



# **Bonus Continuing Legal Education Webinar**

**National Ag Law Center Staff**

**May 26<sup>th</sup>, 2021**



# The National Agricultural Law Center

*The nation's leading source for agricultural and food law  
research & information.*

[nationalaglawcenter.org](http://nationalaglawcenter.org) | [nataglaw@uark.edu](mailto:nataglaw@uark.edu)

Factsheet, Series: 2021

## Case Law Update

*Secured Transactions*

**Micah Brown**

*Staff Attorney, The National Agricultural Law Center*

### Principles of Equity

Scott Day (“Debtor”), a row crop farmer, operates under three partnerships (“Old Entities”) for the 2014 crop season. Regions (“Bank”) provides the Old Entities financing for the 2014 season, which is secured by all crops grown by each entity. The Bank perfects this interest, thereby holding priority against the Old Entities’ crops. Ultimately, the Old Entities did not repay the loans. The following year, the Debtor creates three new partnership (“New Entities”), even though he planned to farm the 2015 crop season under the Old Entities. The Debtor applies for financing with the Old Entities; however, the Bank declines to provide a loan because of the carryover debt from 2014.

The Debtor then turns to AgriFund (“Lender”) for financing. The Lender discovers the Bank’s security interests against the Old Entities, and decides not to supply the Debtor’s loans without subordination. Thus, the Lender asks the Bank to sign a subordination agreement, but the Bank declines. Afterwards, the Lender warns the Bank that the Debtor will use different entities to receive financing if he cannot get loans under the Old Entities. Again, the Lender urges the Bank to agree to subordination, but the Bank refused.

After the second refusal, the Debtor requests loans from the Lender under the New Entities. Apparently, it was the Lender’s idea for the Debtor to apply for loans under the New Entities. The next day, the Lender provides the loans and perfects this interest against the New Entities’ crops and the Debtor, individually. The New Entities default on the loans after the 2015 crop season, and the Bank and Lender claim a first priority security interest against 2015 crop proceeds.

The Lender argues it has first priority to the proceeds because the liens were valid only against the Debtor individually. In short, the Lender urged the court to disregard the New Entities because the entities are the Debtor’s alter egos. According to the Lender, piercing the corporate veil will hold the Debtor individually liable for the loans. Because the Lender held the only lien against the Debtor individually, the Lender has priority to the proceeds.

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**

 National Agricultural Library  
UNITED STATES DEPARTMENT OF AGRICULTURE

This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, USDA

However, the court disagrees with the Lender's assertion of priority. The Lender, according to the court, may not assert the doctrine of piercing the corporate veil because the Lender did not suffer injury from the Debtor's use of the New Entities. Rather, the Lender engaged in inequitable conduct towards the Bank to obtain subordination, and later priority over its interest. Both the Debtor and Lender abused the corporate structure in an attempt to gain a priority stake over the lien that was held by the Bank. Because the New Entities are just the alter egos of the Old Entities, the Bank's lien is was ongoing and has priority over the Lender's subsequent perfected interest.

*AgriFund, LLC v. Regions Bank*, 2020 Ark. 246, 602 S.W.3d 726 (2020)

### Priority Dispute in Crops: Security Interest vs. Landlord's Lien

ARALP ("Landlord") leased farmland to Keith Milacek ("Tenant"). Afterwards, the Tenant borrowed money from the Bank of Kremlin ("Bank"), granting the Bank a security interest in the crops grown upon the leased land, which the Bank then perfected. The Tenant defaulted on his lease, and the Landlord regained possession of the land. The Landlord sent notice to the Bank informing it of the Tenant's default and the Landlord's possession. Later, the Landlord cultivated the already planted crops, harvested the crops, and sold them at market. The Bank filed suit against the Landlord for wrongfully converting the crops because the Bank has priority to the collateral.

The Landlord claims they have a valid interest in the crops because they hold a statutory landlord's lien under Oklahoma law, which states: "Any rent due for farming land shall be a lien on the crop growing or made on the premises." Further, the Landlord claims their lien in the crops has priority over the Bank's interest because the statutory landlord's lien is not subject to the UCC, meaning Article 9's priority rules do not apply. To support this argument, the Landlord claims the state's real property laws dictate the order of priority, and under these laws, the Landlord has priority.

In opposition, the Bank claims it has priority. Overall, the Bank asserts the landlord's lien is subject to Article 9 rules because the lien is an "agricultural lien" that falls within the scope of the UCC. Because the statutory lien is subject to the UCC, Article 9 priority rules apply to the Landlord's interest in the crops. The Bank points out that Article 9 provides specific rules to determine priority among creditors who hold interests in crops. Under Article 9, "A perfected security interest in crops growing on real property has priority over conflicting interest of an encumbrancer or owner of the real property..."

Importantly, the Bank counters the Landlord's claim that state real property laws dictate the manner of determining priority in this situation. Oklahoma enacted a provision which states § 334(i) supersedes "any inconsistent provisions of other statutes of this state." In other words, all other state laws providing for an alternative method of determining priority in crops is invalid, and § 334(i) is the exclusive method of determining priority in crops.

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**



Because the Bank holds a perfected security interest, it has priority in the crops over the Landlord's conflicting lien interest, pursuant to § 334(i). Accordingly, the Landlord's harvest and sale of the crops constitutes conversion because it was the Bank who had the rights in the crops.

*Bank of Kremlin v. ARA, L.P.*, 2020 OK CIV APP 30, 469 P.3d 724

#### No Collateral Investigation, No Future Advances Clause

Harvey Haynes ("Debtor"), a tobacco farmer, borrows money from Versailles Farm, Home and Garden, LLC ("Creditor") who takes a security interest in the Debtor's 2013 tobacco crop. Weeks later, the Debtor executes a security agreement with Farmers Tobacco Warehouse ("Warehouse"), which provides the Warehouse a security interest in 100 acres of burley tobacco and any insurance proceeds from the crop. The Warehouse then perfects its interest by filing a UCC financing statement. Afterwards, the Creditor perfects its interest in the Debtor's tobacco crop. Months later, the Creditor informs the Warehouse of its perfected security interest in the Debtor's 2013 tobacco crop, and requests the Warehouse to include the Creditor as a payee on any proceeds from the crop. However, the Creditor never receives a payment for the sale of the tobacco crop. The creditor files suit against the Warehouse, alleging conversion of the proceeds of the sale of the Debtor's 2013 tobacco crop.

The Creditor claims the Warehouse has first priority the tobacco crop proceeds, but not the all the proceeds received from its sale. The Creditor argues it has a right to the proceeds that were not secured by the Debtor-Warehouse security agreement because the agreement did not include a future advances clause. According to the Creditor, because the Debtor-Warehouse security agreement does not include a future advances clause, the Warehouse does not have priority over the Creditor in the crops once the Warehouse's loan is satisfied.

The court disagrees with the Creditor's argument because the UCC does not require the Warehouse include a future advances clause in its security agreement to secure future advances. Instead, because the Warehouse provided notice of its interest by filing the financing statement, it was the Creditor's duty to investigate the state of collateral under the Debtor-Warehouse security agreement. However, the Creditor was unaware of the Warehouse's financing statement, and as a result, made no attempt to obtain the Debtor-Warehouse security agreement or inquire about other creditors with an interest in the Debtor's tobacco crop. Because the Creditor did not obtain the Debtor-Warehouse security agreement, it obviously did not rely on the absence of the future advances clause when providing its loan to the Debtor.

In general, the court determined that failing to investigate the state of the tobacco crop collateral prior to issuing the loan impaired the Creditor's ability to enforce its interest. The Warehouse's neglect to include a future advances clause in a security agreement does not entitled the Creditor to collect on the tobacco crop proceeds.

*Versailles Farm, Home & Garden, LLC v. Haynes*, 2021 WL 519722 (Ky. Ct. App. Feb. 12, 2021)

The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.





# The National Agricultural Law Center

*The nation's leading source for agricultural and food law  
research & information.*

[nationalaglawcenter.org](http://nationalaglawcenter.org) | [nataglaw@uark.edu](mailto:nataglaw@uark.edu)

Factsheet, Series: 2021

## Federal Livestock Dealer Trust

*Payment Protection for Sellers*

**Micah Brown**

*Staff Attorney, The National Agricultural Law Center*

On December 21, 2020, the Consolidated Appropriations Act (“CAA”) passed both houses of Congress and was later signed into law on December 27. The CAA is a \$2.3 trillion spending bill, \$900 billion of which is being used for stimulus relief due to the COVID-19 pandemic. Of the \$900 billion in stimulus relief, \$13 billion is allocated to the agricultural sector. This legislation is the first stimulus relief package since the CARES Act was enacted in April, 2020.

Most of the agricultural provisions contained in the stimulus legislation offers financial assistance to producers through various USDA-led programs. However, the CAA also contains measures designed to protect and benefit certain individuals within the agricultural industry. One of these agricultural measures contained in the CAA creates a federal livestock dealers trust. Congress established this statutory trust to benefit unpaid sellers of livestock.

### Background

Before the enactment of the livestock dealer trust, two statutory trusts have been enacted in the agricultural industry. One trust is found under the Packers and Stockyards Act (“PSA”), which applies to meat packers and poultry dealers respectively. A statutory trust applicable to produce buyers operates under the Perishable Agricultural Commodities Act (“PACA”), which is modeled after the PSA trust. In general, each of these trusts Congress created were in response to an economic downfall in the industry, and were developed to protect sellers of commodities from losing money when they go unpaid.

For years, livestock sellers have lost large amounts of money due to livestock dealers defaulting on their payments, but no trust was set in place to protect these sellers. In 2018, the Securing All Livestock Equitably Act (“SALE Act”) was introduced in Congress. This bill was designed to create a livestock dealer trust, but it went no further in the legislative process. However, the 2018 Farm Bill instructed the United States Department of Agriculture (“USDA”) to conduct a study to determine whether a livestock dealer trust would be feasible. On February 4, 2020, USDA published its report from the study, finding that a statutory trust covering dealers’ livestock

 National Agricultural Library  
UNITED STATES DEPARTMENT OF AGRICULTURE

This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, USDA

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**

purchases is feasible, and “could be established in much the same manner as the statutory trusts covering meat packers, live poultry dealers, and produce buyers.”

One month after the report was published, the Securing All Livestock Equitably Act of 2020 was introduced in Congress. Similar to the 2018 SALE Act, the bill creates a statutory livestock dealers trust that is modeled after the PSA trust. But unlike the 2018 Act, the 2020 bill was enacted because it was included in the CAA stimulus legislation. Accordingly, the statutory livestock dealer trust is now in effect, and livestock sellers are currently receiving payment protection under the trust.

### Why Create a Livestock Dealer Trust?

The main goal of enacting the livestock dealer trust is to ensure livestock sellers are repaid for the livestock they sold to a dealer. In the livestock industry, dealers regularly buy and resell livestock, so dealers are typically allowed to possess the livestock and pay for it at a later date. However, before enacting the livestock dealer trust, there was no guarantee a livestock seller would receive payment from the dealer. Therefore, enacting the livestock dealer trust accomplishes the main goal by requiring a livestock dealer to retain certain assets in trust for the benefit of unpaid livestock sellers. In other words, if the dealer fails to pay the seller for livestock, the seller will be able to receive payment through the trust assets.

#### What Parties are Subject to the Trust?

Congress established the livestock dealer trust to benefit unpaid cash sellers of livestock. The statutory trust provision under the CAA defines cash sales as “a sale in which the seller does not expressly extend credit to the buyer.” Also, in terms of the statutory trust, livestock includes “cattle, sheep, swine, horses, mules, or goats—whether live or dead.” 7 U.S.C.A. § 182(4). Overall, the trust applies to sellers who do not finance a dealer’s purchase of the seller’s livestock, and have not yet been paid for the sale. Examples of “unpaid cash sellers” that may receive protection from the statutory trust include livestock producers, auction markets, and livestock dealers selling to another livestock dealer.

Also, this trust specifically applies to livestock dealers. The PSA says a dealer is “any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.” 7 U.S.C.A. § 201(d). This means a person buying and selling livestock with their own funds, or the funds of their employer, is a dealer subject to the statutory livestock dealer trust. However, as provided in the CAA, livestock dealers whose average annual purchases of livestock do not exceed \$100,000 are excluded from the statutory trust.

### How Does the Trust Function?

A dealer’s trust is created when they take delivery of livestock without paying the seller, or when the dealer pays with a check that is later dishonored. In other words, if the dealer does not pay for livestock they “purchase” from a seller, the dealer must maintain a trust with certain assets until they satisfy the unpaid purchase of livestock. Generally, the trust assets include the dealer’s

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**





livestock, all inventories of, or account receivables or proceeds from, the livestock purchased by the dealer. Therefore, the dealer's livestock and earnings from reselling livestock are assets held in trust for the seller.

Importantly, the statutory trust does not require dealers to keep trust assets separate for each individual seller because the trust is an integrated "floating trust." This means all of the dealer's livestock-related assets are commingled together to make up the trust. For example, if the dealer purchases livestock from multiple sellers, all livestock and proceeds are combined together to make up the trust assets. Thus, all of the trust assets are subject to claims from every unpaid seller, up to the amount they are owed.

The statutory trust serves as an important tool for unpaid livestock sellers because it secures repayment through the trust assets held by the dealer. The trust guarantees repayment by providing unpaid sellers first priority to the trust assets. In other words, the statutory trust gives unpaid sellers a superior claim to the trust assets over the dealer's secured creditors who hold an interest in the assets. Accordingly, sellers who deliver livestock to a dealer without payment automatically become beneficiaries of the trust, and will have a greater claim to the trust assets until their claim is paid in full.

Generally, priority to the trust assets sometimes becomes an issue in cases where the livestock dealer files for bankruptcy. Conflicts between unpaid sellers and the dealer's creditors occur because they each have an interest in the dealer's property, which includes the trust assets. However, if an unpaid seller files a bankruptcy petition, the trust assets do not become part of the bankruptcy estate. Therefore, unpaid sellers will receive payment from the trust assets before any creditors who claim an interest in the same assets.

### Preserving Seller's Trust Claim

Although the livestock dealer trust is triggered when the dealer takes delivery of livestock without paying the seller, the statutory language of the trust contains two requirements a seller must satisfy to establish a right under the trust. First, the seller must sell livestock to a dealer who averages over \$100,000 in livestock purchases annually. Dealers who average less than \$100,000 annually are not subject to the statutory trust, and have no obligation to hold assets in trust. Second, the unpaid seller must provide the dealer with a written claim on the trust, and the seller must file this claim with the Secretary of Agriculture ("Secretary"). The unpaid seller must send this notice to the dealer and Secretary within 30 days after payment was due. In general, a dealer's payment is due before the close of the next business day following the purchase and delivery of the livestock. 7 U.S.C.A. § 228b.

If the dealer did provide payment to the seller, but the dealer's payment instrument (usually a check) is dishonored, the seller is still an "unpaid seller." In this situation, the seller must send their claim on the trust to the dealer and Secretary within 15 days after receiving notice that the dealer's check was returned for insufficient funds.

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**



After the dealer receives a written trust claim from the unpaid seller, the dealer is required to provide a notice to all of their creditors who have recorded a security interest in the dealer's livestock held in trust. The dealer must provide this notice within 15 days of receiving the seller's claim.

### Conclusion

In general, the enactment of the statutory livestock dealer trust does not change the day-to-day business, and livestock sales will continue as before. However, with the statutory trust in place, livestock sellers are much more protected, and are now more likely to receive repayment for livestock they sale and deliver to dealers. Most likely, if a dealer takes delivery of livestock without paying the seller, the unpaid seller will be able to invoke the dealer trust provision to pursue payment through the trust assets if the seller makes a proper claim on the trust.

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**







# The National Agricultural Law Center

*The nation's leading source for agricultural and food law  
research & information.*

[nationalaglawcenter.org](http://nationalaglawcenter.org) | [nataglaw@uark.edu](mailto:nataglaw@uark.edu)

Factsheet, Series: 2021

## Interests in Federal Crop Insurance Proceeds

*Obtaining an Enforceable Interest under the FCIA & Article 9*

**Micah Brown**

*Staff Attorney, The National Agricultural Law Center*

### I. Introduction

Many agricultural producers borrow money to successfully run their operations. Typically, the lender requires the borrower to give a security interest in personal property such as livestock, crops, or equipment before supplying the funds. A *security interest* is an interest held by a lender in property, referred to as *collateral*, that has been pledged by a debtor. This interest allows the lender to take possession or sell the collateralized property if the debt is not paid.

#### A. UCC Article 9

In these situations, the producer-debtor and lender-creditor have entered into a *secured transaction*, which is primarily governed by Article 9 of the Uniform Commercial Code (“UCC”). The UCC is a collection of rules affecting commercial transactions. While the UCC itself is not legally binding—it was originally compiled by as a recommendation or model by private organizations—every state has chosen to enact some version of the rules within it, including Article 9. Those laws, once enacted by states, are legally binding on the transactions within their boundaries.

Article 9 contains rules and requirements that creditors must satisfy in order to obtain an enforceable security interest in certain collateral. In general, Article 9 requires that the creditor satisfy two steps to obtain an enforceable interest. The first of those steps is attachment of the security interest, which is typically accomplished when the debtor and creditor execute a security agreement. Next, the creditor must perfect their security interest. Most often, this step is satisfied by filing a financing statement in the appropriate filing office.

In most secured transactions, lenders are required to satisfy these two steps to hold an interest in certain collateral. However, depending on the type of collateral secured by a creditor’s security interest, Article 9 may not entirely govern the creditor’s interest. Sometimes state Article 9 laws are replaced by federal laws depending on the property serving as collateral. One type of agricultural-property that commonly serves as collateral for an agricultural loan is federal crop

 National Agricultural Library  
UNITED STATES DEPARTMENT OF AGRICULTURE

This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, USDA

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**

insurance indemnities. Importantly, however, these crop insurance payments are not entirely governed by Article 9.

## **B. FCIA**

Agricultural lenders that loan money to crop producers frequently take a security interest in the producer-debtor’s crop insurance indemnity (or “proceeds”) as collateral for a loan. However, in certain situations Article 9 provisions are replaced by federal law. Generally, crop insurance proceeds stem from the federal crop insurance program, which is governed by the Federal Crop Insurance Act (“FCIA”). The FCIA is a federal law, passed by Congress, and it applies to the entire United States and preempts or supersedes laws such as certain UCC provisions passed by state legislatures<sup>1</sup>. Additionally, the regulations implemented to carry out the provisions of FCIA also preempt state laws that conflict with the federal regulations. Therefore, lenders may risk losing their interest in crop insurance proceeds when they do not satisfy the federal requirements.

The FCIA established the federal crop insurance program, and much of the Act’s text lays the general foundation of the program itself. Accordingly, much of the program is developed by the federal regulations implemented by the Federal Crop Insurance Corporation (“FCIC”). In general, the FCIC—which was created under the FCIA—implements regulations in order to carry out the federal crop insurance program. Together, the FCIA and regulations contain provisions which preempt Article 9 security interests in federal crop insurance proceeds. However, the federal provisions only preempt Article 9 to the extent provided under the FCIA.

## **II. Discussion**

### **A. FCIA Preemptive Provisions**

Congress enacted the FCIA with the intent of limiting a creditor’s ability to enforce a lien created under state law against federal crop insurance proceeds. Under the FCIA, “[c]laims for indemnities under this subchapter shall not be liable to attachment, levy, garnishment, or any other legal process before payment to the insured. . . .”<sup>2</sup> Under this statute, creditors are not permitted to enforce their interests created under state law to obtain a debtor’s insurance proceeds. Thus, this provision clearly preempts Article 9 security interests, at least to some extent.

After the enactment of the FCIA, some creditors did not stop enforcing their security interests against unpaid crop insurance proceeds, a clear violation of §1509 of the FCIA. These creditors used their interest against the insurance providers to receive insurance policy payments before the payment could be issued to the producer. Because of this, the FCIC began receiving a number of reports “where indemnities have not reached the intended recipient because of. . .liens, attachments, etc., served upon the reinsured companies under the various State laws.”<sup>3</sup> According to the FCIC, it was Congress’ “clear statutory intent” that these unpaid insurance proceeds “be exempt from

---

<sup>1</sup> The FCIA or associated federal regulations do not modify the Article 9 provisions on the creation or perfection of a security interest.

<sup>2</sup> 7 U.S.C. § 1509

<sup>3</sup> 55 Fed. Reg. 23,066 (1990).



such interference.”<sup>4</sup> In response to this problem, the FCIC implemented regulations intending to clarify the FCIA’s preemptive impact on state laws.

## **B. Regulatory Preemptive Provisions**

In 1990, the FCIC added a new subpart to its regulations entitled “Preemption of State Laws and Regulations” (“1990 regulations”). The FCIC established this subpart “to prescribe the procedures for federal preemption of State laws and regulations not consistent with the purpose, intent, or authority of the [FCIA].”<sup>5</sup> In essence, the 1990 regulations are implemented in order to guide state legislatures, courts, and creditors on the preemptive effect the FCIA has over state laws. Because federal regulations have the same preemptive effect as federal statutes, the regulations the FCIC implement preempt conflicting state laws.

This new regulatory subpart contains only two sections, but the provisions relate directly to Article 9 security interests created under state law. Under the regulations, FCIC mandates that public and private entities are prohibited from undertaking certain actions that affect insurance agreements or contracts provided under the FCIA and issued or reinsured by the FCIC or its agents.<sup>6</sup> Additionally, this regulatory provision includes examples of specific prohibited actions the FCIA and associated regulations preempt. One example directly affects Article 9 security interests, stating that a person may not “[i]mpose or enforce liens, garnishments, or other similar actions against proceeds obtained, or payments issued in accordance with the [FCIA], these regulations or contracts or agreements entered into pursuant to these regulations...”<sup>7</sup>

Shortly after publishing the new preemption regulations, the FCIC established further regulations relating to Article 9 security interests in 1991 (“1991 regulations”). An important regulation, entitled “Creditors,” provides that “an interest of a person in an insured crop existing by virtue of a lien...shall not entitle the holder of the interest to any benefit under the contract.”<sup>8</sup> Even though the language of this provision seems to invalidate interests in crop insurance proceeds, the 1991 regulations offered creditors an alternative procedure for receiving interests in their debtor’s crop insurance indemnities.

## **C. Assignment of Indemnity**

The 1991 regulations contained an updated version of the crop insurance application that insurers provide to producers applying for federal crop insurance coverage. One provision the regulations added to the application is an “assignment of indemnity” provision. In general, this application provision permits an insured producer to transfer their policy rights to creditors.<sup>9</sup> In other words, creditors obtaining an assignment receive the right to the debtor’s insurance indemnity payment.

---

<sup>4</sup> *Id.*

<sup>5</sup> 7 C.F.R. § 400.351.

<sup>6</sup> 7 C.F.R. § 400.352(a)

<sup>7</sup> 7 C.F.R. §400.352(b)

<sup>8</sup> 7 C.F.R. § 457.5

<sup>9</sup> 7 C.F.R. §§ 407.9; 457.8



Although the “assignment of indemnity” provision offers creditors a way to receive an interest in insurance proceeds, the regulations contain several requirements which must be satisfied in order to properly assign indemnity rights. To satisfy the assignment requirements, the insured producer:

- (1) May only assign an indemnity to creditors they owe a financial debt;
- (2) May only assign the indemnity for the current crop year;
- (3) Must properly execute an “Assignment of Indemnity” form provided by the insured’s insurance provider or the FCIC; and
- (4) Must have the “Assignment of Indemnity” form approved, in writing, by their insurance provider or the FCIC.<sup>10</sup>

If the insured debtor does not properly satisfy each of these requirements, then the insurance provider “will not make any payment to a lienholder...to whom [the insured has] a financial debt...even if [the insured has] a lien or other assignment recorded elsewhere.”<sup>11</sup> Alternatively, if the assignment requirements are satisfied, the creditor’s name will be placed on the debtor’s insurance policy and they will obtain the debtor’s indemnity rights under the policy. Thus, in situations when a claim on the insurance is approved, the insurance provider will send the insurance payment directly to the creditor-assignee on the policy.

#### **D. Interpreting the Preemptive Provisions**

Upon examining the 1990 and 1991 regulations, it would appear the regulatory language preempts all Article 9 security interest in crop insurance proceeds. A reading of the regulations “could lead one to the conclusion that the only way to obtain a [security interest] on the proceeds of a crop insurance policy is by an assignment secured in the manner described in the policy.”<sup>12</sup> Meanwhile, analyzing the regulations this way would appear to conflict with FCIA’s §1509. Unlike the language contained in the regulations, §1509 prohibits creditors from enforcing Article 9 security interests only “before payment to the insured...”<sup>13</sup> Consequently, the ambiguity between §1509 and the regulations led to legal disputes between agricultural lenders and producers.

After the 1990 and 1991 regulations were implemented, some lenders choose to only take a security interest in their debtor’s crop insurance proceeds, rather than obtain an assignment. When the lender’s producer filed for bankruptcy, the lender would attempt to enforce their security interest against them to recover the insurance proceeds. However, producer would argue that the lender has no right to recover the insurance proceeds because the FCIA regulations require an assignment of crop insurance proceeds, thus preempting state law and preventing the creditor from enforcing their security interest against the proceeds. In opposition, the lender would claim the FCIA preempts Article 9 security interests only before the debtor receives insurance proceeds, pursuant to §1509. Unfortunately, both litigants base their arguments on two different understandings of the same federal statute and regulations. Without detailed guidance from the

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *In re Rees*, 216 B.R. 551, 554 (1998)

<sup>13</sup> 7 U.S.C. § 1509



FCIC or the regulations on this preemption issue, courts had to determine what Congress intended when enacting §1509 of the FCIA.

In situations where a statute's language is unclear, judges must interpret the statute. In other words, judges will consider the purpose of the statute and try to figure out the goal of the legislature in passing the law. Determining the legislative intent of a statute provides a judge with an understanding of what is required under the statute, or what a party must do to comply with the statute. If the legislature clearly intended the federal statute to accomplish a certain goal, the regulations must give effect to that intent. This means if the statute contains language that directly resolves the precise question at issue, courts rely on the statute because statutes have legal priority or authority over regulations. Since the implementation of the 1990 and 1991 regulations, a few judges have interpreted the FCIA and the regulations to determine whether the federal provisions completely preempt Article 9 security interests in crop insurance proceeds.

The courts interpreting the preemptive provisions of the FCIA and its regulations have reached similar conclusions, finding that the FCIA preempts state law only before the producer receives insurance proceeds. In reaching this conclusion, these court examined the statutory language of §1509. According to the courts, Congress intentionally mandated that claims for insurance proceeds are not subject to “attachment...or any other legal process *before* payment to the insured...”<sup>14</sup> These courts emphasized that Congress “would have provided for anti-attachment ‘before *or after* payment to the insured’” had it intended to preempt the lender’s Article 9 security interest against the producer *after* they receive insurance proceeds.<sup>15</sup> Hence, Congress clearly intended the FCIA to preempt Article 9 only before the producer receives an insurance payment.

The regulations do not exceed Congressional intent. Rather, the regulations only preempt state law “to the extent that they are ‘not consistent with the [intent]’ of the FCIA.”<sup>16</sup> Because Congress intended the FCIA to preempt Article 9 security interests in insurance proceeds only before the producer receives insurance proceeds, “the FCIC cannot place restrictions on those funds after payment to the insured.”<sup>17</sup> While the regulations do not extend to proceeds already collected by the producer, they still apply to proceeds not yet paid to the producer. In other words, lenders seeking to obtain insurance proceeds directly from their debtor’s insurance provider must obtain an “assignment of indemnity” in accordance with 7 C.F.R. §§ 407.9 or 457.8.

Overall, each court interpreting the FCIA’s preemptive effect on state law came to the same conclusion and ultimately agree with the lender’s argument. These courts confirm that it is not necessary for the lender to obtain an “assignment of indemnity” to hold an interest in their debtor’s insurance proceeds. The lender may still enforce their security interest against the debtor who receives a policy payment because the FCIA preempts Article 9 only when the debtor has not received insurance proceeds.

---

<sup>14</sup> 7 U.S.C. §1509 (emphasis added)

<sup>15</sup> *In re Cook*, 169 F.3d, 276 (1999)

<sup>16</sup> *Id.* (citing 7 C.F.R. § 400.351)

<sup>17</sup> *In re Rees*, 216 B.R. 551, 554 (1998)



As example of this is as follows:

**Example:** Hometown Bank provides Piper Producer a loan and takes a security interest in Piper's 2021 crop year insurance proceeds. Hometown Bank correctly attaches and perfects its security interest in accordance with the applicable Article 9 laws of the state. Later that year, half of Piper's crops are destroyed by flooding, which is covered under her crop insurance policy. She files a claim with her insurance provider, and this claim is approved. Weeks later, Piper receives a \$70,000 insurance payment. Instead of using the funds to satisfy her loan with Hometown Bank, Piper purchases farming equipment and satisfies loans with her other creditors (who did not have an assignment or security interest in her crop insurance proceeds. Unfortunately, Piper faces financial struggles and files for bankruptcy. In the bankruptcy proceeding, Hometown Bank attempts to enforce its security interest against Piper to recover the \$70,000 insurance proceeds. However, Piper claims the bank does not have an enforceable interest in the proceeds because the FCIA preempts state law, and she did not assign indemnity rights to Hometown Bank in accordance with 7 C.F.R. §457.8.

In this example, the court will most likely find that Hometown Bank holds an enforceable security interest in Piper's crop insurance proceeds. As previously decided by some courts, §1509 of the FCIA only preempts Article 9 security interests before the producer-debtor receives insurance proceeds. Once the producer is paid for their insurance claim, state law applies and the FCIA no longer protects the producer from security interests created under state law. Whether the lender obtained an assignment of the producer's indemnity rights becomes irrelevant once state law applies because Article 9 does not require the lender to gain an assignment to hold a valid interest in the producer's insurance proceeds.

Here, Piper received the insurance proceeds which means Article 9 applies, not the FCIA. Because Article 9 governs the bank's interest, the bank is able to enforce its security interest against the \$70,000 insurance proceeds. If Hometown Bank successfully enforces its interest, it will recover most or all of the money Piper received from her insurance claim and use the funds to satisfy her unpaid loan debt.

### **E. Obtaining Assignments and Security Interests**

Whether the FCIA preempts an Article 9 security interest in crop insurance proceeds depends primarily upon timing. If the producer-debtor has yet to receive an insurance payment from the insurance provider, §1509 of the FCIA governs. Thus, the lender's security interest in the insurance proceeds is not recognized and cannot be enforced. To gain an interest in unpaid insurance proceeds, the lender must obtain an assignment in accordance with the regulations. However, if the producer receives an insurance payment, state law applies and the lender can enforce their Article 9 security interest against the producer to recover the insurance proceeds. Overall, whether

The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.





the producer-debtor receives insurance proceeds controls whether the FCIA or Article 9 governs the lender's interest in proceeds.

