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Mid-South Ag Lending and Market Outlook: Recent Trends and Outlook

Greg Cole

U.S. Farm Income Outlook: December 2020 Forecast

February 9, 2021

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CRS REPORT
Prepared for Members and
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SUMMARY

R46676

February 9, 2021

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U.S. Farm Income Outlook: December 2020 Forecast

The U.S. Department of Agriculture (USDA) projects that U.S. farm profitability—as measured by net farm income and net cash income—increasedsubstantially in 2020 from 2019 levels. In nominal dollars (not adjusted for inflation), both income measures are projected to attain their highest levels since 2013. Net farm income (calculated on an accrual basis) was projected to rise 43.1% year-over-year in 2020 to $119.6 billion, up $36.0 billion from last year. Net cash income (calculated on a cash-flow basis), was projected at $134.1 billion in 2020, up $24.7 billion or 22.6% from 2019.

The year-to-year increase in both net farmincome and net cash farmincome is primarily due to a substantial increase in direct government payments to a record $46.5 billion in 2020. At this level, government support payments wouldaccount for nearly 39% of net farm income—the highest share since the year 2000, when government subsidies accounted for 46% of net farm income. In contrast with federal direct payments to producers, farmincome from cash sales of crop and livestock products and other farm-related activities were forecasted to decline by 0.9% in 2020.

The record government farmassistance in 2020 included $12.6 billion from farm programs authorized by the 2018 farm bill (P.L. 115-334) and $33.9 billion in ad hoc (i.e., authorized outside of omnibus farmlegislation) programoutlays, including $3.7 billion from the 2019 Market Facilitation Program(MFP) payments, $5.9 billion from the Paycheck Protection Program (PPP), and $24.3 billion from the Coronavirus Food Assistance Program(CFAP). If realized, the 2020 government payments of $46.5 billion would represent a 107.1% increase from 2019's $22.4 billion in government support, and would nearly double the previous record of $24.4 billion (nominal dollars) in 2005.

Farm asset values in 2020 were projected at $3.1 trillion, up 1.5% from 2019. Farm asset values reflect farminvestors' and lenders' expectations about long-termprofitability of farmsector investments. Another measure of the farmsector's well-being is aggregate farmdebt, which was projected to be at a record $435.2 billion in 2020—up 4.0% from 2019. Both the debt-to-asset and the debt-to-equity ratios have risen for eight consecutive years as both ratios inch upward toward their long- run historical averages. At the farmhousehold level, average farmhousehold incomes have been wellaboveaverage U.S. household incomes since the late 1990s. However, this advantage derives primarily from off-farm income as a share of farm household total income.

USDA will continue to fine-tune farmincome estimates for 2020 as more and better data become available through 2021. USDA released its first forecast of U.S. farm income for 2021 on February 5, 2021. Farm prices for corn, soybeans, wheat, and cotton ended 2020 on an upswing—driven by a declining outlook for carryover stocks and increasing international demand. Despite this hopeful pattern for commodity prices, the outlook for 2021 farm income remains clouded by several critical uncertainties. The potential speed at which the economic effects of the Coronavirus Disease 2019 (COVID-19) pandemic could be abated as vaccination distribution expands nationwide is unknown. This may be critical to when and how the general economy will recover and consumer demand patterns return to normal. Another uncertainty is whether agricultural and food supply chains will emerge in a more resilient and responsive formthat revives investment and growth at both the producer and retail levels. Finally, despite the signing of a Phase One trade agreement with China on January 15, 2020, it is unclear how soon—if at all—the United States may resume normal trade with China.

USDA Farm Income Projections as of December 2, 2020

The most recent aggregate national net farm income projections for calendar year 2020 were issued by USDA's Economic Research Service (ERS) on December 2, 2020. This is the third of three ERS forecasts for 2020: the first farm income forecast was announced on February 5, 2020. The second forecast was released on September 2, 2020.

The first USDA forecast of U.S. net farm income for 2021 occurred on February 5, 2021, and will be discussed in a separate report.

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Introduction

The U.S. Department of Agriculture (USDA) periodically forecasts several economic measures of the U.S. agricultural sector as an aid to Congress and policymakers who monitor and respond to the changing health of the U.S. farm sector. From among these economic measures, annual U.S. net farm income is the most-watched indicator of farm sector well-being. Net farm income measures the profitability of U.S. crop and livestock production. [1] In a single statistic, it captures and reflects the entirety of economic activity across the range of production processes, input expenses, and marketing conditions that have prevailed during the calendar year.[2] When national net farm income is reported together with a measure of the national farm debt, [3] the two summary statistics provide quick and widely referenced indicators of the economic well-being of the national farm economy.

USDA also measures and reports net cash income in tandem with net farm income. Net cash income uses a cash-flow basis to compare cash receipts to cash expenses, while net farm income uses an accrual basis to include the value of farm production as well as noncash balance sheet items, such as capital replacement, implicit rent, home consumption, and other noncash income and expenses.[4]

This report discusses the results of the third of three official USDA national farm income outlook forecasts released for 2020 (see box "ERS's Annual Farm Income Forecasts" in the **Appendix**) by USDA's Economic Research Service (ERS).[5] This release of December 2, 2020, provided the most comprehensive view of annual net farm income for the year because harvests were close to completion for most crops, and a substantial share of the harvested crops already had been sold. However, USDA will continue to fine-tune farm income estimates for 2020 as more and better data become available through 2021. This report's **Appendix** has a discussion of how the December forecast aligns with prior forecasts from earlier in 2020.

USDA Forecasts Higher Farm Income in 2020

U.S. farm profitability—as measured by net farm income and net cash income—was projected to increase substantially in 2020 from 2019 levels. In nominal dollars (not adjusted for inflation), both measures were projected to attain their highest level since 2013. Net farm income was projected to rise 43.1% year-over-year in 2020 to $119.6 billion, up $36.0 billion from last year (**Table 1**). Net cash income (calculated on a cash-flow basis) was projected at $134.1 billion in 2020, up $24.7 billion or 22.6% from 2019.

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[1] See the box "Measuring Farm Profitability" in the **Appendix** for definitions of *net farm income* and its companion *net cash income.*

[2] The **Appendix** includes supporting tables and charts that provide additional details on the Economic Research Service's (ERS's) farm income forecast.

[3] For example, the debt-to-asset or debt-to-equity ratios are discussed in "Farm Finances: Assets, Debt, and Equity."

[4] A major difference between the two measures of net income is their different treatment of unsold harvested crops. Net farm income includes a crop's value after harvest , even if it remains in on-farm storage. In contrast, net cash income includes a crop's value only when it is sold. Thus, crops placed in on-farm storage are included in net farm income but not net cash income. Net cash income tends to be more stable on a year-to-year basis than net farm income, as farm households will adjust their sales from on-farm inventories to meet both farm business and household cash-flow needs.

[5] USDA, ERS, " Webinar: Farm Income and Financial Forecasts, December 2020 Update," December 2, 2020, at https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/webinars-on-forecast-highlights/.

Table 1. Annual U.S. Farm Income ($ Billions) Since 2017, Including 2020 Forecasts

Item	2017	2018	2019	2020F	2019 to 2020 Difference	2019 to 2020 Change (%)[a]
Cash Income Statement						
1. Cash receipts	**370.4**	**371.4**	**369.7**	**366.5**	**-3.2**	**-0.9%**
Crops[b]	194.9	195.1	193.7	200.2	6.5	3.3%
Livestock	175.6	176.3	176.0	166.3	-9.7	-5.5%
2. Government payments[c]	**11.5**	**13.7**	**22.4**	**46.5**	**24.0**	**107.1%**
PLC-ARC[d]	7.0	3.2	3.0	6.1	3.1	106.3%
Marketing loan benefits[e]	0.0	0.0	0.0	0.2	0.2	2,154.8%[f]
Conservation	3.8	4.0	3.8	3.8	0.0	0.4%
Disaster and emergency[g]	0.7	0.9	1.4	2.2	0.8	54.0%
All other[h]	0.0	5.6	14.5	34.1	19.6	135.3%
3. Farm-related income[i]	**31.2**	**29.1**	**34.7**	**34.1**	**-0.6**	**-1.8%**
4. Gross cash income (1+2+3)	413.2	414.2	426.9	447.1	20.2	4.7%
5. Cash expenses[j]	311.9	311.4	317.5	313.0	-4.5	-1.4%
6. NET CASH INCOME	**101.3**	**102.8**	**109.4**	**134.1**	**24.7**	**22.6%**
Farm Income Statement						
7. Total gross revenues[k]	413.2	414.2	426.9	447.1	20.2	4.7%
8. Non-money income[l]	18.3	19.1	18.4	19.5	1.2	6.3%
9. Inventory adjustment	-6.0	-8.2	-12.9	-3.4	9.5	-73.4%
10. Total gross income	425.4	425.1	432.3	463.2	30.9	7.1%
11. Total production expenses[m]	350.4	343.8	348.7	343.6	-5.2	-1.5%
12. NET FARM INCOME	**75.1**	**81.3**	**83.6**	**119.6**	**36.0**	**43.1%**

Source: Congressional Research Service (CRS) using data from USDA, Economic Research Service (ERS), "Farm Income and Wealth Statistics: U.S. and State Farm Income and Wealth Statistics," updated as of December 2, 2020. NA = not applicable.

Notes: F = forecast.

a. Change represents year-to-year projected change between 2019 and the December 2 forecast for 2020.
b. Includes Commodity Credit Corporation loans under the farm commodity support program.
c. Government payments reflect payments made directly to all recipients in the farm sector, including landlords. The nonoperator landlords' share is offset by its inclusion in rental expenses paid to these landlords and thus is not reflected in net farm income or net cash income.
d. PLC = Price Loss Coverage. ARC = Agriculture Risk Coverage.
e. Includes loan deficiency payments, marketing loan gains, and commodity certificate exchange gains.
f. In 2020, USDA made Marketing Assistance Loan (MAL) payments of $169 million compared with $7 million in 2019.
g. Includes payments made under the Wildfire and Hurricane Indemnity Program (WHIP).
h. Includes ad hoc programs such as the Market Facilitation Program (MFP), Coronavirus Food Assistance Program (CFAP), and the cotton ginning cost-share program, as well as the biomass crop assistance program, milk income loss, and other miscellaneous payments.
i. Income from crop insurance indemnities, custom work, machine hire, agritourism, forest product sales, and other farm sources.
j. Excludes depreciation and perquisites to hired labor.
k. Total gross revenue (#7) is the same as gross cash income (#4).
l. Value of home consumption of farm products plus the imputed rental value of operator and hired labor dwellings.
m. Cash expenses (#5) plus depreciation and perquisites to hired labor.

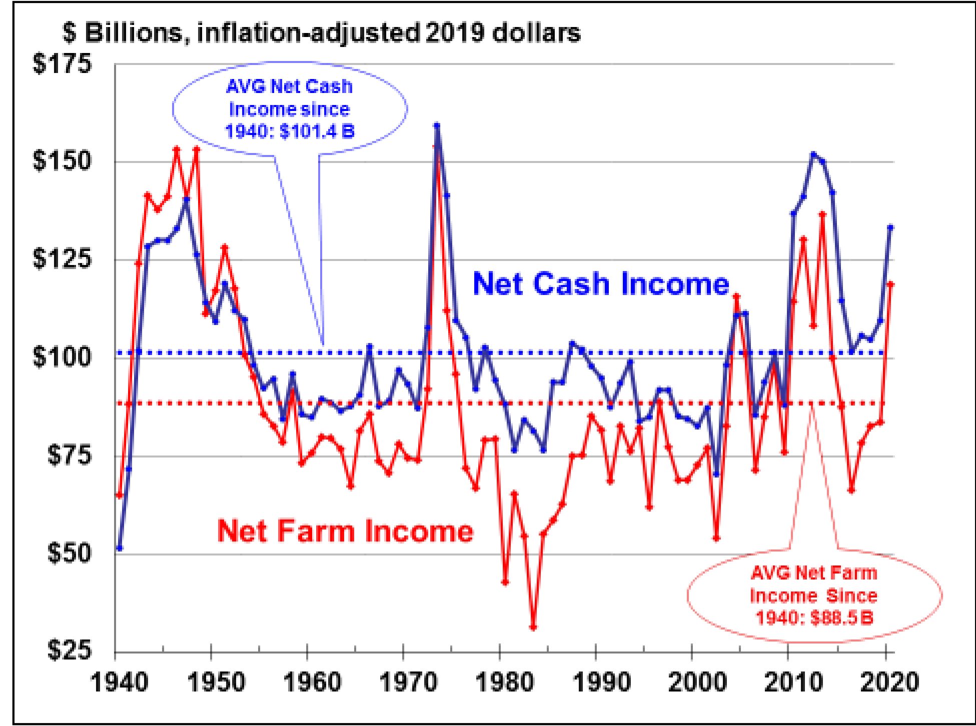
The year-to-year increase in both net farm income and net cash farm income is due to record government payments of $46.5 billion in 2020. At this level, government support payments

account for nearly 39% of net farm income—the highest share since the year 2000, when government subsidies accounted for 46% of net farm income.

In contrast to federal direct payments, farm income from cash sales of crop and livestock products (-0.9%) and other farm-related activities (-1.8%) were forecasted to decline from 2019. Additionally, sales from on-farm inventories from prior years' crops are expected to make a smaller contribution to net cash income in 2020 than in 2019 (**Table 1**). The 2020 net cash income forecast of $134.1 billion included $3.4 billion in sales from on-farm inventories. In 2019, sales of on-farm crop inventories contributed $12.9 billion to net cash income.

When adjusted for inflation and represented in 2019 dollars (**Figure 1**), both the net farm income and net cash income for 2020 were projected to be above their average values since 1940 of $88.5 billion and $101.4 billion, respectively. The net farm income forecast for 2020 was the third highest in inflation-adjusted terms since 1973.

Figure 1. U.S. Farm Sector Inflation-Adjusted Income, 1940-2020F



Sources: CRS using data from USDA, ERS, "2020 Farm Sector Income Forecast," December 2, 2020. All values are adjusted for inflation using the chain-type gross domestic product (GDP) deflator, where 2019 = 100. Bureau of Economic Analysis (BEA), real GDP chained dollars (accessed December 11, 2020), coupled with projections from the Congressional Budget Office, July 2020. Values for 2020 are forecasts.

For historical perspective, both net cash income and net farm income achieved inflation-adjusted peaks three times since 1940: first, in the late 1940s when U.S. exports were flowing into war-torn Europe; second, in the mid-1970s when oil and commodity markets experienced surges in prices; and finally, during the 2011-2014 period when prolonged widespread drought impacted U.S. crop yields and reduced available supplies.

Farm Sector Revenues

Farms earn revenue from three principal sources: cash receipts from crop and livestock production activities; government direct payments; and other on-farm activities.

Cash Receipts for Crop and Livestock Production

Cash receipts for crop and livestock production in 2020 were projected to be down 0.9% relative to 2019 (**Table 1**). Crop receipts were forecasted to increase by $6.5 billion in 2020, but these gains were more than offset by a forecast decline of $9.7 billion for livestock receipts.

Table 2. U.S. Farm Sector Cash Receipts from Production of Commodities

Commodities	Share All	Share Sub[a]	2017	2018	2019	2020F	Change: 2019 to 2020	
			$ Billion				$ Billion	%
Row Crops	**31.1%**	**59.1%**	**115.2**	**117.7**	**115.0**	**114.9**	**-0.2**	**-0.1%**
Corn	12.3%	23.4%	45.6	48.6	49.4	46.9	-2.5	-5.1%
Soybeans	10.4%	19.8%	38.5	37.0	34.2	36.8	2.6	7.5%
Wheat	2.3%	4.5%	8.7	9.5	8.7	8.6	-0.1	-1.0%
Cotton	2.0%	3.9%	7.6	7.5	7.2	6.6	-0.6	-7.8%
Hay	1.7%	3.3%	6.4	6.9	7.6	7.8	0.2	2.9%
Rice	0.7%	1.2%	2.4	2.5	2.8	2.7	0.0	-0.6%
Peanuts	0.4%	0.7%	1.4	1.5	1.1	1.2	0.2	14.4%
Other row crops[b]	1.2%	2.3%	4.6	4.1	4.2	4.3	0.1	2.5%
Specialty Crops	**21.5%**	**40.9%**	**79.7**	**77.4**	**78.7**	**85.3**	**6.6**	**8.4%**
Fruits and nuts	8.3%	15.7%	30.6	29.2	28.8	33.4	4.6	16.1%
Vegetables/Melons	5.5%	10.5%	20.5	18.5	18.9	19.6	0.7	3.7%
All other crops[c]	8.1%	15.4%	30.0	31.0	32.0	33.1	1.1	3.5%
Total Crops	**53%**	**100%**	**194.9**	**195.1**	**193.7**	**200.2**	**6.5**	**3.3%**
Livestock Products								
Cattle and calves	18.1%	38.1%	66.9	67.0	66.2	62.3	-4.0	-6.0%
Hogs	5.7%	12.0%	21.0	20.9	22.0	20.9	-1.1	-5.1%
All dairy	10.2%	21.6%	7.9	35.2	40.5	40.4	-0.1	-0.2%
Poultry and eggs	11.6%	24.4%	42.8	46.2	40.4	35.8	-4.6	-11.4%
Other livestock[d]	1.9%	3.9%	6.9	6.9	6.9	7.0	0.1	1.2%
Total Livestock	**47%**	**100%**	**175.6**	**176.3**	**176.0**	**166.3**	**-9.7**	**-5.5%**
GRAND TOTAL	**100%**	na	**370.4**	**371.4**	**369.7**	**366.5**	**-3.2**	**-0.9%**

Source: CRS using data from USDA, ERS, "Farm Business Income," December 2, 2020.

Notes: F = forecast.

a. Sub = Subcategory. There are two subcategories: "total crops" and "total livestock."

b. Other row crops include other feed grains, hay, and minor oilseeds.

c. All other crops include sugar beets, sugarcane, hops, mint, mushrooms, and other miscellaneous crops.

d. Other livestock includes aquaculture, sheep and lambs, honey, mohair, wool, pelts, and other miscellaneous animal products.

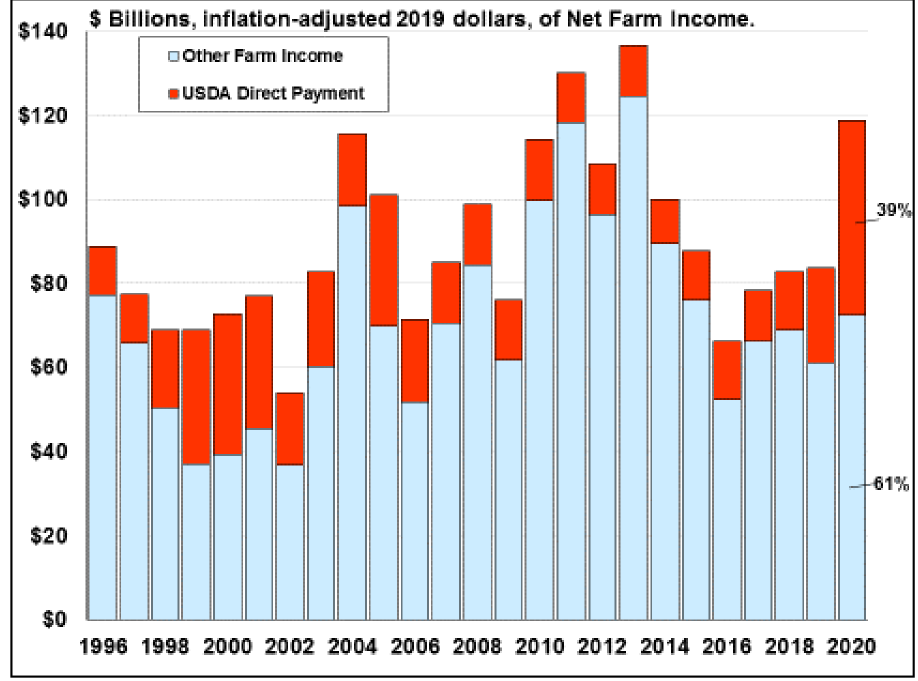
For row crops, cash receipts were forecasted to decline by 0.1%, with the bulk of the decline coming from sales of corn, cotton, and wheat (**Table 2**). USDAforecasts higher prices for corn, cotton, and wheat for the 2020-2021 marketing year (**Table A-2**); however, 2020 cash receipts also include sales for the 2019-2020 marketing year, which had relatively lower prices for these commodities. For specialty crops, cash receipts were forecasted to increase by 8.4%, the bulk of the increase coming from sales of fruits and nuts.

With respect to livestock production, cash receipts were forecasted to be lower for poultry and eggs (-11.4%), for cattle and calves (-6.0%), for hogs (-5.1%), and for dairy (-0.2%). These declines are driven by declines in market prices (**Table A-2**), as domestic production of beef, pork, broilers, and dairy were forecasted to increase in 2020 relative to 2019 levels (**Table 10**).

Government Payments

USDA projected government direct payments to U.S. farmers and landowners at a record $46.5 billion in 2020. If realized, the $46.5 billion would be the largest annual federal subsidy outlay to the agricultural sector on record in both nominal and inflation-adjusted dollars.[6] Furthermore, it accounted for 39% of net farm income (**Figure 2**)—the largest share since 2000, when government payments of $23.2 billion (nominal dollars) accounted for 46% of net farm income.[7]

Figure 2. Net Farm Income by Source, 1996-2020F



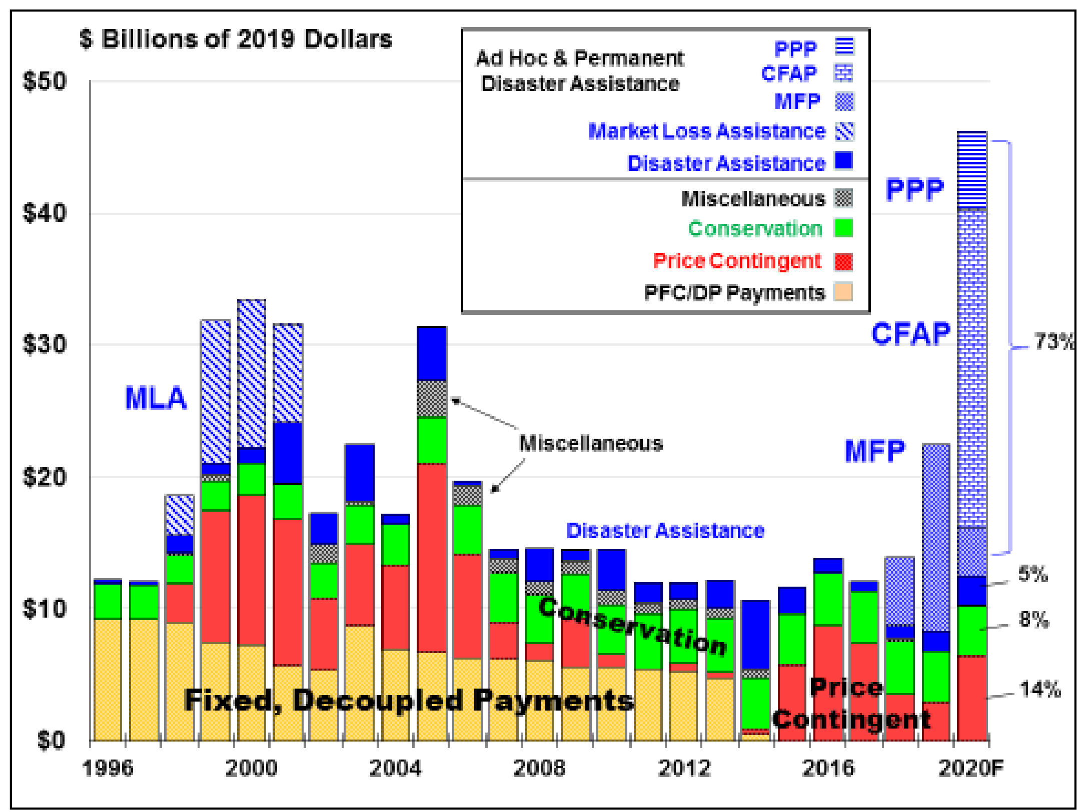
Source: CRS using data from USDA ERS, "2020 Farm Sector Income Forecast," December 2, 2020. Sources of net farm income, expressed as percentage shares (right-hand side), are for 2020. Values for 2020 are forecasts.

[6] Indirect subsidies, such as crop insurance premium subsidies, are not included in the $46.5 billion subsidy total.

[7] The government share of net farm income peaked at 65.2% in 1984 during the height of the farm crisis of the 1980s.

The record government farm assistance in 2020 included $12.6 billion from traditional farm programs authorized under the 2018 farm bill (P.L. 115-334)[8] and $33.9 billion from ad hoc programs—authorized outside of traditional farm omnibus legislation in response to the Coronavirus Disease 2019 (COVID-19) pandemic, as well as continuing support for trade-related market disruptions.[9] If realized, the federal subsidies of $46.5 billion would represent a 107.1% increase from 2019's $22.4 billion in government support and would easily surpass the previous record farm subsidy outlay of $24.4 billion (nominal dollars; $31.4 billion in 2019 dollars) in 2005 (**Table 1** and **Figure 3**).

Figure 3. U.S. Government Farm Support, Direct Outlays, 1996-2020F



Source: CRS using data from USDA ERS, "2020 Farm Sector Income Forecast," December 2, 2020. All values are adjusted for inflation using the chain-type GDP deflator, where 2019 = 100. Values for 2020 are forecasts. Government payments as percentage shares (right-hand side) are for 2020.

Notes: Data are on a calendar-year basis and reflect the timing of the actual payment. "Direct Payments" include production flexibility contract (PFC) payments enacted under the 1996 farm bill and fixed direct payments (DP) of the 2002 and 2008 farm bills. "Price-Contingent" outlays include loan deficiency payments, marketing loan gains, countercyclical payments (CCP), Average Crop Revenue Election (ACRE), Price Loss Coverage (PLC), Agriculture Risk Coverage (ARC), the dairy Margin Protection program (MPP), and Dairy Margin Coverage (DMC) payments. "Conservation" outlays include CRP payments along with other conservation program outlays. "Ad Hoc and Permanent Disaster Assistance" is divided into payments under the 2018 and 2019 Market Facilitation Programs (MFP), Paycheck Protection Program (PPP), both rounds of the Coronavirus Food Assistance Program (CFAP), Market Loss Assistance (MLA), and "Disaster Assistance" programs, each of which is identified with a different blue pattern. "Disaster Assistance" is an aggregate category

[8] CRS Report R45730, *Farm Commodity Provisions in the 2018 Farm Bill (P.L. 115-334)*.

[9] See CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*; CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*; CRS Report R46395, *USDA's Coronavirus Food Assistance Program: Round One (CFAP-1)*; and CRS Report R46645, *USDA's Coronavirus Food Assistance Program: Round Two (CFAP-2)*.

that includes supplemental crop and livestock disaster payments and other emergency payments to the agriculture sector, such as payment made under the Wildfire and Hurricane Indemnity Program (WHIP). "Miscellaneous" outlays include payments under the cotton ginning cost-share, biomass crop assistance, peanut quota buyout, milk income loss contract, tobacco transition, and other miscellaneous payment programs.

Traditional Farm Revenue-Support Programs

Historically, direct government farm program payments have included a mixture of support but have come primarily from programs authorized by omnibus farm legislation.[10] These programs have included the payments listed below.

- Direct payments (decoupled payments based on historical planted acres),[11] which were terminated by the 2014 farm bill (P.L. 113-79).
- Price-contingent payments (both coupled and decoupled program outlays linked to market conditions) include the benefits available under the Marketing Assistance Loan (MAL) program, the Agriculture Risk Coverage (ARC) and Price Loss Coverage (PLC) programs, and the Dairy Margin Coverage (DMC) program. Payments under price contingent programs were projected at $6.3 billion in 2020—including $5.0 billion for PLC, $1.1 billion for ARC, $184 million for DMC, and $169 million for MAL.[12]
- Conservation programs include all conservation programs operated by USDA's Farm Service Agency and the Natural Resources Conservation Service that provide direct payments to producers. Conservation payments were forecasted at $3.8 billion for 2020, unchanged from 2019.[13]
- Agricultural disaster assistance includes payments under the four permanent disaster assistance programs—the Livestock Indemnity Program (LIP), Livestock Forage Program (LFP), Tree Indemnity Program (TIP), and Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP)—as well as payments under emergency supplemental programs (described below).[14] Outlays under the four permanent disaster assistance programs were projected at $543 million in 2020.
- Other miscellaneous legislatively authorized payment programs include the biomass crop assistance program, peanut quota buyout, milk income loss, tobacco transition, and other miscellaneous programs. Miscellaneous program outlays were projected at $29 million in 2020.

[10] Government farm payments do not include premium subsidies or indemnities paid under the federal crop insurance program—indemnity payments are included as " farm-related income." Also, government payments do not include USDA loans, which are listed as a liability in the farm sector's balance sheet.

[11] *Decoupled* means that payments are not linked to current producer behavior and, instead, are based on some other measure outside of the producer's decisionmaking sphere, such as historical acres planted to program crops. Decoupling of payments is intended to minimize their influence on producer behavior.

[12] For details, see CRS Report R43448, *Farm Commodity Provisions in the 2014 Farm Bill (P.L. 113 -79)*; and CRS Report R46561, *U.S. Farm Policy: Revenue Support Program Outlays, 2014 -2020*.

[13] CRS Report R45698, *Agricultural Conservation in the 2018 Farm Bill*.

[14] Fiscal year payments generally involve outlay commitments incurred during the previous crop year. For example, FY2019 disaster assistance payments are primarily related to disasters for crops that were grown and harvested in 2018. For information on available farm disaster programs, see CRS Report RS21212, *Agricultural Disaster Assistance*.

Ad Hoc and Emergency Supplemental Payments

Since 2018, ad hoc programs initiated by the Trump Administration, outside of traditional farm-bill authorities, have played an increasingly important role in supporting farm incomes. [15] These include the Market Facilitation Program (MFP) payments to offset retaliatory tariff damages (2018-2020) and the Coronavirus Food Assistance Program (2020) in response to the COVID-19 pandemic.

In addition, Congress has frequently authorized emergency supplemental crop and livestock disaster payments—but outside of omnibus farm legislation—that have targeted the agricultural sector in response to natural disasters, such as the Wildfire and Hurricane Indemnity Program (WHIP). Most of the $2.2 billion in agricultural disaster and emergency payments projected for 2020 were expected to come from WHIP Plus, enacted through the Disaster Relief Act of 2019 (P.L. 116-20).[16]

The 2018 and 2019 MFPs—initiated by USDA using authority under the CCC Charter Act of 1938—represented USDA's attempt to provide "trade-damage" payments to U.S. producers in response to retaliatory tariffs by other countries, including China.[17] Payments under the two MFPs were expected to total $23.1 billion spread over 2018 to 2020.[18] On September 9, 2020, USDA announced a new MFP-like program—referred to as the Seafood Trade Relief Program (STRP)—valued at $530 million targeted U.S. seafood products that had been affected by retaliatory tariffs.[19] However, seafood is not included as part of ERS farm income forecasts. In addition, no further MFP payments have been announced for 2021 by either the Trump Administration or the current Biden Administration.

The surge in federal subsidies in 2020 was driven by large ad hoc payments made under three Trump Administration-initiated programs: $3.7 billion in remaining payments under the 2019 MFP, $5.9 billion from the Paycheck Protection Program (PPP), and $24.3 billion from two rounds of payments under the Coronavirus Food Assistance Program (CFAP1 and CFAP2). The PPP and CFAP programs were designed to address COVID-19-related damages that occurred during 2020.

With respect to CFAP, USDA allocated $16 billion in funding for the first round (CFAP1) and up to an additional $14 billion for the second round (CFAP2).[20] As of December 28, 2020, $10.5 billion of CFAP1 and $13.0 billion of CFAP2 funding had been dispersed.

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[15] Previous historically important ad hoc programs have included the Market Loss Assistance (MLA) payments for relief of low commodity prices (1998-2001) and the Cotton Ginning Cost-Share program (2016 and 2018).

[16] CRS In Focus IF11539, *Wildfires and Hurricanes Indemnity Program (WHIP)*.

[17] USDA initiated the two trade aid packages with up to $28 billion of financial support designed to partially offset the negative price and income effects of lost commodity sales to major markets. The 2018 trade aid package was valued at up to $12 billion (see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*), and the 2019 trade aid package was valued at up to $16 billion (see CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*).

[18] The projected $8.6 billion in 2018 Market Facilitation Program (MFP) payments include $5.1 billion in 2018 and $3.5 billion in 2019. T he projected $14.5 billion in 2019 MFP payments were expected to occur as $10.8 billion in 2019 and $3.7 billion in 2020.

[19] USDA, " USDA Supports U.S. Seafood Industry Impacted by Retaliatory Tariffs," press release, September 9, 2020, at https://www.usda.gov/media/press-releases/2020/09/09/usda-supports-us-seafood-industry-impacted-retaliatory-tariffs.

[20] For details, see CRS Report R46395, *USDA's Coronavirus Food Assistance Program: Round One (CFAP-1)*; and CRS Report R46645, *USDA's Coronavirus Food Assistance Program: Round Two (CFAP-2)*.

Additionally, farmers are projected to receive additional income for COVID-19-related damages from the Small Business Administration's (SBA's) PPP, authorized under the CARES Act (P.L. 116-136). USDA expected that $5.9 billion of $7.3 billion of PPP loans to agriculture-related enterprises would be forgiven and counted as farm income in 2020.[21] The December 2020 COVID-19 relief package—contained as Division N within the omnibus Consolidated Appropriations Act, 2021 (P.L. 116-260)—includes new funding for a third round of CFAP ($11.2 billion) and for a second round of PPP support ($284 million).[22]

Income from Other On-Farm Activities

Income from other on-farm activities includes crop insurance indemnities, custom work, machine hire, agritourism, and other farm sources of income (**Table 3**). Net farm income also includes an imputed measure of the rental value of farm dwellings, which is not included in net cash farm income.

Income from other on-farm activities was forecasted to increase by $0.5 billion or 1% in 2020 as compared with 2019. The bulk of the increase is due to forecast increases in the imputed rental value of farm dwellings, which were forecasted to increase by $1.1 billion. Indemnities from federal crop insurance were forecasted to decline by $0.4 billion; however, the declines in indemnities from federal crop insurance were forecasted to be more than offset by gains in indemnities from nonfederal crop insurance policies.

Table 3. Income from Other On-Farm Activities

Farm-related Income	2017	2018	2019	2020F	Change: 2019 to 2020	
	$ Billion				$ Billion	%
Forest products sold	0.7	0.7	0.6	0.6	0.0	1%
Gross imputed rental value of farm dwellings	17.9	18.7	17.9	19.0	1.1	6%
Machine hire and custom work	4.6	3.9	4.1	4.0	-0.1	-3%
Federal commodity insurance indemnities	5.2	6.2	10.2	9.8	-0.4	-4%
Non-federal commodity insurance indemnities	1.9	1.4	2.1	2.6	0.5	25%
Net cash rent received by operator landlords[a]	2.3	2.1	2.3	2.3	0.0	2%
Other farm income[b]	16.4	14.8	15.4	14.7	-0.7	-4%
Total	**49.1**	**47.8**	**52.6**	**53.1**	**0.5**	**1%**

Source: CRS using data from USDA, ERS, "Farm Business Income," as of December 2, 2020.

Notes: The total from this table equals the summation of rows #3 and #8 from **Table 1** adjusted for double counting (e.g., the imputed value of home consumption of farm products counted in cash receipts).

a. Net cash rent received by operator landlords excludes income from land rented under crop -share agreements. Income from land rented under crop-share agreements is included in income from cash receipts (**Table 2**).

b. Income from agritourism, recreational activities, and other farm sources.

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[21] For information on the Paycheck Protection Program (PPP) loan forgiveness, see CRS Report R46397, *SBA Paycheck Protection Program (PPP) Loan Forgiveness: In Brief*.

[22] John Newton, " What's in the New COVID-19 Relief Package for Agriculture?," *Market Intel*, American Farm Bureau Federation, December 22, 2020; and Jacqui Fatka, " PPP changes in COVID Relief Bill Offer More Aid for Farmers," *Feedstuffs*, December 31, 2020.

Farm Sector Expenses

Overall, cash expenses for production of farm commodities were forecasted at $313 billion in 2020, down $4.5 billion or 1% from 2019 (**Table 4**). Expenses for livestock and poultry purchases (-7%), interest payments (-25%), and fuel and oil (-14%) were projected to decline. These declines were partially offset by increases in expenses for labor (+2%), property taxes and fees (+8%), fertilizer and lime (+5%), and net rent to landlords (+6%).

Projected reductions in expenditure for interest payments, livestock and poultry purchases, and fuel and oil purchases partially reflect reductions in the prices of these items from 2019 to 2020. For example, average interest rates for interest-bearing debt held by the U.S. Treasury declined from 2.4% in December 2019 to 1.7% in November 2020, reflecting the lower interest rate environment generally.[23] Prices for crude oil, gasoline, diesel, and heating oil declined from 2019 to 2020, reflecting the impact of COVID-19-related declines in global demand for these commodities.[24] Price declines for livestock and poultry in 2020 (**Table A-2**) also link to declines in prices for breeding stock as a result of COVID-19-related disruptions in normal operations of meatpacking and livestock processers.

Table 4. U.S. Farm Sector Cash Expenses

Expenses	2017	2018	2019	2020F	Change: 2019 to 2020F	
	$ Billion				$ Billion	%
Feed purchased	54.5	53.8	59.4	59.7	0.2	0%
Labor	35.8	33.8	34.7	35.3	0.6	2%
Livestock and poultry purchases	27.4	29.2	28.7	26.7	-1.9	-7%
Fertilizer and lime	22.0	23.2	22.3	23.5	1.1	5%
Seed	22.5	21.9	21.2	21.3	0.0	0%
Net rent to landlords	19.3	16.8	18.1	19.1	1.0	6%
Pesticides	15.8	15.4	15.5	15.5	0.0	0%
Interest	17.5	19.4	19.7	14.7	-5.0	-25%
Property taxes and fees	12.7	12.7	13.3	14.3	1.0	8%
Fuel and oil	12.8	13.2	13.2	11.3	-1.9	-14%
Electricity	5.8	6.1	5.7	5.8	0.0	0%
Other expenses[a]	65.8	65.8	65.5	65.8	0.3	0%
Total	**311.9**	**311.4**	**317.5**	**313.0**	**-4.5**	**-1%**

Source: CRS using data from USDA, ERS, "Farm Income and Wealth Statistics: Net Cash Income," as of December 2, 2020.

Notes:

a. Other expenses exclude maintenance for operator dwellings and landlord capital consumption.

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[23] U.S. Department of theTreasury, TreasuryDirect, " Average Interest Rates on U.S. Treasury Securities," at https://www.treasurydirect.gov/govt/rates/avg/avg.htm.

[24] U.S. Energy Information Administration, *Short Term Energy Outlook*, December 8, 2020, at https://www.eia.gov/outlooks/steo/report/prices.php.

USDA does not forecast the extent to which these production expenses vary by farm typology, commodity specialization, or region.[25] For example, most farms benefit from lower fuel and oil prices; however, only operations that purchase livestock and poultry benefit from declines in the prices of these commodities.[26]

Similarly, many farm operations may hold farm debt and therefore benefit from lower interest payments on that debt. The median household debt holdings for residential, intermediate, and commercial farms in 2019 were $90,025, $84,697, and $496,275, respectively.[27] If this pattern were maintained for 2020, then commercial farms likely received the largest share of benefits from lower interest payments on debt holdings.

Farm Finances: Assets, Debt, and Equity

Farm asset values and debt levels were projected to reach record levels in 2020—asset values at $3.1 trillion (+1.5% year-over-year) and farm debt at $435.2 billion (+4.0%)—pushing the projected debt-to-asset ratio up to 13.9%, the highest level since 2002 (**Table 5**).

Table 5. Balance Sheet of the U.S. Farming Sector

		2017	2018	2019	2020F	2019 to 2020F	
Category	**Share %**		**$Billions**			**Change $Billions**	**Change %**
Assets	**100.0%**	**3,005.9**	**3,026.7**	**3,075.2**	**3,120.6**	**45.5**	**1.5%**
Real estate	82.1%	2,472.8	2,510.2	2,546.0	2,569.4	23.4	0.9%
Machinery/vehicles	8.8%	272.3	271.0	279.0	287.3	8.4	3.0%
Financial assets	2.9%	81.1	72.6	87.5	108.9	21.4	24.5%
Animals and products	3.7%	107.1	97.1	99.2	92.6	-6.6	-6.6%
Crop inventory	1.9%	56.8	59.7	49.6	48.6	-1.0	-2.1%
Purchased inputs	0.6%	15.8	16.1	13.9	13.8	-0.1	-0.7%
Debt	**100.0%**	**390.4**	**402.0**	**418.6**	**435.2**	**16.6**	**4.0%**
Real estate	60.2%	236.2	245.7	266.8	283.0	16.2	6.1%
Non-real estate	39.8%	154.2	156.3	151.8	152.1	0.4	0.2%
Equity	**100.0%**	**2,615.5**	**2,624.7**	**2,656.6**	**2,685.4**	**28.9**	**1.1%**
Debt-to-asset ratio		**13.0%**	**13.3%**	**13.6%**	**13.9%**	0.3%	2.4%
Debt-to-equity ratio		**14.9%**	**15.3%**	**15.8%**	**16.2%**	0.4%	2.8%

Source: CRS using data from USDA, ERS, "Assets, Debt, and Wealth," as of December 2, 2020.

Notes: Data for 2020 are USDA forecasts.

[25] Robert A. Hoppe and James M. MacDonald, *Updating the ERS Farm Typology*, USDA, ERS, EIB-110, April 2013.

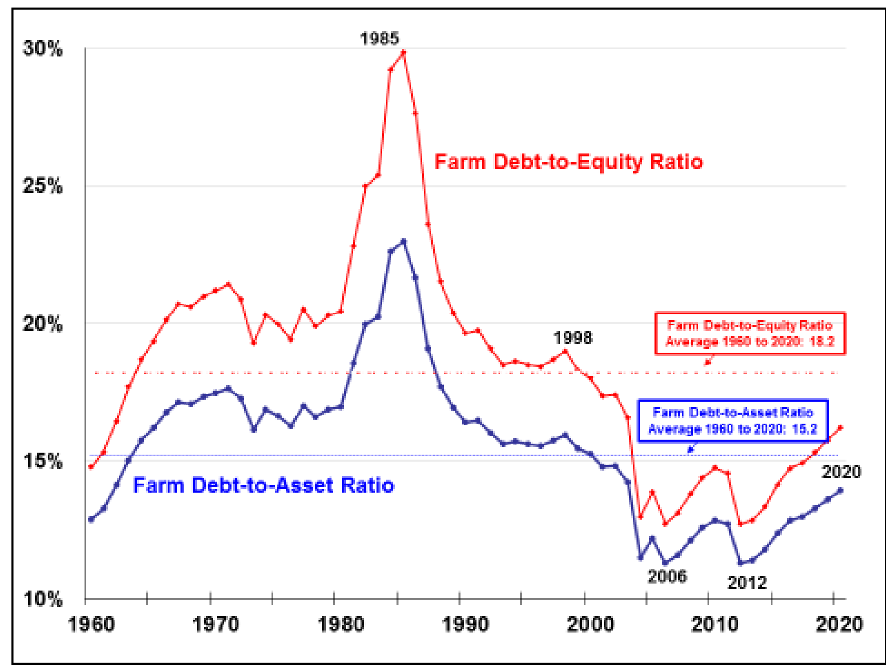
[26] See "Farm Business Income by Location, Commodity Specialization" for a discussion of farm businesses by specialization.

[27] See "Farm Type Varies by Gross Sales and On-Farm Share of Income" for definitions of residential, intermediate, and commercial farm businesses. Household debt statistics are from USDA, ERS, " Farm Household Income and Characteristics," *Principal farm operator household finances by ERS farm typology, 2019*, December 2, 2020, at https://www.ers.usda.gov/webdocs/DataFiles/48870/table02.xlsx?v=7167.6.

The values of financial assets (+24.5%), machinery and vehicles (+3.0%), and real estate (+0.9%) were forecasted to increase from 2019 to 2020, while the values of animals and products (-6.6%), crop inventories (-2.1%), and purchased inputs (-0.7%) were forecasted to decline in 2020. Increases in values for real estate and machinery and vehicles may reflect increasing prices, increasing inventories held, or both.[28] The values of inventories of crops and livestock declined in part because farmers were holding less inventory for a number of commodities relative to previous years (see, for example, **Figure 7** for corn, soybeans, wheat, and cotton).

Debt held by the U.S. agricultural sector also was forecasted to increase in 2020 to $435.2 billion (up 4%), both for real estate (+6.2%) and non-real estate (+0.9%) loans. These increases likely reflect the lower cost of holding debt—historically low interest rates have reduced the cost of holding more debt.[29] Increases in farm asset values were forecasted to more than offset increases in farm debt, leading to a year-on-year increase in farm equity of 1.1%. The debt-to-asset and debt-to-equity ratios both were forecasted to increase in 2020 (the eighth consecutive year of increase in both ratios); however, both ratios are still low relative to their long-term historical averages (**Figure 4**).

Figure 4. Farm Sector Debt-to-Asset and Debt-to-Equity Ratios, 1960-2020



Source: CRS using data from ERS, "2020 Farm Sector Income Forecast," December 2, 2020. 2020 values are forecasts.

Notes: Both the farm debt-to-asset and debt-to-equity ratios peaked in the 1980s during the farm loan crisis.

[28] For example, in the Corn Belt, land prices and farm equipment holdings increased in 2020 relative to 2019. David Oppendahl, *AgLetter: November 2020*, Federal Reserve Bank of Chicago, AgLetter no. 1990, November 2020, at https://www.chicagofed.org/publications/agletter/2020-2024/november-2020.

[29] For example, Corn Belt average loan rates from commercial agricultural lenders for operating loans, feeder cattle, and real estate declined by 1.06 percentage points, 0.98 percentage points, and 0.64 percentage points for July, August, and September 2020, respectively, as compared with the same period in 2019. Oppendahl, *AgLetter: November 2020*.

Annual bankruptcy filings declined for farmers and fishermen between September 30, 2019, and September 30, 2020; however, the rate of the decline was smaller than for all bankruptcy filings overall (**Table 6**).

Loan delinquency rates at commercial banks remained below the long-run average for 2010-2020 for real-estate loans and less than 1% above the long-run average for 2010-2020 for non-real-estate loans.[30] Delinquency rates for the Farm Credit System institutions declined on a year-over-year basis from 0.30% in September 2019 to 0.28% in September 2020.[31]

Although individual farms may be experiencing elevated levels of farm financial stress, the evidence from farm bankruptcy filings and loan delinquencies suggests that the total number of individual farms experiencing financial stress may be on par with recent historical levels.

Table 6. Bankruptcy Rates for Selected Businesses, 2019-2020

Bankruptcy Type	12-months ending September 30, 2019	12-months ending September 30, 2020	% Change
All Chapters	776,674	612,561	-21.1%
Chapter 12 (for farmers and fishermen)	580	571	-1.6%

Source: CRS using data from United States Courts, "Statistics & Reports," *Table F-2 Bankruptcy Filings for September 30, 2019, and September 30, 2020*, at https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2020/09/30.

Average Farm Household Income

Farm households may earn income from their farm businesses as well as from off-farm sources—for example, if members of the household work off-farm jobs or the farm's asset portfolio includes financial assets that have increased in value during the year.

- Average farm household income was forecasted at $132,558 in 2020, up 7.4% from 2019, with increases in on-farm income (+54.0%) offsetting decreases on off-farm income (-2.5%) (**Table 7**).
- About 25% ($33,460) of total farm household income in 2020 was projected to be from farm production activities (including government payments), while the overwhelming majority, 75% ($99,098), was earned off the farm.

Lower off-farm income for farm households in 2020 may be an indicator of lower incomes for rural populations more generally during the COVID-19 pandemic, as farm households and other rural households generally participate in the same labor market. However, counties where employment is concentrated in farming may have experienced lower unemployment rates than counties where employment is concentrated in other sectors of the economy (e.g., mining, manufacturing, recreation).[32] This suggests that the decline in off-farm income forecast for farm households may be less than the decline in incomes for rural households in general.

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[30] CRS calculations using data from the Federal Reserve Bank of Kansas City, *Commercial Bank Call Report Data*, December 4, 2020, at https://www.kansascityfed.org/~/media/files/publicat/research/indicatorsdata/agfinance/call_report_data_historical_data_q3_2020.xlsx.

[31] Hal Johnson, *Farm Credit System Condition and Performance as of September 30, 2020*, Farm Credit Administration, Office of Examination, at https://www.fca.gov/template-fca/about/2020DecQuarterlyReportonFCSCondition.pdf.

[32] John Cromartie et al., *Rural America at a Glance: 2020 Edition*, USDA ERS, EIB-221, at https://www.ers.usda.gov/publications/pub-details/?pubid=100088.

Table 7. Average Annual Income per U.S. Household, Farm Versus All, 2015-2020

($ per household)

	2015	2016	2017	2018	2019	2020	Change 2019-2020
Average U.S. farm income by source (nominal dollars)							
On-farm income	24,740	24,731	21,842	18,425	21,730	33,460	54.0%
Off-farm income	95,140	93,187	89,747	93,786	101,638	99,098	-2.5%
Total farm income	119,880	117,918	111,589	112,210	123,368	132,558	7.4%
Average U.S. farm income by source (share as a %)							
On-farm income	21%	21%	20%	16%	18%	25%	54.0%
Off-farm income	79%	79%	80%	84%	82%	75%	-2.5%
Total farm income	100%	100%	100%	100%	100%	100%	7.4%
Avg. U.S. HH income	79,263	83,143	86,220	90,021	98,088	NA	NA
Farm household income as a share of U.S. average household income							
Share (%)	**151%**	**142%**	**129%**	**125%**	**126%**	**NA**	**NA**

Source: CRS using data from ERS, "Farm Household Income and Characteristics," *Principal farm operator household finances*, data set updated as of December 2, 2020.

Notes: HH = household; NA = not available. Data for 2020 are USDA forecasts.

USDA does not forecast average annual income by farm typology.[33] However, in 2019, off-farm income accounted for more than 90% of average farm household income for residential and intermediate farms and more than 20% of average farm household income for commercial farms.[34] If this pattern was maintained for 2020, then average farm household income more likely increased year-over-year for the largest farm business category—commercial farms—than for smaller residential and intermediate farms.

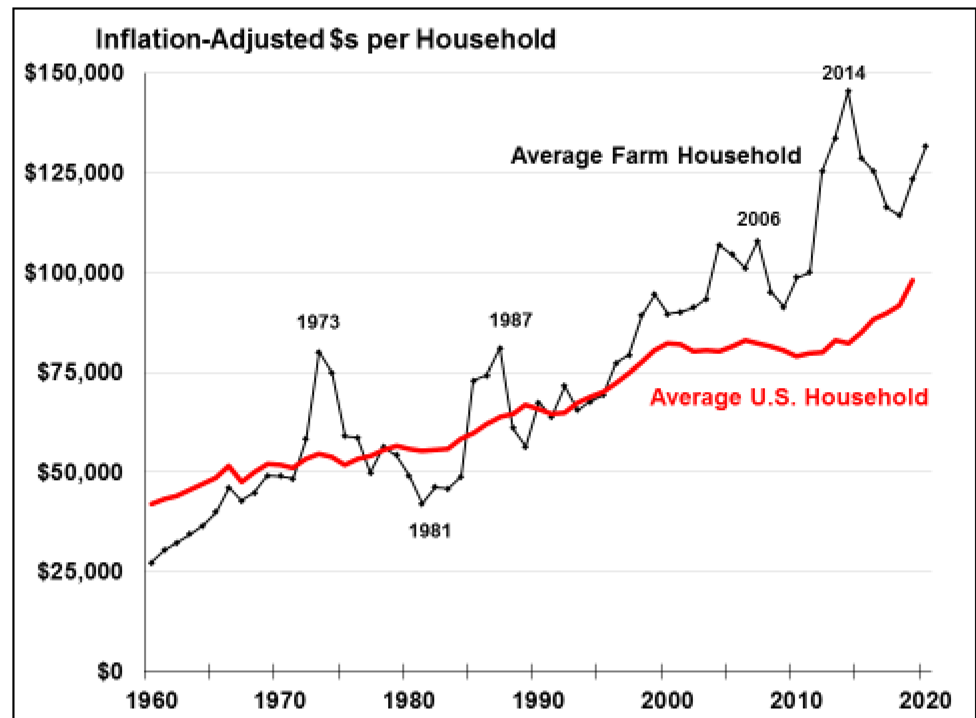
U.S. Total vs. Farm Household Average Income

Since the late 1990s, farm household incomes have surged ahead of average U.S. household incomes (**Figure 5**). In 2019 (the last year for which comparable data were available), the average farm household income of $123,368 was about 26% higher than the average U.S. household income of $98,088 (**Table 7**).

[33] See "Farm Income by Farm Type, Specialization, Region."

[34] See "Farm Type Varies by Gross Sales and On-Farm Share of Income" for definitions of residential, intermediate, and commercial farm businesses. On- and off-farm income statistics are from USDA, ERS and National Agricultural Statistics Service (NASS), *Principal farm operator household finances, by farm type, 2019* , Agricultural Resource Management Survey, data as of December 2, 2020.

Figure 5. Average Farm Household Compared with Average U.S. Household Income



Source: ERS, "2020 Farm Sector Income Forecast," December 2, 2020. All values are adjusted for inflation using the chain-type GDP deflator, 2019 = 100; BEA. Values for 2020 are forecasts.

Farm Income by Farm Type, Specialization, Region

The U.S. farm sector is vast and varied. It supplies a wide array of markets for food, animal feed, fuel, fibers, and forestry products in the United States and abroad. It encompasses production activities relating to traditional field crops (such as corn, soybeans, wheat, and cotton) and livestock and poultry products (including meat, dairy, and eggs), as well as fruits, tree nuts, and vegetables. In addition, U.S. agricultural output includes greenhouse and nursery products, forest products, custom work,[35] and other farm-related activities. The intensity and economic importance of each of these activities, as well as their underlying market structure and production processes, vary regionally based on the agroclimatic setting, market conditions, and other factors. As a result, farm income and rural economic conditions may vary substantially across the United States.

As seen in the previous section, measures of farm household income, which include income earned on and off of the farm, provide a view into the welfare of farm households and the rural economy. In contrast, measures of farm business income provide a view into the profitability of crop and livestock production.[36] Both types of metrics may be useful to policymakers in understanding the extent of COVID-19-related impacts on the farm sector and on the aggregate supply of food, feed, fuel, fibers, and forestry products for U.S. and international markets.

[35] Custom work involves performing machine operations for another landowner in exchange for a set fee or rate.

[36] ERS forecasts farm business income and farm household income.

Farm Type Varies by Gross Sales and On-Farm Share of Income

Net farm income and net cash farm income are measures of profitability of the sector overall. However, the profitability of any individual farm can depend on the type of farm business and scale of production of the operation. Additionally, some farms may derive limited income from their farm operations because their operators work primarily in off-farm activities.

USDA reports average net cash farm income (NCFI) for all U.S. farms as well as for specific categories of farms based on farm ownership, gross value of sales, and farm typology (**Table 8**).

- **Farm Ownership.** USDA distinguishes between family farms—operations where the majority of the business is owned by an operator and individuals related to the operator—and nonfamily farms where an operator and persons related to the operator do not own a majority of the business. Family farms account for more than 97% of all U.S. farms.
- **Gross Value of Sales.** USDAclassifies farm operations into five categories based on gross sales value. The largest category consists of the more than 80% of U.S. farms earning less than $100,000 in gross sales.
- **Farm Typology.** USDA classifies farms into three types based on the farm operator's primary occupation and the farm's gross cash income—residence farms, intermediate farm businesses, and commercial farm businesses.
  - **Residence farms**—farms operated by those whose primary occupation is something other than farming and where the operation reports gross cash farm income of under $350,000.
  - **Intermediate farm businesses**—farming is the operator's primary occupation; the operation reports gross cash farm income of under $350,000.
  - **Commercial farm businesses**—the farming operation reports gross cash farm income of over $350,000.

USDA's Agricultural Resource Management Survey (ARMS) data for 2019 indicate that approximately 10% of U.S. farms are commercial farm businesses, 38% are intermediate farm businesses, and the remaining 52% are residence farms (**Table 8**).[37] According to ERS, farm businesses account for fewer than half of U.S. farms but contribute more than 90% of the farm sector's value of production and hold most of its assets and debt.[38]

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[37] For more information on the Agricultural Resource Management Survey (ARMS) survey, see USDA, NASS, "ARMS," at https://www.nass.usda.gov/Surveys/Guide_to_NASS_ Surveys/Ag_Reso urce_Management/.

[38] USDA, ERS, " Farm Sector Income and Finances: Farm Business Income," as of December 2, 2020, at https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-business-income/.

Table 8. Average Net Cash Farm Income for All Farms by Sales Class and Typology

	All Farms[a]	2017	2018	2019	2020F	2019 to 2020F	
Farm Characteristics	Share %	$1,000 per farm				Change $1,000	Change %
All farms	100.0%	39.0	35.5	38.0	51.8	13.8	36.3%
Family farms	97.6%	35.2	31.9	32.6	45.2	12.6	38.7%
Farms by gross sales value							
$1,000,000 or more	3.9%	657.7	624.2	677.5	858.4	180.9	26.7%
$500,000 - 999,999	3.5%	183.1	196.9	174.5	239.7	65.2	37.4%
$250,000 - 499,999	4.4%	92.6	94.3	98.5	132.8	34.3	34.8%
$100,000 - 249,999	6.5%	47.3	35.9	40.4	58.5	18.1	44.8%
Less than $100,000	81.8%	-0.3	-2.4	-1.5	0.8	2.3	153.3%
Farm typology							
Farm businesses[b]	47.9%	81.6	76.8	78.8	104.5	25.7	32.6%
Commercial farms[c]	10.4%	333.5	325.9	336.9	435.8	98.9	29.4%
Intermediate farms[d]	37.6%	9.8	6.9	7.5	13.0	5.5	73.3%
Residence farms[e]	52.1%	0.3	-1.2	0.5	3.4	2.9	580.0%

Source: USDA, ERS, "Farm Business Income," as of December 2, 2020.

Notes: F = forecast. Net cash farm income does not include off-farm income. The category "All farms" encompasses family farms (97.6% of total farms) and nonfamily farms (2.4% of total farms, not displayed on the table). The total shares of all farms by gross sales value sum to 100%. The category "Farm Typology" encompasses farm businesses (47.9% of total farms) and resident farms (52.1% of total farms). Farm businesses can be subdivided into commercial farms (10.4% of all farms) and intermediate farms (37.6% of all farms). The average net cash income for all farms will be approximately equal to the weighted sum of average net cash income for farm businesses and residence farms, with differences possible due to rounding errors.

a. USDA estimated 2,015,068 farms in the United States in 2019, including 1,967,617 (97.6%) family farms.
b. Farm businesses are farms that have annual gross cash farm income of at least $350,000 or smaller operations in terms of gross sales but where farming is reported as the operator's primary occupation.
c. Commercial farm business operations are farms with gross cash farm income of over $350,000.
d. Intermediate farm business operations are farms with gross cash farm income < $350,000 but where farming is reported as the operator's primary occupation.
e. Residence farms are small farms (with annual gross cash farm income less than $350,000) operated by those whose primary occupation is something other than farming.

For U.S. farms overall, average NCFI was forecasted to increase 36.3% in 2020 to $51,800 per farm from $38,000 in 2019. Average NCFI was also forecasted to increase for every category of farm (i.e., gross sales value and typology), with the largest increase in dollar terms reported for the largest-scale operations.

- Average NCFI for farms with gross sales value of $1,000,000 or more was forecasted to increase by $180,900 from 2019 to 2020 (in nominal dollars), or an increase of 26.7%, while farms with smaller gross sales were forecasted to have smaller year-over-year increases in average nominal NCFI but with larger percentage changes.

