capital and legal infrastructure to navigate FSA review hurdles prior to September 15. Small family LLCs—often restructuring for intergenerational land transfers or estate planning—are routinely caught in state corporate filing backlogs or local FSA processing delays. Applying an absolute forfeiture rule under 7 CFR § 1400.100(c) selectively destroys the safety net for family entities while insulating sophisticated agribusinesses.

6 RECOMMENDATIONS (REGENT)

Component A (Severable): Substantive Integrity and Net Risk Accounting to Deter Fraud

1. **Net Capital Risk Accounting:** Require that any guaranteed income stream (W-2 salary, fixed management fee, or IRC § 707(c) distribution) drawn by a member from the farming entity be deducted directly from that member's equity capital contribution for purposes of satisfying 7 U.S.C. § 1308-1(b)(2)(A)(iii).
2. **Targeted Application of 500-Hour Threshold (Off-Farm Limitation):**
 - **Primary Operator Safe Harbor:** Full-time agricultural producers whose primary occupation is farming are exempt from the 500-hour management logbook regime and are presumed to satisfy active personal management through continuous operational presence.
 - **Off-Farm Management Scope:** The 500-hour management threshold is strictly limited to individuals maintaining off-farm employment who seek to establish active personal management.
 - **Dual-Employment Scaling:** Entity members claiming active personal management while holding off-farm employment must certify their annual off-farm W-2 hours. If an off-farm role exceeds 1,600 annual hours, the management threshold required to establish a "significant contribution" scales upward from 500 hours to 1,000 hours, supported by mandatory contemporaneous logbooks.
3. **Empirical Baseline Re-Establishment:** Initiate a targeted annual survey of regional farm management norms to supply the factual foundation required by 7 U.S.C. § 1308-1(b)(2)(D), replacing the defunct NASS survey stream.

Component B (Severable): Entity Neutrality & Flexible Snapshot Administration

1. **Dual-Employment Hour Reconciliation:** Require entity members claiming active personal management to certify their total annual off-farm W-2 hours. If an individual works more than 1,600 hours in an off-farm role, the management threshold required to establish "significant contribution" scales upward from 500 hours to 1,000 hours, supported by mandatory contemporaneous logbooks.
2. **Procedural Safe Harbor for Snapshot Updates:** Retain September 15 as an initial reporting target, but establish a mandatory 60-day notice-and-cure window. If an LLC submits an updated Form CCC-902 after September 15 due to legitimate estate planning, tax restructuring, or family equity transfers, pass-through status is preserved upon payment of a minor administrative processing fee rather than total forfeiture.
3. **Harmonized Review Thresholds:** Rescind 7 CFR § 1400.2(g)'s special State Office escalation for 6+ member LLCs. Apply risk-based audit sampling uniformly across all entity types (LLCs, S-Corps, Joint Ventures, and General Partnerships) based on operational complexity rather than legal entity form.

Notice of Severability: Components A and B are functionally independent. The agency cannot reject Component A based on administrative cost arguments applicable to Component B, nor

may it reject Component B without conducting a separate regulatory impact assessment under OMB Circular A-4.

7 Proposed Redline

7 CFR § 1400.3 [Capital At-Risk & Empirical Labor Auditing]

"Capital at risk means personal funds or capital subject to loss. **Guaranteed payments, W-2 salaries, or guaranteed partner draws under Internal Revenue Code § 707(c) shall not constitute capital at risk.**"

"Active personal management means... **Management evaluation standards shall be established using objective regional NASS labor data. For individuals maintaining off-farm employment, FSA shall evaluate management contributions against local customary standards using transparent, audited regional benchmarks.**"

8 Conclusion

Congress established farm payment limitations to protect family-scale agricultural enterprises and prevent the consolidation of federal safety-net disbursements into mega-operations. The combined enforcement of an unreasoned 500-hour management threshold, multi-member LLC audit triggers, net-risk accounting loopholes, and the rigid September 15 snapshot deadline creates a regulatory environment that privileges large corporate agribusinesses over family-scale operations. USDA must withdraw these defective provisions, reinstate an empirical baseline, and adopt the severable alternatives proposed herein prior to issuing a final rule.