Generally, it is important for lenders to know the differences between the FCIA and Article 9 because both laws offer lenders two separate methods to secure an enforceable interest in crop insurance proceeds. To gain an interest in a producer's insurance proceeds under the FCIA, a lender must obtain an assignment of the producer's indemnity rights in accordance with the FCIA regulations.<sup>18</sup> The regulations contain specific requirements that the producer must satisfy in order to properly assign their indemnity rights to the lender.

Under the regulations, the producer must complete an "assignment of indemnity" form provided by their insurance provider. After completing the form, the producer submits it to the insurance provider for approval. If the insurer accepts the assignment, the producer's right to receive insurance proceeds is transferred to the lender listed on the assignment form. The lender-assignee's interest in the proceeds begins the moment the insurer approves the assignment, even if the producer has made no claim on the insurance policy in order to receive an insurance payment.

While lenders can obtain an interest through assignment under the FCIA, some lenders choose to only hold an interest in the proceeds under Article 9. Gaining an Article 9 security interest requires lenders to attach and perfect their interest in accordance with the applicable state laws. Many agricultural lenders attach their interest by executing a security agreement with the producer-debtor. After attachment, the lender perfects their interest, which is usually done by filing a financing statement in a central recording office. Once the lender satisfies these steps, they have an enforceable security interest in the collateralized property.

While the FCIA and Article 9 provide separate methods for lenders to gain an interest in crop insurance proceeds, lender-assignee's usually hold an interest to the same proceeds under both methods. Lenders holding an assignment also hold a security interest in proceeds because the FCIA regulations only allow producers to assign their indemnity rights to individuals they owe a financial debt (*i.e.*, creditors). Because Article 9 rules govern how lenders create and enforce financial debts, most lenders take a security interest in collateral in order to hold a legally binding interest. Thus, it's likely many lenders who obtain an assignment in insurance proceeds also hold an Article 9 security interest in the same proceeds.

## **F. Assignments as a Superior Interest**

Both the FCIA and Article 9 provide ways for lenders to obtain an interest in a producer's crop insurance proceeds; however, these interests operate differently. For instance, methods of collecting insurance proceeds under assignments and security interests are different. Additionally, lenders who obtain an assignment become eligible to submit a claim under the insurance policy, but lenders who hold only a security interest do not have that privilege. Because assignments provide lenders more control over insurance policies and proceeds, lender-assignees probably avoid more financial risk than lenders holding only a security interest. Additionally, assignments likely provide lenders a superior interest over Article 9 security interests in crop insurance

---

<sup>18</sup> See 7 C.F.R. §§ 407.9, 457.8





proceeds. Thus, in most situations, lenders may seek to obtain an assignment in order to protect themselves from the risk of not receiving insurance proceeds to satisfy a debtor’s loan debt.

## **1. Claims on Insurant Policy**

Assignments provide lenders with a superior interest in crop insurance proceeds for three reasons. First, the FCIA provides lender-assignees the ability to submit a loss notice to the insurance provider.<sup>19</sup> Lenders with an assignment are permitted to make a claim on an insurance policy when their debtor fails to do so. This provides lender-assignees extra protection because they do not have to rely on a producer’s insurance claim to receive insurance proceeds. For example, if a producer fails to make a claim, and their lender-assignee submits a claim that is then approved, the lender is now able to collect insurance funds that would not have otherwise been paid had they not submitted the claim.

In instances where a producer does not make a claim for insurance proceeds—even if the reason for crop-loss is covered under the insurance policy—lenders holding only a security interest will not receive proceeds. Security interest lenders cannot make a claim for an insurance payment on behalf of their producer-debtor because these lenders do not hold legal rights under the insurance policy. Insurance policies are legally binding contracts, and an individual who is not a party to the contract cannot influence or assert legal rights under the terms of the contract. Because of this, security interest lenders have no way to collect insurance proceeds when their producer-debtor does not make a claim on the insurance policy. Therefore, assignments provide lenders a greater opportunity to collect insurance proceeds because they are not forced to rely on a producer to make a claim on the insurance policy.

## **2. Collecting Insurance Proceeds**

The second advantage assignments offer to lenders is the ability to collect insurance proceeds directly. Typically, lenders with an assignment collect insurance proceeds without the producer ever receiving the payment. For example, many insurers place provisions with their “assignment of indemnity” forms which provide a lender-assignee direct payment of insurance proceeds. When an insurance claim is approved by the insurance provider, they issue a check payable jointly to the producer-debtor and lender-assignee, but the check is sent directly to the lender-assignee. Once the lender-assignee receives the payment, they apply the funds to the producer’s loan debt.

Unlike lender-assignees, lenders holding only a security interest cannot collect insurance proceeds directly from a producer’s insurance provider. In general, security interest lenders must file an action in a court to enforce their interest against the insurance proceeds. Meanwhile, the producer may use the insurance funds for other expenses while the lender is in the process of enforcing their interest to collect the proceeds. Thus, lenders holding an assignment avoid the risk of not collecting insurance funds to satisfy the producer’s debt because the producer has limited access to the insurance funds, meaning they do not have the ability to use the funds on other expenses.

---

<sup>19</sup> See 7 C.F.R. §§ 407.9, 457.8



### 3. Priority

Lastly, assignments provide lenders a superior interest because it likely provides priority to insurance proceeds over lenders who only hold security interests. Priority is the order in which lenders receive money to satisfy a debtor's loan debt. This means the lender with higher priority will receive payment before a lender with lower priority. When two or more lenders have an interest in the same insurance proceeds, the lender with first priority is the first to receive the proceeds. Therefore, the first priority lender has their loan repaid before all other creditors.

Some courts have ruled on the issue of priority between a lender-assignee and a security interest lender who held competing interests in undistributed insurance proceeds. In those cases, the lender-assignee had rights to the insurance funds. These courts explained that the lender with a security interest did not have an enforceable interest because insurance proceeds had not yet been issued to the producer. Because the FCIA preempts Article 9 before the producer receives insurance proceeds, a security interest is not recognized and assignments govern. Thus, the lender-assignee had the only valid interest to undistributed insurance proceeds.

While some case law exists for priority between undistributed proceeds, there is currently no case law directly ruling on the priority issue for insurance proceeds that have been distributed. However, if the issue is litigated, it is likely the court will find that a lender-assignee has first priority over a security interest lender. Lender-assignees will likely have priority to proceeds that an insurer distributes because most lender-assignees receive insurance payments directly from the insurer. If the lender-assignee receives an insurance payment directly, it's likely the producer never receives any of the funds because most or all the proceeds are used to satisfy the producer's loan debt.

In situations where the lender-assignee collects insurance proceeds directly and the producer does not personally receive any insurance funds, Article 9 may never apply. Assignments preempt security interests to insurance proceeds "before payment to the insured,"<sup>20</sup> and if the insured producer never receives payment personally, security interests will continue being preempted. If a lender's security interest remains unenforceable, they will have no ability to collect on the insurance proceeds, while the lender-assignee will continue collecting payments directly. Nevertheless, this is just one interpretation of the statutory language, and courts hearing such a priority issue may come to a different conclusion.

### III. Conclusion

Many agricultural lenders providing loans to row crop farmers take an interest in the farmer's federal crop insurance proceeds, which is governed by the FCIA. The federal statute and its associated regulations preempt state law governing security interests, but only "before payment to the insured."<sup>21</sup> The FCIA regulations provide lenders the ability to obtain an assignment of their

---

<sup>20</sup> 7 U.S.C. § 1509

<sup>21</sup> *Id.*



debtor's right to receive an insurance payment, which provides lenders a right in proceeds before an insurance payment is issued.

In general, whether the FCIA preempts an Article 9 security interest in crop insurance proceeds depends primarily upon timing. If a producer-debtor has not received an insurance payment, the federal law governs and only assignments are enforceable. However, if a producer receives an insurance payment, state law applies, and the lender can enforce their Article 9 security interest against the producer to recover the proceeds.

Although the FCIA and Article 9 provide lenders the ability to gain an interest in crop insurance proceeds, a lender with an assignment likely holds a more stable interest over a lender with only a security interest. Lender-assignees likely have superior interests for three reasons. First, the FCIA regulations permit the lender to make a claim on an insurance policy when their producer fails to do so. Second, most lender-assignees have direct access to insurance proceeds because insurers will send the indemnity check directly to the lender, not the producer. Last, and most important, lender-assignees likely have priority to the insurance funds over lenders with security interests, primarily because Article 9 may never govern in situations where the lender-assignee receives direct payment from the insurer. Accordingly, assignments likely provide lenders a superior interest over security interests in crop insurance proceeds, and lenders may consider obtaining an assignment to protect themselves from the risk of not receiving insurance proceeds to satisfy a debtor's loan debt.

**The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.**





**Congressional  
Research Service**

Informing the legislative debate since 1914

---

# Federal Crop Insurance: A Primer

February 18, 2021

Congressional Research Service  
<https://crsreports.congress.gov>

R46686



**R46686**

February 18, 2021

**Stephanie Rosch**  
Analyst in Agriculture  
Policy

## Federal Crop Insurance: A Primer

The federal crop insurance program (FCIP) offers farmers the opportunity to purchase insurance coverage against financial losses caused by a wide variety of perils, including certain adverse growing and market conditions. The federal government subsidizes the premiums that farmers pay for these insurance policies to encourage farmer participation. Farmers can choose among many types of policies and policy options to customize the coverage to their farm businesses' specific needs. Private-sector companies sell and service the policies; the U.S. Department of Agriculture (USDA) plays critical roles in subsidizing, regulating, and reinsuring the policies.

The FCIP was created in 1938 as part of the agricultural policy response to the Great Depression. The FCIP is permanently authorized under the Agricultural Adjustment Act of 1938 (P.L. 75-430) and the Federal Crop Insurance Act of 1980 (P.L. 96-365). The Federal Crop Insurance Corporation (FCIC)—the agency that finances FCIP operations—is funded with mandatory appropriations of “such sums as necessary.” The Congressional Budget Office projects that net spending for the FCIP will be almost \$40 billion for FY2021-FY2025 and more than \$80 billion for FY2021-FY2030—including expenditures to subsidize farmers' policy premiums, compensate for private insurance providers' administrative and operating expenses, and reinsure losses from policies sold.

The FCIP plays a prominent role in helping producers manage financial risk. In crop year 2019, the program sold more than 2 million policies and insured crops and livestock valued at more than \$116 billion, equivalent to about 28% of the value of U.S. agricultural production. More than 90% of planted acres for corn, soybeans, and cotton and more than 85% of wheat planted acres were insured through the FCIP. In all, the FCIP provided coverage for 124 commodities and offered 19 types of insurance policies. Sixteen companies sold crop insurance to farmers through the program, and farmers enrolled a record high 379.9 million acres in 2019.

The FCIP is a central component of the federal farm safety net, which is a collection of programs that provide risk protection and financial support to U.S. farmers in times of low farm prices and natural disasters. For 2014-2018, the FCIP accounted for the largest share (52%) of payments to farmers from farm safety net programs. The FCIP also supports conservation policy goals through conservation compliance requirements and contributes to the stability of agricultural credit markets.

Congress may be interested in understanding how FCIP implementation affects which farmers purchase crop insurance and the types of insurance they purchase, as well as the associated costs to the U.S. taxpayer for providing that coverage. Congress may also be interested in ways to expand coverage options, improve the program's efficiency and actuarial performance, provide outreach to farmers who have not previously participated in the program, and in evaluating the program against its policy objectives for the agricultural sector.

# Contents

Introduction .....	1
Authorities and Appropriations .....	3
Statutory and Discretionary Authorities .....	3
Appropriations, Outlays, and Budget Baseline .....	3
How Federal Crop Insurance Works .....	4
Types of Commodities Covered .....	5
Time Period Covered.....	5
Policies and Coverage Options .....	6
Covered Production Practices .....	7
Crop Ownership and Covered Units .....	8
Who Buys Crop Insurance.....	9
Why Farmers Purchase Crop Insurance.....	11
Scope of the Current Program .....	13
Covered Crops, Livestock, and Livestock Products .....	13
Covered Locations .....	15
Policies Purchased .....	17
Federal Crop Insurance Program Structure and Operations .....	18
Pricing Crop Insurance Policies .....	19
The Role of Projected Market Prices .....	20
The Role of Yields and Actual Production History .....	20
Establishing an Actual Production History .....	21
Yield Risk .....	21
Loss Ratio .....	22
Premium Subsidies.....	22
Creating New Policies and Pilot Programs .....	24
Reinsurance Agreements.....	24
Marketing Crop Insurance Policies to Farmers.....	25
Approved Insurance Provider Compensation .....	25
Reinsurance.....	26
Approved Insurance Provider Qualifications .....	27
Market Competition Among Approved Insurance Providers and Agent Compensation .....	27
Waste, Fraud, and Abuse .....	28
Costs of the FCIP .....	29
The Role of the FCIP in Agricultural Policy .....	32
The FCIP and the Farm Safety Net .....	32
The FCIP and Conservation Requirements .....	34
The FCIP and Farm Credit.....	35
The FCIP and Trade .....	36
Rationale for Publicly Supported Crop Insurance.....	37
Costs and Benefits of the FCIP .....	38
Issues for Congress .....	39

## Figures

Figure 1. Federal Crop Insurance Program: Policies Sold and Insured Acres.....	2
Figure 2. All Farms and Farms Purchasing FCIP Policies, by Annual Sales.....	10
Figure 3. All Farms and Farms Purchasing FCIP Policies, by Acres Operated.....	11
Figure 4. Annual FCIP Total Premium, Premium Subsidies, and Liabilities.....	13
Figure 5. Policies Sold and Liabilities Insured in 2019, by Commodity Type.....	14
Figure 6. 2019 FCIP Liabilities by State.....	16
Figure 7. 2019 FCIP Premium Subsidies by State.....	17
Figure 8. Key Entities Involved in FCIP Implementation.....	19
Figure 9. FCIP Net Payments to Farmers and Approved Insurance Providers.....	30
Figure 10. Contributions to FCIP Net Payments.....	31

## Tables

Table 1. CBO Baseline for the Federal Crop Insurance Program.....	4
Table 2. Major Crops, Livestock, and Livestock Products Insured in 2019.....	14
Table 3. FCIP Policies Purchased in 2019.....	18
Table 4. Crop Insurance Premium Subsidies.....	23
Table 5. 2020 Compensation Subsidies for Approved Insurance Providers.....	26
Table 6. Farm Safety Net Program Outlays Since 2014.....	33
Table 7. Program Classifications under WTO’s Agreement on Agriculture.....	36
Table A-1. Selected Legislation Affecting the Development of the Federal Crop Insurance Program.....	43
Table A-2. USDA Agencies Administering FCIP Since 1938.....	44

## Appendixes

Appendix. A Brief History of Crop Insurance.....	42
--	----

## Contacts

Author Information.....	44
-------------------------	----



## Introduction

The federal crop insurance program (FCIP) provides insurance coverage for the production of most U.S. agricultural commodities against financial losses caused by adverse growing and market conditions. This insurance coverage helps stabilize farm business incomes, which can help farmers to repay debt, reduce farm bankruptcies, and thus avoid disruptions to food, livestock feed, and other markets for agriculture commodities, including export markets. The FCIP supplies insurance coverage that is not otherwise available from the private sector and is a central component of the federal farm safety net, a collection of programs that provide risk protection and financial support to farmers in times of low farm prices and natural disasters. Farmers can choose from a variety of insurance coverage options to customize the coverage to the specific needs of their farm businesses. The federal government subsidizes the policy premiums to encourage participation.

The FCIP was established in 1938 as part of the agricultural policy response to the Great Depression. Congress established the FCIP following several unsuccessful attempts by private industry to market similar products.<sup>1</sup> Prior to 1938, the private sector was unable to fund losses stemming from agricultural weather risks, as these losses simultaneously affected numerous farmers over a broad area.<sup>2</sup> Initially, the FCIP had no private sector involvement and covered only wheat, but after a few years, Congress expanded the program to include other commodities. In response to a period of high disaster support payments in the 1970s and low crop insurance participation, Congress enacted the Federal Crop Insurance Act of 1980 (P.L. 96-365). This law expanded the commodities covered and geographic scope of the program, introduced premium subsidies, and allowed private-sector companies to sell and service policies. Since the 1980s, Congress has made numerous changes to the program that expanded crop insurance coverage options, increased premium subsidies, and aligned the FCIP with other U.S. Department of Agriculture (USDA) programs and agricultural policy goals (for more background on the history of the FCIP, see the discussion in the **Appendix**).

For FY2010-FY2019, the FCIP paid out nearly \$85 billion for losses to insured agriculture producers and more than \$14 billion in reinsurance payments to private-sector insurance companies.<sup>3</sup> These losses affected farmers and ranchers in all 50 states who produced a wide variety of insurable crops, livestock, and animal products. FCIP payments helped mitigate the negative financial impacts to farmers and insurance companies from abnormal drought conditions, record flooding, extended periods of price declines for market commodities, and other adverse outcomes.

The FCIP plays a prominent role in helping agricultural producers manage financial risk. In crop year 2019, the FCIP provided coverage for 124 commodities and offered 19 types of insurance policies.<sup>4</sup> Sixteen Approved Insurance Providers (AIPs) sold crop insurance through the program,

<sup>1</sup> Randall A. Kramer, “Federal Crop Insurance 1938-1982,” *Agricultural History*, vol. 57, no. 2 (April 1983), pp. 181-200.

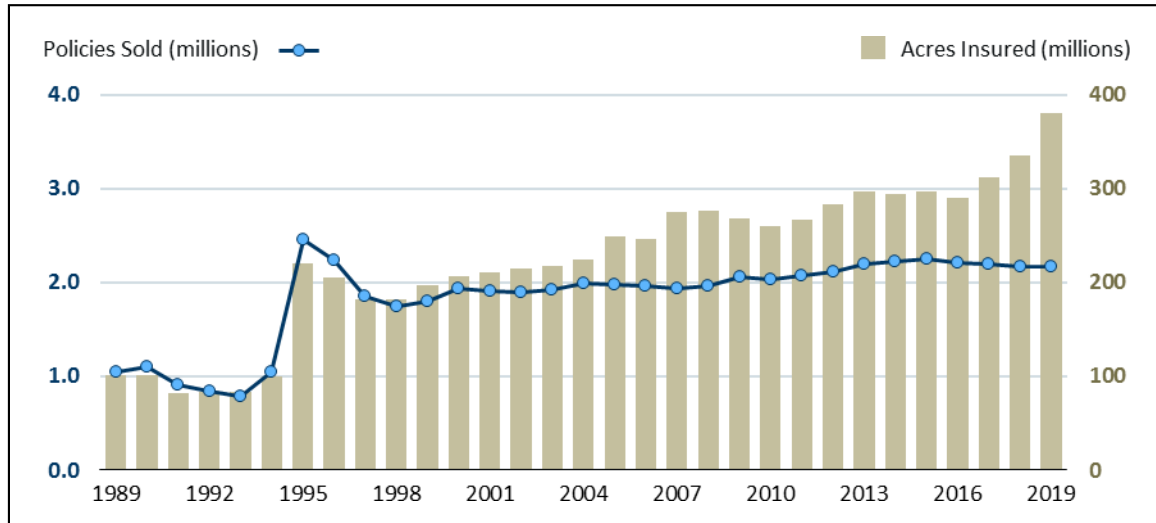
<sup>2</sup> Mario J. Miranda and Joseph W. Glauber, “Systemic Risk, Reinsurance, and the Failure of Crop Insurance Markets,” *American Journal of Agricultural Economics*, vol. 79, no. 1 (February 1997), pp. 206-215.

<sup>3</sup> Congressional Research Service (CRS) calculations using data from the *Federal Crop Insurance Corporation/Risk Management Agency’s Financial Statements* for FY2010-FY2019. Outlays for indemnity payments were partially offset by premiums paid by farmer policyholders. Premium subsidies are not available on a fiscal year basis. For additional information about costs of premium subsidies and farmer paid premiums, see “Costs of the FCIP.”

<sup>4</sup> U.S. Department of Agriculture (USDA), Office of Inspector General, *Federal Crop Insurance Corporation/Risk Management Agency’s Financial Statements for Fiscal Years 2018 and 2019*, Audit Report 05401-0011-11, November

and farmers enrolled a record high of 379.9 million acres (**Figure 1**).<sup>5</sup> The AIPs sold more than 2 million policies, insuring more than \$116 billion in value, which was equivalent to about 28% of value of U.S. agricultural production in 2019.<sup>6</sup> The majority of policies were purchased by producers of corn, soybeans, wheat, and cotton—the principal crops grown in the United States. In crop year 2019, farmers insured more than 90% of planted acres for corn, soybeans, and cotton and more than 85% of planted acres for wheat through the FCIP.<sup>7</sup>

**Figure 1. Federal Crop Insurance Program: Policies Sold and Insured Acres**  
1989-2019 crop years



**Source:** Figure created by CRS using data from U.S. Department of Agriculture (USDA), Risk Management Agency (RMA), “Summary of Business.”

Private-sector AIPs sell and service FCIP policies, while USDA plays critical roles in subsidizing, regulating, and reinsuring the policies. The principal USDA entities that fund and administer the FCIP are the Federal Crop Insurance Corporation (FCIC) and the Risk Management Agency (RMA). Congress determines the types of coverage that the FCIP can insure, the rules that USDA and AIPs must follow in implementing the program, and the funding available for program operations.

This report provides an overview of the FCIP and of how farmers use federal crop insurance policies to manage financial risk. It discusses legal authorities and annual appropriations for the program, key milestones in the program’s history, and how the FCIP relates to the broader U.S. agricultural policy framework. The report also reviews the rationale for providing crop insurance by the public sector and outlines several issues Congress may consider related to program expansion, reform, and oversight.

2019.

<sup>5</sup> For a list of Approved Insurance Providers (AIPs), see USDA, Risk Management Agency (RMA), “Insurance Provider List,” at <https://public.rma.usda.gov/AipListing/InsuranceProviders>.

<sup>6</sup> USDA’s Economic Research Service (ERS) estimates the value of U.S. agricultural production in 2019 was \$414 billion. USDA, ERS, “Farm Income and Wealth Statistics: Value Added Years by State,” at <https://data.ers.usda.gov/reports.aspx?ID=17830>.

<sup>7</sup> CRS calculations based on USDA’s National Agricultural Statistics Service (NASS) records for planted acres and USDA’s RMA records for insured acres.

# Authorities and Appropriations

## Statutory and Discretionary Authorities

The FCIP is permanently authorized under the Agricultural Adjustment Act of 1938 (P.L. 75-430, 52 Stat. 72) and the Federal Crop Insurance Act of 1980 (P.L. 96-365, 7 U.S.C. §1501 et seq). These statutory authorities define the FCIP’s purpose and general parameters, including the powers of the FCIC;<sup>8</sup> FCIC funding and management requirements; specific types of insurance coverage that the FCIC can make available to agricultural producers;<sup>9</sup> schedules and eligibility requirements for subsidies; provisions for pilot programs; and other provisions. Within these statutory requirements, USDA’s RMA, as approved by the FCIC Board, has discretion to determine where policies are offered,<sup>10</sup> what coverage is offered, and what paperwork is required. RMA can also set paperwork submission deadlines, negotiate the terms by which private insurance companies can participate in the program, and determine other aspects of the program.

Since 2008, Congress has made changes to the crop insurance program in successive farm bills,<sup>11</sup> as well as in annual and supplemental appropriations legislation. These changes have expanded the types of agricultural commodities and risks that can be insured, clarified how crop insurance interacts with commodity support and conservation programs, and directed research toward emerging priority risk management topics (e.g., greenhouse production, local foods, and subsurface and limited irrigation practices).

## Appropriations, Outlays, and Budget Baseline

The FCIP has permanent, indefinite funding authority provided under the Federal Crop Insurance Act of 1980. Annual funding for the FCIP comes from both mandatory and discretionary appropriations.<sup>12</sup> The financial assistance offered through FCIC is funded with mandatory appropriations of “such sums as necessary” (7 U.S.C. §1516). The majority of funding for RMA salaries and expenses to administer the crop insurance program is discretionary and is provided through the annual appropriations process. RMA can also use up to \$7 million in mandatory funding from FCIC to pay costs associated with program operations.<sup>13</sup>

The Congressional Budget Office (CBO) projects that the FCIP will cost almost \$40 billion for the 5-year period FY2021-FY2025 and more than \$80 billion for the 10-year period FY2021-

<sup>8</sup> The Federal Crop Insurance Corporation (FCIC) is a government-owned corporation that finances the federal crop insurance program’s (FCIP’s) operations, analogous to the Commodity Credit Corporation’s role in financing USDA’s farm revenue support and conservation programs. The FCIC is managed by a Board of Directors that includes certain statutorily mandated members, including the USDA Under Secretary that oversees the FCIP, the USDA Chief Economist, farmers, and representatives of the AIPs. See the section “Federal Crop Insurance Program Structure and Operations” for details on the FCIC.

<sup>9</sup> Agricultural producers eligible for crop insurance coverage include farmers, ranchers, and producers of other types of eligible agricultural products (e.g., honey, aquaculture, forage crops).

<sup>10</sup> While crop insurance is available nationwide, the availability of specific types of crop insurance policies and coverage options varies by county. See the section “Policies and Coverage Options” for more details.

<sup>11</sup> See CRS Report RS22131, *What Is the Farm Bill?*, by Renée Johnson and Jim Monke.

<sup>12</sup> Discretionary spending authority is established annually by Congress through the appropriations process. Mandatory spending is composed of budget outlays controlled by laws other than appropriations acts, including federal spending on entitlement programs. For more information, see CRS Report R44641, *Trends in Mandatory Spending: In Brief*, by D. Andrew Austin.

<sup>13</sup> 7 U.S.C. §1516(b)(2)(C).

FY2030 (see **Table 1**).<sup>14</sup> The average cost of the program is projected to be nearly \$8 billion per year for FY2021-FY2025 and to remain at around that level in FY2026-FY2030. This baseline represents the expected budgetary cost of the FCIP under current statutory authorities. The budgetary impacts of any legislative proposals to change aspects of the program would be measured as changes from this baseline (until the next CBO baseline has been released).

**Table 1. CBO Baseline for the Federal Crop Insurance Program**  
\$ billion

Category	Total	Annual Average	Total	Annual Average
	FY2021-FY2025	FY2021-FY2025	FY2021-FY2030	FY2021-FY2030
Budget Authority	\$39.9	\$8.0	\$81.9	\$8.2
Outlays	\$38.8	\$7.8	\$80.4	\$8.0

**Source:** CRS calculations using Congressional Budget Office (CBO), USDA’s mandatory farm program outlay projections, March 6, 2020.

**Notes:** CBO projects annual budgetary authority and outlays for the federal crop insurance program (FCIP) for each fiscal year for a 10-year budget window. Budgetary authority are funds required to meet new obligations incurred in that fiscal year. Outlays are funds expended in the fiscal year. FCIP budgetary authority and outlays for any given fiscal year may not be equal because outlays tend to follow crop year and/or reinsurance year timing instead of aligning with fiscal year schedules.

Projections for the budgetary cost of the FCIP depend in part on projections of future commodity prices. Higher commodity prices in the future would increase the expected value of insured crops, thereby increasing the expected value of insured liability and premium subsidies relative to what liabilities and premium subsidies would cost with lower commodity prices.<sup>15</sup> To put these CBO projections in context, federal outlays for the FCIP averaged \$7.7 billion per year from FY2010 to FY2019.<sup>16</sup>

## How Federal Crop Insurance Works

Federal crop insurance policies can provide coverage for agricultural commodities against losses due to unavoidable natural events and market price declines. Covered perils or “causes of loss” include adverse weather conditions (e.g., hail, frost, drought, flooding); failure of irrigation water supply (if caused by an insured peril during the period of insurance coverage); fire (due to natural causes); plant diseases (provided the farmer followed guidance on proper application of disease control measures); and insect and wildlife damage (provided the farmer followed guidance on proper application of pest and wildlife control measures). Certain policies also insure against losses from market price declines.

Because a loss from any of a variety of covered causes can trigger an indemnity payment, federal crop insurance is often referred to as “multiperil crop insurance.” Other types of crop insurance available from the private sector insure against a single type of risk, such as hail damage or losses due to freezing temperatures.

<sup>14</sup> Congressional Budget Office (CBO), USDA’s mandatory farm program outlay projections, March 6, 2020.

<sup>15</sup> Premium subsidies are funds provided by USDA on behalf of farmer policyholders to defray a portion of the premium costs of the policies sold. See “Premium Subsidies” for more details.

<sup>16</sup> Compiled by CRS from USDA, Office of Inspector General, *Federal Crop Insurance Corporation/Risk Management Agency’s Financial Statements for Fiscal Years 2010-2019*. This average includes expenditures on premium subsidies, administrative and operating payments to AIPs, and underwriting costs.

Farmers purchase federal crop insurance from an insurance company approved to sell federal crop insurance, or an AIP. When a farmer incurs a loss from any of the covered causes, the farmer submits a claim to the insurer. If the insurer determines that the claim is valid, then the insurer makes an indemnity payment to the farmer. Depending on how the policy is reinsured, the AIP may also collect a reinsurance payment from USDA or a third-party reinsurer.

## Types of Commodities Covered

Federal crop insurance covers the production of agricultural commodities only. Insurable commodities vary by location and can include annual crops, perennial crops, forage crops, livestock, and animal products. Federal crop insurance can be purchased separately for different commodities or bundled so that a single policy insures the entire farm's production (i.e., Whole-Farm Revenue Protection). Farm buildings, equipment, vehicles, on-farm inventories, and farm operating liability or work-related injury cannot be insured through the FCIP but may be covered through private-sector insurance products.

Depending on the type of commodity, federal crop insurance can be used to insure the market value of the commodity (e.g., market price of a bushel of corn); the replacement value of the commodity (e.g., the cost to replant an orange tree); or the marginal value of producing a commodity (e.g., the market price of a gallon of milk less the cost to produce a gallon of milk). For annual crops such as corn and tomatoes, federal crop insurance covers only the market value of annual production. For perennial crops such as certain fruit and nut trees, growers can choose to insure the replacement value of the tree itself, the market value of the annual fruit or nut harvest, or both. For livestock and animal products, agricultural producers can choose to insure the market values of the animals (e.g., cattle, clams), the operating margin<sup>17</sup> of raising the animals, or the market value of specific animal products (e.g., milk, honey).