- Similarly, commercial farm business were forecasted to have greater absolute increases in average NCFI from 2019 to 2020 than either intermediate farm businesses or residence farms.
- Although the largest operations (commercial farms) were forecasted to have the largest year-over-year increase in average NCFI in nominal dollars (+$98,900), smaller farm operations (intermediate and residence farms) were forecasted to have larger increases in percentage terms.

USDA analyses of farms in 2016 and 2017 indicated that beginning farmers, limited resource farm households, and socially disadvantaged farmers tended to operate smaller farms and, as a result, earned less income from on-farm activities compared with farms that were not operated by beginning, limited resource, or socially disadvantaged farmers.[39] If this pattern was maintained in 2020, it suggests that farms operated by beginning, limited resource, or socially disadvantaged farmers likely received a smaller year-over-year increase in farm income compared with farms whose operators did not fall into any of those categories.

Farm Business Income by Location, Commodity Specialization

In addition to forecasting average NFCI for farms based on gross farm sales, USDAforecasts average NFCI for farm businesses by region and by commodity specialization. USDA's regions divide the continental United States into areas that contain similar types of farms and similar physiographic, soil, and climate traits (**Figure 6**).[40] USDAdetermines commodity specialization for farm businesses where at least 50% of the value of production derives from a particular commodity. However, farm businesses often produce multiple commodities, so average NFCI statistics should not be interpreted as resulting solely from the production and sale of the commodity highlighted as the commodity specialization.

USDA forecasted average NFCI to increase for farm businesses in all regions of the United States in 2020 (**Table 9** and **Figure 6**). The three regions forecasted to gain the most from 2019 to 2020 in dollar terms were the Fruitful Rim, Northern Great Plains, and Mississippi Portal, which also were forecasted to be the regions with the highest average NFCI for farm businesses. The three regions forecasted to gain the most from 2019 to 2020 in percentage terms were the Mississippi Portal (+42.8%), the Northern Great Plains (+41.7%), and the Basin and Range (+40.9%).

USDA forecasted average NFCI to increase from 2019 to 2020 for farm businesses that specialize in wheat, corn, soybeans, cotton, specialty crops, and certain other commodity crops (**Table 9**). The three commodity specializations with the largest increases in dollar terms were cotton, specialty crops, and wheat. The three commodity specializations with the largest increases in percent terms were wheat, cotton, and soybeans. USDAalso forecasted average NFCI to increase from 2019 to 2020 for farm business that specialize in most types of livestock production—poultry being the exception (**Table 9**). The livestock specializations with the largest increases in

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[39] According to USDA ERS, *beginning farmers* are defined as farmers who have materially and substantially participated in the operation of any farm or ranch for 10 years or less. *Limited-resource farm households* are defined as households with low farm sales and low household incomes for two years. *Socially disadvantaged farmers* are defined as operators who belong to a group whose members have been subject to racial, ethnic, or gender prejudice because of their identity as members of the group without regard to their individual qualities. See USDA, ERS, " Beginning, Limited Resource, Socially Disadvantaged, and Female Farmers," at https://www.ers.usda.gov/topics/farm-economy/beginning-limited-resource-socially-disadvantaged-and-female-farmers/.

[40] For a description of the ERS resource regions, see ERS, *Farm Resource Regions*, Agricultural Information Bulletin no. 760, September 2000.

dollar terms were dairy and hogs, and the largest increases in percentage terms were other livestock and cattle and calves.

Table 9. Average Net Cash Income for Farm Businesses by Region and Commodity

	All Farms	2017	2018	2019	2020F	2019 to 2020F	
Farm Characteristics	Share %	$1,000 per farm				Change $1,000	Change %
Farm Businesses	47.9%	81.6	76.8	78.8	104.5	25.7	32.6%
Resource region[a]							
Heartland	10.8%	109.8	110.8	102.5	130.5	28.0	27.3%
Northern Crescent	6.8%	66.3	62.4	59.2	79.0	19.8	33.4%
Northern Great Plains	2.5%	109.5	101.0	113.4	160.7	47.3	41.7%
Prairie Gateway	6.6%	68.9	63.7	76.7	101.9	25.2	32.9%
Eastern Uplands	5.9%	13.6	13.8	32.6	39.5	6.9	21.2%
Southern Seaboard	5.5%	47.9	30.5	36.3	49.0	12.7	35.0%
Fruitful Rim	5.4%	165.0	149.9	149.9	202.5	52.6	35.1%
Basin and Range	2.8%	52.2	71.8	39.6	55.8	16.2	40.9%
Mississippi Portal	1.6%	97.3	88.1	103.4	147.7	44.3	42.8%
Commodity Specialization: Crops							
Wheat	0.5%	82.3	102.3	107.3	160.5	53.2	49.6%
Corn	5.1%	139.1	171.8	143.3	190.9	47.6	33.2%
Soybeans	2.1%	98.8	76.4	77.6	110.5	32.9	42.4%
Cotton	0.3%	259.4	190.2	252.3	366.8	114.5	45.2%
Specialty crops[b]	4.3%	222.6	189.1	196.4	262.2	65.8	33.5%
Other crops[c]	11.4%	67.1	65.2	56.8	80.4	23.6	41.5%
Commodity Specialization: Livestock							
Cattle and calves	16.3%	23.1	23.0	19.6	27.9	8.3	42.3%
Hogs	0.5%	288.6	249.0	341.6	386.7	45.1	13.2%
Poultry	1.8%	96.2	105.5	141.6	139.1	-2.5	-1.8%
Dairy	1.8%	269.3	215.8	260.6	333.3	72.7	27.9%
Other livestock[d]	3.9%	12.8	5.7	12.2	17.8	5.6	45.9%

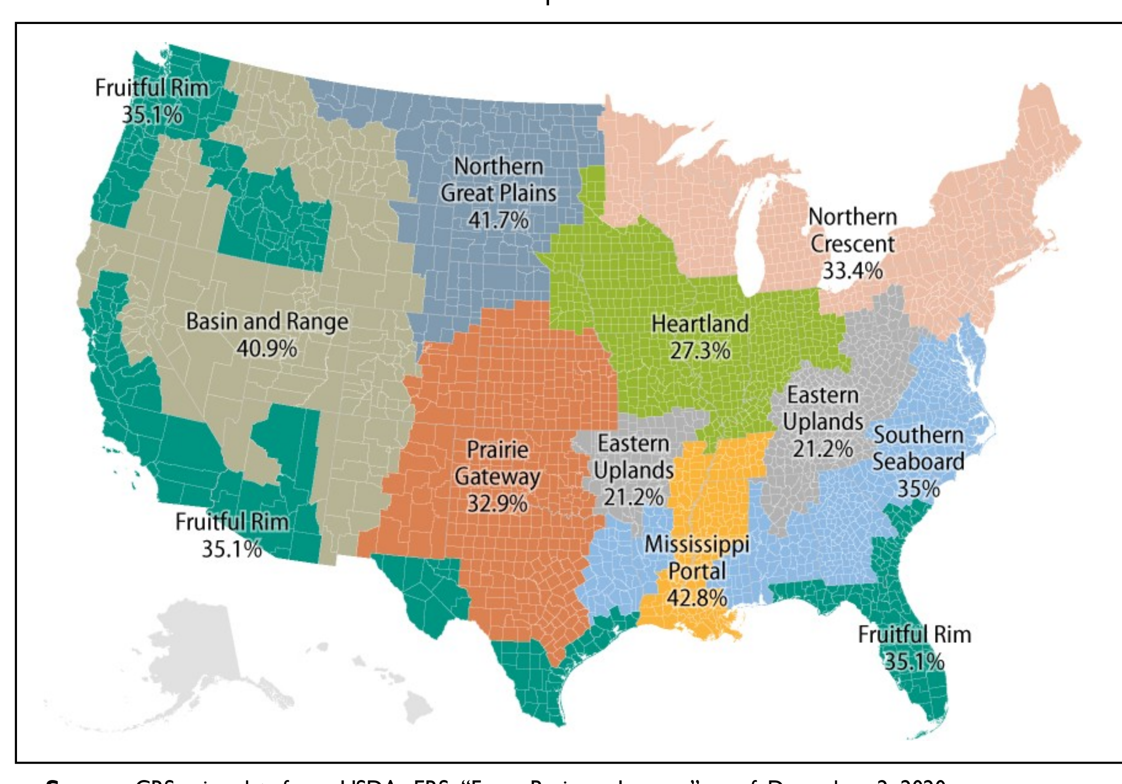
Source: CRS using data from USDA, ERS, "Farm Business Income," as of December 2, 2020.

Notes: F = forecast. Commodity specialization is determined by a farm business having at least 50% of the value of production from a particular commodity. Farm businesses often produce multiple commodities, so average net cash farm income statistics should not be interpreted as resulting solely from the production and sale of the commodity highlighted as the commodity specialization.

a. For a description of the ERS resource regions, see **Figure 6** and accompanying notes.
b. Specialty crops include fruits and tree nuts, vegetables, and nursery and greenhouse products.
c. All remaining crops not listed, including feed grains (sorghum, barley, and oats), peanuts, sunflower, minor oilseeds, rice, pulse crops, tobacco, sugar, and other miscellaneous crops.
d. All other livestock not listed, including eggs, aquaculture, sheep and lambs, honey, mohair, wool pelts, and other miscellaneous animal products.

Figure 6. Farm Business Average Net Cash Farm Income by Resource Region

2020F compared with 2019



Source: CRS using data from USDA, ERS, "Farm Business Income," as of December 2, 2020.

Notes: F = forecast. For a description of the ERS resource regions, see USDA ERS, *Farm Resource Regions*, Agriculture Information Bulletin no. 760, September 2000.

Sources of Revenue for Commercial and Residential Farms

Individual farms vary widely in the share of revenue they derive from each of the three potential sources—cash receipts, government payments, and other farm income sources. USDAdoes not forecast the extent to which these sources vary by farm typology, commodity specialization, or region.

Because farm programs provide benefits for specific commodities and producers, the importance of government payments as a percentage of net farm income varies by crop and livestock sector specialization and by region. For example, the USDA direct payment programs CFAP1 and CFAP2 were forecasted to make a large contribution to government payments in 2020.[41] As of December 27, 2020, the largest shares of CFAP1 and CFAP2 payments had been paid to producers of cattle and corn; thus, it is likely that farms that specialize in corn and/or cattle benefited more from increases in government payments in 2020 than farms that specialize in other types of commodities.[42]

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[41] See "Government Payments" section.

[42] See CRS Report R46395, *USDA's Coronavirus Food Assistance Program: Round One (CFAP-1)*; and CRS Report R46645, *USDA's Coronavirus Food Assistance Program: Round Two (CFAP-2)*.

Summary of 2020 Farm Income Forecast

The global COVID-19 pandemic disrupted normal operations of markets for a number of agricultural products in the United States and abroad and continues to disrupt operations for markets for some commodities in 2021. Despite these disruptions, production of most agricultural commodities and total farm sector income increased in 2020 on a year-over-year basis. In addition, USDA's farm income forecasts improved with each successive forecast throughout the year (**Table A-1**).

Three key reasons for why farm sector income may have increased in 2020 include the following:

1. **Government payments increased.** Government payments increased by over 100% from 2019 to 2020, constituting the highest levels of government payments on record, the largest share of total farm sector income in more than 30 years, and exceeding the amount of revenue lost from reductions in the value of agricultural output in 2020.
2. **Reductions in income from farm cash receipts were smaller than initially expected.** Although prices for many agricultural commodities declined by more than 5% during the first two quarters of the year, some of these commodities saw full price recoveries by the end of 2020. Because some farmers were able to delay sales of certain commodities by holding crops in storage until later in 2020, the overall impact of early price declines on farm income was less than would have occurred if the price declines had persisted through the end of the year.
3. **Reductions in farm production expenses in 2020 partially offset the decline in output values.** COVID-19-related disruptions to global markets for fuel and credit allowed farmers to benefit from lower prices for fuel and oil to run their farm operations and from lower interest payments on debt.

World trade also impacted farm income in 2020. China's purchases of agricultural commodities, although less than the levels specified under the U.S.-China Phase One trade agreement, contributed to the price recovery of some commodities in late 2020. Farmers also received the final tranche of MFP payments in 2020, along with CFAP payments, which contributed to the total amount of income attributable to government payments. The United States-Mexico-Canada Agreement (USMCA) was signed in 2020; however, its effects on farm income are expected to be modest and to accrue mostly to dairy and poultry.[43]

Even though national farm income increased in 2020, the impact of COVID-19 varied at the individual farm level and was severe for some farms and commodity sectors. USDA's national forecasts do not reflect changes to the range of incomes that individual farms received in 2020.

2020 Year in Review for Farm Sector

Several major economic and policy events have occurred since 2018 that helped to shape the U.S. farm income outlook for 2020. These include the U.S.-China trade dispute and subsequent Phase One trade agreement between the two countries, as well as the COVID-19 pandemic and several federal direct payment programs targeting affected producers in response to these events. In addition, the year 2020 saw three major weather events that impacted the U.S. agricultural sector: wet spring conditions in the upper Midwest that resulted in a second year of large prevent-plant acres; an unprecedented derecho wind storm through the heart of the Corn Belt that damaged

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[43] CRS Report R45661, *Agricultural Provisions of the U.S.-Mexico-Canada Agreement*.

several million acres of prime cropland; and a late-season drought across the western Corn Belt. Finally, China began making large-scale purchases of U.S. corn and soybeans in the third and fourth quarter of the year. These and other important events of 2020 are briefly reviewed here.

State of the U.S. Agricultural Sector Heading into 2020

Corn, soybeans, wheat, and cotton are the four largest commercial crops produced annually in the United States in terms of area harvested, volume of output, and value (**Table 2**).[44] Since 2015, these four commodities have experienced relatively strong growth in output, helping to build stockpiles through the 2018 season, while upland cotton saw its end-of-year stocks surge in 2019 (**Figure 7**). The outlook for abundant supplies relative to demand for these four major commodities contributed to weak commodity price outlook heading into 2020.

In 2018, the U.S.-China trade dispute emerged as an impediment to trade and contributed to lower soybean prices.[45] The U.S.-China trade dispute led to declines in U.S. farm exports to China—a major market for U.S. agricultural products—in 2018 and 2019 and added to market uncertainty in 2020. The difficulties associated with the trade dispute were exacerbated in 2018 when U.S. farmers produced a record soybean harvest of 4.4 billion bushels, which resulted in both record end-of-year stocks and a record stocks-to-use ratio (22.9%). The record soybean harvest combined with the sudden loss of the Chinese soybean market kept downward pressure on U.S. soybean prices through 2019 and into early 2020.

In 2019, U.S. producers encountered extremely wet conditions in the spring that delayed planting of major row crops in many regions of the country and resulted in a record 19.6 million acres prevented from being planted.[46] The reduction in planted acres, primarily for corn and soybeans, coupled with unfavorable weather during the fall harvests, resulted in below-average yields and an unexpectedly smaller crop in 2019.[47] Despite a smaller crop and lower stocks in 2019, the reduction in U.S. soybean exports to China prevented a price recovery that year.

In response to the U.S.-China trade dispute, USDA used its authority under the Commodity Credit Corporation (CCC) Charter Act[48] to initiate successive direct payment programs in 2018 and 2019—referred to as Market Facilitation Programs (MFPs)—to partially offset the commodity price effects of the trade dispute on U.S. producers.[49] As of November 23, 2020, USDA had paid out a combined $23.1 billion under the two MFP programs.[50]

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[44] The U.S. hay crop exceeds the U.S. cotton crop in area, volume, and value but is less commercially traded and is used primarily by the livestock sector. In recent years, two specialty crops—grapes and almonds—have rivaled cotton for fourth place in terms of the value of production, depending on market prices and production.

[45] CRS Report R45929, *China's Retaliatory Tariffs on U.S. Agriculture: In Brief.*

[46] CRS Report R46180, *Federal Crop Insurance: Record Prevent Plant (PPL) Acres and Payments in 2019*.

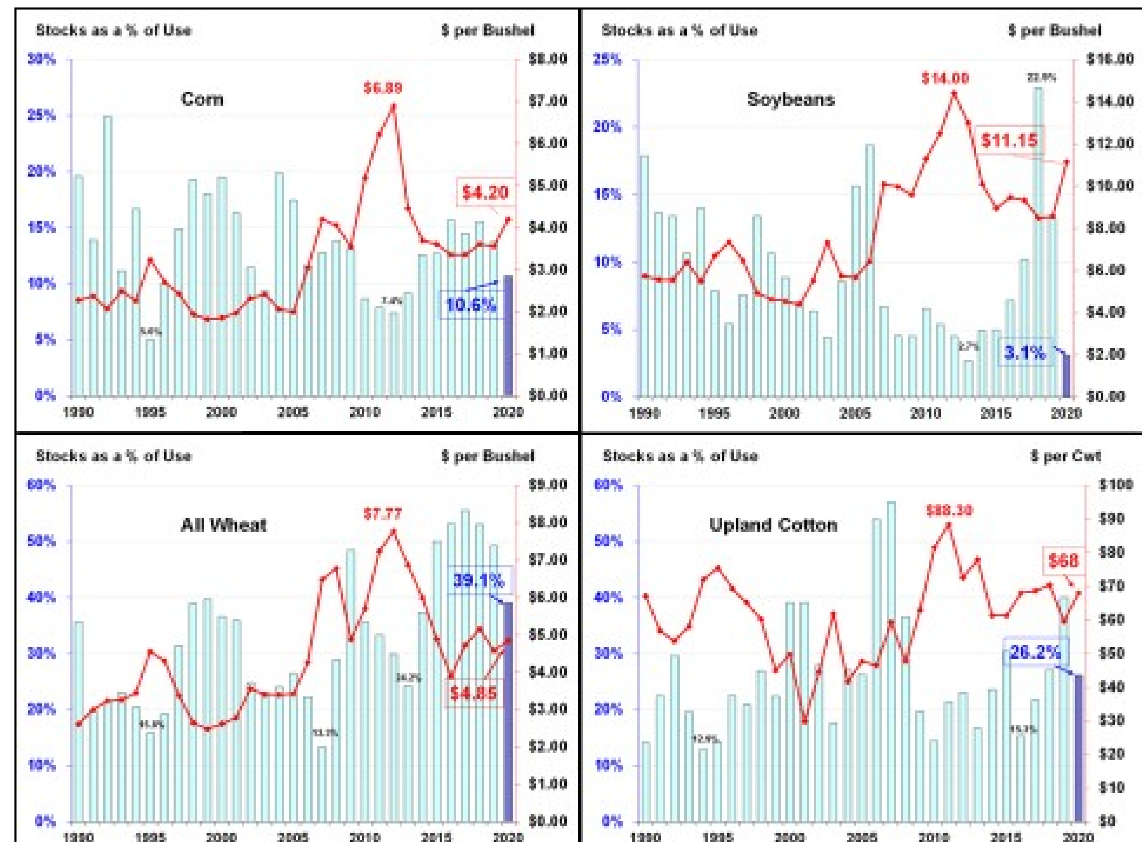
[47] CRS Report R46132, *U.S. Farm Income Outlook: November 2019 Forecast*.

[48] CRS Report R44606, *The Commodity Credit Corporation (CCC).*

[49] The 2018, MFP was authorized by Agriculture Secretary Sonny Perdue at up to $12 billion in financial assistance, including up to $10 billion in direct payments (see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*). The 2019, MFP was authorized by Secretary Perdue at up to $16 billion in financial assistance, including up to $14.5 billion in direct payments (see CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*).

[50] Data include $8.6 billion under the 2018 MFP and $14.5 billion under the 2019 MFP . See USDA, Farm Service Agency (FSA), "MFP," at https://www.farmers.gov/manage/mfp.

Figure 7. Stocks-to-Use Ratios and Farm Prices: Corn, Soybeans, Wheat, and Cotton



Source: CRS using data from USDA, World Agricultural Outlook Board, *World Agricultural Supply and Demand Estimates*, January 12, 2021. All values are nominal. Values for 2020 are forecasts, are in dark blue, and are separated from historical data.

Notes: Stocks-to-use equals the ratio of season-ending stocks relative to the season's total usage. Data are reported on a market-year basis—the market year is the 12-month period that begins at harvest time, during which the harvested crop is either stored or used on farm or sold in the marketplace. For example, for corn and soybeans, the 2020 market year started on September 1, 2020, and runs through August 31, 2021. Wheat data are on a June-May market year basis, and upland cotton data are on an August-July market year.

U.S.-China Agree on Phase One Trade Deal in Early 2020

On January 15, 2020, President Trump signed a "Phase One" executive agreement with the Chinese government on trade and investment issues, including agriculture.[51] The agreement was expected to improve market access for U.S. products into China, including a commitment by China to import $32 billion worth of additional U.S. agricultural products (relative to a 2017 base of $24 billion) over a two-year period. Most observers expected the Phase One agreement to provide improved opportunity for certain U.S. exporters; however, there is uncertainty over whether the agreement may lead to a rearrangement of global trading patterns or create new market demand.

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[51] CRS In Focus IF11412, *U.S.-China Phase I Deal: Agriculture*.

Farmer optimism from the U.S.-China Phase One trade agreement contributed to expectations for large planted acres in March 2020 (discussed below in "Weather Factors Influence Crop Outcomes in 2020").[52] The large acreage projections, plus the uncertainty over how quickly China might restart large-scale imports of U.S. farm products, hindered market price recovery during the first quarter of 2020. This recovery was also stymied by the emergence of COVID-19 in mid-January 2020.

COVID-19 Pandemic Impacts Food Supply Chain

In mid-January 2020, COVID-19 first appeared in the United States and spread rapidly through the country. The COVID-19 pandemic produced an aggregate demand shock across the U.S. economy, including the agricultural sector.[53] In particular, the COVID-19 pandemic induced widespread business closures, massive lay-offs, and 2020 GDP declines (annualized basis) of -4.8% for the first quarter and -31.7% for the second quarter.[54] In August 2020, 24.2 million persons were unable to work because their employer closed or lost business due to the pandemic, and the overall U.S. unemployment rate reached 8.4%—up sharply from a seasonally adjusted rate of 3.5% in February.[55]

COVID-19-related lockdowns caused widespread supply chain disruptions that shifted, and in some cases stopped, the flow of agricultural commodities through the various supply chains and led to sharp declines in farm prices and considerable market uncertainty. The principal impact on the U.S. agricultural sector was primarily the result of the COVID-19-related demand shock on food demand, including institutional, hospitality, and retail (i.e., dine-in restaurant) purchasing.[56] The short-run impact was lower farm prices, stock building of grains and oilseeds, and a temporary backup of unmarketable surpluses of market-ready livestock, poultry, and dairy products, as well as perishable fruits and vegetables. Similarly, people canceled travel plans and many businesses and schools shifted to full-time telework, thus dramatically reducing transportation fuel consumption, including of corn-based ethanol (which comprises roughly 10% of all fuel consumption for cars and light trucks and accounts for roughly 30% of U.S. corn usage).

Congress and USDA Respond to COVID-19 Pandemic with Large-Scale Programs

In response to the COVID-19 pandemic, on April 17, 2020, USDA initiated the Coronavirus Food Assistance Program (CFAP1) valued at $19 billion, including $16 billion in direct payments to affected agricultural producers and $3 billion for food purchases and distribution.[57] As of January 10, 2021, USDA had made $10.6 billion in direct payments under CFAP1.[58]

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[52] USDA, NASS, *Prospective Planting*, March 31, 2020.

[53] CRS Report R46347, *COVID-19, U.S. Agriculture, and USDA's Coronavirus Food Assistance Program (CFAP)*.

[54] GDP growth estimates are on an annualized basis, from U.S. Bureau of Economic Analysis, " Gross Domestic Product, 2nd Quarter 2020 (Second Estimate); Corporate Profits, 2nd Quarter 2020 (Preliminary Estimate)," news release no. BEA 20-41, August 27, 2020.

[55] U.S. Bureau of Labor Statistics, " The Employment Situation—August 2020," USDL-20-1650, September 4, 2020.

[56] Todd Hubbs and Scott Irwin, "Crop Markets Suffer Massive Demand Shock from COVID-19," *Economic Impact of COVID-19 on Food and Agricultural Markets*, CAST Commentary, June 2020.

[57] For information, see CRS Report R46395, *USDA's Coronavirus Food Assistance Program: Round One (CFAP-1)*.

[58] USDA, Coronavirus Food Assistance Program Data, "CFAP 1.0 Dashboard," January 10, 2021, at

On September 18, 2020, USDA announced a second CFAP payment program (CFAP2) with funding of up to an additional $14 billion.[59] Signup for CFAP2 began on September 21 and ran through December 11, 2020.[60] As of January 10, 2021, USDAhad made $13.1 billion in direct payments under CFAP2.[61]

The Trump Administration announced several other new programs in response to the COVID-19 pandemic, including $349 billion in funding to support the SBA's lending programs and the new PPP.[62] The PPP provides short-term, low-interest loans that could be forgiven under specified circumstances to qualifying small business (including agricultural firms) and nonprofits. As of August 8, 2020, the PPP had made $7.3 billion in potentially forgivable loans to agriculture-related enterprises.[63]

The long-run impact of the COVID-19 pandemic will depend on how quickly the economy recovers from Depression-level high unemployment and widespread restaurant and retail business shutdowns. The speed of the vaccination roll out for the COVID-19 pandemic coupled with the speed of the subsequent business reopening is expected to influence the recovery prospects for both the U.S. economy and the U.S. agricultural sector.

Weather Factors Influence Crop Outcomes in 2020

The early spring outlook for large crop plantings coupled with the demand-depressing impact of the COVID-19 pandemic contributed to plunging commodity prices from January 2020 into July. But, three major weather events—wet spring conditions in the upper Midwest that resulted in a second year of large prevent-plant acres, an unprecedented derecho wind storm through the heart of the Corn Belt that damaged several million acres of prime cropland, and a late-season drought across the western Corn Belt and Plains states—reversed the price decline and contributed to late-year price increases for several major crops, including corn and soybeans. USDAwas slow to capture the weather-related supply effects in its monthly crop reports, and this resulted in USDA having to reverse its preliminary optimistic crop outlook. This reversal helped to trigger a strong upward movement in farm prices starting in mid-August.

The early year market optimism—based on the Administration's U.S.-China Phase One trade agreement—contributed to projections in March for large planted acres in 2020, including 97.0 million acres for corn (up 8.1% from 2019), 83.5 million for soybeans (+9.7%), 44.7 million for wheat (-1.1%), 13.7 million for cotton (unchanged), and 319.1 million total acres planted to principal crops (+5.4%).[64] However, eventual planted acres for major field crops in 2020 were

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https://www.farmers.gov/cfap1/data.

[59] See CRS Report R46645, *USDA's Coronavirus Food Assistance Program: Round Two (CFAP-2)*.

[60] For more information, see USDA, " USDA to Provide Additional Direct Assistance to Farmers and Ranchers Impacted by the Coronavirus," press release no. 0378.20, September 18, 2020.

[61] USDA, Coronavirus Food Assistance Program Data, "CFAP 2.0 Dashboard," January 10, 2021, at https://www.farmers.gov/cfap/data.

[62] For information on the federal response to the COVID-19 pandemic for different sectors of the U.S. economy, visit the CRS COVID-19 Resources page at https://www.crs.gov/Resources/coronavirus-disease-2019.

[63] The Small Business Administration (SBA) stopped taking PPP applications on August 8, 2020. Final loan data for PPP reported here were obtained via a Freedom of Information Act request by an anonymous nongovernmental organization and shared with CRS.

[64] USDA, NASS, *Prospective Plantings*, March 31, 2020. Principal crops include corn, sorghum, oats, barley, rye, winter wheat, Durum wheat, other spring wheat, rice, soybeans, peanuts, sunflower, cotton, dry edible beans, chickpeas, potatoes, sugarbeets, canola, proso millet, all hay, tobacco, and sugarcane but also include double cropped acres and unharvested small grains planted as cover crops.

limited by a second year of above-normal prevented planting, estimated at over 10 million acres, compared with a record 19 million acres of prevented planting acres in 2019. [65] By comparison, from 2000 to 2018, prevented planting averaged 4.1 million acres annually. In June, when USDA surveyed farmers for their actual plantings, farmers reported that they had planted 311.9 million acres to principal crops (up 3.1% from 2019 but down over 7 million acres from the March survey of intentions). This total included 92.0 million of corn (+2.6%), 83.8 million of soybeans (+9.7%), 44.3 million of wheat (-2.0%), and 12.2 million of cotton (-11.3%).[66]

Except for the prevent-planting acreage, most principal crops were planted on time and under good soil moisture conditions. However, in mid-July, widespread hot, dry conditions set in over much of the western United States, including portions of the Corn Belt—that is, the Dakotas, Nebraska, Iowa, and northern Illinois (**Figure 4**). The poor growing conditions began to negatively impact yields for corn and soybeans but were slow to impact USDA crop forecasts. For example, in August, USDA's initial outlook for 2020 crop production projected a record corn crop of 15.3 billion bushels and a near-record large soybean crop of 4.4 billion bushels.[67] Forecasts for both crops included record yields of 181.8 and 53.3 bushels per acre, respectively, for corn and soybeans. This initial forecast included declines in market-year average farm prices (MYAPs) for corn to $3.10 per bushel (-13.9% from 2019) and for soybeans to $8.35 per bushel (-2.3%) for 2020.

On August 10, 2020, a large derecho storm system plowed through the Midwest.[68] Early news reports suggested substantial damage, including approximately 10 million acres of corn and soybeans, roughly a third of Iowa's total cropland, damaged by rain, hail, and wind. Also, starting in mid-August, China began to make large purchases of U.S. corn and soybeans.[69] While much uncertainty remains about the eventual size of Chinese grain and oilseed imports, market optimism about Chinese purchases and concerns about weather-related production losses fueled a rise in commodity prices in the U.S. futures market. The price rally that began on August 12 pushed soybean prices for the nearby futures contract above $10 per bushel on September 14, 2020, and above $14 per bushel on January 12, 2021.[70]

Similarly, USDA began to gradually lower its yield and harvested area projections and to raise its price projections in successive monthly crop outlook reports starting in September. For example, in USDA's September crop report, national corn and soybean yield estimates were reduced to 178.5 and 51.9 bushels per acre, respectively.[71] The harvested-corn acreage estimate was lowered to 83.473 million acres, a reduction of 550,000 acres—all from Iowa. Soybean acres were left unchanged. MYAPs were revised substantially upward to $3.50 per bushel for corn and $9.25 per bushel for soybeans. In November, USDAraised the 2020 corn price forecast to $4.00 per bushel.

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[65] USDA, FSA, " FSA Crop Acreage Data Reported to FSA, 2020 Crop Year," September 1, 2020. See a lso CRS Report R46180, *Federal Crop Insurance: Record Prevent Plant (PPL) Acres and Payments in 2019* .

[66] USDA, NASS, "Acreage," June 30, 2020.

[67] USDA, World Agricultural Outlook Board (WAOB), *World Agricultural Supply and Demand Estimates (WASDE)* , released August 12, 2020.

[68] A *derecho* is a weather event caused by severe thunderstorms and often characterized by 70 -100 mph straight-line winds. Krissa Welshans, "Derecho storm causes widespread, significant damage," *Feedstuffs*, August 11, 2020.

[69] Keith Good, " China Could Become Largest Corn Importer, While Soybean Variables Come Into Focus," Farm Policy News, September 10, 2020.

[70] Chicago Mercantile Exchange (CME), Soybean Futures Quotes for nearby contracts: t he September 14, 2020, price is for the November 2020 contract (accessed on September 15, 2020); and the January 12, 2021, price is for the January 2021 contract (accessed on January 14, 2021).

[71] USDA, WAOB, WASDE, released September 11, 2020.

In December, USDA raised the soybean farm price to $10.55 per bushel. In January 2021, USDA raised both corn and soybean prices to $4.20 per bushel and $11.15 per bushel (up from the August forecasts of $3.10 and $8.35, respectively).[72]

Commodity Production and Usage in 2020

New Production of Principal Crops and Livestock

USDA forecasted that production of corn, oats, rice, sorghum, and soybeans would increase in 2020 and that production of barley, cotton, and wheat would decline. Increases in corn, oats, rice, sorghum, and soybean production are driven by year-over-over increases in acreage planted and harvested, and higher yields per acre. Declines in wheat and barley production are driven by year-over-year declines in acreage planted and harvested, and lower yields per acre. Declines in cotton production are driven by declines in acreage planted and harvested.

Despite short-term COVID-19-related shutdowns to slaughterhouses and meatpacking facilities in 2020, total production of beef, broiler chickens, milk, and pork was forecasted to increase on a year-over-year basis. However, production of eggs was forecasted to decline on a year-over-year basis.

Table 10. U.S. Domestic Production of Key Agricultural Commodities

2019 and 2020 crop years

Commodity	Units	2019 Production	2020F Production	Change Quantity	Change %
Row Crops					
Corn	Mil. Bushels	13,620	14,182	562	4%
Soybeans	Mil. Bushels	3,552	4,135	618	16%
Wheat	Mil. Bushels	1,932	1,826	-106	-5%
Sorghum	Mil. Bushels	341	373	32	9%
Rice	Mil. Hundredweight	185	228	43	23%
Barley	Mil. Bushels	172	165	-7	-4%
Oats	Mil. Bushels	53	65	12	23%
Cotton	Mil. 480 lb Bales	19.9	15.0	-4.9	-25%
Livestock, Dairy, Poultry, and Eggs					
Broilers	Mil. Pounds	43,905	44,550	645	1%
Pork	Mil. Pounds	27,638	28,296	658	2%
Beef	Mil. Pounds	27,155	27,158	3	0%
Eggs	Mil. Dozens	9,447	9,258	-189	-2%
Milk	Bil. Pounds	218.4	222.9	4.5	2%

Source: CRS using data from USDA, *World Agricultural Supply and Demand Estimates*, released January 12, 2021.

Notes: F = forecast values for 2020 production.

[72] USDA, WAOB, WASDE, report releases for November 10, 2020, December 10, 2020, and January 12, 2021.

End-of-Year Crop Inventories for 2020

By December 2020—after taking into account the downward revisions to acres, yields, and usage—stocks-to-use ratios for corn, soybeans, wheat, and cotton were forecasted to decline in 2020 from 2019 (**Figure 7**). Declining stocks-to-use ratios for corn and soybeans primarily reflect increasing sales to China from both inventories carried over from prior year harvests, as well as from new crop production. Increases in corn sales to China helped to offset lost demand for corn for ethanol production, which paralleled the short-term declines in U.S. gasoline sales related to the COVID-19 pandemic. Declining stocks-to-use for wheat primarily reflects increasing domestic demand for wheat. Declining stocks-to-use for cotton primarily reflects decreasing year-over-year production and COVID-19-related declines in global demand.

Early 2021 Developments

Two recent developments—U.S. corn and soybean farm prices projected at the highest levels in six years (**Figure 7**) and China's resurgent interest in buying U.S. corn and soybeans—generated substantial optimism in the U.S. farm sector heading in 2021.[73] Furthermore, if dry weather patterns persist in key South American corn and soybean production zones, they could further tighten global supplies and support U.S. farm prices.

USDA's first projection of U.S. farm income for 2021 was released on February 5, 2021.[74] Early farm income estimates rely primarily on trends for crop yields and commodity demand from both domestic and international markets. Despite the initial optimism, the U.S. agricultural picture for 2021 is clouded by several major uncertainties related to potential weather and trade developments.

- First, as of early 2021, much of the western United States, including much of the western Corn Belt, remains mired in a prolonged drought that developed in late summer of 2020 (**Figure 8**).

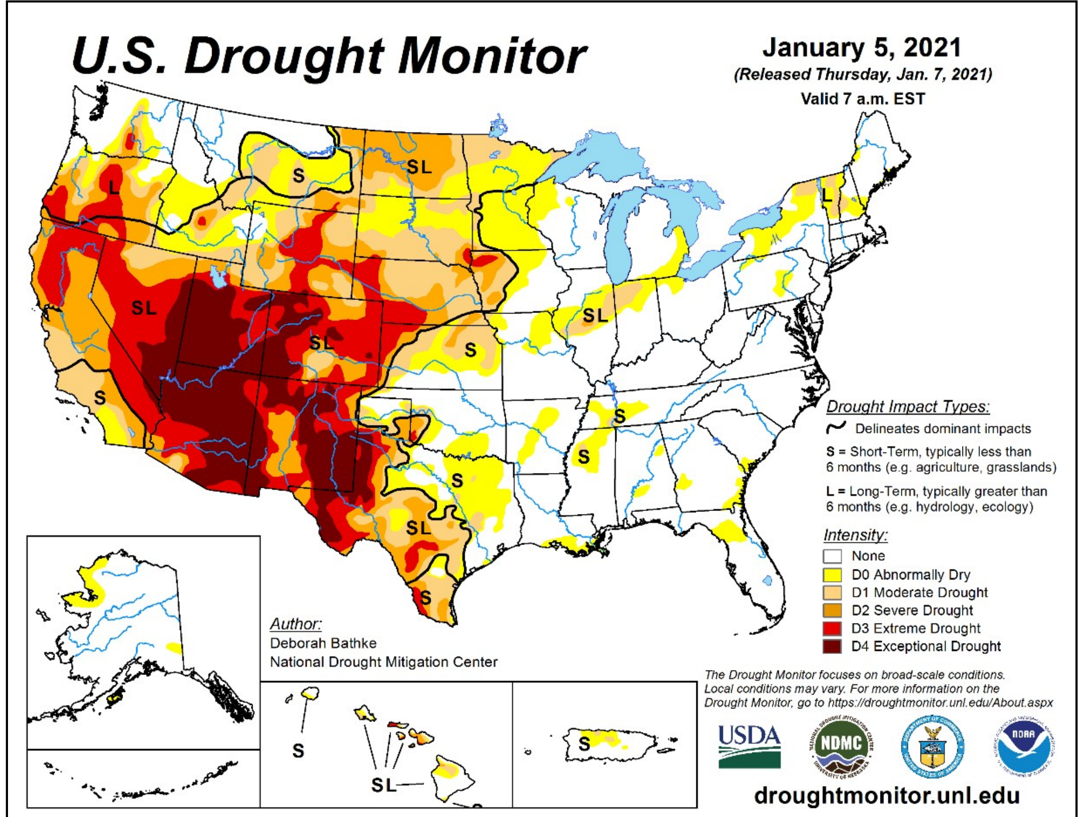
  On the positive side, dry conditions allow for early field work activity in the spring and often contribute to greater-than-expected plantings; however, they also signal potential yield loss and above-normal acreage abandonment if precipitation patterns do not return to normal during the crop growing season. The potential extent of weather-related effects on planted acres in 2021 will not be known until spring planting is completed—most likely not before June 2021, while the effect on yields and early crop development is often not known with certainty until harvest.
- A second uncertainty is the extent to which the COVID-19 pandemic may persist in 2021 and how quickly a successful vaccination campaign can be achieved.
- Third, also related to the COVID-19 pandemic, is when and how the general economy will recover and consumer demand patterns return to normal.
- Fourth, it is not yet known whether agricultural and food supply chains might resuscitate themselves in a more resilient and responsive form that revives investment and growth at both the producer and retail ends.
- Finally, despite the signing of a Phase One trade agreement with China, it is unclear if the United States may resume normal trade with China. Also unknown

[73] James Mintert and Michael Langemeier, " Farmer sentiment rises as income prospects improve, concerns about key policy issues remain," Purdue/CME Group, *Ag Economy Barometer*, January 5, 2021.

[74] USDA farm income projections for 2021 are not covered in this report.

is whether Chinese large-scale grain purchases in late 2020 and early 2021 could be one-off events related to the rapid rebuilding of its hog sector following its collapse from the onset of the African Swine Flu in late 2018.

Figure 8. U.S. Drought Monitor for December



Source: The National Drought Mitigation Center, University of Nebraska-Lincoln, at https://droughtmonitor.unl.edu/.

Appendix. Supporting Material on Farm Income

Measuring Farm Profitability

Two different indicators measure farm profitability: net cash income and net farm income.

Net cash income compares cash receipts to cash expenses. As such, it is a cash flow measure representing the funds that are available to farm operators to meet family living expenses and make debt payments. For example, crops that are produced and harvested but kept in on-farm storage are not counted in net cash income. Farm output must be sold before it is counted as part of the household's cash flow.

Net farm income is a more comprehensive measure of farm profitability. It measures value of production, indicating the farm operator's share of the net value added to the national economy within a calendar year independent of whether it is received in cash or noncash form. As a result, net farm income includes the value of home consumption, changes in inventories, capital replacement, and implicit rent and expenses related to the farm operator's dwelling that are not reflected in cash transactions. Thus, once a crop is grown and harvested , it is included in the farm's net income calculation, even if it remains in on-farm storage.

Key Concepts Behind Farm Income

- Net cash income is generally less variable than net farm income. Farmers can manage the timing of crop and livestock sales and purchase of inputs to stabilize the variability in their net cash income. For example, farmers can hold crops from large harvests in on-farm storage to sell in the forthcoming year when output may be lower and prices higher.
- Off-farm income and crop insurance subsidies, both of which have increased in importance in recent years, are not included in the calculation of aggregate farm income. Crop insurance indemnity payments are included.

National vs. State-Level Farm Household Data

Aggregate data often obscure or understate the diversity and regional variation that occurs across America's agricultural landscape. For insights into the differences in American agriculture, visit the Economic Research Service (ERS) web pages on "Farm Structure and Organization" and "Farm Household Well-Being."[75]

ERS's Annual Farm Income Forecasts

ERS releases three farm income forecasts each calendar year. The first forecast generally is released in February as part of the President's budget process and coincides with the U.S. Department of Agriculture's (USDA's) annual outlook forum, which convenes toward the end of every February. The initial forecast consists primarily of trend projections for the year since it precedes most agricultural activity, which occurs later in the spring and summer. The initial projections rely heavily on assumptions of trend yields and USDA's baseline forecasts for market conditions.

ERS's second farm income forecast is generally released in late August or early September as part of what USDA refers to as the mid-session budget review. By late August, most planting of major program crops is finished and crop growing conditions are better known, thus contributing to improved yield estimates. Domestic and international market conditions and trade patterns also have been established, thus improving forecasts for most commodity prices and potential farm revenue support outlays. It is not unusual for large variations in farm income projections to occur between the first and second farm income forecasts.

ERS's third farm income forecast is generally released in late November (in 2020, it was released on December 2) and represents a tightening up of the data—preliminary forecasts of planted acres and yields are gradually replaced with estimates based on actual field surveys and crop reporting by farmers to USDA. In most years, only small variations in farm income estimates occur between the second and third forecasts. The farm income forecast cycle then begins anew in the succeeding year. However, changes to estimates from previous years continue to occur for several years as more complete data become available.

This report discusses aggregate national net farm income projections for calendar year 2020 as reported by ERS on December 2, 2020,[76] which is the third of three USDA farm income forecasts for 2020 (**Table A-1**).

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[75] U.S. Department of Agriculture (USDA) Economic Research Service (ERS), " Farm Structure and Organization," at http://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization.aspx; and USDA, ERS, " Farm Household Well-Being," at http://www.ers.usda.gov/topics/farm-economy/farm-household-well-being.aspx.

[76] For both national and state-level farm income, see USDA, ERS, " U.S. and State Farm Income and Wealth Statistics," http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics.aspx.

Table A-1. USDA Forecasts of U.S. Farm Income in 2020 ($ Billions)

Item	2019	2020 Forecasts 2-05-20	9-02-20	12-02-20	2020: Feb. to Dec. (%)[a]
1. Cash receipts	**369.7**	**384.4**	**358.3**	**366.5**	**-4.7%**
Crops[b]	193.7	198.6	196.6	200.2	0.8%
Livestock	176.0	185.8	161.7	166.3	-10.5%
2. Government payments[c]	**22.4**	**15.0**	**37.2**	**46.5**	**210.0%**
CCP-PLC-ARC[d]	2.7	3.9	4.8	6.1	56.4%
Marketing loan benefits[e]	0.0	0.5	0.9	0.2	-60.0%
Conservation	3.8	4.2	4.0	3.8	-9.5%
Ad hoc and emergency[f]	1.4	2.5	1.6	2.2	-12.0%
All other[g]	14.5	4.3	25.8	34.1	693.0%
3. Farm-related income[h]	**34.7**	**31.5**	**33.3**	**34.1**	**8.3%**
4. Gross cash income (1+2+3)	426.9	430.9	428.8	447.1	3.8%
5. Cash expenses[i]	317.5	321.3	313.5	313.0	-2.6%
6. NET CASH INCOME	**109.4**	**109.6**	**115.2**	**134.1**	**22.4%**
7. Total gross revenues[j]	432.3	451.3	446.8	463.2	2.6%
8. Total production expenses[k]	348.7	354.7	344.2	343.6	-3.1%
9. NET FARM INCOME	**83.6**	**96.7**	**102.7**	**119.6**	**23.7%**

Source: CRS using data from USDA, ERS, "Farm Income and Wealth Statistics: U.S. and State Farm Income and Wealth Statistics," forecasts dated February 5, 2020, September 2, 2020, and December 2, 2020.

Notes:

a. Change represents the change between the initial February 2 forecast and the December 2 forecast for 2020.
b. Includes Commodity Credit Corporation loans under the farm commodity support program.
c. Government payments reflect payments made directly to all recipients in the farm sector, including landlords. The nonoperator landlords' share is offset by its inclusion in rental expenses paid to these landlords and thus is not reflected in net farm income or net cash income.
d. CCP = countercyclical payments. PLC = Price Loss Coverage. ARC = Agricultu re Risk Coverage.
e. Includes loan deficiency payments, marketing loan gains, and commodity certificate exchange gains.
f. Includes payments made under the Wildfire and Hurricane Indemnity Program (WHIP), as well as the Average Crop Revenue Election (ACRE) program, which was eliminated by the 2014 farm bill (P.L. 113-79).
g. Market Facilitation Program (MFP), Coronavirus Food Assistance Program (CFAP), cotton ginning cost-share, biomass crop assistance program, milk income loss, and other miscellaneous payments.
h. Income from crop insurance indemnities, custom work, machine hire, agritourism, and other farm sources.
i. Excludes depreciation and perquisites to hired labor.
j. Gross cash income plus inventory adjustments, the value of home consumption, and the imputed rental value of operator dwellings.
k. Cash expenses plus depreciation and perquisites to hired labor.

USDA Farm Prices Received Indexes for Selected Commodities

Table A-2 presents the annual average farm price received for several major commodities, including the USDA forecast for the 2020-2021 marketing year for major program crops and 2021 for livestock products.

In addition, **Figure A-1** to **Figure A-4** present USDAdata on monthly farm prices received for several major farm commodities—corn, soybeans, wheat, upland cotton, rice, milk, cattle, hogs, and chickens. The data are presented in an indexed format where monthly price data for year 2010 = 100 to facilitate comparisons.

Table A-2. U.S. Farm Prices and Support Rates for Selected Commodities Since 2018-2019 Marketing Year

Commodity[a]	Unit	Mkt Yr.	2018-2019	2019-2020	2020-2021[b]	% Chg. 19/20-20/21	2021-2022[b]	% Chg. 20/21-21/22	LR[c]	RP
Wheat	$/bu	Ju-My	5.16	4.58	4.85	5.9%	—	—	3.38	5.50
Corn	$/bu	S-Ag	3.61	3.56	4.20	18.0%	—	—	2.20	3.70
Sorghum	$/bu	S-Ag	3.26	3.34	4.70	40.7%	—	—	2.20	3.95
Barley	$/bu	Ju-My	4.62	4.69	4.60	-1.9%	—	—	2.50	4.95
Oats	$/bu	Ju-My	2.66	2.82	2.70	-4.3%	—	—	2.00	2.40
Rice	$/cwt	Ag-Jl	12.60	13.50	13.20	-2.2%	—	—	7.00	14.00
Soybeans	$/bu	S-Ag	8.48	8.57	11.15	30.1%	—	—	6.20	8.40
Soybean Oil	¢/lb	O-S	28.26	29.65	38.50	29.8%	—	—	—	—
Soybean Meal	$/st	O-S	308.28	299.5	390.0	30.2%	—	—	—	—
Cotton, Upland	¢/lb	A-Jl	70.3	59.6	68.0	14.1%	—	—	45-52	none
Livestock Products		**CY**	**2018**	**2019**	**2020**	**% Chg. 19-20**	**2021**	**% Chg. 20-21**	—	—
Choice Steers	$/cwt	Ja-D	117.12	116.78	108.5	-7.1%	115.5	6.4%	—	—
Barrows/Gilts	$/cwt	Ja-D	45.93	47.95	43.2	-9.9%	49.5	14.6%	—	—
Broilers	¢/lb	Ja-D	97.8	88.6	73.2	-17.4%	81.0	10.7%	—	—
Eggs	¢/doz	Ja-D	137.6	94.0	112.2	19.4%	107.5	-4.2%	—	—
Milk	$/cwt	Ja-D	16.27	18.63	18.30	-1.8%	17.65	-3.6%	—	—

Source: CRS using data from various USDA agency sources as described in the notes below.

Notes: Chg = change, CY = calendar year, LR = loan rate, RP = reference price, bu = bushels, cwt = 100 pounds, lb = pound, st = short ton (2,000 pounds), doz = dozen, Ja-D = January to December, Ju-My = June to May, S-Ag = September to August, O-S = October to September, A-Jl = August to July.

a. Price for grains and oilseeds are from USDA, *World Agricultural Supply and Demand Estimates (WASDE)*, released January 12, 2021. "—" = no value. USDA's out-year 2021-2022 crop price forecasts will first appear in the May 2021 *WASDE*. Soybean and livestock product prices are from USDA, Agricultural Marketing Service: soybean oil—Decatur, IL, cash price, simple average crude; soybean meal—Decatur, IL, cash price, simple average 48% protein; choice steers—Nebraska, direct 1,100-1,300 lbs.; barrows/gilts—national base, live equivalent 51%-52% lean; broilers—wholesale, 12-city average; eggs—Grade A, New York, volume buyers; and milk—simple average of prices received by farmers for all milk.

b. Data for 2020-2021 are USDA forecasts. Data for 2021-2022 are USDA projections.

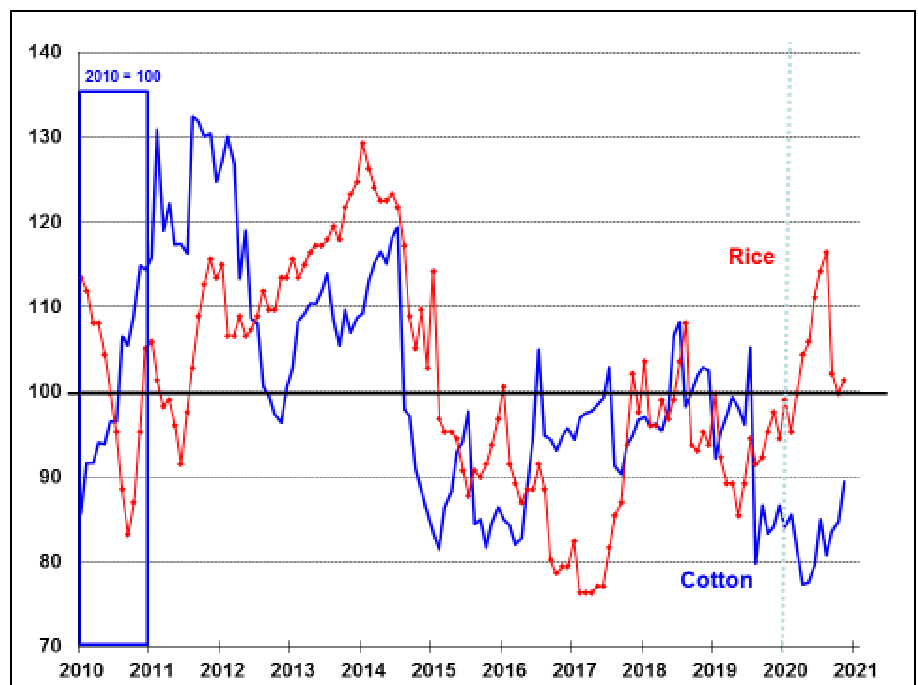
c. Loan rates (LRs) and reference prices (RPs) are for the 2020-2021 market year as defined under the 2018 farm bill (P.L. 115-334). The loan rate for upland cotton equals the average market-year-average price for the two preceding crop years but within the range of 45 cents/lb. and 52 cents/lb. See CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*.

Figure A-1. Monthly Farm Prices for Corn, Soybeans, and Wheat, Indexed Dollars

Source: USDA, National Agricultural Statistics Service (NASS), *Agricultural Prices*, December 30, 2020. Calculations by CRS.

Notes: Monthly farm prices for the 2010-2020 period have been divided by the annual average price for 2010 and multiplied by 100 such that 2010 = 100. Such price indexing facilitates relative comparisons.

Figure A-2. Monthly Farm Prices for Cotton and Rice, Indexed Dollars



Source: USDA, NASS, *Agricultural Prices*, December 30, 2020. Calculations by CRS.

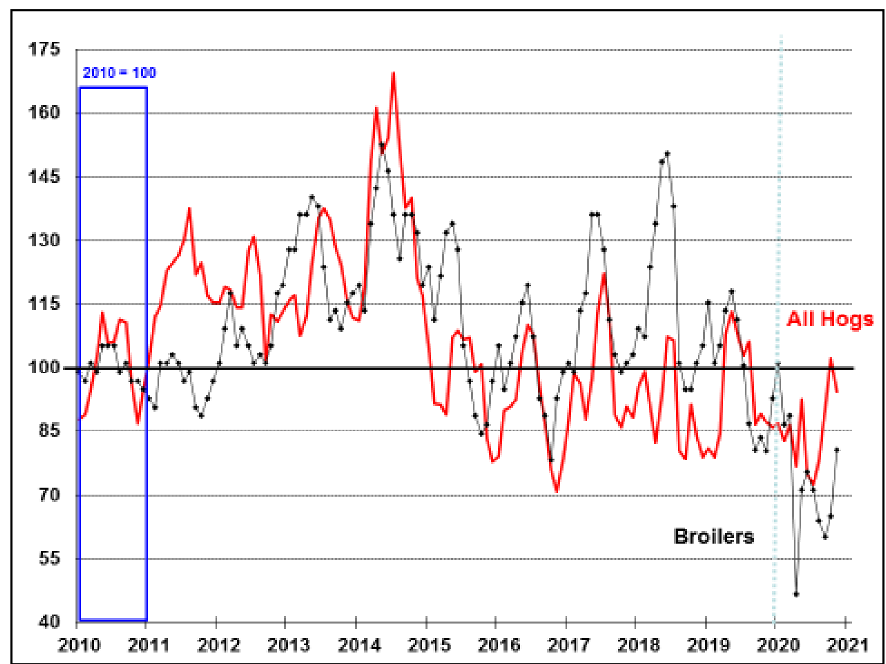
Notes: Monthly farm prices for the 2010-2020 period have been divided by the annual average price for 2010 and multiplied by 100 such that 2010 = 100. Such price indexing facilitates relative comparisons.

Figure A-3. Monthly Farm Prices for All-Milk and Cattle (500+ lbs.), Indexed Dollars

Source: USDA, NASS, *Agricultural Prices,* December 30, 2020. Calculations by CRS.

Notes: Monthly farm prices for the 2010-2020 period have been divided by the annual average price for 2010 and multiplied by 100 such that 2010 = 100. Such price indexing facilitates relative comparisons.

Figure A-4. Monthly Farm Prices for All Hogs and Broilers, Indexed Dollars



Source: USDA, NASS, *Agricultural Prices*, December 30, 2020. Calculations by CRS.

Notes: Monthly farm prices for the 2010-2020 period have been divided by the annual average price for 2010 and multiplied by 100 such that 2010 = 100. Such price indexing facilitates relative comparisons.

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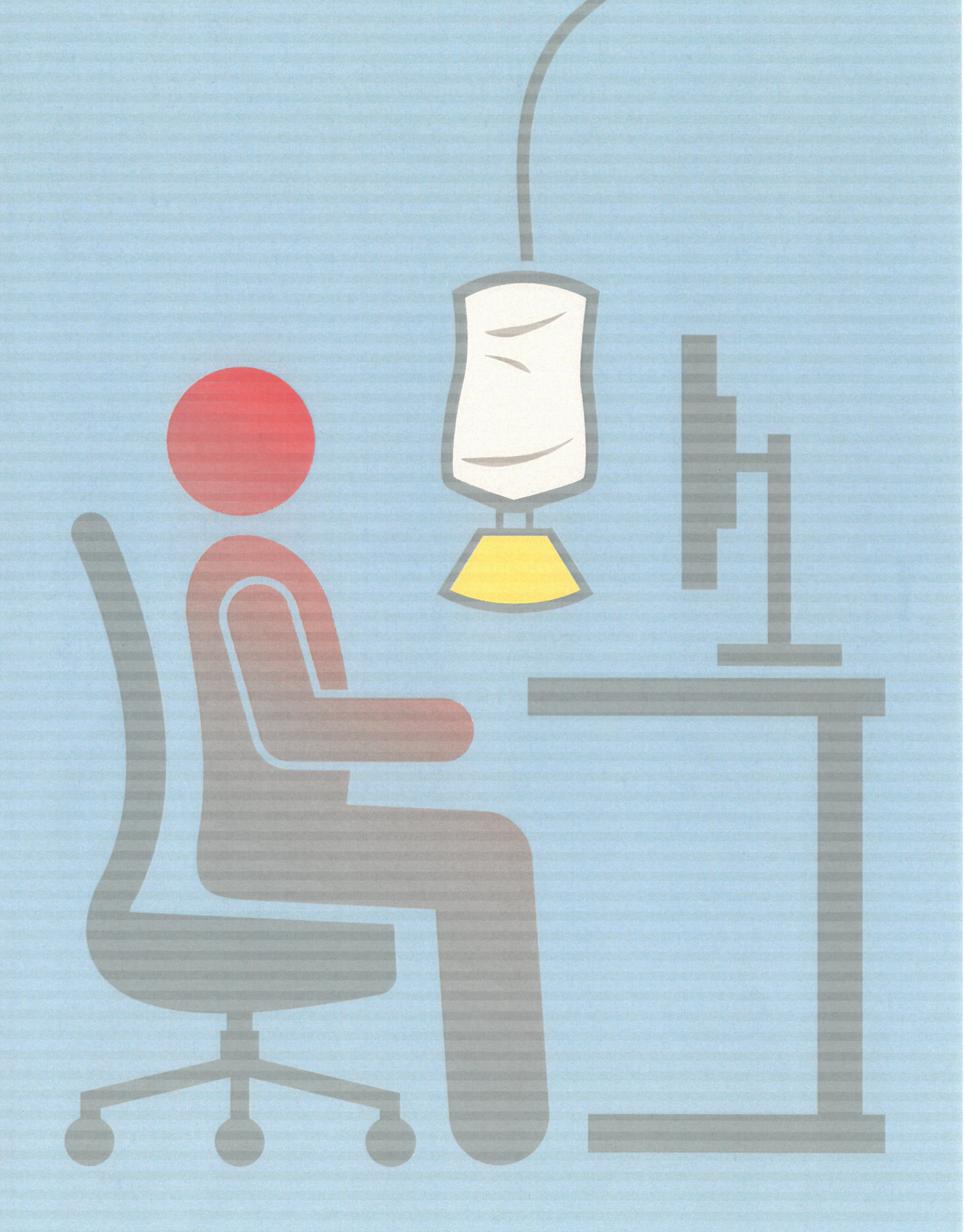

CHEAT SHEET

- *Walk.* The next time you need to meet with someone in your office, and no PowerPoint presentation is involved, suggest a walking meeting.
- *Meditate.* Studies suggest that a daily mediation practice can improve your ability to handle stress.
- *Go off the grid.* Establish hours when you will not respond to emails or texts.
- *Give back.* Helping others through pro bono activities might remind you why you became an attorney.

Secure Your Mask First, Then Help Others

By Sherie L. Edwards

As in-house counsel, we have many demands on our time and resources. It's easy to put our needs last and forget to care for ourselves. But is this really what we should be doing? Do we shortchange ourselves, and others, if we ignore our health? If you fly on a regular basis, you most likely have the safety speech memorized. When the flight attendant comes to the part of the speech regarding the use of oxygen masks, have you ever considered the wisdom in the words "secure your mask first, then help others"?