QUESTION & ACTION ITEMS

1. Empirical Baseline and Denominator Determination

Target Regulations: 7 CFR § 1400.3 & § 1400.6

Legal Basis: 7 U.S.C. § 1308-1(b)(2)(D); 5 U.S.C. § 553(c); *State Farm*, 463 U.S. at 43

- **1A:** What specific empirical dataset, regional survey, or statistical baseline did USDA rely upon to determine that 500 hours or 25% of total management hours constitutes a "significant contribution" of active personal management across all geographic regions, farm sizes, and commodity types?
- **1B:** Given the termination of regional NASS labor survey collection, what specific mathematical formula or empirical baseline will local FSA committees use to calculate the 100% management denominator required to evaluate the 25% contribution prong under 7 CFR § 1400.6?
- **1C:** Why has USDA failed to distinguish between full-time primary producers (whose primary occupation is farming) and off-farm participants, subjecting full-time operators to identical logbook burdens despite their continuous operational presence?

- **1D:** Does USDA plan to reinstate the NASS Farm Labor Survey to re-establish the objective, regional, and commodity-specific empirical factual foundation required by 7 U.S.C. § 1308-1(b)(2)(D)? If the agency does not intend to reinstate the survey, what specific legal, economic, or administrative rationale justifies abandoning the report while continuing to enforce quantitative management thresholds that rely on regional labor data

Action Items:

- **Factual Record / Baseline):** Conduct and publish a formal Regional Agricultural Labor & Management Survey to replace the discontinued NASS survey stream before finalizing management thresholds. (*Legal Basis:* 7 U.S.C. § 1308-1(b)(2)(D); 5 U.S.C. § 553(c))
- **7 CFR § 1400.3 Management Rules:** Amend Form CCC-902 to require reporting of all off-farm W-2 employment hours, exempting full-time primary operators from logbook requirements while establishing a rebuttable presumption that full-time off-farm employment (>1,600 hrs/yr) scales the required management threshold from 500 to 1,000 hours. (*Legal Basis:* 7 U.S.C. § 1308-1(b)(2)(D); *State Farm*, 463 U.S. at 43)

2. Net Risk Accounting

Target Regulations: 7 CFR § 1400.201 & § 1400.3

Legal Basis: 7 U.S.C. § 1308-1(b)(2)(A)(iii); APA § 706(2)(C)

- **2A:** How does USDA justify allowing entity members to claim compliance with capital contribution requirements under 7 U.S.C. § 1308-1(b)(2)(A)(iii) when those same members draw guaranteed W-2 salaries, fixed management fees, or IRC § 707(c) distributions that offset or exceed their initial capital input?
- **2B:** Does USDA acknowledge that failing to offset guaranteed income streams against claimed equity contributions allows passive investors to create an illusion of capital at risk while taking zero net economic exposure?

Action Item:

- Promulgate an explicit "Net Risk Offset" rule requiring that any guaranteed W-2 salary, fixed fee, or IRC § 707(c) distribution drawn by an entity member be subtracted dollar-for-dollar from that member's claimed equity capital contribution. (*Legal Basis:* 7 U.S.C. § 1308-1(b)(2)(A)(iii); APA § 706(2)(C))

3. Procedural Due Process and Snapshot Forfeiture

Target Regulation: 7 CFR § 1400.100(c)

Legal Basis: 7 U.S.C. § 1308(e)(5); 5 U.S.C. § 706(2)(A)

- **3A:** What statutory authority permits USDA to enforce an absolute September 15 snapshot deadline that results in total payment forfeiture for minor, technical, or

structural paperwork updates, without offering an administrative cure period?

- **3B:** Has USDA evaluated the disproportionate financial impact of the September 15 snapshot cliff on small family operations undergoing estate planning or entity restructuring relative to large corporate agribusinesses with dedicated legal counsel?

Action Item:

- Replace the automatic forfeiture penalty of the September 15 snapshot date with a mandatory 60-day administrative cure period for technical or structural paperwork updates. (*Legal Basis: 7 U.S.C. § 1308(e)(5); 5 U.S.C. § 706(2)(A)*)

4. Disparate Entity Treatment of LLC Discrimination

Target Regulation: 7 CFR § 1400.2(g)

Legal Basis: 7 U.S.C. § 1308(e)(5)(C); 5 U.S.C. § 603 (RFA/SBREFA)

- **4A:** What empirical evidence demonstrates that multi-member LLCs with 6 or more members present a higher risk of payment limitation abuse than general partnerships of equivalent size, justifying mandatory State Office audit triggers under 7 CFR § 1400.2(g)?
- **4B:** Why has USDA imposed heightened procedural hurdles specifically on LLCs—the primary business structure used by small family operations for intergenerational transfers—while allowing general partnerships to bypass State Office review?

Action Item:

- Re-evaluate the mandatory State Office review trigger for 6+ member LLCs, harmonizing processing workflows and audit triggers across all legal entity structures, including general partnerships. (*Legal Basis: 7 U.S.C. § 1308(e)(5)(C)*)