## Time Period Covered

Federal crop insurance covers the following three categories of agricultural commodities for specific time periods.

- **Annual Crops.** Federal crop insurance insures the commodities for the period between the planting and harvesting of crops.<sup>18</sup> After the crop is harvested, farmers seeking to insure their harvested commodities must seek coverage outside of the FCIP, such as through privately provided property coverage. Farmers must have their crops planted and harvested by specific dates in order to be eligible for crop insurance indemnities.<sup>19</sup> However, in the event that farmers are unable to complete planting by the required date, some policies allow for the producer to choose between reduced coverage or “prevented planting” payments. Prevented planting payments provide smaller indemnities when weather conditions prevent farmers from planting their crops before the cutoff dates.<sup>20</sup>

<sup>17</sup> *Operating margin* is defined here as the difference between the market price of the animals and the operating costs incurred to raise the animals.

<sup>18</sup> The relevant calendar dates for crop insurance vary by type of policy, year, crop, and location. For the specific dates for each type of policy by year, crop, and location, see USDA, RMA, “Actuarial Information Browser,” at <https://webapp.rma.usda.gov/apps/actuarialinformationbrowser/>.

<sup>19</sup> CRS Report R45193, *Federal Crop Insurance: Program Overview for the 115th Congress*, by Isabel Rosa.

<sup>20</sup> CRS Report R46180, *Federal Crop Insurance: Record Prevent Plant (PPL) Acres and Payments in 2019*, by Randy Schnepf.

- **Perennial Tree Crops.** Federal crop insurance coverage for the trees is for a single crop year, not the full life span of the tree.
- **Livestock and Animal Products.** Federal crop insurance can be purchased by the month, by the quarter, or annually, depending on the life cycle of the animal or animal product involved.

Federal crop insurance policies renew automatically for the next year, and each year thereafter, unless canceled by the farmer or the AIP. Just as with new policies, farmers purchasing renewed federal crop insurance coverage must pay their share of the annual premium every year for which they purchase coverage.

## Policies and Coverage Options

Farmers can choose between a variety of options to tailor their crop insurance coverage to suit their particular farm management goals and production practices. Farmers growing certain annual crops can choose from various types of coverage under federal crop insurance. For example, policy types are available to insure a farm's average crop yield, its crop revenue, the county's average crop yield, or the county's average crop revenue. Insurance coverage for revenue is more expensive to purchase than yield coverage because revenue policies also insure against an additional risk (i.e., lower revenue from a decline in the market price), while yield policies do not. Insurance coverage for the farm is more expensive to purchase than coverage for the county because the risk of crop losses to any one farm is greater than the risk of crop losses for the county as a whole. Coverage can be even more specific by insuring all of a farm's fields in the same county, the same township, or in some cases, insuring a specific field (described below under "Crop Ownership and Covered Units").

### Selected Federal Crop Insurance Program (FCIP) Policies

FCIP offered 26 different insurance policies for crop year 2019. Selected policy types included the following:

- **Yield-Based Policies.** Actual Production History (APH) and Yield Protection (YP) policies insure farmers against yield losses for a specific crop. Farmers select the percentages of average yield and projected price to insure. For APH policies, the price is established annually by the Risk Management Agency (RMA). For YP policies, the price is based on futures market prices.
- **Revenue-Based Policies.** Revenue Protection (RP) and Revenue Protection with Harvest Price Exclusion (RP-HPE) insure farmers against revenue losses for a specific crop. Farmers select the percentage of the revenue guarantee to insure. The revenue guarantee is based on the farmers' APH and either the projected price or the harvest price. Futures market prices are used to determine the projected price and the harvest price. For RP policies, the revenue guarantee uses the higher of the projected price or the harvest price. For RP-HPE policies, the revenue guarantee uses the projected price only.
- **Area-Based Policies.** Area Yield Protection (AYP), Area Revenue Protection (ARP), and Area Revenue Protection with Harvest Price Exclusion (ARP-HPE) insure farmers against losses for county yields or county revenues for a specific crop. Farmers select the percentage of the county's yield or the county's revenue guarantee to insure.
- **Rainfall Index (RI).** RI insures farmers and ranchers against rainfall losses in target geographic areas. Producers select the percentage of an index of rainfall to insure. The rainfall index is based on weather data collected and maintained by the National Oceanic and Atmospheric Administration's Climate Prediction Center.
- **Whole-Farm Revenue Protection (WFRP).** WFRP insures farmers against revenue losses for all insurable crops and livestock produced. Farmers select the percentage of their historic average revenue to insure. Historic average revenue is based on farmers' Schedule F tax forms and current-year expected farm revenues from insurable crops and livestock.
- **Dairy Revenue Protection (Dairy-RP).** Dairy-RP insures farmers against revenue losses on quarterly milk production. Farmers select the quarter(s) of the year to insure, the milk category or components used



to establish the value of milk production, and the percentage of quarterly milk production to insure. Prices for milk categories or components are based on monthly average prices announced by USDA's Agricultural Marketing Service. Yields for milk categories or components are based on USDA's National Agricultural Statistics Service Milk Production report.

**Source:** USDA, RMA, "Insurance Plans," at <https://www.rma.usda.gov/Policy-and-Procedure/Insurance-Plans>.

For all insured commodities, except for certain livestock and animal products, farmers must select the level of federal crop insurance coverage they want to purchase. The coverage level is the percentage of commodity value that is covered<sup>21</sup>—referred to as the liability—and the corresponding loss that a farmer must incur before an indemnity payment will be made—comparable to a deductible for home or auto insurance. For example, a revenue policy with 75% coverage level would insure revenue losses greater than 25% of the liability but provide no coverage for losses amounting to less than 25% of the liability. Lower coverage levels provide indemnity payments only in the event of larger losses, that is, losses that exceed the lower coverage level. Higher coverage levels are more expensive to purchase than lower coverage levels because farms are more likely to incur small losses than large losses.<sup>22</sup>

The minimum coverage possible is catastrophic, or CAT, coverage.<sup>23</sup> CAT coverage makes indemnity payments only when farmers lose 50% or more of their expected yields. CAT coverage is available nationwide, but only for crops insured on an acreage basis (e.g., annual crops, forage crops).

The highest available coverage level varies by crop, location, and policy type but is always less than 100%. Farmers cannot insure the full value of their crops under federal crop insurance. This ensures that producers can never earn more money from collecting crop insurance than from harvesting and selling their crops; this is to reduce the potential for moral hazard. For the most commonly purchased federal crop insurance policies, farmers may purchase coverage levels ranging from a minimum of 50% to a maximum of 85%, in increments of 5%.<sup>24</sup>

## Covered Production Practices

For all insured crops, farmers are required to follow USDA's guidance on good farm management practices while planting, growing, and harvesting their crops in order to reduce the risk of operator-caused crop losses. Good farming practices are the production methods and practices used to produce a crop such that it is likely to make normal progress toward maturity and produce yields on par with average historical yields for the farm operation. USDA's requirements for good farming practices can vary by crop and location and can include actions taken before planting (e.g., choosing appropriate plant varieties for the area, preparing a field properly before planting); during the growth period (e.g., properly watering and weeding crops); and during crop harvest (e.g., harvesting in ways that minimize crop damage). Failure to adhere

<sup>21</sup> For some policies, farmers can choose the amount of revenue loss covered. For other policies, farmers can choose coverage for the amount of yield and price loss separately.

<sup>22</sup> In general, policies that provide coverage for more types of losses and/or higher levels of coverage will be more expensive to purchase than policies that cover fewer sources of loss or lower levels of coverage.

<sup>23</sup> Catastrophic (CAT) coverage is offered without a premium charge to the producer but carries a signup fee of \$655 per crop per county. CAT coverage was first added in 1994 when crop insurance was temporarily mandatory for participation in other farm programs. CAT coverage represented a low-cost option for the producer to meet the insurance purchase requirement. See the **Appendix** for additional background on the history of crop insurance.

<sup>24</sup> Some policies allow for maximum coverage levels above 85%.



to good farm management practices, as determined by USDA, can disqualify the farmer from receiving federal crop insurance indemnity payments.

In addition, certain farm production practices can also influence the risk of crop losses. For example, farmers who irrigate their crops have lower risks of crop loss due to drought than farmers who do not irrigate. USDA accounts for these types of differences in loss risk by pricing policies differently for irrigated crops, organic crops, follow-on crops, tillage practices, and other production practices that affect the risk of crop yield loss.<sup>25</sup>

## Crop Ownership and Covered Units

Farmers may own the land they farm, pay cash to rent the land they farm, and/or rent the land they farm for a share of the crop produced on the land (i.e., crop-share). Under each of these arrangements, farmers accept at least some of the financial risk associated with producing the crop and therefore would be eligible to purchase crop insurance coverage for their portion of the risk. Landlords who rent their land on a cash rent basis do not share in the financial risk of producing the crop and therefore are not eligible to purchase crop insurance for the rented acres. However, landlords who rent their land for a share of the crop produced, thereby accepting some of the financial risk of producing the crop, would be eligible to purchase crop insurance on the rented acres.<sup>26</sup>

Federal crop insurance allows for differences in land and crop ownership through five types of insured units:<sup>27</sup> basic, optional, enterprise, multicounty enterprise, and whole farm.

- **Basic units** are all the insurable land in the county that is either owned or cash rented and planted to one crop.<sup>28</sup> Farmers can also insure as a basic unit land that is rented based on crop-share, but farmers cannot combine multiple crop-share agreements into a single basic unit. For example, consider a farmer who plants corn on four fields: one field the farmer owns, one field the farmer cash rents, one field that is farmed under a crop-share rental agreement with Landlord A, and another field that is farmed under a second crop-share rental agreement with Landlord B. If the farmer wants to insure these fields using only basic units, then the farmer would need to use three basic units in total. The farmer can combine the corn planted on the field that he owns and the field that he cash rents under a single basic unit, but he must use separate basic units to insure each of the fields under crop-share agreement reflects the differences in crop-share ownership. Basic units are available nationwide to all farms with insurable crops and impose no minimum or maximum acreage requirements.
- **Optional units** subdivide a basic unit by geographic boundaries and allow farmers to tailor their crop insurance coverage for differences in growing conditions within the basic unit. If a basic unit includes land in multiple sections

<sup>25</sup> For background on how USDA prices crop insurance policies, see “Pricing Crop Insurance Policies.”

<sup>26</sup> Landlords cannot purchase coverage on a tenant’s share of the crop (and vice versa) without written approval from the other party. See USDA, RMA, “Final Agency Determination: FAD-122,” at <https://legacy.rma.usda.gov/regs/533/2010/fad-122.html>.

<sup>27</sup> In addition to the five unit-level coverage plans shown here, area plan coverage (yield or revenue) is available for basic, enterprise, or multicounty enterprise units.

<sup>28</sup> County boundaries can affect the calculation of yield risk and therefore how premiums get priced for an insured unit. See discussion below under “Yield Risk.”

of a county,<sup>29</sup> the farmer can insure the land in each section under a separate optional unit. Farmers can also use optional units to insure irrigated acreage separately from nonirrigated land. Optional units have no minimum or maximum acreage requirements and can be established wherever counties can be subdivided into distinct geographic areas.<sup>30</sup>

- **Enterprise units** include all the insurable acreage for a crop in a county, regardless of whether the land is owned or rented. To qualify for an enterprise unit, a farmer must have a minimum number of acres (either 20 acres or 20% of the total insurable acres, whichever is the smaller amount) in each of two or more different geographic areas within the county.
- **Multicounty enterprise units** are enterprise units that include all the insurable acreage in two contiguous counties. Multicounty enterprise units have the same minimum acreage requirements as enterprise units, plus limits on total insurable acres in the second county. These limits prevent farmers from pooling land in two counties in a single multicounty enterprise unit when the acres could be insured under separate enterprise units for each county.
- **Whole farm units** must include all crops grown and all land insured for the farm, regardless of county boundaries. Whole farm units are available nationwide and impose no minimum or maximum acreage requirements.

In general, farmers select the unit or combination of units to insure that suit their particular crop insurance goals. Whole farm units can be used to cover multiple crops planted in multiple counties in a single unit. The other unit types are crop and location specific, such that a farmer could use one unit type for corn and a different unit type for soybeans planted in the same county. Enterprise and multi-enterprise units allow farmers to cover their crops with fewer insurance policies than they would need to purchase using basic units. Because enterprise and multi-enterprise units pool acreage from multiple basic or optional units, enterprise and multi-enterprise units also have lower risks of average crop losses compared with basic units and therefore cost less to insure than the equivalent acreage covered under basic units.

As a general rule, the smaller and more specific the insured unit, the more costly will be the insurance premium. By the same logic, the greater the number of fields pooled together under the insured unit, the lower the premium rate. Optional units, which may subdivide coverage into the smallest geographic area, usually have the highest premium rates. Whole farm policies usually have the lowest premium rates because they pool risk from the largest geographic area and across multiple crops.

## Who Buys Crop Insurance

While over 85% of cropland planted to corn, soybeans, wheat, or cotton is insured by the FCIP,<sup>31</sup> not all farmers planting insurable crops choose to purchase crop insurance. According to the 2017 Census of Agriculture, 380,236 farms enrolled cropland, pasture, and/or rangeland in the FCIP in 2017. These farms constituted approximately 19% of all farms and approximately 26% of all

<sup>29</sup> A section is a demarcation of land under the Public Land Survey System. Sections are one square mile areas containing 640 acres.

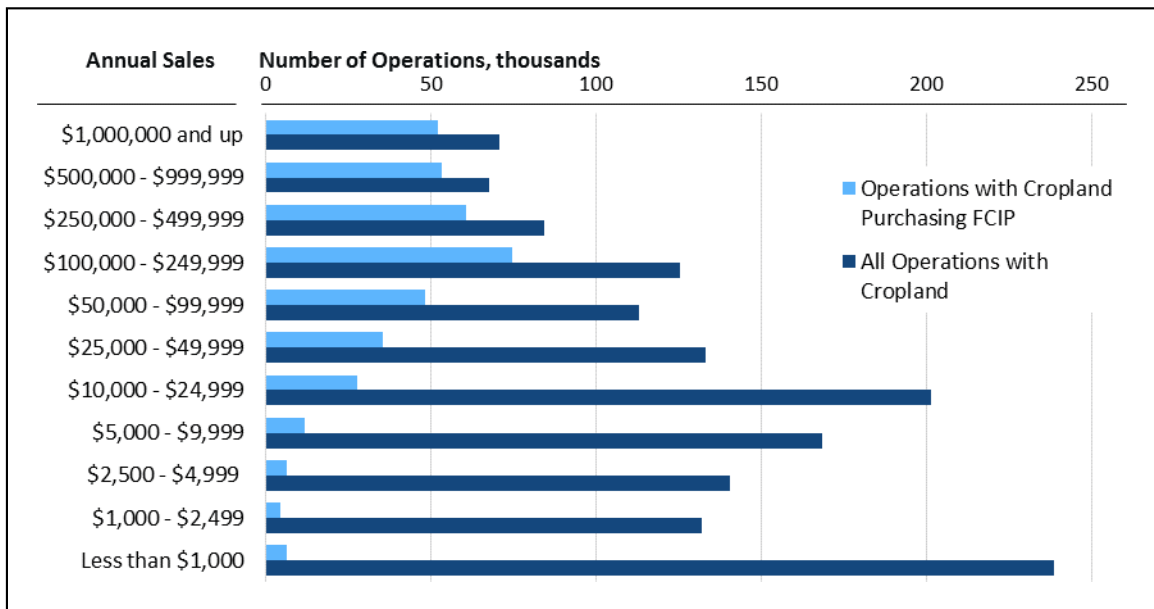
<sup>30</sup> Geographic areas can be county sections, section equivalents, areas farmed under separate Farm Service Agency farm numbers, or areas that otherwise qualify for different optional units.

<sup>31</sup> CRS calculations using data from various NASS *Acreage* reports and RMA Summary of Business data.

farms with cropland acreage in 2017.<sup>32</sup> However, the Census of Agriculture counts farms that enrolled land in the FCIP, which may not include some farms that insured crops, livestock, or animal products on a non-acreage basis. In 2017, the FCIP sold more than 19,000 policies that provided coverage on a non-acreage basis.<sup>33</sup>

While crop insurance coverage can be purchased by any size operation, the average crop farm insured under an FCIP policy usually has larger annual sales (**Figure 2**) and operates more acres (**Figure 3**) than the average crop farm. This pattern may reflect underlying differences in crop risk across different farm production scales.<sup>34</sup> This pattern could also reflect other factors associated with farm size, such as region of the country, mix of crops grown, production practices used, risk management practices employed, and other farm characteristics.

**Figure 2. All Farms and Farms Purchasing FCIP Policies, by Annual Sales**  
2017 data



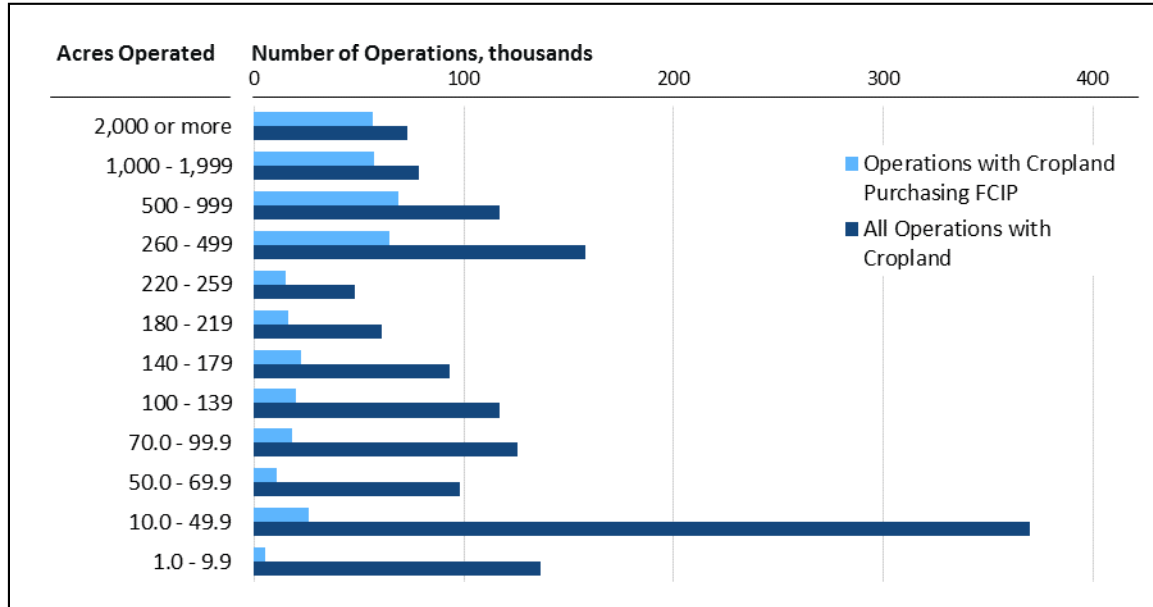
**Source:** Figure created by CRS using data from USDA, National Agricultural Statistics Service (NASS), 2017 Census of Agriculture.

<sup>32</sup> The data suggest that many small farm operations—as defined by USDA’s Census criteria of having at least \$1,000 in sales during the year—do not purchase crop insurance. CRS calculations using data from USDA, NASS, 2017 Census of Agriculture.

<sup>33</sup> RMA Summary of Business data.

<sup>34</sup> Keith H. Coble and Brian Williams, “Are Large Farms Less Risky to Insure than Small Farms?,” *Choices*, vol. 33, no. 4 (2018), pp. 1-5.

**Figure 3. All Farms and Farms Purchasing FCIP Policies, by Acres Operated**  
2017 data



**Source:** Figure created by CRS using data from USDA, NASS, *2017 Census of Agriculture*.

Certain types of farms may also be less likely to purchase crop insurance than other types of farms. For example, certified organic farms have historically tended to insure a smaller percentage of their acreage and crop value on average than farms producing with conventional techniques.<sup>35</sup> Some possible reasons for the lower take-up rates among organic producers could include policies that may not be well suited to the specific needs of these growers, difficulties in pricing insurance policies for crops that command premium pricing in markets, lack of insurance agents who understand organic farming practices, and difficulties in filing and processing claims related to disputes over requirements for good farming practices for organic producers.<sup>36</sup>

## Why Farmers Purchase Crop Insurance

Farmers may purchase crop insurance for a variety of reasons. The available studies commonly list four reasons why farmers purchase crop insurance:<sup>37</sup> (1) as a tool for managing farm financial risk; (2) as a means of being able to access farm credit; (3) as a complement to other farm yield

<sup>35</sup> Mike Morris, Eric Belasco, and Jeff Schahczenski, *Is Organic Farming Risky? Improving Crop Insurance for Organic Farms*, National Center for Appropriate Technology, October 2019, at <https://attra.ncat.org/product/is-organic-farming-risky/> (hereinafter Morris, Belasco, and Schahczenski, *Is Organic Farming Risky?*, 2019).

<sup>36</sup> Morris, Belasco, and Schahczenski, *Is Organic Farming Risky?*, 2019.

<sup>37</sup> See, for example, Bruce J. Sherrick et al., “Factors Influencing Farmers’ Crop Insurance Decisions,” *American Journal of Agricultural Economics*, vol. 86, no. 1 (2004), pp. 103-114 (hereinafter Sherrick et al., “Factors Influencing Farmers’ Crop Insurance,” 2004); Jennifer Ifft, Todd H. Kueth, and Mitchell Morehart, “Farm Debt Use by Farms with Crop Insurance,” *Choices*, vol. 28, no. 3 (2013) (hereinafter Ifft, Kueth, and Morehart, “Farm Debt Use,” 2013); and Bruce A. Babcock, “Using Cumulative Prospect Theory to Explain Anomalous Crop Insurance Coverage Choice,” *American Journal of Agricultural Economics*, vol. 97, no. 5 (2015), pp. 1371-1384 (hereinafter Babcock, “Cumulative Prospect Theory,” 2015).

and revenue risk management strategies; and (4) as a financial investment with an expected positive rate of return.

1. **Risk Management.** Crop insurance is a tool that can help farmers manage farm financial risk. Farm revenues can vary significantly from year to year due to market price movements and changes in crop yields. Crop insurance payments may help smooth farm revenues in the advent of poor yields or lower market prices.
2. **Lending Requirement.** Farm lenders sometimes require farmers to purchase crop insurance as a condition for obtaining a loan.<sup>38</sup> Farming can be a capital-intensive business, and lenders may require farmers to purchase crop insurance to reduce the risk that farmers would be unable to repay their loans after poor harvests or during a period of low market prices.<sup>39</sup>
3. **Risk Diversification.** Purchasing crop insurance may be part of a diversified farm risk management strategy. Farmers have many options for managing crop revenue risk, including using forward contracts to lock in market prices,<sup>40</sup> purchasing futures and options contracts on commodity stock exchanges to hedge against adverse price movements,<sup>41</sup> self-insuring using their own savings, and other risk management strategies.<sup>42</sup> Farmers can also invest in a variety of different production practices that affect crop yield risk and thereby crop revenue risk. Farmers may seek to use crop insurance in conjunction with these yield and revenue risk management strategies to manage farm financial risk at lower total cost than would be available without crop insurance.<sup>43</sup>
4. **Positive Return.** Some farmers may view crop insurance as a financial investment with an expected positive rate of return.<sup>44</sup> Federal crop insurance is designed such that the average indemnity payment is approximately equal to the total premium collected. Because of premium subsidies, farmers do not pay the full amount of the total premium—they pay the cost of the total premium less the value of premium subsidies provided by USDA. If there were no premium subsidies and farmers were responsible for paying the full cost of the premium, then the expected rate of return from purchasing insurance would be zero. The federal government pays a substantial portion of crop insurance premiums as a means of encouraging farmers to purchase policies. Because of premium subsidies, farmers are likely to recoup more in indemnity payments over time

<sup>38</sup> Ifft, Kuethe, and Morehart, “Farm Debt Use,” 2013.

<sup>39</sup> David Oppedahl, *AgLetter: August 2017*, Federal Reserve Bank of Chicago, no. 1977, at <https://www.chicagofed.org/publications/agletter/2015-2019/august-2017>.

<sup>40</sup> A forward contract is an agreement between a farmer and a buyer under which the farmer agrees to deliver a set quantity of a commodity to the buyer at a future date in return for a specified price.

<sup>41</sup> A futures contract is an agreement that obliges a buyer to buy or a seller to sell a set quantity of a standardized commodity (e.g., number 2 yellow corn) traded on a commodity exchange at a future date. An options contract is an agreement that can give a buyer the right (but not the obligation) to buy or a seller the right (but not the obligation) to sell a standardized commodity traded on a commodity exchange at a future date.

<sup>42</sup> Joy Harwood et al., *Managing Risk in Farming: Concepts, Research, and Analysis*, USDA, ERS, Agricultural Economic Report no. 774, March 1999.

<sup>43</sup> Sherrick et al., “Factors Influencing Farmers’ Crop Insurance,” 2004.

<sup>44</sup> Babcock, “Cumulative Prospect Theory,” 2015.

than they pay in premiums, generating a net positive financial return from purchasing crop insurance.

## Scope of the Current Program

The scope of the program in any year depends on the policies that farmers choose to purchase that year. In recent years, the number of policies sold has remained relatively constant, and the total acreage insured has increased (see **Figure 1**). Annual liabilities, total premium, and premium subsidies have increased since 2016 but remain below the record high levels in the early 2010s (see **Figure 4**).<sup>45</sup> Trends in commodity prices, which were relatively higher in 2008-2014 compared with the 2009-2019 period, affect insured liabilities, total premium, and premium subsidies.

**Figure 4. Annual FCIP Total Premium, Premium Subsidies, and Liabilities**



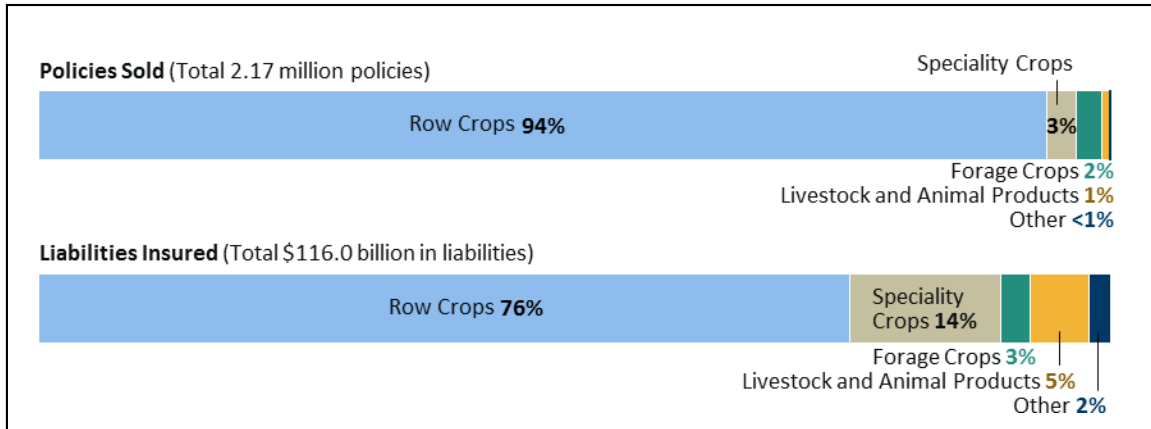
Source: Figure created by CRS using data from USDA, RMA, "Summary of Business."

## Covered Crops, Livestock, and Livestock Products

In 2019, the majority of policies sold were for row crops, including grains, oilseeds, pulses, and other commodity crops covered by commodity support programs (see **Figure 5**). Specialty crops (e.g., fruits, vegetables, and nuts), forage crops, and policies insuring livestock and animal products accounted for less than 10% of all policies sold. In terms of insured liabilities, however, row crops accounted for 76%, specialty crops accounted for 14%, and the other commodities accounted for 10% of total liabilities.

<sup>45</sup> Additional background on premium subsidies is available in "Premium Subsidies."

**Figure 5. Policies Sold and Liabilities Insured in 2019, by Commodity Type**



**Source:** Figure created by CRS using data from USDA, RMA, “Summary of Business.”

**Notes:** Row crops include grains, oilseeds, pulses, and other commodities covered under Title I Commodity Support Programs. Specialty crops include fruits, vegetables, nuts, nursery, and other crops. Forage crops include hay, alfalfa, and other commodities grown specifically as livestock forage. Livestock and animal products include cattle, bees, swine, lamb, and dairy production. Other includes Whole-Farm Revenue Protection.

Corn, soybeans, and wheat accounted for the largest share of policies sold and insured liabilities among insured commodities (see **Table 2**). Forage crops, however, accounted for the largest share of total insured acres. Milk accounted for the largest share of insured liabilities for livestock and animal products and had the fourth largest liabilities of any insured commodity. Almonds, grapes, nursery, and apples had the largest share of insured liabilities for specialty crops.

**Table 2. Major Crops, Livestock, and Livestock Products Insured in 2019**  
determined based on insured liabilities

Commodity Type	Commodity	Share of Total Policies Sold	Share of Total Insured Acres	Share of Total Insured Liabilities
Row Crops	Corn	26%	23%	38%
	Soybeans	24%	19%	21%
	Wheat	14%	10%	6%
	Cotton	4%	4%	5%
Forage Crops	All Forage Crops	2%	38%	3%
Specialty Crops	Almonds	< 1%	< 1%	2%
	Grapes	< 1%	< 1%	1%
	Nursery	< 1%	N/A	1%
	Apples	< 1%	< 1%	1%
Livestock and Animal Products	Milk	< 1%	N/A	5%
	Bees	< 1%	N/A	< 1%
	Cattle	< 1%	N/A	< 1%
	Swine	< 1%	N/A	< 1%

**Source:** CRS calculations using data from USDA, RMA, “Summary of Business.”

**Notes:** N/A = not applicable. Cattle includes dairy, feeder, and fed cattle. Table lists only the top four crops for each commodity type. Due to omitted insured crops, the columns do not sum to 100%.



For row crops, the pattern of crop insurance purchases largely aligns with crop planting patterns. Corn, soybeans, wheat, and cotton were the top four row crops by planted area in 2019.<sup>46</sup> For specialty crops, the pattern of crop insurance purchases largely aligns with production value. In 2019, the top four specialty crops by production value were almonds, grapes, apples, and strawberries.<sup>47</sup> The pattern of crop insurance purchases for livestock and animal products do not reflect commodity rankings based on the 2019 value of production. The top four livestock and animal products in 2019 by value of production were cattle, milk, chickens, and hogs.<sup>48</sup> The FCIP has never offered coverage for chickens. Additionally, even though cattle producers insured a small share of their animals, they purchased insurance coverage for cattle forage equivalent to approximately 14% of the value of 2019 U.S. hay production.<sup>49</sup>

## Covered Locations

Agricultural producers purchased crop insurance policies in all 50 states in 2019. The five states with the largest insured liabilities were Iowa, Illinois, California, Minnesota, and Nebraska ( see **Figure 6**). These states were among the top 10 agricultural producing states for 2019,<sup>50</sup> and insured liabilities reflect the extent of agricultural production in those states.