An internet search for the terms "addiction" or "depression" and "attorneys" returns many articles, blogs and studies that point to the increased prevalence of these diseases within our profession. An oft-cited 1990 Johns Hopkins study of depression by occupation revealed that attorneys are 3.6 times more likely to suffer depression than any other profession.[1] Why is this the case? The constant stress of our profession may be one answer. According to Daniel K. Hall-Flavin, M.D., without the use of healthy coping mechanisms, stress can lead to depression.[2] The problem is that a person under stress may well put aside those healthy coping mechanisms or turn to unhealthy coping mechanisms, such as alcohol or drugs, when dealing with deadlines, multiple priorities that need immediate attention, and other sources of stress.[3]

In order to cope with the stress and, hopefully, avoid serious health issues, it's time to "secure your oxygen mask" and incorporate healthy stress-coping mechanisms into your daily routine.

Go to sleep

When you're juggling multiple priorities, it's tempting to shortchange sleep in order to accomplish more on your to-do list. Ironically, cutting back on sleep actually makes you less productive. Lack of sleep impacts memory, cognitive processes and concentration. As the amount of sleep a person gets decreases, forgetfulness increases. Lack of sleep is also a factor in high blood pressure, obesity and inflammation in the body due to the increase of C-reactive protein production.

Conversely, routinely getting seven to eight hours of sleep a night improves memory and concentration, decreases stress, increases emotional stability and lowers blood pressure. The body uses sleep to repair cells and tissues. This is also the time that the brain goes through the process of consolidation, which involves moving memories from "temporary storage" to "long-term storage" in the neocortex.[4]

If falling, or staying, asleep is difficult, sleep experts suggest the following:

1. Establish a sleep time ritual. If you're a parent, you know how important a sleep-time ritual can be when putting children to bed for the evening. The same principle applies to adults. The ritual signals to the brain that it's time to settle down and relax. This ritual can be a bedtime bath, getting into bed and reading a chapter in an actual book (not on an electronic reader), or yoga or meditation.
2. If you are sensitive to caffeine, stay away from food or drink containing that ingredient after 3 or 4 PM. Caffeine isn't found in just tea, coffee or cola; it's also found in chocolate and in some headache remedies.
3. Don't eat a heavy meal within a few hours of going to bed. Digesting food is work for the body and can lead to decreased sleep. Eating a large meal and then lying down can lead to heartburn, which will also keep you awake.
4. Go to bed and wake up close to the same time every day, even on the weekends.
5. Be aware that watching television, working on the computer, or using an iPad or other tablet disrupts sleep. The light from these devices affects the neurotransmitters in the brain, switching the brain to "on."

If after trying these tips for a while, you still have trouble sleeping, or if you are told that you snore heavily, it may be time to consult your doctor about undergoing a sleep study to rule out sleep apnea. It is estimated that one in 15 Americans suffers from sleep apnea, which can develop into a life-threatening condition if left untreated.[5]

Walk it out

The health benefits of exercise are well documented; yet going to the gym is usually the first habit to fall by the wayside when deadlines are looming on the horizon. Hitting the weight machines or catching an hour-long spin class isn't the only type of exercise that is beneficial. Walking briskly for 30 minutes, three times per week, has been documented to decrease blood pressure, as well as waist and hip measurements.[6]

There are several ways to incorporate walking into your work day. The next time you need to meet with someone in your office (without the need for PowerPoint) suggest a walking meeting. There are several types of pens that incorporate recording devices; this can be used to record and then transcribe the meeting. Getting outside of the office provides a fresh perspective and may increase creativity. Another suggestion is to walk at lunch. Too many of us eat our lunch while working at our desk. After finishing the healthy lunch you bring from home, put on your walking shoes (conveniently stored under your desk) and go outside for 30 minutes. You'll return to the office refreshed, rejuvenated and ready to tackle the afternoon.

As attorneys, we understand the concept of accountability to others. Use accountability when it comes to getting exercise. Have a set appointment with

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a group of coworkers to walk during the day. Not only will you all derive the health benefits of exercise, but you'll also build camaraderie with those in your department or across department lines. If you supervise a law department, encourage your employees to take walking breaks; it will increase productivity. Just make sure you're setting the example by taking walking breaks yourself.

Rest your mind

Many people dismiss meditation as a practice followed by yogis, hippies and Sting, and fail to appreciate the benefits derived from practicing mindfulness meditation. A study at Harvard Medical School demonstrated, through magnetic resonance imaging of the brain, the changes caused by a meditation practice. Study participants who had no prior experience with meditation followed an eight-week program; the participants in the control group did not meditate. Imaging studies were done three weeks prior to the beginning of the study, as well as three weeks after the program ended. There were measurable changes in the right amygdala (the part of the brain that has primary responsibility for processing memory, decision-making and emotional reactions to situations), resulting in an improved ability to handle stress.[7]

There are other benefits to meditation. Studies have shown that meditation — when practiced regularly — improves sleep, lowers blood pressure, decreases inflammation in the body and increases immunity to disease.

There is a reason it is called a meditation *practice*: It takes time, discipline and practice to learn how to turn off your mind for a period of time. There are websites dedicated to learning meditation, apps to help with guided meditation, CDs and books to guide the new practitioner into a daily meditation practice, and many yoga teachers incorporate meditation into their classes. Please see the sidebar "Meditation Resources" for links and titles to help you develop your own meditation practice.

Breathe in, breathe out

Within seconds of birth, we begin to breathe. But do you truly know how to breathe? Deep breathing exercises can help you relax, calm down and manage stress. The next time you feel stressed, try this simple breathing exercise:

> As you sit, close your eyes and pay attention to your breath. Count to five as you breathe in, then hold your breath for five seconds, and count to five as you slowly exhale. At first, you may experience a bit of lightheadedness, but as your body adjusts to the infusion of air deep into your lungs, that feeling will subside. Do this for 20 breaths.

Over time, with practice, you will be able to lengthen the intervals to 10 seconds or even longer. This is a great technique to deal with anger, to calm your mind or to help you fall asleep. Breathing is also key in meditation and yoga, so as you practice one, you will strengthen your practice in another.

Go off the grid

Smartphones, tablets and laptops have revolutionized how and where we work. No longer is work confined to the hours spent in the office. We can answer emails on the beach, prepare documents while waiting on the plumber, and even return phone calls while on a plane. This has been a great development, especially for working parents who can go home for dinner or softball games, help with homework, and then get back to work after the children are in bed. But this connectivity also increases expectations and demands — sometimes unrealistically — from our clients who, for many in-house counsel, are the board, the CEO or the CLO. Email is thought by many to require an immediate response, even if it is received at 10 PM. There are even some attorneys who sleep with their smartphone under their pillow so that they will wake up if an email hits the inbox in the middle of the night. In order to decrease stress and have a better quality personal life, set boundaries and manage expectations.

Many people dismiss meditation as a practice followed by yogis, hippies and Sting, and fail to appreciate the benefits derived from practicing mindfulness meditation. A study at Harvard Medical School demonstrated, through magnetic resonance imaging of the brain, the changes caused by a meditation practice.

Although circumstances and work styles differ from person to person, many attorneys have had success with establishing hours when they will not respond to emails or texts. Additionally, they have negotiated an agreement to not respond at all while on vacation or to check email only at certain hours. Some attorneys put their phone/tablet on the other side of the room or in their briefcase at bedtime. Having the device on the bedside table provides too much temptation to check emails in the middle of the night or first thing in the morning before ever getting out of bed.

Another practice that is a great stress reducer is to unplug one day a week. For that day, do not check email, work on a brief, look at Facebook, play Candy Crush ... you get the point. If you have a family, this is a great practice to put in place so that the family finds other things to do together (go

Set the example for your staff and encourage them to unplug when they leave the office — whether it is for the evening, the weekend or for a week's vacation. You will reap the results of a happier, less stressed and more productive staff.

hiking, play board games, talk to each other, etc.). You may want to try this on Sundays; it's a good way to kick off the week.

If you supervise a law department, reflect on the expectations you set for your staff. Have you created an environment in which your employees feel compelled to respond immediately to emails or texts? Do you allow your employees to take a vacation unhampered by work responsibilities? Set the example for your staff and encourage them to unplug when they leave the office — whether it is for the evening, the weekend or for a week's vacation. You will reap the results of a happier, less stressed and more productive staff.

Reach out

Many in-house attorneys began practicing law in a firm, which brings with it a built-in social network and sounding board. The move to an in-house practice, especially in a small law department of five or fewer attorneys, can be surprisingly lonely. In talking with several in-house attorneys who were once in firms, each one expressed their initial surprise about how isolated they felt. The lack of a sounding board to bounce new concepts and ideas off can lead to stress about work and feelings of isolation and depression. This is why organizations such as ACC — especially the Small Law Department Committee if you happen to work in a small law department — and your local bar association's corporate counsel committee are so vitally important to an in-house attorney's mental and social well-being. If you are new to in-house practice, find a mentor who can help guide you through the transition to this new phase in your career. If you are an established in-house attorney, offer to mentor a new in-house attorney. Make yourself available to provide guidance and advice, especially in the areas that are unique to the in-house practice, such as working across departments, project management, supervising staff, and working with senior management and a board of directors. Mentors can learn as much from those they mentor as the person being mentored. It is also a way to give back to our profession.

It's important to have a network outside of the legal profession. Let's be honest — when a group of attorneys gets together, they tend to trade war stories and talk shop. You need a break from the legal world to refresh your mind and recharge your batteries. Look for others who share a similar hobby or interest. Join a running group or check websites such as Meetup™ to find groups that go dancing, take golf lessons or try new restaurants. Having friends and acquaintances outside of the legal profession gives you a chance to gain new perspective, which helps reduce stress and may actually improve your law practice with fresh insights. Several studies have proven that having a strong network of family and friends is important to combatting depression. Make spending time with others a priority for your health.

"Come on, get happy"[8]

Have you noticed? Happiness has become an industry. There are books on how to be happy, magazines devoted to the subject, and websites with tips and ideas on how to be happy. There is even the Happiness Project! Why this emphasis on happiness? Research is beginning to show a positive (no pun intended) correlation between positive emotions and longevity. Laura Kubansky of the Harvard School of Public Health is involved in research to prove that the link between happiness and good health is more than just the absence of the impact of negativity on health.[9] Thus far, her research has shown a connection between "emotional vitality," which she defines as "a sense of enthusiasm

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ACC EXTRAS ON… Reducing stress

Program Material

Substance Abuse, Anxiety, and Depression: Overcoming the Woes of the Legal Profession (Oct. 2013). *www.acc.com/pm/depression_oct13*

Articles

Legal Practice Management: Reducing Stress, Improving Retention Rates (Feb. 2014). *www.acc.com/legal-practice_feb14*

Stressed Out? 6 Ways To Better Manage Workplace Pressures (May 2013). *www.acc.com/article/stress_may13*

Top Ten

Top Ten Ways To Become A More Efficient (And Possibly Happier) In-house Attorney (March 2014). *www.acc.com/topten/happy-inhouse_mar14*

Presentations

Mental Illness, Violence, and Substance Abuse in the Workplace (June 2014). *www.acc.com/abuse-violence_june14*

Substance Impairment in the Legal Profession (Jan. 2014). *www.acc.com/substance-impairment_jan14*

Substance Abuse Education (Jan. 2012). *www.acc.com/substance-abuse_jan12*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

Resources

To help you on your path to establishing health coping mechanisms, you may find some of the following resources helpful.

MEDITATION

- "Success Through Stillness" by Russell Simmons (Gotham Books, 2014). This book is a primer for starting a meditation practice, and provides a discussion of the benefits of meditation and how the author benefited from the practice.
- *www.Tm.org*: This website on transcendental meditation will provide you with information on the health benefits of TM. It also provides a link to find a TM instructor in your area.
- *www.How-to-meditate.org*: This is a Buddhist-sponsored website that provides easy to follow instruction on meditation.
- *www.headspace.com*: This website, which also has an app for Android and iPhone, offers a free program called "Take Ten," which guides you through a 10-minute meditation for 10 days.

PRO BONO

- *www.cpbo.org:* This website offers resources for corporate law departments who want to participate in pro bono activities.
- *www.streetlaw.org/en/home*: Information regarding the Street Law program and how to get involved is found on this site.

HAPPINESS AND POSITIVE PSYCHOLOGY

- "Happy" by Ian K. Smith, M.D. (St. Martin's Press, 2010). This book provides steps to bring more happiness, optimism and positivity into your life.
- *www.gretchenrubin.com:* This is the home of the Happiness Project. It provides 21 day programs to concentrate on a specific area in order to bring more happiness into your life.
- *www.livehappy.com:* This website if full of great tips for bringing happiness into every aspect of your life. The companion magazine, *Live Happy*, is an easy read (good for commutes if you take mass transit, or to keep in your briefcase for a mental health break).

If you supervise a law department, take the time as a group to celebrate each other, laugh together and show your gratitude in the form of recognition and celebration for a job well done.

and hopefulness," with a decrease in coronary disease. The field of Positive Psychology focuses on the impact of optimism, enthusiasm and happiness on health and longevity.

How can you bring more happiness into your life? One way is to practice gratitude. When a person is busy and stressed, it's easy to lose sight of the good things in life. By keeping a gratitude journal and jotting down three things every day for which you are grateful, you can refocus your thoughts toward positivity rather than negativity. If you have a family, go around the dinner table every evening (eating as a family whenever possible is a great way to keep connected and share laughter) and have each person state one good thing that happened that day for which that person is thankful. Another technique for practicing gratitude is to reframe a problem to make it positive. For example, rather than complain about the extra five pounds you want to lose, be thankful that you have plenty to eat. Rather than complain about the traffic jam, be thankful for a car and the ability to drive. It may seem overly simplistic, but spinning a negative into a positive will help you see life in a more hopeful light.

What can you do if you are having an incredibly stressful day and see no end in sight? Take a laughter break. YouTube™ is replete with laughing baby videos. After a few moments of chuckling babies, you may find a smile on your face. You may also realize that your stress level has decreased, your breathing is more relaxed, and your tension headache is dissipating. There is truth in the saying "laughter is the best medicine."

If you supervise a law department, take the time as a group to celebrate each other, laugh together and show your gratitude in the form of recognition and celebration for a job well done. Make birthday celebrations part of your monthly department routine. Take your department bowling one evening to have fun, connect and foster camaraderie. If you show that you are comfortable taking time to laugh and have a bit of fun, your employees will feel free to do the same.

Giving back

There is a link between gratitude and giving your time and talents to others. Most states have a pro bono requirement within their ethics rules. Putting

If you supervise a law department, the Corporate Pro Bono Challenge website has great resources to help you find a pro bono project that your department can work on together. In Nashville, for example, the legal department of Community Health Services staffs a Tuesday night legal clinic within their community.

rules aside, helping others through pro bono activities may remind you just why you became an attorney. There are many organizations (e.g., Legal Aid, Operation Stand Down, etc.) that need volunteer attorneys to help those who can't afford to pay for legal services. Your local bar association can help connect you with pro bono opportunities in your area.

There are, of course, other opportunities to volunteer outside of the legal profession. The skills we develop as attorneys are needed on not-for-profit boards. If you enjoy mentoring, organizations for youth, such as the Scouts and Boys and Girls Club, offer the opportunity to mentor young people who may not otherwise have a positive, supportive adult in their lives. If you have strong project management skills, charities such as Habitat for Humanity could use your help. There are myriad possibilities. The important point is that by volunteering, you give back to the community and get back a sense of fulfillment and gratitude.

If you supervise a law department, the Corporate Pro Bono Challenge website has great resources to help you find a pro bono project that your department can work on together. In Nashville, for example, the legal department of Community Health Services staffs a Tuesday night legal clinic within their community. Other corporate law departments have taught Street Law programs, staffed immigration or adoption clinics and provided other programs to help their respective communities. If you would rather do a non-legal department activity, consider a Habitat for Humanity build or volunteering to sort food at the local food bank. These department volunteer activities also serve as team building exercises and, by example, show your corporation or business that reaching out to the community is an important part of being a good corporate citizen.

Baby steps

If you've read to this point, you've taken the first step towards incorporating healthy stress coping mechanisms into your life. Now, it's time to put these tips into action — but not all at once. Take one area that seems attainable (i.e., incorporating 30 minutes of walking into your day) and set achievable goals in that area. Bring your walking shoes to work tomorrow and make an appointment with yourself to get out and walk. Set the goal of getting out three days this week. Once you meet that goal, decide whether you want to add in another day. Once you have that goal ingrained as a habit, pick another area on which to concentrate. With positive, health-coping mechanisms in place, you should find that you can handle stress better. However, if you get to the point where you feel that the walls are closing in, you feel yourself withdrawing from others or you start to drink to handle the stress, do not be afraid to ask for help. Each state or province has a Lawyers Assistance Program that is free and confidential. There is no shame in asking for help. If you supervise a law department and realize that one of your staff is showing signs of depression or chronic stress, have the courage to speak to that person and guide them to help. In the end, after we've put on our oxygen mask, we need to make sure that those around us are wearing their oxygen masks, too. **ACC**

NOTES

1. Eaton WW, Anthony JC, Mandel W, Garrison R, "Occupations and the Prevalence of Major Depressive Disorder." *J. Occup. Med.* 1990 Nov.; 32(11): 1079-87.
2. *www.mayoclinic.org/healthy-living/stress-management/expert-answers/stress/faq-20058233.*
3. *www.psychologytoday.com/blog/in-practice/201303/why-stress-turns-depression.*
4. *www.ncbi.nlm.nih.gov/pmc/articles/PMC3278619.*
5. *http://sleepdisordersguide.com/sleepapnea/sleep-apnea-statistics.html.*
6. Tully M., *Journal of Epidemiology and Community Health*, Aug. 13, 2007; Vol. 61: pp. 778–783.
7. *http://news.harvard.edu/gazette/story/2012/11/meditations-positive-residual-effects.*
8. With credit to Wes Farrell and Danny Janssen.
9. *www.hsph.harvard.edu/news/magazine/happiness-stress-heart-disease.*

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NATIONAL TASK FORCE ON LAWYER WELL-BEING

Creating a Movement To Improve Well-Being in the Legal Profession

August 14, 2017

Enclosed is a copy of *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* from the National Task Force on Lawyer Well-Being. The Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). It is a collection of entities within and outside the ABA that was created in August 2016. Its participating entities currently include the following: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners. Additionally, CoLAP was a co-sponsor of the 2016 ABA CoLAP and Hazelden Betty Ford Foundation's study of mental health and substance use disorders among lawyers and of the 2016 Survey of Law Student Well-Being.

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

This report's recommendations focus on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The members of this Task Force make the following recommendations after extended deliberation. We recognize this number of recommendations may seem overwhelming at first. Thus we also provide proposed state action plans with simple checklists. These help each stakeholder inventory their current system and explore the recommendations relevant to their group. We invite you to read this report, which sets forth the basis for why the legal profession is at a tipping point, and we present these recommendations and action plans for building a more positive future. We call on you to take action and hear our clarion call. The time is now to use your experience, status, and leadership to construct a profession built on greater well-being, increased competence, and greater public trust.

Sincerely,

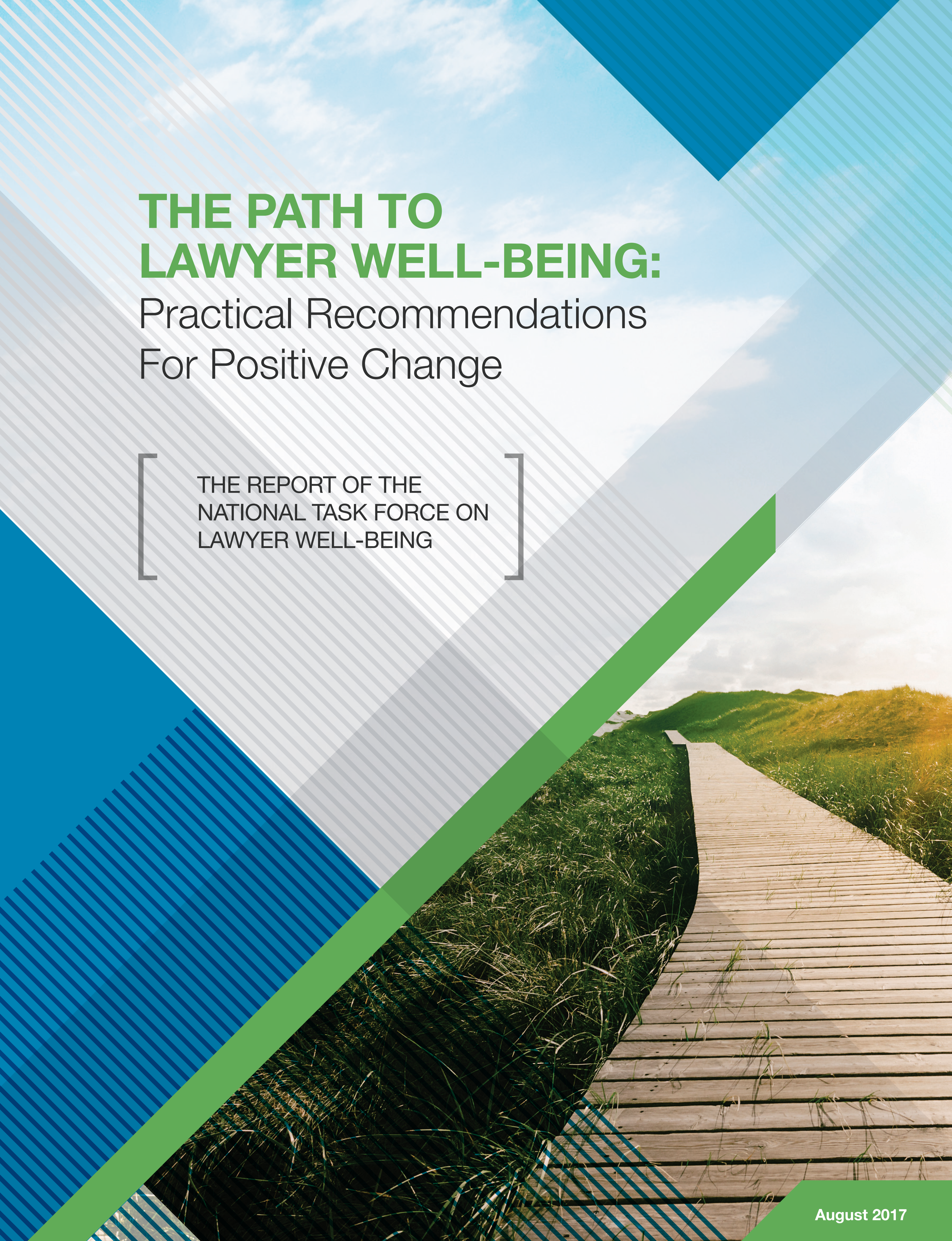
Bree Buchanan, Esq.
Task Force Co-Chair
Director
Texas Lawyers Assistance Program
State Bar of Texas

James C. Coyle, Esq.
Task Force Co-Chair
Attorney Regulation Counsel
Colorado Supreme Court

"Lawyers, judges and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction and mental disorders, including depression and thoughts of suicide—often unrecognized—are at shockingly high rates. As a consequence the National Task Force on Lawyer Well-being, under the aegis of CoLAP (the ABA Commission on Lawyer Assistance programs) has been formed to promote nationwide awareness, recognition and treatment. This Task Force deserves the strong support of every lawyer and bar association."

*David R Brink**
Past President
American Bar Association

* David R. Brink (ABA President 1981-82) passed away in July 2017 at the age of 97. He tirelessly supported the work of lawyer assistance programs across the nation, and was a beacon of hope in the legal profession for those seeking recovery.


THE PATH TO
LAWYER WELL-BEING:
Practical Recommendations
For Positive Change
THE REPORT OF THE
NATIONAL TASK FORCE ON
LAWYER WELL-BEING
August 2017

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28. Assess Law School Practices and Offer Faculty Education on Promoting Well-Being in the Classroom.

29. Empower Students to Help Fellow Students in Need.

30. Include Well-Being Topics in Courses on Professional Responsibility.

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32. Facilitate a Confidential Recovery Network.

33. Provide Education Opportunities on Well-Being Related Topics.

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36.3 Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.

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Task Force Member Biographies and Acknowledgments

THE PATH TO LAWYER WELL-BEING:
Practical Recommendations For Positive Change

Although the legal profession has known for years that many of its students and practitioners are languishing, far too little has been done to address it. Recent studies show we can no longer continue to ignore the problems. In 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published their study of nearly 13,000 currently-practicing lawyers [the "Study"]. It found that between 21 and 36 percent qualify as problem drinkers, and that approximately 28 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress, respectively.[1] The parade of difficulties also includes suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, a "diversity crisis," complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception.[2] Notably, the Study found that younger lawyers in the first ten years of practice and those working in private firms experience the highest rates of problem drinking and depression. The budding impairment of many of the future generation of lawyers should be alarming to everyone. Too many face less productive, less satisfying, and more troubled career paths.

Additionally, 15 law schools and over 3,300 law students participated in the Survey of Law Student Well-Being, the results of which were released in 2016.[3] It found that 17 percent experienced some level of depression, 14 percent experienced severe anxiety, 23 percent had mild or moderate anxiety, and six percent reported serious suicidal thoughts in the past year. As to alcohol use, 43 percent reported binge drinking at least once in the prior two weeks and nearly one-quarter (22 percent) reported binge-drinking two or more times during that period. One-quarter fell into the category of being at risk for alcoholism for which further screening was recommended.

The results from both surveys signal an elevated risk in the legal community for mental health and substance use disorders tightly intertwined with an alcohol-based social culture. The analysis of the problem cannot end there, however. The studies reflect that the majority of lawyers and law students do not have a mental health or substance use disorder. But that does not mean that they're thriving. Many lawyers experience a "profound ambivalence" about their work,[4] and different sectors of the profession vary in their levels of satisfaction and well-being.[5]

Given this data, lawyer well-being issues can no longer be ignored. Acting for the benefit of lawyers who are functioning below their ability and for those suffering due to substance use and mental health disorders, the National Task Force on Lawyer Well-Being urges our profession's leaders to act.

[1] P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).
[2] A. M. Brafford, Building the Positive Law Firm: The Legal Profession At Its Best (August 1, 2014) (Master's thesis, Univ. Pa., on file with U. Pa. Scholarly Commons Database), *available at* http://repository.upenn.edu/mapp_capstone/62/.
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[4] *See* D. L. Chambers, *Overstating the Satisfaction of Lawyers,* 39 LAW & SOC. INQUIRY 1 (2013).
[5] J. M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. J. 225 (2011); L. S. Krieger & K. M. Sheldon, *What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers,* 83 GEO. WASH. L. REV. 554 (2015).

REASONS TO TAKE ACTION

We offer three reasons to take action: organizational effectiveness, ethical integrity, and humanitarian concerns.

First, lawyer well-being contributes to organizational success—in law firms, corporations, and government entities. If cognitive functioning is impaired as explained above, legal professionals will be unable to do their best work. For law firms and corporations, lawyer health is an important form of human capital that can provide a competitive advantage.[6]

For example, job satisfaction predicts retention and performance.[7] Gallup Corporation has done years of research showing that worker well-being in the form of engagement is linked to a host of organizational success factors, including lower turnover, high client satisfaction, and higher productivity and profitability. The Gallup research also shows that few organizations fully benefit from their human capital because most employees (68 percent) are not engaged.[8] Reducing turnover is especially important for law firms, where turnover rates can be high. For example, a 2016 survey by Law360 found that over 40 percent of lawyers reported that they were likely or very likely to leave their current law firms in the next year.[9] This high turnover rate for law firms is expensive—with estimated costs for larger firms of $25 million every year.[10] In short, enhancing lawyer health and well-being is good business and makes sound financial sense.

Reasons to Improve Attorney Well-Being

✔ Good for business

✔ Good for clients

✔ The right thing to do

Second, lawyer well-being influences ethics and professionalism. Rule 1.1 of the ABA's Model Rules of Professional Conduct requires lawyers to "provide competent representation." Rule 1.3 requires diligence in client representation, and Rules 4.1 through 4.4 regulate working with people other than clients. Minimum competence is critical to protecting clients and allows lawyers to avoid discipline. But it will not enable them to live up to the aspirational goal articulated in the Preamble to the ABA's Model Rules of Professional Conduct, which calls lawyers to "strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."

Troubled lawyers can struggle with even minimum competence. At least one author suggests that 40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.[11] This can be explained, in part, by declining mental capacity due to these conditions. For example, major depression is associated

[6] C. Keyes & J. Grzywacz, *Health as a Complete State: The Added Value in Work Performance and Healthcare Costs*, 47 J. OCCUPATIONAL & ENVTL. MED. 523 (2005).
[7] T. A. Judge & R. Klinger, *Promote Job Satisfaction through Mental Challenge, in* HANDBOOK OF PRINCIPLES OF ORGANIZATIONAL BEHAV. (E. A. Locke ed., 2009).
[8] J. K. HARTER, F. L. SCHMIDT, E. A. KILLHAM, & J. W. ASPLUND, Q12 META-ANALYSIS, GALLUP CONSULTING (2006), https://strengths.gallup.com/private/resources/q12meta-analysis_flyer_gen_08%2008_bp.pdf; *see also* Brafford, *supra* note 2, for a summary of studies linking engagement and other positive employee states to business success factors.
[9] C. Violante, *Law360's 2016 Lawyer Satisfaction Survey: By the Numbers,* Law360, Sept. 4, 2016, https://www.law360.com/articles/833246/law360-s-2016-lawyer-satisfaction-survey-by-the-numbers.
[10] M. Levin & B. MacEwen, Assessing Lawyer Traits & Finding a Fit for Success Introducing the Sheffield Legal Assessment (2014) (unpublished), *available at* http://therightprofile.com/wp-content/uploads/Attorney-Trait-Assessment-Study-Whitepaper-from-The-Right-Profile.pdf (discussing associate turnover statistics and estimated cost of turnover in large law firms).
[11] D. B. Marlowe, *Alcoholism, Symptoms, Causes & Treatments, in* STRESS MANAGEMENT FOR LAWYERS 104-130 (Amiram Elwork ed., 2d ed., 1997) (cited in M. A. Silver, Substance Abuse, Stress, Mental Health and The Legal Profession, NEW YORK STATE LAW. ASSISTANT TRUST (2004), *available at* http://www.nylat.org/documents/courseinabox.pdf).

with impaired executive functioning, including diminished memory, attention, and problem-solving. Well-functioning executive capacities are needed to make good decisions and evaluate risks, plan for the future, prioritize and sequence actions, and cope with new situations. Further, some types of cognitive impairment persist in up to 60 percent of individuals with depression even after mood symptoms have diminished, making prevention strategies essential.[12] For alcohol abuse, the majority of abusers (up to 80 percent) experience mild to severe cognitive impairment.[13] Deficits are particularly severe in executive functions, especially in problem-solving, abstraction, planning, organizing, and working memory—core features of competent lawyering.

Third, from a humanitarian perspective, promoting well-being is the right thing to do. Untreated mental health and substance use disorders ruin lives and careers. They affect too many of our colleagues. Though our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture. Whether that culture is toxic or sustaining is up to us. Our interdependence creates a joint responsibility for solutions.

DEFINING "LAWYER WELL-BEING"

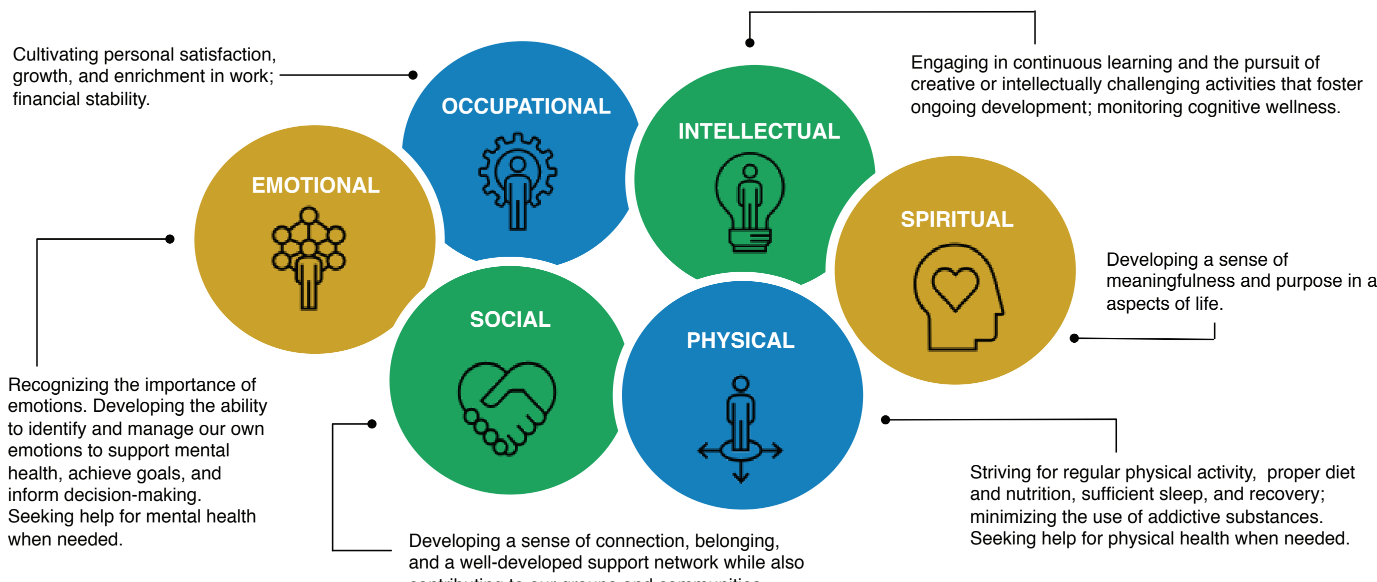
We define lawyer well-being as a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer's

> ***"Well-Being": A Continuous process toward thriving across all life dimensions.***

ethical duty of competence. It includes lawyers' ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients. It includes maintaining their own long term well-being. This definition highlights that complete health

Defining Lawyer Well-Being

A continuous process in which lawyers strive for thriving in each dimension of their lives:



[12] P. L. Rock, J. P. Roiser, W. J. Riedel, A. D. Blackwell, *A Cognitive Impairment in Depression: A Systematic Review and Meta-Analysis,* 44 PSYCHOL. MED. 2029 (2014); H. R. Snyder, *Major Depressive Disorder is Associated with Broad Impairments on Neuropsychological Measures of Executive Function: A Meta-Analysis and Review,* 139 PSYCHOL. BULL. 81 (2013).
[13] C. Smeraldi, S. M. Angelone, M. Movalli, M. Cavicchioli, G. Mazza, A. Notaristefano, & C. Maffei, *Testing Three Theories of Cognitive Dysfunction in Alcohol Abuse,* 21 J. PSYCHOPATHOLOGY 125 (2015).[14] The WHO's definition of "health" can be found at: http://www.who.int/about/mission/en. The definition of "mental health" can be found at: http://www.who.int/features/factfiles/mental_health/en/.

is not defined solely by the absence of illness; it includes a positive state of wellness.

To arrive at this definition, the Task Force consulted other prominent well-being definitions and social science research, which emphasize that well-being is not limited to: (1) an absence of illness, (2) feeling happy all the time, or (3) intra-individual processes—context matters. For example, the World Health Organization (WHO) defines "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." It defines "mental health" as "a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community."[14]

Social science research also emphasizes that "well-being" is not defined solely by an absence of dysfunction; but nor is it limited to feeling "happy" or filled with positive emotions. The concept of well-being in social science research is multi-dimensional and includes, for example, engagement in interesting activities, having close relationships and a sense of belonging, developing confidence through mastery, achieving goals that matter to us, meaning and purpose, a sense of autonomy and control, self-acceptance, and personal growth. This multi-dimensional approach underscores that a positive state of well-being is not synonymous with feeling happy or experiencing positive emotions. It is much broader.

Another common theme in social science research is that well-being is not just an intra-personal process: context powerfully influences it.[15] Consistent with this view, a study of world-wide survey data found that five factors constitute the key elements of well-being: career, social relationships, community, health, and finances.[16]

The Task Force chose the term "well-being" based on the view that the terms "health" or "wellness" connote only physical health or the absence of illness. Our definition of "lawyer well-being" embraces the multi-dimensional concept of mental health and the importance of context to complete health.

OUR CALL TO ACTION

The benefits of increased lawyer well-being are compelling and the cost of lawyer impairment are too great to ignore. There has never been a better or more important time for all sectors of the profession to get serious about the substance use and mental health of ourselves and those around us. The publication of this report, in and of itself, serves the vital role of bringing conversations about these conditions out in the open. In the following pages, we present recommendations for many stakeholders in the legal profession including the judiciary, regulators, legal employers, law schools, bar associations, lawyers' professional liability carriers, and lawyer assistance programs. The recommendations revolve around five core steps intended to build a more sustainable culture:

(1) Identifying stakeholders and the role that each of us can play in reducing the level of toxicity in our profession.

(2) Ending the stigma surrounding help-seeking behaviors. This report contains numerous recommendations to combat the stigma that seeking help will lead to negative professional consequences.

(3) Emphasizing that well-being is an indispensable part of a lawyer's duty of competence. Among the report's recommendations are steps stakeholders can take to highlight the tie-in between competence and well-being. These include giving this connection formal recognition through modifying the Rules of Professional Conduct or their comments to reference well-being.

(4) Expanding educational outreach and programming on well-being issues. We need to educate lawyers, judges, and law students on well-being issues. This includes instruction in recognizing mental health and

[14]The WHO's definition of "health" can be found at: http://www.who.int/about/mission/en. The definition of "mental health" can be found at: http://www.who.int/features/factfiles/mental_health/en/

[15]*E.g.*, I. Prilleltensky, S. Dietz, O. Prilleltensky, N. D. Myers, C. L. Rubenstein, Y. Jin, & A. McMahon, *Assessing Multidimensional Well-Being: Development and Validation of the I COPPE Scale,* 43 J. CMTY. PSYCHOL. 199 (2015).

[16]T. RATH & J. HARTER, WELL-BEING: THE FIVE ESSENTIAL ELEMENTS (2010).

substance use disorders as well as navigating the practice of law in a healthy manner. To implement this recommendation effectively, more resources need to be devoted to promoting well-being.

(5) Changing the tone of the profession one small step at a time. This report contains a number of small-scale recommendations, such as allowing lawyers to earn continuing legal education (CLE) credit for well-being workshops or de-emphasizing alcohol at bar association social events. These small steps can start the process necessary to place health, resilience, self-care, and helping others at the forefront of what it means to be a lawyer. Collectively, small steps can lead to transformative cultural change in a profession that has always been, and will remain, demanding.

Historically, law firms, law schools, bar associations, courts, and malpractice insurers have taken a largely hands-off approach to these issues. They have dealt with them only when forced to because of impairment that can no longer be ignored. The dedication and hard work of lawyer assistance programs aside, we have not done enough to help, encourage, or require lawyers to be, get, or stay well. However, the goal of achieving increased lawyer well-being is within our collective reach. The time to redouble our efforts is now.

RECOMMENDATIONS

Below, the Task Force provides detailed recommendations for minimizing lawyer dysfunction, boosting well-being, and reinforcing the importance of well-being to competence and excellence in practicing law. This section has two main parts. Part I provides general recommendations for all stakeholders in the legal community. Part II provides recommendations tailored to a specific stakeholder: (1) judges, (2) regulators, (3) legal employers, (4) law schools, (5) bar associations, (6) lawyers' professional liability carriers, and (7) lawyer assistance programs.

"None of us got where we are solely by pulling ourselves up by our bootstraps. We got there because somebody bent down and helped us pick up our boots." — Thurgood Marshall

First, we recommend strategies for all stakeholders in the legal profession to play a part in the transformational process aimed at developing a thriving legal profession.

1. ACKNOWLEDGE THE PROBLEMS AND TAKE RESPONSIBILITY.

Every sector of the legal profession must support lawyer well-being. Each of us can take a leadership role within our own spheres to change the profession's mindset from passive denial of problems to proactive support for change. We have the capacity to make a difference.

For too long, the legal profession has turned a blind eye to widespread health problems.

For too long, the legal profession has turned a blind eye to widespread health problems. Many in the legal profession have behaved, at best, as if their colleagues' well-being is none of their business. At worst, some appear to believe that supporting well-being will harm professional success. Many also appear to believe that lawyers' health problems are solely attributable to their own personal failings for which they are solely responsible.

As to the long-standing psychological distress and substance use problems, many appear to believe that the establishment of lawyer assistance programs—a necessary but not sufficient step toward a solution—has satisfied any responsibility that the profession might have. Lawyer assistance programs have made incredible strides; however, to meaningfully reduce lawyer distress, enhance well-being, and change legal culture, all corners of the legal profession need to prioritize lawyer health and well-being. It is not solely a job for lawyer assistance programs. Each of us shares responsibility for making it happen.

2. USE THIS REPORT AS A LAUNCH PAD FOR A PROFESSION-WIDE ACTION PLAN.

All stakeholders must lead their own efforts aimed at incorporating well-being as an essential component of practicing law, using this report as a launch pad. Changing the culture will not be easy. Critical to this complex endeavor will be the development of a National Action Plan and state-level action plans that continue the effort started in this report. An organized coalition will be necessary to plan, fund, instigate, motivate, and sustain long-term change. The coalition should include, for example, the Conference of Chief Justices, the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers, the ABA, state bar associations as a whole and specific divisions (young lawyers, lawyer well-being, senior lawyers, etc.), the Commission on Lawyer Assistance Programs, state lawyer assistance programs, other stakeholders that have contributed to this report, and many others.

3. LEADERS SHOULD DEMONSTRATE A PERSONAL COMMITMENT TO WELL-BEING.

Policy statements alone do not shift culture. Broad-scale change requires buy-in and role modeling from top

[17] E. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (2010); R. R. Sims & J. Brinkmann, *Leaders As Moral Role Models,* 35 J. BUS. ETHICS 327 (2002).

leadership.[17] Leaders in the courts, regulators' offices, legal employers, law schools, and bar associations will be closely watched for signals about what is expected. Leaders can create and support change through their own demonstrated commitment to core values and well-being in their own lives and by supporting others in doing the same.[18]

4. FACILITATE, DESTIGMATIZE, AND ENCOURAGE HELP-SEEKING BEHAVIORS.

All stakeholders must take steps to minimize the stigma of mental health and substance use disorders because the stigma prevents lawyers from seeking help.

Research has identified multiple factors that can hinder seeking help for mental health conditions: (1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture's negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules.[19]

The Study identified similar factors. The two most common barriers to seeking treatment for a substance use disorder that lawyers reported were not wanting others to find out they needed help and concerns regarding privacy or confidentiality. Top concerns of law students in the Survey of Law Student Well Being were fear of jeopardizing their academic standing or admission to the practice of law, social stigma, and privacy concerns.[21]

Research also suggests that professionals with hectic, stressful jobs (like many lawyers and law students) are more likely to perceive obstacles for accessing treatment, which can exacerbate depression. The result of these barriers is that, rather than seeking help early, many wait until their symptoms are so severe that they interfere with daily functioning. Similar dynamics likely apply for aging lawyers seeking assistance.

Removing these barriers requires education, skill-building, and stigma-reduction strategies. Research shows that the most effective way to reduce stigma is through direct contact with someone who has personally experienced a relevant disorder. Ideally, this person should be a practicing lawyer or law student (depending on the audience) in order to create a personal connection that lends credibility and combats stigma.[22] Viewing video-taped narratives also is useful, but not as effective as in-person contacts.

The military's "Real Warrior" mental health campaign can serve as one model for the legal profession. It is designed to improve soldiers' education about mental health disorders, reduce stigma, and encourage help-seeking. Because many soldiers (like many lawyers) perceive seeking help as a weakness, the campaign also has sought to re-frame help-seeking as a sign of strength that is important to resilience. It also highlights cultural values that align with seeking psychological help.[23]

5. BUILD RELATIONSHIPS WITH LAWYER WELL-BEING EXPERTS.

5.1. Partner With Lawyer Assistance Programs.

All stakeholders should partner with and ensure stable and sufficient funding for the ABA's Commission on Lawyer Assistance Programs (CoLAP) as well as

[18] L. M. Sama & V. Shoaf, *Ethical Leadership for the Professions: Fostering a Moral Community*, 78 J. BUS. ETHICS 39 (2008).
[19] T. W. Britt, T. M. Greene-Shortridge, S. Brink, Q. B. Nguyen, J. Rath, A. L. Cox, C. W. Hoge, C. A. Castro, *Perceived Stigma and Barriers to Care for Psychological Treatment: Implications for Reactions to Stressors in Different Contexts*, 27 J. SOC. & CLINICAL PSYCHOL. 317 (2008); S. Ey, K. R. Henning, & D. L. Shaw, *Attitudes and Factors Related to Seeking Mental Health Treatment among Medical and Dental Students*, 14 J. C. STUDENT PSYCHOTHERAPY 23 (2000); S. E. Hanisch, C. D. Twomey, A. H. Szeto, U. W. Birner, D. Nowak, & C. Sabariego, *The Effectiveness of Interventions Targeting the Stigma of Mental Illness at the Workplace: A Systematic Review*, 16 BMC PSYCHIATRY 1 (2016); K. S. Jennings, J. H. Cheung, T. W. Britt, K. N. Goguen, S. M. Jeffirs, A. L. Peasley, & A. C. Lee, *How Are Perceived Stigma, Self-Stigma, and Self-Reliance Related to Treatment-Seeking? A Three-Path Model*, 38 PSYCHIATRIC REHABILITATION J. 109 (2015); N. G. Wade, D. L. Vogel, P. Armistead-Jehle, S. S. Meit, P. J. Heath, H. A. Strass, *Modeling Stigma, Help-Seeking Attitudes, and Intentions to Seek Behavioral Healthcare in a Clinical Military Sample*, 38 PSYCHIATRIC REHABILITATION J. 135 (2015).
[20] Krill, Johnson, & Albert, *supra* note 1, at 50.
[21] Organ, Jaffe, & Bender, *supra* note 3, at 141.
[22] P. W. Corrigan, S. B. Morris, P. J. Michaels, J. D. Rafacz, & N. Rüsch, *Challenging the Public Stigma of Mental Illness: a Meta-Analysis of Outcome Studies,* 63 PSYCHIATRIC SERV. 963 (2012).
[23] Wade, Vogel, Armistead-Jehle, Meit, Heath, Strass, *supra* note 19. The Real Warrior website can be found at www.realwarriors.net.

for state-based lawyer assistance programs. ABA CoLAP and state-based lawyer assistance programs are indispensable partners in efforts to educate and empower the legal profession to identify, treat, and prevent conditions at the root of the current well-being crisis, and to create lawyer-specific programs and access to treatment.[24] Many lawyer assistance programs employ teams of experts that are well-qualified to help lawyers, judges, and law students who experience physical or mental health conditions. Lawyer assistance programs' services are confidential, and many include prevention, intervention, evaluation, counseling, referral to professional help, and on-going monitoring. Many cover a range of well-being-related topics including substance use and mental health disorders, as well as cognitive impairment, process addictions, burnout, and chronic stress. A number also provide services to lawyer discipline and admissions processes (e.g., monitoring and drug and alcohol screening).[25]

Notably, the Study found that, of lawyers who had reported past treatment for alcohol use, those who had used a treatment program specifically tailored to legal professionals reported, on average, significantly lower scores on the current assessment of alcohol use.[26] This at least suggests that lawyer assistance programs, which are specifically tailored to identify and refer lawyers to treatment providers and resources, are a better fit than general treatment programs.

Judges, regulators, legal employers, law schools, and bar associations should ally themselves with lawyer assistance programs to provide the above services. These stakeholders should also promote the services of state lawyer assistance programs. They also should emphasize the confidential nature of those services to reduce barriers to seeking help. Lawyers are reluctant to seek help for mental health and substance use disorders for fear that doing so might negatively affect their licenses and lead to stigma or judgment of peers.[27] All stakeholders can help combat these fears by clearly communicating about the confidentiality of lawyer assistance programs.

We also recommend coordinating regular meetings with lawyer assistance program directors to create solutions to the problems facing the profession. Lawyer assistance programs can help organizations establish confidential support groups, wellness days, trainings, summits, and/or fairs. Additionally, lawyer assistance programs can serve as a resource for speakers and trainers on lawyer well-being topics, contribute to publications, and provide guidance to those concerned about a lawyer's well-being.

5.2. Consult Lawyer Well-Being Committees and Other Types of Well-Being Experts.

We also recommend partnerships with lawyer well-being committees and other types of organizations and consultants that specialize in relevant topics. For example, the American Bar Association's Law Practice Division established an Attorney Well-Being Committee in 2015. A number of state bars also have well-being committees including Georgia, Indiana, Maryland, South Carolina, and Tennessee.[28] The Florida Bar Association's Young Lawyers Division has a Quality of Life Committee "for enhancing and promoting the quality of life for young lawyers."[29] Some city bar associations also have well-being initiatives, such as the Cincinnati Bar Association's Health and Well-Being Committee.[30] These committees can serve as a resource for education, identifying speakers and trainers, developing materials, and contributing to publications. Many high-quality consultants are also available on well-being subjects.

[24]The ABA Commission on Lawyer Assistance Programs' (CoLAP) website provides numerous resources, including help lines and a directory of state-based law assistant programs. See http://www.americanbar.org/groups/lawyer_assistance.html.
[25]COMM'N ON LAWYER ASSISTANCE PROGRAMS, AM. BAR ASS'N, 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS 34-37 (2014).
[26]Krill, Johnson, & Albert, *supra* note 1, at 50.
[27]*Id.* at 51.
[28]The State Bar of Georgia, "Lawyers Living Well," https://www.gabar.org/wellness/; The Indiana State Bar Association Wellness Committee, https://inbar.site-ym.com/members/group.aspx?id=134020; Maryland State Bar Association Wellness Committee, http://www.msba.org/Wellness/default.aspx; South Carolina Bar Lawyer Wellness Committee, http://discussions.scbar.org/public/wellness/index.html; Tennessee Bar Association Attorney Well Being Committee, http://www.tba.org/committee/attorney-well-being-committee.
[29]The Fla. Bar Ass'n, Young Lawyers Division, Committees, Quality of Life, https://flayld.org/board-of-governors/committees/ (last visited June 8, 2017).
[30]Cincinnati Bar Ass'n Health and Well-Being Committee, http://www.cincybar.org/groups/health-and-well-being.php (last visited June 28, 2017).

Care should be taken to ensure that they understand the particular types of stress that affect lawyers.

6. FOSTER COLLEGIALITY AND RESPECTFUL ENGAGEMENT THROUGHOUT THE PROFESSION.

We recommend that all stakeholders develop and enforce standards of collegiality and respectful engagement. Judges, regulators, practicing lawyers, law students, and professors continually interact with each other, clients, opposing parties, staff, and many others.[31] Those interactions can either foment a toxic culture that contributes to poor health or can foster a respectful culture that supports well-being. Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage. It diminishes productivity, performance, creativity, and helping behaviors.[32]

Civility appears to be declining in the legal profession. For example, in a 1992 study, 42 percent of lawyers and 45 percent of judges believed that civility and professionalism among bar members were significant problems. In a 2007 survey of Illinois lawyers, 72 percent of respondents categorized incivility as a serious or moderately serious problem[33] in the profession. A recent study of over 6,000 lawyers found that lawyers did not generally have a positive view of lawyer or judge professionalism.[34] There is evidence showing that women lawyers are more frequent targets of incivility and harassment.[36] Legal-industry commentators offer a host of hypotheses to explain the decline in civility.[37] Rather than continuing to puzzle over the causes, we acknowledge the complexity of the problem and invite further thinking on how to address it.

Incivility appears to be on the rise.

As a start, we recommend that bar associations and courts adopt rules of professionalism and civility, such as those that exist in many jurisdictions.[38] Likewise, law firms should adopt their own professionalism standards.[39] Since rules alone will not change culture, all stakeholders should devise strategies to promote wide-scale, voluntary observance of those standards. This should include an expectation that all leaders in the profession be a role model for these standards of professionalism.

Exemplary standards of professionalism are inclusive. Research reflects that organizational diversity and inclusion initiatives are associated with employee well-being, including, for example, general mental and physical health, perceived stress level, job satisfaction, organizational commitment, trust, work engagement,

[31]*See* C. B. Preston & H. Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey on Civility Standards and Options for Enforcement,* 48 U. MICH. J.L. REFORM 701 (2015); AM. BAR ASS'N RESOL. 108 (August 2011), http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/civility.authcheckdam.pdf; AM. BAR ASS'N RESOL. 105B (August 2014), http://www.americanbar.org/news/reporter_resources/aba-2014-annual-meeting/2014-annual-meeting-house-of-delegates-resolutions/105b.html.

[32]J. E. Dutton & E. D. Heaphy, *The Power of High-Quality Connections, in POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE* 263-278 (K. S. Cameron, J. E. Dutton, & R. E. Quinn eds., 2003); C. M. Pearson & C. L. Porath, *On the Nature, Consequences and Remedies of Workplace Incivility: No Time for "Nice"? Think Again*, 19 ACAD. OF MGMT. EXECUTIVE 7 (2005); B. M. Walsh, V. J. Magley, D. W. Reeves, K. A. Davies-Schrils, M. D. Marmet, & J. A. Gallus, *Assessing Workgroup Norms for Civility: The Development of the Civility Norms Questionnaire-Brief*, 27 J. BUS. PSYCHOL. 407 (2012).

[33]S. S. DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (2004).

[34]D. E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As An Obligation of Professional Responsibility,* 47 GONZ. L. REV. 99 (2012); *see also* IL. SUP. CT. COMM'N ON PROFESSIONALISM, *Survey on Professionalism, A Study of Illinois Lawyers 2007 & Survey on Professionalism, A Study of Illinois Lawyers 2014* (2007 & 2014); L. Brodoff & T. M. Jaasko-Fisher, *WSBA Civility Study,* NW LAWYER, Dec. 2016/Jan. 2017, at 22, *available at* http://nwlawyer.wsba.org/nwlawyer/dec_2016_jan_2017?pg=22#pg22.

[35]Krieger & Sheldon, *supra* note 5.

[36]L. M. Cortina, K. A. Lonsway, V. J. Magley, L. V. Freeman, L. L. Collinsworth, M. Hunter, & L. F. Fitzgerald, *What's Gender Got to Do with It? Incivility in the Federal Courts,* 27 LAW & SOC. INQUIRY 235 (2002); see also L. M. Cortina, D. Kabat-Farr, E. A. Leskinen, M. Huerta, & V. J. Magley, *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact,* 30 J. MGMT. 1579 (2013).

[37]*E.g.*, Campbell, *supra* note 34; A. T. Kronman, THE LOST LAWYER (1993); J. Smith, *Lawyers Behaving Badly Get a Dressing Down from Civility Cops,* WALL ST. J., Jan. 27, 2013, at A1; Walsh, Magley, Reeves, Davies-Schrils, Marmet, & Gallus, *supra* note 32.

[38]Examples of professionalism codes can be found on the ABA Center for Professional Responsibility's website: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2/professionalism_codes.html; *see also* AM. BAR ASS'N RESOL. 108 (2011), available at http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_108.authcheckdam.pdf.

[39]*See* C. B. Preston & H. Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey on Civility Standards and Options for Enforcement,* 48 U. MICH. J.L. REFORM 701 (2015).

perceptions of organizational fairness, and intentions to remain on the job.[40] A significant contributor to well-being is a sense of organizational belongingness, which has been defined as feeling personally accepted, respected, included, and supported by others. A weak sense of belonging is strongly associated with depressive symptoms.[41] Unfortunately, however, a lack of diversity and inclusion is an entrenched problem in the legal profession.[42] The issue is pronounced for women and minorities in larger law firms.[43]

6.1. Promote Diversity and Inclusivity.

Given the above, we recommend that all stakeholders urgently prioritize diversity and inclusion. Regulators and bar associations can play an especially influential role in advocating for initiatives in the profession as a whole and educating on why those initiatives are important to individual and institutional well-being. Examples of relevant initiatives include: scholarships, bar exam grants for qualified applicants, law school orientation programs that highlight the importance of diversity and inclusion, CLE programs focused on diversity in the legal profession, business development symposia for women- and minority-owned law firms, pipeline programming for low-income high school and college students, diversity clerkship programs for law students, studies and reports on the state of diversity within the state's bench and bar, and diversity initiatives in law firms.[44]

6.2. Create Meaningful Mentoring and Sponsorship Programs.

Another relevant initiative that fosters inclusiveness and respectful engagement is mentoring. Research has shown that mentorship and sponsorship can aid well-being and career progression for women and diverse professionals. They also reduce lawyer isolation.[46] Those who have participated in legal mentoring report a stronger sense of personal connection with others in the legal community, restored enthusiasm for the legal profession, and more resilience—all of which benefit both mentors and mentees.[47] At least 35 states and the District of Columbia sponsor formal mentoring programs.[48]

7. ENHANCE LAWYERS' SENSE OF CONTROL.

Practices that rob lawyers of a sense of autonomy and control over their schedules and lives are especially harmful to their well-being. Research studies show that high job demands paired with a lack of a sense of control breeds depression and other psychological disorders.[49] Research suggests that men in jobs with such characteristics have an elevated risk of alcohol abuse.[50] A recent review of strategies designed to prevent workplace depression found that those designed to improve the perception of control were among the

[40] *E.g.,* M. M. Barak & A. Levin, *Outside of the Corporate Mainstream and Excluded from the Work Community: A Study of Diversity, Job Satisfaction and Well-Being,* 5 COMM., WORK & FAM. 133 (2002); J. Hwang & K. M. Hopkins, *A Structural Equation Model of the Effects of Diversity Characteristics and Inclusion on Organizational Outcomes in the Child Welfare Workforce,* 50 CHILD. & YOUTH SERVS. REV. 44 (2015); *see generally* G. R. Ferris, S. R. Daniels, & J. C. Sexton, *Race, Stress, and Well-Being in Organizations: An Integrative Conceptualization, in* THE ROLE OF DEMOGRAPHICS IN OCCUPATIONAL STRESS AND WELL-BEING 1-39 (P. L. Perrewé, C. C. Rosen, J. B. Halbesleben, P. L. Perrewé eds., 2014).

[41] W. D. Cockshaw & I. M. Shochet, *The Link Between Belongingness and Depressive Symptoms: An Exploration in the Workplace Interpersonal Context,* 45 AUSTRL. PSYCHOL. 283 (2010); W. D. Cockshaw, I. M. Shochet & P. L. *Obst, Depression and Belongingness in General and Workplace Contexts: A Cross-Lagged Longitudinal Investigation,* 33 J. SOC. & CLINICAL PSYCHOL. 448 (2014).

[42] D. L. Rhode, *Law Is The Least Diverse Profession in The Nation. And Lawyers Aren't Doing Enough to Change That,* WASH. POST, *Post Everything*, May 27, 2015, *available at* https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.a79ad124eb5cl; *see also* Aviva Culyer, *Diversity in the Practice of Law: How Far Have We Come?*, G.P. SOLO, Sept./Oct. 2012, *available at* http://www.americanbar.org/publications/gp_solo/2012/september_october/diversity_practice_law_how_far_have_we_come.html.

[43] L. S. RIKLEEN, NAT'L ASSOC. WOMEN LAWYERS, REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2015), *available at* http://www.nawl.org/2015nawlsurvey; S. A. SCHARFL, R. LIEBENBERG, & C. AMALFE, NAT'L ASSOC. WOMEN LAWYERS, REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2014), *available at* http://www.nawl.org/p/bl/et/blogid=10&blogaid=56; see also FLA. BAR ASS'N YOUNG LAW. DIVISION COMM'N ON WOMEN, https://flayld.org/commission-on-women/.

[44] *See* C. U. Stacy, *Trends and Innovations Boosting Diversity in the Law and Beyond,* L. PRAC. TODAY, March 14, 2016, *available at* http://www.lawpracticetoday.org/article/trends-and-innovations-boosting-diversity-in-the-law-and-beyond; IL. SUP. CT. COMM'N ON PROFESSIONALISM, DIVERSITY & INCLUSION TOOLKIT, https://www.2civility.org/programs/cle/cle-resources/diversity-inclusion.