---

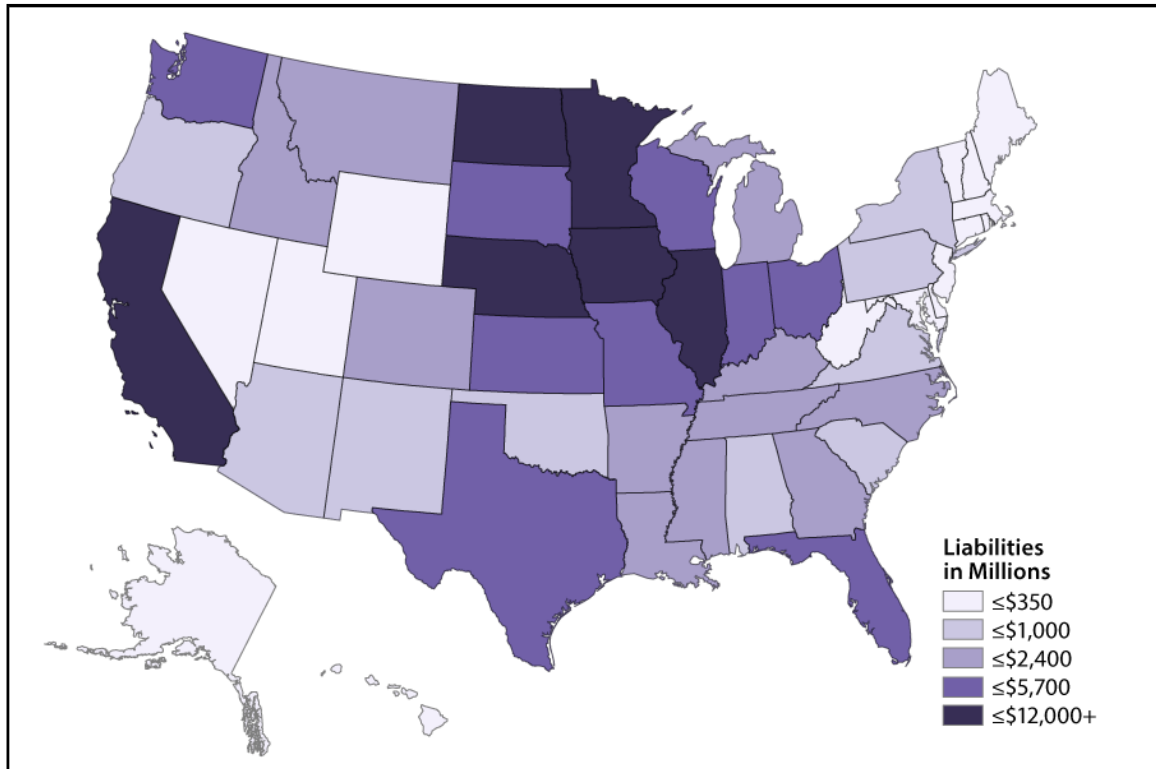
<sup>46</sup> The top 10 row crops by 2019 planted acres were corn, soybeans, wheat, cotton, sorghum, oats, barley, rice, canola, and rye. See USDA, NASS, *Crop Production: 2019 Summary*, January 2020, at [https://www.nass.usda.gov/Publications/Todays\\_Reports/reports/cropan20.pdf](https://www.nass.usda.gov/Publications/Todays_Reports/reports/cropan20.pdf).

<sup>47</sup> According to USDA NASS records, the top 10 specialty crops by 2019 value of production were almonds, grapes, apples, strawberries, lettuce, pistachios, oranges, tomatoes, walnuts, and onions. Statistics on the 2019 value of production for nursery crops are not available.

<sup>48</sup> According to USDA NASS records, the top 10 livestock and animal products by 2019 value of production were cattle (including calves), milk, chickens, hogs, turkeys, catfish, trout, mink, wool, and mohair. Statistics on the 2019 value of apiculture or honey production are not available.

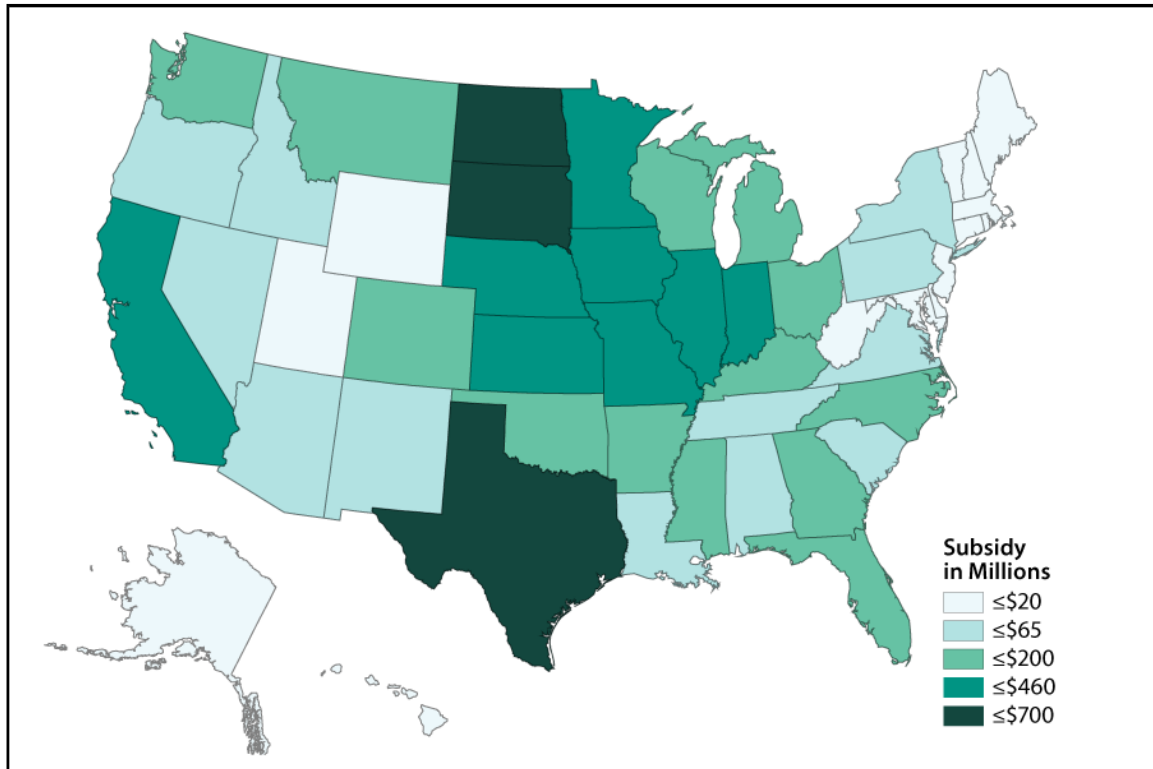
<sup>49</sup> CRS calculations based on data from USDA's RMA and NASS.

<sup>50</sup> According to USDA's ERS, the top 10 agricultural producing states in terms of 2019 cash receipts were (in descending order) California, Iowa, Nebraska, Texas, Minnesota, Illinois, Kansas, Wisconsin, North Carolina, and Indiana. See USDA, ERS, "FAQs," at <https://www.ers.usda.gov/faqs/>.

**Figure 6. 2019 FCIP Liabilities by State**

**Source:** Figure created by CRS using data from USDA, RMA, “Summary of Business” and Esri Data and Maps 2019.

In 2019, the five states in which producers received the most premium subsidies were Texas, North Dakota, South Dakota, Kansas, and Illinois (see **Figure 7**). The total amount of the premium subsidies received by farmers in a state depends on the number of policies sold and the subsidy received per policy. Premium subsidies are calculated as a fixed proportion of the total premium for each policy. For high-valued crops, such as cotton, rice, and many specialty crops, premium rates per acre are much higher than for lower-valued crops, such as corn and wheat.

**Figure 7. 2019 FCIP Premium Subsidies by State**

**Source:** Figure created by CRS using data from USDA, RMA, “Summary of Business” and Esri Data and Maps 2019.

Premium subsidies may also be higher in certain states due to differences in yield risk for crop production in those states.<sup>51</sup> In areas where crop production is more risky, total premiums are more expensive than for less risky areas.<sup>52</sup> This means that the premium subsidy must also be higher to cover the same proportion of the total premium.

## Policies Purchased

The types of policies purchased reflect the type of commodities insured under the FCIP. Revenue Protection was the most frequently purchased policy type in 2019 (**Table 3**), accounting for almost 70% of policies purchased, 53% of acres insured, and 65% of the total liabilities insured for the program. Actual Production History (APH) and Yield Protection, two types of yield insurance policies, were the second and third most frequently purchased in terms of liabilities insured. Revenue Protection (RP), APH, and Yield Protection policies are the most commonly selected policies for most row and specialty crops.

Area-based policies—including Rainfall Index, Area Revenue Protection, and Margin Protection—accounted for a small share of liabilities insured, although Rainfall Index covered 37% of total acres insured under the program. Whole-Farm Revenue Protection also accounted for a very small share of total number of policies sold and the total liabilities insured.

<sup>51</sup> Additional background on yield risk is available in “Yield Risk”.

<sup>52</sup> Yield risk is one of multiple factors that impact total premiums. Additional background on how premium rates are calculated is available in “Pricing Crop Insurance Policies”.

**Table 3. FCIP Policies Purchased in 2019**

Policy Type	Share of Total Policies Sold	Share of Total Acres Insured	Share of Total Liabilities Insured
Revenue Protection	69%	53%	65%
Actual Production History	9%	3%	12%
Yield Protection	14%	6%	6%
Dairy Revenue Protection	< 1%	N/A	5%
Rainfall Index	2%	37%	2%
Whole-Farm Revenue Protection	< 1%	N/A	2%
All Other Policies	5%	1%	8%
Total	100%	100%	100%

**Source:** CRS calculations using data from USDA, RMA, “Summary of Business” database.

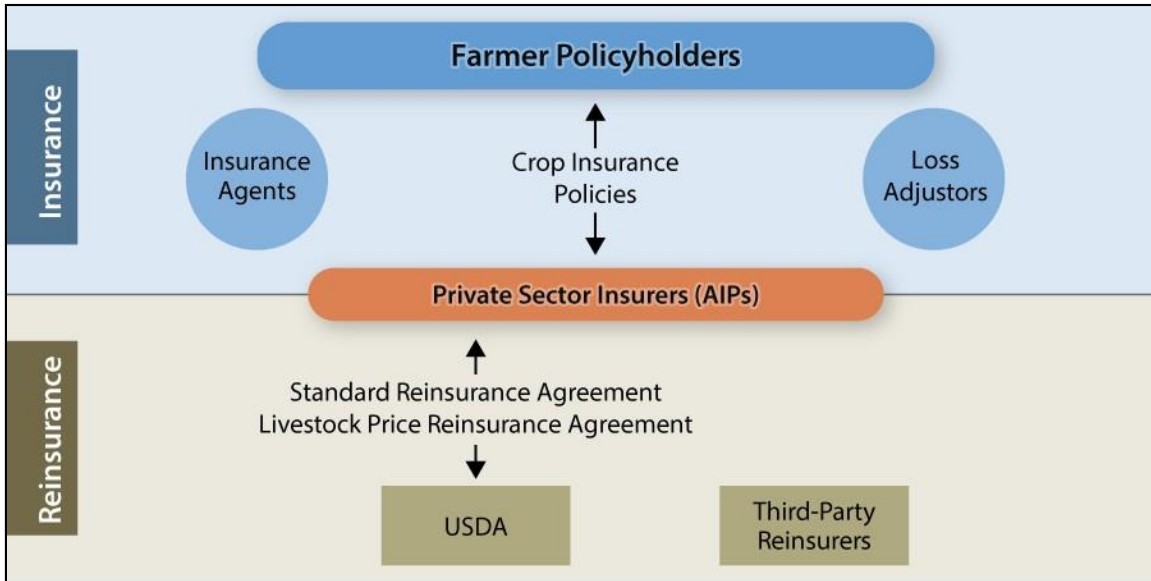
**Note:** Policies ordered by share of liabilities insured. N/A = not applicable.

## Federal Crop Insurance Program Structure and Operations

The FCIP operates as a public-private partnership. Authorized private-sector insurance companies, called AIPs, sell and service crop insurance policies (**Figure 8**). USDA regulates the policies offered and their pricing and subsidizes the costs that farmers pay to purchase the policies.

Two entities within USDA are responsible for operating the FCIP. The FCIC, a corporation wholly owned by the federal government,<sup>53</sup> administers payments to AIPs to cover the federal subsidy of policy premiums, reinsurance costs, and direct costs incurred in delivering and servicing the policies. RMA administers the FCIP; determines crop insurance policy terms; sets premium rates, underwriting provisions, and loss adjustment standards; and regulates AIPs.

<sup>53</sup> The federal government owns a variety of corporations, including the U.S. Postal Service and Federal Deposit Insurance Corporation. For a discussion of the issues related to government-owned corporations, see archived CRS Report RL30365, Federal Government Corporations: An Overview, June 8, 2011 (available to congressional clients upon request).

**Figure 8. Key Entities Involved in FCIP Implementation**

**Source:** CRS.

**Notes:** The federal crop insurance program (FCIP) is implemented as a public-private partnership. Farmer policyholders work with insurance agents to purchase crop insurance policies sold by private sector insurers, known as Approved Insurance Providers (AIPs). When farmers file claims on the insurance policies, AIPs hire loss adjustors to determine the extent of losses incurred by the farmers. USDA provides reinsurance to AIPs for a portion of the losses from crop insurance policies sold. AIPs may purchase additional reinsurance from third-party reinsurers. USDA also regulates the policies sold by AIPs, subsidizes farmer premiums, and subsidizes AIPs for the cost of selling and servicing crop insurance policies.

## Pricing Crop Insurance Policies

Crop insurance policies, like other types of commercially available insurance, are priced according to their actuarial ratings. Any premium subsidies are then applied to the price determined by the actuarial rating. Actuarial rates are an estimate of losses likely to be incurred in the future based on losses that were incurred in the past. Crop insurance policies are priced with the goal of being actuarially fair, meaning that the total value of premiums paid over many years should be approximately equal to the total value of indemnity payments paid over that same time period. To make an evaluation of the risk of loss associated with a policy, USDA sets the premium rates for policies based on projections of market prices, crop yields, and yield and price risks.

Unlike some other private-sector insurance products, premiums for crop insurance are not “expense loaded.”<sup>54</sup> USDA incurs costs from running the program, including costs for compensating AIPs for selling and servicing policies and for reinsuring against losses from policies sold. These costs are specified under the terms of the Standard Reinsurance Agreement (SRA) and Livestock Price Reinsurance Agreement (LPRA), (see “Reinsurance Agreements”). Neither AIP compensation nor costs associated with reinsuring AIPs factor into the calculation of premium rates. Crop insurance premiums are calculated to cover only the liability associated with crop loss payments.

<sup>54</sup> Expense loading is a practice used by commercial insurers that increases premium rates to cover the insurers’ administrative and operating expenses (e.g., taxes, agent commissions, reinsurance costs), as well as a profit margin.

## **The Role of Projected Market Prices**

An agricultural producer selects and signs a crop insurance policy at the start of the growing season. Each policy must establish the insured value for the crop at the time of signing, which is before USDA, producers, or AIPs know what the market price of the crop will be at harvest. To value each commodity, USDA uses what is referred to as a “projected price.”

For crops that are traded on commodity exchanges, USDA uses futures contract prices to set the projected price and estimate the commodity’s price risk for revenue insurance coverage. Futures markets trade contracts for different delivery points in the future (e.g., delivery in November, delivery in March). USDA uses the prices quoted before the start of planting for the futures contract date closest to the end of the crop’s harvest period. For example, the projected price for corn insurance policies is the average price over the month of February for the Chicago Mercantile Exchange’s December corn futures contract.<sup>55</sup> For crops that are not traded on commodity exchanges, USDA uses other data sources, such as contract prices, to calculate the insured value of the crop, that is, the policy’s liability.

The futures market prices are national prices; as such, they may differ from the prices farmers receive when they sell their crops to local buyers. This difference is known as “basis” and represents an additional crop marketing risk for producers since the basis amount cannot be insured with federal crop insurance.

Crop insurance premiums are sensitive to futures contract prices. Higher prices of harvest-time futures contracts before planting will increase the value of the insured crop at the time the policy is purchased and therefore the crop insurance premium charged to insure the crop.

## **The Role of Yields and Actual Production History**

While projected prices are common to all farmers insuring the same crop, expected yields are set individually for each insured unit. A farmer with multiple insured units will have a separate expected yield for each insured unit, so that the farmer’s crop insurance guarantee will reflect the expected yields and yield risk of the unit given the crop, location, and production practices used.

The expected yield for an insured unit is referred to as the actual production history (APH). The APH is used in conjunction with the projected price to establish the insured value covered under the policy. Higher APH yields increase the value of the insured crop and therefore the crop insurance premium charged for the policy.

For crop insurance policies that cover production losses, such as Yield Protection or APH policies, a farmer’s APH is also used to calculate the insurance guarantee that triggers indemnity payments. For example, if a farmer’s APH were 100 bushels per acre and the farmer purchases 75% coverage under an APH or Yield Protection policy, then the guarantee would be 75 bushels per acre. Any harvest of less than 100 bushels per acre could be considered a loss from the farmer’s point of view, but only harvests of less than 75 bushels per acre would qualify for indemnity payments.

---

<sup>55</sup> Corn planting in the United States usually begins each year in March or April, and harvesting usually finishes in November or December. Thus, the December futures contract is an indicator of what corn prices will be at harvest. Since crop insurance contracts must be purchased before planting begins, USDA uses the price of the December corn futures contract in February as a forecast of what harvest prices are likely to be for the purposes of calculating crop insurance premiums.

## Establishing an Actual Production History

USDA uses farm production records, such as sales receipts or storage records, to establish an APH for each insured unit. Farms can submit up to 10 years of records documenting actual yields. If farmers do not have at least four years of records available, USDA substitutes a county-specific transition, or “T-yield,” for the missing years. T-yields are based on the 10-year average yield for the whole county. Farmers without such records are assigned 65% of the T-yield as their APH yield. Farmers with fewer than four years of records can receive between 80% and 100% of the T-yield for the missing years depending on how many years they provide.

The APH is calculated as an average of all the years of records provided, which means that the calculation can be strongly influenced by years with very poor harvest yields. Farmers in certain counties can purchase the ability to exclude records for some years from their APH calculations. The APH yield exclusion option allows farmers to exclude records from years when the county had severe yield losses (i.e., less than 50% of the county average trend yield over 10 years).

Farmers may not exclude years for which they experienced a severe loss, but the county overall did not experience a loss of equal severity. This requirement reduces the potential for moral hazard within the FCIP. For policies with yield exclusion options, USDA still incorporates the excluded years in its assessment of yield risk for the insured unit. Excluding any years from the assessment of yield risk could compromise the actuarial soundness of the underlying insurance policy.

Premiums for yield exclusion options are more expensive than premiums without this option. Excluding years with severe losses from the APH calculation increases the insured value of the crop and thus the premium required for the policy.

### How the Yield Exclusion Option Impacts Farmers’ Indemnity Payments

By excluding years of severe county yield losses, a farmer can insure a higher Actual Production History (APH) value for the farmer’s unit and therefore receive larger indemnity payments in the event of losses or receive indemnities when a lower APH might not trigger a loss. For example, consider a farmer who has an APH of 100 bushels per acre, purchases a Yield Protection policy with 75% coverage, and harvests 65 bushels per acre. The Yield Protection policy would provide indemnity payments on  $0.75 \times 100 - 65 = 10$  bushels per acre. If that same farmer had also purchased a yield exclusion option that allowed him to increase his APH to 110 bushels per acre, the indemnity payments would be  $0.75 \times 110 - 65 = 17.5$  bushels per acre, or 7.5 bushels per acre more than without the yield exclusion option.

The yield exclusion option allows farmers to collect indemnity payments for losses that are less severe than would be required without the yield exclusion option. Continuing the example of the farmer with an APH of 100 bushels per acre who purchases a Yield Protection policy with 75% coverage, suppose this farmer were to harvest 79 bushels per acre instead of 65 bushels per acre. The threshold harvest yield to collect an indemnity would be  $0.75 \times 100 = 75$  bushels per acre. Because 79 bushels per acre is greater than 75 bushels per acre, the policy would provide no indemnity for this loss. If, however, the farmer were to purchase the yield exclusion option and increase the APH to 110 bushels per acre, the threshold harvest yield to collect an indemnity would be  $0.75 \times 110 = 82.5$  bushels per acre. In this circumstance, the farmer would receive indemnity payments on 3.5 bushels per acre, which would not have been made without the yield exclusion option.

## Yield Risk

Yield risk is the likelihood of realizing crop yields above or below typical yields for a given farm. Yield risk can vary by crop, location of the farm (i.e., the agroclimatic setting that encompasses soil type, weather, and other physical attributes of the production setting), production practice used, and type of farm or county outcome insured. For this reason, USDA prices yield risk separately for each insured unit. In general, estimating yield risk for an insured unit requires many years of data, and some farmers may not have such records available.



Since USDA is required to make crop insurance available to all eligible producers, regardless of the years of records they have available, RMA uses a variety of farm-specific and county-specific factors to estimate yield risk for each insured unit.<sup>56</sup> RMA sets premium rates using a crop-specific “base rate” that reflects the average yield risk for a specific county, unit type, and production practice. Then USDA adjusts premium rates from base rates as needed to reflect actuarially fair pricing for the yield risk estimated for each insured unit.

On average, crop insurance premiums are more expensive in areas where growing conditions are less favorable.

## Loss Ratio

A loss ratio is a measure of the financial performance of an insurance policy or portfolio of policies. For FCIP policies, *loss ratio* is defined as the amount of indemnities paid divided by the amount of premiums collected for policies sold in a given year. The loss ratio includes neither the costs paid to AIPs for selling and servicing crop insurance policies nor the costs of reinsuring AIPs against losses from policies sold.

A loss ratio of 1.0 indicates that the crop insurance indemnities paid equal the premiums collected for that year. A loss ratio greater than 1.0 indicates that indemnities exceeded premiums, and a loss ratio less than 1.0 indicates that premiums exceeded indemnities. USDA calculates the loss ratio for the program as a whole, as well as separately by crop, state, county, policy type, and coverage level.

USDA is statutorily required to operate the program in ways that “improve the actuarial soundness of federal multiperil crop insurance coverage.”<sup>57</sup> USDA assesses the actuarial performance of the crop insurance program based on the loss ratio. Statute requires USDA to operate the program “to achieve an overall projected loss ratio of not greater than 1.0.”<sup>58</sup> CBO records show overall program loss ratios have been less than 1.0 for most of the last 10 crop years, meaning that premiums have more than covered indemnities. In March 2020, CBO projected an overall FCIP loss ratio of 0.9 for crop marketing years 2020-2030.<sup>59</sup>

## Premium Subsidies

USDA provides subsidies to AIPs on behalf of farmer policyholders to defray a portion of the premium costs.<sup>60</sup> The subsidy rates for most acreage policies are set by statute and vary based on the coverage level and unit type the producer selects (**Table 4**). The government pays 100% of the premium rate for CAT policies, with decreasing amounts of subsidy provided for higher levels of coverage. For example, the government pays 59% of the premium cost for a farmer insuring a basic or optional unit at the 70% coverage level.

The amount of the subsidy provided is larger for enterprise and whole farm units compared with basic or optional units. Beginning and veteran farmers and ranchers are entitled to a 10% subsidy

<sup>56</sup> Keith Coble et al., *A Comprehensive Review of the RMA APH and COMBO Rating Methodology: Final Report*, prepared for USDA RMA, March 15, 2010, p. 15.

<sup>57</sup> 7 U.S.C. §1506(n)(1).

<sup>58</sup> 7 U.S.C. §1506(n)(2).

<sup>59</sup> CBO, *USDA mandatory farm program outlay projections*, March 6, 2020.

<sup>60</sup> The Standard Reinsurance Agreement (SRA) refers to these subsidies as “risk subsidies,” as distinct from other subsidies paid to AIPs.

rate above the amount listed in **Table 4** when insuring enterprise, area yield, area revenue, or whole farm units.<sup>61</sup>

FCIP participants also pay administrative fees for the policies they purchase. For CAT coverage, the administrative fee is \$655 per crop per county. Because CAT premiums are 100% subsidized, the administrative fee is the only cost to the farmer for the policy. For policies with higher coverage levels, the administrative fee is \$30 per crop per county, which must be paid in addition to the cost of the farmer-paid premium.

**Table 4. Crop Insurance Premium Subsidies**  
government-paid portion of premium as a percent of total premium

Unit Type	Coverage Level									
	CAT	50%	55%	60%	65%	70%	75%	80%	85%	
				Subsidy rate (%)						
Basic or Optional	100	67	64	64	59	59	55	48	38	
Enterprise or Multicounty enterprise	n/a	80	80	80	80	80	77	68	53	
Area plan (yield)	n/a	n/a	n/a	n/a	n/a	59	59	55	55	
Area plan (revenue)	n/a	n/a	n/a	n/a	n/a	59	55	55	49	
Whole farm	n/a	80	80	80	80	80	80	71	56	

**Source:** CRS using 7 U.S.C. §1508(e).

**Notes:** N/A= not applicable; CAT = catastrophic. Table provides subsidy rates. Farmer deductibles (not shown on the table) are calculated as 100% minus the coverage level percentage shown. A basic unit covers land in one county with the same tenants and landlords. An optional unit is a basic unit divided into small units by township section. An enterprise unit covers all land of a single crop in a county for a producer, regardless of tenant and landlord arrangements. A multicounty enterprise unit covers all land of a single crop in two counties for a producer, regardless of tenant and landlord arrangements. Area plan (yield or revenue) coverage insures county losses instead of farm-specific losses and can be applied to basic, enterprise, or multicounty enterprise units. A whole farm unit covers more than one crop. For CAT coverage, a loss beyond 50% is indemnified at 55% of the expected price. CAT coverage is not available for all types of policies. For coverage levels other than CAT, losses are indemnified at more than 55% of the expected price (as selected by the purchaser) within the minimum and maximum range specified by USDA's Risk Management Agency (RMA). The whole farm subsidy shown is for farms insuring three or more commodities; for less than three commodities, whole farm coverage is not offered at 80% or 85%. Premium subsidies for beginning and veteran farmers purchasing area yield, area revenue, enterprise, or whole farm coverage are increased by 10% over the rates shown in the table.

Although the government-paid premium subsidies are paid to AIPs on behalf of farmer policyholders, the policyholders are the ultimate beneficiaries—both in terms of risk reduction and lower cost of coverage. Because crop insurance policies are actuarially fair, indemnities paid over time average out to be close to the value of total premium. As such in the long run, farmer policyholders collect indemnities that are approximately equal to the value of total premiums. Over time, the value of the premium subsidies accrues to farmers as excess indemnities received after accounting for the farmer-paid share of the premium.

<sup>61</sup> For FCIP purposes, a beginning farmer or rancher is an individual who has not actively operated and managed a farm or ranch with an insurable interest in a crop or livestock as an owner-operator, landlord, tenant, or sharecropper for more than five years. This includes an insurable interest as an individual or as a substantial beneficial interest holder (10% or more) in another person who has an insurable interest in any crop or livestock. Crop years when the beginning farmer/rancher was under the age of 18, enrolled in post-secondary studies (not to exceed five crop years), or on active duty in the U.S. military may be excluded from consideration of the five crop years.

By providing the subsidies to AIPs on behalf of farmer policyholders, in lieu of providing the subsidy payments to farmers directly, USDA may be reducing the total cost required for distributing the subsidy payments. Millions of crop insurance policies are sold every year (see **Figure 1**), but fewer than 20 AIPs service all of these policies. An open question is whether providing premium subsidies to AIPs instead of directly to farmers may result in farmers selecting higher coverage levels than they would if they were required to pay the entire premium upfront and receive the premium subsidy from USDA afterward.<sup>62</sup>

## Creating New Policies and Pilot Programs

USDA has broad authority to insure or reinsure producers of agricultural commodities for losses due to “drought, flood, or other natural disaster (as determined by the Secretary).”<sup>63</sup> The FCIC Board of Directors must approve any new crop insurance policies. These can include new policies submitted by RMA or submissions from nongovernment actors, including AIPs, colleges, universities, cooperatives, trade associations, or any person.<sup>64</sup> Policies, provisions of policies, or premium rates submitted by the private sector are often referred to as 508(h) submissions.<sup>65</sup>

USDA will reimburse the costs of preparing 508(h) submissions if the FCIC Board of Directors adopts the proposal. USDA can also reimburse for the costs of preparing “concept proposals” for future 508(h) submissions that a private-sector actor intends to develop.<sup>66</sup> External experts review concept proposals and full 508(h) submissions prior to consideration for adoption by the FCIC Board of Directors. USDA estimates that reimbursements for 508(h) submissions will cost \$12 million per fiscal year for FY2021-FY2025.<sup>67</sup>

By statute, when considering new 508(h) proposals, the FCIC Board of Directors must consider the interests of agricultural producers and the potential for “significant adverse impact on the crop insurance delivery system.”<sup>68</sup> The 508(h) proposal must also provide coverage that is likely to be “viable and marketable,” address “a clear and identifiable flaw or problem in an existing policy,” or provide coverage for a commodity that either could not be covered or had low participation under the existing coverage.<sup>69</sup>

## Reinsurance Agreements

AIPs sell and service crop insurance policies under two agreements with USDA: the Standard Reinsurance Agreement (SRA) and the Livestock Price Reinsurance Agreement (LRPA). The

<sup>62</sup> See, for example, Babcock, “Cumulative Prospect Theory,” 2015; Xiaodong Du, Hongli Feng, and David A. Hennessy, “Rationality of Choices in Subsidized Crop Insurance Markets,” *American Journal of Agricultural Economics*, vol. 99, no. 3 (June 2016), pp. 732-756; Tobias Dalhaus, Barry J. Barnett, and Robert Finger, “Behavioral Weather Insurance: Applying Cumulative Prospect Theory to Agricultural Insurance Design Under Narrow Framing,” *PLOS ONE*, vol. 15, no. 5 (May 2020).

<sup>63</sup> 7 U.S.C. §1508(a)(1).

<sup>64</sup> 7 U.S.C. §1508(h).

<sup>65</sup> 508(h) submissions are authorized under 7 U.S.C. §1508(h).

<sup>66</sup> 7 U.S.C. §1522.

<sup>67</sup> The FY2021 President’s Budget for USDA included a proposal to eliminate reimbursements for 508(h) proposals, which is expected to provide savings of \$12 million per fiscal year. See USDA, *2021 USDA Explanatory Notes—Risk Management Agency*, at <https://www.usda.gov/sites/default/files/documents/fpac-rma-fy2021-explanatory-notes.pdf>. This proposal was not adopted by the 116<sup>th</sup> Congress.

<sup>68</sup> 7 U.S.C. §1508(h)(3)(a).

<sup>69</sup> 7 U.S.C. §1508(h)(3)(a).

SRA covers the majority of FCIP crop insurance policies offered, while the LPRA covers livestock insurance policies.<sup>70</sup> The SRA and LPRA are annual agreements that must be signed before the start of each reinsurance year, which begins on July 1 of each calendar year.

These agreements specify expense reimbursements and risk-sharing arrangements by the federal government, including the terms under which FCIC provides subsidies and reinsurance (i.e., insurance for insurance companies) on eligible crop insurance contracts sold or reinsured by insurance companies. The agreements also define AIP eligibility criteria, limitations on insurance agent compensation, data reporting and privacy requirements, and other terms and conditions of participating in the FCIP.

The terms of the SRA and the LPRA are fixed and do not change for each new annual agreement. The 2008 farm bill (P.L. 110-246) allows USDA to renegotiate the SRA and LPRA once every five years starting with the 2011 reinsurance year.<sup>71</sup> The last time USDA renegotiated either agreement was for the 2011 reinsurance year.

Congress does not directly approve any new agreements between USDA and AIPs. However, Congress may be interested in the SRA in its oversight capacity, particularly with respect to any terms that could affect farmer participation, policy coverage, or industry interest in selling crop insurance to farmers (e.g., compensation provided to AIPs and insurance agents, requirements for new policy marketing outreach to farmers).

## Marketing Crop Insurance Policies to Farmers

Under the SRA and LPRA, an AIP is required to offer and market all insurance plans for any crops in any state in which the AIP operates, provided that RMA actuarial data are available for that state. AIPs must also accept and approve applications from all eligible farmers. AIPs are prohibited from providing a rebate (e.g., money, goods, or other benefits) to farmers in exchange for purchasing a crop insurance policy.

In addition to marketing efforts undertaken by AIPs, USDA also works with private partner organizations to provide risk management training and education about crop insurance options to farmers and ranchers. Training is targeted toward limited resource, socially disadvantaged, and other farmers and ranchers traditionally underserved by the FCIP. USDA also targets producers in specific states in which FCIP participation has been low historically, including Alaska, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

## Approved Insurance Provider Compensation

Under the SRA, USDA does not reimburse AIPs according to actual expenses incurred for selling and servicing crop insurance policies. Instead, AIPs receive three types of subsidies depending on the policies sold: a Catastrophic Loss Adjustment Expense (CAT LAE) subsidy, an Administrative and Operating (A&O) subsidy, and a SnapBack subsidy. The CAT LAE subsidy compensates AIPs for offering and servicing CAT coverage. A&O subsidies compensate AIPs for offering and servicing all other types of coverage.<sup>72</sup> SnapBack subsidies are extra compensation

---

<sup>70</sup> For more background on the Standard Reinsurance Agreement (SRA) and the Livestock Price Reinsurance Agreement (LRPA), see USDA, RMA, “Reinsurance Agreements,” at <https://www.rma.usda.gov/pubs/ra>.

<sup>71</sup> Requirements for renegotiating the SRA are codified in 7 U.S.C. §1508(k)(8).

<sup>72</sup> Coverage that is not CAT coverage is commonly referred to as “buy-up” coverage.

provided for offering and servicing certain policies in states with high loss ratios (i.e., loss ratios of 1.2 or greater).<sup>73</sup>

CAT LAE, A&O, and SnapBack subsidies are calculated in proportion to the total premiums for the policies sold (see **Table 5**). The amount each AIP earns from these three subsidies depends on the volume, types, and locations of policies underwritten by the AIP. The SRA specifies that the total amount of A&O subsidies provided to all AIPs is subject to a minimum (cup) and a maximum (cap).<sup>74</sup> The cup is designed to guarantee that AIPs as a group will earn a minimum amount of A&O subsidies for participating in the program. The cap is designed to guarantee that USDA will not have to pay more than a set amount in total A&O subsidies in any reinsurance year. Since 2015, the cup and cap have been fixed at \$1.02 billion and \$1.28 billion, respectively.

**Table 5. 2020 Compensation Subsidies for Approved Insurance Providers**

Subsidy Type	Applicable Policies	Value of Subsidy (Percent of Total Premium)	Notes
CAT LAE	CAT	6%	—
A&O	All except for CAT	12.0%-22.2%	Value of subsidy depends on the type of insurance policy sold
SnapBack	All except for CAT and area coverage	1.15%	Only available in states with loss ratios of 1.2 or greater

**Source:** CRS using USDA, RMA, *2020 Standard Reinsurance Agreement*, Section III.

**Notes:** An approved insurance provider (AIP) will receive either a Catastrophic Loss Adjustment Expense (CAT LAE) subsidy or an Administrative and Operating (A&O) subsidy, depending on the specific policies sold. However, in locations where SnapBack is available, AIPs receive SnapBack subsidies in addition to either the CAT LAE or A&O subsidy.

## Reinsurance

USDA provides reinsurance to AIPs against a portion of the losses from selling and servicing crop insurance policies.<sup>75</sup> USDA determines the amount of reinsurance coverage based on AIPs' "net book of premium," which is the total premium for all eligible policies sold less the value of A&O subsidies and fees. The SRA and LPR also permit AIPs to purchase reinsurance from third parties on the portion of net book premium not reinsured by USDA. Any portion of the risk from the net book of premium retained by AIPs (i.e., not reinsured by USDA or a third party) can provide incentives for AIPs to properly adjust claims and not award excess indemnities as a means of growing their crop insurance businesses.

AIPs can choose which policies they want to retain risk for and which policies they want USDA to reinsure.<sup>76</sup> Additionally, AIPs can assign the reinsured policies to different USDA reinsurance

<sup>73</sup> For more information about subsidies for AIPs, see CRS Report R45291, *Federal Crop Insurance: Delivery Subsidies in Brief*, by Isabel Rosa.

<sup>74</sup> Congress mandated a reduction in AIP subsidy rates in the 2008 farm bill but did not require USDA to negotiate a cup or cap on subsidy rates. For additional background on the origin of the cup and cap on AIP subsidies, see archived CRS Report R40966, *Renegotiation of the Standard Reinsurance Agreement (SRA) for Federal Crop Insurance*, available to congressional clients on request.

<sup>75</sup> This reinsurance is also referred to as "shared underwriting risk."

<sup>76</sup> Under this arrangement, AIPs generally transfer the highest-risk policies to USDA for reinsurance. See discussion in CRS Report R40532, *Federal Crop Insurance: Background*, coordinated by Randy Schnepf.

fund types, allowing AIPs to further limit their exposure to losses from offering crop insurance policies in locations with higher yield risk.

Under the SRA, AIPs must cede 6.5% of the net gain or loss from their total crop insurance business nationwide—referred to as the net book quota share—to USDA. In most years, AIPs have earned gains on their crop insurance portfolios; ceding a portion of the gains to USDA has helped offset part of costs to USDA for operating the program. The LPRAdoes not include a net book quota share provision.

USDA does not purchase third-party reinsurance for the portion of the AIPs’ net book of premium ceded to USDA. USDA is able to reinsure all policies ceded from AIPs because FCIC has the ability to borrow from the U.S. Treasury to cover such losses.

### Approved Insurance Provider Qualifications

AIPs must reapply for approval each reinsurance year. Applications are due April 1 for the subsequent reinsurance year, which begins July 1. An AIP must be a licensed U.S. property and casualty insurance company.<sup>77</sup> Section II of the SRAdescribes the required qualifications for AIPs.<sup>78</sup> AIPs must have the financial and operational resources available to successfully administer the program and maintain a satisfactory performance history over five reinsurance years, as per RMA requirements, and be able to achieve minimum financial ratio standards.<sup>79</sup> AIPs must also have the ability to absorb a defined level of losses, or Maximum Possible Underwriting Loss.<sup>80</sup> Throughout the year, RMAmonitors AIPs’ operational and financial performances, ratings provided by A.M. Best,<sup>81</sup> and regulatory compliance with applicable state laws and regulations. Additionally, USDA conducts performance reviews for each AIP approximately once every three years, unless more frequent reviews are warranted.<sup>82</sup> New AIP applicants must demonstrate to RMAtheir capacity to service policies—including sales, underwriting, claims, processing systems, accounting, and compliance—prior to being approved as an AIP.

### Market Competition Among Approved Insurance Providers and Agent Compensation

AIPs must compete with each other for the opportunity to underwrite farmers’ crop insurance policies. Unlike a typical private-sector insurance product, AIPs cannot compete by offering different premium pricing. USDA sets premium prices, and all AIPs must offer the same premium rates to any given farmer. AIPs do not have direct relationships with their farmer customers. Farmers work with an insurance agent, who may in turn contract with multiple AIPs.<sup>83</sup> Insurance agents can play a key role in determining which AIPs underwrite the policies for the farmers that

<sup>77</sup> Property insurance provides coverage for personal property and belongings, including homes, buildings, vehicles, and other types of personal property or belongings. Casualty insurance provides liability coverage for accidental injury to another person or damage to another person’s property or belongings.

<sup>78</sup> The required qualifications are set out in 7 C.F.R. §400, Subpart L.

<sup>79</sup> The requirements for demonstration a satisfactory performance history are specified in SRA, Section II (a)(9), and the financial ratio standards required to qualify as an AIP are codified in 7 C.F.R. §400.162.

<sup>80</sup> 7 C.F.R. §400.164.

<sup>81</sup> A.M. Best is a credit rating agency that provides creditworthiness assessments of insurance companies.

<sup>82</sup> USDA, RMA, *COM-17-004, Informational Memorandum*, August 17, 2017, at <https://legacy.rma.usda.gov/bulletins/info/2017/com-17-004.pdf>.

<sup>83</sup> CRS Report R45291, *Federal Crop Insurance: Delivery Subsidies in Brief*, by Isabel Rosa.



the agents represent.<sup>84</sup> Therefore, instead of competing based on price, AIPs compete based on (1) the service they provide to the insurance agents, and (2) the compensation they provide to insurance agents.<sup>85</sup>

The compensation that AIPs provide to agents can affect the types of policies that agents choose to recommend to their farmer clients, the incentive agents have to provide outreach to farmers who may have been previously underserved by the FCIP, and the incentive agents have to become familiar with new FCIP product offerings, such as insurance options for organic producers and other new offerings. For example, some stakeholders have suggested that one reason for low uptake of whole farm revenue protection policies is due to limited promotion of the policies by insurance agents.<sup>86</sup>

The SRA limits the amount AIPs are allowed to pay agents to not more than 80% of A&O and CAT LAE by state. However, an AIP may pay compensation up to 100% of A&O and CAT LAE by state if certain conditions are met.<sup>87</sup> There is no limitation on how much any given agent may receive so long as it is within the maximum amount allowable per state.<sup>88</sup> In addition to the limits imposed by the SRA, USDA has provided guidance to limit the use of fringe benefits and other types of compensation, including acquisitions, commissions, profit sharing payments, bonuses, consulting fees, loans, advance and deferred payments, health or other types of insurance coverage, trips or entertainment valued in excess of \$600, and advertising and promotion payments.<sup>89</sup>

## Waste, Fraud, and Abuse

USDA and AIPs share responsibility for safeguarding the FCIP against waste, fraud, and abuse. AIPs are responsible for properly adjusting claims and complying with all SRA and USDA procedures under penalty of forfeiting their A&O and CAT LAE subsidies.<sup>90</sup> AIPs have a duty to report suspected instances of misrepresentation, fraud, waste, or abuse to USDA, and the FCIP Spot Check List Handbook specifies requirements for AIP review of anomalous losses.<sup>91</sup>

<sup>84</sup> Matthew Ginder et al., “Factors Affecting Crop Insurance Purchase Decisions by Farmers in Northern Illinois,” *Agricultural Finance Review*, vol. 69, no. 1 (May 2009).

<sup>85</sup> Bruce Babcock, *Cutting the Fat – It Won’t Kill Crop Insurance*, prepared for the Environmental Working Group, December 2015, at [https://static.ewg.org/reports/2015/cutting-the-fat/CuttingTheFat.pdf?\\_ga=2.260327501.1702212085.1532617233-677630425.1531861799](https://static.ewg.org/reports/2015/cutting-the-fat/CuttingTheFat.pdf?_ga=2.260327501.1702212085.1532617233-677630425.1531861799).

<sup>86</sup> National Sustainable Agriculture Coalition, “Much Needed Improvement to Whole-Farm Revenue Protection,” June 21, 2019, at <https://sustainableagriculture.net/blog/whole-farm-revenue-protection-improvements/>.

<sup>87</sup> For example, an AIP can pay agents in excess of 80% of A&O and CAT LAE subsidies by state if the AIP received payments for an underwriting gain for certain funds reinsured through the FCIP. For additional information on limits to agent compensation, see the 2021 Standard Reinsurance Agreement Section III (a)(4)(C), available at <https://www.rma.usda.gov/-/media/RMA/Regulations/Appendix-2021/21sra.ashx?la=en>.

<sup>88</sup> RMA, “Frequently Asked Questions: Agent Compensation—Schemes or Devices,” at <https://www.rma.usda.gov/help/faq/agentcomp.html>.

<sup>89</sup> USDA, RMA, “Guidance Regarding SRA Section III(a)(4) – Agent Compensation,” Bulletin MGR-10-011, at <https://legacy.rma.usda.gov/bulletins/managers/2010/mgr-10-011.1.pdf>. See also USDA, RMA, *Information Memorandum No. IS-11-006*, July 22, 2011, at <https://legacy.rma.usda.gov/bulletins/info/2011/is-11-006.pdf>.

<sup>90</sup> SRA, Section IV (h)(8).

<sup>91</sup> USDA, RMA, *Spot Check List Handbook: 2020 and Succeeding Crop Years*, at <https://rma.usda.gov/-/media/RMA/Handbooks/Program-Administration—14000/Spot-Check-List/2020-14070-Spot-Check-List.ashx>.



RMA’s compliance division is responsible for assessing and investigating program vulnerability, fraud, waste, and abuse, as well as recommending changes to RMA leadership in policies, loss adjustment, and farm-service-related procedures, agreements, and contract services.<sup>92</sup>

## Costs of the FCIP

USDA reports costs for the FCIP on a fiscal year basis and in terms of net payments to farmers and AIPs. Net payments to AIPs consist of subsidies for program delivery (i.e., A&O, CAT LAE, and Snapback subsidies) plus reinsurance gains less AIP reinsurance losses. Net payments to farmers consist of indemnity payments made less premiums paid by farmers. On average, over time, indemnity payments are likely to be approximately equal to the value of premium subsidies plus farmer paid premiums. However, indemnity payments in any fiscal year may not reflect the value of premium subsidies paid by USDA on behalf of farmer policyholders in that year. USDA reports premium subsidies paid by crop year, and **Figure 4** shows premium subsidy costs for crop years 2000-2019. Because USDA does not report premium subsidies on a fiscal year basis, the rest of this section discusses costs of the FCIP in terms of net payments made to farmers—including indemnity payments made to farmers and premiums paid by farmers—and net payments made to AIPs—including subsidies for program delivery and reinsurance gains and losses.

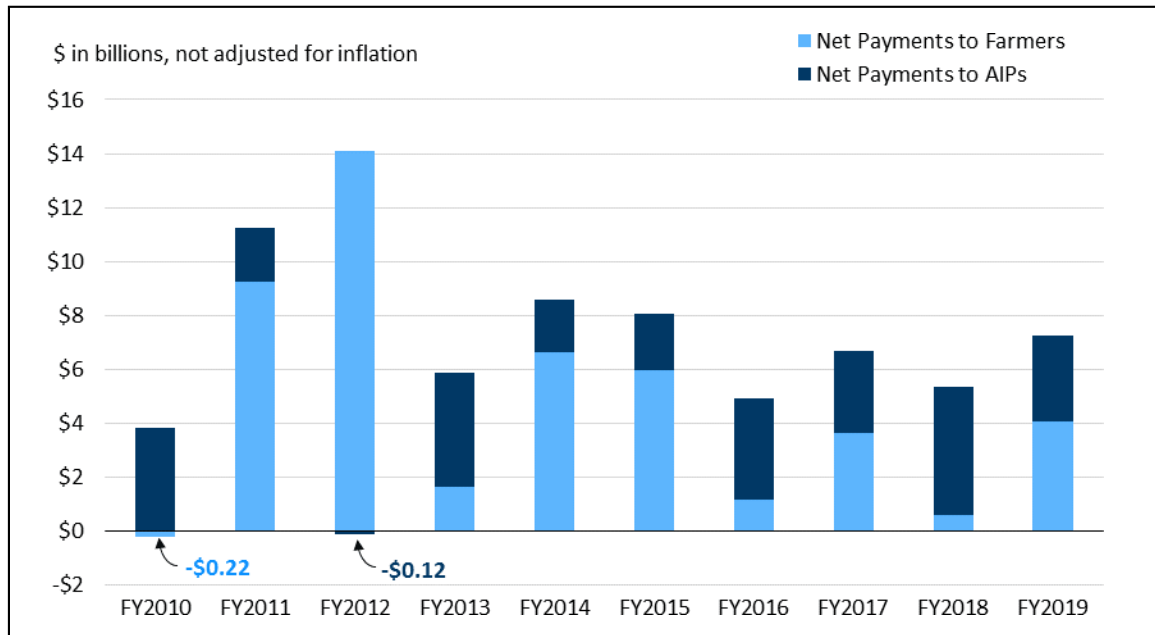
USDA expended \$7.3 billion on FCIP net payments to farmers and AIPs in FY2019 (see **Figure 9**). This amount exceeded total net payments for the previous fiscal year but was close to the average net payments for FY2010-FY2019.<sup>93</sup> Farmers and AIPs each received positive net payments in FY2019, consistent with FCIP expenditures for most of the previous decade.

---

<sup>92</sup> USDA, RMA, “About the Risk Management Agency,” fact sheet, August 2016, at <https://www.rma.usda.gov/en/Fact-Sheets/National-Fact-Sheets/About-the-Risk-Management-Agency>.

<sup>93</sup> CRS calculates the average net payments to farmers and AIPs for FY2010 -FY2019 at \$7.7 billion.

**Figure 9. FCIP Net Payments to Farmers and Approved Insurance Providers**  
by fiscal year



**Source:** CRS calculations using data from USDA, Office of Inspector General, *Federal Crop Insurance Corporation/Risk Management Agency's Financial Statements*, audit reports, FY2010-FY2019.

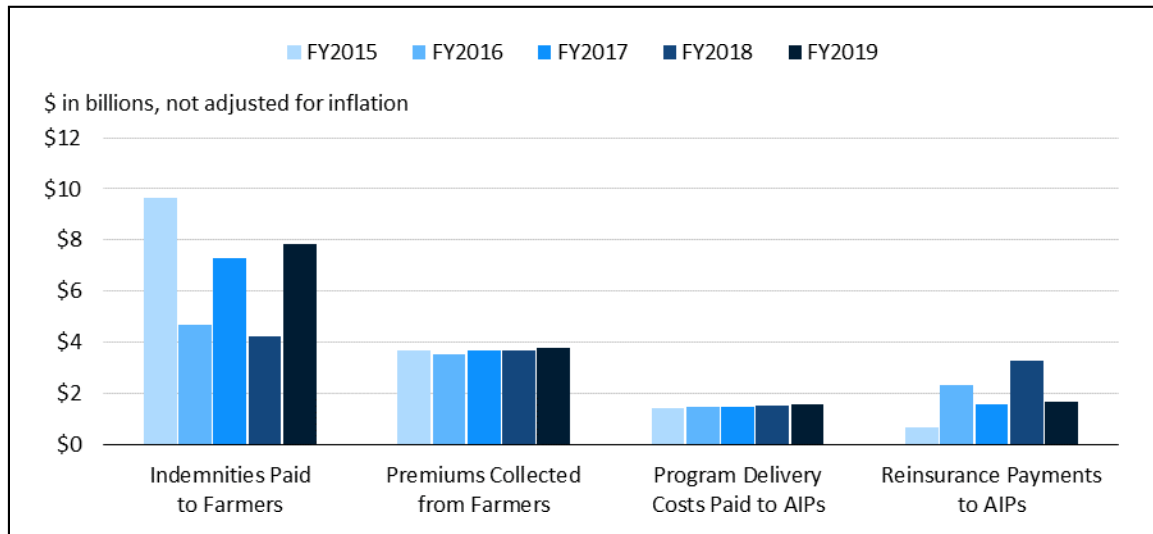
Net payments to farmers are positive when indemnities exceed farmer-paid premiums. Net payments to AIPs are positive when subsidies for program delivery (i.e., A&O, CAT LAE, and Snapback subsidies) and AIP underwriting gains on policies sold exceed underwriting losses.<sup>94</sup> For FY2010-FY2019, there were only two instances where farmers or AIPs did not earn positive net payments for the fiscal year. Farmers received negative net payments in FY2010, a year when low yields were offset by higher prices, thus limiting indemnities on revenue plans. AIPs received negative net payments in FY2012, a year of historic drought, below-average yields, and large indemnity payments.

In FY2019, farmers paid nearly \$4 billion in premiums and received nearly \$8 billion in indemnity payments (see **Figure 10**). AIPs received \$3.2 billion in federal outlays, approximately half of which was for selling and servicing policies (i.e., delivery expenses), and half was for underwriting gains from policies reinsured by USDA.<sup>95</sup>

<sup>94</sup> Subsidies for program delivery and underwriting gains and losses are explained in the “Approved Insurance Provider Compensation” and “Reinsurance.”

<sup>95</sup> AIPs’ role in selling and servicing policies is explained in “Federal Crop Insurance Program Structure and Operations.”

**Figure 10. Contributions to FCIP Net Payments**  
by fiscal year



**Source:** CRS using data from USDA, Office of Inspector General, *Federal Crop Insurance Corporation/Risk Management Agency's Financial Statements*, audit reports, FY2015-FY2019.

**Notes:** Amounts not adjusted for inflation. Net payments to farmers (corresponding to net payments shown in **Figure 9**) are the difference between indemnities paid to farmers and premiums collected from farmers for each fiscal year. Net payments to Approved Insurance Providers (AIPs) (corresponding to net payments shown in **Figure 9**) are the sum of program delivery costs paid to AIPs and reinsurance payments to AIPs for each fiscal year. Premiums collected from farmer policyholders do not reflect premium subsidies paid by USDA on policyholders' behalf. Premium subsidies are not available on a fiscal year basis but can be seen on a crop year basis in **Figure 4**. Premium subsidies have the effect of reducing the amount of premiums collected from farmers relative to the amounts that would be collected without premium subsidies. Over time, the indemnities paid to farmers average to be approximately equal to the sum of premiums collected from farmers and premium subsidies.

Although FCIP costs vary from year to year depending on policies purchased and losses incurred, premiums collected from farmers and subsidies paid to AIPs for program delivery costs tend to be less variable than other cost components (see **Figure 10**). Farmers often renew coverage from year to year and therefore pay a similar amount for premiums over time. Subsidies for AIP delivery expenses tend to be stable over time because of the cup and cap imposed on certain delivery expenses in the SRA.<sup>96</sup> Indemnity payments and underwriting gains can vary considerably from year to year based on weather and market conditions. Additionally, Congress provided a supplemental “top-up” to the indemnity payments for prevented planting in FY2019, which further increased indemnity payments compared with previous years.<sup>97</sup>

In a 2017 report, the Government Accountability Office (GAO) identified potential cost savings for the program through reducing AIPs' target rates of return and portions of premiums retained.<sup>98</sup> The CBO also identified several potential cost-saving strategies including limiting premium subsidies to area-based plans; changing how losses are calculated by eliminating the yield

<sup>96</sup> The Standard Reinsurance Agreement is explained in “Reinsurance Agreements.”

<sup>97</sup> For details, see CRS Report R46180, *Federal Crop Insurance: Record Prevent Plant (PPL) Acres and Payments in 2019*, by Randy Schnepf.

<sup>98</sup> Government Accountability Office (GAO), *Crop Insurance: Opportunities Exist to Improve Program Delivery and Reduce Cost*, GAO-17-501, July 26, 2017, at <https://www.gao.gov/products/GAO-17-501>.

exclusion and the use of the harvest price in determining the insurance guarantee; removing the harvest price option as the default revenue plan option; and lowering the expected rate of return for AIPs reflected in the SRA.<sup>99</sup> Proposals from other stakeholders include eliminating certain types of revenue coverage,<sup>100</sup> capping premium subsidies,<sup>101</sup> and changing prevented planting rules that discourage farmers from replanting.<sup>102</sup>

## The Role of the FCIP in Agricultural Policy

### The FCIP and the Farm Safety Net

The FCIP is a central component of the farm safety net, a collection of programs that provide risk protection and financial support to U.S. farmers in times of low farm prices and natural disasters. The three main components of the safety net are (1) permanently authorized federal crop insurance, (2) farm commodity price and income support programs authorized under the 2018 farm bill for crop years 2019-2023,<sup>103</sup> and (3) permanently authorized agricultural disaster assistance programs.<sup>104</sup> Additional support may be provided through ad hoc disaster assistance, emergency loans, and USDA discretionary assistance.<sup>105</sup>

For 2014-2018, the FCIP and commodity support programs provided the largest share of outlays from farm safety net programs, with the FCIP and commodity programs providing similar levels of support. Since 2018, however, FCIP outlays have exceeded (or are projected to exceed) commodity support payments. Additionally, ad hoc payments for trade and market disruptions related to the Coronavirus Disease 2019 (COVID-19) pandemic, including forgivable loans provided through the Small Business Administration's Paycheck Protection Program (PPP), have exceeded all other categories of farm safety net spending (**Table 6**) for 2019-2020.

<sup>99</sup> CBO, *Options to Reduce the Budgetary Costs of the Federal Crop Insurance Program*, December 2017.

<sup>100</sup> Joseph W. Glauber, *Reform Our Crop Insurance Program to Reduce the Burden on Taxpayers*, American Enterprise Institute, November 8, 2017, at <https://www.aei.org/articles/reform-our-crop-insurance-program-to-reduce-the-burden-on-taxpayers/>.

<sup>101</sup> Scott Faber, *Top 5 Reasons to Reform Crop Insurance*, Environmental Working Group, June 27, 2018, at <https://www.ewg.org/agmag/2018/06/top-5-reasons-reform-crop-insurance> (hereinafter Faber, *Top 5 Reasons*, 2018).

<sup>102</sup> Claire O'Connor and Lara Bryant, *Covering Crops: How Federal Crop Insurance Program Reforms Can Reduce Costs, Empower Farmers, and Protect Natural Resources*, National Resources Defense Council, Issue Paper no. I7-11-A, December 2017, at <https://www.nrdc.org/sites/default/files/federal-crop-insurance-program-reforms-ip.pdf> (hereinafter O'Connor and Bryant, *Covering Crops*, 2017).

<sup>103</sup> CRS Report R43758, *Farm Safety Net Programs: Background and Issues*, coordinated by Randy Schnepf.

<sup>104</sup> CRS Report RS21212, *Agricultural Disaster Assistance*, by Megan Stubbs.

<sup>105</sup> For example, see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*, by Randy Schnepf et al.; CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*, by Randy Schnepf; CRS In Focus IF11539, *Wildfires and Hurricanes Indemnity Program (WHIP)*, by Megan Stubbs; and CRS Report R46347, *COVID-19, U.S. Agriculture, and USDA's Coronavirus Food Assistance Program (CFAP)*, by Randy Schnepf and Jim Monke.

**Table 6. Farm Safety Net Program Outlays Since 2014**

annual average in \$ billion for five years from 2014 to 2018 and two years from 2019 to 2020

Years	FCIP <sup>a</sup>	Commodity Support <sup>b</sup>	Permanent and Supplemental Disaster Programs <sup>c</sup>	Trade and COVID-related Support <sup>d</sup>	Total Farm Safety Net Support
2014-2018	6.2	6.2	1.8	1.0	15.2
2019-2020	6.6	4.8	2.0	23.8	37.2

**Sources:** CRS calculations using data from USDA, ERS, *Farm Incomes and Wealth Statistics: U.S. and State Farm Income and Wealth Statistics*, updated as of February 5, 2021; and USDA, RMA, "Summary of Business" database, downloaded on February 5, 2021.

**Notes:** To the extent possible, the data are on a calendar year basis and reflect the timing of the payments. FCIP data are by crop year. Data for 2020 for commodity support, permanent and supplemental disaster programs, and trade and COVID-related support are forecast. Descriptions of and authorities for commodity, permanent disaster, supplemental disaster, trade, and COVID-19-related support programs are available in CRS Report R46577, *U.S. Farm Support: Outlook for Compliance with WTO Commitments, 2018 to 2020*, by Randy Schnepf.

- FCIP outlays include premium subsidies and indemnity payments to farmers in excess of total premiums paid (i.e., excess losses).
- Commodity support includes payments under the Agricultural Risk Coverage, Price Loss Coverage, and marketing assistance loan programs, the Dairy Margin Protection Program and Dairy Margin Coverage programs, cotton ginning cost share program in 2016 and 2018, and other miscellaneous commodity-specific programs.
- Permanent and supplemental disaster payments include the Livestock Forage Disaster Program, Livestock Indemnity Program, Tree Assistance Program, and Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program, as well as supplemental and emergency payments made under programs such as the Wildfire and Hurricane Indemnity Program (WHIP) and WHIP+.
- Ad hoc support for trade and COVID-19-related market disruptions includes payments under the 2018 Market Facilitation Program (MFP) of \$8.6 billion; the 2019 MFP of \$14.5 billion; portions of the two 2020 Coronavirus Food Assistance Programs (CFAP-1 and CFAP-2), valued at \$16 billion and \$14 billion, respectively; and portions of the \$7.3 billion in forgivable loans under the PPP.