[45] Ferris, Daniels, & Sexton, *supra* note 40; A. Ramaswami, G. F. Dreher, R. Bretz, & C. Wiethoff, *The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers,* 37 J. CAREER DEV. 692 (2010).

[46] R. NERISON, LAWYERS, ANGER, AND ANXIETY: DEALING WITH THE STRESSES OF THE LEGAL PROFESSION (2010).

[47] D. A. Cotter, *The Positives of Mentoring,* YOUNG LAW. DIV., AM. BAR ASS'N (2017), *available at* http://www.americanbar.org/publications/tyl/topics/mentoring/the_positives_mentoring.html; M. M. Heekin, Implementing Psychological Resilience Training in Law Incubators, 1 J. EXPERIENTIAL LEARNING 286 (2016).

[48] Of the 35 programs, seven are mandatory (GA, NV, NM, OR, SC, UT, and WY) and some are approved for CLE credits. *See* the American Bar Association for more information: http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html.

[49] J-M Woo & T. T. Postolache, *The Impact of Work Environment on Mood Disorders and Suicide: Evidence and Implications,* 7 INT'L J. DISABILITY & HUMAN DEV. 185 (2008); J. M. Griffin, R. Fuhrer, S. A. Stansfeld, & M. Marmot, *The Importance of Low Control at Work and Home on Depression and Anxiety: Do These Effects Vary by Gender and Social Class?,* 54 SOC. SCI. & MED. 783 (2002).

[50] A. J. Crum, P. Salovey, & S. Achor, *Rethinking Stress: The Role of Mindsets in Determining the Stress Response,* 10 J. PERSONALITY & SOC. PSYCHOL. 716 (2013).

most effective.[51] Research confirms that environments that facilitate control and autonomy contribute to optimal functioning and well-being.[52]

We recommend that all stakeholders consider how long-standing structures of the legal system, organizational norms, and embedded expectations might be modified to enhance lawyers' sense of control and support a healthier lifestyle. Courts, clients, colleagues, and opposing lawyers all contribute to this problem. Examples of the types of practices that should be reviewed include the following:

- Practices concerning deadlines such as tight deadlines for completing a large volume of work, limited bases for seeking extensions of time, and ease and promptness of procedures for requesting extensions of time;
- Refusal to permit trial lawyers to extend trial dates to accommodate vacation plans or scheduling trials shortly after the end of a vacation so that lawyers must work during that time;
- Tight deadlines set by clients that are not based on business needs;
- Senior lawyer decision-making in matters about key milestones and deadlines without consulting other members of the litigation team, including junior lawyers;
- Senior lawyers' poor time-management habits that result in repeated emergencies and weekend work for junior lawyers and staff;
- Expectations of 24/7 work schedules and of prompt response to electronic messages at all times; and
- Excessive law school workload, controlling teaching styles, and mandatory grading curves.

8. PROVIDE HIGH-QUALITY EDUCATIONAL PROGRAMS ABOUT LAWYER DISTRESS AND WELL-BEING.

All stakeholders should ensure that legal professionals receive training in identifying, addressing, and supporting fellow professionals with mental health and substance use disorders. At a minimum, training should cover the following:

- The warning signs of substance use or mental health disorders, including suicidal thinking;
- How, why, and where to seek help at the first signs of difficulty;
- The relationship between substance use, depression, anxiety, and suicide;
- Freedom from substance use and mental health disorders as an indispensable predicate to fitness to practice;
- How to approach a colleague who may be in trouble;
- How to thrive in practice and manage stress without reliance on alcohol and drugs; and
- A self-assessment or other check of participants' mental health or substance use risk.

As noted above, to help reduce stigma, such programs should consider enlisting the help of recovering lawyers who are successful members of the legal community. Some evidence reflects that social norms predict problem drinking even more so than stress.[53] Therefore, a team-based training program may be most effective because it focuses on the level at which the social norms are enforced.[54]

Given the influence of drinking norms throughout the profession, however, isolated training programs are not sufficient. A more comprehensive, systemic campaign is likely to be the most effective—though certainly the most challenging.[55] All stakeholders will be critical players in such an aspirational goal. Long-term strategies should consider scholars' recommendations to incorporate mental health and substance use disorder training into broader health-promotion programs to help skirt the stigma that may otherwise deter attendance.

[51] S. Joyce, M. Modini, H. Christensen, A. Mykletun, R. Bryant, P. B. Mitchell, & S. B. Harvey, *Workplace Interventions for Common Mental Disorders: A Systematic Meta-Review,* 46 PSYCHOL. MED. 683, 693 (2016).
[52] Y-L Su & J. Reeve, *A Meta-Analysis of the Effectiveness of Intervention Programs Designed to Support Autonomy*, 23 EDUC. PSYCHOL. REV. 159 (2011).
[53] D. C. Hodgins, R. Williams, & G. Munro, *Workplace Responsibility, Stress, Alcohol Availability and Norms as Predictors of Alcohol Consumption-Related Problems Among Employed Workers,* 44 SUBSTANCE USE & MISUSE 2062 (2009).
[54] C. Kolar & K. von Treuer, *Alcohol Misuse Interventions in the Workplace: A Systematic Review of Workplace and Sports Management Alcohol Interventions,* 13 INT'L J. MENTAL HEALTH ADDICTION 563 (2015); *e.g., J. B. Bennett,* W. E. K. Lehman, G. S. Reynolds, *Team Awareness for Workplace Substance Abuse Prevention: The Empirical and Conceptual Development of a Training Program,* 1 PREVENTION SCI. 157 (2000).
[55] Kolar & von Treuer, *supra* note 54.

Research also suggests that, where social drinking has become a ritual for relieving stress and for social bonding, individuals may resist efforts to deprive them of a valued activity that they enjoy. To alleviate resistance based on such concerns, prevention programs should consider making "it clear that they are not a temperance movement, only a force for moderation," and that they are not designed to eliminate bonding but to ensure that drinking does not reach damaging dimensions.[56]

Additionally, genuine efforts to enhance lawyer well-being must extend beyond disorder detection and treatment. Efforts aimed at remodeling institutional and organizational features that breed stress are crucial, as are those designed to cultivate lawyers' personal resources to boost resilience. All stakeholders should participate in the development and delivery of educational materials and programming that go beyond detection to include causes and consequences of distress. These programs should be eligible for CLE credit, as discussed in Recommendation 20.3. **Appendix B** to this report offers examples of well-being-related educational content, along with empirical evidence to support each example.

Well-being efforts must extend beyond detection and treatment and address root causes of poor health.

9. GUIDE AND SUPPORT THE TRANSITION OF OLDER LAWYERS.

Like the general population, the lawyer community is aging and lawyers are practicing longer.[57] In the Baby Boomer generation, the oldest turned 62 in 2008, and the youngest will turn 62 in 2026.[58] In law firms, one estimate indicates that nearly 65 percent of equity partners will retire over the next decade.[59] Senior lawyers can bring much to the table, including their wealth of experience, valuable public service, and mentoring of new lawyers. At the same time, however, aging lawyers have an increasing risk for declining physical and mental capacity. Yet few lawyers and legal organizations have sufficiently prepared to manage transitions away from the practice of law before a crisis occurs. The result is a rise in regulatory and other issues relating to the impairment of senior lawyers. We make the following recommendations to address these issues:

Planning Transition of Older Lawyers

1. **Provide education to detect cognitive decline.**
2. **Develop succession plans.**
3. **Create transition programs to respectfully aid retiring professionals plan for their next chapter.**

[56] R. F. Cook, A. S. Back, J. Trudeau, & T. McPherson, *Integrating Substance Abuse Prevention into Health Promotion Programs in the Workplace: A Social Cognitive Intervention Targeting the Mainstream User, in* PREVENTING WORKPLACE SUBSTANCE ABUSE: BEYOND DRUG TESTING TO WELLNESS 97 (W. K. Lehman, J. B. Bennett eds., 2003).

[57] A recent American Bar Association report reflected that, in 2005, 34 percent of practicing lawyers were age fifty-five or over, compared to 25 percent in 1980. See LAWYER DEMOGRAPHICS, A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2016), *available at* http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

[58] E. A. McNickle, A Grounded Theory Study of Intrinsic Work Motivation Factors Influencing Public Utility Employees Aged 55 and Older as Related to Retirement Decisions (2009) (doctoral dissertation, Capella University) (available from ProQuest Dissertations and Theses Database).

[59] M. P. Shannon, *A Short Course in Succession Planning,* 37 L. PRAC. MAG. (2011), *available at* http://www.americanbar.org/publications/law_practice_magazine/2011/may_june/a_short_course_in_succession_planning.html.

First, all stakeholders should create or support programming for detecting and addressing cognitive decline in oneself and colleagues.

Second, judges, legal employers, bar associations, and regulators should develop succession plans, or provide education on how to do so, to guide the transition of aging legal professionals. Programs should include help for aging members who show signs of diminished cognitive skills, to maintain their dignity while also assuring they are competent to practice.[60] A model program in this regard is the North Carolina Bar Association's Senior Lawyers Division.[61]

Third, we recommend that legal employers, law firms, courts, and law schools develop programs to aid the transition of retiring legal professionals. Retirement can enhance or harm well-being depending on the individual's adjustment process.[62] Many lawyers who are approaching retirement age have devoted most of their adult lives to the legal profession, and their identities often are wrapped up in their work. Lawyers whose self-esteem is contingent on their workplace success are likely to delay transitioning and have a hard time adjusting to retirement.[63] Forced retirement that deprives individuals of a sense of control over the exit timing or process is particularly harmful to well-being and long-term adjustment to retirement.[64]

To assist stakeholders in creating the programming to guide and support transitioning lawyers, the Task Force sets out a number of suggestions in **Appendix C**.

10. DE-EMPHASIZE ALCOHOL AT SOCIAL EVENTS.

Workplace cultures or social climates that support alcohol consumption are among the most consistent predictors of employee drinking. When employees drink together to unwind from stress and for social bonding, social norms can reinforce tendencies toward problem drinking and stigmatize seeking help. On the other hand, social norms can also lead colleagues to encourage those who abuse alcohol to seek help.[65]

In the legal profession, social events often center around alcohol consumption (e.g., "Happy Hours," "Bar Reviews," networking receptions, etc.). The expectation of drinking is embedded in the culture, which may contribute to over-consumption. Legal employers, law schools, bar associations, and other stakeholders that plan social events should provide a variety of alternative non-alcoholic beverages and consider other types of activities to promote socializing and networking. They should strive to develop social norms in which lawyers discourage heavy drinking and encourage others to seek help for problem use.

11. UTILIZE MONITORING TO SUPPORT RECOVERY FROM SUBSTANCE USE DISORDERS.

Extensive research has demonstrated that random drug and alcohol testing (or "monitoring") is an effective way of supporting recovery from substance use disorders and increasing abstinence rates. The medical profession has long relied on monitoring as a key component of its treatment paradigm for physicians, resulting in long-term recovery rates for that population that are between 70-96 percent, which is the highest in all of the treatment outcome literature.[66] One study found that 96 percent of medical professionals who were subject to random drug tests remained drug-free, compared to only 64 percent of those who were not subject to mandatory testing.[67] Further, a national survey of physician health programs found that among medical professionals who completed their prescribed treatment requirements (including monitoring), 95 percent were licensed and actively

[60] *See generally* W. SLEASE ET AL., NOBC-APRL-COLAP SECOND JOINT COMMITTEE ON AGING LAWYERS, FINAL REPORT (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_nobc_aprl_colap_second_joint_committee_aging_lawyers.authcheckdam.pdf.
[61] Senior Lawyers Division, N. C. Bar Ass'n, https://www.ncbar.org/members/divisions/senior-lawyers/.
[62] N. Houlfort, C. Fernet, R. J. Vallerand, A. Laframboise, F. Guay, & R. Koestner, *The Role of Passion for Work and Need for Satisfaction in Psychological Adjustment to Retirement,* 88 J. VOCATIONAL BEHAVIORS 84 (2015).
[63] *Id.*
[64] E. Dingemans & K. Henkens, *How Do Retirement Dynamics Influence Mental Well-Being in Later Life? A 10-Year Panel Study,* 41 SCANDINAVIAN J. WORK, ENV'T & HEALTH 16 (2015); A. M. Muratore & J. K. Earl, *Improving Retirement Outcomes: The Role of Resources, Pre-Retirement Planning and Transition Characteristics,* 35 AGEING & SOC. 2100 (2015).
[65] J. B. Bennett, C. R. Patterson, G. S. Reynolds, W. L. Wiitala, & W. K. Lehman, *Team Awareness, Problem Drinking, and Drinking Climate: Workplace Social Health Promotion in a Policy Context,* 19 AM. J. HEALTH PROMOTION 103 (2004).
[66] R. L. DuPont, A. T. McLellan, W. L. White, L. Merlo & M. S. Gold, *Setting the Standard for Recovery: Physicians Health Programs Evaluation Review,* 36 J. SUBSTANCE ABUSE TREATMENT 159 (2009).
[67] J. Shore, *The Oregon Experience with Impaired Physicians on Probation: An Eight Year Follow-Up,* 257 J. AM. MED. ASS'N 2931 (1987).

working in the health care field at a five year follow-up after completing their primary treatment program.[68] In addition, one study has found that physicians undergoing monitoring through physician health programs experienced lower rates of malpractice claims.[69]

Such outcomes are not only exceptional and encouraging, they offer clear guidance for how the legal profession could better address its high rates of substance use disorders and increase the likelihood of positive outcomes. Although the benefits of monitoring have been recognized by various bar associations, lawyer assistance programs, and employers throughout the legal profession, a uniform or "best practices" approach to the treatment and recovery management of lawyers has been lacking. Through advances in monitoring technologies, random drug and alcohol testing can now be administered with greater accuracy and reliability—as well as less cost and inconvenience—than ever before. Law schools, legal employers, regulators, and lawyer assistance programs would all benefit from greater utilization of monitoring to support individuals recovering from substance use disorders.

12. BEGIN A DIALOGUE ABOUT SUICIDE PREVENTION.

It is well-documented that lawyers have high rates of suicide.[70] The reasons for this are complicated and varied, but some include the reluctance of attorneys to ask for help when they need it, high levels of depression amongst legal professionals, and the stressful nature of the job.[71] If we are to change these statistics, stakeholders need to provide education and take action. Suicide, like mental health or substance use disorders, is a highly stigmatized topic. While it is an issue that touches many of us, most people are uncomfortable discussing suicide. Therefore, stakeholders must make a concerted effort towards suicide prevention to demonstrate to the legal community that we are not afraid of addressing this issue. We need leaders to encourage dialogue about suicide prevention.

One model for this is through a "Call to Action," where members of the legal community and stakeholders from lawyer assistance programs, the judiciary, law firms, law schools, and bar associations are invited to attend a presentation and community discussion about the issue.

Call to Action

- ✔ **Organize "Call to Action" events to raise awareness.**
- ✔ **Share stories of those affected by suicide.**
- ✔ **Provide education about signs of depression and suicidal thinking.**
- ✔ **Learn non-verbal signs of distress.**
- ✔ **Collect and publicize available resources.**

When people who have been affected by the suicide of a friend or colleague share their stories, other members of the legal community begin to better understand the impact and need for prevention.[72] In addition, stakeholders can schedule educational presentations that incorporate information on the signs and symptoms of suicidal thinking along with other mental health/

[68] R. L. DuPont, A. T. McLellan, G, Carr, M. Gendel, & G. E. Skipper, *How Are Addicted Physicians Treated? A National Survey of Physician Health Programs,* 37 J. SUBSTANCE ABUSE TREATMENT 1 (2009).

[69] E. Brooks, M. H. Gendel, D. C. Gundersen, S. R. Early, R. Schirrmacher, A. Lembitz, & J. H. Shore, *Physician Health Programs and Malpractice Claims: Reducing Risk Through Monitoring,* 63 OCCUPATIONAL MED. 274 (2013).

[70] R. Flores & R. M. Arce, *Why Are Lawyers Killing Themselves?*, CNN, Jan. 20, 2014, http://www.cnn.com/2014/01/19/us/lawyer-suicides/. If you or someone you know is experiencing suicidal thinking, please seek help immediately. The National Suicide Prevention Lifeline can be reached at 1-800-273-8255, https://suicidepreventionlifeline.org.

[71] *Id.*

[72] The Colorado Lawyer Assistance Program sponsored one such Call to Action on January 21, 2016, in an effort to generate more exposure to this issue so the legal community better understands the need for dialogue and prevention.

substance use disorders. These can occur during CLE presentations, staff meetings, training seminars, at law school orientations, bar association functions, etc. Stakeholders can contact their state lawyer assistance programs, employee assistance program agencies, or health centers at law schools to find speakers, or referrals for counselors or therapists so that resources are available for family members of lawyers, judges, and law students who have taken their own life.

It's important for all stakeholders to understand that, while lawyers might not tell us that they are suffering, they will show us through various changes in behavior and communication styles. This is so because the majority of what we express is non-verbal.[73] Becoming better educated about signs of distress will enable us to take action by, for example, making health-related inquiries or directing them to potentially life-saving resources.

13. SUPPORT A LAWYER WELL-BEING INDEX TO MEASURE THE PROFESSION'S PROGRESS.

We recommend that the ABA coordinate with state bar associations to create a well-being index for the legal profession that will include metrics related to lawyers, staff, clients, the legal profession as a whole, and the broader community. The goal would be to optimize the well-being of all of the legal profession's stakeholders.[74] Creating such an index would correspond with a growing worldwide consensus that success should not be measured solely in economic terms. Measures of well-being also have an important role to play in defining success and informing policy.[75] The index would help track progress on the transformational effort proposed in this report. For law firms, it also may help counter-balance the "profits per partner metric" that has been published by *The American Lawyer* since the late 1980s, and which some argue has driven the profession away from its core values. As a foundation for building the well-being index, stakeholders could look to, for example, criteria used in *The American Lawyer's* Best Places to Work survey, or the Tristan Jepson Memorial Foundation's best practice guidelines for promoting psychological well-being in the legal profession.[76]

[73] ALBERT MEHRABIAN, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (1972).

[74] *See* R. E. FREEMAN, J. S. HARRISON, & A. WICKS, MANAGING FOR STAKEHOLDERS: SURVIVAL, REPUTATION, AND SUCCESS (2007); J. MACKEY & R. SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS (2014).

[75] L. Fasolo, M. Galetto, & E. Turina, *A Pragmatic Approach to Evaluate Alternative Indicators to GDP,* 47 QUALITY & QUANTITY 633 (2013); WORLD HAPPINESS REPORT (J. Helliwell, R. Layard, & J. Sachs eds., 2013), *available at* http://unsdsn.org/wp-content/uploads/2014/02/WorldHappinessReport2013_online.pdf; G. O'Donnell, *Using Well-Being as a Guide to Public Policy, in* WORLD HAPPINESS REPORT.

[76] The Tristan Jepson Memorial Foundation's Guidelines are *available at* http://tjmf.client.fatbeehive.com.au/wp/wp-content/uploads/TJMFMentalHealthGuidelines_A4_140427.pdf.

"A tree with strong roots laughs at storms." — Malay Proverb

Judges occupy an esteemed position in the legal profession and society at large. For most, serving on the bench is the capstone of their legal career. The position, however, can take a toll on judges' health and well-being. Judges regularly confront contentious, personal, and vitriolic proceedings. Judges presiding over domestic relations dockets make life-changing decisions for children and families daily.[77] Some report lying awake at night worrying about making the right decision or the consequences of that decision.[78] Other judges face the stress of presiding over criminal cases with horrific underlying facts.[79]

Also stressful is the increasing rate of violence against judges inside and outside the courthouse.[80] Further, many judges contend with isolation in their professional lives and sometimes in their personal lives.[81] When a judge is appointed to the bench, former colleagues who were once a source of professional and personal support can become more guarded and distant.[82] Often, judges do not have feedback on their performance. A number take the bench with little preparation, compounding the sense of going it alone.[83] Judges also cannot "take off the robe" in every day interactions outside the courthouse because of their elevated status in society, which can contribute to social isolation.[84] Additional stressors include re-election in certain jurisdictions.[85] Limited judicial resources coupled with time-intensive, congested dockets are a pronounced problem.[86] More recently, judges have reported a sense of diminishment in their estimation among the public at large.[87] Even the most astute, conscientious, and collected judicial officer can struggle to keep these issues in perspective.

We further recognize that many judges have the same reticence in seeking help out of the same fear of embarrassment and occupational repercussions that lawyers have. The public nature of the bench often heightens the sense of peril in coming forward.[88] Many judges, like lawyers, have a strong sense of perfectionism and believe they must display this perfectionism at all times.[89] Judges' staff can act as protectors or enablers of problematic behavior. These are all impediments to seeking help. In addition, lawyers, and even a judge's colleagues, can be hesitant to report or refer a judge whose behavior is problematic for fear of retribution.

In light of these barriers and the stressors inherent in the unique role judges occupy in the legal system, we make the following recommendations to enhance well-being among members of the judiciary.

14. COMMUNICATE THAT WELL-BEING IS A PRIORITY.

The highest court in each state should set the tone for the importance of the well-being of judges. Judges are not immune from suffering from the same stressors as lawyers, and additional stressors are unique to work as a jurist.

[77] A. Resnick, K. Myatt, & P. Marotta, *Surviving Bench Stress,* 49 FAM. CT. REV. 610, 610-11 (2011).
[78] *Id*. at 611-12.
[79] M. K. Miller, D. M. Flores, & A. N. Dolezilek, *Addressing the Problem of Courtroom Stress,* 91 JUDICATURE 60, 61, 64 (2007); J. Chamberlain & M. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogeneous Group of Judges in a Single Jurisdiction,* 37 J. AM. ACAD. PSYCHIATRY L. 214, 215 (2009).
[80] Miller, Flores, & Dolezilek, *supra* note 79, at 60-61; *see also* T. FAUTSKO, S. BERSON, & S. SWENSEN, NAT'L CTR. FOR STATE CTS., STATUS OF COURT SECURITY IN STATE COURTS – A NATIONAL PERSPECTIVE (2013), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/184#img_view_container.
[81] I. Zimmerman, Helping Judges in Distress, 90 JUDICATURE 10, 13 (2006).
[82] *Id.*
[83] C. Bremer, *Reducing Judicial Stress Through Mentoring,* 87 JUDICATURE 244-45 (2004).
[84] Resnick, Myatt, & Marotta, *supra* note 77, at 610.
[85] *Id*. at 610-11; Zimmerman, *supra* note 81, at 11-12.
[86] Resnick, Myatt, Marotta, *supra* note 77, at 610.
[87] *Judges Are Feeling Less Respected*, NAT'L JUDICIAL C. (2017), *available at* http://www.judges.org/judges-feeling-less-respected/.
[88] S. KRAUSS, N. STEK, W. DRESSEL, AM. BAR ASS'N COMM'N ON LAW. ASSISTANCE PROGRAMS, HELPING JUDGES, MODULE 1 – OVERVIEW OF A JUDICIAL ASSISTANCE PROGRAM (2010); Zimmerman, *supra* note 81, at 13.
[89] R. L. Childers, *Got Stress? Using CoLAP and Its New Judicial Assistance Project,* JUDGES JOURNAL (2006); Chamberlain & Miller, *supra* note 79, at 220.

15. DEVELOP POLICIES FOR IMPAIRED JUDGES.

It is essential that the highest court and its commission on judicial conduct implement policies and procedures for intervening with impaired members of the judiciary. For example, the highest court should consider adoption of policies such as a Diversion Rule for Judges in appropriate cases. Administrative and chief judges also should implement policies and procedures for intervening with members of the judiciary who are impaired in compliance with Model Rule of Judicial Conduct 2.14. They should feel comfortable referring members to judicial or lawyer assistance programs. Educating judicial leaders about the confidential nature of these programs will go a long way in this regard. Judicial associations and educators also should promote CoLAP's judicial peer support network, as well as the National Helpline for Judges Helping Judges.[90]

16. REDUCE THE STIGMA OF MENTAL HEALTH AND SUBSTANCE USE DISORDERS.

As reflected in Recommendation 4, the stigma surrounding mental health and substance use disorders poses an obstacle to treatment. Judges are undisputed leaders in the legal profession. We recommend they work to reduce this stigma by creating opportunities for open dialogue. Simply talking about these issues helps combat the unease and discomfort that causes the issues to remain unresolved. In a similar vein, we encourage judges to participate in the activities of lawyer assistance programs, such as volunteering as speakers and serving as board members. This is a powerful way to convey to lawyers, law students, and other judges the importance of lawyer assistance programs and to encourage them to access the programs' resources.

17. CONDUCT JUDICIAL WELL-BEING SURVEYS.

This report was triggered in part by the Study and the Survey of Law Student Well-Being. No comparable research has been conducted of the judiciary. We recommend that CoLAP and other concerned entities conduct a broad-based survey of the judiciary to determine the state of well-being and the prevalence of issues directly related to judicial fitness such as burnout, compassion fatigue, mental health, substance use disorders and help-seeking behaviors.

18. PROVIDE WELL-BEING PROGRAMMING FOR JUDGES AND STAFF.

Judicial associations should invite lawyer assistance program directors and other well-being experts to judicial conferences who can provide programming on topics related to self-care as well as resources available to members of the judiciary experiencing mental health or

- ✔ **Design well-being education specifically for judges.**
- ✔ **Connect judges for support and mentoring.**
- ✔ **Publish well-being resources tailored to judges.**

substance use disorders. Topics could include burnout, secondary traumatic stress, compassion fatigue, strategies to maintain well-being, as well as identification of and intervention for mental health and substance use disorders.

Judicial educators also should make use of programming that allows judges to engage in mutual support and sharing of self-care strategies. One such example is roundtable discussions held as part of judicial conferences or establishing a facilitated mentoring

[90]The ABA-sponsored National Helpline for Judges Helping Judges is 1-800-219-6474.

program or mentoring circle for judicial members. We have identified isolation as a significant challenge for many members of the judiciary. Roundtable discussions and mentoring programs combat the detrimental effects of this isolation.[91]

Judicial associations and educators also should develop publications and resources related to well-being, such as guidebooks. For example, a judicial association could create wellness guides such as “A Wellness Guide for Judges of the California State Courts.” This sends the signal that thought leaders in the judiciary value well-being.

19. MONITOR FOR IMPAIRED LAWYERS AND PARTNER WITH LAWYER ASSISTANCE PROGRAMS

Judges often are among the first to detect lawyers suffering from an impairment. Judges know when a lawyer is late to court regularly, fails to appear, or appears in court under the influence of alcohol or drugs. They witness incomprehensible pleadings or cascading requests for extensions of time. We believe judges have a keen pulse on when a lawyer needs help. With the appropriate training, judges’ actions can reduce client harm and save a law practice or a life. We make the following recommendations tailored to helping judges help the lawyers appearing before them.

Consistent with Recommendation 5.1, judges should become familiar with lawyer assistance programs in their state. They should learn how best to make referrals to the program. They should understand the confidentiality protections surrounding these referrals. Judges also should invite lawyer assistance programs to conduct educational programming for lawyers in their jurisdiction using their courtroom or other courthouse space.

Judges, for example, can devote a bench-bar luncheon at the courthouse to well-being and invite representatives of the lawyers assistance program to the luncheon.

Judicial educators should include a section in bench book-style publications dedicated to lawyer assistance programs and their resources, as well as discussing how to identify and handle lawyers who appear to have mental health or substance use disorders. Further, judges and their staff should learn the signs of mental health and substance use disorders, as well as strategies for intervention, to assist lawyers in their courtrooms who may be struggling with these issues. Judges can also advance the well-being of lawyers who appear before them by maintaining courtroom decorum and de-escalating the hostilities that litigation often breeds.

[90]The ABA-sponsored National Helpline for Judges Helping Judges is 1-800-219-6474.
[91]For more information on judicial roundtables, *see* AM. BAR ASS’N COMM’N ON LAW. ASSISTANCE PROGRAMS, JUDICIAL ROUNDTABLES, *available at* https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_Judicial_Roundtable_Protocols.authcheckdam.pdf.

"You can do what I cannot do. I can do what you cannot do. Together we can do great things." — Mother Teresa

Regulators play a vital role in fostering individual lawyer well-being and a professional culture that makes it possible. We broadly define "regulators" to encompass all stakeholders who assist the highest court in each state in regulating the practice of law.[92] This definition includes lawyers and staff in regulatory offices; volunteer lawyer and non-lawyer committee, board, and commission members; and professional liability lawyers who advise law firms and represent lawyers in the regulatory process.

Courts and their regulators frequently witness the conditions that generate toxic professional environments, the impairments that may result, and the negative professional consequences for those who do not seek help. Regulators are well-positioned to improve and adjust the regulatory process to address the conditions that produce these effects. As a result, we propose that the highest court in each state set an agenda for action and send a clear message to all participants in the legal system that lawyer well-being is a high priority.

Transform the profession's perception of regulators from police to partner.

To carry out the agenda, regulators should develop their reputation as partners with practitioners. The legal profession often has a negative perception of regulators, who typically appear only when something has gone awry. Regulators can transform this perception by building their identity as partners with the rest of the legal community rather than being viewed only as its "police."

Most regulators are already familiar with the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement—better known as the "McKay Commission Report."[93] It recognized and encouraged precisely what we seek to do through this report: to make continual improvements to the lawyer regulation process to protect the public and assist lawyers in their professional roles. Accordingly, we offer the following recommendations to ensure that the regulatory process proactively fosters a healthy legal community and provides resources to rehabilitate impaired lawyers.

20. TAKE ACTIONS TO MEANINGFULLY COMMUNICATE THAT LAWYER WELL-BEING IS A PRIORITY.

20.1. Adopt Regulatory Objectives That Prioritize Lawyer Well-Being.

In 2016, the Conference of Chief Justices adopted a resolution recommending that each state's highest court consider the ABA's proposed Model Regulatory Objectives.[94] Among other things, those objectives sought to encourage "appropriate preventive or wellness programs." By including a wellness provision, the ABA recognized the importance of the human element in the practice of law: To accomplish all other listed objectives, the profession must have healthy, competent lawyers. The Supreme Court of Colorado already has adopted

[92] *See* AM. BAR ASS'N RESOL. 105 (February 2016).
[93] AM BAR ASS'N COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992), *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.
[94] RESOL. 105*, supra* note 92.

a version of the ABA's Regulatory Objectives. In doing so, it recommended proactive programs offered by the Colorado Lawyer Assistance Program and other organizations to assist lawyers throughout all stages of their careers to practice successfully and serve their clients.[95] The Supreme Court of Washington also recently enacted regulatory objectives.[96]

We recommend that the highest court in each U.S. jurisdiction follow this lead. Each should review the ABA and Colorado regulatory objectives and create its own objectives that specifically promote effective lawyer assistance and other proactive programs relating to well-being. Such objectives will send a clear message that the court prioritizes lawyer well-being, which influences competent legal services. This, in turn, can boost public confidence in the administration of justice.

20.2. Modify the Rules of Professional Conduct to Endorse Well-Being As Part of a Lawyer's Duty of Competence.

ABA Model Rule of Professional Conduct 1.1 (Competence) states that lawyers owe a duty of competence to their clients. "Competent" representation is defined to require "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[97] We recommend revising this Rule and/or its Comments to more clearly include lawyers' well-being in the definition of "competence."

One alternative is to include language similar to California's Rule of Professional Conduct 3-110, which defines "competence" to include the "mental, emotional, and physical ability reasonably necessary" for the representation.[98] A second option is to amend the Comments to Rule 1.1 to clarify that professional competence requires an ability to comply with all of the Court's essential eligibility requirements (see Recommendation 21.2 below).

Notably, we do <u>not</u> recommend discipline solely for a lawyer's failure to satisfy the well-being requirement or the essential eligibility requirements. Enforcement should proceed only in the case of actionable misconduct in the client representation or in connection with disability proceedings under Rule 23 of the ABA Model Rules for Disciplinary Enforcement. The goal of the proposed amendment is not to threaten lawyers with discipline for poor health but to underscore the importance of well-being in client representations. It is intended to remind lawyers that their mental and physical health impacts clients and the administration of justice, to reduce stigma associated with mental health disorders, and to encourage preventive strategies and self-care.

20.3. Expand Continuing Education Requirements to Include Well-Being Topics.

We recommend expanding continuing education requirements for lawyers and judges to mandate credit for mental health and substance use disorder programming and allow credit for other well-being-related topics that affect lawyers' professional capabilities.

In 2017, the ABA proposed a new Model Continuing Legal Education (MCLE) Rule that recommends mandatory mental health programming. The Model Rule requires lawyers to earn at least one credit hour every three years of CLE programming that addresses the prevention, detection, and/or treatment of "mental health and substance use disorders." We recommend that all states adopt this provision of the Model Rule. Alternatively, states could consider authorizing ethics credit (or other specialized credits) for CLE programs that address these topics. California and Illinois are examples of state bars that already have such requirements.[99]

The ABA's new Model Rule also provisionally recommends that states grant CLE credit for "Lawyer Well-Being Programming." The provision encompasses a broader scope of topics than might fall under a narrow definition of mental health and substance use

[96] Washington Courts, Suggested Amendments to General Rules (2017), http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=549.
[97] MODEL RULES PROF. CONDUCT R. 1.1 (2017), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.
[98] CAL. RULES PROF'L CONDUCT R. 3-110, *available at* http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-3-110.
[99] *See* RULES OF THE STATE BAR OF CAL., Title 2, Div. 4, R. 2.72 (2017); ILL. SUP. CT. R. 794(d)(1) (2017).

disorders. Tennessee is one example of a pioneering state that authorizes credit for a broad set of well-being topics. Its CLE Regulation 5H authorizes ethics and professionalism credit for programs that are designed, for example, to: enhance optimism, resilience, relationship skills, and energy and engagement in their practices; connect lawyers with their strengths and values; address stress; and to foster cultures that support outstanding professionalism.[100] We recommend that regulators follow Tennessee's lead by revising CLE rules to grant credit for similar topics.

20.4. Require Law Schools to Create Well-Being Education for Students as An Accreditation Requirement.

In this recommendation, the Task Force recognizes the ABA's unique role as accreditor for law schools through the Council of the Section of Legal Education and Admissions to the Bar of the ABA.[101] The Task Force recommends that the Council revise the Standards and Rules of Procedure for Approval of Law Schools to require law schools to create well-being education as a criterion for ABA accreditation. The ABA should require law schools to publish their well-being-related resources on their websites. These disclosures can serve as resources for other law schools as they develop and improve their own programs. Examples of well-being education include a mandatory one credit-hour course on well-being topics or incorporating well-being topics in to the professional responsibility curriculum.

A requirement similar to this already has been implemented in the medical profession for hospitals that operate residency programs. Hospitals that operate Graduate Medical Education programs to train residents must comply with the Accreditation Council for Graduate Medical Education (ACGME) Program Requirements. The ACGME requires hospitals to "be committed to and responsible for . . . resident well-being in a supportive educational environment."[102] This provision requires that teaching hospitals have a documented strategy for promoting resident well-being and, typically, hospitals develop a wellness curriculum for residents.

21. ADJUST THE ADMISSIONS PROCESS TO SUPPORT LAW STUDENT WELL-BEING.

To promote law student well-being, regulations governing the admission to the practice of law should facilitate the treatment and rehabilitation of law students with impairments.

21.1. Re-Evaluate Bar Application Inquiries About Mental Health History.

Most bar admission agencies include inquiries about applicants' mental health as part of fitness evaluations for licensure. Some critics have contended that the deterrent effect of those inquiries discourages persons in need of help from seeking it. Not everyone agrees with that premise, and some argue that licensing of professionals necessarily requires evaluation of all risks that an applicant may pose to the public. Over the past several decades, questions have evolved to be more tightly focused and to elicit only information that is current and germane. There is continuing controversy over the appropriateness of asking questions about mental health at all. The U.S. Department of Justice has actively encouraged states to eliminate questions relating to mental health, and some states have modified or eliminated such questions.[103] In 2015, the ABA adopted a resolution that the focus should be directed "on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner."[104] We recommend that each state follow the ABA and more closely focus on such conduct or behavior rather than any diagnosis or treatment history.

[100] TENN. COMM'N ON CONTINUING LEGAL EDUC., REG. 5H (2008), *available at* http://www.cletn.com/images/Documents/Regulations2013.04.16.pdf.
[101] *See* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, *available at* https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.
[102] ACCREDITATION COUNSEL FOR GRADUATE MEDICAL EDUCATION, CGME COMMON PROGRAM REQUIREMENTS, § VI.A.2, *available at* https://www.acgme.org/Portals/0/PFAssets/ProgramRequirements/CPRs_07012016.pdf
[103] D. Hudson, *Honesty Is the Best Policy for Character and Fitness Screenings,* A.B.A. J., June 1, 2016, *available at* http://www.abajournal.com/magazine/article/honesty_is_the_best_policy_for_character_and_fitness_screenings.
[104] AM. BAR ASS'N RESOL. 102 (August 2015).

21.2. Adopt Essential Eligibility Admission Requirements.

Promoting lawyer well-being includes providing clear eligibility guidelines for lawyers with mental or physical impairments. Regulators in each state should adopt essential eligibility requirements that affirmatively state the abilities needed to become a licensed lawyer. Their purpose is to provide the framework for determining whether or not an individual has the required abilities, with or without reasonable accommodations.

At least fourteen states have essential eligibility requirements for admission to practice law.[105] These requirements help the applicant, the admissions authority, and the medical expert understand what is needed to demonstrate fitness to practice law. Essential eligibility requirements also aid participants in lawyer disability and reinstatement proceedings, when determinations must be made of lawyers' capacity to practice law.

21.3. Adopt a Rule for Conditional Admission to Practice Law With Specific Requirements and Conditions.

Overly-rigid admission requirements can deter lawyers and law students from seeking help for substance use and mental health disorders. To alleviate this problem, states should adopt conditional admission requirements, which govern applicants for admission to the practice of law who have successfully undergone rehabilitation for substance use or another mental disorder, but whose period of treatment and recovery may not yet be sufficient to ensure continuing success.[106] Conditional admission programs help dismantle the stigma of mental health and substance use disorders as "scarlet letters." Especially for law students, they send a meaningful message that even in the worst circumstances, there is

Rigid admission requirements can deter help-seeking.

hope: seeking help will not block entry into their chosen profession.

21.4. Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.

At present, no state publishes data showing the number of applications for admission to practice law that are actually denied or delayed due to conduct related to substance use and other mental health disorders. From informal discussions with regulators, we know that a low percentage of applications are denied. Publication of this data might help alleviate law students' and other applicants' fears that seeking help for such disorders will inevitably block them from practicing law. Accordingly, we recommend that boards of bar examiners collect and publish such data as another means of encouraging potential applicants to seek help immediately and not delay until after their admission.

22. ADJUST LAWYER REGULATIONS TO SUPPORT WELL-BEING.

22.1. Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.

PMBP programs encourage best business practices and provide a resource-based framework to improve lawyers' ability to manage their practice. Such programs

[105] *See*, e.g., SUP. CT. OF OHIO, OFF. OF BAR ADMISSIONS, OHIO ESSENTIAL ELIGIBILITY REQUIREMENTS; *available at* http://www.supremecourt.ohio.gov/AttySvcs/admissions/pdf/ESSENTIAL_ELIGIBILITY_REQUIREMENTS.pdf; MINN. RULES FOR ADMISSION TO THE BAR, RULE 5, *available at* https://www.revisor.leg.state.mn.us/court_rules/rule.php?type=pr&subtype=admi&id=5; COLO. R. CIV. PROC. 208.1(5), *available at* http://www.coloradosupremecourt.com/Future%20Lawyers/FAQ_CharacterFitness.asp; WASH. ADMISSION AND PRACTICE RULES, RULE 20(e), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr); IDAHO BAR COMM'N RULE 201. Other states to adopt essential eligibility requirements include Florida, Illinois, Kentucky, Massachusetts, Minnesota, Nebraska, North Dakota, South Dakota, and Wyoming.

[106] About a quarter of all jurisdictions already have conditional admission rules for conduct resulting from substance use or other mental disorders. *See* 2016 NAT'L CONF. OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS, Chart 2: Character and Fitness Determinations (2016). Those states include Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming. Additionally, Guam allows conditional admission for conduct related to substance abuse.

are designed to alleviate practice stress, improve lawyer-client relationships, and enhance career satisfaction.[107] Further, PMBP programs allow regulators to engage with the profession in a service-oriented, positive manner, reducing the anxiety, fear, and distrust that often accompanies lawyers' interactions with regulators.[108] Transforming the perception of regulators so that they are viewed as partners and not only as police will help combat the culture of stress and fear that has allowed mental health and substance use disorders to proliferate.

22.2. Adopt A Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.

We recommend that regulators adopt centralized intake systems. These allow expedited methods for receipt and resolution of grievances and help reduce the stress associated with pending disciplinary matters. With specialized training for intake personnel, such systems also can result in faster identification of and possible intervention for lawyers struggling with substance use or mental health disorders.[109]

22.3. Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information From Regulators to Lawyer Assistance Programs.

Regulators' information-sharing practices can contribute to the speed of help to lawyers in need. For example, admissions offices sometimes learn that applicants are suffering from a substance use or other mental health disorder. Other regulators may receive similar information during investigations or prosecutions of lawyer regulation matters that they consider to be confidential information. To facilitate help for lawyers suffering from such disorders, each state should simplify its confidentiality rules to allow admissions offices and other regulators to share such information immediately with local lawyer assistance programs.

Allowing this one-way flow of information can accelerate help to lawyers who need it. To be clear, the recommended information sharing would be one-way. As always, the lawyer assistance programs would be precluded from sharing any information with any regulators or others.

22.4. Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven Successful in Promoting Well-Being.

Discipline does not make an ill lawyer well. We recommend that regulators adopt alternatives to formal disciplinary proceedings that rehabilitate lawyers with impairments. Diversion programs are one such alternative, and they have a direct and positive impact

Discipline does not make an ill lawyer well.

on lawyer well-being. Diversion programs address minor lawyer misconduct that often features an underlying mental health or substance use disorder.[110] When lawyers enter a diversion program, they agree to follow

[107] S. Fortney & T. Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L. J. 152 (2012).
[108] L. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System,* 20 LEWIS & CLARK L. REV. 717 (2016).
[109] The American Bar Association's Model Rules for Lawyer Disciplinary Enforcement, Rule 1, defines a Central Intake Office as the office that "receive[s] information and complaints regarding the conduct of lawyers over whom the court has jurisdiction" and determines whether to dismiss the complaint or forward it to the appropriate disciplinary agency. The Model Rules for Lawyer Disciplinary Enforcement are *available at* http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html.
[110] Title 6 of Washington's Rules for Enforcement of Lawyer Conduct provides an excellent overview of when diversion is appropriate and procedures for diversion. It is available through the Washington State Courts website at http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=ELC. Some of the many jurisdictions to adopt such programs are Arizona, Colorado, the District of Columbia, Florida, Illinois, Iowa, Kansas, Louisiana, New Hampshire, New Jersey, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

certain conditions to continue practicing law. Those conditions can include training, drug or alcohol testing, peer assistance, and treatment. Monitoring plays a central role in ensuring compliance with the diversion agreement and helps lawyers successfully transition back to an unconditional practice of law and do so healthy and sober. By conditioning continued practice on treatment for an underlying mental health disorder or substance use disorder, diversion agreements can change a lawyer's life.

In addition, probation programs also promote wellness. Lawyer misconduct that warrants a suspension of a lawyer's license may, under certain circumstances, qualify for probation. In most jurisdictions, the probation period stays the license suspension and lawyers may continue practicing under supervision and specified conditions that include training, testing, monitoring, and treatment. Once again, this places a lawyer facing a mental health or substance use crisis on the path to better client service and a lifetime of greater well-being and sobriety.

23. ADD WELL-BEING-RELATED QUESTIONS TO THE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAM (MPRE).

A 2009 survey reflected that 22.9 percent of professional responsibility/legal ethics professors did not cover substance use and addiction at all in their course, and 69.8 percent addressed the topic in fewer than two hours.[111] Notwithstanding the pressure to address myriad topics in this course, increased attention must be given to reduce these issues among our law students. The National Conference of Bar Examiners should consider adding several relevant questions to the MPRE, such as on the confidentiality of using lawyer assistance programs, the frequency of mental health and substance use disorders, and the tie-in to competence and other professional responsibility issues.[112] Taking this step underscores both the importance of the topic and the likelihood of students paying closer attention to that subject matter in their course. In addition, professional responsibility casebook authors are encouraged to include a section devoted to the topic, which will in turn compel instructors to teach in this area.

[111] A. M. PERLMAN, M. RAYMOND & L. S. TERRY, A SURVEY OF PROFESSIONAL RESPONSIBILITY COURSES AT AMERICAN LAW SCHOOLS IN 2009, http://www.legalethicsforum.com/files/pr-survey-results-final.pdf.

[112] *See* Krill, Johnson, & Albert, *supra* note 1, for the ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation Study; Organ, Jaffe, Bender, *supra* note 3, for *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns.*

"Self-care is not selfish. You cannot serve from an empty vessel." — Eleanor Brown

Legal employers, meaning all entities that employ multiple practicing lawyers, can play a large role in contributing to lawyer well-being. While this is a broad and sizable group with considerable diversity, our recommendations apply fairly universally. A specific recommendation may need to be tailored to address the realities particular to each context, but the crux of each recommendation applies to all.

24. ESTABLISH ORGANIZATIONAL INFRASTRUCTURE TO PROMOTE WELL-BEING.

24.1. Form A Lawyer Well-Being Committee.

Without dedicated personnel, real progress on well-being strategies will be difficult to implement and sustain.[113] Accordingly, legal employers should launch a well-being initiative by forming a Lawyer Well-Being Committee or appointing a Well-Being Advocate. The advocate or committee should be responsible for evaluating the work environment, identifying and addressing policies and procedures that create the greatest mental distress among employees, identifying how best to promote a positive state of well-being, and tracking progress of well-being strategies. They should prepare key milestones, communicate them, and create accountability strategies.[114] They also should develop strategic partnerships with lawyer assistance programs and other well-being experts and stay abreast of developments in the profession and relevant literature.

24.2. Assess Lawyers' Well-Being.

Legal employers should consider continually assessing the state of well-being among lawyers and staff and whether workplace cultures support well-being. An assessment strategy might include an anonymous survey conducted to measure lawyer and staff attitudes and beliefs about well-being, stressors in the firm that significantly affect well-being, and organizational support for improving well-being in the workplace. Attitudes are formed not only by an organization's explicit messages but also implicitly by how leaders and lawyers actually behave. Specifically related to the organizational climate for support for mental health or substance use disorders, legal employers should collect information to ascertain, for example, whether lawyers:

- Perceive that you, their employer, values and supports well-being.
- Perceive leaders as role modeling healthy behaviors and empathetic to lawyers who may be struggling.
- Can suggest improvements to better support well-being.
- Would feel comfortable seeking needed help, taking time off, or otherwise taking steps to improve their situation.
- Are aware of resources available to assist their well-being.
- Feel expected to drink alcohol at organizational events.
- Feel that substance use and mental health problems are stigmatized.
- Understand that the organization will reasonably accommodate health conditions, including recovery from mental health disorders and addiction.

[113] Companies with dedicated wellness personnel achieve, on average, a 10 percent higher rate of employee participation. *See* OPTUM HEALTHCARE, WELLNESS IN THE WORKPLACE 2012: AN OPTUM RESEARCH UPDATE (Resource Center for Health & Wellbeing White Paper 2012), *available at* https://broker.uhc.com/assets/wellness-in-the-worklplace-2012-WP.pdf.

[114] For guidance on developing their own strategic plan, Well-Being Committees could look to the Tristan Jepson Memorial Foundation's best practice guidelines for promoting psychological well-being in the legal profession, *see supra* note 76. They might also consider creating an information hub to post all well-being related resources. Resources could include information about the growing number of mental health apps. See, e.g., R. E. Silverman, *Tackling Workers' Mental Health, One Text at a Time*, WALL ST. J., July 19, 2016, *available at* https://www.wsj.com/articles/tackling-workers-mental-health-one-text-at-a-time-1468953055; B. A. Clough & L. M. Casey, *The Smart Therapist: A Look to the Future of Smartphones and eHealth Technologies in Psychotherapy,* 46 PROF. PSYCHOL. RES. & PRAC. 147 (2015).

As part of the same survey or conducted separately, legal employers should consider assessing the overall state of lawyers' well-being. Surveys are available to measure concepts like depression, substance use, burnout, work engagement, and psychological well-being. The Maslach Burnout Inventory (MBI) is the most widely used burnout assessment. It has been used to measure burnout among lawyers and law students.[115] Programs in the medical profession have recommended a bi-annual distribution of the MBI.[116]

Legal employers should carefully consider whether internal staff will be able to accurately conduct this type of assessment or whether hiring an outside consultant would be advisable. Internal staff may be more vulnerable to influence by bias, denial, and misinterpretation.

25. ESTABLISH POLICIES AND PRACTICES TO SUPPORT LAWYER WELL-BEING.

Legal employers should conduct an in-depth and honest evaluation of their current policies and practices that relate to well-being and make necessary adjustments. This evaluation should seek input from all lawyers and staff in a safe and confidential manner, which creates transparency that builds trust. **Appendix D** sets out example topics for an assessment.

Legal employers also should establish a confidential reporting procedure for lawyers and staff to convey concerns about their colleagues' mental health or substance use internally, and communicate how lawyers and staff can report concerns to the appropriate disciplinary authority and/or to the local lawyer assistance program. Legal employers additionally should establish a procedure for lawyers to seek confidential help for themselves without being penalized or stigmatized. CoLAP and state lawyer assistance programs can refer legal employers to existing help lines and offer guidance for establishing an effective procedure that is staffed by properly-trained people.[117] We note that the ABA and New York State Bar Association have proposed model law firm policies for handling lawyer impairment that can be used for guidance.[118] The ABA has provided formal guidance on managing lawyer impairment.[119]

25.1. Monitor For Signs of Work Addiction and Poor Self-Care.

Research reflects that about a quarter of lawyers are workaholics, which is more than double that of the 10 percent rate estimated for U.S. adults generally.[120] Numerous health and relationship problems, including depression, anger, anxiety, sleep problems, weight gain, high blood pressure, low self-esteem, low life satisfaction, work burnout, and family conflict can develop from work addiction. Therefore, we recommend that legal employers monitor for work addiction and avoid rewarding extreme behaviors that can ultimately harm their health. Legal employers should expressly encourage lawyers to make time to care for themselves and attend to other personal obligations. They may also want to consider promoting physical activity to aid health and cognitive functioning.

25.2. Actively Combat Social Isolation and Encourage Interconnectivity.

As job demands have increased and budgets have tightened, many legal employers have cut back on social activities. This could be a mistake. Social support from colleagues is an important factor for coping with stress and preventing negative consequences like burnout.[121] Socializing helps individuals recover from work demands

[115] *See, e.g.,* S. E. Jackson, J. A. Turner, & A. P. Brief, *Correlates of Burnout Among Public Service Lawyers,* 8 J. ORG. BEHAV. 339 (1987); *see also* R. Durr, *Creating 'Whole Lawyers': Wellness, Balance, and Performance Excellence At Northwestern University School of Law,* NW. SCH. OF L. (2015), *available at* http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/8_wellbeing_program_catalog_2014_2015%204%203%2015%20version.authcheckdam.pdf.
[116] J. Eckleberry-Hunt, A. Van Dyke, D. Lick, & J. Tucciarone, *Changing the Conversation from Burnout to Wellness: Physician Well-being in Residency Training Programs,* 1 J. GRADUATE MED. EDUC. 225 (2009). The MBI is *available at* http://www.mindgarden.com/117-maslach-burnout-inventory.
[117] CoLAP's website provides help-line information and a directory of state-based lawyer assistance programs: http://www.americanbar.org/groups/lawyer_assistance.html.
[118] AM. BAR ASS'N RESOL. 118, MODEL LAW FIRM/LEGAL DEPARTMENT IMPAIRMENT POLICY & GUIDELINES (Aug. 1990), *available at* https://www.texasbar.com/AM/Template.cfm?Section=Employers1&Template=/CM/ContentDisplay.cfm&ContentID=15131; NEW YORK STATE BAR ASSOCIATION LAWYER ASSISTANCE COMMITTEE MODEL POLICY, N. Y. STATE BAR ASS'N (2010), *available at* https://www.nassaubar.org/UserFiles/Model_Policy.pdf.
[119] AM. BAR ASS'N FORMAL OPINION 03-429 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/03_429.authcheckdam.pdf.
[120] Brafford, *supra* note 2.
[121] C. Maslach, W. B. Schaufeli, & M. P. Leiter, *Job Burnout,* 52 ANN. REV. OF PSYCHOL. 397, 415 (2001); T. Reuter & R. Schwarzer, *Manage Stress at Work Through Preventive and Proactive Coping, in* Locke, *supra* note 7.

and can help stave off emotional exhaustion.[122] It inhibits lawyers feeling isolated and disconnected, which helps with firm branding, messaging, and may help reduce turnover. We recommend deemphasizing alcohol at such events.

26. PROVIDE TRAINING AND EDUCATION ON WELL-BEING, INCLUDING DURING NEW LAWYER ORIENTATION.

We recommend that legal employers provide education and training on well-being-related topics and recruit experts to help them do so. A number of law firms already offer well-being related programs, like meditation, yoga sessions, and resilience workshops.[123] We also recommend orientation programs for new lawyers that incorporate lawyer well-being education and training.[124] Introducing this topic during orientation will signal its importance to the organization and will start the process of developing skills that may help prevent well-being problems. Such programs could:

- Introduce new lawyers to the psychological challenges of the job.[125]
- Reduce stigma surrounding mental health problems.
- Take a baseline measure of well-being to track changes over time.
- Provide resilience-related training.
- Incorporate activities focused on individual lawyers' interests and strengths, and not only on organizational expectations.[126]

Further, law firms should ensure that all members and staff know about resources, including lawyer assistance programs, that can assist lawyers who may experience mental health and substance use disorders. This includes making sure that members and staff understand confidentiality issues pertaining to those resources.

26.1. Emphasize a Service-Centered Mission.

At its core, law is a helping profession. This can get lost in the rush of practice and in the business aspects of law. Much research reflects that organizational cultures that focus chiefly on materialistic, external rewards can damage well-being and promote a self-only focus. In fact, research shows that intrinsic values like relationship-development and kindness are stifled in organizations that emphasize extrinsic values like competition, power, and monetary rewards.[127] Work cultures that constantly emphasize competitive, self-serving goals will continually trigger competitive, selfish behaviors from lawyers that harm organizations and individual well-being. This can be psychologically draining. Research of Australian lawyers found that 70 percent reported that the practice of law is bottom-line driven.[128] Lawyers who reported that the practice of law was primarily about generating profits were more likely to be depressed.[129] This affects the

> ***Work cultures that constantly emphasize competitive, self-serving goals can harm lawyer well-being.***

[122] M. J. Tews, J. W. Michel, & K. Stafford, *Does Fun Pay? The Impact of Workplace Fun on Employee Turnover and Performance,* 54 CORNELL HOSPITALITY QUARTERLY, 370 (2013).
[123] *E.g.,* C. Bushey, *Kirkland & Ellis to Offer Wellness Training to All U.S. Lawyers,* CRAIN'S CHICAGO BUS., May 2, 2016, *available at* http://www.chicagobusiness.com/article/20160502/NEWS04/160509972/kirkland-ellis-to-offer-wellness-training-to-all-u-s-lawyers; N. Rodriguez, *What the Army Can Teach BigLaw about Bouncing Back,* LAW360, Feb. 17, 2017, https://www.law360.com/in-depth/articles/891995?nl_pk=972d8116-f9f0-4582-a4c6-0ab3cf4a034c&utm_source=newsletter&utm_medium=email&utm_campaign=in-depth (identifying Goodwin Procter LLP, O'Melveny & Myers LLP, Morgan Lewis & Bockius LLP, Fish & Richardson PC, Drinker Biddle & Reath LLP, Quarles & Brady LLP, and Neal Gerber & Eisenberg LLP as having hosted resilience workshops).
[124] *See* A. M. Saks, & J. A. Gruman, *Organizational Socialization and Positive Organizational Behaviour: Implications for Theory, Research, and Practice,* 28 CANADIAN J. ADMIN. SCI. 14 (2011).
[125] *See* generally J. P. Wanous & A. E. Reichers, *New Employee Orientation Programs,* 10 HUMAN RESOURCE MGMT. REV. 435 (2000), *available at* http://homepages.se.edu/cvonbergen/files/2013/01/New-Employee-Orientation-Programs.pdf.
[126] *See* D. M. Cable, F. Gino, & B. R. Staats, *Reinventing Employee Onboarding,* M.I.T. SLOAN MGMT. REV. (2013), *available at* http://sloanreview.mit.edu/article/reinventing-employee-onboarding.
[127] T. Kasser, *Materialistic Values and Goals*, 67 ANN. REV. OF PSYCHOL. 489 (2015); T. Kasser, *Teaching about Values and Goals: Applications of the Circumplex Model to Motivation, Well-Being, and Prosocial Behavior,* 41 TEACHING PSYCHOL. 365 (2014).
[128] A. J. Bergin & N. L. Jimmieson, *Australian Lawyer Well-Being: Workplace Demands, Resources and the Impact of Time-Billing Targets,* 21 PSYCHIATRY, PSYCHOL. & L. 427 (2014).
[129] A. D. Joudrey & J. E. Wallace, *Leisure as a Coping Resource: A Test of the Job Demand-Control-Support Model,* 62 HUMAN RELATIONS 195 (2009).
[130] A. Hansen, Z. Byrne, & C. Kiersch, *How Interpersonal Leadership Relates to Employee Engagement,* 29 J. MANAGERIAL PSYCHOL. 953 (2014).

bottom line since poor mental health can cause disability and lost productivity.

Consequently, we recommend that legal employers evaluate what they prioritize and value, and how those values are communicated. When organizational values evoke a sense of belonging and pride, work is experienced as more meaningful.[130] Experiencing work as meaningful is the biggest contributor to work engagement—a form of work-related well-being.[131]

26.2. Create Standards, Align Incentives, and Give Feedback.

Contextual factors (i.e., the structure, habits, and dynamics of the work environment) play an enormous role in influencing behavior change. Training alone is almost never enough. To achieve change, legal employers will need to set standards, align incentives, and give feedback about progress on lawyer well-being topics.[132]

Currently, few legal employers have such structural supports for lawyer well-being. For example, many legal employers have limited or no formal leader development programs, no standards set for leadership skills and competencies, and no standards for evaluating leaders' overall performance or commitment to lawyer well-being. Additionally, incentive systems rarely encourage leaders to develop their own leadership skills or try to enhance the well-being of lawyers with whom they work. In law firms especially, most incentives are aligned almost entirely toward revenue growth, and any feedback is similarly narrow. To genuinely adopt lawyer well-being as a priority, these structural and cultural issues will need to be addressed.

[130] A. Hansen, Z. Byrne, & C. Kiersch, *How Interpersonal Leadership Relates to Employee Engagement,* 29 J. MANAGERIAL PSYCHOL. 953 (2014).

[131] A. M. BRAFFORD, POSITIVE PROFESSIONALS: CREATING HIGH-PERFORMING, PROFITABLE FIRMS THROUGH THE SCIENCE OF ENGAGEMENT. (American Bar Association, forthcoming November 2017.); D. R. May, R. L. Gilson, & L. M. Harter, *The Psychological Conditions of Meaningfulness, Safety and Availability and the Engagement of the Human Spirit at Work,* 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 11 (2004).

[132] R. A. NOE, EMPLOYEE TRAINING AND DEVELOPMENT (McGraw-Hill 2013).

"Well-being is a combination of feeling good as well as actually having meaning, good relationships, and accomplishment." — Martin Seligman

Law students start law school with high life satisfaction and strong mental health measures. But within the first year of law school, they experience a significant increase in anxiety and depression.[133] Research suggests that law students are among the most dissatisfied, demoralized, and depressed of any graduate student population.[134]

The 2016 Survey of Law Student Well-Being found troublesome rates of alcohol use, anxiety, depression, and illegal drug use at law schools across the country.