Most farmers and ranchers are eligible for at least one of the aforementioned federal programs. Some commodities are supported by a single program; others can receive support through a combination of programs. Within the farm safety net, federal crop insurance covers the widest variety of U.S. agricultural production. In addition to the FCIP, certain row crops (e.g., corn, soybeans, wheat) are eligible for multiple farm commodity support programs, including Agriculture Risk Coverage (ARC), Price Loss Coverage (PLC), and marketing loans.<sup>106</sup> Sugar and dairy have their own support programs in addition to coverage through the FCIP. Specialty crop and livestock producers have coverage through the FCIP and may receive support from permanent disaster programs.

Some farm support programs are designed to provide benefits that do not overlap with FCIP benefits. For example, ARC and PLC provide support for market price declines in ways that differ from how crop insurance Revenue Protection (RP) policies insure against market price losses.<sup>107</sup> The Dairy Margin Coverage program provides support for changes in market prices and

<sup>106</sup> Agriculture Risk Coverage, Price Loss Coverage, and marketing loans are the principal farm -bill-authorized revenue support programs for U.S. grain, oilseed, and pulse producers. For additional information about these programs, see CRS Report R46561, *U.S. Farm Policy: Revenue Support Program Outlays, 2014 -2020*, by Randy Schnepf.

<sup>107</sup> CRS Report R45730, *Farm Commodity Provisions in the 2018 Farm Bill (P.L. 115 -334)*, by Randy Schnepf.

feed input costs, while Dairy Revenue Protection under crop insurance insures against changes in dairy revenue.

USDA administers the Noninsured Crop Disaster Assistance Program, which provides benefits similar to FCIP CAT coverage but is available only for crops and/or locations that cannot be insured through the FCIP. USDA also administers four permanently authorized disaster programs for livestock and trees: the Livestock Forage Disaster Program (LFP), the Livestock Indemnity Program (LIP), the Tree Assistance Program (TAP), and Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP). LIP and ELAP provide compensation for animal losses that cannot be insured under FCIP policies. LFP provides compensation for grazing losses, which is similar to the coverage provided by pasture, rangeland, and forage (PRF) coverage under the FCIP. However, PRF coverage makes payments based on acres affected by adverse weather conditions, whereas LFP makes payments based on the head of livestock affected by adverse weather conditions. TAP makes payments for replacement or rehabilitation of trees, bushes, and vines damaged by natural disasters, which can overlap with indemnity payments from FCIP tree coverage policies.<sup>108</sup>

Most farm safety net programs are provided free of charge or for a nominal participation fee. The FCIP is one of the few farm safety net programs that requires farmers to pay a significant contribution toward the cost of coverage provided under the program. The FCIP is also the only farm safety net program implemented as a public-private partnership. USDA program agencies deliver all other farm safety net programs.

## The FCIP and Conservation Requirements

The FCIP incentivizes farmers to conserve wetlands and highly erodible lands through conservation compliance requirements. Conservation compliance requires that producers agree to maintain a minimum level of conservation on highly erodible land and to not convert wetlands to crop production.<sup>109</sup> The 2014 farm bill (P.L. 113-79) returned crop insurance premium subsidies to the list of USDA program benefits that could be lost if a producer is determined to be out of compliance with the conservation compliance provisions.<sup>110</sup> USDA's Economic Research Service concluded in 2017 that the inclusion of crop insurance premium subsidies to the list of potential lost program benefits significantly increased the incentive to comply with conservation compliance requirements for many farms.<sup>111</sup>

The 2014 farm bill also amended and expanded the *sodsaver* provision in the 2008 farm bill (P.L. 110-246).<sup>112</sup> Under *sodsaver*, approved yield guarantees and crop insurance premium subsidies are lowered by 50 percentage points for production of annual crops on native sod<sup>113</sup> during the

<sup>108</sup> The FY2021 President's Budget included a proposal to prevent producers from claiming duplicate benefits under the Tree Assistance Program and the FCIP. White House, Office of Management and Budget, *President's Budget FY 2021: Budget Appendix*, pp. 61-185, at [https://www.whitehouse.gov/wp-content/uploads/2020/02/agr\\_fy21.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/02/agr_fy21.pdf). This proposal was not adopted by the 116<sup>th</sup> Congress.

<sup>109</sup> For more information on conservation requirements, see CRS Report R42459, *Conservation Compliance and U.S. Farm Policy*, by Megan Stubbs.

<sup>110</sup> P.L. 113-79, §2611. See **Appendix** for history of the FCIP and conservation compliance requirements.

<sup>111</sup> Roger Claassen et al., *Conservation Compliance: How Farmer Incentives Are Changing in the Crop Insurance Era*, USDA, ERS, Economic Research Report no. ERR-234, July 2017.

<sup>112</sup> Referred to in statute as "Crop Production on Native Sod." 7 U.S.C. §1508(o).

<sup>113</sup> Native sod is land that has never been tilled or for which there is no history of prior tilling for crop production. Native sod and native grasslands can provide habitat for numerous species, including birds, breeding waterfowl, and



first four years of planting. The 2018 farm bill extended the sodsaver penalties to apply to any insurable crop, including perennial crops. The sodsaver provision applies to native sod in six states—Minnesota, Iowa, North Dakota, South Dakota, Montana, and Nebraska. These states included some of the areas with the highest rates of conversion of native sod to cropland during 2008-2016.<sup>114</sup>

In addition to incentivizing conservation of wetlands and highly erodible lands, Congress and USDA have made changes to certain FCIP procedures that previously could have deterred farmers from planting cover crops, a practice that could improve soil quality and help reduce soil erosion. The 2018 farm bill introduced new provisions to qualify certain voluntary uses of cover crops as a type of good farming practice,<sup>115</sup> thereby allowing land planted with cover crops to maintain eligibility for crop insurance. USDA also adjusted certain cutoff dates that applied to prevented planting acres in 2019 and 2020 because the original dates could have deterred farmers from applying cover crops to their prevented planting acreage.

The FCIP also supports state conservation efforts in Iowa and Kansas as part of a collaboration with their state departments of agriculture. USDA is conducting a multiyear demonstration project, started in 2017, that aims to increase use of cover crops in Iowa by providing crop insurance premium discounts for farmers who plant cover crops. For certain counties in Kansas, USDA introduced a limited irrigation policy option for corn and soybeans that allows producers to voluntarily reduce irrigation applications while maintaining insurance coverage and FCIP records on historical yields and irrigation water usage.

## The FCIP and Farm Credit

Several types of lenders make farm loans, including commercial banks, Farm Credit System (FCS) institutions, USDA's FSA, life insurance companies, individuals, and other types of lenders.<sup>116</sup> The extent of loans offered and terms of credit available from each of these sources can depend on the creditworthiness of farmer borrowers. In general, purchasing federal crop insurance improves the likelihood repayment in the event of a poor harvest or low market prices. Some lenders may require a farmer to purchase crop insurance to obtain a loan.

FSA is the primary federal lender to farmers. By statute, farmers are required to purchase at least CAT coverage as a condition for FSA operating, ownership, and emergency loans in areas where crop insurance is available.<sup>117</sup> The requirement applies to loans that FSA makes directly and loans guaranteed by FSA. Farmers can use FSA loans to purchase crop insurance coverage and can be disqualified from FSA direct loans for violations of the Federal Crop Insurance Act (e.g., crop insurance fraud).

FCS institutions are borrower-owned and funded by the private sector but operate under a federal charter with a statutory mandate to serve only agriculture-related borrowers. By statute, FCS

---

pollinators.

<sup>114</sup> Tyler J. Lark et al., "Cropland expansion in the United States produces marginal yields at high costs to wildlife," *Nature Communications*, vol. 11, no. 4295 (September 2020).

<sup>115</sup> P.L. 115-334, §11107.

<sup>116</sup> For a description of these lenders, see CRS Report RS21977, *Agricultural Credit: Institutions and Issues*, by Jim Monke.

<sup>117</sup> 7 U.S.C. §2008f.

institutions are allowed to sell crop insurance to their members,<sup>118</sup> although they cannot require members to take out loans in order to purchase crop insurance.

## The FCIP and Trade

As a signatory member of the World Trade Organization (WTO), the United States has committed to abide by WTO rules and disciplines—including those that govern domestic farm policy and its effects on international markets. Under the WTO’s Agreement on Agriculture, agricultural support programs must be classified and reported based on their potential to distort markets (i.e., to alter the supply and market price of a commodity) from the equilibrium that would otherwise exist in the absence of the program’s influence.<sup>119</sup> The WTO uses a traffic light analogy to group programs into four boxes (red, amber, blue, and green) and imposes spending limits for national spending on programs classified in certain boxes. At one extreme, red box programs are prohibited due to their trade distortionary effects. At the other extreme, green box programs are considered minimally or nontrade distorting and are not subject to spending limits. Amber box programs are considered trade distorting and subject to different spending limits depending on whether they are classified as product-specific (PS) or nonproduct-specific (NPS). Exceeding amber box spending limits could constitute a violation of WTO rules, which if successfully challenged by another WTO member under the WTO dispute settlement process, could require elimination, alteration, or amendment by Congress of the program(s) to bring amber box spending into compliance.

**Table 7. Program Classifications under WTO’s Agreement on Agriculture**

Box	Trade Distorting	Production Limiting	Prohibited	Annual Spending Limit for the U.S.
Green	None or Minimal	No	No	None
Blue	Not Minimal	Yes	No	None
Amber	Not Minimal	No	No	\$19.1 billion
Red	Not Minimal	No	Yes	\$0

**Source:** CRS using the WTO Agreement on Agriculture, as previously described in CRS Report R45305, *Agriculture in the WTO: Rules and Limits on U.S. Domestic Support*, by Randy Schnepf.

**Notes:** Amber box spending limit includes aggregate spending on a country’s product-specific and nonproduct-specific programs. Outlays for nonproduct-specific amber box programs may be exempt from counting against the amber box limit if the outlays amount to less than 5% of the value of total U.S. agricultural output. Outlays for product-specific amber box programs may be exempt from counting against the amber box limit if the outlays amount to less than 5% of the commodity’s production value. WTO rules prohibit spending on red box programs.

Insurance underwriting costs and A&O expenses are notified to the WTO as green box outlays, whereas premium subsidies are notified to the WTO as amber box outlays. However, USDA has discretion in how it classifies and reports amber box FCIP premium subsidies to the WTO. From 1995 to 2011, USDA classified FCIP premium subsidies as NPS amber box outlays such that the total value of premium subsidies was perennially exempted from counting against the amber box spending limit under the NPS *de minimis* exemption.<sup>120</sup> Since 2012, USDA has classified FCIP

<sup>118</sup> 12 U.S.C. §618.8040.

<sup>119</sup> CRS Report R45305, *Agriculture in the WTO: Rules and Limits on U.S. Domestic Support*, by Randy Schnepf.

<sup>120</sup> Nonproduct-specific outlays may be exempt from counting against the amber box limit if they are less than 5% of

premium subsidies as PS amber box outlays. Under this change in notification, USDA evaluates premium subsidies at the individual commodity level. If total farm support for a commodity (including revenue support, premium subsidies, and any other program support) amounts to less than 5% of the commodity's value of production, it may be exempted from counting against the amber box spending limit.<sup>121</sup> On a crop-specific basis, most crop insurance subsidies are exempt from the tally because they do not exceed the 5% threshold. For example, U.S. crop insurance subsidies in 2014 totaled more than \$6.4 billion, but 70% of those subsidies were exempt from the amber box tally on a product-specific basis.<sup>122</sup> However, in years where substantial additional farm support payments have been made, such as in 2019 and 2020 (see **Table 6**), there is a greater likelihood that premium subsidies coupled with the other support payments may exceed the 5% PS de minimis threshold, thus counting against the U.S. amber box spending limit. The United States has not notified the WTO of its domestic support spending for 2018, 2019, or 2020, so it remains to be seen how it will classify spending in recent years and whether those totals will exceed the amber box limit.

## Rationale for Publicly Supported Crop Insurance

The federal government conducts a wide variety of insurance activities beyond agriculture,<sup>123</sup> some of which parallel coverage currently, or previously, offered by private insurers. Private insurers have a long history of selling insurance coverage for a single type of losses (e.g., damage from hail) without intervention or support from the federal government. Although the private sector previously experimented with offering multiperil<sup>124</sup> crop insurance from about 1899 to the early 1920s,<sup>125</sup> the FCIP is the only supplier of multiperil crop insurance in the U.S. today. While the FCIP offered multiperil crop insurance without premium subsidies prior to 1980, history has shown that farmers have been unwilling to purchase unsubsidized multiperil crop insurance.<sup>126</sup>

Like all insurance products, crop insurance is susceptible to problems of adverse selection and moral hazard. Adverse selection arises when insured farmers have more information about their own risk of loss than the insurers offering the policies. Without information to distinguish high- and low-risk farmers, insurers tend to offer products at prices that appeal more to high-risk farmers than to low-risk farmers. Moral hazard in the insurance industry refers to the general tendency of an insured party to take on greater risk once insured. Congress and USDA work to mitigate problems of adverse selection and moral hazard through policy design and premium rating procedures.

---

the value of total U.S. agricultural output.

<sup>121</sup> Product-specific (PS) amber box subsidies for any commodity are included in the tally of total amber box support if the value of the subsidies exceeds 5% of the commodity's production value. Subsidies of less than 5% are considered to be PS de minimis exempt and are excluded from the amber box tally.

<sup>122</sup> Vincent H. Smith, Joseph W. Glauber, and Barry K. Goodwin, *Time to Reform the US Federal Agricultural Insurance Program*, American Enterprise Institute, October 2017, at <http://www.aei.org/wp-content/uploads/2017/10/Time-to-Reform-the-US-Federal-Agricultural-Insurance-Program.pdf>.

<sup>123</sup> A 2005 GAO report detailed 95 different federal insurance activities and noted that "no generally accepted definition of federal insurance exists" (GAO, *Catalogue of Federal Insurance Activities*, GAO-05-265R, March 4, 2005, p. 2, at <http://www.gao.gov/assets/100/93046.pdf>).

<sup>124</sup> FCIP policies are referred to as multiperil policies because they insure against multiple types of losses. Multiperil insurance is distinct from other private-sector crop insurance products that insure against a single type of loss.

<sup>125</sup> Randall A. Kramer, "Federal Crop Insurance 1938-1982," *Agricultural History*, vol. 57, no. 2 (April 1983), pp. 181-200.

<sup>126</sup> Joseph W. Glauber, "Crop Insurance Reconsidered," *American Journal of Agricultural Economics*, vol. 86, no. 5 (December 2004), pp. 1179-1195.

## Costs and Benefits of the FCIP

The FCIP imposes costs and provides benefits to producers, AIPs, and the public. These costs and benefits include direct costs and benefits, as well as indirect costs incurred and benefits received from the FCIP, such as ancillary effects on risk management decisions, credit markets, and the environment.

Costs incurred include the following:

- **Costs to Producers.** Producers incur direct costs for their share of premiums.
- **Costs to AIPs.** AIPs incur direct costs for underwriting losses not otherwise reinsured by USDA or third-party reinsurers.
- **Costs to the Public.** The public incurs costs for FCIP outlays, including subsidies paid to farmers and AIPs, as well as the costs to USDA for running the program. In addition to the direct costs associated with the FCIP, some researchers have suggested that the FCIP imposes indirect costs on the public including rent seeking,<sup>127</sup> encouraging production on land prone to flooding and on marginal land subject to large yield variability,<sup>128</sup> excess production of agricultural commodities,<sup>129</sup> and environmental impacts from excess production.<sup>130</sup> Other researchers have found limited impacts of the FCIP on planted acres, crop selection, and environmental pollution.<sup>131</sup> There is also potential for the FCIP to “crowd out” private-sector insurance and financial risk management securities, such as catastrophic bonds and weather derivatives.<sup>132</sup> Crowding out occurs when government intervention in a market deters actions from private-sector participants. If crowding out were to occur, it would impose indirect costs on the public.

Benefits provided include the following:

- **Benefits to Producers.** Producers receive direct benefits from premium subsidies and indemnity payments for excess losses. These direct benefits accrue mostly to larger-scale operations.<sup>133</sup> Producers can also receive indirect benefits, including

<sup>127</sup> Vincent H. Smith, “The US federal crop insurance program: a case study in rent seeking,” *Agricultural Finance Review*, vol. 80, no. 3 (December 2019).

<sup>128</sup> Ron Wirtz, *Crop insurance: Helping farmers, but not without consequences*, Federal Reserve Bank of Minneapolis, at <https://www.minneapolisfed.org/article/2018/crop-insurance-helping-farmers-but-not-without-consequences>.

<sup>129</sup> C. Edwin Young, Monte L. Vandever, and Randall D. Schnepf, “Production and Price Impacts of US Crop Insurance Programs,” *American Journal of Agricultural Economics*, vol. 83, no. 5 (December 2001), pp. 1196-1203; and Barry K. Goodwin and Vincent H. Smith, “What Harm Is Done by Subsidizing Crop Insurance?,” *American Journal of Agricultural Economics*, vol. 95 no. 2 (January 2013), pp. 489-497.

<sup>130</sup> JunJie Wu, “Crop Insurance, Acreage Decisions, and Nonpoint -Source Pollution,” *American Journal of Agricultural Economics*, vol. 81, no. 2 (May 1999), pp. 305-320.

<sup>131</sup> Jeremy G. Weber, Nigel Key, and Erik O’Donoghue, “Does Federal Crop Insurance Make Environmental Externalities from Agriculture Worse?,” *Journal of the Association of Environmental and Resource Economists*, vol. 3, no. 3 (September 2016), pp. 707-742; and Roger Claassen, Christian Langpap, and JunJie Wu, “Impacts of Federal Crop Insurance on Land Use and Environmental Quality,” *American Journal of Agricultural Economics*, vol. 99, no. 3 (April 2017), pp. 592-613.

<sup>132</sup> Joshua D. Woodard et al., “A Spatial Econometric Analysis of Loss Experience in the US Crop Insurance Program,” *Journal of Risk and Insurance*, vol. 79, no. 1 (March 2012), pp. 261-286.

<sup>133</sup> Daren Bakst, *What You Should Know About Who Receives Farm Subsidies*, The Heritage Foundation, Backgrounder no. 3306, April 16, 2018, at <https://www.heritage.org/agriculture/report/what-you-should-know-about-who-receives->

reduced farm revenue risk, reduced total expenditure on farm risk management, access to farm credit from lenders who require crop insurance as a condition for approving farm operating loans, and/or lower cost farm loans. These indirect benefits vary in value across farm operations.

- **Benefits to AIPs.** AIPs receive benefits for any A&O, CAT LAE, and SnapBack subsidies that exceed costs incurred to sell and service policies, as well as underwriting gains from reinsurance. AIPs also receive benefits from developing and marketing private add-on coverage to federal crop insurance.<sup>134</sup>
- **Benefits to the Public.** The public does not receive direct benefits from the FCIP. However, the public may benefit from indirect effects of the FCIP that help to stabilize farm businesses, agricultural production, and commodity prices. As the farm lender of last resort, USDA incurs costs from operating farm loan programs. To the extent that the FCIP facilitates commercial lending to agriculture, the public may indirectly benefit from reduced USDA outlays for farm lending programs. Additionally, the public may also indirectly benefit from reduced spending on ad hoc farm disaster program payments.<sup>135</sup>

## Issues for Congress

Over the last three farm bills, Congress has acted to expand the FCIP to cover more commodities and more types of risks. Although current crop insurance market penetration for row crops has been high historically, opportunities exist to expand coverage, especially for specialty crops, livestock, and animal products. Additionally, farmers have shown limited interest in policies designed to appeal to organic producers and to highly diversified fruit and vegetable producers. Congress may consider investigating issues that have made FCIP coverage less appealing to producers of these commodities.

Numerous stakeholders have proposed reducing the cost of the FCIP. For example, the FY2021 President's Budget recommended several proposals, including capping underwriting gains for AIPs, reducing premium subsidies for producers, and introducing premium subsidy eligibility criteria based on the producer's adjusted gross income.<sup>136</sup> The GAO and CBO also have identified a number of changes to the program that Congress could consider to lower FCIP costs to the government. Although all of these proposals have the potential to impact which farmers choose to purchase crop insurance, proposals that reduce federal costs by targeting payments to AIPs are less likely to change producers' incentives to purchase crop insurance than proposals that target premium subsidies or coverage options.

Additionally, Congress may also be interested in how the SRA affects the cost effectiveness of the FCIP and the baseline spending levels that determine funding for the next farm bill. The distribution of risk sharing between AIPs and USDA has been an issue of perennial concern for

---

farm-subsidies.

<sup>134</sup> Selected examples include CLIFF, Excess Moisture, MPowerD, Variable Interval Product, Increased Coverage Election (ICE), Price-Flex, and Supplemental Replant Coverage.

<sup>135</sup> Keith H. Coble and Barry J. Barnett, "Why Do We Subsidize Crop Insurance?," *American Journal of Agricultural Economics*, vol. 95, no. 2 (January 2013), pp. 498-504.

<sup>136</sup> White House, Office of Management and Budget, *President's Budget FY 2021: Budget Appendix*, pp. 61-185, at [https://www.whitehouse.gov/wp-content/uploads/2020/02/agr\\_fy21.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/02/agr_fy21.pdf). These proposals were not adopted by the 116<sup>th</sup> Congress.

some policymakers. Congress may be interested in requiring greater transparency of the actual cost of federal underwriting and the extent that it is shared with AIPs.

Three topic areas, in particular, may be of interest for Congress in performing oversight of FCIP operations.

- Research has suggested that the program could be vulnerable to waste, fraud, and abuse by using certain unit types in areas where farmers insured a higher proportion of acres at high coverage levels and in times of unfavorable economic and/or adverse weather conditions.<sup>137</sup> Congress may consider whether RMA's waste, fraud, and abuse detection procedures need to be strengthened to counter any such vulnerability.
- Socially disadvantaged farmers may be less likely to purchase crop insurance than nonsocially disadvantaged farmers, primarily due to the size of their operations and commodities grown.<sup>138</sup> The 2018 farm bill requires USDA to make recommendations on ways to increase crop insurance participation among underserved producers as part of the regular review of FCIP insurance plans and policies.<sup>139</sup> Congress may seek to understand the steps that USDA is taking to prepare their recommendations, including any efforts that USDA and AIPs are undertaking to solicit input directly from underserved producers.
- The number of AIPs participating in the FCIP has decreased over time, largely due to consolidation in the insurance industry. Congress may wish to inquire into the drivers of this consolidation, as well as any implications it may be having on AIPs' outreach to producers in underserved areas and on their willingness to market new types of crop insurance coverage.

Additionally, Congress may be interested in reassessing the role of the FCIP in agricultural policy more broadly. Numerous environmental stakeholders have issued proposals to enhance the FCIP's role in promoting conservation by incentivizing the use of cover crops and other practices to improve soil health.<sup>140</sup> Congress may consider the potential environmental benefits of these proposals and what their effects might be on the actuarial soundness of the program. Congress may also consider the interplay, and possible overlap, among the benefits that various producer groups have received from crop insurance, as well as from ad hoc payments to producers since 2018 for trade-related damages through USDA's Market Facilitation Program and for market disruptions related to COVID-19 through USDA's Coronavirus Food Assistance Program. A substantial portion of these ad hoc payments were targeted at commodities that have high crop insurance penetration rates.<sup>141</sup> One of the reasons Congress introduced crop insurance premium subsidies in 1980 was to increase participation in the FCIP and reduce the need for future ad hoc

<sup>137</sup> Sungkwol Park et al., "Contract elements, growing conditions, and anomalous claims behaviour in US crop insurance," *The Geneva Papers on Risk and Insurance-Issues and Practice*, vol. 45, no. 1 (August 2019), pp. 157-183.

<sup>138</sup> For examples of how farm size and commodity specialization can impact crop insurance purchases by socially disadvantaged farmers and ranchers, see GAO, *Agricultural Lending: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers is Limited*, GAO-19-539, July 2019, at <https://www.gao.gov/assets/710/700218.pdf>.

<sup>139</sup> 7 U.S.C. §1508(a)(7)(C).

<sup>140</sup> See, for example, O'Connor and Bryant, *Covering Crops*, 2017; and Faber, *Top 5 Reasons*, 2018.

<sup>141</sup> See CRS Report R46577, *U.S. Farm Support: Outlook for Compliance with WTO Commitments, 2018 to 2020*, by Randy Schnepf for a discussion of USDA's Market Facilitation Program and Coronavirus Food Assistance Program payments for different agricultural commodities.



disaster spending.<sup>142</sup> Congress may consider whether the crop insurance program could be adapted to provide post-harvest production loss and price risk protection tools and whether such adaptations could further its policy objectives for the agricultural sector.<sup>143</sup>

---

<sup>142</sup> See **Appendix** for details about the history of premium subsidies in the FCIP.

<sup>143</sup> The FY2021 President’s Budget for USDA included a proposal to commission the National Academies of Sciences, Engineering, and Medicine to present recommendations on the effectiveness of current farm support programs. See USDA, *2021 USDA Explanatory Notes—Risk Management Agency*, at <https://www.usda.gov/sites/default/files/documents/fpac-rma-fy2021-explanatory-notes.pdf>. This proposal was not adopted by the 116<sup>th</sup> Congress.



## Appendix. A Brief History of Crop Insurance

The federal crop insurance program (FCIP) was created in 1938 as part of the agricultural policy response to the Great Depression.<sup>144</sup> The program initially had no private sector involvement and covered only wheat, but after a few years, the program was expanded to include cotton, flax, and other commodities (see **Table A-1**). Because of consistently high loss ratios in certain areas and for the program as a whole, Congress enacted legislation to restrict the geographic scope of the program in 1947.

In response to a period of high disaster support payments in the 1970s and low crop insurance participation, Congress enacted the Federal Crop Insurance Act of 1980 (P.L. 96-365). This law expanded the commodities covered and geographic scope of the program, introduced premium subsidies, and allowed private-sector companies to sell and service policies. By passing this law and providing incentives for farmers to expand their use of crop insurance, policymakers reportedly hoped to reduce the demand for future disaster assistance payments.<sup>145</sup> However, the 1980s were characterized by low farmer participation rates, high program loss ratios, and large outlays for disaster programs.<sup>146</sup> Additionally, Approved Insurance Providers (AIPs) accrued net underwriting gains over this period, raising concerns about how reinsurance risks were shared between the U.S. Department of Agriculture (USDA) and AIPs.<sup>147</sup>

In 1994, Congress enacted the Federal Crop Insurance Reform and Department of Agricultural Reauthorization Act (P.L. 103-354), which increased premium subsidies, created catastrophic (CAT) coverage, authorized prevented planting coverage, and required farmers to purchase crop insurance as a condition for receiving commodity support payments. Farmers responded to these changes by purchasing a record number of policies and expanding acreage insured under the program (see **Figure 1**). Congress removed the crop insurance purchase requirement for receiving commodity support payments in the Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127). This act also allowed for the creation of USDA's Risk Management Agency, which has administered the FCIP since 1996 (see **Table A-2**) and required USDA to cease selling crop insurance policies directly to farmers in areas where AIP coverage was available.

The Agriculture Risk Protection Act of 2000 (P.L. 106-224) further expanded the FCIP by authorizing sales of crop revenue insurance and insurance for livestock. The legislation increased premium subsidies to their current levels for basic and optional units and introduced the 508(h) mechanism for the private sector to propose and develop new types of crop insurance coverage.

<sup>144</sup> Randall A. Kramer, "Federal Crop Insurance 1938-1982," *Agricultural History*, vol. 57, no. 2 (April 1983), pp. 181-200.

<sup>145</sup> Kramer, 1983, pp. 181-200.

<sup>146</sup> Bruce L. Gardner, "Crop Insurance in US Farm Policy," in *Economics of Agricultural Crop Insurance: Theory and Evidence*, eds. Darrell L. Hueth and William H. Furtan (New York, NY: Springer Science+Business Media, 1994), pp. 17-44.

<sup>147</sup> See discussion in Joseph W. Glauber, "Crop Insurance Reconsidered," *American Journal of Agricultural Economics*, vol. 86, no. 5 (December 2004), pp. 1179-1195. Although there have been changes in how reinsurance risks are shared between USDA and the AIPs since the 1980's, some stakeholders still consider this issue to be of concern in the modern FCIP. See, for example, Joseph W. Glauber, "Crop Insurance and Private Sector Delivery: Reassessing the Public-Private Partnership," *Taxpayers for Common Sense*, December 2016; Barry Barnett et al., "Public and Private Roles in Agricultural Risk Transfer," *AGree*, March 2016; and Vincent Smit h et al., "Time to Reform the US Federal Agricultural Insurance Program," *American Enterprise Institute*, October 2017. For additional background, see CRS Report R45291, *Federal Crop Insurance: Delivery Subsidies in Brief*, by Isabel Rosa.

One of these new policy types was revenue coverage, which has proved to be a popular option; within a decade, revenue coverage accounted for the largest share of all policies sold.<sup>148</sup>

The 2008, 2014, and 2018 farm bills continued to expand crop insurance coverage options available (see **Table A-1**). The 2008 farm bill introduced enterprise and whole farm units and increased subsidies for area-based coverage. The 2014 farm bill authorized shallow loss coverage and yield exclusion options. The 2018 farm bill introduced multicounty enterprise units. In addition to expanding the coverage options available, the 2008 farm bill authorized USDA to renegotiate the Standard Reinsurance Agreement (SRA) for the 2011 reinsurance year beginning in July 2010. Since 2011, each annual SRA has included limits on certain subsidies paid to AIPs.<sup>149</sup>

The 2014 farm bill restored conservation compliance as an eligibility requirement for producers to receive crop insurance premium subsidies, a requirement that had previously been in effect from 1985 to 1996.

**Table A-1. Selected Legislation Affecting the Development of the Federal Crop Insurance Program**

Year	Legislation	Major Changes to FCIP
1938	Agricultural Adjustment Act of 1938	Established the Federal Crop Insurance Corporation (FCIC). Authorized insurance for wheat.
1941	55 Stat. 255	Authorized insurance for cotton.
1944	Agricultural Appropriation Act of 1944	Prohibited FCIC from issuing any policies.
1944	58 Stat. 918	Reauthorized FCIC to issue policies for wheat, cotton, and flax. Established experimental program to insure other major commodities in geographically limited areas.
1947	61 Stat. 718	Restricted FCIC policies for all crops to limited areas to improve actuarial performance.
1980	Federal Crop Insurance Act of 1980	Authorized FCIC to issue policies for all commodities and geographic areas. Subsidized 30% of insurance premiums. Allowed private companies to sell FCIC policies.
1985	Food Security Act of 1985	Introduced conservation compliance requirements for crop insurance purchases.
1994	Federal Crop Insurance Reform and Department of Agriculture Reauthorization Act	Increased premium subsidies and introduced catastrophic coverage. Required crop insurance purchases for eligibility for commodity support. Authorized prevented planting coverage.
1996	Federal Agriculture Improvement and Reform Act of 1996	Removed requirement linking commodity support and conservation compliance to crop insurance purchases. Created USDA's Risk Management Agency. Disallowed sales of crop insurance through USDA county offices unless approved insurance provider coverage is unavailable.
2000	Agriculture Risk Protection Act of 2000	Increased premium subsidies to present levels. Granted authority for revenue coverage and insurance for livestock. Authorized creation of 508(h) pilot programs.

<sup>148</sup> Joseph W. Glauber, "The Growth of the Federal Crop Insurance Program, 1990–2011," *American Journal of Agricultural Economics*, vol. 95, no. 2 (January 2013), pp. 482–488.

<sup>149</sup> For background on limits to AIP subsidies imposed in the Standard Reinsurance Agreement, see "Approved Insurance Provider Compensation."

Year	Legislation	Major Changes to FCIP
2008	Food, Conservation, and Energy Act of 2008	Introduced enterprise and whole farm units. Increase subsidies for area coverage plans. Authorized renegotiation of the Standard Reinsurance Agreement for the 2011 reinsurance year.
2014	Agricultural Act of 2014	Introduced area-based shallow loss coverage and yield exclusion options. Relinked conservation compliance requirements.
2018	Agricultural Improvement Act of 2018	Introduced multicounty enterprise coverage.

**Sources:** CRS using Randall A. Kramer, “Federal Crop Insurance 1938-1982,” *Agricultural History*, vol. 57, no. 2 (April 1983), pp. 181-200, for legislation enacted prior to 1983; Joseph W. Glauber, “Crop Insurance Reconsidered,” *American Journal of Agricultural Economics*, vol. 86, no. 5 (December 2004), pp. 1179-1195 and Joseph W. Glauber, “The Growth of the Federal Crop Insurance Program, 1990 -2011,” *American Journal of Agricultural Economics*, vol. 95, no. 2 (January 2013) for legislation enacted prior to 2014; and USDA, Office of Inspector General, *Annual Federal Crop Insurance Corporation/Risk Management Agency’s Financial Statements for Fiscal Years 2019 and 2018*, Audit Report 05401-0011-11, November 2019, for legislation enacted after 2014.

**Notes:** See CRS Report R42459, *Conservation Compliance and U.S. Farm Policy*, by Megan Stubbs for a history of conservation compliance requirements in USDA programs.

**Table A-2. USDA Agencies Administering FCIP Since 1938**

Period	USDA Agency Administering FCIP
1938-1942	Agricultural Adjustment Administration
1942-1945	Agricultural Adjustment Agency
1945-1953	Production and Marketing Administration
1953-1961	Commodity Stabilization Service
1961-1994	Agricultural Conservation and Stabilization Service
1994-1996	Consolidated Farm Service Agency
1996-Present	Risk Management Agency

**Source:** CRS using National Archives guides to records for the Federal Crop Insurance Corporation (FCIC) and the Farm Service Agency (FSA).

**Note:** In 1996, the Consolidated FSA became the FSA as per the Secretary of Agriculture’s Notice (61 *Federal Register* 1109, January 16, 1996).

## Author Information

Stephanie Rosch  
Analyst in Agriculture Policy

---

## **Disclaimer**

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.



# **Environmental Law Update**

**Brigit Rollins**

**Staff Attorney**

**May 26<sup>th</sup>, 2021**

Two lawsuits have recently been filed in California state courts against Corteva Inc. (“Corteva”), the corporation which manufactures the pesticide chlorpyrifos. The plaintiffs in *Avila v. Corteva Inc., No. 20C-0311 (Cal. Super. Ct., October 27, 2020)* and *Calderon de Cerda v. Corteva Inc., No. 20C-0250 (Cal. Super. Ct., September 16, 2020)* are agricultural workers who live and work in Kings County, California. In each case, the plaintiffs are suing on behalf of their minor children, alleging that chlorpyrifos caused their children’s neurological injuries and that Corteva is at fault as the manufacturer of chlorpyrifos. According to the plaintiffs, Corteva either knew or should have known about the risks posed by chlorpyrifos, and continued to manufacture an unreasonably dangerous product while failing to warn consumers. Additionally, the plaintiffs allege that the city which supplied drinking water to their households negligently allowed chlorpyrifos to contaminate that water.

## **Background**

Both of the California lawsuits have been brought against Corteva, which was previously known as Dow Agrosciences, LLC (“Dow Agrosciences”). During the 2000s, Dow Agrosciences held the federal registration for, and was the primary seller of, Lorsban, the trade name used by Dow Agrosciences to market chlorpyrifos. Dow Chemical Company (“Dow Chemical”) is both the parent company of Dow Agrosciences, and the manufacturer of Lorsban. All three companies are named in the lawsuit, and are collectively referred to as “Dow.”

Chlorpyrifos was first patented by Dow Chemical in 1966. It was first registered under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) in 1965 for use in the United States. Chlorpyrifos is primarily used to control foliage and soil-borne insect pests on a variety of crops including corn, soybeans, fruit and nut trees, and a variety of row crops. Until the year 2000, chlorpyrifos was also approved for residential uses.

Because chlorpyrifos is a type of chemical known as a phosphorothioate organophosphate, it will metabolize into its oxon form within the body of an organism. Chlorpyrifos oxon (“oxon”) is considered to be about 1000 times more toxic than chlorpyrifos, and is a neurotoxin that can be harmful to humans. Although oxon was included as a pesticide in the 1966 chlorpyrifos patent, it has never been registered for use as a pesticide or presented for registration. However, the effectiveness of chlorpyrifos as an insecticide depends on its transformation into oxon. According to Dow, this transformation depends on the target insect’s biological ability to convert chlorpyrifos into oxon after ingestion.

The plaintiffs, on the other hand, state that chlorpyrifos is unstable in the environment and will convert to oxon when mixed with water that contains chlorine or bromide, and when exposed to sunlight. According to the plaintiffs, the practical effect of spraying chlorpyrifos in agricultural areas is an application of the unregistered oxon. The plaintiffs also claim that Dow is aware that spraying chlorpyrifos results in an application of oxon, and has known so for decades.

## **Claims Brought Against Dow**

In both complaints, three claims were brought against Dow: negligence, failure to warn, and design defect. All three are state law claims. The following arguments all come directly from the plaintiffs’ complaints. Because Corteva has yet to file its answer, there are currently no counter-arguments to discuss.

### Negligence

According to the plaintiffs, Dow negligently failed “to test for certain specific harms or to appreciate and take appropriate measures to protect from those harms associated with chlorpyrifos.” In other words, the plaintiffs claim that Dow violated the law by failing to discover the risks associated with using chlorpyrifos, or to protect the public from those risks.

The plaintiffs assert that during the 1980s, the need to assess the exposure of children to chlorpyrifos was well known. According to both complaints, researchers with the California Department of Food and Agriculture’s Worker Health and Safety Branch flagged chlorpyrifos as a potential risk to children during the 1980s and in 1990. Yet Dow did nothing at that time to examine the exposure of children to chlorpyrifos. In 1991, the Environmental Protection Agency (“EPA”) issued a standardized protocol for testing the degree to which a substance was poisonous to developing nervous systems. However, Dow did not begin such testing until 1995 after an independent study suggested that chlorpyrifos had a high level of developmental neurotoxicity.

The plaintiffs claim that if Dow had taken the steps that a reasonably careful manufacturer would have taken, it would have conducted additional tests, reported the results, and adopted the necessary protective measures such as removing Lorsban from the market entirely or issuing stricter directions for use. Instead, Dow acted negligently by not testing chlorpyrifos for harm to neurological development, ultimately leading to the neurological injuries sustained by the children represented in the California lawsuits.

#### Failure to Warn

Under their failure to warn claims, the plaintiffs assert that Dow had a duty under California law to know the expected uses of its chlorpyrifos products and to ensure that those products were safe for those reasonably expected uses. The plaintiffs allege that by the time the children at the center of these lawsuits were born in the early 2000s, Dow knew or should have known that Lorsban was not safe for its reasonably expected uses because its labeling lacked warnings necessary to render it safe for use.

According to the plaintiffs, the warnings that would have been necessary to make Lorsban safe would have included warnings that chlorpyrifos transforms into oxon after being introduced to chlorinated water; that chlorpyrifos and oxon were known to be hazardous to the developing nervous systems of animals; and that extra care was required when spraying Lorsban near structures that contained children or pregnant women. Had Dow appropriately labeled Lorsban, the plaintiffs argue that they would not have been injured.

#### Design Defect

As the manufacturer and seller of Lorsban in the United States, Dow had a duty under California law to ensure that its Lorsban products were safely designed for its reasonably expected uses. In other words, Dow had a duty to ensure that the way its Lorsban products were designed rendered them safe for their intended purpose. According to the plaintiffs, Dow’s Lorsban products were defectively designed in two ways. First, they were more dangerous than the ordinary customer or end user would reasonably expect. Second, they contained ingredients – chlorpyrifos and oxon – that rendered the products unreasonably dangerous when safer ingredients were available.

The plaintiffs claim that the Lorsban products were more dangerous than any reasonable consumer would expect because chlorpyrifos and oxon were highly toxic to developing nervous systems, caused



developmental issues from repeated low-dose exposures, and become more toxic when mixed with chlorinated water. Although these hazards were known or should have been known to Dow by 2002. Ordinary consumers would have had no way of knowing about the hazards posed by Lorsban, which therefore made Lorsban more dangerous than the ordinary consumer would expect. According to the plaintiffs, the defective design of Lorsban led to the injuries sustained by the children.

### **Other Claims**

In addition to bringing claims against Dow and Corteva, the plaintiffs have also brought claims against the City of Avenal (“City”), where both families reside. Under California law, utilities that provide drinking water for human consumption have a duty to ensure that water is “wholesome, potable, [and] in no way harmful or dangerous to human health.” According to the plaintiffs, the City violated this duty by negligently allowing chlorpyrifos to enter the drinking water provided to the families.

The plaintiffs allege that the City failed to exercise reasonable care to ensure safe drinking water in two ways. First, the City allowed portions of its water treatment facility open to the air which allowed drift from chlorpyrifos applications to enter the water. Second, the City failed to follow a 2002 publication from the United States Department of Agriculture which advised the City to take extra precautions against invasion of its water system by chlorpyrifos and oxon.

According to the plaintiffs, if the City had not been negligent in its duty to provide safe drinking water, the plaintiffs would not have been injured.

### **Going Forward**

Numerous lawsuits have been filed during the past few years against pesticide manufacturers alleging that their pesticide products have caused serious health issues in the plaintiffs. The lawsuits brought against Monsanto over its glyphosate-based pesticide, Roundup, has resulted in judgments requiring the company to pay millions of dollars, and settlements that may require the company to pay billions. Although Roundup is still available for use, the on-going lawsuits have cost a considerable amount of time and resources.

[More cases are expected to be filed](#) concerning damage allegedly caused by chlorpyrifos. However, whether these cases will impact the future availability of chlorpyrifos is hard to say. The two California cases request that the defendants pay damages for injuries allegedly caused by chlorpyrifos, but do not challenge the registration of chlorpyrifos. While it is possible that future lawsuits may challenge the chlorpyrifos registration, which could result in chlorpyrifos no longer being available for use, the two lawsuits from California are not likely to affect the availability of chlorpyrifos.

To read the complaint in *Avila v. Corteva Inc.*, click [here](#).

To read the complaint in *Calderon de Cerda v. Corteva Inc.*, click [here](#).

To read the text of FIFRA, click [here](#).

For more National Agricultural Law Center resources on pesticides, click [here](#).

In a ruling issued on April 29, 2021, the Ninth Circuit Court of Appeals ordered the Environmental Protection Agency (“EPA”) to revoke all tolerances for chlorpyrifos, or modify the tolerances to conform with federal law. Use of the insecticide chlorpyrifos has become controversial due to evidence of its neurotoxic effects, particularly to teens and children. The proceedings leading up to the court’s decision in *League of United Latin Am. Citizens v. Regan*, No. 19-71979 (9th Cir. 2021) initially began in 2007 when two environmental organizations filed a petition asking EPA to prohibit all foods that contain chlorpyrifos residue. EPA denied the 2007 petition in 2017, and in 2019 denied all objections to that decision. The plaintiffs in this lawsuit challenged EPA’s denial of the 2007 petition, claiming that the denial violated EPA’s duty under the Federal Food, Drug and Cosmetic Act (“FFDCA”). The Ninth Circuit agreed with the plaintiffs, finding that EPA had acted contrary to the requirements of the FFDCA.

### **The FFDCA**

The FFDCA was first passed by Congress in 1938, granting the Food and Drug Administration (“FDA”) authority to oversee the safety of food, drugs, medical devices, and cosmetics manufactured and sold within the United States. Although FDA is responsible for administering the bulk of the FFDCA, section 346a of the Act authorizes EPA to set tolerances for pesticide residues on foods. In other words, the FFDCA requires EPA to set limits on the amount of a particular pesticide that can legally be in or on raw agricultural commodities or processed foods.

In setting pesticide tolerances, the FFDCA states that EPA “may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food on if [EPA] determines that the tolerance is safe.” 21 U.S.C. § 346a(b)(2)(A)(i). The Act goes on to state that with respect to pesticide tolerances, the term “safe” means that EPA “has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.” 21 U.S.C. § 346a(b)(2)(A)(ii). Additionally, the FFDCA requires EPA to “ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue” when it is establishing pesticide tolerances. 21 U.S.C. § 346a(b)(2)(C)(ii).

EPA may decide to issue regulations establishing, modifying, or revoking a pesticide residue tolerance based either on the agency’s own initiative, or in response to a petition filed by an independent party. 21 U.S.C. § 346a(c)(1). Any party may file a petition with EPA to establish, modify, or revoke a pesticide residue tolerance. However, if the petition is asking EPA to modify or revoke the tolerance, then it must include data supporting the request. 40 C.F.R. § 180.32(b). Within 30 of receiving the petition, EPA is required to publish in the Federal Register to undergo 60 days of public notice and comment. 40 C.F.R. §§ 180.7(f), 180.29(b). It is then up to EPA to either issue a regulation in response to the petition, or an order denying the petition. 21 U.S.C. § 346a(d)(4)(A). If EPA chooses to deny a petition, the petitioners may file objections to that decision. If the petitioners do so, EPA is required to respond to the objections “as soon as practicable.” 21 U.S.C. § 346a(g)(2)(C).

### **Lawsuit Background**

The proceeding at the heart of this case began with the filing of the 2007 petition which asked EPA to revoke all tolerances for chlorpyrifos. Chlorpyrifos is an organophosphate pesticide that was initially registered for use as a pesticide in the United States in 1965. It is used on various different crops, and is often used to control soil-borne insect pests. However, there have long been concerns that chlorpyrifos may have neurotoxic effects that are especially harmful to infants and children. The 2007 petition was

filed partly due to those concerns, and asserted that newly available scientific evidence showed that current chlorpyrifos tolerances were not safe, particularly for infants and children.

During the following years, EPA conducted its own research on the safety of chlorpyrifos, concluding that “maternal chlorpyrifos exposure would likely be associated with adverse neurodevelopmental outcomes in humans.” However, by 2012, EPA had still not responded to the 2007 petition, which prompted the petitioners to file a lawsuit with the Ninth Circuit asking the court to order EPA to respond. The court agreed with the petitioners and ordered EPA to issue a final agency action on the 2007 petition by February, 2014. While EPA failed to issue a final action at that time, it did publish a document in December 2014 expressing greater certainty that chlorpyrifos was causing neurotoxic harm.

In August 2015, the Ninth Circuit again set a deadline for EPA to issue a final response to the 2007 petition. This time, the court ordered EPA to respond by October 31, 2015. While EPA failed to meet this deadline, it did publish a Notice of Proposed Rulemaking to revoke all chlorpyrifos tolerances in the Federal Register in November 2015. Because the proposed rulemaking was not a final agency action, the Ninth Circuit ordered EPA to issue a final response to the 2007 petition by December 30, 2016. That deadline was later extended to March 31, 2017.

Finally, in April 2017, EPA ruled on the 2007 petition. In a final order published in the Federal Register on April 5, 2017, EPA denied the 2007 petition, concluding that “despite several years of study, the science addressing neurodevelopmental effects remains unresolved.” Therefore, the chlorpyrifos tolerances would not be revoked or modified. The petitioners filed objections to 2017 order soon after, and once again filed with the Ninth Circuit asking EPA to respond to those objections after the agency did not respond for over a year. Ultimately, that lawsuit resulted in an order from the court that EPA rule on the objections to the 2017 order within 90 days. In July 2019, EPA issued a final order denying the petitioners’ objections, finally completing the administrative process for the 2007 petition. The decision issued by the Ninth Circuit in *League of United Latin am. Citizens v. Regan* addresses the petitioners request for review of the 2017 and 2019 orders denying the 2007 petition and the objections to it.

### **Ninth Circuit Decision**

To begin its analysis, the Ninth Circuit first considered whether EPA had lawfully denied the 2007 petition according to the FFDCA. Ultimately, the court concluded that the 2007 petition had been wrongfully denied.

First, the court noted that the FFDCA requires EPA to “establish or leave in effect” a pesticide tolerance “only if [EPA] determines that the tolerance is safe.” 21 U.S.C. § 346a(b)(2)(A)(i). According to the court, the language of the FFDCA shows that “Congress made the explicit decision to prioritize safety over all else.” If EPA becomes aware that there are “genuine questions” as to the safety of a pesticide tolerance, then EPA has a duty under the FFDCA to determine whether the tolerance is still safe. If EPA finds that an existing tolerance is unsafe, then the tolerance may no longer remain in effect.

Here, the 2007 petition contained sufficient evidence to establish that a review of the chlorpyrifos tolerances was necessary, and EPA’s own subsequent research concluded that the existing chlorpyrifos tolerances were harmful. Because EPA discovered that the existing chlorpyrifos tolerances were unsafe, and because the FFDCA states that a pesticide tolerance may remain in effect “only if” EPA determines

that it is safe, the court concluded that EPA wrongly denied the 2007 petition asking that the chlorpyrifos tolerances be modified or vacated.

After concluding that EPA had unlawfully denied the 2007 petition, the Ninth Circuit next considered what the appropriate remedy should be. At the outset, the court concluded that it had to at least set aside the 2017 order denying the 2007 petition. The plaintiffs argued that the court should also order EPA to revoke the current chlorpyrifos tolerances by a specific date. Once again, the court turned to the text of the FFDCA which states that EPA “shall modify or review a tolerance if [EPA] determines that it is not safe.” 21 U.S.C. § 346a(b)(2)(A)(i). According to the court, that language “makes it clear that once the EPA has determined that a tolerance is not safe, it has no discretion to temporize pending additional research; it must modify or revoke the tolerance.” Because EPA has determined that the existing chlorpyrifos tolerance is not safe, it must modify or revoke the tolerance. Therefore, the court has ordered EPA to issue a final regulation within 60 days that will either revoke all chlorpyrifos tolerances or modify the tolerances so that they will be safe for humans, including infants and children.

### **Conclusion**

Once the Ninth Circuit issues its mandate, a separate document that the court issues once the decision becomes final, EPA will have 60 days to determine whether it will revoke or modify the chlorpyrifos tolerances. Whatever EPA decides to do, the amount of chlorpyrifos that is allowed to legally be in or on raw agricultural products or processed foods is likely to change. Additionally, EPA has been ordered to review all Federal Insecticide, Fungicide, and Rodenticide Act regulations related to chlorpyrifos in order to ensure that they remain in-line with chlorpyrifos tolerances once EPA completes the court’s order. Whether this could lead to a change in the federally registered chlorpyrifos label is currently unclear. For members of the agricultural industry who use chlorpyrifos, a change to the tolerances could affect future use. Until EPA issues the action ordered by the court, it is unclear how much current chlorpyrifos use may be affected.

To read the Ninth Circuit’s decision in *League of United Latin am. Citizens v. Regan*, click [here](#).

To read the 2007 petition, click [here](#).

To read the 2017 order, click [here](#).

To read the 2019 order, click [here](#).

To read the text of the FFDCA, click [here](#).

For additional National Agricultural Law Center resources on pesticides, click [here](#).

For many reasons, 2020 was a noteworthy year. One of those reasons was the developments in many on-going dicamba litigations. From a jury awarding a multi-million-dollar award to a farmer who experienced dicamba damage, to a Ninth Circuit decision that vacated the then current federally-approved dicamba label, there is no doubt that the last year saw several important dicamba-related developments.

However, dicamba-related legal issues did not end in 2020. The following is an overview of recent developments that have occurred so far in 2021, and are likely to continue evolving throughout the year.

### ***Bader Farms Appeal***

The first dicamba-related case to go to trial received significant attention last year after a jury returned a verdict awarding \$265 million to the plaintiffs who claimed that Monsanto Company (“Monsanto”) was responsible for dicamba damage done to their peach orchards. In ***Bader Farms v. Monsanto Co., No. 1:16-cv-299 (E.D. Mo. 2019)***, the jury ruled in favor of Bader Farms on every claim, concluding that Monsanto had been negligent in its actions, and had engaged in civil conspiracy. To read more about that case, click [here](#).

On March 12, 2021, Monsanto filed its opening brief in the Eighth Circuit Court of Appeals to appeal the verdict from the lower court. In its brief, Monsanto raises three arguments to support its claim that the lower court verdict should be reversed. First, Monsanto argued that the district court wrongly allowed Bader Farms to claim that Monsanto was responsible for the dicamba damage without proving that Monsanto manufactured or sold the herbicides responsible for the injury, and despite third parties being responsible for the illegal misuse of the herbicides. Second, Monsanto claimed that the district court should not have allowed the compensatory damages to be based on “speculative lost profits.” Finally, Monsanto asserts that the punitive damages permitted by the district court violated Missouri state law.

In its case before the lower court, Bader Farms argued that Monsanto was responsible for the damage caused by its “dicamba tolerant system.” According to Bader Farms, this system consisted both of the dicamba pesticide manufactured by Monsanto that the Environmental Protection Agency (“EPA”) approved for over-the-top use in 2016, and the dicamba-tolerant soybean and cotton seeds that were first available for sale in 2015. Bader Farms argued that Monsanto was responsible for the dicamba damage done to its peach orchards starting in 2015, before Monsanto’s over-the-top dicamba pesticide was available, because Monsanto sold dicamba-tolerant seeds despite the fact that it knew or should have known that farmers would illegally apply older dicamba products that were not approved for use directly onto crops.

In its appeal, Monsanto argues that the district court went too far in allowing Bader Farms to make this argument because it imposed liability on Monsanto for third-party farmers’ illegal use of older dicamba products that Monsanto did not manufacture. Monsanto claims that Missouri law does not permit a party to be held liable “when the injury would not have happened but for criminal conduct by a third party.” Because the damage done to Bader Farms’ peach orchards was the result of farmers who illegally applied dicamba, Monsanto asserts that it cannot be held liable for the damage.

Next, Monsanto argues that both the compensatory damages and the punitive damages violated Missouri law. In its verdict, the jury awarded Bader Farms \$15 million in compensatory damages and \$250 million in punitive. The compensatory damages represent how much Bader Farms lost as a result of the injury it sustained, while the punitive damages are essentially meant to punish Monsanto for causing the injury. In its brief, Monsanto argued that both were improperly awarded. First, Monsanto claims that the compensatory damages were calculated in a manner that contracted “longstanding Missouri precedent.” In Missouri, courts will generally award damages for injury to fruit-bearing trees based on “the difference between the market value of the land immediately before and immediately after the injury.” However, the compensatory damages for Bader Farms were calculated according to estimates of lost profit as a result of harm to the trees. Monsanto claims that the compensatory damages are invalid because they were calculated according to lost profit estimates instead of land value.

Finally, Monsanto argues that the punitive damages were also improperly awarded in violation of Missouri law. In Missouri, courts generally will not grant punitive damages without “clear and convincing evidence of evil motive and reckless indifference to the plaintiff’s rights.” Monsanto argues that punitive damages should not have been awarded because there was no evidence that it had acted with reckless indifference in selling its dicamba-tolerant soybean and cotton seeds.

This appeal is still in its early stages, and it is currently uncertain what the outcome will be. However, because *Bader Farms v. Monsanto Co.* is regarded as the bellwether case for similar litigation the outcome of the appeal could impact other lawsuits.

### **Soybean Settlement**

In December, 2020, a settlement was reached between Bayer and multiple soybean farmers who were suing the company over dicamba damage to their crops. Bayer, which bought Monsanto in 2018, has agreed to a multi-million-dollar settlement which is available to any soybean farmers who can show that they suffered yield loss as a result of dicamba damage between 2015 and 2020. The settlement is part of a larger effort by Bayer to resolve multiple on-going herbicide litigations.

In 2017, after the dicamba herbicide manufactured by Monsanto was approved for use directly onto crops, farmers began filing lawsuits against the company over crop damage allegedly caused by dicamba drift. Those cases were eventually consolidated in a multi-district litigation known as ***In re: Dicamba Herbicides Litigation, No. 1:18-md-02820 (E.D. Mo. 2019)***. To read more about the details that case, click [here](#). Most of the farmers who brought claims under this lawsuit were soybean farmers who had not sprayed a dicamba herbicide on their crops or planted Monsanto’s dicamba-tolerant seeds. According to the parameters of the settlement, those farmers would be eligible to submit a claim

The claim period for the settlement began on December 29, 2020 and is scheduled to run through May 28, 2021. Although farmers who are parties to the multi-district litigation can apply for settlements, many may choose not to. Any farmer who agrees to the settlement is also agreeing not to pursue legal claims against Bayer for dicamba-related damage during the 2015 – 2020 growing seasons. Farmers who had already brought claims under the multi-district litigation are required to drop those claims if they agree to the settlement. Some parties to the litigation may want to pursue their claims to trial.

Currently *In re: Dicamba Herbicides Litigation* is on-going. It remains to be seen whether the settlement will fully resolve that case or if some plaintiffs will continue on to trial.

### **Arkansas State Rules**

Finally, the Arkansas State Plant Board (“Plant Board”) voted in early March, 2021 to adopt the cut-off date set by EPA in the dicamba label approved by the agency last fall. In doing so, the Plant Board removed a cut-off date that it established in December, 2020 which would have required application of over-the-top dicamba products to stop on May 25 instead of June 30.

Since 2017, the Plant Board has passed regulations establishing dates when it would no longer be legal to apply dicamba products within the state of Arkansas. When EPA first approved dicamba herbicides for application directly onto crops in 2016, it did not include a cut-off date in the federal label. This meant that, unless a state restriction was in place, farmers could apply dicamba throughout the growing season. When EPA renewed the dicamba approval in 2018, it once again did not set a cut-off date. In lieu of a federally established cut-off dates, several states chose to adopt their own. Most states did so by applying to EPA for a Special Local Needs permit which states can use to set localized rules for federally-approved pesticides. Arkansas, however, set cut-off dates through states regulations passed by the Plant Board.

Since 2017, the Plant Board has passed regulations establishing a dicamba cut-off date for May 25. These regulations have faced legal challenges in Arkansas state court from plaintiffs who claim that the cut-off dates were unnecessarily restrictive. To read more about those cases, click [here](#). Although the Plant Board had initially passed a regulation in December, 2020 that would have once again set a May 25 cut-off date for the 2021 growing season, it changed course in March, 2021 by voting to follow the cut-off date EPA included in its most recent dicamba label. The new label, which approves several dicamba products for application directly onto crops for the 2021 – 2025 growing seasons, contains a cut-off date of June 30. Because the cut-off date is in the federal label, it will apply to all states where dicamba is used.

### **Conclusion**

Legal issues involving dicamba continue to remain at the forefront as we transition into 2021. The Center will provide updates as these issues develop.

To read Monsanto’s opening brief, click [here](#).

To read the settlement agreement, click [here](#).

To view the most recently approved dicamba label, click [here](#).

To view documents from the Plant Board’s March 2021 meeting, click [here](#).

For previous Ag & Food Law Update posts on dicamba, click [here](#).



On January 21, 2021, the Environmental Protection Agency (“EPA”) sent a letter to the Department of Justice (“DOJ”) requesting stays for pending litigation that seek judicial review of EPA regulations implemented during the Trump administration. In other words, EPA is asking that the DOJ request that courts slow down or pause cases involving EPA actions between January 20, 2017 and January 20, 2021, while EPA reviews those actions and determines the appropriate path forward under a new administration. The request coincides with two orders from President Biden ordering [a review of agency actions](#) taken by the Trump administration, and [freezing all Trump-era rules](#) that have not yet taken legal effect. Additionally, the Biden administration has released [a non-exclusive list](#) of agency actions taken during the Trump administration that it intends to review. However, EPA is requesting that DOJ seek stays of litigation for all lawsuits targeting EPA actions taken during the last four years, not just those specifically identified for review.

The Biden administration has inherited numerous lawsuits challenging actions taken by EPA during the Trump administration. Many of those lawsuits may have progressed past the point where a stay of litigation will be appropriate, while others could be paused for certain periods of time. The following is a review of certain cases relevant to the agricultural industry which could be put on hold as a result of EPA’s request, and where those cases are in the litigation process.

### **WOTUS Litigation**

The Navigable Waters Protection Rule (“Navigable Waters Rule”) was passed by the Trump administration in 2020, taking legal effect in June of that year. The rule redefines the term “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”), and replaces an Obama-era regulation which had previously defined the term WOTUS. The Biden administration has been specifically identified the Navigable Waters Rule as one it will review. In the meantime, numerous cases have been filed seeking judicial review of the rule, some of which may be stayed following the request from EPA. While many of the lawsuits targeting the Navigable Waters Rule claim that the rule should be overturned because it does not do enough to protect the nation’s waters, other lawsuits argue that the rule goes too far and overregulates beyond the scope of the CWA. For additional information on the background of these cases, click [here](#) and [here](#).

Both states and environmental groups have challenged the Navigable Waters Rule for being too narrow. In ***State of California v. Wheeler, No. 20-cv-03005 (N.D. Cal. 2020)*** and ***State of Colorado v. U.S. Env’tl. Prot. Agency, No. 20-cv-1461 (D. Colo. 2020)***, a state has filed suit asking that the court vacate the Navigable Waters Rule for not protecting the nation’s waters as required by the CWA. Both cases were filed in May, 2020, after the final Navigable Waters Rule was published in the Federal Register, but before it took legal effect. At this point, neither case has resulted in a judicial opinion on the legality of the Navigable Waters Rule, however the plaintiffs in both cases requested a preliminary injunction that would prevent the rule from taking effect in their respective jurisdictions. Preliminary injunction was denied in the California case, but was granted in the Colorado case under limited circumstances. Specifically, the preliminary injunction barring the Navigable Waters Rule from taking effect in Colorado only applies to the United States Army Corps of Engineers (“Corps”). EPA and the Corps jointly administer the CWA, although the EPA is tasked with determining the definition for WOTUS. Accordingly, EPA can follow the Navigable Waters Rule in Colorado, but the preliminary injunction prevents the Corps from implementing that rule while the litigation continues. Both the California and Colorado cases are currently on-going.