42% of students needed help for poor mental health but only about half sought it out.

Equally worrisome is students' level of reluctance to seek help for those issues. A large majority of students (about 80 percent) said that they were somewhat or very likely to seek help from a health professional for alcohol, drug, or mental health issues, but few actually did.[135] For example, while 42 percent thought that they had needed help for mental health problems in the prior year, only about half of that group actually received counseling from a health professional.[136] Only four percent said they had ever received counseling for alcohol or drug issues—even though a quarter were at risk for problem drinking.[137]

The top factors that students reported as discouraging them from seeking help were concerns that it would threaten their bar admission, job, or academic status; social stigma; privacy concerns; financial reasons; belief that they could handle problems on their own; and not having enough time. Students' general reluctance to seek help may be one factor explaining why law student wellness has not changed significantly since the last student survey in the 1990s.[138] It appears that recommendations stemming from the 1993 survey either were not implemented or were not successful.[139]
The Survey of Law Student Well-Being did not seek to identify the individual or contextual factors that might be contributing to students' health problems. It is important to root out such causes to enable real change. For example, law school graduates cite heavy workload, competition, and grades as major law school stressors.[140] Others in the legal community have offered additional insights about common law school practices, which are discussed below. Law school well-being initiatives should not be limited to detecting disorders and enhancing student resilience. They also should include identifying organizational practices that may be contributing to the problems and assessing what changes can be made to support student well-being. If legal educators ignore the impact of law school stressors, learning is likely to be suppressed and illness may be intensified.[141]

The above reflects a need for both prevention strategies to address dysfunctional drinking and misuse of substances as well as promotion strategies that identify aspects of legal education that can be revised to support

[133] L. S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence,* 52 J. LEGAL EDUC. 112, 113-15 (2002).
[134] A. A. Patthoff, *This is Your Brain on Law School: The Impact of Fear-Based Narratives on Law Students,* 2015 UTAH L. REV. 391, 424 (2015).
[135] Organ, Jaffe, & Bender, *supra* note 3, at 143.
[136] *Id.* at 140.
[137] *Id.*
[138] ASS'N AM. L. SCH. SPECIAL COMM. ON PROBLEMS OF SUBSTANCE ABUSE IN THE L. SCHS. (1993).
[139] *Id.* at vi-vii.
[140] R. A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance,* 15 BARRY L. REV. 73, 79 (2010).
[141] Patthoff, *supra* note 134, at 424.

well-being. The recommendations below offer some ideas for both.

27. CREATE BEST PRACTICES FOR DETECTING AND ASSISTING STUDENTS EXPERIENCING PSYCHOLOGICAL DISTRESS.

Ignoring law school stressors can suppress learning and intensify illness.

Law schools should develop best practices for creating a culture in which all associated with the school take responsibility for student well-being. Faculty and administrators play an important role in forming a school's culture and should be encouraged to share responsibility for student well-being.

27.1. Provide Training to Faculty Members Relating to Student Mental Health and Substance Use Disorders.

Faculty have significant sway over students but generally students are reluctant to approach them with personal problems, especially relating to their mental health. Students' aversion to doing so may be exacerbated by a perception that faculty members must disclose information relating to students' competence to practice to the state bar. To help remove uncertainty and encourage students to ask for help, law schools should consider working with lawyer assistance programs on training faculty on how to detect students in trouble, how to have productive conversations with such students, what and when faculty need to report information relating to such students, as well as confidentiality surrounding these services.[142] Students should be educated about faculty's reporting requirements to add clarity and reduce student anxiety when interacting with faculty.

Additionally, faculty members should be encouraged to occasionally step out of their formal teaching role to convey their respect and concern for students, to acknowledge the stressors of law school, and to decrease stigma about seeking help for any health issues that arise. Faculty should consider sharing experiences in which students confronted similar issues and went on to become healthy and productive lawyers.

To support this recommendation, deans of law schools must be engaged. The well-being of future lawyers is too important to relegate to student affairs departments. For faculty to take these issues seriously, it must be clear to them that deans value the time that faculty spend learning about and addressing the needs of students outside the classroom. With the full backing of their deans, deans of students should provide training and/or information to all faculty that includes talking points that correspond to students' likely needs—e.g., exam scores, obtaining jobs, passing the bar, accumulating financial debt, etc. Talking points should be offered only as a guideline. Faculty should be encouraged to tailor conversations to their own style, voice, and relationship with the student.

Law schools should consider inviting law student and lawyer well-being experts to speak at faculty lunches, colloquia, and workshops to enhance their knowledge of this scholarship.[143] Such programming should include not just faculty but teaching assistants, legal writers, peer mentors, and others with leadership roles in whom law students may seek to confide. Many of these experts are members of the Association of American Law Schools section on Balance in Legal Education.[144] Their scholarship is organized in an online bibliography divided into two topics: Humanizing the Law School Experience and Humanizing the Practice of Law.[145]

[142] *See* Organ, Jaffe, & Bender, *supra* note 3, at 153. At American University Washington College of Law, as but one example likely among many, the dean of students invites faculty no less than every other year to meet with the University Counseling director and D.C. Bar Lawyer Assistance Program manager to discuss trends, highlight notable behaviors, discuss how to respond to or refer a student, and the importance of tracking attendance.

[143] *See* J. Bibelhausen, K. M. Bender, R. Barrett, *Reducing the Stigma: The Deadly Effect of Untreated Mental Illness and New Strategies for Changing Outcomes in Law Students,* 41 WM. MITCHELL L. REV. 918 (2015).

[144] Balance in Legal Educ. Sec., Ass'n Am. L. Sch., https://memberaccess.aals.org/eweb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=9fb324e8-e515-4fd3-b6db-a1723feeb799.

[145] *Id.* at Bibliography.

27.2. Adopt a Uniform Attendance Policy to Detect Early Warning Signs of Students in Crisis.

While law students may occasionally miss class due to personal conflicts, their repeated absence often results from deteriorating mental health.[146] Creating a system to monitor for chronic absences can help identify students for proactive outreach. Consequently, law schools should adhere to a consistent attendance policy that includes a timely reporting requirement to the relevant law school official. Absent such a requirement, deans of students may be left with only a delayed, reactive approach.

If faculty members are reluctant to report student absences, a system can be created to ensure that a report cannot be traced to the faculty member. Several law schools have adopted "care" networks or random check-ins whereby someone can report a student as potentially needing assistance.[147] In these programs, the identity of the person who provided the report is kept confidential.

Certain models on this issue include the American University Washington College of Law, which implements random "check-in" outreach, emailing students to visit the Student Affairs office for brief conversations. This method allows for a student about whom a concern has been raised to be folded quietly into the outreach.[148] Georgetown Law School allows anyone concerned about a student to send an email containing only the student's name, prompting relevant law school officials to check first with one another and then investigate to determine if a student meeting is warranted.[149] The University of Miami School of Law uses an online protocol for a student to self-report absences in advance, thus enabling the dean of students to follow up as appropriate if personal problems are indicated.[150]

27.3. Provide Mental Health and Substance Use Disorder Resources.

Law schools should identify and publicize resources so that students understand that there are resources available to help them confront stress and well-being crises. They should highlight the benefits of these resources and that students should not feel stigmatized for seeking help. One way to go about this is to have

Develop Student Resources

- ✔ Create and publicize well-being resources designed for students.
- ✔ Counter issues of stigma.
- ✔ Include mental health resources in every course syllabus.
- ✔ Organize wellness events.
- ✔ Develop a well-being curriculum.
- ✔ Establish peer mentoring.

every course syllabus identify the law school's mental health resources. The syllabus language should reflect an understanding that stressors exist.[151] Law schools also can hold special events, forums, and conversations that coincide with national awareness days, such as mental health day and suicide prevention day.

[146] *See* Organ, Jaffe, & Bender, *supra* note 3, at 152.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] One example of such a provision is: "Mental Health Resources: Law school is a context where mental health struggles can be exacerbated. If you ever find yourself struggling, please do not hesitate to ask for help. If you wish to seek out campus resources, here is some basic information: [Website]. [Law School Name] is committed to promoting psychological wellness for all students. Our mental health resources offer support for a range of psychological issues in a confidential and safe environment. [Phone; email; address; hotline number]."

Developing a well-being curriculum is an additional way to convey that resources are available and that the law school considers well-being a top priority. Northwestern University's Pritzker School of Law has accomplished the latter with well-being workshops, mindfulness and resilience courses, and meditation sessions as part of a larger well-being curriculum.[152]

Another noteworthy way to provide resources is to establish a program where law students can reach out to other law students who have been trained to intervene and help refer students in crisis. Touro Law School established a "Students Helping Students" program in 2010 where students volunteer to undergo training to recognize mental health problems and refer students confronting a mental health crisis.[153]

28. ASSESS LAW SCHOOL PRACTICES AND OFFER FACULTY EDUCATION ON PROMOTING WELL-BEING IN THE CLASSROOM.

Law school faculty are essential partners in student well-being efforts. They often exercise powerful personal influence over students, and their classroom practices contribute enormously to the overall law school experience. Whether faculty members exercise their influence to promote student well-being depends, in part, on support of the law school culture and priorities. To support their involvement, faculty members should be invited into strategic planning to develop workable ideas. Framing strategies as helping students develop into healthy lawyers who possess grit and resilience may help foster faculty buy-in. Students' mental resilience can be viewed as a competitive advantage during their job searches and as support along their journeys as practicing lawyers toward sustainable professional and personal identities.

Educating law school faculty on how classroom practices can affect student well-being is one place to start the process of gaining faculty buy-in. For example, law professor Larry Krieger and social scientist Kennon Sheldon identified potential culprits that undercut student well-being, including hierarchical markers of worth such as comparative grading, mandatory curves, status-seeking placement practices, lack of clear and timely feedback, and teaching practices that are isolating and intimidating.[154]

Evaluate classroom practices for their impact on student well-being.

Because organizational practices so significantly influence student well-being, we recommend against focusing well-being efforts solely on detecting dysfunction and strengthening students' mental toughness. We recommend that law schools assess their classroom and organizational practices, make modifications where possible, and offer faculty programming on supporting student well-being while continuing to uphold high standards of excellence. Harmful practices should not be defended solely on the ground that law school has always been this way. Teaching practices should be evaluated to assess whether they are necessary to the educational experience and whether evidence supports their effectiveness.

29. EMPOWER STUDENTS TO HELP FELLOW STUDENTS IN NEED.

As noted above, students often are reluctant to seek mental health assistance from faculty members. Empowering students to assist each other can be a helpful alternative. One suggestion is to create a peer mentoring program that trains student mentors to provide support to fellow students in need. The ideal mentors would be students who are themselves in

[152] Northwestern Law's well-being curriculum can be found at http://www.law.northwestern.edu/law-school-life/studentservices/wellness/curriculum/.
[153] TOURO L. SCH. STUDENTS HELPING STUDENTS (2017), *available at* https://www.tourolaw.edu/uploads/Students%20Helping%20Students%20Spring17.pdf.
[154] *See* K. M. Sheldon & L. S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory,* 33 PERSONALITY & SOC. PSYCH. BULL. 883 (2007); K. M. Sheldon & L. S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being,* 22 BEHAV. SCI. & THE LAW 261 (2004).

recovery. They should be certified by the local lawyer assistance program or another relevant organization and should be covered by the lawyer assistance program's confidentiality provisions. Peer mentors should not have a direct reporting obligation to their law school dean of students. This would help ensure confidentiality in the peer mentoring relationship and would foster trust in the law school community.[155]

30. INCLUDE WELL-BEING TOPICS IN COURSES ON PROFESSIONAL RESPONSIBILITY.

Mental health and substance use should play a more prominent role in courses on professional responsibility, legal ethics, or professionalism. A minimum of one class session should be dedicated to the topic of substance use and mental health issues, during which bar examiners and professional responsibility professors or their designee (such as a lawyer assistance program representative) appear side-by-side to address the issues. Until students learn from those assessing them that seeking assistance will not hurt their bar admission prospects, they will not get the help they need.

31. COMMIT RESOURCES FOR ONSITE PROFESSIONAL COUNSELORS.

Law schools should have, at a minimum, a part-time, onsite professional counselor. An onsite counselor provides easier access to students in need and sends a symbolic message to the law school community that seeking help is supported and should not be stigmatized. Although the value of such a resource to students should justify the necessary budget, law schools also could explore inexpensive or no-cost assistance from lawyer assistance programs. Other possible resources may be available from the university or private sector.

32. FACILITATE A CONFIDENTIAL RECOVERY NETWORK.

Law schools should consider facilitating a confidential network of practicing lawyers in recovery from substance use to connect with law students in recovery. Law students are entering a new community and may assume that there are few practicing lawyers in recovery. Facilitating a confidential network will provide an additional support network to help students manage the challenges of law school and maintain health. Lawyers Concerned for Lawyers is an example of a legal peer assistance group that exists in many regions that may be a confidential network source.

33. PROVIDE EDUCATION OPPORTUNITIES ON WELL-BEING-RELATED TOPICS.

33.1. Provide Well-Being Programming During the 1L Year.

We agree with the Survey of Law Student Well-Being report's recommendation that law schools should incorporate well-being topics into student orientation.[156] We recommend that during 1L orientation, law schools should include information about student well-being and options for dealing with stress. Communications should convey that seeking help is the best way to optimize their studies and to ensure they graduate and move successfully into law practice. Other vulnerable times during which well-being-related programming would be particularly appropriate include the period before fall final exams, the period when students receive their first set of law school grades (usually at the start of spring semester), and the period before spring final exams. The Task Force commends Southwestern Law School's IL "Peak Performance Program" and its goal of helping new law students de-stress, focus, and perform well in law school.[157] This voluntary program is the type of programming that can have a transformative effect on law student well-being.

33.2. Create A Well-Being Course and Lecture Series for Students.

To promote a culture of well-being, law schools should create a lecture series open to all students and a course designed to cover well-being topics in depth. Well-being

[155] The University of Washington School of Law offers a "Peer Support Program" that includes peer counseling, that offers stress management resources, and support for multicultural engagement. More information on the program can be found at https://www.law.uw.edu/wellness/resources/.
[156] Organ, Jaffe, & Bender, *supra* note 3, at 148.
[157] Southwestern Law School, Mindfulness, Peak Performance, and Wellness Programs, http://www.swlaw.edu/student-life/support-network/mindfulness-peak-performance-and-wellness-programs.

has been linked to improved academic performance, and, conversely, research reflects that well-being deficits connect to impaired cognitive performance. Recent research also has found that teaching well-being skills enhances student performance on standardized tests, and improves study habits, homework submission,

Effects of Student Well-Being

- ✔ Better academic performance and cognitive functioning
- ✔ Enhanced test performance
- ✔ Improved study habits and homework quality
- ✔ Long-term academic success

grades, and long-term academic success, as well as adult education attainment, health, and wealth.[158] A well-being course can, for example, leverage research findings from positive psychology and neuroscience to explore the intersection of improved well-being, enhanced performance, and enriched professional identity development for law students and lawyers. Further knowledge of how to maintain well-being can enhance competence, diligence, and work relationships—all of which are required by the ABA's Model Rules of Professional Conduct. The content of a well-being course could be guided by education reform recommendations. **Appendix E** provides content suggestions for such a course.

34. DISCOURAGE ALCOHOL-CENTERED SOCIAL EVENTS.

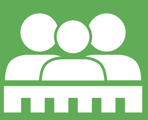
Although the overwhelming majority of law students are of legal drinking age, a law school sends a strong message when alcohol-related events are held or publicized with regularity. Students in recovery and those thinking about it may feel that the law school does not take the matter seriously and may be less likely to seek assistance or resources. A law school can minimize the alcohol provided; it can establish a policy whereby student organizations cannot use student funds for the purchase of alcohol.[159] Events at which alcohol is not the primary focus should be encouraged and supported. Further, law school faculty should refrain from drinking alcohol at law school social events.

35. CONDUCT ANONYMOUS SURVEYS RELATING TO STUDENT WELL-BEING.

Recommendation 24 for legal employers suggests regular assessment of lawyer well-being. That same Recommendation applies in the law school context.

[158] A. Adler & M. E. P. Seligman, *Using Wellbeing for Public Policy: Theory, Measurement, and Recommendations,* 6 INT'L J. WELLBEING, 1, 17 (2016); M. A. White & A. S. Murray, *Building a Positive Institution, in* EVIDENCE-BASED APPROACHES IN POSITIVE EDUC. IN SCHS.: IMPLEMENTING A STRATEGIC FRAMEWORK FOR WELL-BEING IN SCHS. 1, 8 (M. A. White & A. S. Murray eds., 2015).

[159] At a minimum, permission should be sought from the dean of students to serve alcohol at school-sponsored, school-located events, so administration is aware. Off-campus events should be only on a cash basis by the establishment. Professional networking events, and on campus events should be focused on the program or speaker, and not on drink specials or offers of free alcohol. Publicity of these events should avoid mention of discounted drink specials that could detract from the professional networking environment. In all instances, providing alcohol should be limited to beer and wine. Open bars not regulated by drink tickets or some other manner of controlling consumption should not be permitted.



"When we look at what has the strongest statistical relationship to overall [life satisfaction], the first one is your career well-being, or the mission, purpose and meaning of what you're doing when you wake up each day." — Tom Rath

Bar associations are organized in a variety of ways, but all share common goals of promoting members' professional growth, quality of life, and quality of the profession by encouraging continuing education, professionalism (which encompasses lawyer competence, ethical conduct, eliminating bias, and enhancing diversity), pro bono and public service. Bar members who are exhausted, impaired, disengaged, or overly self-interested will not live up to their full potential as lawyers or positive contributors to society. Below are recommendations for bar associations to foster positive change in the well-being of the legal community which, in turn, should benefit lawyers, bar associations, and the general public.

36. ENCOURAGE EDUCATION ON WELL-BEING TOPICS IN COORDINATION AND IN ASSOCIATION WITH LAWYER ASSISTANCE PROGRAMS.

36.1. Sponsor High-Quality CLE Programming on Well-Being-Related Topics.

In line with Recommendation 8, bar associations should develop and regularly offer educational programming on well-being-related topics. Bar leadership should recommend that all sections adopt a goal of providing at least one well-being related educational opportunity at all bar-sponsored events, including conferences, section retreats, and day-long continuing legal education events.

36.2. Create Educational Materials to Support Individual Well-Being and "Best Practices" for Legal Organizations.

We recommend that bar associations develop "best practice" model policies on well-being-related topics, for example practices for responding to lawyers in distress, succession planning, diversity and inclusion, mentoring practices, work-life balance policies, etc.

36.3 Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.

Educating bar association staff regarding lawyer assistance programs' services, resources, and the confidentiality of referrals is another way to foster change in the legal community. Bar association staff can further promote these resources to their membership. A bar association staff member may be the person who coordinates a needed intervention for a lawyer facing a mental health or substance use crisis.

37. SPONSOR EMPIRICAL RESEARCH ON LAWYER WELL-BEING AS PART OF ANNUAL MEMBER SURVEYS.

Many bar associations conduct annual member surveys. These surveys offer an opportunity for additional research on lawyer well-being and awareness of resources. For example, questions in these surveys can gauge awareness of support networks either in law firms or through lawyer assistance programs. They can survey lawyers on well-being topics they would like to see addressed in bar journal articles, at bar association events, or potentially through continuing legal education courses. The data gathered can inform bar associations' outreach and educational efforts.

38. LAUNCH A LAWYER WELL-BEING COMMITTEE.

We recommend that bar associations consider forming Lawyer Well-Being Committees. As noted in Recommendation 5.2, the ABA and a number of state bar associations already have done so. Their work supplements lawyer assistance programs with a more expansive approach to well-being. These committees typically focus not only on addressing disorders and ensuring competence to practice law but also on optimal functioning and full engagement in the profession. Such committees can provide a valuable service to members by, for example, dedicating attention to compiling resources, high-quality speakers, developing and compiling educational materials and programs, serving as a clearinghouse for lawyer well-being information, and partnering with the lawyer assistance program, and other state and national organizations to advocate for lawyer well-being initiatives.

The South Carolina Bar's Lawyer Wellness Committee, launched in 2014 and featuring a "Living Above the Bar" website, is a good model for well-being committees. In 2016, the ABA awarded this Committee the E. Smythe Gambrell Professionalism Award, which honors excellence and innovation in professionalism programs.[160]

39. SERVE AS AN EXAMPLE OF BEST PRACTICES RELATING TO LAWYER WELL-BEING AT BAR ASSOCIATION EVENTS.

Bar associations should support members' well-being and role model best practices in connection with their own activities and meetings. This might include, for example, organizing functions to be family-friendly, scheduling programming during times that do not interfere with personal and family time, offering well-being-related activities at events (e.g., yoga, fun runs, meditation, providing coffee or juice bars, organizing Friends of Bill/support group meetings), providing well-being-related education and training to bar association leaders, and including related programming at conferences and other events. For instance, several bar associations around the country sponsor family-friendly fun runs, such as the Maricopa County Bar Association annual 5k Race Judicata.

[160]The South Carolina Bar's lawyer well-being website is *available at* http://discussions.scbar.org/public/wellness/index.html.

"If any organism fails to fulfill its potentialities, it becomes sick." — William James

Lawyers' professional liability (LPL) carriers have a vested interest from a loss prevention perspective to encourage lawyer well-being. Happier, healthier lawyers generally equate to better risks. Better risks create stronger risk pools. Stronger risk pools enjoy lower frequency and often less severe claims. Fewer claims increases profitability. For lawyers, the stronger the performance of the risk pool, the greater the likelihood of premium reduction. Stakeholders interested in lawyer well-being would be well-served to explore partnerships with lawyers' professional liability carriers, many of whom enjoy bar-related origins with their respective state bar and as members of the National Association of Bar-Related Insurance Carriers (or NABRICOs). Even commercial carriers active in the lawyers' malpractice market enjoy important economic incentives to support wellness initiatives, and actively assess risks which reflect on the likelihood of future claims.[161] Below are several recommendations for LPL carriers to consider in their pursuit of improving lawyer well-being.

Happier, healthier lawyers equate to better risk, fewer claims, and greater profitability.

40. ACTIVELY SUPPORT LAWYER ASSISTANCE PROGRAMS.

In certain jurisdictions, lawyers' professional liability carriers are amongst the most important funders of lawyer assistance programs, appreciating that an ounce of prevention is worth a pound of cure. An impaired or troubled attorney who is aided before further downward spiral harms the lawyer's ability to engage in high-quality professional services can directly prevent claims. Thus, LPL carriers are well-served to understand lawyer assistance program needs, their impact, and how financial and marketing support of such programs can be a worthy investment. At the same time, where appropriate, lawyer assistance programs could prepare a case for support to LPL carriers on how their activities affect attorneys, much like a private foundation examines the impact effectiveness of grantees. If the case for support is effectively made, support may follow.

41. EMPHASIZE WELL-BEING IN LOSS PREVENTION PROGRAMS.

Most LPL carriers, as a means of delivering value beyond just the promise of attorney protection in the event of an error or omission, are active in developing risk management programs via CLE, law practice resources, checklists, and sample forms designed to reduce the susceptibility of an attorney to a claim. These resources often center on topics arising from recent claims trends, be it law practice management tips, technology traps, professionalism changes, or ethical infrastructure challenges. LPL carriers should consider paying additional attention to higher level attorney wellness issues, focusing on how such programs promote the emotional and physical foundations from which lawyers can thrive in legal service delivery. Bar associations are increasingly exploring well-being programs as a member benefit, and LPL carriers could be helpful in providing financial support or thought leadership in the development of such programs.

[161] Examples of LPL carriers serving the market from the commercial side include CNA, AON, Liberty Mutual, Hartford, among others.

42. INCENTIVIZE DESIRED BEHAVIOR IN UNDERWRITING LAW FIRM RISK.

The process of selecting, structuring, and pricing LPL risk is part art, part science. Underwriters, in addition to seeking core LPL information such as area of practice, claim frequency, claim severity, firm size, firm longevity and firm location, are also working to appreciate and understand the firm's complete risk profile. The more effectively a firm can illustrate its profile in a positive manner, the more desirable a firm will be to a carrier's risk pool. Most states permit carriers flexibility in applying schedule rating credits or debits to reflect the individual risk characteristics of the law firm. LPL carriers should more actively explore the application of lawyer well-being premium credits, much like they currently do for internal risk management systems, documented attorney back-up systems, and firm continuity.

43. COLLECT DATA WHEN LAWYER IMPAIRMENT IS A CONTRIBUTING FACTOR TO CLAIMS ACTIVITY.

LPL carriers traditionally track claims based on area of practice or the nature of the error. LPL carriers do not ordinarily track when substance abuse, stress, depression, or mental health are suspected to be contributing factors to the underlying claim. This is primarily due to the fact that most LPL claims adjusters, usually attorneys by trade, lack sufficient (or usually any) clinical training to make such a determination. That being said, anecdotal evidence suggests the impact is substantial. Thus, LPL carriers should consider whether a "common sense" assessment of instances where attorney impairment is suspected to be a contributing factor to the underlying claim. Such information would be helpful to lawyer assistance programs and as an important data point for what bar counsel or disciplinary units similarly see when investigating bar grievances. LPL carriers are in a prime position to collect data, share such data when appropriate, and assess the manner in which lawyer impairment has a direct correlation to claims activity.

"It is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and others." — Dalai Lama

Because lawyer assistance programs are so well-positioned to play a pivotal role in lawyer well-being, they should be adequately funded and organized to ensure that they can fulfill their potential.

Lawyer assistance programs should be supported to fulfill their full potential.

This is not consistently the case. While a lawyer assistance program exists in every state, according to the 2014 Comprehensive Survey of Lawyer Assistance Programs their structures, services, and funding vary widely. Lawyer assistance programs are organized either as agencies within bar associations, as independent agencies, or as programs within the state's court system.[162] Many operate with annual budgets of less than $500,000.[163] About one quarter operate without any funding and depend solely on volunteers.[164] The recommendations below are designed to equip lawyer assistance programs to best serve their important role in lawyer well-being.

44. LAWYERS ASSISTANCE PROGRAMS SHOULD BE APPROPRIATELY ORGANIZED AND FUNDED.

44.1 Pursue Stable, Adequate Funding.

Lawyer assistance programs should advocate for stable, adequate funding to provide outreach, screening, counseling, peer assistance, monitoring, and preventative education. Other stakeholders should ally themselves with lawyer assistance programs in pursuit of this funding.

44.2 Emphasize Confidentiality.

Lawyer assistance programs should highlight the confidentiality of the assistance they provide. The greatest concern voiced by lawyer assistance programs in the most recent CoLAP survey was under-utilization of their services stemming from the shame and fear of disclosure that are bound up with mental health and substance use disorders.[165] Additionally, lawyer assistance programs should advocate for a supreme court rule protecting the confidentiality of participants in the program, as well as immunity for those making good faith reports, volunteers, and staff.

44.3 Develop High-Quality Well-Being Programming.

Lawyer assistance programs should collaborate with other organizations to develop and deliver programs on the topics of lawyer well-being, identifying and treating substance use and mental health disorders, suicide prevention, cognitive impairment, and the like.[166] They should ensure that all training and other education efforts emphasize the availability of resources and the

[162] 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 25, at 3.
[163] *Id.* at 5.
[164] *Id.* at 27.
[165] *Id.* at 49-50.
[166] Accommodating adult learning should inform program development. The Illinois Supreme Court Commission on Professionalism offers a number of resources through its "Strategies for Teaching CLE" web page, https://www.2civility.org/programs/cle/cle-resources/strategies-for-teaching-cle/. *See also* K. TAYLOR & C. MARIENAU, FACILITATING LEARNING WITH THE ADULT BRAIN IN MIND: A CONCEPTUAL AND PRACTICAL GUIDE (2016); M. Silverthorn, *Adult Learning: How Do We Learn?*, ILL. SUP. CT. COMM'N ON PROFESSIONALISM, Dec. 4, 2014, https://www.2civility.org/adult-learning/.

confidentiality of the process.

Lawyer assistance programs should evaluate whether they have an interest in and funding to expand their programming beyond the traditional focus on treatment of alcohol use and mental health disorders. Some lawyer assistance programs already have done so. The 2014 Comprehensive Survey of Lawyer Assistance Programs reflects that some well-resourced lawyer assistance programs include services that, for example, address transition and succession planning, career counseling, anger management, grief, and family counseling.[167] Increasingly, lawyer assistance programs are expanding their services to affirmatively promote well-being (rather than seeking only to address dysfunction) as a means of preventing prevalent impairments.

This expansion is consistent with some scholars' recommendations for Employee Assistance Programs that encourage engagement in a broader set of prevention and health-promotion strategies. Doing so could expand the lawyer assistance programs' net to people who are in need but have not progressed to the level of a disorder. It also could reach people who may participate in a health-promotion program but would avoid a prevention program due to social stigma.[168] Health-promotion approaches could be incorporated into traditional treatment protocols. For example, "Positive Recovery" strategies strive not only for sobriety but also for human flourishing.[169] Resilience-boosting strategies have also been proposed for addiction treatment.[170]

44.4 Lawyer Assistance Programs' Foundational Elements.

All lawyer assistance programs should include the following foundational elements to provide effective leadership and services to lawyers, judges, and law students:

- A program director with an understanding of the legal profession and experience addressing mental health conditions, substance use disorders, and wellness issues for professionals;
- A well-defined program mission and operating policies and procedures;
- Regular educational activities to increase awareness and understanding of mental health and substance use disorders;
- Volunteers trained in crisis intervention and assistance;
- Services to assist impaired members of the legal profession to begin and continue recovery;
- Participation in the creation and delivery of interventions;
- Consultation, aftercare services, voluntary and diversion monitoring services, referrals to other professionals, and treatment facilities; and
- A helpline for individuals with concern about themselves or others.[171]

[167] 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 25, at 13.
[168] R. F. Cook, A. S. Back, J. Trudeau, & T. McPherson, *Integrating Substance Abuse Prevention into Health Promotion Programs in the Workplace: A Social Cognitive Intervention Targeting the Mainstream User, in* PREVENTING WORKPLACE SUBSTANCE ABUSE: BEYOND DRUG TESTING TO WELLNESS 97-133 (J. B. Bennett, W. K. Lehman eds., 2003).
[169] J. Z. POWERS, POSITIVE RECOVERY DAILY GUIDE: THRIVE IN RECOVERY (2015).
[170] T. Alim, W. Lawson, A. Neumeister, et al., *Resilience to Meet the Challenge of Addiction: Psychobiology and Clinical Considerations,* 34 ALCOHOL RESEARCH: CURRENT REVIEWS 506 (2012).
[171] *See* AM. BAR ASS'N, MODEL LAWYER ASSISTANCE PROGRAM (Revised 2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_model_lawyer_assistance_program.authcheckdam.pdf; AM. BAR ASS'N, GUIDING PRINCIPLES FOR A LAWYER ASSISTANCE PROGRAM (1991), *available at* http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_guiding_principles_for_assistance.authcheckdam.pdf.

"It always seems impossible until it's done." — Nelson Mandela

This Report makes a compelling case that the legal profession is at a crossroads. Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable. Studies cited above show that our members suffer at alarming rates from conditions that impair our ability to function at levels compatible with high ethical standards and public expectations. Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough. To preserve the public's trust and maintain our status as a self-regulating profession, we must truly become "our brothers' and sisters' keepers," through a strong commitment to caring for the well-being of one another, as well as ourselves.

The members of the National Task Force for Lawyer Well-Being urge all stakeholders identified in this report to take action. To start, please review the State Action Plan and Checklist that follows in **Appendix A.** If you are a leader in one of these sectors, please use your authority to call upon your cohorts to come together and develop a plan of action. Regardless of your position in the legal profession, please consider ways in which you can make a difference in the essential task of bringing about a culture change in how we, as lawyers, regard our own well-being and that of one another.

We have the capacity to create a better future for our lawyers.

As a profession, we have the capacity to face these challenges and create a better future for our lawyers that is sustainable. We can do so—not in spite of—but in pursuit of the highest professional standards, business practices, and ethical ideals.

[1]P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).
[2]A. M. Brafford, Building the Positive Law Firm: The Legal Profession At Its Best (August 1, 2014) (Master's thesis, Univ. Pa., on file with U. Pa. Scholarly Commons Database), *available at* http://repository.upenn.edu/mapp_capstone/62/.
[3]J. M. Organ, D. Jaffe, & K. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).
[4]*See* D. L. Chambers, *Overstating the Satisfaction of Lawyers,* 39 LAW & SOC. INQUIRY 1 (2013).
[5]J. M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. J. 225 (2011); L. S. Krieger & K. M. Sheldon, *What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers,* 83 GEO. WASH. L. REV. 554 (2015).

National Task Force on Lawyer Well-Being
State Action Plan & Checklist

Chief Justice (or Designee) "To Do List"

____ **Gather all stakeholders**

(Identify leaders in the jurisdiction with an interest in and commitment to well-being issues. Bring these leaders together in a Commission on Lawyer Well-Being. The attached list of potential stakeholder representatives offers guidance.)

____ **Review the Task Force Report**

Have Commission members familiarize themselves with the Task Force Report. It provides concrete recommendations for how to address lawyer well-being issues.

____ **Do an inventory of recommendations**

(Next, assess which recommendations can be implemented in the jurisdiction. This includes an assessment of the leadership and resources required to implement these recommendations.)

____ **Create priorities**

(Each jurisdiction will have its own priorities based on the inventory of recommendations. Which ones are the most urgent? Which ones will create the most change? Which ones are feasible?)

____ **Develop an action plan**

(Having inventoried the recommendations and prioritized them, now is the time to act. What does that path forward look like? Who needs to be involved? How will progress be measured?)

National Task Force on Lawyer Well-Being
State Action Plan & Checklist

Checklist for Gathering the Stakeholders

Item 1 of the Plan above recommends the gathering of stakeholders as a first step. The National Task Force suggests the Chief Justice of each state create a Commission on Lawyer Well-Being in that state and appoint representatives from each stakeholder group to the Commission. Below is a checklist of potential stakeholder representatives the Chief Justice may consider in making appointments.

JUDICIAL

__ Supreme Court Chief Justice or designated representative
__ Other judge representatives

LAWYER ASSISTANCE PROGRAM (LAP)

__ LAP Director
__ Clinical director
__ Lawyer representative to the LAP

LAW SCHOOLS

__ Dean representative
__ Faculty representative
__ Law student representative

REGULATORS

__ Admissions (or Board of Law Examiners) representative
__ Mandatory CLE program representative
__ CLE provider representative
__ Regulation/Bar/Disciplinary Counsel representative

BAR ASSOCIATIONS

__ Bar president
__ Bar president-elect
__ Executive director
__ Young lawyer division representative
__ Specialty bar representative

LAW FIRMS

__ Sole practitioner
__ Small firm representative (2-5 lawyers)
__ Medium firm representative (6-15 lawyers)
__ Large firm representative (16+ lawyers)
__ In-house counsel representative
__ Non-traditional lawyer representative

ALLIES

__ ASAM representative (addiction psychiatrist)
__ Organizational/behavioral psychologist
__ Members of the public

Appendix to Recommendation 8: Example Educational Topics About Lawyer Distress and Well-Being

Recommendation 8 advises stakeholders to provide high-quality education programs and materials on causes and consequences of lawyer distress and well-being. Below is a list of example educational topics for such programming with empirical support.

8.1 Work Engagement vs. Burnout

The work engagement-burnout model can serve as a general organizing framework for stakeholders' efforts to boost lawyer well-being and curb dysfunction. Work engagement is a kind of work-related well-being. It includes high levels of energy and mental resilience, dedication (which includes a sense of meaningfulness, significance, and challenge), and frequently feeling positively absorbed in work.[172] Work engagement contributes to, for example, mental health, less stress and burnout, job satisfaction, helping behaviors, reduced turnover, performance, and profitability.[173]

Burnout is essentially the opposite of engagement. It is a stress response syndrome that is highly correlated with depression and can have serious psychological and physiological effects. Workers experiencing burnout feel emotionally and physically exhausted, cynical about the value of their activities, and uncertain about their capacity to perform well.[174]

The work engagement-burnout model proposes the idea of a balance between resources and demands: Engagement arises when a person's resources (i.e., positive individual, job, and organizational factors, like autonomy, good leadership, supportive colleagues, feedback, interesting work, optimism, resilience) outweigh demands (i.e., draining aspects of the job, like work overload and conflicting demands). But when excessive demands or a lack of recovery from demands tip the scale, workers are in danger of burnout. Disengagement, alienation, and turnover become likely. Resources contribute to engagement; demands feed burnout. Using this framework as a guide, stakeholders should develop lawyer well-being strategies that focus on increasing individual and organizational resources and decreasing demands when possible.[175]

The incidence of burnout vs. work engagement in the legal profession is unknown but has been well-studied in the medical profession. Research has found that 30-40 percent of licensed physicians, 49 percent of medical students, and 60 percent of new residents meet the definition of burnout, which is associated with an increased risk of depression, substance use, and suicidal thinking.[176] Burnout also undermines professionalism and quality of patient care by eroding honesty, integrity, altruism, and self-regulation.[177]

The medical profession's work on these issues can serve as a guide for the legal profession. It has conducted

[172]W. B. Schaufeli, *What is Engagement?, in* EMPLOYEE ENGAGEMENT IN THEORY AND PRACTICE (C. Truss, K. Alfes, R. Delbridge, A. Shantz, & E. Soane eds., 2013).
[173]C. Bailey, A. Madden, K. Alfes, & L. Fletcher, *The Meaning, Antecedents and Outcomes of Employee Engagement: A Narrative Synthesis,* 19 INT'L J. MGMT. REV. 19 (2017); BRAFFORD, *supra* note 131; GALLUP, INC., ENGAGEMENT AT WORK: ITS EFFECT ON PERFORMANCE CONTINUES IN TOUGH ECONOMIC TIMES (2013), *available at* http://www.gallup.com/services/176657/engagement-work-effect-performance-continues-tough-economic-times.aspx.
[174]Maslach, Schaufeli, & Leiter, *supra* note 121.
[175]A. B. Bakker & E. Demerouti, *Job Demands–Resources Theory: Taking Stock and Looking Forward,* J. OCCUPATIONAL HEALTH PSYCHOL. (2016), *advance online publication available at* http://dx.doi.org/10.1037/ocp0000056; A. B. Bakker, *Top-Down and Bottom-Up Interventions to Increase Work Engagement,* in AM. PSYCHOL. ASS'N HANDBOOK OF CAREER INTERVENTION: VOL. 2. APPLICATIONS 427-38 (P. J. Hartung, M. L. Savickas, & W. B. Walsh eds., 2015); BRAFFORD, *supra* note 131.
[176]L. Dyrbye, T. Shanafelt, *Physician Burnout: A Potential Threat to Successful Health Care Reform,* 305 J. AM. MED. ASS'N 2009 (2009); L. Dyrbye & T. Shanafelt, *A Narrative Review of Burnout Experienced by Medical Students and Residents,* 50 MED. EDUC. 132 (2016); J. J. Hakanen & W. B. Schaufeli, *Do Burnout and Work Engagement Predict Depressive Symptoms and Life Satisfaction? A Three-Wave Seven-Year Prospective Study,* 141 J. AFFECTIVE DISORDERS 415 (2012).
[177]Dyrbye & Shanafelt, *supra* note 176; T. L. Schwenk, *Resident Depression: The Tip of a Graduate Medical Education Iceberg,* 314 J. AM. MED. ASS'N 2357 (2015).

hundreds of studies, has identified many individual and organizational contributors to burnout, and has proposed wellness strategies and resilience programs.[178] Bi-annually, the American Medical Association (AMA) co-sponsors an International Conference on Physician Health. The September 2016 conference was held in Boston with the theme, "Increasing Joy in Medicine." The conference included 70 presentations, workshops, and plenary speaker sessions on a wide variety of well-being topics over a three-day period (See AMA website).

8.2 Stress

Stress is inevitable in lawyers' lives and is not necessarily unhealthy.[179] Mild to moderate levels of stress that are within our capability can present positive challenges that result in a sense of mastery and accomplishment.[180] Much of our daily stress is governed by our beliefs about our coping abilities.[181] When stress is perceived as a positive, manageable challenge, the stress response actually can enable peak performance.[182] For example, in a study of a New Zealand law firm, researchers found that lawyers who frequently experience positive challenge reported the highest levels of work engagement. The researchers also found that, where lawyers felt overburdened by work, they were more likely to experience burnout.[183]

This finding highlights the importance of positive challenge but also its paradoxical effect: Challenge contributes to work-related well-being, but it also can lead to negative consequences like burnout when it becomes overwhelming. Stressors that pose the greatest risk of harm are those that are uncontrollable, ambiguous, unpredictable, and chronic that we perceive as exceeding our ability to cope.[184] Such stressors increase the rise of (or exacerbate) depression, anxiety, burnout, alcohol abuse, and physical conditions such as cardiovascular, inflammatory, and other illnesses that can affect lawyers' health and capacity to practice.[185] For example, in a 2004 study of North Carolina lawyers, more than half had elevated levels of perceived stress, and this was the highest predictor of depression of all factors in the study.[186]

Stress also is associated with cognitive decline, including impaired attention, concentration, memory, and problem-solving.[187] Stress also can harm one's ability to establish strong relationships with clients and is associated with relational conflict, which can further undermine lawyers' ability to competently represent and interact with clients. Both personal and environmental factors in the workplace contribute to stress and whether it positively fuels performance or impairs mental health and functioning.[188] Research reflects that organizational factors more significantly contribute to dysfunctional stress responses than individual ones, and that the most effective prevention strategies target both.[189]

8.3 Resilience & Optimism

The American Psychological Association defines resilience

[178] *E.g.*, J. Brennan & A. McGrady, *Designing and Implementing a Resiliency Program for Family Medicine Residents,* 50 INT'L J. PSYCHIATRY MED. 104 (2015); J. Eckleberry-Hunt, A. Van Dyke, D. Lick, & J. Tucciarone, *Changing the Conversation from Burnout to Wellness: Physician Well-Being in Residency Training Programs,* 1 J. GRADUATE MED. EDUC. 225 (2009); R. M. Epstein & M. S. Krasner, Physician Resilience: What It Means, Why It Matters, and How to Promote It, 88 ACAD. MED. 301 (2013); A. Nedrow, N. A. Steckler, & J. Hardman, *Physician Resilience and Burnout: Can You Make the Switch?* 20 FAMILY PRAC. MGMT. 25 (2013).

[179] A. ELWORK, STRESS MANAGEMENT FOR LAWYERS (2007).

[180] K. M. Keyes, M. L. Hatzenbuehler, B. F. Grant, & D. S. Hasin, *Stress and Alcohol: Epidemiologic Evidence,* 34 ALCOHOL RES.: CURRENT REV. 391 (2012).

[181] J. B. Avey, F. Luthans, & S. M. Jensen, *Psychological Capital: A Positive Resource for Combating Employee Stress and Turnover,* 48 HUMAN RES. MGMT. 677 (2009).

[182] BRAFFORD, *supra* note 131; Crum, Salovey, Achor, *supra* note 50; K. McGonigal, THE UPSIDE OF STRESS: WHY STRESS IS GOOD FOR YOU, AND HOW TO GET GOOD AT IT (2015).

[183] V. Hopkins & D. Gardner, *The Mediating Role of Work Engagement and Burnout in the Relationships Between Job Characteristics and Psychological Distress Among Lawyers,* 41 N. Z. J. PSYCHOL. 59 (2012).

[184] R. M. Anthenelli, Overview: *Stress and Alcohol Use Disorders Revisited,* 34 ALCOHOL RES.: CURRENT REV. 386 (2012).

[185] *E.g.*, S. M. Southwick, G. A. Bonanno, A. S. Masten, C. Panter-Brick, & R. Yehuda, *Resilience Definitions, Theory, and Challenges: Interdisciplinary Perspectives,* 5 EUR. J. PSYCHOTRAUMATOLOGY 1 (2014); M. R. Frone, *Work Stress and Alcohol Use,* 23 ALCOHOL RES. & HEALTH 284 (1999); C. Hammen, *Stress and Depression,* 1 ANN. REV. CLINICAL PSYCHOL. 293 (2005); Keyes, Hatzenbuehler, Grant, & Hasin, *supra* note 180; J. Wang, *Work Stress as a Risk Factor for Major Depressive Episode(s),* 35 PSYCHOL. MED. 865 (2005); J-M Woo & T. T. Postolache, *The Impact of Work Environment on Mood Disorders and Suicide: Evidence and Implications,* 7 INT'L J. DISABILITY & HUMAN DEV. 185 (2008).

[186] M. H. Howerton, *The Relationship Between Attributional Style, Work Addiction, Perceived Stress, and Alcohol Abuse on Depression in Lawyers in North Carolina* (2004) (doctoral dissertation, Univ. of N.C. at Charlotte) (available from ProQuest Dissertations and Theses database).

[187] B. S. McEwen, & R. M. Sapolsky, *Stress and Cognitive Function,* 5 CURRENT OPINION IN NEUROBIOLOGY 205–216 (1995); L. Schwabe & O. T. Wolf, *Learning Under Stress Impairs Memory Formation,* 93 NEUROBIOLOGY OF LEARNING & MEMORY 183 (2010); S. Shapiro, J. Astin, S. Bishop, & M. Cordova, *Mindfulness-Based Stress Reduction and Health Care Professionals: Results from a Randomized Controlled Trial,* 12 INT'L J. STRESS MGMT. 164 (2005).

[188] J. C. QUICK, T. A. WRIGHT, J. A. ADKINS, D. L. NELSON, & J. D. QUICK, PREVENTIVE STRESS MANAGEMENT IN ORGANIZATIONS (2013).

[189] Maslach, Schaufeli, & Leiter, *supra* note 121.

as a process that enables us to bounce back from adversity in a healthy way. It also has been defined as a "process to harness resources to sustain well-being"[190]—a definition that connects resilience to the resource-balancing framework of the work engagement-burnout model discussed above. Our capacity for resilience derives from a host of factors, including genetics and childhood experiences that influence the neurobiology of our stress response—specifically, whether the stress response is both activated and terminated efficiently.[191]

But resilience also derives from a collection of psychological, social, and contextual factors—many of which we can change and develop. These include, for example, optimism, confidence in our abilities and strengths (self-efficacy), effective problem-solving, a sense of meaning and purpose, flexible thinking, impulse control, empathy, close relationships and social support, and faith/spirituality.[192] A model for developing many of these psychological and social competencies is provided by the U.S. Army's Master Resilience Training program.[193] As noted above, the medical profession also has designed resilience programs for physicians and residents that can serve as guides, and researchers have offered additional strategies.[194]

Among the most important of the personal competencies is optimistic explanatory style, which is a habit of thought that allows people to put adverse events in a rational context and not be overwhelmed by catastrophic thinking. The principal strategy for building optimistic explanatory style is by teaching cognitive reframing based on cognitive-behavioral therapy research.[195] The core of the technique is to teach people to monitor and dispute their automatic negative self-talk. Neurobiology scholars recently have argued that this capacity is so important to our regulation of stress that it constitutes the cornerstone of resilience.[196]

This skill can benefit not only practicing lawyers but also law students.[197] Stanford Law, for example, has offered a 3-hour course teaching cognitive framing that has been popular and successful.[198] Lawyer assistance programs also could benefit from learning this and other resilience strategies, which have been used in addiction treatment.[199]

Aside from individual-level skills and strengths, developing "structural resilience" also is important, if not more important. This requires leaders to develop organizations and institutions that are resource-enhancing to help give people the wherewithal to realize their full potential.[200] Individual resilience is highly dependent on the context in which people are embedded. This means that initiatives to foster lawyer well-being should take a systemic perspective.

8.4 Mindfulness Meditation

Mindfulness meditation is a practice that can enhance cognitive reframing (and thus resilience) by aiding our ability to monitor our thoughts and avoid becoming emotionally overwhelmed. A rapidly growing body of research on meditation has shown its potential for help in addressing a variety of psychological and psychosomatic disorders, especially those in which stress plays a causal role.[201] One type of meditative practice is mindfulness—a technique that cultivates the skill of being present by focusing attention on your breath and detaching from your thoughts or feelings. Research has found that mindfulness can reduce rumination, stress, depression, and anxiety.[202] It

[190] Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, *supra* note 185.
[191] Alim, Lawson, & Neumeister, et al., *supra* note 170.
[192] K. J. Reivich, M. E. P. Seligman, & S. McBride, *Master Resilience Training in the U.S. Army,* 66 AM. PSYCHOLOGIST 25 (2011); C. D. Schetter & C. Dolbier, *Resilience in the Context of Chronic Stress and Health in Adults,* 5 SOC. PERSONAL PSYCHOL. COMPASS 634 (2011).
[193] *Id*.; R. R. SINCLAIR, & T. A. BRITT, BUILDING PSYCHOLOGICAL RESILIENCE IN MILITARY PERSONNEL: THEORY AND PRACTICE (2013).
[194] C. COOPER, J. FLINT-TAYLOR, & M. PEARN, BUILDING RESILIENCE FOR SUCCESS: A RESOURCE GUIDE FOR MANAGERS AND ORGANIZATIONS (2013); I. T. Robertson, C. L. Cooper, M. Sarkar, & T. Curran, *Resilience Training in the Workplace from 2003 to 2014: A Systematic Review,* 88 J. OCCUPATIONAL & ORG. PSYCHOL. 533 (2015).
[195] *Id.*
[196] R. Kalisch, M. B. Muler, & O. Tuscher, *A Conceptual Framework for the Neurobiological Study of Resilience,* 27 BEHAV. & BRAIN SCI. 1 (2014).
[197] C. Rosen, *Creating the Optimistic Classroom: What Law Schools Learn from Attribution Style Effects,* 42 MCGEORGE L. REV. 319 (2011).
[198] Stanford Law Professor Joe Bankman's use of cognitive behavioral therapy concepts are described on the school's website: http://news.stanford.edu/2015/04/07/bankman-law-anxiety-040715. He has posted relevant materials to educate other law schools how to teach this skill: http://www.colorado.edu/law/sites/default/files/Bankman%20-%20Materials%20for%20Anxiety%20Psychoeducation%20Course.pdf.
[199] Alim, Lawson, & Neumeister, *supra* note 170.
[200] BRAFFORD, *supra* note 131; Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, *supra* note 185.
[201] R. Walsh & S. L. Shapiro (2006), *The Meeting of Meditative Disciplines and Western Psychology,* 61 AM. PSYCHOL. 227 (2006).
[202] *E.g.,* S. G. Hoffman, A. T. Sawyer, A. A. Witt, & D. *Oh, The Effect of Mindfulness-Based Therapy on Anxiety and Depression: A Meta-Analytic Review,* 78 J. CONSULTING & CLINICAL PSYCHOL. 169 (2010); R. Teper, Z. V. Segal, & M. Inzlicht, *Inside the Mindful Mind: How Mindfulness Enhances Emotion Regulation Through Improvements in Executive Control,* 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 449

also can enhance a host of competencies related to lawyer effectiveness, including increased focus and concentration, working memory, critical cognitive skills, reduced burnout, and ethical and rational decision-making.[203] Multiple articles have advocated for mindfulness as an important practice for lawyers and law students.[204] Evidence also suggests that mindfulness can enhance the sense of work-life balance by reducing workers' preoccupation with work.[205]

8.5 Rejuvenation Periods to Recover From Stress

Lawyers must have downtime to recover from work-related stress. People who do not fully recover are at an increased risk over time for depressive symptoms, exhaustion, and burnout. By contrast, people who feel recovered report greater work engagement, job performance, willingness to help others at work, and ability to handle job demands.[206] Recovery can occur during breaks during the workday, evenings, weekends, vacations, and even mircobreaks when transitioning between projects.[207] And the quality of employees' recovery influences their mood, motivation, and job performance.

Researchers have identified four strategies that are most effective for recovering from work demands: (1) psychological detachment (mentally switching off from work), (2) mastery experiences (challenges and learning experiences), (3) control (spending time off as we choose), and (4) relaxation.[208] Falling into the second category is physical activity (exercise and sports), which may be an especially effective form of recovery for people performing mentally demanding work—like lawyers. This is so because low-effort activities (e.g., watching TV) may actually increase subjective feelings of fatigue.[209]

Quality sleep is critically important in the recovery process.[210] Sleep deprivation has been linked to a multitude of health problems that decay the mind and body, including depression, cognitive impairment, decreased concentration, and burnout. Cognitive impairment associated with sleep-deprivation can be profound. For example, a study of over 5,000 people showed that too little sleep was associated with a decline over a five year-period in cognitive functioning, including reasoning, vocabulary, and global cognitive status. Research on short-term effects of sleep deprivation shows that people who average four hours of sleep per night for four or five days develop the same cognitive impairment as if they had been awake for 24 hours—which is the equivalent of being legally drunk.[211] Given lawyers' high risk for depression, it is worth noting evidence that sleep problems have the highest predictive value for who will develop clinical depression.[212]

8.6 Physical Activity

Many lawyers' failure to prioritize physical activity is harmful to their mental health and cognitive functioning. Physical exercise is associated with reduced symptoms of anxiety and low energy. Aerobic exercise has been found to be as effective at improving symptoms of depression

[203] A. P. Jha, E. A. Stanley, W. L. Kiyonaga, & L. Gelfand, *Examining the Protective Effects of Mindfulness Training on Working Memory Capacity and Affective Experience,* 10 EMOTION 56 (2010); D. Levy, J. Wobbrock, A. W. Kaszniak, & M. Ostergren, *The Effects of Mindfulness Meditation Training on Multitasking in a High-Stress Environment, Proceedings of Graphics Interface Conference* (2012), *available at* http://faculty.washington.edu/wobbrock/pubs/gi-12.02.pdf; M. D. Mrazek, M. S. Franklin, D. T. Phillips, B. Baird, & J. W. Schooler, *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering,* 24 PSYCHOL. SCI. 776 (2013); N. E. Ruedy & M. E. Schweizer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making,* 95 J. BUS. ETHICS 73 (2010); F. Zeidan, S. K. Johnson, B. J. Diamond, Z. David, & P. Goolkasian, *Mindfulness Meditation Improves Cognition: Evidence of Brief Mental Training,* 19 CONSCIOUSNESS & COGNITION 597 (2010).

[204] *E.g.,* W. S. Blatt, *What's Special About Meditation? Contemplative Practice for American Lawyers,* 7 HARV. NEGOT. L. REV. 125 (2002); Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism,* 21 J. L. BUS. & ETHICS 35 (2014).

[205] A. Michel, C. Bosch, & M. Rexroth, *Mindfulness as a Cognitive-Emotional Segmentation Strategy: An Intervention Promoting Work-Life Balance,* 87 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 733 (2014).

[206] *See, e.g.,* C. Fritz, A. M. Ellis, C. A. Demsky, B. C. Lin, & F. Guros, *Embracing Work Breaks: Recovery from Work Stress,* 42 ORG. DYNAMICS 274 (2013); N. P. Rothbard & S. V. Patil, *Being There: Work Engagement and Positive Organizational Scholarship, in* THE OXFORD HANDBOOK OF POSITIVE ORGANIZATIONAL SCHOLARSHIP 56-68 (K. S. Cameron & G. M. Spreitzer eds., Oxford University Press 2012).

[207] S. Sonnentag, C. Niessen, & A. Neff, *Recovery: Nonwork Experiences that Promote Positive States, in* Cameron & Spreitzer, *supra* note 206.

[208] BRAFFORD, *supra* note 131; V. C. Hahn, C. Binnewies, S. Sonnentag, & E. J. Mojza, *Learning How to Recover from Job Stress: Effects of a Recovery Training Program on Recovery, Recovery-Related Self-Efficacy, and Well-Being,* 16 J. OCCUPATIONAL HEALTH PSYCHOL. 202 (2011).

[209] J. W. Rook & F. R. H. Zijlstra, *The Contribution of Various Types of Activities to Recovery,* 15 EUROPEAN J. WORK & ORGANIZATIONAL PSYCHOL. 218 (2006).

[210] M. Soderstrom, J. Jeding, M. Ekstedt, A. Perski, & T. Akerstedt, *Insufficient Sleep Predicts Clinical Burnout,* 17 J. OCCUPATIONAL HEALTH PSYCHOL. 175 (2012).

[211] J. E. Ferrie, M. J. Shipley, T. N. Akbaraly, M. G. Marmot, M. Kivmaki, & A. Singh-Manoux, *Change in Sleep Duration and Cognitive Function: Findings from the Whitehall II Study,* 34 SLEEP 565-73 (2011); B. Fryer, *Sleep Deficit: The Performance Killer,* HARV. BUS. REV., Oct. 2006, *available at* http://hbr.org/2006/10/sleep-deficit-the-performance-killer; S. Maxon, *How Sleep Deprivation Decays the Mind and Body,* THE ATLANTIC, December 2013, *available at* http://www.theatlantic.com/health/archive/2013/12/how-sleep-deprivation-decays-the-mind-and-body/282395.

[212] P. L. Franzen, & D. J. Buysse, *Sleep Disturbances and Depression: Risk Relationships for Subsequent Depression and Therapeutic Implications,* 10 DIALOGUES IN CLINICAL NEUROSCIENCE 473 (2008).

as antidepressant medication and psychotherapy.[213] In a review of strategies for preventing workplace depression, researchers found that interventions to increase physical activity were among the most effective.[214]

Research also shows that physical exercise improves brain functioning and cognition. Physical activity, which stimulates new cell growth in the brain, can offset the negative effects of stress, which causes brain atrophy. Greater amounts of physical activity (particularly aerobic) have been associated with improvements in memory, attention, verbal learning, and speed of cognitive processing.[215] A growing body of evidence reflects that regular aerobic activity in middle age significantly reduces the risk of developing dementia and, in older age, can slow the progression of cognitive decline of those who already are diagnosed with Alzheimer's disease.[216]

8.7 Leader Development and Training

Leader development and training is critically important for supporting lawyer well-being and optimal performance. Low-quality leadership is a major contributor to stress, depression, burnout, and other mental and physical health disorders.[217] Even seemingly low-level incivility by leaders can have a big impact on workers' health and motivation. Research found harmful effects from leaders, for example, playing favorites; criticizing unfairly; and failing to provide information, listen to problems, explain goals, praise good work, assist with professional development, and show that they cared. On the other hand, positive leadership styles contribute to subordinates' mental health, work engagement, performance, and job satisfaction.[218] Many studies confirm that positive leader behaviors can be trained and developed.[219] Training is important for all levels of lawyers who supervise others. This is so because leaders with the most direct contact with subordinates have the most significant impact on their work experience.[220] Subordinates' immediate leader drives almost 70 percent of their perceptions of the workplace.[221]

8.8 Control and Autonomy

As noted in Recommendation 7, feeling a lack of control over work is a well-established contributor to poor mental health, including depression and burnout. A sense of autonomy is considered to be a basic psychological need that is foundational to well-being and optimal functioning.[222] Research confirms that leaders can be trained to be more autonomy-supportive.[223] Other organizational practices that can enhance a sense of autonomy include, for example, structuring work to allow for more discretion and autonomy and encouraging lawyers to craft aspects of their jobs to the extent possible to best suit their strengths and interests.[224]

The benefits of autonomy-support are not limited to manager-subordinate relationships for legal employers. Research reflects that law students with autonomy-supportive professors and school cultures have higher well-being and performance.[225] Lawyer-client relationships also

[213] I-H Chu, J. Buckworth, T. E. Kirby, & C. F. Emery, *Effect of Exercise Intensity on Depressive Symptoms in Women,* 2 MENTAL HEALTH AND PHYSICAL ACTIVITY 37 (2009); M. P. Herring, M. L. Jacob, C. Suveg, & P. J. O'Connor, *Effects of Short-Term Exercise Training on Signs and Symptoms of Generalized Anxiety Disorder,* 4 MENTAL HEALTH & PHYSICAL ACTIVITY 71 (2011).

[214] S. Joyce, M. Modini, H. Christensen, A. Mykletun, R. Bryant, P. B. Mitchell, & S. B. Harvey, *Workplace Interventions for Common Mental Disorders: A Systematic Meta-Review,* 46 PSYCHOL. MED. 683 (2016).

[215] A. Kandola, J. Hendrikse, P. J. Lucassen, & M. Yücel, *Aerobic Exercise as A Tool to Improve Hippocampal Plasticity and Function in Humans: Practical Implications for Mental Health Treatment,* 10 FRONTIERS IN HUMAN NEUROSCIENCE 373 (2016)

[216] *Id*.; J. E. Ahlskog, Y. E. Geda, N. R. Graff-Radford, & R. C. Petersen, *Physical Exercise as a Preventive or Disease-Modifying Treatment of Dementia and Brain Aging,* 86 MAYO CLINIC PROC. 876 (2011).

[217] BRAFFORD, *supra* note 131; R. J. BURKE AND K. M. PAGE, RESEARCH HANDBOOK ON WORK AND WELL-BEING (2017); W. Lin, L. Wang, & S. Chen, *Abusive Supervision and Employee Well-Being: The Moderating Effect of Power Distance Orientation,* 62 APPLIED PSYCHOL.: AN INT'L REV 308 (2013); E. K. Kelloway, N. Turner, J. Barling, & C. Loughlin, *Transformational Leadership and Employee Psychological Well-Being: The Mediating Role of Employee Trust in Leadership,* 26 WORK & STRESS 39 (2012).

[218] *E.g.,* A. Amankwaa & O. Anku-Tsede, *Linking Transformational Leadership to Employee Turnover: The Moderating Role of Alternative Job Opportunity,* 6 INT'L J. BUS. ADMIN. 19 (2015); J. Perko, U. Kinnunen, & T. Feldt, *Transformational Leadership and Depressive Symptoms Among Employees: Mediating Factors,* 35 LEADERSHIP & ORG. DEV. J. 286 (2014); M. Y. Ghadi, M. Fernando, & P. Caputi, *Transformational Leadership and Work Engagement,* 34 LEADERSHIP & ORG. DEV. J. 532 (2013).

[219] *E.g.,* B. J. Avolio & B. M. Bass, *You Can Drag a Horse to Water, But You Can't Make It Drink Except When It's Thirsty,* 5 J. LEADERSHIP STUDIES 1 (1998); K. E. Kelloway, J. Barling, & J. Helleur, *Enhancing Transformational Leadership: The Roles of Training and Feedback,* 21 LEADERSHIP & ORG. DEV. J. 145 (2000).

[220] D. J. Therkelsen & C. L. Fiebich, *The Supervisor: The Linchpin of Employee Relations,* 8 J. COMM. MGMT. 120 (2003).

[221] R. Beck & J. Harter, *Managers Account for 70% of Variance in Employee Engagement,* GALLUP BUS. J., April 21, 2015, *available at* http://www.gallup.com/businessjournal/182792/managers-account-variance-employee-engagement.aspx.

[222] BRAFFORD, *supra* note 131; Y-L. Su & J. Reeve, *A Meta-Analysis of the Effectiveness of Intervention Programs Designed to Support Autonomy,* 23 EDUC. PSYCHOL. REV. 159 (2011).

[223] *Id.*

[224] *See* G. R. Slemp & D. A. Vella-Brodrick, *Optimising Employee Mental Health: The Relationship Between Intrinsic Need Satisfaction, Job Crafting, and Employee Well-Being,* 15 J. HAPPINESS STUDIES 957 (2014); D. T. Ong & V. T. Ho, A Self-Determination Perspective of Strengths Use at Work: Examining Its Determinant and Performance Implications, 11 J. POSITIVE PSYCHOL. 15 (2016).

[225] *E.g.*, Sheldon & Krieger, *supra* note 5; *see also* G. F. Hess, *Collaborative Course Design: Not My Course, Not Their Course, But Our Course,* 47 WASHBURN L.J. 367 (2008).

can be enhanced by autonomy-supportive behaviors by both parties. Lawyers respect client autonomy by, for example, taking full account of their perspectives, not interrupting, affording choice, offering information respectfully, providing a rationale for recommendations, sharing power in decision-making (when appropriate), and accepting clients' decisions.[226] In the medical profession, this model of client-centered care has been found to result in better outcomes, patient satisfaction, and diminished risk of malpractice lawsuits.[227]

8.9 Conflict Management

Our legal system is adversarial—it's rooted in conflict. Even so, lawyers generally are not trained on how to constructively handle conflict and to adapt tactics based on context—from necessary work-related conflicts to inter-personal conflicts with clients, opposing counsel, colleagues, or loved ones.[228] Conflict is inevitable and can be both positive and negative.[229] But chronic, unmanaged conflict creates physical, psychological, and behavioral stress. Research suggests that conflict management training can reduce the negative stressful effects of conflict and possibly produce better, more productive lawyers.[230]

8.10 Work-Life Conflict

The stress of chronic work-life conflict can damage well-being and performance.[231] A study of a New Zealand law firm found that work-life conflict was the strongest predictor of lawyer burnout.[232] Similarly, a study of Australian lawyers found that preoccupation with work was the strongest predictor of depression.[233] Research in the medical profession repeatedly has found that work-life conflict contributes to burnout.[234] A large scale study across a variety of occupations found that reports of work-life conflict increased the odds of poor physical health by 90 percent.[235] On the other hand, work-life balance (WLB) benefits workers and organizations.[236]

WLB is a complex topic, but research provides guidance on how to develop a WLB-supportive climate. Adopting a formal policy that endorses flexibility is a threshold requirement. Such policies foster the perception of organizational support for flexibility, which is even more important to workers' experience of WLB than actual benefit use. Policies should not be restricted to work-family concerns and any training should emphasize support for the full range of work-life juggling issues. Narrow family-focused policies can create feelings of resentment by workers who have valued non-family commitment.

WLB initiatives cannot end with formal policies or people will doubt their authenticity and fear using them. For example, nearly all large firms report having a flexible schedule policy.[237] But a recent survey of law firm lawyers found that use of flexibility benefits was highly stigmatizing.[238] To benefit from WLB initiatives, organizations must develop a WLB-supportive climate. Research has identified multiple factors for doing so: (1) job autonomy, (2) lack of negative consequences for using WLB benefits, (3) level of perceived expectation that work should be prioritized over family, and (5) supervisor support for WLB. By far, the most important factor is the last. Supervisors communicate their support for WLB by, for example, creatively accommodating non-work-related needs, being empathetic with juggling efforts, and role modeling WLB behaviors.[239]

[226] G. C. Williams, R. M. Frankel, T. L. Campbell, & E. L. Deci, *Research on Relationship-Centered Care and Healthcare Outcomes from the Rochester* Biopsy*chosocial Program: A Self-Determination Theory Integration,* 18 FAMILIES, SYS. & HEALTH 79 (2000).
[227] *Id.; see also* C. White, *The Impact of Motivation on Customer Satisfaction Formation: A Self-Determination Perspective,* 49 EUROPEAN J. MARKETING 1923 (2015).
[228] M. T. Colatrella, *A Lawyer for All Seasons: The Lawyer as Conflict Manager,* 49 SAN DIEGO L. REV. 93 (2012).
[229] A. Elwork & G. A. H. Bemjamin, Lawyers in Distress, 23 J. PSYCHIATRY & L. 205 (1995).
[230] D. L. Haraway & W. M. Haraway, *Analysis of the Effect of Conflict-Management and Resolution Training on Employee Stress at a Healthcare Organization,* 83 HOSPITAL TOPICS 11 (2005); *see also* Colatrella, *supra* note 228.
[231] BRAFFORD, *supra* note 131; D. A. MAJOR & R. BURKE, HANDBOOK OF WORK-LIFE INTEGRATION AMONG PROFESSIONALS: CHALLENGES AND OPPORTUNITIES (2013).
[232] Hopkins & Gardner, *supra* note 183.
[233] A. D. Joudrey & J. E. Wallace, *Leisure As A Coping Resource: A Test of the Job Demand-Control-Support Model,* 62 HUMAN RELATIONS 195 (2009).
[234] *E.g.,* E. Amoafo, N. Hanabali, A. Patel, & P. Singh, *What Are the Significant Factors Associated with Burnout in Doctors?*, 65 OCCUPATIONAL MED. 117 (2015).
[235] J. Goh, J. Pfefer, & S. A. Zenios, *Workplace Stressors & Health Outcomes: Health Policy for the Workplace,* 1 BEHAV. SCI. & POL'Y. 43 (2015).
[236] Major & Burke, *supra* note 231; S. L. Munn, *Unveiling the Work-Life System: The Influence of Work-Life Balance on Meaningful Work*
[237] Press Release, *National Association for Law Placement, NALP Press Release on Part-Time Schedules* (Feb. 21, 2013), http://www.nalp.org/part-time_feb2013.
[238] K. M. Managan, E. Giglia, & L. Rowen, *Why Lawyers Leave Law Firms and What Firms Can Do About It,* L. PRAC. TODAY, April 14, 2016, http://www.lawpracticetoday.org/article/why-lawyers-leave-law-firms-and-what-firms-can-do-about-it.
[239] L. B. Hammer, E. E. Kossek, N. L. Yragui, T. E. Bodner, & G. C. Hanson, *Development and Validation of Multidimensional Measure of Family Supportive Supervisor Behaviors* (FSSB), 35 J. MGMT. 837 (2009); L. B. Hammer, S. E. Van Dyck, & A. M. Ellis, *Organizational Policies Supportive of Work-Life Integration, in* Major & Burke, *supra* note 231; E. E. Kossek, S. Pichler, T. Bodner, & L. B. Hammer, *Workplace Social Support and Work-Family Conflict: A Meta-Analysis Clarifying the Influence of General and Work-Family-Specific Supervisor and Organizational Support,* 64 PERSONNEL PSYCHOL. 289 (2011)

To support WLB, bar associations and regulators should work with legal employers to develop best practices and relevant training. Regulators and judges should consider whether any of their practices and policies can be modified to better support lawyer WLB.

8.11 Meaning and Purpose

Research has found that feeling that our lives are meaningful is important for physical and psychological wellness. It provides a buffer against stress.[240] For example, meaning in life is associated with a reduced risk of anxiety, depression, substance use, suicidal ideation, heart attack, and stroke; slower cognitive decline in Alzheimer's patients; and lower overall mortality for older adults.[241]

For many lawyers, an important part of building a meaningful life is through meaningful work. Experiencing our work as meaningful means that we believe that our work matters and is valuable. A large body of research shows that meaningfulness plays an important role in workplace well-being and performance.[242] Evidence suggests that the perception of meaningfulness is the strongest predictor of work engagement.[243]

Meaningfulness develops when people feel that their work corresponds to their values. Organizations can enhance the experience of fit and meaningfulness by, for example, fostering a sense of belonging; designing and framing work to highlight its meaningful aspects; and articulating compelling goals, values, and beliefs.[244]

These same principles apply in law school. Studies in the college context have found that the majority of students want their educational experiences to be meaningful and to contribute to a life purpose.[245] One study measured "psychological sense of community," which was proposed as a foundation for students to find greater meaning in their educational experience. It was the strongest predictor of academic thriving in the study.[246] Deterioration of law students' sense of meaning may contribute to their elevated rate of psychological distress. Research reflects that, over the course of law school, many students disconnect from their values and become emotionally numb.[247]

8.12. Substance Use and Mental Health Disorders

Recommended content for training on substance use and mental disorders is outlined above in Recommendation 8 in the body of this report.

8.13. Additional Topics

Many topics are possible for programming aimed at boosting work engagement and overall well-being (through resource-development) and curbing stress and burnout (by limiting demands) or otherwise promoting lawyer well-being. Additional topics to consider include: psychological

[240] BRAFFORD, *supra* note 131; P. Halama, *Meaning in Life and Coping. Sense of Meaning as a Buffer Against Stress, in* MEANING IN POSITIVE AND EXISTENTIAL PSYCHOLOGY 239-50 (A. Batthyany and P. Russo-Netzer eds., 2014).

[241] E. S. Kim, J. K. Sun, N. Park, C. Peterson, *Purpose in Life and Reduced Incidence of Stroke in Older Adults: The Health and Retirement Study,* 74 J. PSYCHOSOMATIC RES. 427 (2013); M. F. Steger, A. R. Fitch-Martin, J. Donnelly, & K. M. Rickard, *Meaning in Life and Health: Proactive Health Orientation Links Meaning in Life to Health Variables Among American Undergraduates,* 16 J. HAPPINESS STUDIES 583 (2015); M. F. Steger, P. Frazier, S. Oishi, M. Kaler, *The Meaning in Life Questionnaire: Assessing the Presence of and Search for Meaning in Life,* 53 J. COUNSELING PSYCHOL. 80 (2006).

[242] *E.g.,* S. Albrecht, *Meaningful Work: Some Key Questions for Research and Practice, in* FLOURISHING IN LIFE, WORK AND CAREERS: INDIVIDUAL WELLBEING AND CAREER EXPERIENCES (R. J. Burke, K. M. Page, & C. Cooper eds., 2015); B. D. Rosso, K. H. Dekas, & A. Wrzesniewski, *On the Meaning of Work: A Theoretical Integration and Review,* 30 RES. IN ORGANIZATIONAL BEHAV. 91 (2010).

[243] D. R. May, R. L. Gilson, & L. M. Harter, *The Psychological Conditions of Meaningfulness, Safety and Availability and the Engagement of the Human Spirit at Work,* 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 11 (2004); P. Fairlie, *Meaningful Work, Employee Engagement, and Other Key Employee Outcomes: Implications for Human Resource Development,* 13 ADVANCED IN DEVELOPING HUMAN RESOURCES 508 (2011).

[244] BRAFFORD, *supra* note 131; M. G. Pratt & B. E. Ashforth, *Fostering Meaningfulness, in* Cameron, Dutton, & Quinn, *supra* note 32; D. J. Cleavenger & T. P. Munyon, *It's How You Frame It: Transformational Leadership and the Meaning of Work,* 56 BUS. HORIZONS 351 (2013); W. Kahn & S. Fellows, *Employee Engagement and Meaningful Work, in* PURPOSE AND MEANING IN THE WORKPLACE 105-26 (B. J. Dik, Z. S. Byrne, & M. F. Steger eds., 2013).

[245] S. J. DeWitz, M. L. Woolsey, W. B. Walsh, *College Student Retention: An Exploration of the Relationship Between Self-Efficacy Beliefs, and Purpose in Life among College Students,* 50 J. C. STUDENT DEV. 19 (2009); HIGHER EDUC. RES. INST., THE SPIRITUAL LIFE OF COLLEGE STUDENTS (2005), *available at* http://spirituality.ucla.edu/docs/reports/Spiritual_Life_College_Students_Full_Report.pdf; see also J. K. Coffey, L. Wray-Lake, D. Mashek, & B. Branand, *A Longitudinal Examination of a Multidimensional Well-Being Model in College and Community Samples,* 17 J. HAPPINESS STUDIES 187 (2016).

[246] Eric James McIntosh, *Thriving in College: The Role of Spirituality and Psychological Sense of Community in Students of Color* (2012) (unpublished Ph.D. dissertation, Azusa Pacific University).

[247] Sheldon & Krieger, *supra* note 154.

capital (composed of optimism, self-efficacy, hope, and resilience),[248] psychological hardiness (composed of commitment, control, and challenge),[249] stress mindset,[250] growth mindset,[251] grit,[252] effort-reward balance,[253] transformational leadership,[254] self-determination theory,[255] strengths-based management,[256] emotional intelligence and regulation,[257] organizational fairness,[258] nutrition,[259] interpersonal skills,[260] and political skills.[261]

[248]*E.g.,* Avey, Luthans, & Jensen, *supra* note 181.
[249]S. R. Maddi, S. Kahn, & K. L. Maddi, *The Effectiveness of Hardiness Training,* 50 CONSULTING PSYCHOL. J.: PRAC. & RES. 78 (1998)
[250]Crum, Salovey, Achor, *supra* note 50; McGonigal, *supra* note 182.
[251]C. S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2008).
[252]A. DUCKWORTH, GRIT: THE POWER OF PASSION AND *Perseverance* (2016).
[253]A. Allisey, J. Rodwell, & A. Noblet, *Personality and the Effort-Reward Imbalance Model of Stress: Individual Differences in Reward Wensitivity,* 26 WORK & STRESS 230 (2012)
[254]M. Y. Ghadi, M. Fernando, & P. Caputi, *Transformational Leadership and Work Engagement,* 34 LEADERSHIP & ORG. DEV. J. 532 (2013).
[255]Krieger & Sheldon, *supra* note 5.
[256]D. O. Clifton & J. K. Harter, *Investing in Strengths, in* Cameron, Dutton, & Quinn, *supra* note 32.
[257]C. Miao, R. H., Humphrey, & S. Qian, *Leader Emotional Intelligence and Subordinate Job Satisfaction: A Meta-Analysis of Main, Mediator, and Moderator Effects,* 102 PERSONALITY AND INDIVIDUAL DIFFERENCES 13 (2016); K. Thory, *Teaching Managers to Regulate Their Emotions Better: Insights from Emotional Intelligence Training and Work-Based Application,* 16 HUMAN RESOURCE DEV. INT'L 4 (2013); R. E. Riggio, *Emotional Intelligence and Interpersonal Competencies, in* SELF-MANAGEMENT AND LEADERSHIP DEVELOPMENT 160-82 (M. G. Rothstein, R. J. Burke eds., 2010).
[258]J. Greenberg, *Positive Organizational Justice: From Fair to Fairer—and Beyond, in* EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 159-78 (J. E. Dutton & B. R. Ragins eds., 2007).
[259]T. RATH, EAT, MOVE, SLEEP (2013).
[260]J. Mencl, A. J. Wefald, & K. W. van Ittersum, *Transformational Leader Attributes: Interpersonal Skills, Engagement, and Well-Being,* 37 LEADERSHIP & ORG. DEV. J. 635 (2016).
[270]*Id.;* C. C. Rosen & D. C. Ganster, *Workplace Politics and Well-Being: An Allostatic Load Perspective, in* IMPROVING EMPLOYEE HEALTH AND WELL-BEING 3-23 (A. M. Rossi, J. A. Meurs, P. L. Perrewa eds., 2014); Ferris, Daniels, & Sexton, *supra* note 40.

Appendix to Recommendation 9: Guide and Support The Transition of Older Lawyers.

Recommendation 9 advised stakeholders to create programs for detecting and addressing cognitive decline in lawyers, develop succession plans for aging lawyers, and develop reorientation programs to support lawyers facing retirement. Such initiatives and programs may include the following:

- Gathering demographic information about the lawyer population, including years in practice, the nature of the practice, the size of the firm in which the lawyer's practice is conducted, and whether the lawyer has engaged in any formal transition or succession planning for the lawyer's practice;
- Working with medical professionals to develop educational programs, checklists, and other tools to identify lawyers who may be experiencing incapacity issues;
- Developing and implementing educational programs to inform lawyers and their staff members about incapacity issues, steps to take when concerns about a lawyer's incapacity are evident, and the importance of planning for unexpected practice interruptions or the cessation of practice;
- Developing succession or transition planning manuals and checklists, or planning ahead guidelines for lawyers to use to prepare for an unexpected interruption or cessation of practice;[262]
- Enacting rules requiring lawyers to engage in succession planning;
- Providing a place on each lawyer's annual license renewal statement for the lawyer to identify whether the lawyer has engaged in succession and transition planning and, if so, identifying the person, persons or firm designated to serve as a successor;
- Enacting rules that allow senior lawyers to continue to practice in a reduced or limited license or emeritus capacity, including in pro bono and other public service representation;
- Enacting disability inactive status and permanent retirement rules for lawyers whose incapacity does not warrant discipline, but who, nevertheless, should not be allow to practice law;
- Developing a formal, working plan to partner with Judges and Lawyer Assistance Programs to identify, intervene, and assist lawyers demonstrating age-related or other incapacity or impairment.[263]
- Developing "re-orientation" programs to proactively engage lawyers in transition planning with topics to include:
  - financial planning;
  - pursuing "bridge" or second careers;
  - identity transformation;
  - developing purpose in life;
  - cognitive flexibility;
  - goal-setting;
  - interpersonal connection;
  - physical health;
  - self-efficacy;
  - perceived control, mastery, and optimism.[264]

[262] *See, e.g.,* N. M. SUP. CT. LAW. SUCCESSION & TRANSITION COMM. SUCCESSION PLANNING HANDBOOK FOR N. M. LAW. (2014), *available at* http://www.nmbar.org/NmbarDocs/forMembers/Succession/SuccessionHandbook.pdf; W. VA. STATE BAR, SUCCESSION PLANS, *available at* http://wvbar.org/wp-content/uploads/2012/04/succession.pdf; WASH. STATE BAR ASS'N, SUCCESSION PLANNING, *available at* http://www.wsba.org/Resources-and-Services/Ethics/Succession-Planning.

[263] *See* generally W. Slease, et al., *supra* note 60.

[264] *See, e.g.,* S. D. Asebedo & M. C. Seay, *Positive Psychological Attributes and Retirement Satisfaction,* 25 J. FIN. COUNSELING & PLANNING 161 (2014); Dingemans & Henkens, supra note 64; Houlfort, Fernet, Vallerand, Laframboise, Guay, & Koestner, *supra* note 62; Muratore & Earl, *supra* note 64.

Appendix to Recommendation 25: Topics for Legal Employers' Audit of Well-Being Related Policies and Practices

Legal employers should consider topics like the following as part of their audits of current policies and practices to evaluate whether the organization adequately supports lawyer well-being.

MENTAL HEALTH & SUBSTANCE USE DISORDERS

- Is there a policy regarding substance use, mental health, and impairment? If so, does it need updating?
- Does the policy explain lawyers' ethical obligations relating to their own or colleagues' impairment?
- Is there a leave policy that would realistically support time off for treatment?
- Are there meaningful communications about the importance of well-being?
- Do health plans offered to employees include coverage for mental health and substance use disorder treatment?

LAW PRACTICE MANAGEMENT PRACTICES AFFECTING LAWYER WELL-BEING

- **Assessment of Well-Being:** Is there a regular practice established to assess work engagement, burnout, job satisfaction, turnover intentions, psychological well-being, or other indicators of well-being and to take action on the results?
- **Orientation Practices:** Are orientation practices established to set new lawyers up for success, engagement, and well-being?
- **Work-Life Balance-Related Policies & Practices:** Is there a policy that allows flexibility and an organizational climate that supports it? Is it a practice to recognize lawyers and staff who demonstrate a high standard of well-being?
- **Diversity/Inclusion-Related Policies & Practices:** Diversity and inclusion practices impact lawyer well-being. Are policies and practices in place with a specific mission that is adequately funded?[265]
- **24/7 Availability Expectations:** Do practices allow lawyers time for sufficient rejuvenation? Are response-time expectations clearly articulated and reasonable? Is there an effort to protect time for lawyers to recover from work demands by regulating work-related calls and emails during evenings, weekends, and vacations?[266]

[265]For example, a 2015 report found that most larger firms have some type of diversity training (80 percent) and all participating firms reported having a women's affinity group. But the report also found that affinity groups were "woefully underfunded" and lacking clear goals and missions. *See* L. S. RIKLEEN, REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS, NAT'L ASSOC. OF WOMEN LAWYERS FOUND. (2015), *available at* http://www.nawl.org/2015nawlsurvey.

[266]For example, McDonald's and Volkswagen—along with one in four U.S. companies—have agreed to stop sending emails to employees after hours. *See* Fritz, Ellis, Demsky, Lin, & Guros, *supra* note 206. In in the highly-demanding world of law, firms should consider the possibility of establishing new norms for lawyers that limit after-hours emails and calls to actual emergencies—especially to associates who have less work-related autonomy and, thus, are at a higher risk for fatigue and burnout.

- **Billing Policies & Practices:** Do billing practices encourage excessive work and unethical behavior?[267]

- **Compensation Practices:** Are compensation practices fair? And are they perceived as fair? Do they follow standards of distributive (fair outcome), procedural (fair process), interpersonal (treating people with dignity and respect), and informational (transparency) fairness? Perceived unfairness in important practices can devastate well-being and motivation. For example, a large-scale study found that people were 50 percent more likely to have a diagnosed health condition if they perceived unfairness at work.[268] Further, high levels of interpersonal and informational fairness should not be ignored—they can reduce the negative effect of less fair procedures and outcomes.[269]

- **Performance Appraisal Practices:** Are performance appraisal practices fair and perceived as fair? Are observations about performance regularly noted to use in the review? Do multiple raters contribute? Are they trained on the process and to reduce common biases?[270] Is feedback given in a two-way communication? Is specific, timely feedback given regularly, not just annually? Is feedback empathetic and focused on behavior not the person's worth? Is good performance and progress toward goals regularly recognized? Is goal-setting incorporated?[271] Is performance feedback balanced and injected with positive regard and respect to improve likelihood of acceptance?[272] Are lawyers asked to describe when they feel at their best and the circumstances that contribute to that experience?[273] Carefully managing this process is essential given evidence that bungled performance feedback harms well-being and performance.

- **Vacation Policies & Practices:** Is there a clear vacation policy? Does the organizational culture encourage usage and support detachment from work? In their study of 6,000 practicing lawyers, law professor Larry Krieger and psychology professor Kennon Sheldon found that the number of vacation days taken was the strongest predictor of well-being among all activities measured in the study. It was a stronger predictor of well-being even than income level.[274] This suggests that legal employers should encourage taking of vacation—or at least not discourage or unreasonably interfere with it.

[267] ABA COMM'N ON BILLABLE HOURS, AM. BAR ASS'N, THE CORROSIVE IMPACT OF EMPHASIS ON BILLABLE HOURS (2001-2002), *available at* http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf.

[268] J. Goh, J. Pfefer, & S. A. Zenios, *Workplace Stressors & Health Outcomes: Health Policy for the Workplace,* 1 BEHAV. SCI. & POL'Y. 43 (2015); *see also* R. M. Herr, A. Loerbroks, J. A. Bosch, M. Seegel, M. Schneider, & B. Schmidt, *Associations of Organizational Justice with Tinnitus and the Mediating Role of Depressive Symptoms and Burnout—Findings from a Cross-Sectional Study,* 23 INT'L J. BEHAV. MED. 190 (2016).

[269] J. Greenberg, *Promote Procedural and Interactional Justice to Enhance Individual and Organizational Outcomes,* in Locke, *supra* note 7, 255-71; T. R. Tyler & E. A. Lind, A *Relational Model of Authority in Groups, in Advances in Experimental Social Psychology* 115-91 (M. P. Zanna ed., 1st ed., 1992).

[270] F. Luthans & A. Stajkovic, *Provide Recognition for Performance Improvement, in Locke, supra* note 7, 239-53.

[271] A. N. Kluger, & N. DeNisi, *The Effects of Feedback Interventions on Performance: A Historical Review, a Meta-Analysis, and a Preliminary Feedback Intervention Theory,* 119 PSYCHOL. BULL. 254 (1996).

[272] O. Bouskila-Yam & A. N. Kluger, *Strengths-Based Performance Appraisal and Goal Setting,* 21 HUMAN RES. MGMT. REV. 137 (2011).

[273] A. N. Kluger & D. Nir, *The Feedforward Interview,* 20 HUMAN RESOURCES MGMT. REV. 235 (2010).

[274] Krieger & Sheldon, *supra* note 5.

Appendix to Recommendation 33.2: Creating a Well-Being Course and Lecture Series for Law Students

Recommendation 33.2 suggests that law schools design a lecture series dedicated to well-being topics. In 2007, the Carnegie Foundation for the Advancement of Teaching issued a report titled *Educating Lawyers: Preparation for the Profession of Law* (referred to as the "Carnegie Report"). The Carnegie Report describes three "apprenticeships" in legal education: (1) the intellectual apprenticeship, where students acquire a knowledge base; (2) the practice apprenticeship, where students learn practical legal skills; and (3) the professional identity apprenticeship, where students cultivate the attitudes and values of the legal profession.[275] The 2016 *Foundations for Practice Report* by the Institute for the Advancement of the American Legal System recommends that law schools teach character attributes including courtesy, humility, respect, tact, diplomacy, sensitivity, tolerance, and compassion; and self-care and self-regulation skills such as positivity and managing stress; exhibiting flexibility, adaptability, and resilience during challenging circumstances; and decision-making under pressure. A well-being course can address the *Foundations for Practice Report* recommendations while helping law students develop a professional identity that encompasses a commitment to physical and mental well-being.

Appendix B includes topics that could be incorporated into a well-being course for law students. The list below includes additional topics and provides suggested student readings in the footnotes:

- Basic Wellbeing and Stress Reduction;[277]
- Cognitive Well-being and Good Nutrition;[278]
- Restorative Practices, such as Mindfulness, Meditation, Yoga, and Gratitude;[279]
- The Impact of Substances such as Caffeine, Alcohol, Nicotine, Marijuana, Adderall, Ritalin, Cocaine, and Opiates on Cognitive Function;[280]
- "Active bystander" training that educates students about how to detect when their fellow students may be in trouble with respect to mental health disorders, suicidal thinking, or substance use and what action to take;
- Cultivating a Growth Mindset;[281]
- Improving Pathway (strategies for identifying goals and plans for reaching them) and Agency (sustaining motivation to achieve objectives) Thinking;[282]

[275]SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING (2007).

[276]A. Gerkman & L. Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient,* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 30, 33 (2016), *available at* http://iaals.du.edu/foundations/reports/whole-lawyer-and-character-quotient.

[277]*See* L. S. KRIEGER, THE HIDDEN SOURCES OF LAW SCHOOL STRESS: AVOIDING THE MISTAKES THAT CREATE UNHAPPY AND UNPROFESSIONAL LAWYERS (2014); D. S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance,* 59 LOY. L. REV. 791, 828-37 (2013); M. Silver, *Work & Well-Being, in* LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION (L. Wortham, A. Scheer, N. Maurer, & S. L. Brooks eds., 2016).

[278]D. S. Austin, *Food for Thought: The Neuroscience of Nutrition to Fuel Cognitive Performance,* OR. L. REV. (forthcoming 2017), *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808100.

[279]Austin, *supra* note 277, at 837-847; see S. L. Rogers, *Mindfulness and the Importance of Practice,* 90 FLA. B. J. (April 2016); *see* S. L. Rogers, *Mindfulness in Law, in* THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS (A. Ie, C. Ngnoumen & E. Langer eds., 2014); see T. K. Brostoff, *Meditation for Law Students: Mindfulness Practice as Experiential Learning,* 41 L. & PSYCHOL. REV. (forthcoming 2017), online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836923; *see* J. CHO & K. GIFFORD, THE ANXIOUS LAWYER: AN 8-WEEK GUIDE TO A JOYFUL AND SATISFYING LAW PRACTICE THROUGH MINDFULNESS AND MEDITATION (2016); *see* G. MUMFORD, THE MINDFUL ATHLETE: SECRETS TO PURE PERFORMANCE (2015); M. Silver, *supra* note 277.

[280]*See* D. S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and its Impact on Cognitive Wellness,* 15 NEV. L.J. 826 (2015).

[281]D. S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools,* 77 MD. L. REV. at 22-25 (forthcoming 2018), *abstract available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928329; see C. S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2008).

[282]Austin, *supra* note 280, at 826-27.

- Enhancing Emotion Regulation;[283]
- Fostering Optimism and Resilience;[284]
- Preparing for a Satisfying Legal Career;[285]
- Developing Strong Lawyering Values, such as Courage, Willpower, and Integrity;[286]
- Work Life Balance in the Law;[287] and
- Lawyers as Leaders.[288]

Many resources for teaching well-being skills are available to legal educators in the online AALS Balance in Legal Education Bibliography.[289] Expert guest speakers can be found in the AALS Balance in Legal Education section,[290] and at local lawyer assistance programs and lawyer well-being committees.

[283] *See* S. Daicoff, *Lawyer Personality Traits and their Relationship to Various Approaches to Lawyering, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 79 (M. A. Silver ed., 2007); *see* D. S. Austin & R. Durr, *Emotion Regulation for Lawyers: A Mind is a Challenging Thing to Tame,* 16 WYO. L. REV. 826 (2015); M. A. Silver, *Supporting Attorneys' Personal Skills,* 78 REV. JUR. U.P.R. 147 (2009).
[284] *See* S. KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (10th ed., 2011); *see* S. ACHOR, THE HAPPINESS ADVANTAGE: THE SEVEN PRINCIPLES OF POSITIVE PSYCHOLOGY THAT FUEL SUCCESS AND PERFORMANCE AT WORK (2010); *see* S. ACHOR, BEFORE HAPPINESS: THE 5 HIDDEN KEYS TO ACHIEVING SUCCESS, SPREADING HAPPINESS, AND SUSTAINING POSITIVE CHANGE (2013); see A. DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE (2016).
[285] *See* L. S. KRIEGER, A DEEPER UNDERSTANDING OF YOUR CAREER CHOICES: SCIENTIFIC GUIDANCE FOR A FULFILLING LIFE AND CAREER (2007); *see* N. LEVIT & D. O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010); *see* P. H. Huang & R. Swedloff, *Authentic Happiness and Meaning at Law Firms,* 58 SYRACUSE L. REV. 335 (2008); M. Silver, *supra* note 260.
[286] *See* D. O. LINDER & N. LEVIT, THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW (2014); *see* G. Duhaime, *Practicing on Purpose: Promoting Personal Wellness and Professional Values in Legal Education,* 28 TOURO L. REV. 1207 (2012).
[287] L. L. Cooney, *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law,* 47 SAN DIEGO L. REV. 421 (2010).
[288] *See* P. H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?,* 55 HOUSTON L. REV. (forthcoming 2017), *abstract available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907513; Austin, *supra* note 281, at 44-49.
[289] *See* AALS, *supra* note 145.
[290] *See* AALS, *supra* note 144.

BIOGRAPHIES OF TASK FORCE MEMBERS AND TASK FORCE REPORT AUTHORS AND EDITORS

The Report of the National Task Force on Lawyer Well-Being was primarily authored and edited by the Task Force members, whose biographies are below. The Task Force members were assisted in the creation of the Report by a team that included liaisons, contributing authors, peer reviewers, and individuals who contributed in a variety of other important capacities. Their biographies also are provided below.

BREE BUCHANAN (CO-CHAIR, EDITOR, AUTHOR)

Bree Buchanan, J.D., is Director of the Texas Lawyers Assistance Program of the State Bar of Texas. She serves as co-chair of the National Task Force on Lawyer Wellbeing and is an advisory member of the ABA Commission on Lawyers Assistance Programs (CoLAP). Ms. Buchanan is also the appointed chair of CoLAP for 2017-2018.

Ms. Buchanan, upon graduation from the University of Texas School of Law, practiced in the public and private sector with a focus on representing both adult and child victims of family violence. She worked on public policy initiatives and systems change at both the state and federal level as the Public Policy Director for the Texas Council on Family Violence and the National Domestic Violence Hotline. After this position, Ms. Buchanan was appointed Clinical Professor and Co-Director of the Children's Rights Clinic at the University of Texas School of Law.

Ms. Buchanan is a frequent speaker at CLE programs for national organizations, as well as for state and local bar entities. She is a graduate student at the Seminary of the Southwest where she is pursuing a Masters in Spiritual Direction, and is the proud parent of a senior at New York University. Ms. Buchanan tends to her own well-being by engaging in a regular meditation practice, rowing, staying connected to 12-Step recovery, and being willing to ask for help when she needs it.

JAMES C. COYLE (CO-CHAIR, EDITOR, AUTHOR)

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. Mr. Coyle oversees attorney admissions, attorney registration, mandatory continuing legal and judicial education, attorney discipline and diversion, regulation of the unauthorized practice of law, and inventory counsel matters. Mr. Coyle has been a trial attorney with the Office of Disciplinary Counsel or successor Office of Attorney Regulation Counsel since 1990. Prior to that, he was in private practice. He served on the National Organization of Bar Counsel (NOBC) board of directors from 2014 – 2016. Mr. Coyle was on the Advisory Committee to the ABA Commission on Lawyer Assistance Programs and is now a member of the Commission for the 2017 – 2018 term.

Mr. Coyle is active in promoting proactive regulatory programs that focus on helping lawyers throughout the stages of their careers successfully navigate the practice of law and thus better serve their clients. This includes working on and co-hosting the first ABA Center for Professional Responsibility (CPR)/NOBC/Canadian Regulators Workshops on proactive, risk-based regulatory programs, in Denver in May 2015, in Philadelphia in June 2016, and St. Louis in June 2017; participating in the NOBC Program Committee and International Committee, including as Chair of the Entity Regulation Subcommittee, now known as the Proactive Management-Based Programs Committee; and prior service on the NOBC Aging Lawyers and Permanent Retirement subcommittees. Mr. Coyle tends to his own well-being through gardening, exercise, and dreaming about retirement.

ANNE BRAFFORD (EDITOR-IN-CHIEF, AUTHOR)

Anne Brafford served as the Editor-in-Chief for the Task Force Report on Lawyer Well-Being. Anne is the Chairperson of the American Bar Association Law Practice Division's Attorney Well-Being Committee. She is a founding member of Aspire, an educational and consulting firm for the legal profession (www.aspire.legal). In 2014, Anne left her job as an equity partner at Morgan, Lewis & Bockius LLP after 18 years of practice to focus on thriving in the legal profession. Anne has earned a Master's degree in Applied Positive Psychology (MAPP) from the University of Pennsylvania and now is a PhD student in positive organizational psychology at Claremont Graduate University (CGU). Anne's research focuses on lawyer thriving and includes topics like positive leadership, resilience, work engagement, meaningful work, motivation, and retention of women lawyers. She also is an Assistant Instructor in the MAPP program for Dr. Martin Seligman and, for two years, was a Teaching Assistant at CGU for Dr. Mihaly Csikszentmihalyi, the co-founders of positive psychology. Look for her upcoming book to be published this fall by the American Bar Association's Law Practice Division called *Positive Professionals: Creating High-Performing, Profitable Firms Through The Science of Engagement.* It provides practical, science-backed advice on boosting work engagement for lawyers. Anne can be reached at abrafford@aspire.legal, www.aspire.legal.

JOSH CAMSON (EDITOR, AUTHOR)

Josh Camson is a criminal defense attorney with Camson Law, LLC in Collegeville, Pennsylvania. He is a member of the Pennsylvania Bar Association Ethics Committee and the ABA Standing Committee on Professionalism. He is a former long-time staff writer for Lawyerist.com, a law practice management blog and the former editor of BitterLawyer.com, a comedy site for lawyers and law students.

CHARLES GRUBER (AUTHOR)

Charles A. Gruber is a solo practitioner in Sandy, Utah. He is a graduate of the University of Texas Law School. He is licensed to practice law in Utah and California. His areas of practice are personal injury, medical malpractice, and legal malpractice.

A former attorney with the Utah State Bar Office of Professional Conduct, Mr. Gruber represents and advises attorneys on ethics issues. A former member of the NOBC, he currently is a member of APRL. He serves on the Board of Utah Lawyers Helping Lawyers. Utah Lawyers Helping Lawyers is committed to rendering confidential assistance to any member of the Utah State Bar whose professional performance is or may be impaired because of mental illness, emotional distress, substance abuse or any other disabling condition or circumstance.

Mr. Gruber tends to his own well being by trying to remember and follow the suggestions of the 11th step of the 12 Steps.

> As we go through the day we pause, when agitated or doubtful, and ask for the right thought or action. We constantly remind ourselves we are no longer running the show, humbly saying to ourselves many times each day "They will be done". We are then in much less danger of excitement, fear, anger, worry, self-pity, or foolish decisions. We become much more efficient. We do not tire so easily, for we are not burning up energy foolishly as we did when we were trying to arrange life to suit ourselves. Big Book pg. 87-88.

TERRY HARRELL (AUTHOR)

Terry Harrell completed her undergraduate degree in psychology at DePauw University in 1986 and completed her law degree at Maurer School of Law in 1989. Following law school she practiced law with Ice Miller and then clerked for Judge William I. Garrard on the Indiana Court of Appeals.

In 1993 she completed her Master of Social Work Degree (MSW) at Indiana University. Terry is a Licensed Clinical Social Worker (LCSW), a Licensed Clinical Addictions Counselor (LCAC) in Indiana, and has a Master Addictions Counselor certification from NAADAC. In 1992 Terry began working for Midtown Community Mental Health Center. While there she worked in a variety of areas including inpatient treatment, crisis services, adult outpatient treatment, wrap around services for severely emotionally disturbed adolescents, and management. In 2000 Terry began working as the Clinical Director for JLAP and in 2002 became the Executive Director.

From 2007 through 2010 Terry served on the Advisory Committee to the American Bar Association's Commission on Lawyer Assistance Programs (CoLAP).

She served from 2010 through 2013 as a commissioner on CoLAP. She is past Chair of the Senior Lawyer Assistance Subcommittee for CoLAP and an active member of the CoLAP National Conference Planning Committee. In August 2014 Terry became the first ever LAP Director to be appointed Chair of the ABA Commission on Lawyer Assistance Programs. Locally, Terry is a member of the Indiana State Bar Association and is active with the Professional Legal Education Admission and Development Section, the Planning Committee for the Solo Small Firm Conference, and the Wellness Committee.

DAVID B. JAFFE (AUTHOR)

David Jaffe is Associate Dean for Student Affairs at American University Washington College of Law. In his work on wellness issues among law students over the last decade, he has served on the D.C. Bar Lawyer Assistance Program including as its chair, and continues to serve on the ABA Commission on Lawyer Assistance Programs (CoLAP) as co-chair of the Law School Assistance Committee. Jaffe co-authored "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns", reporting the results of a survey he co-piloted in 2014. He also produced the "Getting Health, Staying Healthy" video that is used as a resource in many Professional Responsibility classes around the country, and is responsible for modernizing the "Substance Abuse & Mental Health Toolkit for Law Students and Those Who Care About Them".

Jaffe has presented frequently on law student wellness, including to the National Conference of Bar Examiners, the ABA Academic Deans, the ABA Young Lawyers Division, CoLAP, AALS, the D.C. Bar, and NALSAP. He received the 2015 CoLAP Meritorious Service Award in recognition of his commitment to improving the lives of law students, and the 2009 Peter N. Kutulakis Award from the AALS Student Services Section for outstanding contributions to the professional development of law students. Jaffe states that he seeks self-care each day by being in the moment with each of his two daughters.

TRACY L. KEPLER (AUTHOR)

Tracy L. Kepler is the Director of the American Bar Association's Center for Professional Responsibility (CPR), providing national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection. In that role, she manages and coordinates the efforts of 18 staff members and 13 entities including five ABA Standing Committees (Ethics, Professionalism, Professional Regulation, Client Protection, and Specialization), the ABA/BNA Lawyers' Manual on Professional Conduct, the Center's Coordinating Council and other Center working committees.

From 2014-2016, Ms. Kepler served as an Associate Solicitor in the Office of General Counsel for the U.S. Patent & Trademark Office (USPTO), where she concentrated her practice in the investigation, prosecution and appeal of patent/trademark practitioner disciplinary matters before the Agency, U.S. District Courts and Federal Circuit, provided policy advice on ethics and discipline related matters to senior management, and drafted and revised Agency regulations. From 2000-2014, she served as Senior Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission (ARDC), where she investigated and prosecuted cases of attorney misconduct.

From 2009-2016, Ms. Kepler served in various capacities, including as President, on the Board of the National Organization of Bar Counsel (NOBC), a non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States and abroad. Ms. Kepler also taught legal ethics as an Adjunct Professor at American University's Washington College of Law. Committed to the promotion and encouragement of professional responsibility throughout her career, Ms. Kepler has served as the Chair of the CPR's CLE Committee and its National Conference Planning Committee, and is a frequent presenter of ethics related topics to various national, state and local organizations. She has also served as the NOBC Liaison to the ABA CPR Standing Committees, and to the ABA Commission on Lawyer Assistance Programs (CoLAP), where she was a Commission member, a member of its Advisory Committee, the Chair of its Education and Senior Lawyer Committees, and also a member of its National Conference Planning Committee. Ms. Kepler also participates as a

faculty member for the National Institute of Trial Advocacy (NITA) trial and deposition skills programs, and served as the Administrator of the NOBC-NITA Advanced Advocates Training Program from 2011-2015. She is a graduate of Northwestern University in Evanston, Illinois, and received her law degree from New England School of Law in Boston, Massachusetts.

PATRICK KRILL (AUTHOR)

A leading authority on the addiction and mental health problems of lawyers, Patrick is the founder of Krill Strategies, a behavioral health consulting firm exclusively for the legal profession. Patrick is an attorney, licensed and board certified alcohol and drug counselor, author, and advocate. His groundbreaking work in the field of attorney behavioral health includes initiating and serving as lead author of the first and only national study on the prevalence of attorney substance use and mental health problems, a joint undertaking of the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation that was published in The Journal of Addiction Medicine.

Patrick is the former director of the Hazelden Betty Ford Foundation's Legal Professionals Program, where he counseled many hundreds of legal professionals from around the country who sought to better understand and overcome the unique challenges faced on a lawyer's road to recovery. He has authored more than fifty articles related to addiction and mental health, and has been quoted in dozens of national and regional news outlets, including the New York Times, Wall Street Journal, Washington Post, Chicago Tribune, and countless legal industry trade publications and blogs. As a frequent speaker about addiction and its intersection with the law, Patrick has taught multiple graduate-level courses in addiction counseling, and has spoken, lectured, or conducted seminars for over one hundred organizations throughout the United States, including professional and bar associations, law firms, law schools, and corporations.

Patrick maintains his own wellbeing by prioritizing his personal relationships and exercising daily. Whether it be hiking, yoga, or weight lifting, his secret to managing stress is a dedication to physical activity. Patrick can be reached at patrick@prkrill.com, www.prkrill.com.

CHIEF JUSTICE DONALD W. LEMONS, SUPREME COURT OF VIRGINIA (AUTHOR)

Chief Justice Donald W. Lemons received his B.A. from the University of Virginia in 1970. Before entering law school, he served as a Probation Officer in Juvenile and Domestic Relations Court. In 1976, he earned his J.D. from the University of Virginia School of Law. From 1976 until 1978, he served as Assistant Dean and Assistant Professor of Law at the University of Virginia School of Law. Thereafter, he entered the private practice of the law in Richmond, Virginia. Chief Justice Lemons has served at every level of the court system in Virginia. He served as a substitute judge in General District Court and in Juvenile and Domestic Relations Court. In 1995, he was elected by the General Assembly to be a Judge in the Circuit Court of the City of Richmond. While serving in that capacity, Chief Justice Lemons started one of the first Drug Court dockets in Virginia. He was then elected by the General Assembly to serve as a Judge on the Court of Appeals of Virginia. In 2000, he was elected by the General Assembly as a Justice of the Supreme Court of Virginia. In 2014, the Justices of the Supreme Court of Virginia elected Justice Lemons to serve as the next Chief Justice, following the retirement of Chief Justice Cynthia D. Kinser on December 31, 2014. Chief Justice Lemons is also the Distinguished Professor of Judicial Studies at the Washington and Lee University School of Law, serves on the Board of Directors for the Conference of Chief Justices, is the former President of the American Inns of Court (2010 – 2014), and an Honorary Bencher of Middle Temple in London. He is married to Carol Lemons, and they have three children and six grandchildren. He and Carol reside in beautiful Nelson County, Virginia, in the foothills of the Blue Ridge Mountains.

SARAH MYERS (AUTHOR)

Sarah Myers is the Clinical Director of the Colorado Lawyer Assistance Program. She received her B.A. from the University of Richmond in Virginia, her M.A. from Naropa University in Boulder, Colorado, and her J.D. at the University of Denver in Colorado. She is a Colorado licensed attorney, licensed marriage and family therapist, and licensed addiction counselor. Ms. Myers is also a licensed post-graduate level secondary teacher, certified trauma and abuse psychotherapist, and certified LGTBQ

therapist. She has over 18 years of experience as a professor and teacher, psychotherapist, clinical supervisor, and program director.

Ms. Myers specializes in stress management, psychoneuroimmunology, and psychoeducation, topics that she presents to thousands of judges, lawyers, and law students each year. In addition, she has authored hundreds of articles on wellness concepts such as compassion fatigue, professional burnout, mental health support, and life-enhancing techniques for the legal community. Ms. Myers strives to "practice what she preaches" for self-care, which includes: simple meditation throughout the day to relax her nervous system, using humor and laughter to cope with difficult situations or personalities, cultivating positive relationships with friends and family, and engaging in hobbies such as gardening, caring for numerous pets (including a koi pond), yoga, learning new things, and reading science fiction and fantasy novels.

CHRIS L. NEWBOLD (AUTHOR)

Chris Newbold is Executive Vice President of ALPS Corporation and ALPS Property & Casualty Company. In his role as Executive Vice President, Mr. Newbold oversees bar association relations, strategic and operational planning, risk management activities amongst policyholders, human resources, and non-risk related subsidiary units. Internally at ALPS, Mr. Newbold has developed leading conceptual models for strategic planning which have driven proven results, ensured board and staff accountability, focused organizational energies, embraced change, integrated budgeting and human resource functions into the process and enabled a common vision for principal stakeholders. Externally, Mr. Newbold is a nationally-recognized strategic planning facilitator in the bar association and bar foundations worlds, conducts risk management seminars on best practices in law practice management and is well-versed in captive insurance associations and other insurance-related operations.

Mr. Newbold received his law degree from the University of Montana School of Law in 2001, and holds a bachelor's degree from the University of Wisconsin-Madison. Following his graduation from law school, he served one year as a law clerk for the Honorable Terry N. Trieweiler of the Montana Supreme Court. He began his career at ALPS as President and Principal Consultant of ALPS Foundation Services, a non-profit fundraising and philanthropic management consulting firm. Mr. Newbold is currently a member of the State Bar of Montana, the American Bar Association, and is involved in a variety of charitable activities. Mr. Newbold resides in Missoula, Montana, with his wife, Jennifer, and their three children, Cameron (11), Mallory (9) and Lauren (5).

JAYNE REARDON (EDITOR, AUTHOR)

Jayne Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism. A tireless advocate for professionalism, Jayne oversees programs and initiatives to increase the civility and professionalism of attorneys and judges, create inclusiveness in the profession, and promote increased service to the public. Jayne developed the Commission's successful statewide Lawyer-to-Lawyer Mentoring Program which focuses on activities designed to explore ethics, professionalism, civility, diversity, and wellness in practice settings. She spearheaded development of an interactive digital and social media platform that connects constituencies through blogs, social networking sites and discussion groups.
A frequent writer and speaker on topics involving the changing practice of law, Jayne asserts that embracing inclusiveness and innovation will ensure that the profession remains relevant and impactful in the future.
Jayne's prior experience includes many successful years of practice as a trial lawyer, committee work on diversity and recruiting issues, and handling attorney discipline cases as counsel to the Illinois Attorney Registration and Disciplinary Commission Review Board.

Jayne graduated from the University of Notre Dame and the University of Michigan Law School. She is active in numerous bar and civic organizations. She serves as Chair of the American Bar Association's Standing Committee on Professionalism and is a Steering Committee member of the National Lawyer Mentoring Consortium. Jayne also is active in the ABA Consortium of Professionalism Initiatives, Phi Alpha Delta Legal Fraternity, Illinois State Bar Association, Women's Bar Association of Illinois, and the Chicago Bar Association. Jayne lives in Park Ridge, Illinois, with her husband and those of her four children who are not otherwise living in college towns and beyond.

HON. DAVID SHAHEED (AUTHOR)

David Shaheed became the judge in Civil Court 1, Marion County, Indiana, in August, 2007. Prior to this assignment, Judge Shaheed presided over Criminal Court 14, the Drug Treatment Diversion Court and Reentry Court. The Indiana Correctional Association chose Shaheed as 2007 Judge of the Year for his work with ex-offenders and defendants trying to recover from substance abuse.

Judge Shaheed has worked as a judicial officer in the Marion County Superior Court since 1994 starting as a master commissioner and being appointed judge by Governor Frank O'Bannon in September 1999. As a lawyer, Judge Shaheed was Chief Administrative Law Judge for the Indiana Unemployment Appeals Division; Legal Counsel to the Indiana Department of Workforce Development and served as Counsel to the Democratic Caucus of the Indiana House of Representatives in 1995. He was also co-counsel for the Estate of Michael Taylor, and won a 3.5 million dollar verdict for the mother of a sixteen year-old youth who was found shot in the head in the back seat of a police car.

Judge Shaheed is an associate professor for the School of Public and Environmental Affairs (SPEA) at Indiana University in Indianapolis. He is also a member of the ABA Commission on Lawyers Assistance Programs (CoLAP). Judge Shaheed was on the board of directors for Seeds of Hope, (a shelter for women in recovery), and former officer for the Indiana Juvenile Justice Task Force and the Interfaith Alliance of Indianapolis.

LYNDA C. SHELY (EDITOR, AUTHOR)

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to over 1400 law firms in Arizona and the District of Columbia on a variety of topics including conflicts of interest, fees and billing, trust account procedures, lawyer transitions, multi-jurisdictional practice, ancillary businesses, and ethics requirements for law firm advertising/marketing. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, and trains law firm staff in ethics requirements. Lynda serves as an expert witness and frequently presents continuing legal education programs around the country. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona. Prior to moving to Arizona, Lynda was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC.

Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC. Lynda was the 2015-2016 President of the Association of Professional Responsibility Lawyers. She serves on several State Bar of Arizona Committees, and as a liaison to the ABA Standing Committee on Ethics and Professional Responsibility. She is an Arizona Delegate in the ABA House of Delegates. Lynda has received several awards for her contributions to the legal profession, including the 2007 State Bar of Arizona Member of the Year award, the Scottsdale Bar Association's 2010 Award of Excellence, and the 2015 AWLA, Maricopa Chapter, Ruth V. McGregor award. She is a prior chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. Lynda was the 2008-2009 President of the Scottsdale Bar Association. She has been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

WILLIAM D. SLEASE (AUTHOR)

William D. Slease is Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board. In addition to his duties as Chief Disciplinary Counsel, he serves as an adjunct professor at the University of New Mexico School of Law where he has taught employment law, ethics and trial practice skills. He currently chairs the Supreme Court of the State of New Mexico's Lawyer's Succession and Transition Committee which has developed a comprehensive set of materials for lawyers to use in identifying and responding to incapacities that affect lawyers' abilities to practice law. He is a member and the 2016-17 President of the National Organization of Bar Counsel and previously served as the Chair of the NOBC-APRL-CoLAP Second Joint Committee on Aging Lawyers charged with studying and making recommendations for addressing the so-called "senior tsunami" of age-impaired lawyers. Bill takes care of his own wellness by spending time with his family, and by fishing for trout in the beautiful lakes and streams of New Mexico.

TASK FORCE LIAISONS

LINDA ALBERT

Linda Albert is a Licensed Clinical Social Worker and a Certified Alcohol and Drug Counselor. She received her Master's Degree from UW-Madison in Science and Social Work. Linda has worked over the past 34 years as an administrator, consultant, trainer, program developer and psychotherapist in a variety of settings including providing services to impaired professionals.

Linda served on the ABA Commission on Lawyer Assistance Programs heading up the Research section. She co-facilitated a research project on compassion fatigue and legal professionals resulting in two peer reviewed publications and multiple articles. She is co-author of the ABA, Hazelden Betty Ford collaborative national research study on the current rates of substance use, depression and anxiety within the legal community. Linda has done multiple presentations for conferences at the local, state and national level. She loves her work and is driven by the opportunity to make a positive contribution to the lives of the individuals and the fields of practice she serves.

Currently Linda is employed by The Psychology Center in Madison, Wisconsin, where she works as a professional trainer, consultant, and psychotherapist.

DONALD CAMPBELL

Donald D. Campbell is a shareholder at Collins Einhorn Farrell in suburban Detroit, Michigan. Don's practice focuses on attorney grievance defense, judicial grievance matters, and legal malpractice defense. He has extensive experience in counseling and advising lawyers and judges regarding professional ethics. He is an adjunct professor of law at the University of Detroit School of Law, where he has taught professional responsibility and a seminar in business law and ethics. Prior to joining the Collins Einhorn firm, Don served as associate counsel with the Michigan Attorney Grievance Commission, the Michigan Supreme Court's arm for the investigation and prosecution of lawyer misconduct. He also previously served as an assistant prosecuting attorney in Oakland County, Michigan. He currently serves as the President of the Association of Professional Responsibility Lawyers (see APRL.net). Don tends to his well-being by cheering for the Detroit Lions (and he has been about as successful).

ERICA MOESER

Erica Moeser has been the president of the National Conference of Bar Examiners since 1994. She is a former chairperson of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, and has served as a law school site evaluator, as a member of the Section's Accreditation and Standards Review Committees, and as the co-chairperson of the Section's Bar Admissions Committee. She served as the director of the Board of Bar Examiners of the Supreme Court of Wisconsin from 1978 until joining the Conference. Ms. Moeser holds the following degrees: B.A., Tulane University, 1967; M.S., the University of Wisconsin, 1970; and J.D., the University of Wisconsin, 1974. She was admitted to practice law in Wisconsin in January 1975. Ms. Moeser holds honorary degrees from three law schools. Ms. Moeser has taught Professional Responsibility as an adjunct at the University of Wisconsin Law School. She was elected to membership in the American Law Institute in 1992.

In 2013 Ms. Moeser received the Kutak Award, honoring "an individual who has made significant contributions to the collaboration of the academy, the bench, and the bar," from the ABA Section of Legal Education and Admissions to the Bar.

ACKNOWLEDGEMENTS

PAUL BURGOYNE, TERRY HARRELL, AND LYNDA SHELY

The Task Force gratefully acknowledges the contributions of Paul Burgoyne, immediate past president of the National Organization of Bar Counsel and Deputy Chief Disciplinary Counsel, The Disciplinary Board of the Supreme Court of Pennsylvania, as well as Terry Harrell, President of the ABA Commission on Lawyer Assistance Programs (ABA CoLAP), and Lynda Shely, past president of the Association of Professional Responsibility Lawyers (APRL), for their formal endorsement of the Task Force's formation in the spring of 2016 on behalf of their respective organizations.

JONATHAN WHITE (AUTHOR, EDITOR)

Jonathan White is the Task Force Staff Attorney and also served as a contributing author and editor to the Report. Mr. White is a staff attorney at the Colorado Supreme Court

Office of Attorney Regulation Counsel. He is the day-to-day project manager for the Colorado Supreme Court Advisory Committee's Proactive Management-Based Program (PMBP) Subcommittee. The subcommittee is developing a program to help Colorado lawyers better serve their clients through proactive practice self-assessments. The self-assessments also promote compliance with the Colorado Rules of Professional Conduct. Mr. White rejoined the Office of Attorney Regulation Counsel in November 2016 after previously working for the office as a law clerk in 2009 and 2010.

Mr. White practiced civil defense litigation for several years before rejoining the Office of Attorney Regulation Counsel. Mr. White also served as a judicial law clerk to the Honorable Christopher Cross and the Honorable Vincent White of the Douglas County District Court in Castle Rock, Colorado. He is a 2010 graduate of the University of Colorado Law School. While in law school, he was an articles editor for the Colorado Journal of International Environmental Law & Policy. The Journal published his note, "Drilling in Ecologically and Environmentally Troubled Waters: Law and Policy Concerns Surrounding Development of Oil Resources in the Florida Straits," in 2010. In 2009, fellow law students selected him to receive the annual Family Law Clinic Award in recognition of his work in the law school's clinical program.

Mr. White received his B.A. from Middlebury College in 2003. He recently volunteered as a reading tutor to elementary school students in the Denver Public Schools during the 2015-2016 academic year.

ED BRAFFORD, GRAPHIC DESIGNER

Edward Brafford donated his skills and talents to design the layout for the Task Force Report. Mr. Brafford designs for The Firefly Creative LLC (www.thefireflycreative.com) and can be reached at Ed@tffcreative.com.

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Dr. Austin is a law professor and lawyer wellbeing advocate. She writes and speaks about how neuroscience and positive psychology research can help law students, lawyers, and judges improve their wellbeing and performance. Her seminal work, Killing Them Softly, shines a bright light on lawyer depression, substance abuse, and suicide, and its application of neuroscience to the chronic stresses of law school and law practice depicts how law students and lawyers suffer cognitive damage that impairs them from doing precisely what their studies and practices require. Drink Like a Lawyer uses neuroscience research to demonstrate how self-medication with substances like alcohol, marijuana, and study drugs impairs law student and lawyer thinking. Food for Thought examines neuroscience research that explores the relationship between diet and increased risk of cognitive damage, such as dementia and Alzheimer's disease, and describes optimal nutrition habits that build and maintain a healthy lawyer brain. Positive Legal Education proposes a new field of inquiry and a new method of training lawyer leaders that will enhance lawyer effectiveness and wellbeing. Dr. Austin's presentations connect lawyer wellbeing to performance and ethical obligations, and they are accredited for general and ethics CLE in multiple states.