***Chesapeake Bay Found., Inc. v. Wheeler*, No. 20-cv-01063 (D. Md. 2020)** and ***South Carolina Coastal Conservation League v. Wheeler*, No. 20-cv-01687 (D. S.C. 2020)** were both brought by environmental groups challenging the legality of the Navigable Waters Rule. In each case, the plaintiffs argue that the rule is too narrow to fulfill the requirements of the CWA and must be vacated. Motions for summary judgment have been filed by the plaintiffs and defendants in each case, meaning that the parties in both lawsuits have asked the judge to review their respective arguments and make a decision by applying the arguments to undisputed facts. While a hearing for oral argument has not been scheduled in *Chesapeake Bay Found., Inc. v. Wheeler*, a hearing on the motions for summary judgment had been scheduled for February 4, 2021 in *South Carolina Coastal Conservation League v. Wheeler*. However, that hearing has been postponed following a joint request from all the litigating parties. In their request to postpone the hearing, the parties referenced the executive order from the Biden administration announcing a review of multiple EPA regulations. Currently, the postponement is only for thirty days, but if the government requests a stay of litigation that postponement could become much longer.

Finally, three cases have been filed by different state Cattlemen's Associations challenging the Navigable Waters Rule for being too restrictive. The plaintiffs in ***Oregon Cattlemen's Ass'n v. U.S. Evtl. Prot. Agency*, No. 19-cv-00564 (D. Or. 2019)**, ***Washington Cattlemen's Ass'n v. U.S. Evtl. Prot. Agency*, No. 19-cv-00569 (W.D. Wash. 2019)**, and ***New Mexico Cattle Growers Ass'n v. U.S. Evtl. Prot. Agency*, No. 19-cv-00988 (D. N.M. 2019)** all argued that the Navigable Waters Rule violated the CWA by regulating too broadly. Currently, the cases are at varying stages of litigation. The Oregon case was dismissed in August 2020 for lack of standing. The dismissal was without prejudice, meaning that the plaintiffs could refile their case provided they amend their complaint to show that they have the proper standing to bring their claims. The parties in the Washington case filed motions in 2020 requesting that their case be consolidated together with a similar case filed in the same district court also targeting the Navigable Waters Rule. The court has yet to decide whether the cases will be consolidated. Lastly, the plaintiffs in the New Mexico case filed a request for preliminary injunction to stop the Navigable Waters Rule from having legal effect in the state of New Mexico while the case is litigated. The court has yet to determine whether to grant the plaintiffs' request.

Ultimately, it is possible that each of the above cases, and any other lawsuits challenging the Navigable Waters Rule, could be paused while EPA reviews the rule.

### **Pesticide Litigation**

Other on-going cases that may be stayed include lawsuits challenging Trump-era rules regarding pesticides. There currently multiple lawsuits targeting pesticide-related regulations passed by the Trump administration's EPA. The following is a sample of the types of cases that may be affected by the request to pause such cases.

In ***State of New York v. U.S. Evtl. Prot. Agency*, No. 20-cv-10642 (S.D. N.Y. 2020)**, a group of states filed suit challenging [a rule on application exclusion zones](#) ("AEZs"). An AEZ is the area surrounding the pesticide application equipment that must be free of all persons not appropriately trained during the application of the pesticide. The rule targeted by this lawsuit establishes a 25-foot AEZ for all ground spray pesticide applications, and exempts pesticide applicators from implementing AEZ requirements beyond the boundaries of the establishment where the pesticides are being applied. This is a narrowing of a similar rule adopted in 2015 which established an AEZ of 25 to 100 feet depending on the method of application, and required the pesticide applicator to cease application anytime a person entered the

AEZ, regardless of whether the person was within the boundaries of the establishment or not. In [their complaint](#), the states argue that the new AEZ rule should be overturned because EPA failed to adequately justify the changes. The case was originally filed in December, 2020, and has therefore not had time to get too far in the litigation process. However, the court has agreed to prevent the rule from taking legal effect, and on January 20, 2021 issued an order preventing the rule from taking effect for an additional 30 days.

Other pesticide-related cases that the DOJ may seek to press the pause button on include those targeting the dicamba use label which was approved in late 2020. Although a pesticide label is not a regulation, EPA may still decide to ask for stays of litigation in cases targeting the dicamba label to allow the agency time for review.

The plaintiffs in ***Nat'l Family Farm Coal. v. U.S. Env'tl. Prot. Agency, No. 20-73750 (9th Cir. 2020)*** filed suit in December, 2020, arguing that the dicamba label approved by EPA violates the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). According to the plaintiffs, EPA failed to sufficiently support its registration of dicamba for use under FIFRA. The plaintiffs are asking the court to vacate the label, which could potentially make it unlawful to use the pesticide. Currently, the lawsuit is not very far into the litigation process. Manufacturers of dicamba-based pesticides have moved to intervene in the case, and the court has agreed to transfer the lawsuit out of the Ninth Circuit to the District of Columbia. The lawsuit is similar to one the plaintiffs filed in 2018 which was decided in June, 2020. For more information on that lawsuit and other dicamba litigation, click [here](#) and [here](#).

Finally, another lawsuit targeting the dicamba label was filed in November, 2020 by two agricultural groups. In ***American Soybean Ass'n v. Wheeler, No. -20-cv-03190 (D. D.C. 2020)*** the plaintiffs filed suit arguing that certain aspects of the dicamba label were unlawfully restrictive. The plaintiffs asked that the court invalidate the portions of the label which the plaintiffs allege are unlawful, and send the label back to EPA for revision. Importantly, the plaintiffs also asked that the court uphold the remainder of the dicamba label. The case is currently on-going. For a closer look at the arguments being made by the plaintiffs, click [here](#).

## Conclusion

The cases mentioned above are a non-exclusive list of lawsuits which could be impacted by EPA's request to DOJ. Currently, the government has not filed a formal request to stay litigation in any of the above cases. Until such a request is made, and an order to stay the case issued by the court, all the lawsuits will continue.

Finally, it is important to note how broad EPA's request is. The agency is asking DOJ to request a pause on all litigation concerning actions taken by EPA over the course of four years. This could potentially affect lawsuits targeting rules or regulations issued by EPA as far back as January, 2017. If DOJ seeks to pause all such litigation, the ultimate impact could be far-reaching.

For more National Agricultural Law Center resources on the CWA, click [here](#).

For more National Agricultural Law Center resources on pesticides, click [here](#).

On August 28 August 28, 2020 the United States Department of Agriculture (“USDA”) issued a final rule for the Highly Erodible Land and Wetlands Conservation provisions (“conservation provisions”) of the Food Security Act of 1985 (“the 1985 Farm Bill”). The conservation provisions of the 1985 Farm Bill have the broad goal of conserving wetlands and reducing erosion. That goal is accomplished by linking eligibility for USDA program benefits to land management practices on highly erodible lands and wetlands. Because the conservation provisions are closely tied to the management of highly erodible lands and wetlands, how those areas are identified is essential to implementation of the provisions. The final rules passed by USDA aims to provide greater transparency to the process by which highly erodible lands and wetlands are identified, and to help farmers better understand when their actions may result in ineligibility for USDA program benefits.

### **The Conservation Provisions**

The conservation provisions were first introduced in 1985, and have been amended several times by subsequent Farm Bills. Colloquially, the provisions are referred to as “Sodbuster” and “Swampbuster,” and are administered by USDA’s Natural Resources Conservation Service (“NRCS”). Under the conservation provisions, farmers and landowners who use a field with highly erodible land to produce an agricultural commodity or who convert a wetland for the purpose of producing an agricultural commodity lose eligibility for certain USDA program benefits. USDA program participants must annually certify that they are in compliance with the conservation provisions.

Identifying areas that are highly erodible lands and wetlands is a crucial component of the conservation provisions. NRCS is tasked with identifying such areas, and with ensuring compliance with the provisions. When determining whether an area is a wetland that falls under the wetland conservation provisions, NRCS must determine whether the area has wetland vegetation, the type of soil that can support wetland vegetation, or normally contains hydrologic conditions even if the vegetation has been removed. 7 C.F.R. § 12.30(c)(7). All three characteristics must be present in order for the area to be considered a wetland. Determining whether an area is a highly erodible land is a more complex process that involves calculating the erodibility index for a soil based on factors such as annual rainfall, the degree to which the soil resists erosion, and the steepness of the area. 7 C.F.R. § 12.21 (a)(1)(i)-(iii).

Along with identifying highly erodible lands and wetlands, NRCS is charged with determining whether such areas have been “converted.” Generally, once a highly erodible land or wetland has been converted, the farmer responsible will no longer be eligible for certain USDA program benefits. However, there are multiple exemptions. A person will generally not lose USDA program benefits for production of an agricultural commodity on a converted wetland if the land falls into the definition of prior-converted cropland, farmed wetland, or a farmed-wetland pasture.

### **New Rules**

The rules published by USDA on August 28 finalizes many of the provisions contained in an interim final rule published by USDA in DECEMBER 2018. The new rules make several important changes to the conservation provisions with the intended goal of clarifying when a wetland is present. As part of achieving that goal, the new rules have added definitions for several terms including “wetland hydrology,” “normal climatic conditions,” and “best drained condition,” all of which are terms applied to the process of identifying wetlands. The new rules also revise the definition for “wetland determination” in regard to farmed wetland, farmed wetland pasture, and prior-converted cropland. Because those

three categories converted wetland are exemptions to the conservation provisions, clarifying how those areas are identified will be helpful to farmers and landowners in figuring out what areas are on their land. The new rules also state that any wetland determinations made between 1990 and 1996 will be certified. Under the conservation provisions, a person will not become ineligible for USDA program benefits “as a result of taking an action in reliance on a previous certified wetland determination by NRCS.” 7 C.F.R. § 12.5 (b)(6)(i). By certifying the wetland determinations made between 1990 and 1996, NRCS hopes to add further clarity for many farmers and landowners.

Finally, the new rules incorporate the requirement of the 2018 Farm Bill that USDA must make a reasonable effort to include the “affected person” in an on-site investigation conducted prior to making a determination that a wetland violation has occurred. Additionally, the new rules require that if a person disagrees with an off-site determination of potentially highly erodible soils, NRCS would make an onsite determination.

### **Why It Matters**

The changes to the conservation provisions made by the new rules could have a significant impact on how the provisions are administered moving forward. NRCS has come under criticism for how it administers the conservation provisions. The implementing rules have been criticized for being extremely complex and difficult to navigate, while NRCS has come under scrutiny for making unreasonable wetlands determinations.

One example of such a determination was made by NRCS in 2008. That year, NRCS notified the family who owned Maple Drive Farms that the agency had identified a wetland on their property. The family quickly pointed out that the area in question had been converted from a wetland to farmland in 1965 with help from NRCS. Therefore, the family believed the area was exempt from the conservation provisions. NRCS and the family ultimately ended up in court in 2015, where they argued over whether the land was exempt based on ambiguous regulatory language. Although the court in ***Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)*** ultimately found in favor of NRCS on that argument, it acknowledged that the language was so ambiguous that both interpretations were plausible. The new regulations are intended to clarify the regulatory language so that going forward it will be easier to identify areas that are exempt from the conservation provisions without having to go to court to determine the meaning of ambiguous regulatory language.

However, not everyone is convinced that the new rules will result in more reasonable wetland determinations. The [American Farm Bureau Federation feels](#) that the rule gives NRCS too much discretion to determine whether an area is a wetland, while not providing farmers with enough power to challenge determinations they believe are unfair. At this moment it is unclear whether the new rules will bring the clarity NRCS intended.

To read the new rules for the conservation provisions, click [here](#).

To read the regulations for the conservation provisions, click [here](#).

To read the text of the conservation provisions, click [here](#).

To read the court’s decision in *Maple Drive Farms Ltd. Partnership v. Vilsack*, click [here](#)

For more National Agricultural Law Center resources on the conservation provisions, click [here](#).

On May 14, 2021, the United States Court of Appeals for the Ninth Circuit, issued a decision upholding a \$25 million award to a plaintiff who claimed that he contracted non-Hodgkin's Lymphoma ("NHL") after being exposed to Roundup, a glyphosate-based pesticide. In its opinion, the court considered whether the plaintiff's state law claims were preempted by federal pesticide law, and whether the evidence introduced by the plaintiff at trial had been properly admitted by the court. Because the case is the first one to reach a federal appeals court, the conclusions reached by the Ninth Circuit will likely affect other glyphosate cases brought in that jurisdiction where the plaintiffs are making similar arguments or bringing similar evidence.

## **Background**

***Hardeman v. Monsanto Co., No. 19-16636 (9th Cir. 2021)*** was originally filed in a federal court in California on February 12, 2016. At the time, the case was one of hundreds that was filed against Monsanto Corporation ("Monsanto") alleging that the company's glyphosate pesticide, Roundup, had caused the plaintiffs to develop NHL. Many of the cases were ultimately consolidated into a multidistrict litigation ("MDL"), a type of legal proceeding that allows federal cases from around the country that have questions of fact in common to be consolidated into one court. Of all the cases that were consolidated into the Monsanto Roundup MDL, the *Hardeman* case was the first one selected to go before a jury, making it the "bellwether" trial. In the federal court system, a bellwether trial is a case that the court and parties select to test their arguments. Bellwether trials are typically used in mass tort actions where hundreds or thousands of people are injured by the same product, and are bringing similar claims. The outcome of a bellwether trial will generally impact similar cases going forward.

The plaintiff *Hardeman v. Monsanto Co.* brought a variety of tort claims against Monsanto, including negligence, design defect, failure to warn, and breach of implied warranties. In essence, the plaintiffs argued that Monsanto either knew or should have known that the glyphosate in Roundup was dangerous to human health, and failed to properly warn the public of those dangers. The jury who heard the case returned an \$80 million verdict in favor of the plaintiff in March, 2019. Of that \$80 million, \$5 million were for compensatory damages to cover the actual harm done to the plaintiff, and \$75 million were for punitive damages. Ultimately, the judge reduced the punitive damages to \$20 million, bringing the total award to \$25 million.

In late 2019, Monsanto, which had since been bought by Bayer, appealed the verdict to the Ninth Circuit Court of Appeals. It was the first time a verdict in a glyphosate case had been appealed in federal court. In the appeal, Monsanto raised two main arguments.

First, it claimed that that the pesticide labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempted any state requirement to place cancer warnings on pesticide labels. One of the claims the plaintiff had brought in the lower court was that Monsanto had failed to warn consumers of the risks of glyphosate by putting a warning label on Roundup products. Under FIFRA, states are not permitted to enact any labeling or packaging standards for pesticides that are "in addition to," or "different from" federal standards. 7 U.S.C. § 136v(b). In ***Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)***, the United States Supreme Court interpreted the preemption language in FIFRA to mean that states may only enact labeling and packaging standards for pesticides that are "equivalent to," or "consistent with" federal standards. In its appeal, Monsanto argued that the plaintiff's failure to warn claims were preempted by FIFRA because the Environmental Protection Agency ("EPA") has



consistently registered Roundup labels, and approved sale and use of Roundup without cancer warnings.

Monsanto's second main argument on appeal was that the lower court improperly admitted the plaintiff's expert testimony on the alleged link between glyphosate and NHL. According to Monsanto, the lower court improperly applied what is known as "the *Daubert* standard," a legal standard that is used by trial judges to determine whether an expert witness's scientific testimony is based on scientifically valid reasoning that can be properly applied to the facts of the case. Monsanto claims that the lower court misapplied the *Daubert* standard in such a way that it allowed the plaintiff to rely on flawed findings with an "analytical gap" between the data and conclusions of the expert witnesses. Had the court applied the standard correctly, Monsanto argues that the case never would have been allowed to go to trial because none of the evidence linking glyphosate exposure to cancer would have been admitted.

### **Ninth Circuit Decision**

The decision issued by the Ninth Circuit on May 14 rejected both of Monsanto's main arguments. According to the court, FIFRA did not preempt the plaintiff's failure to warn claims, nor had the lower court improperly allowed testimony from the plaintiff's expert witnesses. Therefore, the Ninth Circuit upheld the lower court's verdict and the award of \$20 million.

The court first considered whether FIFRA preempted the plaintiff's state law failure to warn claims. In order to determine whether the claims were preempted, the court applied the two-part test adopted by the Supreme Court in *Bates v. Dow Agrosciences, LLC*. Under that test, a state law will only be preempted by FIFRA if it is (1) a requirement for pesticide labeling or packaging, and (2) is also in addition to or different from FIFRA requirements. A state requirement for pesticide labeling or packaging that is equivalent to, or consistent with FIFRA requirements will not be preempted.

According to the Ninth Circuit, the plaintiff's failure to warn claims satisfied the first step of the *Bates* test because the claims were based on Monsanto's failure to provide a warning label under California law. Next, the court considered whether a warning label would be consistent with FIFRA requirements. State law is consistent with FIFRA when both impose "parallel requirements," meaning that a violation of the state law is also a violation of FIFRA. Therefore, if a violation of the California state law duty to warn would also be a violation of the FIFRA. Under FIFRA, a pesticide may not be "misbranded." 7 U.S.C. § 136j(a)(1)(E). A pesticide will be considered "misbranded" if "the label does not contain a warning or caution statement which may be necessary ... to protect health and the environment." 7 U.S.C. § 136(q)(1)(G). Under California common law, the duty to warn requires a manufacturer to warn consumers of any health risk that is "known or knowable" or of risks that "a reasonable prudent manufacturer would have known and warned about." According to the court, the FIFRA requirements and the California requirements are parallel because the FIFRA requirement to provide any "necessary" warning to protect human health is broader than the California requirement to warn against any "known or knowable" risks. Therefore, the plaintiff's failure to warn claims were not preempted by FIFRA.

Next, the Ninth Circuit considered whether the lower court had improperly applied the *Daubert* standard by admitting the plaintiff's expert witness testimony. Ultimately, the court found that the *Daubert* standard had been applied correctly according to precedent within the Ninth Circuit.

Under the *Daubert* standard, judges can consider the following non-exclusive factors when determining an expert witness's reliability: (1) whether the theory or technique employed by the expert is generally accepted in the scientific community; (2) whether it has been subject to peer review; (3) whether it can be or has been tested; and (4) whether the known or potential rate of error is acceptable. Monsanto argued that the lower court improperly allowed expert witnesses to make assumptions in violation of how the *Daubert* standard is usually applied in Ninth Circuit cases. The court rejected this argument, noting that in the Ninth Circuit, the guiding principle when applying the *Daubert* standard is to exclude expert evidence when the flaws in theory or methodology are so large that the expert lacks "good grounds" for their conclusions. Because the lower court concluded that the plaintiff's expert witnesses were relying on theories and methodologies that could reasonably support their conclusions that glyphosate exposure is linked to NHL, the Ninth Circuit concluded that the *Daubert* standard had been correctly applied.

### **Conclusion**

Because *Hardeman v. Monsanto Co.* is a bellwether case, the court's conclusions are indicative of how future courts in the Ninth Circuit may rule in similar lawsuits. While the court noted that many of its holdings were fact-specific, and would not necessarily be the same if the facts of the case were different, there are still important takeaways that may be applicable in other glyphosate lawsuits. At least in the state of California, it seems likely that additional claims that Monsanto failed to warn consumers that glyphosate may cause cancer will not be preempted by FIFRA. Additionally, expert witnesses in other glyphosate cases that rely on the same theories and methodologies as the expert witnesses in *Hardeman v. Monsanto Co.* will likely be able to testify in Ninth Circuit courts without violating the *Daubert* standard.

Currently, settlement negotiations for the glyphosate MDL are on-going. If the negotiations are successful, many plaintiffs in the MDL and in the Ninth Circuit will settle their claims and drop their lawsuits. However, some plaintiffs may choose to continue with litigation, and may rely on the decisions reached by the Ninth Circuit.

Going forward, Bayer has said that it intends to pursue all available legal options, including petitioning the Supreme Court to review the case. Should the Supreme Court take the case, it would likely have an impact on future glyphosate cases, regardless of the outcome.

To read the Ninth Circuit's opinion in *Hardeman v. Monsanto Co.*, click [here](#).

To read Monsanto's appellate brief, click [here](#).

To read the plaintiff's initial complaint, click [here](#).

To read the text of FIFRA, click [here](#).

For more information on FIFRA preemption, click [here](#).

For more pesticide resources from the National Agricultural Law Center, click [here](#).

# Legal Checkup on Checkoffs: *R-CALF*, States' Beef Councils, and the Ongoing First Amendment Challenge to the Beef Checkoff

Harrison Pittman

## Introduction

On May 2, 2016 *Ranchers-Cattlemen Legal Defense Fund, United Stockgrowers of America v. Vilsack*, No. 4:16-cv-00041 (D. Mont. May 2, 2016) ("*R-CALF*") was filed in the United States District Court for the District of Montana. *R-CALF* is arguably the most serious constitutional challenge to the national beef checkoff in more than a decade. Since 2016, *R-CALF* has unfolded to include two appeals to the United States Court of Appeals for the Ninth Circuit, triggered historically significant changes to the administration of the Montana Beef Council and numerous other states' Qualified State Beef Councils, and has even spawned new litigation filed by the same plaintiff against USDA. The outcome of that new lawsuit, *Ranchers-Cattlemen Legal Defense Fund, United Stockgrowers of America v. USDA*, No. 1:20-cv-02552 (D. D.C. Sept. 11, 2020), will further define the future administration of the beef checkoff. That litigation will be addressed in an upcoming article in this series. This article focuses on the evolution of *R-CALF* up to its present appeal before the Ninth Circuit.

For more background information, specifically on the unique federal-state partnership structure of the national beef checkoff that is central to *R-CALF*, please review two of the prior articles in this Legal Checkup on Checkoff series, *What is a Checkoff?*, [here](#), and *Beef Checkoff Basics*, [here](#).

## Background: *Johanns to Janus*

The path to *R-CALF* traces to the seminal U.S. Supreme Court checkoff decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). *Johanns* was itself preceded by two other landmark Supreme Court checkoff decisions – *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). In *Johanns*, the plaintiffs argued, as did the plaintiffs in *Glickman* and *United Foods* with respect to tree fruit and mushroom programs, respectively, that the mandated assessment on beef violated the First Amendment because it forced them to subsidize speech – specifically, generic advertisements for beef– with which they disagreed. The Court explained that “For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny.” (*id.* at 553).

The path to *R-CALF* also includes the Supreme Court decision in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), which was followed during the course of *R-CALF* by yet another landmark Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, 138 S. Ct. 2448 (2018). *Knox* and *Janus* involved public employee union dues in which plaintiffs raised objections similar to those in *Glickman*, *United Foods*, and *Johanns*. Specifically, the plaintiffs in *Knox* and *Janus* objected to being forced by state law to contribute mandatory public union dues to subsidize speech espoused via the unions with which they disagree. These two decisions will be addressed in an upcoming article in this series.

## *Johanns*

In *Johanns*, the Court held that the speech at issue was government speech because the messages pronounced by the Cattlemen’s Promotion and Research Board (“Beef Board”) and the Cattlemen’s Beef Operating Committee “is effectively controlled by the Federal Government itself.” (*Id.* at 560). The Court added, “When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” (*Id.* at 562).

At the time *Johanns* was decided, several similar constitutional challenges to other checkoff programs had wound their way through the court system, with most courts holding that the checkoff program at issue violated the First Amendment. All of those legal actions perished in the wake of *Johanns*. Additionally, more than a half dozen new First Amendment challenges were brought against other state and federal checkoff programs in the decade following *Johanns*. *Johanns* was applied in each of those cases, and each upheld the constitutionality of the program at issue. Thus, *Johanns* proved to be a fortress seemingly capable of repelling all First Amendment attacks on checkoff programs.

So, what makes *R-CALF* so different, particularly since it raises the same legal argument against the same beef checkoff program that the United States Supreme Court previously upheld in *Johanns* and has proven effective at defeating so many other First Amendment challenges? The answer to this question lies within the federal-state partnership structure that is the heart of the national beef checkoff, which is reflected in the discussion below. For a more thorough discussion of that background, see *Beef Checkoff Basics*, [here](#).

#### *R-CALF: 2016 Through 2021*

As noted, *Johanns* focused on the oversight and “effective control” the USDA Secretary exercised over the Beef Research and Promotion Board and the Beef Promotion Operating Committee. *R-CALF*, on the other hand, targeted Montana’s QSBC, the Montana Beef Council (MBC). The plaintiffs argued that the portion of the dollar-per-head beef checkoff assessment that is retained and expended by the MBC constituted a “government-compelled subsidy of the speech of a private entity” which is unconstitutional under the First Amendment pursuant to *Johanns*. By targeting a state beef council, the plaintiffs advanced an ironic twist to the longstanding beef checkoff saga: leverage the fortress of *Johanns* to open a new front on the state level component of the national beef checkoff and to do so in a manner that, if successful, would deny the MBC (and potentially other QSBCs) assessment funds it would have otherwise retained and expended as commonly done since 1985.

Very importantly, the plaintiff also asserted that “on information and belief, neither USDA nor the Montana Beef Council has established a procedure by which a cattle producer who disagrees with the Montana Beef Council’s message can request that the complete amount of his assessments be directed to the Beef Board, a body controlled by the federal government.” (*R-CALF* Compl. at ¶174). Approximately six weeks later, on July 15, 2016, USDA addressed this concern by issuing the [proposed rule](#), *Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments*. The final rule was [issued](#) on May 13, 2019.

On August 4, 2016, USDA filed its initial response to the lawsuit. The response focused almost exclusively on the application of the proposed Redirection Rule. USDA asserted that the plaintiffs’ First

Amendment rights were not violated because “in accordance with USDA’s longstanding policy, cattle producers in states like Montana may decline to contribute to a QSBC and instead direct the QSBC to forward the full amount of their federal assessment to the Beef Board.” (See *R-CALF*, Memorandum in Support of Defendants’ Motion to Dismiss Or, In The Alternative to Stay the Case, Doc. 19-1, at 7-8.). According to USDA, the “longstanding policy” is predicated on the legal premise that “neither the Beef Act nor the Beef Order requires cattle producers to contribute a portion of the \$1-per-head checkoff to a QSBC.” (*Id.* at 12 (citing 7 U.S.C. § 2904; 7 C.F.R. Pt. 1260; and the Redirection Proposed Rule, 81 Fed. Reg. 45,984, 45,986). USDA explained, “Therefore, in circumstances where there is no state law requiring cattle producers to contribute to the QSBC, USDA has always understood and interpreted the Beef Act and Beef Order to permit a cattle producer who does not wish to voluntarily contribute to a QSBC to submit a redirection request to the QSBC.” (*Id.* at 12-13.) USDA concluded that it was “not aware of any Montana state law or regulation that requires cattle producers to contribute to the Montana Beef Council.” (*Id.* at 14).

The proposed rule sought to formalize what USDA described as its “longstanding policy” of allowing cattle producers in Montana and other states to request that the entire one-dollar-per head assessment be “directed”, or “redirected”, to the Cattlemen’s Promotion and Research Board (“Beef Board”). This development had the ironic effect of bringing the litigating parties into complete agreement on a central issue in the litigation – whether a producer could forward his or her full assessment to the Board. Further, the proposed rule arguably offered a solution to very problem of which the plaintiff complained. Despite this, the courts in *R-CALF* have not viewed the Redirection Rule, standing alone, as being sufficient to satisfy the plaintiff’s First Amendment concerns.

On December 12, 2016, the United States Magistrate Judge assigned to *R-CALF* issued Findings Recommendations (F&R) almost entirely in plaintiff’s favor. (*R-CALF*, Findings and Recommendations of United States Magistrate Judge, Doc. 44 (Dec. 12, 2016). The F&R were fully adopted by the federal district court later several months later. The F&R, among other items, granted the plaintiff’s motion for preliminary injunction that would require producers to “opt in” to having any of the national checkoff assessment be retained by the MBC. Specifically, the F&R stated that “it is unlikely that the government exerts enough control over MBC’s speech to qualify the speech as government speech.” (*Id.* at 10).

Before the federal district court could issue the final decision, however, USDA announced it had entered into a Memorandum of Understanding with the Montana Beef Council that provided new levels of direct USDA oversight over the MBC. As noted, the federal district court materially adopted the magistrate’s F&R. In so doing, the court did not address the MOU. Additionally, both the Magistrate and the federal district court determined that the procedures set forth in the proposed Redirection Rule were insufficient to overcome the plaintiff’s First Amendment concerns. USDA appealed the matter to the Ninth Circuit. For more background regarding the MOU, see *Recent MOU Provides Direct USDA AMS Oversight of State Beef Council and Binds All Third Parties That Contract With State Beef Council*, available [here](#).

In April of 2018, the Ninth Circuit affirmed in a 2-1 decision the issuance of the preliminary injunction (*R-CALF*, 718 Fed. Appx. 541 (2018)). The oral arguments for this appeal occurred on March 5, 2018 and are available [here](#). The majority did not factor the MOU in its decision, stating that “the Secretary waived any argument that the district court’s silence regarding the MOU was an abuse of discretion, because he failed to articulate this argument in his opening brief.” (cite (citations omitted)). The dissenting opinion stated that “the district court’s decision to preliminarily enjoin the operation of a federal program as unconstitutional without at least addressing the Memorandum was an abuse of

discretion.” With the issuance of the preliminary injunction affirmed, the matter returned to the federal district court.

The plaintiff sought a permanent injunction with respect to the MBC. Additionally, the plaintiff requested that the injunction be applicable to several other states as well -- . It bears noting that the Montana Beef Council, Nebraska Beef Council, Pennsylvania Beef Council, Texas Beef Council, and other individual parties were allowed to intervene into the action.

On March 27, 2020, the previous legal victories enjoyed by the plaintiffs were essentially erased. The federal district court, based on the Magistrate’s Finding and Recommendation, among other determinations granted summary judgment in favor of USDA and defendant-intervenors on the basis that the MOUs provided sufficient control over the state beef councils’ speech to constitute government speech and therefore not violate the First Amendment.

The matter was then appealed to the Ninth Circuit, with briefs filed by each party. Oral arguments currently being scheduled. Oral arguments are not yet scheduled, but will not occur before June 2021.