Dr. Austin teaches at the University of Denver Sturm College of Law. She received her Bachelor of Music Education from University of Colorado; her J.D. from University of San Francisco; and her Ph.D. in Education from University of Denver. She received the William T. Driscoll Master Educator Award in 2001. To maintain her wellbeing, Dr. Austin meditates, practices yoga, and cycles on the beautiful trails around Colorado.

HON. ROBERT L. CHILDERS

Judge Childers was the presiding judge of Division 9 of the Circuit Court of Tennessee for the 30th Judicial District from 1984 to 2017. He is a past president of the Tennessee Judicial Conference and the Tennessee Trial Judges Association. He has also served as a Special Judge of the Tennessee Supreme Court Workers' Compensation Panel and the Tennessee Court of Appeals. He served on the ABA Commission on Lawyer Assistance Programs (CoLAP) from 1999 to 2011, including serving as Chair of the Commission from 2007-2011. He is a founding member, past president and Master of the Bench of the Leo Bearman Sr. Inn of Court. The Memphis Bar Association recognized Judge Childers in 1986, 1999, and 2006 as Outstanding Judge of the Year, and he was recognized by the MBA Family Law Section in 2006. He was recognized as Outstanding

Judge of the Year by the Shelby County (TN) Deputy Sheriffs Association in 1990. He received the Judge Wheatcraft Award from the Tennessee Coalition Against Domestic and Sexual Violence for outstanding service in combating domestic violence in 2001. He has received the Distinguished Alumnus Award from the University of Memphis (2002), the Justice Frank F. Drowota III Outstanding Judicial Service Award from the Tennessee Bar Association (2012), and the Excellence in Legal Community Leadership Award from the Hazelden Foundation (2012). In 2017 he received the William M. Leech Jr. Public Service Award from the Fellows of the Tennessee Bar Association Young Lawyers Division.

Judge Childers is currently serving as president of the University of Memphis Alumni Association. He has been a faculty member at the National Judicial College at the University of Nevada-Reno, the Tennessee Judicial Conference Judicial Academy, and a lecturer at the Cecil C. Humphreys School of Law at the University of Memphis. He has also been a frequent lecturer and speaker at CLE seminars and before numerous schools, civic, church and business groups in Tennessee and throughout the nation.

COURTNEY WYLIE

Courtney recently joined the professional development team at Drinker Biddle & Reath LLP. In this position, she designs and implements programs for the firm's attorneys on leadership, professionalism, and lawyer well-being topics. Prior to joining DBR, Courtney Wylie worked at the University of Chicago Law School as the Associate Director of Student Affairs & Programs. In this position, she was primarily responsible for the Keystone Leadership and Professional Program and the Kapnick Leadership Development Initiative. Before that Courtney worked in both the private and public sector as an attorney.

Courtney is the current appointed ABA Young Lawyer's Division Liaison to the Commission on Lawyer Assistance Programs (COLAP) and an appointed Advisory Committee Member of (COLAP). Though an initial skeptic regarding meditation and exercise, she now makes an effort to make it part of her daily practice to remain healthy, positive, focused, and centered. She similarly regularly lectures on the importance of self-care for attorneys and law students.

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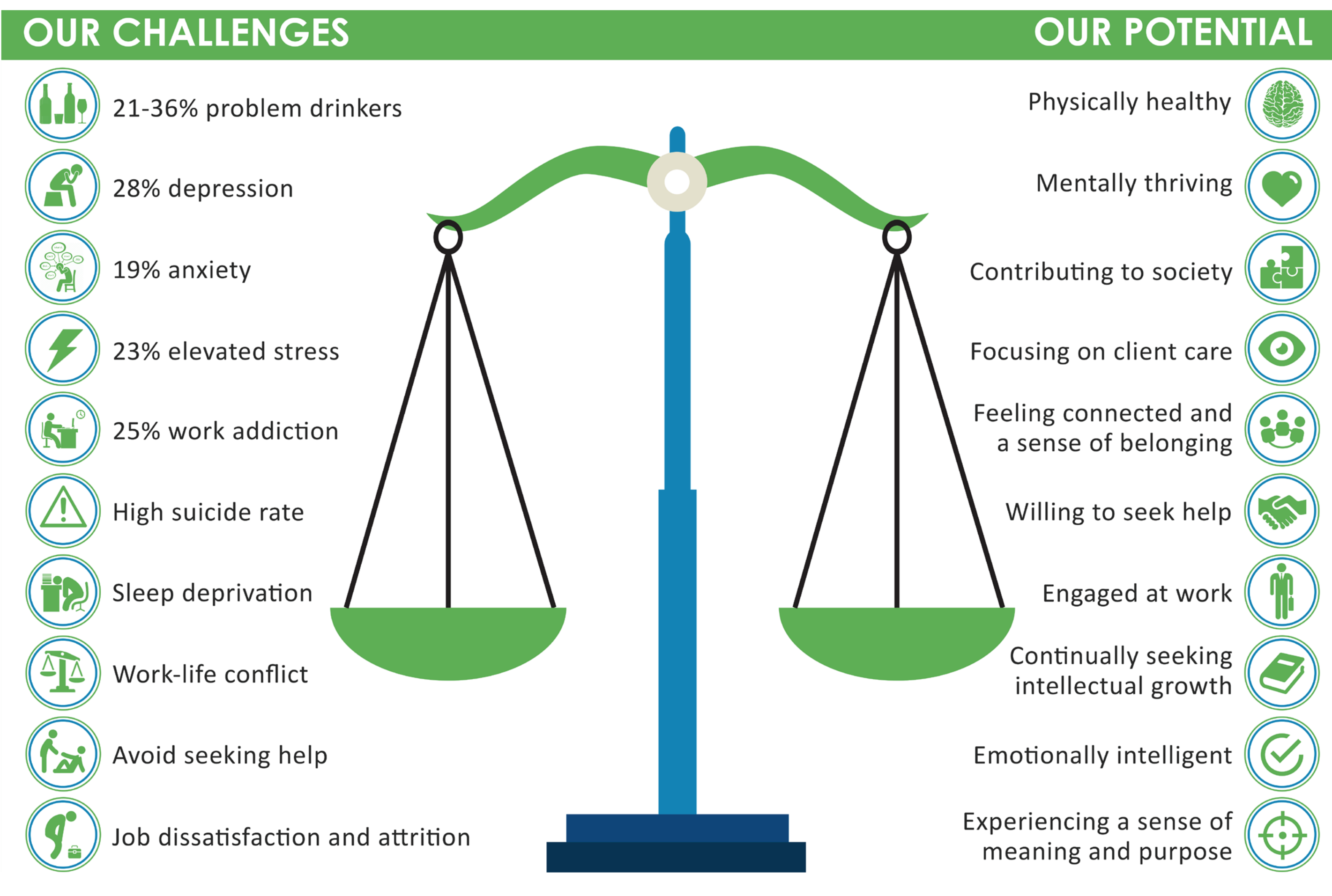

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9th Annual Mid-South Conference Materials

Future of Dicamba, Enlist Duo, & Other Crop Protection Products

Alexandra Dunn

Crop Protection Solutions in Changing Times

Submitted by Alexandra Dunn, Partner and Ricardo Pagulayan, Summer Associate, Baker Botts LPP for

The Ninth Annual Mid-South Agricultural & Environmental Law Conference

This outline provides a high-level summary of developments in the pesticide regulatory and policy arena from November 2021 onwards. The outline complements a slide deck which discusses how the U.S. Environmental Protection Agency ("EPA"), states and tribes, and other stakeholders, including registrants, agricultural worker groups, species protection organizations, and academia, are responding to these developments and some of the creative and proactive solutions being deployed.

I. Science and Policy Stressors on Pesticide Registrations

Plant Resistance

- Weed populations are continuing to develop, over time, resistance to a variety of pesticides. Some of the more resistant weeds are Palmer's pigweed and waterhemp (identified resistance to dicamba); various pigweeds, waterhemp, lambsquarters, ragweed, kochia, and ryegrass (resistance to glyphosate); and waterhemp, wild carrot, and spreading dayflower (resistance to 2,4-D, a component of Enlist Duo).
- EPA has released and sought comment on two Pesticide Registration Notices (PRN 2017-1 and 2017-2) that establish user guides for slowing the spread of resistant weed populations.

Crop Damage Lawsuits

- Many recent crop damage suits are focused on dicamba. 2020 and 2021 saw several damages awards in dicamba drift cases. Many farmers alleging injury to their crops from dicamba drift are still awaiting settlement or trial in 2022.
- To be sure, there have been earlier crop damage suits concerning other pesticides. In 2008, an organic farm was awarded $1 million in a pesticide drift suit tied to chlorpyrifos, diazinon, and dimethoate. In 2020, farmers claiming that the pesticide Sendero damaged their crops through drift revived their case in a Texas state court of appeals.

Farm Worker Justice Movement

- Various factors render farm workers vulnerable to pesticide-related exposures. Approximately 70% are foreign born and have limited English proficiency, and more than 50% are not authorized to work in the U.S., which often stops them from speaking up about their safety.[1]
- Between October 2020 to September 2025, EPA expects to provide up to $500,000 annually to develop national pesticides safety training and education/outreach programs and promote environmental justice for low-income and low-literacy farm workers.
- In June 2022, a federal district court in New York issued a stay until at least August 2022 on EPA's final rule[2] that revises pesticide application exclusion zone standards. The rule addresses which, and how, people are to leave certain areas during pesticide applications.

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[1] Letter from Richard Moore, Chair, National Environmental Justice Advisory Council to Andrew Wheeler, Administrator, U.S. EPA (Dec. 18, 2018), https://www.epa.gov/sites/default/files/2019-03/documents/nejac_letter_on_worker_protection_standards.pdf.

[2] 87 Fed. Reg. 29,673 (codified at 40 C.F.R. pt. 170).

Pollinators and Threatened/Endangered Species

- Since 2015, EPA has been developing risk assessment procedures to determine and document the effects of pesticides on pollinator species, especially bees. In 2020, EPA and USDA conducted a workshop to address factors that affect pollinator health. USDA published the results of the workshop in 2021, iterating the agency's priorities and goals for pollinator health.[3]
- Beginning 2021, EPA began developing a comprehensive, long-term term approach to fulfilling its obligations under the ESA and FIFRA. EPA has engaged in quarterly ESA-FIFRA meetings with stakeholders to develop a workplan for a balanced approach to wildlife protection and pesticide use. The workplan was released in 2022.[4]
- In January 2022, EPA announced that it would be taking a more consistent approach to ESA considerations as to applications for new active pesticide ingredients (*see infra,* Major Policy & Regulatory Developments).

Technology Development

- New approaches are being developed for more precise application of pesticides. Some of the more fruitful ones include using drones/unmanned aerial systems for spraying crops, using GPS technologies for spot treating and site-specific spraying, and deploying laser sensors to control spray rates and reduce airborne spray drift.

II. SELECTED RECENT PESTICIDE LITIGATION

Aldicarb

- In 2021, the D.C. Circuit struck down EPA's 2021 approval of aldicarb in Florida. The court stated that EPA seriously erred in its approval decision in light of studies pointing to the acute toxicity of aldicarb.[5]

Chlorpyrifos

- Following EPA's 2021 final rule revoking all tolerances of chlorpyrifos in food products, a farm group coalition sued EPA requesting a stay of EPA's action and ultimate dismissal.[6] Group members allege that EPA's decision to revoke chlorpyrifos food tolerances inflicts major harm on their industries, which depend on chlorpyrifos to control populations of insect pests. The de facto chlorpyrifos ban stands while litigation is ongoing.

Dicamba

- EPA is facing several lawsuits from environmental groups challenging its 2020 registration of three over-the-top dicamba herbicides: XtendiMax, Engenia, and Tavium. A coalition led by the Center for Biological Diversity is urging the District of Arizona to vacate EPA's 2020 registrations.[7] Generally, challengers claim that the new registrations share the same unreasonable adverse environmental risks as past dicamba registrations.

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[3] U.S. DEP'T OF AGRIC., 2021 USDA ANNUAL STRATEGIC POLLINATOR PRIORITIES AND GOALS REPORT (2021).

[4] U.S. ENV'T PROT. AGENCY, BALANCING WILDLIFE PROTECTION & PESTICIDE USE: HOW EPA'S PESTICIDE PROGRAM WILL MEET ENDANGERED SPECIES ACT OBLIGATIONS (2022).

[5] *Farmworker Ass'n of Fla. v. EPA*, No. 21-1079 (D.C. Cir., closed June 6, 2021).

[6] *RRVSG Ass'n v. Regan*, No. 22-1422 (8th Cir., filed Feb. 28, 2022).

[7] *Ctr. for Biological Diversity v. EPA*, No. 20-cv-555 (D. Ariz., filed Dec. 23, 2020); *Nat'l Family Farm Coal. v. EPA*, No. 20-73750 (9th Cir., filed Dec. 22, 2020).

- Other groups are suing EPA for approving use restrictions in March 2022 that would further limit the use of the 2020 dicamba registrations in Minnesota and Iowa.[8] Challengers take issue with EPA's buffer requirements.
- BASF Corp. and Monsanto Co. continue their appeal of the $75 million verdict in favor of Bader Farms in 2020, claiming that the verdict misplaced blame because there was no way to tell which manufacturer produced the dicamba that caused the harm.[9]

Glyphosate

- The main concern surrounding glyphosate is its potential effect on human health. In January 2020, EPA found that glyphosate is "not likely to be a human carcinogen" after decades of study. Thousands of claims brought by users of the glyphosate-based pesticide Roundup who have been diagnosed with non-Hodgkin's lymphomas have been consolidated into an MDL in the Northern District of California.[10] There are still approximately 4,000 unresolved claims in the MDL. The first case to go before a jury was *Hardeman v. Monsanto Co.* in 2019. In 2021, the Ninth Circuit held that the California plaintiff's failure to warn claim in *Hardeman* was not preempted by FIFRA's statutory warning requirements.[11] Monsanto petitioned for certiorari to the U.S. Supreme Court to contest the Ninth Circuit's decision in *Hardeman*. The Supreme Court will consider Monsanto's petition on June 9, 2022.

Paraquat

- Thousands of claims brought by those who have used or been exposed to Paraquat and diagnosed with Parkinson's disease have been consolidated in an MDL in the Southern District of Illinois.[12] 57 new cases were added in May 2022, and there are now 1,153 total claims pending in the MDL.

Sulfoxaflor

- Litigation challenging EPA's 2019 sulfoxaflor registration is ongoing.[13] During oral arguments held before the Ninth Circuit in January 2022, food and environmental groups urged the court to vacate EPA's sulfoxaflor registration due to concerns over bee populations. The groups claimed that EPA's approval of the pesticide was based on inconclusive studies as to the effects of sulfoxaflor on bee colonies.
- Citing harms on bee populations, a California state court in December 2021 issued a statewide order banning the use of sulfoxaflor in California.[14]

III. MAJOR POLICY & REGULATORY DEVELOPMENTS

New Active Ingredients

- As of January 2022, prior to approving any new active pesticide ingredients, EPA will evaluate potential adverse effects on listed species and critical habitat and will initiate ESA consultations with federal environmental agencies.
- Reapprovals of existing active ingredients are not included in this policy.

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[8] *Am. Soybean Ass'n v. EPA*, No. 20-cv-3190 (D.D.C., filed Nov. 4, 2020); *Am. Soybean Ass'n v. Regan*, No. 20-1441(D.C. Cir., filed Nov. 5, 2020).

[9] *Bader Farms, Inc. v. BASF Corp.*, No. 20-3663 (8th Cir., filed Dec. 22, 2020); *Bader Farms, Inc. v. Monsanto Co.*, No. 20-3665 (8th Cir., filed Dec. 22, 2020).

[10] *In re Roundup Prods. Liability Litig.*, No. 16-md-2741 (N.D. Cal., filed Oct. 4, 2016).

[11] *Hardeman v. Monsanto Co.*, No. 19-16636 (9th Cir. 2021).

[12] *In re Paraquat Prods. Liability Litig. v. Syntega Crop Prot.*, No. 21-md-3004 (S.D. Ill., filed June 8, 2021).

[13] *Ctr. for Food Safety v. Wheeler*, No. 19-72109 (9th Cir., filed Aug. 20, 2019); *Pollinator Stewardship Council v. Wheeler*, No. 19-72280 (9th Cir., filed Sept. 6, 2019).

[14] *Pollinator Stewardship Council v Cal. Dep't of Pesticide Regul.*, No. 20-66156 (Cal. Sup. Ct. Alameda Cnty.).

Chlorpyrifos

- In 2021 EPA revoked all food product tolerances of chlorpyrifos residues.[15]

Dicamba

- On May 15, 2022, EPA issued a status report[16] to the District of Arizona detailing the agency's plans for regulating dicamba in 2022 onwards. Unless directed otherwise by a court, EPA stated that the only changes in dicamba use for 2022 will be additional use restrictions in Minnesota and Iowa and state-specific cutoff dates.
- In the report, EPA shared its plans to monitor the use of its over-the-top 2020 dicamba registrations and deliver a draft risk assessment for dicamba herbicides by July 2022.

Enlist

- In January 2022, EPA issued seven-year reapprovals of Enlist One and Duo. EPA requires certain spray and drift measures to protected listed species and critical habitat. Enlist One and Duo are prohibited in certain areas where EPA has identified risks to on-field listed species that use corn, cotton, or soybean fields for diet or habitat.
- As of March 29, 2022, Enlist One and Duo can now be used in all counties of Arkansas, Kansas, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, and South Dakota.

Neonicotinoids/State Bans

- EPA is expected to extend the use of neonicotinoids such as imidacloprid, thiamethoxam, clothianidin, and dinotefuran for at least 15 more years. Many states fear that neonicotinoids pose risks to pollinators. In 2022, California, Maine, and New Jersey are considering banning residential outdoors uses of neonicotinoids, particularly imidacloprid.

IV. EPA'S AUTONOMY

Inspector General Investigations

- Office of the Inspector General (OIG) examines fraud, waste, and abuse in EPA programs.
- In February 2021, OIG determined that EPA's Special Local Needs Program, which is managed by the Office of Pesticide Programs, needed objective performance measures to determine programmatic success as well as a data collection system to document risk and pollution reduction concerning pesticides.
- In May 2021, OIG found that EPA deviated from typical procedures in its 2018 dicamba registration decision and stated that the agency needs to improve documenting and following established procedures to ensure scientifically sound determinations.

[15] 86 Fed. Reg. 48,315 (Aug. 30, 2021) (codified at 49 C.F.R. § 180.342).
[16] Report filed in *Ctr. for Biological Diversity v. EPA*, No. 20-cv-555 (D. Ariz., filed Dec. 23, 2020).

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9th Annual Mid-South Conference Materials

Estate Planning & Taxation: Latest Updates, Pitfalls, & Pointers

Lucas Haley

Ninth Annual Mid-South Agricultural and Environmental Law Conference

Estate Planning & Taxation: Latest Updates, Pitfalls, & Pointers

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*The Greater Mississippi River system includes over thirteen thousand miles of naturally navigable, interconnected waterways—**more than the combined total of all the world's non-American internal river systems**—and it almost perfectly overlaps the largest contiguous piece of arable, flat, temperate-zone land under a single political authority in the world.*

Estate Planning & Taxation: Latest Updates, Pitfalls, & Pointers

- Smattering of topics – This is a brainstorming session.
- These ideas will not always work with clients, some are obstinate, too resistant to change and unwilling to solve a future problem today.
- My view is that part of our role is to provide all clients with good ideas and options for setting things up the most optimal way. They can choose not to, but you earned your fee by making them think through the process and imagine the possibilities.
- These are concepts that are readily embraced by the best client, who are usually also the best business operators, and are rejected by other clients, who usually are not the best business operators.

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Legacy

- All farmers and landowners love to talk about legacy.
- Many think they are leaving a legacy with the land when in fact they are leaving a legacy of conflict.
- How to avoid establishing a family legacy of conflict?
- Information, information, information is key.

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Scenario

- Mom and Dad have built significant farmland holdings and farming operation.
- Son works on the farm with Dad and rents some land on his own on the side. They share equipment.
- Sister is not involved in the farming operation, lives in the City, has no understanding of farming economics, but does feel strong attachment to the family farm and family legacy.
- This is a very common scenario and it is a disaster waiting to happen.
- Everyone is this room has likely made a lot of money on disputes that have these basic facts.

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- **Point 1** – No unnatural business partnerships.
  - Do not force people to be business partners under a vague operating structure, particularly if they would not be natural business partners.
  - If they do not get along or have strongly different opinions and outlooks on life, they will not make good business partners.
  - You would not go into business yourself with someone who did not feel like a partner, so why force your kids to?

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- **Practice tip** - Present the option of splitting the farm into separate 100% owned tracts, as opposed to undivided interests, as a normal and common sense path.
- Most people fall back to undivided interests because it is easy, but often it is not the right answer.
- This is easier said than done, however, getting at least some portion of the land into separately owned tracts can be beneficial for Son and Daughter.
- Pros –
    a. Provides Son with land he can use as collateral to buy more land and grow his business operation.
    b. Provides Daughter with feeling of control over her inheritance and gives collateral base for buying beach house.
    c. Structure should be flexible enough to allow best use of the assets – not so rigid that the farm earns a 3-4% return each year and the real value sits unutilized.
    d. Trust terms at time of distribution can still provide Son with right of first refusal to purchase family land.

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Point 2 – No surprises.

- Provide a bullet point list of trust terms, lease terms, buy-out rights, etc. to all children.
- Surprises or unmet expectations are never good. *Do not allow your clients to provide the spark that starts a fire between their children.*
- Many families want to provide Son with opportunity to continue farming the land after Mom/Dad die. If they choose to go this route, then make sure the lease provisions and farm operations are transparent enough to avoid a dispute.
- You would not expect someone to be a co-owner in any other type of business and not have full access to the corporate books and records and input on major decisions.
- Why treat the farm differently?

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Practice Tip

- Farm lease terms can provide for semi-annual reports on the farm, crops planted, improvements made, on farm yields, county average yields, contract prices, input prices, real estate taxes, etc.
- Essentially providing a balance sheet and income statement for the farm to the Sister.
- She may never look at it, but the point is that she can if she chooses.
- More problems and suspicions arise from lack of clarity than from answers in black and white.
- Information and communication on the decision making process will build trust between business partners. If it does not, then it is never going to work anyway.

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Point 3 – Liquidity

- Many clients want to force the family to hold the farm perpetually and restrict their ability to sell, exchange, transfer or mortgage the property.
- Predicting the future is a fool's errand. The combination of crop prices, specialty crop operations, solar leases, wind farms, hunting sites, etc. should give anyone pause before restricting land uses for decades/generations.
- Allowing the land to be sold, exchanged, or mortgaged provides flexibility for future generations and often times actually ends up with the land being kept longer than in a "forced hold" scenario.
- One of the major complaints of the siblings who do not farm is that the cash flow from the farm versus the asset value are mismatched. Allowing flexibility of using the land as collateral for other purchases, whether investments or strictly recreational, allows the farm to remain a central part of the family legacy, but allows everyone to enjoy it in their own way.

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<u>Practice Tip</u>

- Consider an entity structure that provides for perpetual management of the family land and assets, but leaves the actual decision making to the next generation.
- A family trust or LLC can provide for different levels of voting for different types of decisions.
- Categories can range from simple majority vote for basic decisions, 2/3rds or 3/4ths supermajority vote on a list of "Major Decisions". This would include land sales, acquisitions, exchanges, loans over a certain amount, and farm leases.

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- **Blended Families**. All of the above issues become even more complex with blended families. Opportunities for creative planning abound in this area.

  A. **Scenario 1 –** Wife's family owns farmland. Wife wants to ensure husband has income stream from land if she dies first, but also wants to ensure land is ultimately distributed to her children.

     1. Husband and Wife's Revocable Trust can provide at Wife's death (assuming she is first spouse to die), the farmland is transferred to an irrevocable sub-trust, providing for income to be distributed each year to Husband, no principal distributions of farmland, and termination of Husband's income rights upon remarriage or cohabitation.
     2. Trust can also provide a cap on income amount to Husband, with remainder being distributed to children. Examples would be: income not to exceed $100,000 annually or provide for 60% of income to Husband remaining 40% equally between children.
     3. Remainder of joint assets of Husband and wife remain in the Revocable Trust, which is revocable and can be amended by surviving spouse.

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B. **Scenario 2** – Parents own farmland.

- They want to ultimate ownership of land to remain in the bloodline, but also want to provide for income to spouses of children.
- At parent’s death, land is transferred into an irrevocable trust for the benefit of child.
- At child’s death, then income is split between surviving spouse and children in a manner similar to above example.
- Provide child with limited power of appointment so they can alter trust terms and income distributions between surviving spouse and children or exclude spouse completely.

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- **Estate Tax Planning**. As of now exemption levels are high and cover a significant amount of assets, but land values are increasing quickly and many families are now in the danger zone of being over the exemption amount. There is no predicting what will happen between now and 2025, when the current exemption is to sunset, however, there are options:
  - **a. Typical Family LP/LLC Gifting Strategy** – Transfer land into an LP/LLC. Create voting and non-voting shares. Parents retain voting shares and transfer some portion of non-voting shares to children or trusts created for children. This does many things:

    1. Gifts land to next generation at a discount to the current market value (marketability/minority interest discount);
    2. Freezes the value of the land made at the time of the gift for estate tax purposes;
    3. Lowers the value of the remaining interest held by parents;
    4. Allows parents to retain voting control over the assets during their lifetime;
    5. Transfers the income stream from the assets to the next generation, which prevents parents' estate from growing larger each year due to income.

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b. **Section 6166** – the "Last Resort Plan" – IRC Section 6166 is a little known estate tax mechanism.

- The basic rules allow the Estate to pay estate tax arising from "family owned businesses" over a period of up to 14 years, instead of being due 9 months after the decedent's date of death.
- The first 4 years of the 14 years can be paid interest only, with regular payments of principal and interest beginning in year 5.
- The interest rate is set at 2% on the tax due for the first $1 Million of the estate and the remainder is set at a rate of 45% of the Section 6621 interest rate. As of now that interest rate is around 4%.
- The interest only period can give the family sufficient time to settle out the Estate, normalize farm income, and complete the transition to the next generation before being required to make principal payments.
- Longer amortization terms may favor bank loans over this option, but the interest rate differential must also be factored in.

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Section 6166 – Additional Requirements

- The "family owned business" must represent at least 35% of the value of the Estate.
- The decedent must have been an "active participant" in the family owned business. Farming operations, including the value of the land, qualify for this, and in addition, crop share landlords who are "material participants" in the farming operation also qualify as "active participants".
- Land leased on a cash rent basis is not deemed to be a family owned business and does not quality for the payment extension. This can be a very costly and important distinction.
- The Estate must be at least a 20% owner in the business.
- **Practice Tip** – Include terms in written farms leases that specify the landlord is a "material participant" in the farming operation.

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Section 2032A – Special Use Valuation

- More commonly used than Section 6166
- This Section allows the market value of an asset to be adjusted down to the value attributed to the cash flow it produces as opposed to the value of the land itself.
- Calculation provides for the cash rent value of the land divided by the average annual interest rate on Federal Land Bank loans.
- Example: $200/acre cash rent divided by 4% = $5,000 per acre valuation on land.
- In some areas the interest rate is higher than the current rental income on farmland. This is essentially a “cap rate” valuation metric.
- The maximum discount in value that can be claimed from 2032A election is $1,230,000 for 2022. Adjusted for inflation, with a large increase expected for 2022.
- $1,230,000 discount in value at a 40% estate tax rate equates to a maximum of $492,000 in tax savings.
- This tool will not cure a large estate tax problem, but can certainly help smaller estates that are near or slightly over the estate tax limit.

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- Short list of requirements for the election:
  - 25% of the "adjusted value" of the Estate must consist of real estate passed on to a "qualified heir";
  - Real estate must have been a "qualified use" for five out of prior eight years before decedent's death;
  - Decedent or family member must have "materially participated" in the qualified use for five out of last eight years;
  - In addition, 50% of the "adjusted value of the Estate must consist of property that was used for a "qualified use" by decedent or family member and passed on to a "qualified heir".
  - Several more defined terms and exceptions through 2032A – limited application but impactful when it is available.

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I. Section 6166 — Deferral of Estate Tax on Business Assets

B. General Rules of §6166

The general rules of §6166 are set forth in §6166(a) and §6166(d).

1. **Qualification — §6166(a)(1) and §6166(a)(2)** —

If the gross estate of a U.S. citizen or resident includes an interest in a closely held business valued at more than 35% of the adjusted gross estate, the executor may elect to pay part or all of the estate tax in two or more (but not more than 10) equal installments.[17] In general, such an estate may defer that portion of the estate tax, as reduced by the credits against the estate tax, in the proportion that the amount of the interest in the closely held business bears to the adjusted gross estate.[18]

[17] §6166(a)(1). The IRS will usually not issue a ruling on an estate's qualification under §6166 until after the decedent's death. Rev. Proc. 2022-3, §3.01(139).

[18] §6166(a)(2). *See also* Keith Schiller, *Estate Planning at the Movies — Art of the Estate Tax Return*, ch. 27 (Bloomberg BNA 2d ed. 2014 & 2015 Supp.).

Example: The decedent (D) died in 2022, a year in which the unified credit exempted $12,060,000 from estate tax. D's gross estate had a date of death value of $15,000,000, including her 100% ownership of a closely held business that was valued at $7,000,000. D's funeral and administration expenses were $150,000. D's estate had deductible uninsured losses of $50,000. D's estate qualifies for §6166 deferral because the value of D's interest in the closely held business exceeds 35% of D's adjusted gross estate (i.e., $700,000). D's estate may defer 45% ($900,000/$2,000,000) of the estate tax liability. The following illustrates the computation of the amount of estate tax that D's estate will be permitted to defer under §6166:

(1) Gross estate	$15,000,000
(2) Deductible §2053 administration and funeral expenses	<150,000>
(3) Deductible §2054 uninsured losses	<50,000>
(4) Adjusted gross estate	$14,800,000

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(5) Federal estate tax due	5,865,000
(6) Unified credit under §2010	4,717,800
(7) Total credits under §§2011–2015	0
(8) Federal estate tax reduced by allowable credits (780,800 – 345, 800)	1,148,000
(9) Closely held business amount	7,000,000
(10) Percentage of estate tax to be deferred	47.3%
(11) Amount of estate tax to be paid upon filing the return	604,996
(12) Amount of estate to be deferred	543,004
(13) Amount of each of 10 equal annual installments	54,300

Interest on the $543,004 of estate tax is payable at 2% and is not deductible for estate or income tax purposes.[19]

[19] *See* §6601(j), §2053(c)(1)(D), §163(k). See E. and G., below, for a discussion of the interest rate applicable to the deferred estate tax.

In CCA 200141015, the IRS Chief Counsel determined that an estate would qualify for deferral under §6166, even though it was legally bound under a buy-sell agreement to redeem its remaining stock in a closely held corporation. The value of the closely held stock owned by the estate met the 35% threshold limitation. Following an initial redemption funded with insurance proceeds, the corporation was obligated to redeem the remaining stock from the estate over a period of no more than 10 years. The buy-sell agreement provided that any stock that was not redeemed during the 10-year period would not be considered sold and would remain property of the estate until redeemed. According to CCA 200141015, "although certain events will terminate the §6166 deferral, those events are only relevant after the election has been granted; the fact that acceleration may occur at a future date is not taken into account when determining whether an estate qualifies for the §6166 installment privilege." Although the buy-sell agreement required the estate to eventually redeem its stock, the IRS ruled that the sales after death were not relevant for purposes of determining if the estate initially qualified for the benefits of §6166 deferral.

Inter vivos estate planning for an individual who owns an interest in a closely held business should consider the potential qualification of the individual's estate for deferral under §6166. For instance, in one common estate planning technique, an individual (i.e., the grantor) sells all or a portion of his or her interest in a closely held business to a wholly owned grantor trust in exchange for an installment note of equal value to the property sold. Following this transaction, the grantor's estate may no longer qualify for deferral because the estate would not meet the threshold limitations under §6166. Nevertheless, the transaction may leave the estate with an asset (an installment note) subject to estate tax and not eligible for deferral under §6166. An estate could also fail to qualify for deferral under §6166 because of a variety of inter vivos estate planning techniques, including the use of an outright gift of an interest in a closely held business. Use of appropriate inter vivos estate planning strategies, may enable an estate to qualify for deferral under §6166. For example, a gift of nonbusiness assets may cause an individual's interest in a closely held business to exceed the threshold limitations under §6166.

Comment: An election to use alternate valuation under §2032 or special use valuation under §2032A could affect the availability of estate tax deferral under §6166. See the discussion at E. and I., below.

2. **Payment Dates — §6166(a)(3)** —

The first installment payment of estate tax may be made on or before a date selected by the executor; however, the date selected cannot be more than five years after the date prescribed by §6151(a) for payment of the estate tax. Section 6151(a) prescribes the due date for the payment of estate tax as the date the estate tax return is required to be filed

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determined without regard to any extensions of time for filing that return. Each succeeding installment payment must be made on or before the next anniversary of the initial payment date selected by the executor.[20]

[20] §6166(a)(3). For certain extensions related to the coronavirus (COVID-19) pandemic, see Notice 2020-23, *amplifying* Notice 2020-20.

Comment: In practice, executors generally elect to maximize the deferral benefit available under §6166; therefore, most executors elect to make the first payment of the 10 equal annual installments on the fifth anniversary of the due date for the estate tax return. The deferred estate tax can always be prepaid without penalty at any time before it is due. If an election is made for a period that is less than the maximum allowable deferral period (i.e., five years), however, a longer period cannot be elected after the date for making the election has passed.

The IRS takes the position that estate tax payments made by an estate electing §6166 deferral are allocated in the following order: (1) first to the nondeferred portion of the estate tax (that is the estate tax attributable to property that does not qualify for the §6166 election); (2) next to the interest accrued on both the nondeferred and deferred taxes; and (3) finally to the tax deferred under §6166.[21]

[21] *See* TAM 9046003, TAM 9046002. In TAM 200648028, the National Office addressed whether an estate had the right to reallocate to §6166 interest installments a remittance sent to the IRS before the estate made the §6166 election. Because the estate asked the IRS to change the estate's original designation of the payment, which had been for estate and GST taxes, to the §6166 interest installments and then to outstanding gift taxes, the National Office advised that the IRS could treat the remittance as an undesignated voluntary payment. The National Office advised that the estate had no legal right to force the IRS to reallocate the payment because the IRS has complete discretion to allocate undesignated payments against any matured tax liabilities.

The estate's payment of the first required installment five years after the decedent's death is allocated proportionately in the following order: (1) first to the required installments of deferred tax; (2) next to the interest on the deferred tax; and (3) finally to any unpaid balance of the deferred tax.[22]

[22] *See* TAM 9046003, TAM 9046002.

3. **The Election — §6166(d)** —

An election under §6166 must be made no later than the date prescribed by §6075(a) for filing the estate tax return, including extensions. While Form 4768, *Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes,* does not contain any reference to the §6166 election itself and a §6166 election is not actually made until the estate tax return is filed (since where a §6166 is anticipated less than all tax shown as due will be paid with Form 4768), it may be advisable to include a written statement with Form 4768 notifying the IRS of the intention to make the §6166 election. For a sample Form 4768 with such a written statement, see the Worksheets.

However, §6166(h) and Reg. §20.6166-1(c)(1) provide that where no election, including a protective election, has been made under §6166(a) and a deficiency is then assessed, the estate may subsequently make a §6166 election. The estate tax deferral is available only with respect to the portion of the deficiency attributable to the decedent's interest in the closely held business. The election must be made within 60 days of the notice and demand for payment from the IRS, and must contain the same information as required with respect to a notice of election filed with the original estate tax return.[23] However, an executor may not elect to pay a deficiency in installments if the deficiency is due to negligence, intentional disregard of rules and regulations, or fraud with intent to evade tax.[24]

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[23] Reg. §20.6166-1(b), §20.6166-1(c)(1).

[24] §6166(h). *See also* CCA 200909047.

Requests for extension of time under Reg. §301.9100-3 will be denied because the §6166 election is a statutory election.[25] Furthermore, the election must be made as prescribed in the regulations. When an election is made, all the provisions of Subtitle F — "Procedure and Administration" — apply "as though" the time of payment of the tax was extended.[26]

[25] *See* §6166(d), §6075(a); PLR 201015003 (§6166 was a statutory election that must be made by date prescribed by statute; therefore, IRS denied extension of time to file); CCA 200848004 (§6166 election may not be made on late-filed return; taxpayer's statement on timely extension request of intent to make election did not qualify); PLR 200721006 (request for extension of time under Reg. §301.9100-3 to file §6166 election was denied because Reg. §301.9100-3 applied only to regulatory elections, and §6166 election was statutory). *See also Estate of Woodbury v. Commissioner*, T.C. Memo 2014-66 (estate denied election because (1) in its statement on timely extension to file request, estate failed to substantially comply with election regulatory requirements by not providing specific information on closely held business interests, and (2) although estate did substantially comply with election requirements on return, return was not timely filed). For estates of decedents dying after 2009 and before December 17, 2010, a non-Code provision in the 2010 Tax Relief Act, Pub. L. No. 111-312, §301(d)(1), extended for at least nine months after December 17, 2010, the due dates for: (1) filing an estate tax return (including any elections required to be made on such returns) under §6018, as in effect without EGTRRA, Pub. L. No. 107-16, §542(b)(1), amendments, and without regard to the election available (under the 2010 Tax Relief Act, Pub. L. No. 111-312, §301(c)) to such decedents to apply the §1022 modified carryover basis rules rather than the reinstated estate tax regime; and (2) making any estate tax payments. For any extensions related to the coronavirus (COVID-19 pandemic), see Notice 2020-23, *amplifying* Notice 2020-20.

[26] §6166(d). In CCA 200628042, the Chief Counsel's Office advised that there was no reasonable cause exception for a denial of a §6166 election where the estate made the election on a late-filed return. The Chief Counsel noted, apparently incorrectly, that the estate may be able to seek relief under Reg. §301.9100-3. *See also Bank of the West v. Commissioner*, 93 T.C. 462 (1989) ("Petitioner concedes that the estate tax return was not timely filed; therefore, the purported election to pay the tax in installments was ineffectual as a matter of law"); *Estate of Hinz v. Commissioner*, T.C. Memo 2000-6 (citing *Estate of La Meres v. Commissioner*, 98 T.C. 294 (1992) as follows: "Petitioner did not timely pay the estate tax shown on the return because it elected to defer payment under section 6166. The section 6166 election was invalid because it was made in a return which was not timely filed."); CCA 200848004 (§6166 election made on late-filed return is not eligible for Reg. §301.9100-3 relief); PLR 200721006 (request for extension of time under Reg. §301.9100-3 to file §6166 election was denied).

Practice Point: In many estates consisting of closely held business interests, an executor will not know if the IRS will accept the valuations originally set forth in an estate tax return. These returns typically have a high probability of audit because such estates consist of substantial interests in one or more closely held businesses. Any adjustment by the IRS in the value originally reported on an estate tax return could affect the ability of an estate to qualify for §6166 deferral. Thus, if the IRS increases the value of a closely held business interest it will increase the likelihood that the interest will qualify under the 35% of adjusted gross estate limitation previously discussed. On the other hand, if the IRS adds excluded assets to an estate (i.e., a transfer with retained interests (under §2036–§2038)), it could decrease the likelihood that the closely held business interest will satisfy the 35% threshold. Similarly, an adjustment to the value of another estate asset (i.e., an interest in a limited partnership consisting of marketable securities and cash) could also

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decrease the likelihood that a closely held business interest will satisfy the 35% threshold.

Under Reg. §20.6166A-1(e)(3),[27] an executor may make a protective election to defer estate tax payments under §6166 if the values originally reported on an estate tax return do not qualify under the threshold 35% limitation or the estate tax return as originally filed shows that no tax is due.

[27] *See also* Reg. §20.6166-1(d). In CCA 201302037, an estate would have been eligible to make an election under §6166(a) at the time its original return was filed. However, the estate paid the tax in full. Later, the IRS determined that there was a deficiency. The Chief Counsel's Office advised that only that portion of the deficiency attributable to a closely held business may qualify for the §6166(h) election, even though the estate could have elected a larger deferral had it done so with the original filed return.

The IRS[28] decides in examination whether an election meets the requirements of §6166.[29] If the election is rejected, the executor may request consideration by the Appeals Office. The appellate determination will be regarded as the IRS's final decision.[30]

[28] Reg. §20.6166A-1(e) refers to the “district director,” a position eliminated from the IRS in its restructuring pursuant to the 1998 IRS Restructuring and Reform Act.

[29] Following receipt of an election, the IRS will make a preliminary determination if the estate qualifies for §6166. If the estate qualifies, the IRS will prepare and issue Letter 2568C, indicating the installment amounts and notifying the estate that the election has been received, but that it is subject to examination. Thereafter, the IRS will issue an annual Letter 249C approximately 30 days prior to each installment's due date.

[30] Rev. Proc. 79-55, *modifying* Rev. Proc. 60-33. *See* TAM 8512003 (§6166 election was not valid because it was not attached to the estate tax return even though election, with full information, had been attached to two prior, timely filed applications for extension of time to file the return).

While the election is under consideration in examination or Appeals, an executor may request that the case be referred to the National Office for technical advice, either because a lack of uniformity exists as to the disposition of the issue or the issue is so unusual or complex as to warrant review by the National Office.[31]

[31] Rev. Proc. 79-55.

a. **Form of the Election** —

The IRS has not issued a form to make a §6166 election, although the executor should check the election box on the estate tax return (Form 706, Part 3). The election may be made in any style. For example, the election could be made by attaching a notice to the estate tax return. A sample election statement is available at *Deferral of Estate and Generation-Skipping Transfer Tax on Closely Held Businesses (§6166)* in the Bloomberg Tax & Accounting Election and Compliance Statements Library.

Nevertheless, the following information must be included with the election:

(1) the decedent's name and taxpayer identification number as each appears on the estate tax return;

(2) the amount of the estate tax to be paid in installments;

(3) the date selected for the payment of the first installment;

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(4) the number of annual installments, including the first installment, in which the tax is to be paid;

(5) the property shown on the estate tax return that constitutes a closely held business, identified by schedule and item number; and

(6) the facts that serve as the basis for the executor's conclusion that the estate qualifies for payment of the estate tax in installments.[32]

[32] Reg. §20.6166-1(b). *See also* Worksheet 5. For additional discussion of the mechanics of §6166, see Elizabeth Carrott Minnigh, *So You Think You Can Read,* BNA Fin. Planning J. (May 14, 2014).

If the notice of the §6166 election omits the amount of estate tax to be paid in installments, the date selected for payment of the first installment, or the number of installments, the election will be presumed to be for the maximum amount payable in installments with such payment to be made in 10 equal installments, the first of which is due five years after due date for the estate tax return prescribed in §6151(a).[33]

[33] Reg. §20.6166-1(b). *See, e.g.,* TAM 8142015, TAM 8142014 (where authorized representative's letter making §6166 election excluded certain information, maximum amount of tax payable on estate tax return was to be paid in 10 equal installments beginning five years after return was filed). *See also* TAM 8331006 (where second Form 706 was filed by due date to elect payments under §6166, but first Form 706 excluded such election, filing second estate tax return by due date was valid §6166 election).

Practice Tip: If the notice of a §6166 election for a lending and finance company does not contain the required information, presumably it will be assumed that the election is for the maximum amount of estate tax payable in installments with such payment to be made in five equal installments, the first of which is due on the estate tax return due date prescribed in §6151(a). Furthermore, for a holding company that has operating subsidiaries with stock that is not “non-readily tradable” stock, presumably it will be assumed that the §6166 election is for the maximum amount of the estate tax that is payable in installments also with such payment to be made in five equal installments, the first of which is due on the due date for the estate tax return prescribed in §6151(a).[34]

[34] *See* §6166(b)(8), §6166(b)(10)(A).

b. **Late Election Allowed for Certain Deficiency Determinations — §6166(h)** —

If an executor did not previously make an election under §6166, but the estate qualifies under §6166(a)(1) after a deficiency in the estate tax is assessed, the executor may elect to pay the deficiency in installments under §6166(h)(1). The deficiency, however, cannot be due to negligence, intentional disregard of rules and regulations, or fraud with intent to evade tax. (These are the same rules that apply to prorating deficiencies to installments where an election to defer tax had been made before determination of the deficiency under §6166(e). See I.B., above.) This election must be made no later than 60 days after the Secretary issues notice and demand for payment of the deficiency, and it is made as prescribed by regulations.[35] For a sample election statement, see *Deferral of Deficiency of Estate and Generation-Skipping Transfer Tax on Closely Held Businesses if Deferral Was Not Elected on Original Return (§6166(h))* in the Bloomberg Tax & Accounting Election & Compliance Statement Library. The portion of the deficiency eligible for payment in installments is paid on the due date for the installments due after the date of election. For this purpose, the due dates are determined as if a timely §6166 election had been made upon filing the estate tax return. The portion of the deficiency attributable to any installment that would have been due when the election is made under §6166(h)(1) must be paid at the time of the election.[36]

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[35] §6166(h)(2).

[36] §6166(h)(3).

Comment: In TAM 8846001, the IRS increased the value of an interest in a closely held business during an audit to 74% of the adjusted gross estate. Pursuant to §6166(h)(1), the estate elected to pay the deficiency in installments under §6166, however, the IRS limited the amount that the estate could defer to 74% of the deficiency. This is an inequitable interpretation of §6166(h)(3), which is a relief provision. Section 6166(h)(3) states that "the deficiency shall (subject to the limitation provided by [§6166](a)(2)) be prorated to the installments which would have been due if an election had been timely made . . ." Nonetheless, §6166(a)(2) provides only a ceiling amount that a deficiency attributable to the business asset cannot exceed. Therefore, the entire deficiency should be deferrable under §6166 .

4. **Challenging IRS §6166 Determinations**

a. **Section 7479 Declaratory Judgments** —

To limit the potential hardship caused by an erroneous denial of a §6166 election, a declaratory judgment remedy was added under §7479 by the 1997 Act.[37]

[37] Until the enactment of the 1997 Taxpayer Relief Act (TRA), the Tax Court had no jurisdiction to resolve disputes between an estate and the IRS regarding an estate's qualification for §6166 deferral. This was because the denial of an installment election did not create a "deficiency." Before the 1997 TRA, a deficiency was necessary to confer jurisdiction on the Tax Court. Even a reference to a §6166 issue in a deficiency notice that raised other issues over which the Tax Court had jurisdiction would not give the Tax Court jurisdiction to review this issue. *See Estate of Meyer v. Commissioner*, 84 T.C. 560 (1985) (court had jurisdiction over deduction of interest under §2053, but not over right to defer estate tax under §6166); *Estate of Sherrod v. Commissioner*, 82 T.C. 523 (1984), *rev'd on other grounds*, 774 F.2d 1057 (11th Cir. 1985); *Estate of Bell v. Commissioner*, 92 T.C. 714 (1989), *aff'd*, 928 F.2d 901 (9th Cir. 1991). *But see Estate of Baumgardner v. Commissioner* , 85 T.C. 445 (1985), *acq.,* 1986-2 C.B. 1 (Tax Court had jurisdiction to determine overpayment of interest paid on estate tax installments as part of its jurisdiction to determine overpayment of tax).

Section 7479 grants an estate the ability to petition the Tax Court to resolve a dispute concerning initial or continuing eligibility for §6166 deferral without first requiring the estate to pay the full amount of estate tax the IRS asserts is due. According to its legislative history, §7479 was enacted because requiring full payment of the estate tax before allowing an estate to seek judicial review of §6166 issues might require an estate to liquidate the assets that §6166 was designed to protect.[38]

[38] H.R. Rep. No. 148, 105th Cong., 1st Sess. 83 (1997); S. Rep. No. 33, 105th Cong., 1st Sess. 48 (1997).

Under §7479, the Tax Court may grant a declaratory judgment in an actual controversy involving an IRS determination (or failure to make a determination) with respect to an estate's eligibility to make a §6166 election or whether an estate will cease to qualify for §6166 deferral.[39] The 1998 Act made technical corrections to §7479(a) which clarified that the Tax Court's declaratory judgment jurisdiction extends to the determination of whether particular property qualifies for §6166 deferral. The purpose of the amendment was to clarify that an estate may seek a declaratory judgment as to the qualification of particular property, even if the estate already qualifies for the

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§6166 election on the basis of other property included in the estate.[40]

[39] §7479(a). See I.G., below, for a discussion of the loss of §6166 deferral.

[40] H.R. Rep. No. 148, 105th Cong., 1st Sess. 83 (1997); S. Rep. No. 33, 105th Cong., 1st Sess. 48 (1997). *See also* CCA 201226027 (Tax Court had jurisdiction under §7479 to review IRS Appeal's determination that amount of deferred payment of estate tax should be reduced).

The Tax Court's declaration has the full force and effect of a Tax Court decision and is reviewable.[41]

[41] §7479(a).

Either the executor of the estate or the person who has assumed an obligation to make the deferred tax payments (the petitioner) may bring the action under §7479; however, if more than one person has the obligation to make the payments, all such persons must be joined as parties in the case.[42] A petitioner is required to exhaust all available administrative remedies within the IRS before an action may be brought under §7479.[43] Failure by the IRS to make a determination within 180 days after a request has been made will satisfy this requirement if the petitioner has taken all reasonable steps in a timely manner to secure the IRS determination.[44]

[42] §7479(b)(1).

[43] §7479(b)(2). Rev. Proc. 2005-33 provides guidance as to exhausting all administrative remedies prior to seeking a declaratory judgment.

[44] §7479(b)(2).

The Tax Court action must be filed before the 91st day after the IRS mails notice by certified or registered mail of a determination to deny initial or continuing §6166 eligibility.[45]

[45] §7479(b)(3). See 630 T.M., *Tax Court Litigation* (U.S. Income Series), and 460 T.M., *Tax-Exempt Organizations — Declaratory Judgments (Section 7428),* for further discussion of Tax Court procedures.

b. **Section 7422 Refund Actions** —

The 1998 IRS Restructuring and Reform Act created an additional remedy under §7422(j).[46] Section 7422(j) allows an estate that made the §6166 election to file an estate tax refund claim in federal district court or the Court of Federal Claims before the entire estate tax has been paid. Section 7422(j) overrules prior cases that held that an estate must wait until it had made the final deferred payment before filing a refund claim.[47]

[46] Until the enactment of the 1998 IRS Restructuring and Reform Act, an estate incurred significant obstacles in attempting to challenge a late rejection of a §6166 election in court or a dispute arising during the §6166 deferral period. To gain access to court to file a refund claim, the estate first had to pay the entire estate tax liability. The payment of all installments due prior to bringing the action was insufficient to invoke jurisdiction. *See, e.g., Flora v. United States*, 357 U.S. 63 (1958), *aff'd on reh'g*, 362 U.S. 145 (1960); *Rocovich v. United States*, 18 Cl. Ct. 418, 89-2 USTC ¶13,819 (Cl. Ct. 1989), *aff'd*, 933 F.2d 991 (Fed. Cir. 1991); *Abruzzo v. United States*, 24 Cl. Ct. 668 (1991).

[47] *See* H.R. Rep. No. 364, 105th Cong., 2d Sess. (1998); S. Rep. No. 174, 105th Cong., 2d Sess. (1998).

Section 7422(j) provides that an estate may file a refund suit if the following requirements are met:

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- no portion of the §6166 payments has been accelerated;
- all installments due as of the date of filing have been paid;
- there is no Tax Court case pending with respect to the estate tax liability; and
- the estate has not filed a §7479 declaratory judgment action with respect to its eligibility for the §6166 election.

In *Hansen v. United States* [48] the first decision to address §7422(j), the court held that a decedent's estate was jurisdictionally barred from bringing suit for a redetermination of estate taxes under §7422(j) where the estate had not paid all installments due before the suit was filed, installments due during the litigation, or the full amount of its tax liability after acceleration by the IRS. The court stated that to allow an estate to withhold payment and still bring suit for a redetermination of taxes would be “contrary to the carefully structured system of tax litigation and limited waiver of sovereign immunity envisioned by Congress.”[49]

[48] *Hansen v. United States*, 248 F.3d 761 (8th Cir. 2001).

[49] *Hansen v. United States*, 248 F.3d 761 (“district court pointed out ‘[t]he Estate's argument, however, ignores completely the jurisdictional preconditions listed in §7422(j) that are pertinent to this case. First, §7422(j)(2)(B) requires that all installments are paid in full at the time of the taxpayer suit. I.R.C. §7422(j)(2)(B). Since the Estate was admittedly not current in its installment payments when it filed suit in this Court, the Estate is jurisdictionally barred from litigating this action in federal court.’”).

Practice Tip: Practitioners should note that §7422(j) does not alter the generally applicable statute of limitations for refund claims[50] and the refund will be limited to the tax (including interest) paid within the limitations period.

[50] *See, e.g.,* TAM 9843001–TAM 9843005 (refund allowed only for §2032A recapture tax and interest paid during two years before refund claim was filed; refund of earlier payments barred by statute of limitations), TAM 9828002 (where estate sought deductions for interest paid during deferral period and claimed refund of resulting overpayment of estate tax, IRS advised that estate was entitled to refund of only final deferred payment because it was only one that was paid within two years of refund claim (i.e., period specified in §6511(b)(2)(B) for refunds)).

In CCA 200141013, an estate applied for and received an extension of time to file its estate tax return and pay the estate tax that was due. The estate also remitted a payment of the estimated estate tax with its extension request. The estate filed its estate tax return within the extended due date. The return included an election under §6166 to pay the estate tax attributable to the decedent's interest in a closely held business in installments and a claim for refund because the estate's initial payment of the estimated tax was more than the tax due on the portion of the estate that was not eligible for deferral. Following an examination of the return it was determined that the estate's initial payment was still greater than the tax that was due on the portion of the estate that was not eligible for deferral under §6166. The Chief Counsel advised that the estate should not receive a refund of the difference between the amount paid and the minimum amount of tax that was due on the portion of the estate not eligible for deferral. Chief Counsel stated that §7422(j) “does not change the fact that there must be an overpayment of the entire estate tax liability in order to obtain a refund,” and does not permit “payment of a refund merely because one or more estate tax installments have been overpaid or because the amount not eligible for deferral has been overpaid.” Thus, Chief Counsel concluded that the IRS could not issue a refund because there was no overpayment of the entire estate tax liability.[51]

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[51] CCA 200141013 (citing *Estate of Baumgardner v. Commissioner*, 85 T.C. 445, 461 (1985), which provided that "an overpayment of an installment is not an 'overpayment of tax' until the entire amount of the tax has been paid"). *See also Estate of Shapiro v. Commissioner*, 111 F.3d 1010 (2d Cir. 1997) ("when the overpayment of a §6166 installment is voluntarily made (e.g., is the result of a mistake on the part of the taxpayer), it will be credited against outstanding installments under §6403, but when the overpayment is both the result of erroneous or wrongful conduct on the part of the government and made under protest by the taxpayer, it will be refunded to the taxpayer in order to preserve the taxpayer's statutory right to defer payment under §6166").

In CCA 201226027, an estate timely filed an *application for extension of time to file* and to pay the estate tax, and the estate attached a letter stating it would be making an election under §6166 and that the payment enclosed was to be applied to the nondeferred portion of the estate tax. The estate tax return was filed timely. Because the nondeferred portion of the tax was much less than the amount remitted, the estate requested a refund for the overpayment of the nondeferred tax. Citing §6403, the IRS responded that the overpayment had to be applied to the deferred tax and would not be refunded. The Chief Counsel's Office advised that before the IRS is permitted to refund an amount of tax paid, §6402 requires that there be an overpayment. According to the Chief Counsel's Office, an overpayment exists when the amount of tax paid exceeds the amount of tax properly due. The Chief Counsel's Office stated that the estate may have overpaid the nondeferred portion of the estate tax, but the estate did not overpay its total estate tax liability. Although §6403 provides an exception to §6402, that exception is inapplicable in these circumstances because §6403 is only applicable when a §6166 election has been made and the payment is submitted as an installment payment. Because the §6166 election had not been made and the payment was not submitted as an installment payment, the Chief Counsel's Office advised that none of the payment could be treated as an installment payment under §6403 and there was no overpayment of tax that could be refunded.[52]

[52] Chief Counsel's conclusions were effectively affirmed in *Estate of McNeely v. United States*, No. 0:12-CV-01973, 2014 BL 165515 (D. Minn. June 12, 2014). The facts of *Estate of McNeely* were identical to those in CCA 201226027 (it is likely that the McNeely estate was the impetus for the issuance of the CCA). The district court concluded that §6402 and §6403 both gave the IRS discretion to credit overpayments against other tax liability, and there was no indication that Congress provided for or intended an exception from those provisions for taxpayers electing under §6166. *Estate of McNeely v. United States*, 2014 BL 165515 at *5–7. The court also held that, because the estimated payment made with the request for an extension was a voluntary overpayment, it was governed by §6402 and the IRS was not required to give effect to any attempt by the estate to designate the taxes to which it would be applied. *Estate of McNeely v. United States*, 2014 BL 165515 at *8–9.

In *Estate of Adell v. Commissioner*.[53] the taxpayer timely filed its estate tax return and made a §6166 election. Included in the assets of the taxpayer was a loan receivable due from the deceased's son as a result of the deceased paying a legal judgment entered against the son. The estate tax return listed this loan amount as an asset. In filing its estate tax return, the taxpayer paid a portion of the tax due (i.e., the portion which was ineligible for deferral), which included an amount as a result of the aforementioned loan. A year later, the taxpayer filed an amended estate tax return reclassifying the loan as a gift, and a gift tax return showing an amount due as a result of the gift. Almost two years later, the IRS assessed the gift tax shown on the return, together with interest and penalties. The taxpayer argued that its overpayment of estate tax on its original return (which was the result of including the loan as an asset of the estate) should be applied towards its outstanding gift tax liability. The Tax Court, citing §6403, held that the overpayment on the nondeferred portion of estate tax must first be credited against the taxpayer's deferred portion of the estate tax, rather than the gift tax liability. Because the overpayment

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did not exceed the deferred portion of the estate tax owed, the court allowed the IRS to proceed with its collection action on the gift tax liability.

[53] *Estate of Adell v. Commissioner*, T.C. Memo 2014-89.

Editor's Note: The majority of cases addressing the issue of refunds on overpayments of installments cited *Estate of Bell* [54] for the notion that any overpayment of an installment must be applied first to any unpaid installments and may be credited or refunded if the overpayment exceeds the full amount of tax due. Furthermore, any overpayment of the nondeferred portion must be applied to the deferred portion before any credit or refund may be permitted.

[54] *Estate of Bell v. Commissioner*, 92 T.C. 714 (1989), *aff'd*, 928 F.2d 901 (9th Cir. 1991).

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II. Eligibility Criteria

Special use valuation is only available to certain estates, and only for certain real property owned by these estates. While the narrow congressional targeting of the benefits of special use valuation can be broadly summarized in terms of a substantiality threshold, historical usage requirements, and future usage limitations, applying these eligibility criteria to the estates of actual decedents can be daunting, even for the seasoned practitioner. As far back as 1984, Professor Neil Harl declared that "Special use valuation is on its way to becoming the most complex section in the entire Internal Revenue Code."[37] More recently, the authors of a noted treatise remarked that, as one "becomes submerged in the intricacies of §2032A, one may begin to wonder whether the game is worth the candle,"[38] and others have observed that "farm special use valuation, which began its existence visualized as a panacea for the ills of agricultural land valuation, proved to be instead a Pandora's box of troubles."[39] Of course, not all reviews are unfavorable: in 1990, Professor Martin Begleiter attributed his achieving tenure to the §2032A material participation requirements.[40]

[37] Neil E. Harl, *Special Use Valuation: The Complexities of Economic Engineering,* 60 N.D. L. Rev. 7, 43 (1984).

[38] Richard Stephens, Guy Maxfield, Dennis Calfee, Stephen Lind, *Federal Estate and Gift Taxation* ¶4.04[3][b], n. 79 (8th ed. 2002). For an argument that "the game may not be worth the candle," see XIII.B., below.

[39] Donald H. Kelley & Burnell E. Steinmeyer, Jr., *Estate Planning for Farmers and Ranchers,* 3d ed. 2008.

[40] Martin D. Begleiter, *Material Participation Under Section 2032A: It Didn't Save the Family Farm but It Sure Got Me Tenure,* 94 Dick. L. Rev. 561 (1990).

In part, the complexity of §2032A is due to the statutory scheme where only certain estates may elect special use valuation

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for certain real property. After determining whether the estate is eligible under the citizen/resident, 25%, and 50% tests, it is next necessary to determine whether specific parcels of real property qualify for the election. Further complexity results from the unique language of the §2032A eligibility criteria.[41] In order to understand the section, one must thoroughly understand such concepts as "material participation," "active management," "qualified use," "member of the family," "acquired from or passed from," "qualified heir," and "qualified real property." These concepts are merely introduced in this section with detailed developments of each concept to follow in III., below.

[41] Perhaps unfortunately for practitioners, the "language" of §2032A spread. "Material participation" was picked up and expanded upon for purposes of the §469 passive activity rules, and former §2057 heavily cross-references the qualifying requirements of §2032A for purposes of the (pre-2004) Family-Owned Business Deduction. *But see* Reg. §1.469-5T(b)(2)(i). Both §501(c)(15) (tax exemption for certain insurance companies) and §664(g) (charitable remainder trusts) use the §2032A definition of "family," and §170 (charitable contributions), §453 (installment method) and regulations for §45D (New Markets Tax Credit) incorporate the §2032A definition of "farming."

For real property to qualify for §2032A use valuation, three eligibility criteria for the estate and four eligibility criteria for the property must be met. If eligible, §2032A can be invoked by the executor's election on the decedent's estate tax return, along with the submission of an agreement by all parties with an interest in the property consenting to recapture tax.

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A. Eligibility Criteria for the Estate

To elect special use valuation, an estate must meet the citizen or resident requirement, as well as the 25% test and 50% test, each as explained below.

1. **Citizen or Resident** —

At the time of death, the decedent was a citizen or resident of the United States.[42]

[42] §2032A(a)(1)(A).

2. **Twenty-Five Percent Test** —

Twenty-five percent or more of the "adjusted value" of the decedent's gross estate must consist of real property:

• that "was acquired from or passed from" the decedent to a "qualified heir";

• that was owned and used for a "qualified use" by the decedent or a member of the decedent's family for five or more years of the eight-year period before death; and

• for which there was "material participation" by the decedent or a member of the decedent's family during five or more years of the eight-year period before retirement, disability or death.[43]

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[43] §2032A(b)(1)(B).

As discussed more fully below, “qualified use” refers to either use as a farm for farming purposes or use in a trade or business other than farming. “Material participation” requires a threshold amount of active involvement in the business. See XIII.F. and *XIII.W.*, below, for a discussion of planning considerations relating to the 25% test.

3. **Fifty Percent Test** —

Fifty percent or more of the “adjusted value” of the decedent's gross estate must consist of the “adjusted value” of real or personal property that was:

- used for a “qualified use” by the decedent or a “member of the decedent's family” on the date of death; and
- “acquired from or passed from” the decedent to a “qualified heir.”[44]

[44] §2032A(b)(1)(A).

For purposes of §2032A, the “value of the gross estate” includes the value of property gifted by the decedent within three years of death other than gifts subject to the annual gift tax exclusion, the medical-educational exclusion, or the charitable deduction.[45] In certain circumstances (including interspousal transfers qualifying for the marital deduction), this provision would prevent the decedent from decreasing the percentage of ineligible property in his or her estate by making deathbed gifts. However, this provision could also *increase* the percentage of eligible property by pulling back property that was gifted to qualified heirs and that continues to be used in the farm or other closely held business into the estate.[46]

[45] §2035(c)(1)(B), §2035(c)(3), §6019.

[46] Section 2032A(e)(9)(A) relies on the §1014(b) definition of “property acquired from the decedent,” which includes property deemed part of the gross estate under §2035. In PLR 8514032, the IRS agreed that otherwise qualifying property transferred within three years of death could be used to satisfy the materiality thresholds.

When applying the 25% and 50% tests, the “adjusted value of the gross estate” is the “value of the gross estate” less allowable deductions under §2053(a)(4) (mortgages or indebtedness with respect to the property).[47] The “adjusted value” of the real and personal property is the value (at its highest and best use) of the property less §2053(a)(4) deductions with respect to the property.[48] Because the §2053(a)(4) deduction is for mortgages or any “indebtedness in respect of” property, unsecured indebtedness is not deducted in determining either the “adjusted value of the gross estate” or the “adjusted value of the real and personal property.”

[47] §2032A(b)(3)(A).

[48] §2032A(b)(3)(B).

An issue left unresolved by the Code and regulations is whether cash or liquid assets such as inventory are included as part of the personal property used in the trade or business for purposes of the 50% test. Given that maintaining a supply of working capital is an essential aspect of any business, it would seem that cash reserves for the reasonable needs of operating the farm or other business should be included as the business's personalty that can be applied toward satisfying the 50% test. In the context of installment payments of tax, the §6166 regulations support this view, providing that if a bank account is shown to be a part of a closely held business's working capital, the account is considered part of the business.[49] However, where a bank account commingled funds used for a qualified use with other funds, the Tax Court held that only the funds actually used for a qualified use counted toward the 50% test.[50]

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[49] Reg. §20.6166A-2(c)(2). The IRS itself apparently acknowledged it applied this regulation to the §2032A 50% test. *See Estate of Mapes v. Commissioner*, 99 T.C. 511, 519 (1992).

[50] *Estate of Mapes*, 99 T.C. 511.

Like cash reserves, inventory should be personal property. In a Technical Advice Memorandum, the National Office advised that grain stored on the farm as well as grain stored at the local elevator were property included as an interest in a wheat farming proprietorship for purposes of §6166 installment payments of federal estate tax.[51] In contrast, if substantial amounts of grain inventory have been carried over from prior crop years, it might be determined that the excess inventory would not be needed as part of the trade or business and, therefore, could not be counted for purposes of the 50% test.

[51] TAM 8251015.

Not only are there issues regarding which assets may be included as part of the trade or business for purposes of the 25% and 50% tests, there is also an issue as to whether assets from two different trades or businesses may be aggregated to satisfy the tests. In Rev. Rul. 85-168, the IRS cited the §2032A(b)(2) "qualified use" section to hold that the adjusted value of a building used in a nonfarm business could be combined with both the adjusted value of real property used as a farm for purposes of satisfying the 25% test, and with the adjusted value of personal property used for the farm for purposes of satisfying the 50% test.[52] However, in *Estate of Geiger v. Commissioner*,[53] the Tax Court held that where personal property was used in a separate trade or business and was not connected with real property that satisfied the requirements of §2032A(b)(1)(A), the adjusted value of such personal property could not be applied to satisfy the 50% test. The Tax Court reasoned that:

[52] *See also* PLR 8843023 (allowing closely held banking business interest's aggregation with farm assets for purposes of 50% test); TAM 8433006.

[53] 80 T.C. 484 (1983).

> where personal property is not a part of a business in danger of being "over valued" in the context of an existing use because real property connected with that business has been valued on the basis of another alternative possible use, the family business is not penalized and its continuance is not threatened.[54]

[54] 80 T.C. 484, 488.

The Eleventh Circuit, in *Estate of Sherrod v. Commissioner*,[55] held that neither unused land nor cropland leased pursuant to a cash rent lease were used for a "qualified use" and, therefore, the value of neither parcel could be included for purposes of satisfying the 50% test. As a result, there was insufficient property to satisfy the 50% test and the estate was not permitted to elect special use valuation. The estate argued that because the land in question was part of a tract of timberland that otherwise qualified for special use valuation, the adjoining property should also qualify. It was the court's view, however, that because the land was not "functionally related" to the qualifying timberland as required by §2032A(e)(3), it would not satisfy the qualified use test.[56]

[55] 774 F.2d 1057 (11th Cir. 1985), *rev'g* 82 T.C. 523 (1984).

[56] For further discussion of the rationale for excluding the pastureland and cropland in *Sherrod*, see III.C.6.b., below.

Practice Tip: The citizen/resident, 25%, and 50% tests are threshold tests, limiting the benefits of a special use election to certain decedents' estates that are substantially comprised of farming or closely held business operations. These threshold tests must be met before determining whether specific parcels of real estate qualify for special use valuation.

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B. Eligibility Criteria for the Property

After determining whether the estate meets the estate-level tests for §2032A eligibility, the estate determines whether specific real property parcels qualify for the election.

1. **Real Property** —

Only real property is eligible for special use valuation.

2. **Qualified Real Property** —

The real property must be “qualified real property,” which means the real property is:

- located in the United States;[57]
- “acquired from or passed from” the decedent to a “qualified heir”; and
- used for a “qualified use” at the time of death by the decedent or by a “member of the decedent's family.”[58]

[57] Curiously, while “qualified real property” must be in the United States, the language of the statute does not prevent foreign real property from being used to meet the 25% and 50% tests. *Compare* §2032A(b)(1) *with* §2032A(b)(1)(A)(i).

[58] §2032A(b)(1).

If there are successive interests in the “qualified real property,” all successive interests must be received by “qualified heirs.” A remainder interest by itself will not qualify for special use valuation.[59] *See* III.G., below.

[59] Reg. §20.2032A-8(a)(2); TAM 8223004, TAM 8045018, TAM 8020011.

3. **Qualified Use in Five of Eight Years** —

The real property for which an election is made must have been owned and used for a “qualified use” by the decedent or a “member of the decedent's family” for a period aggregating five years or more during the eight-year period ending on the decedent's date of death.[60]

[60] §2032A(b)(1)(C)(i).

4. **Material Participation in Five of Eight Years** —

The real property for which an election is made must have been used in a farm or business in which the decedent or a “member of the decedent's family” “materially participated” for a period aggregating five years or more during the eight-year period ending on the earlier of the date of death or the date of retirement or disability, provided that such retirement or disability continues to the date of death.[61] For this purpose, retirement or disability begins on the date the decedent began receiving Social Security retirement benefits or became disabled.[62] An individual is considered disabled if he or

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she has a mental or physical impairment that makes him or her unable to materially participate.[63]

[61] §2032A(b)(1)(C)(ii), §2032A(b)(4).

[62] §2032A(b)(4)(A).

[63] §2032A(b)(4)(B).

Practice Tip: If a surviving spouse acquired qualified real property from a deceased spouse, the surviving spouse may demonstrate more limited “active management” rather than “material participation” prior to the surviving spouse's death, preserving the ability to elect special use valuation in the estate of the second-to-die spouse.[64]

[64] §2032A(b)(5); see III.B., below.

While the existence (or lack thereof) of “material participation” in the pre-death period is generally fixed at death, a decedent's estate was able to satisfy the five-of-eight-year material participation requirement when the decedent's brother timely adopted a stepdaughter whose spouse was farming the decedent's land.[65]

[65] PLR 8610073.

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C. Election and Agreement

After the executor determines (1) that the decedent's estate is eligible to invoke §2032A valuation, and (2) what property qualifies for a special use election, the executor must submit an election notice with the decedent's estate tax return.[66] While an executor does not need to elect special use valuation for all eligible real property, Reg. §20.2032A-8(a)(2) requires an electing estate to apply special use valuation to at least 25% of the adjusted value of the gross estate even though such a requirement does not seem supportable by the plain language of the statute. In *Miller v. United States* and *Finfrock v. United States*,[67] decided 24 years apart, the same district court held this minimum election requirement to be an invalid extension of §2032A(b)(1)(B). Nevertheless, Reg. §20.2032A-8(a)(2) remains on the books and, to the knowledge of the authors, continues to be applied by the IRS.[68]

[66] §2032A(a)(1)(B), §2032A(d)(1); Reg. §20.2032A-8(a).

[67] *Miller v. United States*, 680 F. Supp. 1269 (C.D. Ill. 1988); *Finfrock v. United States*, 860 F. Supp. 2d 651 (C.D. Ill. 2012); *see* VII.D., below.

[68] The courts also attacked this regulation's position on successive interests. *See* III.G.2., below.

Contemporaneously with the election, all persons with an interest in the “qualified real property” for which an election is made must sign and attach to the return an agreement pursuant to which all “qualified heirs” with an interest in the property consent to personal liability for the additional estate tax (recapture tax) imposed by §2032A(c). Other parties with an interest in the property who are not qualified heirs must consent to collecting the additional estate tax from the “qualified real property.”[69]

[69] §2032A(a)(1)(B), §2032A(d)(2); Reg. §20.2032A-8(c).

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III. Definitions

A. Material Participation

1. **In General** —

Both the historical usage requirements for electing special use valuation and the future usage requirements for avoiding the §2032A recapture tax require the property owner (or a family member) to materially participate in a qualified use of the property. As such, the dual requirements of material participation and qualified use (discussed at III.C., below) are the principal devices by which Congress limited access to the benefits of §2032A.

Material participation plays two key roles in defining and limiting the beneficiaries of special use valuation. First, to qualify for special use valuation, the decedent or a member of the decedent's family must materially participate for five or more of the eight years prior to the decedent's (i) death, (ii) disability, or (iii) retirement.[70] Second, to avoid the post-death recapture of tax benefits, there must not be periods aggregating more than three years during any eight-year period ending after the decedent's death during which there was not material participation by the decedent or member of the decedent's family (in the pre-death period) or by the qualified heir or a member of the qualified heir's family (in the post-death period).[71]

[70] §2032A(b)(1)(C)(ii), §2032A(b)(4). For surviving spouses, material participation can also be achieved through "active management." *See* III.B., below.

[71] §2032A(c)(6)(B).

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Congress's intent in promulgating these requirements was to make a distinction for §2032A purposes between those decedents and heirs who are actively involved in the farm operation or the trade or business and those individuals who hold real property merely as a passive investment. Rather than imposing a new framework for making this distinction, §2032A made use of the "material participation" concept already existing for self-employment tax. Mechanically, this occurs under §2032A(e)(6), which provides that, for purposes of §2032A, material participation is determined in a manner similar to that in §1402(a)(1).

Section 1402(a) defines net earnings from self-employment for purposes of the §1401 self-employment tax. In turn, §1402(a)(1) provides that rental income does not generally qualify as net earnings from self-employment. However, §1402(a)(1) provides that if income is produced pursuant to an arrangement to produce agricultural or horticultural commodities and the arrangement requires "material participation," the income will be deemed net earnings from self-employment without regard to its classification as rental income. Thus, the cross-reference from §2032A to §1402 creates a double-edged sword for the commodity grower where it will not be possible to implement a plan that both avoids self-employment tax and nevertheless qualifies the property for special use valuation.

Complexity results, however, from the existence of the term and concept of material participation in other contexts. First, § 211(a)(1) of the Social Security Act (SSA) also utilizes the concept of material participation.[72] Cases and rulings under this provision may be highly precedential in the §2032A context, as the definition of "net earnings from self-employment" found at SSA §211(a)(1) closely parallels that in §1402(a)(1).[73] Although §1402(a)(1) was promulgated as part of the Self-Employment Contributions Act of 1954 (also known as the Social Security Amendments of 1954)[74] and §211(a)(1) is part of the Social Security Act, the complementary nature of the two statutes suggests that the concept of material participation in each Act would be interpreted similarly, as was indeed done in the Eighth Circuit.[75]

[72] 42 U.S.C. §411.

[73] 42 U.S.C. §411.

[74] Pub. L. No. 83-761.

[75] See the discussions of *Mangels v. United States*, 828 F.2d 1324 (8th Cir. 1987), *rev'g* 632 F. Supp. 1555 (S.D. Iowa 1986), in III.A.3.b., and III.A.6.c., below.

Additionally, the enactment of §469 as part of the Tax Reform Act of 1986 (TRA 1986)[76] introduced the concept of "material participation" into yet another context. Section 469 imposes limitations on the deduction for losses from "passive activities." Absence of "material participation" by the taxpayer in a trade or business activity is one of the elements that causes the trade or business activity to be characterized as "passive." Further complicating matters, §1411 imposes a tax on "net investment income" above certain threshold amounts by cross-referencing the §469 passive activity rules in determining whether income from a trade or business is subject to the §1411 tax.[77]

[76] Pub. L. No. 99-514.

[77] §1411(c). The Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §1402, enacted §1411.

More directly analogous to §2032A, and therefore of more precedential value, may be cases and rulings under former §2057, which provided a deduction from the gross estate for certain "qualified family-owned business interests" of decedents dying before 2004. This section closely paralleled §2032A by imposing similar historical and future usage material participation requirements. Former §2057 explicitly cross-referenced §2032A in defining "material participation."

Finally, the IRS issued regulations for §2032A setting forth activities constituting material participation and the factors considered in determining the presence of material participation.[78] While these regulations are detailed, they clearly envision a facts-and-circumstances inquiry, stating that no single factor is determinative of the presence of material

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participation.[79] For this reason, valuable guidance may be available by a thorough review of material participation as it was defined in each of the above discussed areas. Thus, the following discussion analyzes material participation in five contexts: (i) §1402(a)(1) self-employment tax, (ii) §211(a)(1) of the Social Security Act, (iii) §469 passive activity loss rules, (iv) former §2057 and former §2033 family-owned business deduction/credit, and (v) the §2032A regulations.

[78] Reg. §20.2032A-3(e).

[79] Reg. §20.2032A-3(e)(2).

2. **Section 1402(a)(1) Material Participation** —

Section 1402(a) defines net earnings from self-employment used to calculate the tax on self-employment income. As noted above, self-employment income generally excludes rental income. Nevertheless, income from an arrangement between the owner or tenant and another individual will be taxable self-employment income (without regard to its characterization as "rental income" by the parties) if: (i) the arrangement provides that the other individual shall produce agricultural or horticultural commodities, and (ii) the owner or tenant materially participates in producing the agricultural or horticultural commodities. Thus, material participation by the owner or tenant is significant because it causes certain otherwise-excludible rental income to be characterized as earnings from self-employment and, therefore, subject to the tax imposed by §1401.

Section 1402 and its regulations further provide that it is not possible to establish material participation through services performed by employees or agents.[80] Consequently, an individual cannot satisfy the §2032A material participation requirements by using an agent or employee to carry out production or management. Nonetheless, while the activities of an agent will not be *helpful* in determining whether material participation exists, such activities need not be *fatal* to the inquiry. Instead, both the Code and the regulations clearly contemplate the existence of agents or employees in conjunction with materially participating owners. As an example, the §2032A regulations set forth an attorney who has a farm manager but nevertheless materially participates in the farm operation.[81] Furthermore, if a family member is acting in the role of agent, family member status is controlling.[82] Thus, the material participation limitation restricts access to §2032A to families who are personally involved in the business and excludes individuals who own farmland as a passive investment.

[80] §1402(a)(1); Reg. §1.1402(a)-4(b)(5). *But see* Notice 2006-108 discussed in XIII.S., below.

[81] Reg. §20.2032A-3(g) *Ex.* 4.

[82] Reg. §20.2032A-3(e)(1).

Comment: Section 1402(a)(1) and the corresponding regulations set forth the activities that constitute material participation by a landlord or tenant. Although §2032A provides that material participation will be determined in a manner similar to that used in §1402(a)(1), it would seem obvious that, if an individual directly operates the farm or trade or business outside of a rental arrangement, there would be material participation by the individual for purposes of special use valuation. The reference to §1402(a)(1) is to clarify the more difficult situation of determining the presence of material participation in the context of a rental arrangement.[83]

[83] *Wuebker v. Commissioner*, 205 F.3d 897 (6th Cir. 2000), *rev'g* 110 T.C. 431 (1998) ("The issue of material participation [in the self-employment context] arises only when there is an arrangement between an owner or tenant and another individual whereby the other individual is to produce agricultural or horticultural commodities on the land."). *Wuebker* rightly recognizes that the exclusion from self-employment tax requires both the income be classifiable as "rents" and the taxpayer not have "materially participated." This distinction was occasionally muddied in cases where the Tax Court found it convenient to hold that material participation existed, thereby mooting the issue of whether the income in question properly constituted "rents." *See, e.g.,*

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Schmidt v. Commissioner, T.C. Memo 1997-41 (concluding that determining material participation was necessary where farmer grew beets on his own land and sold them pursuant to contract with food company); *Gill v. Commissioner*, T.C. Memo 1995-328 (material participation where taxpayer personally raised flocks of birds and delivered them under contract to chicken processor). *Cf. Morehouse v. Commissioner*, 769 F.3d 616 (8th Cir. 2014), *rev'g* 140 T.C. 350 (2013), (citing Rev. Rul. 60-32 and distinguishing *Wuebker*, Eighth Circuit held that government Conservation Reserve Program payments received by nonfarmer were rentals from real estate under §1402(a)(1) and, thus, not subject to §1401 self-employment tax), *nonacq.* 2015-41 I.R.B. See XIII.S., below, for a discussion of special use valuation and federal agricultural programs.

The regulations promulgated under §1402 provide that the following elements must be present for an owner of farmland to be a material participant in the context of a rental relationship:

- there must be a written or oral "arrangement" between the owner and an individual;
- the arrangement must contemplate actual material participation by the owner in the producing, or managing the production of, agricultural or horticultural commodities;
- the arrangement must impose an obligation upon the individual to produce an agricultural or horticultural commodity; and
- the owner must actually participate to a material extent in the production and/or production management of agricultural or horticultural commodities.[84]

[84] Reg. §1.1402(a)-4(b)(2), §1.1402(a)-4(b)(3), §1.1402(a)-4(b)(4).

a. **Arrangement** —

In *Mizell v. Commissioner*,[85] the taxpayer argued that, although rental income was derived under a series of leases with respect to a farm partnership in which the taxpayer was a partner and materially participated, no self-employment tax was due because the lease agreements did not contractually require the taxpayer's material participation. The Tax Court disagreed, holding that the word "arrangement" as used in §1402(a)(1) is to be interpreted broadly as encompassing not only the rental or loan agreement, but also "those obligations that existed within the overall scheme of the farming operations" including the partnership agreement and the general understanding between the taxpayer and the other partners. *Mizell* was subsequently cited favorably by the IRS in a technical advice memorandum finding self-employment material participation where payments were received pursuant to the Conservation Reserve Program.[86]

[85] T.C. Memo 1995-571.

[86] TAM 9637004. *See also* CCA 200325002. For more on material participation in the context of federal programs, see XIII.S., below.

In a trio of recommendations, the Chief Counsel's Office favorably cited *Mizell* in concluding that an employment contract and a lease should be examined together in determining whether material participation existed.[87]

[87] FSA 199917008, FSA 199917006, FSA 199917005.

While not directly addressing *Mizell*, the Eighth Circuit, in *McNamara v. Commissioner*,[88] determined that there must be a nexus between the taxpayer's participation and the rental payments before self-employment tax may be imposed. The *McNamara* court concluded that rentals at rates consistent with market prices "very strongly suggest"

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that the rental arrangement is an independent transaction. The Tax Court followed the *McNamara* court in *Solvie v. Commissioner*,[89] when it found there was a nexus between the taxpayers' participation and the rental payments they received.

[88] 236 F.3d 410 (8th Cir. 2000) (discussing §1402(a)(1)'s "requirement that rents be 'derived under' such an arrangement" for the rents to be considered self-employment income), *rev'g* T.C. Memo 1999-333; *Hennen v. Commissioner*, T.C. Memo 1999-306; *Bot v. Commissioner*, T.C. Memo 1999-256. The IRS nonacquiesced to the Eighth Circuit's *McNamara* decision in 2003-42 I.R.B. 839. In its Action on Decision, the IRS identified factors that would determine whether it would litigate a particular case in the Eighth Circuit: (1) whether fair rental value was paid under the leases, (2) whether wages were paid pursuant to an employment agreement, and whether any wages paid were at fair value, (3) whether there would have been rental income absent the farmer's services, and (4) whether past practices suggest that the services would have been performed absent an employment contract. AOD 2003-03 (Oct. 20, 2003).

[89] T.C. Memo 2004-55. Here, as in *McNamara*, 236 F.3d 410, the taxpayers failed to prove that the rent received was at fair market value.

Practice Tip: As the relevant object of the §2032A inquiry is the real property (instead of the rental income itself), the *McNamara* nexus approach may not be applicable in the context of special use valuation. Nevertheless, the cautious practitioner should advise clients to ensure that any rental agreement explicitly requires material participation by the property owner or a member of his or her family, rather than relying on the broad interpretation of "arrangement" found in *Mizell*.

An example of a material participation farm lease can be found in Worksheet 9, below.

b. **Production** —

The §1402 regulations provide that "production" consists of both: (i) performing physical work, and (ii) providing capital. The owner cannot, however, establish material participation merely by undertaking to provide capital. There must also be some actual physical work performed if material participation is to be established based on production.[90]

[90] Reg. §1.1402(a)-4(b)(3)(iii).

c. **Management of Production** —

The §1402 regulations define "management of production" as "services performed in making managerial decisions relating to the production, such as when to plant, cultivate, dust, spray, or harvest the crop." This term encompasses "advising and consulting, making inspections, and making decisions as to matters such as rotating crops, the type of crops to be grown, the type of livestock to be raised, and the type of machinery and implements to be furnished."[91]

[91] Reg. §1.1402(a)-4(b)(3)(iii).

The regulations place a heavy emphasis on making inspections and periodic advising and consulting. The regulations further provide that undertaking to select crops and livestock to be produced, the type of machinery and implements to be furnished, or to make decisions as to rotating crops, generally is not of itself sufficient.[92]

[92] Reg. §1.1402(a)-4(b)(3)(iii).

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Comment: In contrast with the regulations' emphasis on consulting and periodic inspections, when determining the presence of material participation in the context of the Social Security Act, the courts have emphasized ultimate decision-making authority.

The IRS Pub. 225, *Farmer's Tax Guide,* gives further indications of what constitutes material participation. The Guide provides that material participation occurs with respect to an arrangement if any of the following four tests is satisfied:

Test No. 1. The taxpayer does any three of the following: (1) pays, using cash or credit, for at least half the direct costs of producing the crop or livestock, (2) furnishes at least half the tools, equipment, and livestock used in the production activities, (3) advises or consults with tenants on issues like deciding what crops to plant, the type of seed or fertilizer to use, or when and at what price the crops should be sold, and (4) inspects the production activities periodically.

Test No. 2. The taxpayer regularly and frequently makes, or takes an important part in making, management decisions substantially contributing to or affecting the success of the enterprise. For example, the taxpayer makes or is involved in making decisions about when and where to plant or spray, when to harvest, what standards to follow, and what records to keep.

Test No. 3. The taxpayer works 100 hours or more in activities connected with agricultural production spread over a period of at least five weeks.

Test No. 4. The taxpayer does things which, considered in their total effect, show that the taxpayer is materially and significantly involved in producing farm commodities.[93]

[93] IRS Pub. 225, *Farmer's Tax Guide,* Chapter 12. This publication is revised annually, usually in October. The IRS also posts information on developments affecting IRS Pub. 225 at https://www.irs.gov/forms-pubs/about-publication-225. Four similar tests are presented by the Social Security Administration in the Social Security Handbook §1221–§1232 (available at https://www.ssa.gov/OP_Home/handbook/handbook-toc.html), although with important variations. For example, the SSA Test No. 1 substitutes the more subjective term “significant” where the IRS requires “at least half.” The SSA Handbook continues by stating that “one-third or more” is generally “significant.”.

Only Test No. 3 provides a quantitative standard for material participation. Test Nos. 2 and 4 are simply restatements of the “production” and “management of production” requirement. Test No. 1's standard for satisfying the combination “production/management of production” requirement is partly quantitative in that it specifies the percentage of financial contribution for certain factors of production. Overall, however, Test No. 1 is a subjective test.

3. **Social Security Act Material Participation** —

The Social Security Act contains provisions that parallel §1402(a)(1) in defining material participation. The underlying rationale of the Act is that when an individual's income is reduced because of an inability to work, a portion of the income should be replaced. Included in the types of income eligible for replacement is the income of farm owners and tenants if there was “material participation” by the farm owner or tenant in producing or managing the production of agricultural or horticultural commodities.

The provisions of §1402(a)(1) are almost identical to §211(a)(1) of the Social Security Act [94] and the corresponding regulations defining self-employment income of owners and tenants who produce agricultural and horticultural

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commodities. This apparent symmetry makes sense in that the funds to finance the benefits distributed under the Social Security Act are generated by the tax imposed by §1401.

[94] 42 U.S.C. §411(a)(1).

Even though §2032A(e)(6) only references §1402(a)(1), given the parallel language in §1402(a)(1) and SSA §211(a)(1) and the complementary purpose of the two sections, it is useful to examine the case law of material participation in the context of SSA §211(a)(1).[95] These cases typically involve the denial of Social Security benefits based on the government's position that the individual's income from a lease arrangement was not eligible for replacement because the individual was not materially participating with respect to the leased property.

[95] At least one court did so. See the discussion of *Mangels* at III.A.6.c., below.

a. **Production** —

Three cases from the Fifth Circuit indicate that the material participation requirement is satisfied if an arrangement requires a substantial financial contribution to producing agricultural or horticultural commodities. This position was first set forth in *Henderson v. Flemming* [96] in the following dictum:

[96] 283 F.2d 882, 888 (5th Cir. 1960).

> [W]e know at least today that agriculture is or may be big business. It takes more than land and a willing hand. It takes working capital, frequently in considerable amounts. An owner of land who is required to (and does) furnish substantial amounts of cash, credit or supplies toward this mutual undertaking which are reasonably needed in the production of the agricultural commodity and from the success of which he must look for actual recoupment likewise makes a "material participation."

The above dictum was cited favorably in two other Fifth Circuit cases, *Celebrezze v. Miller* [97] and *Celebrezze v. Maxwell*.[98] In *Maxwell*, the court viewed a 25% financial contribution as proportionately small and concluded there was not material participation. Although there were other factors in *Henderson* and *Miller* that were absent in *Maxwell* (such as advice and consultation), both the *Henderson* and the *Miller* courts emphasized the financial contribution to find material participation.[99] Two district court cases are split on the position taken in *Henderson* that material participation can be established by financial contribution alone. In *Bridie v. Ribicoff*,[100] a district court approvingly cited *Henderson*, while the district court in *Bryant v. Celebrezze* [101] rejected that position.[102]

[97] 333 F.2d 29 (5th Cir. 1964).

[98] 315 F.2d 727 (5th Cir. 1963).

[99] *See also Harper v. Flemming*, 288 F.2d 61 (4th Cir. 1961), *aff'g* 185 F. Supp. 14 (E.D.N.C. 1960); *Vance v. Ribicoff*, 202 F. Supp. 790 (E.D. Tenn. 1961).

[100] 194 F. Supp. 809 (N.D. Iowa 1961).

[101] 229 F. Supp. 329 (E.D.S.C. 1964).

[102] *See also Celebrezze v. Wifstad*, 314 F.2d 208 (8th Cir. 1963).

Practice Tip: Because the regulations for §1402(a)(1) specifically indicate that merely providing capital will not constitute material participation and there is nothing in the §2032A regulations that would support a "capital only" qualification, one should not rely on providing substantial amounts of capital alone to establish §2032A material participation. Nevertheless, the Fifth Circuit cases indicate that when other factors are present, the extent of the capital provided may be relevant.

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b. **Management of Production** —

The regulations under the Social Security Act emphasize inspections, advising and consulting to establish material participation by managing production. However, cases analyzing material participation by managing production place more emphasis on final decision-making authority.

In *Colegate v. Gardner* [103] and *Conley v. Ribicoff*,[104] the property owner undertook only limited inspections but made a substantial number of final decisions regarding material matters. In *Hoffman v. Gardner*,[105] a resident of Missouri and owner of Iowa farmland engaged in limited inspection and did not frequently advise or consult. The lease by its terms gave him complete managerial control which he exercised by telephone communication and mail. In all three cases, the courts found that there was material participation by production management based on the authority to make significant management decisions.[106]

[103] 265 F. Supp. 987 (S.D. Ohio 1967).

[104] 294 F.2d 190 (9th Cir. 1961).

[105] 369 F.2d 837 (8th Cir. 1966).

[106] *See also McCormick v. Richardson*, 460 F.2d 783 (10th Cir. 1972); *Foster v. Celebrezze*, 313 F.2d 604 (8th Cir. 1963); *Hoffman v. Ribicoff*, 305 F.2d 1 (8th Cir. 1962); *Rausch v. Gardner*, 267 F. Supp. 4 (E.D. Wis. 1967).

Comment 1: It is questionable how much weight should be placed on the Social Security Act cases. First, §2032A(e)(6) refers only to §1402(a)(1) and not to the comparable provisions in §211(a)(1) of the Social Security Act. While it seems reasonable to conclude that material participation would be given the same meaning under the Social Security Act and the Self-Employment Contributions Act of 1954, it may not follow that courts called upon to interpret §2032A material participation would be persuaded by analysis in the context of the Social Security Act. It is notable that the Eighth Circuit in *Mangels v. United States* cited with approval in its analysis of "material participation" an SSA §211(a)(1) case as it analyzed material participation in the context of §2032A.[107]

[107] 828 F.2d 1324 (8th Cir. 1987), citing *Foster v. Celebrezze*, 313 F.2d 604 (8th Cir. 1963).

Comment 2: Because the purpose of the material participation test is to limit access to the benefits of §2032A, which is an exception to the standard estate valuation procedures, the courts may be more hesitant to find the presence of material participation in the context of §2032A than under the Social Security Act.

4. **Material Participation and Passive Loss Restrictions** —

Enacted as part of the Tax Reform Act of 1986 (TRA 1986),[108] §469 seeks to curtail the use of various income tax shelter schemes by grouping a taxpayer's items of income, gain and loss by activity, classifying these activities as either "active" or "passive," and then providing that losses from passive activities may not be used to offset income and gains from active activities. For purposes of this section, generally, the term "passive activity" means any activity involving the conduct of a trade or business in which the taxpayer does not materially participate.

[108] Pub. L. No. 99-514 (Oct. 22, 1986). For further discussion of passive activity losses and §469, see 549 T.M., *Passive Loss Rules* (U.S. Income Series).

The Senate Report to the TRA 1986[109] states that the §469 "material participation" requirement was derived from the existing standards under §1402(a) and §2032A, but was modified to take into account the purposes of the passive loss provisions. For example, the report indicates that in the case of farming, it is not necessary that the taxpayer perform physical labor, but the taxpayer must at least be liable for the §1402 self-employment tax to establish material

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participation. The examples given in the report indicate that Congress expected that a stricter standard be applied to material participation in the passive loss context, and Treasury took this approach in the regulations.

[109] S. Rep. No. 99-313, at 732-735 (1986), *reprinted in* 1986-3 C.B. vol. 3 (described as *Internal Revenue Cumulative Bulletin 1986 [5]* at https://www.govinfo.gov/app/details/GOVPUB-T22-1286c5320d83f63528466d064ff9ef02/GOVPUB-T22-1286c5320d83f63528466d064ff9ef02-3/context).

On the most subjective level, a taxpayer meets the §469 material participation requirement with respect to an activity only if he or she is involved in its operations on a regular, continuous and substantial basis.[110] In temporary regulations first issued in 1988 and subsequently amended in 1989 and 1992, the IRS expanded on this subjective determination to provide a more objective method for measuring material participation.[111] Accordingly, a taxpayer is considered to materially participate in an activity if his or her activities satisfy at least one of seven specific tests established by those regulations, only five of which appear to have any relevance in the context of special use valuations. Under each test, participation by the individual's spouse is counted as participation by the individual personally.[112] However, work that is not ordinarily performed by an owner of such an activity is not counted if the primary reason for doing such work was to avoid the disallowance of any loss or credit from such activity. Furthermore, unless the individual is directly involved in the day-to-day activity management, any investment work done by the individual is similarly not treated as participation.[113]

[110] §469(h)(1).

[111] Reg. §1.469-5T(a).

[112] Reg. §1.469-5T(f)(3).

[113] Reg. §1.469-5T(f)(2).

Under the temporary regulations, an individual is treated as materially participating in an activity if:

• The individual participates in the activity for more than 500 hours during the taxable year, and the individual owns an interest in the activity at the time the work is performed.[114]

• The individual's work constitutes substantially all the work performed in connection with the activity by all individuals involved during that tax year. Thus, a one-person operation satisfies the material participation standard, and it is irrelevant how few hours that individual spent participating in the activity.[115]

• The individual participates in the activity more than 100 hours during the taxable year, and his or her level of participation in the activity for the taxable year is not less than the participation in the activity of any other individual for such year.[116]

• The activity is a “significant participation activity,” and the individual's total participation in all such activities during the taxable year exceeds 500 hours. A significant participation activity is a trade or business activity in which an individual participates for more than 100 hours during the year and in which the individual does not materially participate under any other test.[117]

• Based on all of the facts and circumstances, an individual participates in an activity on a regular, continuous and substantial basis during the year.[118] A taxpayer cannot qualify as materially participating under the facts-and-circumstances test, however, unless he or she participates in the activity for more than 100 hours during the taxable year.[119] Also, an individual's services performed in managing an activity shall not be taken into account unless no other person is compensated for management services and no other individual performs management services exceeding the hourly total of such services performed by the taxpayer.[120]

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[114] Reg. §1.469-5T(a)(1).

[115] Reg. §1.469-5T(a)(2).

[116] Reg. §1.469-5T(a)(3).

[117] Reg. §1.469-5T(a)(4).

[118] Reg. §1.469-5T(a)(7).

[119] Reg. §1.469-5T(b)(2)(iii).

[120] Reg. §1.469-5T(b)(2)(ii).

Unfortunately, the regulations fail to define "management services," and determining regular, continuous and substantial participation, as mentioned above, is a highly subjective standard.

The remaining two tests listed in the temporary regulations condition material participation in a given year based upon material participation in other years, which is inappropriate in §2032A applications.[121]

[121] *See* Reg. §1.469-5T(a)(5), §1.469-5T(a)(6).

In approving the above tests as the sole measures of determining material participation for the passive loss rules, Reg. §1.469-5T(b)(2) explicitly provides that the definition of material participation under other sections such as §2032A is irrelevant for purposes of §469, except in the case of certain retired individuals and surviving spouses participating in farming activities.[122]

[122] §469(h)(3); Reg. §1.469-5T(h)(2).

Thus, §2032A material participation is not conclusive for purposes of §469. However, given the express intention of Congress and the IRS in *narrowing* the definition of material participation for passive loss purposes, a finding of material participation for passive loss purposes will likely result in §2032A material participation. For example, in TAM 9428002 the National Office advised that a decedent's treatment of ranch losses as passive activity losses under §469 for income tax purposes was a "significant factor" in establishing the decedent's lack of material participation for §2032A purposes.

Comment: Section 469 and Reg. §1.469-4 provide detailed guidance for determining what constitutes a single activity for purposes of the passive loss rules. This level of detail is absent in §2032A and the regulations thereunder. Nevertheless, to the extent the quantitative tests of the §469 temporary regulations are used to demonstrate §2032A material participation, logical consistency would suggest that these tests be applied after grouping the decedent's activities according to the rules set forth in Reg. §1.469-4(c). For most estates, this is a nonissue, as the decedent is likely to have engaged in only a single activity under any reasonable definition. For decedents with diversified farming and/or business interests, however, the ability to bootstrap the §469 activity grouping rules into the §2032A context may determine whether material participation exists with respect to all, some, or none of the qualified use property.

More recently, material participation in the context of §469 and passive income and losses took on added importance with the enactment of §1411, the Unearned Income Medicare Contribution, or net investment income tax. [123] This 3.8% tax relies on the definitions of §469 to determine what taxpayer activities are subject to the tax.[124]

[123] *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §1402. The 3.8% net investment income tax, effective for tax years beginning after 2012, cross-references the §469 passive activity rules in determining whether income from a trade or business is subject to the §1411 tax. The §1411 regulations provide guidance on the §469 and §1411 rules interaction (as well as on the §1411 and §1401 self-employment tax interaction). *See* Reg. §1.1411-0 to Reg. §1.1411-10. (generally applicable to tax years beginning after 2013). For

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further discussion of §1411 and the regulations thereunder, see 507 T.M., *Income Tax Liability: Concepts and Calculation* (U.S. Income Series), and 852 T.M., *Income Taxation of Trusts and Estates.*

[124] §1411(c)(2).

5. **Former §2057 and Former §2033A Material Participation** —

Former §2057 was originally enacted as §2033A,[125] retroactively amended and renumbered as §2057 as part of the Internal Revenue Service Restructuring and Reform Act of 1998,[126] and formally repealed in 2014.[127] Former §2057 provided a $675,000 estate tax deduction for certain "qualified family-owned business interests" for estates of decedents dying after 1997 and before 2004.[128] Tax benefits under former §2057 were conditioned on meeting a material participation requirement, and former §2057(b)(1)(D)(ii) analyzed material participation by reference to §2032A(e)(6). The recapture provisions found at former §2057(f)(1)(A) similarly refer to the material participation recapture triggers of §2032A(c)(6)(B). As the entire structure of former §2057 closely parallels that of §2032A, it is likely that a finding of material participation in either context should result in a finding of material participation in the other and, similarly, that a finding of no material participation should be conclusive for both purposes. While no cases have directly focused on the material participation requirement in the former §2057 context, this conclusion is supported by several IRS letter rulings, each of which deferred to the statutory direction to apply the §2032A "material participation" standard when analyzing former §2057 issues.[129]

[125] Section 2033A was enacted as part of the Taxpayer Relief Act of 1997 and provided a $1,300, 000 gross estate *exclusion* for the value of certain "qualified family owned business interests" of the decedent. Pub. L. No. 105-34 (Aug. 5, 1997).

[126] Pub. L. No. 105-206. For further discussion of the provisions of former §2057, see 829 T.M., *The Family-Owned Business Deduction — Section 2057.*

[127] Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, §221(a)(97) (Dec. 19, 2014).

[128] Former §2057(a).

[129] *See, e.g.,* PLR 200743031, PLR 200743027, PLR 200620020, PLR 200521001, PLR 200327016.

6. **Section 2032A Regulations: Material Participation**

a. **In General** —

The §2032A regulations discuss material participation in two contexts. First, where the individual is directly involved in managing the farm or business, the requirement is met if the individual is actually employed in managing the farm or business (i) on a full-time basis (35 hours or more per week) or (ii) to any lesser extent necessary personally to fully manage the farm or business, allowing for the seasonal nature of certain activities.[130] Second, if the activities are less than required for such "direct involvement," material participation must be pursuant to an arrangement providing for actual participation in the production or management of production, and must meet the standards prescribed by the §1402(a)(1) regulations.[131]

[130] In the case of a farming activity that is seasonal, material participation is present if all necessary functions are performed even though little activity occurs during nonproducing seasons. Reg. §20.2032A-3(e)(1).

[131] Reg. §20.2032A-3(e)(1). The regulations provide that, if no self-employment taxes were paid, material participation is presumed not to have occurred unless the executor establishes otherwise. Reg. §20.2032A-3(e)(1). *See* III.A.2., above.

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The regulations also provide other clarifications. First, the activities of several individuals cannot be aggregated to result in a finding of material participation. At least one individual at a given time must be engaged in sufficient activities to constitute material participation.[132] Second, while a member of the family may materially participate, the individual must be a member of the family at the time the activities were carried out.[133] For example, activities of X's spouse prior to marriage cannot be counted as material participation by a member of X's family.

[132] Reg. §20.2032A-3(e)(1).

[133] Reg. §20.2032A-3(e)(1).

For purposes of the five-of-eight-years test, brief periods (e.g., periods of 30 days or less) during which there was no material participation may be disregarded if both preceded and followed by substantial periods (e.g., periods of more than 120 days) in which there was uninterrupted material participation.[134]

[134] Reg. §20.2032A-3(c).

The regulations provide that the factors to be considered in determining the presence of material participation are as follows:[135]

[135] Reg. §20.2032A-3(e)(2).

- physical work;
- participation in management decisions;
- regular advice and consultation on operating the business;
- regularly inspecting production activities;
- advancement of funds for the operation;
- financing a substantial portion of operating expenses (i.e., in the case of a farm, a substantial portion of machinery, implements, and livestock used in production activities); and
- maintenance of a residence on the premises.

While no single factor is determinative, the first two factors listed above are described as the “principal” factors. At a minimum, the decedent or family member must provide regular advice and consultation and participate in a substantial number of final management decisions.[136]

[136] Reg. §20.2032A-3(e)(2). *See also* PLR 9117046 (finding material participation where family members make all management decisions and perform substantially all physical work).

b. **Material Participation by Arrangement** —

If there was a farm manager employed to operate the farm, the regulations require the decedent or family member to personally materially participate under the terms of an arrangement with the farm manager in order to be considered a material participant.[137] Thus, even if there is an agent employed by the owner, it is still possible for the owner to satisfy the material participation requirement.

[137] Reg. §20.2032A-3(e)(2).

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Although the regulations state that if involvement is less than full-time, there must be an arrangement providing for actual participation in the production or management of production. “Full-time” must be interpreted in the context of operating the specific farm or business. For example, if operating a farm does not require full-time efforts (35 hours per week or more), the “arrangement” requirement presumably does not apply if the individual personally and fully manages the business.[138] If the individual does not fully manage the farm or business, however, there must be an arrangement and the activities must satisfy the requirements of §1402(a)(1) and the §2032A regulations.

[138] Reg. §20.2032A-3(e)(1).

While the regulations provide that the arrangement may be oral, the regulations further provide that the arrangement must be formalized in a manner capable of proof.[139] A discussion of the required “arrangement” in the self-employment tax context is set forth in III.A.2.a., above.

[139] Reg. §20.2032A-3(e)(1).

Comment: The IRS argued that a special use valuation election was invalid because there was no “formal” arrangement when the arrangement was oral in nature and sufficient evidence of the arrangement was not provided.[140] Therefore, as a practical matter, the arrangement should be pursuant to a written document. Activities not contemplated by the arrangement will not be considered in determining the existence of material participation. Therefore, if the arrangement is in written form, it is important to include a sufficient number of activities to result in material participation.

[140] *See Finfrock v. United States*, 860 F. Supp. 2d 651 (C.D. Ill. 2012). In *Finfrock*, the service argued that a special use valuation election was invalid “because there was no formal arrangement calling for material participation by the decedent owner or a family member.” In that case, the executor replied that although there was no written arrangement, there was an oral arrangement. The IRS conceded that an oral arrangement may satisfy the material participation requirement, but stated it required additional documentation before the IRS would abandon its argument.

c. **Material Participation Under Lease** —

A substantial amount of case law analyzed material participation by a landlord under a crop share lease. Because lease arrangements are frequently used both as a farmer nears retirement and in the post-death period, it is important to understand the elements that will qualify the lease as a material participation lease.

Reg. §20.2032A-3(e) specifies several factors to be considered in determining the presence of material participation. As a result, the cases that address the issue of material participation are fact intensive. It appears from the cases and private letter rulings that actual physical inspection and substantial input into the decision-making process are important.

(1) **Material Participation Found** —

In *Mangels v. United States*,[141] the Eighth Circuit, reversing the district court, held that activities of the landlord under a crop share lease arrangement would be enough to constitute material participation. The court also held that the activities of a court-appointed conservator would be attributed to the disabled decedent. In overruling the lower court, the court cited its decision in *Foster v. Celebrezze*.[142] As the *Foster* case arose under §211(a)(1) of the Social Security Act,[143] which provides replacement income to farm owners and tenants who materially participate in producing or managing the production of agricultural or horticultural commodities, it is significant that the court in *Mangels* indicated a willingness to equate material participation under the

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Social Security Act and material participation under §2032A, augmenting the §2032A(e)(6) provision that material participation will be determined in a manner similar to that under §1402(a)(1). *Foster* and *Mangels* seem to suggest that it is inappropriate to set a standard that the landlord must participate beyond a normal amount for purposes of determining material participation with respect to both statutes.

[141] 828 F.2d 1324 (8th Cir. 1987), *rev'g sub nom. Foster v. Fleming*, 632 F. Supp. 1555 (S.D. Iowa 1986).

[142] 313 F.2d 604 (8th Cir. 1963), *rev'g* 190 F. Supp. 908 (N.D. Iowa 1960).

[143] 42 U.S.C. §411(a)(1).

The activities that constituted the landlord/conservator materially participating under the lease in *Mangels* were as follows:

- daily attention to farm market reports and executing futures contracts as required;
- physically inspecting the growing crops and the farm ground (approximately two hours per inspection) quarterly;
- monthly telephone or in-person contact with the tenant concerning operating problems (approximately one hour per month);
- annual sessions with the tenant concerning cropping decisions and the prospective year's operating plan (one and one-half to two hours per session);
- annual post-harvest analysis of the cash equivalent rental effect of annual crop share proceeds (approximately four hours annually); and
- occasional long-term management decisions.

The *Mangels* court determined that the activities of the landlord satisfied the two minimum requirements in the regulations of (i) regular consultation and (ii) substantial participation in final management decisions. The landlord jointly participated with the tenant in decisions concerning crop patterns and rotation; the level and formula of fertilizer application; chemical, weed and insect control; fence repair; plowing and minimum tillage techniques; seed and crop planting; and harvesting. In addition to the minimum requirements, two of the four additional factors in Reg. §20.2032A-3(e)(2) were present: regularly inspecting production activities, advancing funds, and assuming financial responsibility for a substantial portion of the farm's operating expenses. While the Commissioner argued that the inspections of only eight hours annually were inadequate, the court disagreed. Instead, it argued, the regularity requirement does not necessarily require expending a great deal of time nor frequent inspections. Rather, the sufficiency of the inspections must be measured against the total need for such inspections, as contemplated by Reg. §20.2032A-3(g) *Ex.* 7. The court also found that the landlord assumed financial responsibility and risk by paying one-half the fertilizer, pesticide, herbicide, and seed costs incurred in the farm operations.

The Tax Court in *Estate of Ward v. Commissioner* [144] found that there was material participation in a crop share rental arrangement where the landlord lived on the premises, inspected the crops on a regular basis, consulted directly with the tenant, and made decisions regarding harvesting and selling of her portion of the crops, independently of the tenant's decisions.

[144] 89 T.C. 54 (1987).

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In PLR 8939031, the IRS found that the payment for all property taxes and irrigation equipment, the individual's harvesting of his or her crop share, and a share of the fertilizer used, and both living on and regularly inspecting the farm, in conjunction with fulfilling the two basic requirements, was sufficient to establish material participation under the regulations.

(2) **Material Participation Not Found** —

In *Estate of Coon v. Commissioner*,[145] the Tax Court found that material participation by the landlord was absent where the farm was leased to an experienced tenant and the only participation by the decedent or a member of the decedent's family consisted of:

[145] 81 T.C. 602 (1983).

- discussing with the tenant the planned crops for the succeeding year;
- directing the tenant where to purchase the landlord's share of seed and fertilizer;
- consulting with the tenant regarding improvements or major repairs to the property; and
- occasionally viewing the farm and checking for damage after storms.

The Tax Court held in *Estate of Coffing v. Commissioner* [146] that the decedent did not materially participate for purposes of §2032A where she neither lived nor worked on the farm and was only minimally involved in management decisions. The decedent employed a farm manager whose activities were not attributed to the decedent. After he was hired, the manager and the decedent implemented a basic plan for operating the farm, which was not subsequently changed. The decedent had discussions with the farm manager concerning the seeds, herbicides, or fertilizer to buy and when or where to market the crops. The farm manager visited with the decedent about once a month. On three occasions, the decedent was consulted concerning farm management proposals. The farm manager took the decedent by automobile to visit the farm. During those visits she made limited inspections. In a comparison with the facts in *Coon*, the Tax Court found that in both instances the decedent assumed financial responsibility for a substantial portion of the expenses involved in operating the farm; however, in both cases neither machinery nor implements were provided by the decedent nor did the decedent reside on the farm. In *Coffing*, the decedent inspected the production to a greater extent than in *Coon*. On the other hand, there was less involvement in the decision making in *Coffing*. Based on those findings, the Tax Court held that there was not material participation.

[146] T.C. Memo 1987-336.

In *Estate of Heffley v. Commissioner*,[147] the Tax Court held that the activities of the decedent and her son did not constitute material participation. The land in question was farmed under a combination of rental arrangements prior to death. Although the decedent lived on the property, neither the decedent nor her son participated in management decisions. The record indicated that the tenants made all important decisions about operating the farm. The tenants chose the brand of seed, fertilizer, and herbicide to be used and determined the proper crop rotation. They also determined the appropriate time for planting, tilling, and harvesting crops. They neither sought nor received the advice of the decedent or her son on such matters. Furthermore, neither the decedent nor her son regularly inspected the crops or assumed financial responsibility for any expense of operating the farm except for the incidental expenses of applying lime to the soil. The son performed occasional minor chores, but he did so as the tenant's employee and not as the decedent's family member.

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[147] 89 T.C. 265 (1987), *aff'd*, 884 F.2d 279 (7th Cir. 1989).

Where real property is rented to an unrelated party for the conduct of a business, the material participation test is applied to the underlying business rather than the superimposed rental business. Thus, one cannot bootstrap into material participation in a rental context by arguing that the rental itself constituted a trade or business activity. In *Estate of Trueman v. United States*,[148] the Claims Court held that the decedent did not materially participate in the operation or management of two gas stations or a parking lot, which he had leased to unrelated third parties, where the decedent bore no part of the financial risk of the operation nor based its rent upon production.

[148] 6 Cl. Ct. 380 (1984).

d. **Material Participation Despite Failure to Pay Self-Employment Tax** —

Although the §2032A regulations presume that material participation is lacking where no self-employment tax was paid, special use valuation may still be available if the executor provides an explanation to the IRS and pays any applicable self-employment tax, interest and penalties.[149]

[149] Reg. §20.2032A-3(e)(1). For a more detailed discussion, see III.A.8, below.

7. **Material Participation: Real Property Owned by or Leased to an Entity** —

If a corporation, partnership, or trust owns or leases the real property, regulations require an arrangement calling for material participation by the decedent or member of the family.[150] In addition, the decedent's interest in the corporation, partnership, or trust must be an interest in a closely held business as defined by §6166(b)(1).[151] If the business is a partnership, §6166(b) requires that either 20% or more of the total capital interest in such partnership must be included in the gross estate of the decedent, or the partnership must have 45 or fewer partners. In the case of a corporation, either 20% or more in value of the voting stock of the corporation must be included in the gross estate of the decedent, or the corporation must have 45 or fewer shareholders.[152] There is no definition of interest of a closely held business in §6166(b) for a trust or estate.

[150] §2032A(g); Reg. §20.2032A-3(f)(1).

[151] §2032A(g); Reg. §20.2032A-3(b)(1). For a more detailed analysis of §6166, see X.A., and XIII.L., below, and 832 T.M., *Estate Tax Payments, Liabilities, and Liens (Sections 6161 and 6166)*.

[152] Prior to the enactment of Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, on June 7, 2001, the §6166(b) definitions of closely held partnership and closely held corporation limited the owners to 15. The EGTRRA amendments, increasing the number from 15 to 45, apply to estates of decedents dying after December 31, 2001, and thus, the 45-owner limitation is presumably applicable to decedents dying in 2002 or later for the entire pre-death period. Thus, if a decedent died in 2003 and had always materially participated in a partnership (or corporation) with 30 partners (or shareholders), the decedent's interest in the real property of such partnership (or corporation) would not be barred from special use valuation. EGTRRA's amendments of the §6166(b) partner/shareholder limits were made permanent by the American Taxpayer Relief Act of 2012 (ATRA), Pub. L. No. 112-240, §101(a)(1), §101(a)(3).

a. **Owned by Corporation or Partnership** —

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Serving as an officer or director in a corporation, or a general partner responsible for the management of the partnership, will not necessarily establish material participation. Participating in the management and operation of the property is the determinative factor. If the position's established duties are enough to constitute material participation, the requirement is satisfied. Although as corporate employees such individuals are not subject to self-employment tax, the activities must be sufficient to subject the individuals to self-employment taxes were they self-employed. Regardless of whether the individual serves as an officer, director, or employee, the determinative factor is participation in the qualified real property's management and operation.[153]

[153] Reg. §20.2032A-3(f)(2).

The National Office advised in TAM 9220006 that a decedent's ownership of preferred stock in a corporation that owned and operated a ranch met the requirements for a §2032A election. The decedent owned more than 78% of the preferred shares, and his children and grandchildren owned the remaining preferred shares and the common shares. The preferred and common stock had equal voting rights. Noting that a passive interest is not generally eligible for §2032A valuation under Reg. §20.2032A-3(b)(1), the National Office advised that even though the preferred stock did not participate in the appreciation in the corporation, it was nevertheless an equity interest eligible for special use valuation on the facts at hand.[154]

[154] See the discussion at X.C. and X.D., below.

b. **Owned by Trust** —

The §2032A regulations provide that if a trust owns property, an arrangement can generally be found in one of four situations:[155]

[155] Reg. §20.2032A-3(f)(1).

- appointing the individual with material participation as a trustee;
- an employer-employee relationship in which the participant is employed by a qualified closely held business owned by the trust in a position requiring material participation;
- a contract with the trustee whereby the participant manages or takes part in managing the property for the trust; or
- granting management rights to the beneficial owner in the trust agreement.

As with corporate and partnership-owned property, the determinative factor with respect to activities rendered pursuant to the arrangement is participation in managing and operating the qualified real property itself.[156]

[156] Reg. §20.2032A-3(f)(2).

c. **Owned by Estate** —

In the post-death period when real property is held by an estate, material participation is determined in the same manner as if a trust held the property.[157]

[157] Reg. §20.2032A-3(f)(2).

d. **Leased to Entity** —

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The regulations state:

> When real property is directly owned and is leased to a corporation or partnership in which the decedent owns an interest which qualifies as an interest in a trade or business within the meaning of section 6166(b)(1), the presence of material participation is determined by looking at the activities of the participant with regard to the property in whatever capacity rendered.[158]

[158] Reg. §20.2032A-3(f)(2).

If the qualified real property is leased by the decedent to an entity, the entity apparently must be a §6166(b)(1) closely held business with respect to the decedent. The regulations provide:

> Directly owned real estate that is leased by a decedent to a separate closely held business is considered to be qualified real property, but only if the separate business qualifies as a closely held business under §6166(b)(1) with respect to the decedent. . .[159]

[159] Reg. §20.2032A-3(b)(1).

Although the regulations expressly address only pre-death leasing by the decedent, in *Minter v. United States*,[160] the Eighth Circuit held that the §6166(b)(1) test set forth above should be used with respect to leasing by qualified heirs in the post-death period as well. The court did not appear to be concerned with the size of the interest in the closely held business. The court held the property interests were not subject to recapture where the decedent had held a 7% interest in the family farming corporation and the two qualified heir petitioners each held less than 6% interest therein.

[160] 19 F.3d 426 (8th Cir. 1994), *rev'g and remanding* No. 2:91-cv-00034, #35 (D.N.D. Sept. 28, 1992).

Comment: If the farm was leased to a nonfamily member, it would be possible to satisfy the qualified use and material participation requirements through a material participation crop share lease.[161] It seems that a material participation crop share lease to an entity should also qualify. There is no statutory justification for an additional requirement that the entity must be a §6166(b)(1) closely held business with respect to the decedent.

[161] *See* III.A.6.c., above.

8. **Material Participation and Self-Employment Tax** —

Most arrangements that contemplate material participation result in imposing the self-employment tax due to the relationship between §1402(a)(1) and §2032A. However, paying the self-employment tax does not conclusively prove the presence of material participation.[162] One cannot bootstrap oneself into satisfying the material participation test merely by paying the self-employment tax.

[162] Reg. §20.2032A-3(e)(1).

Alternatively, if no self-employment tax was paid, the presumption is there is no material participation unless the executor is able to satisfy the IRS that material participation did in fact occur, and informs the IRS why no tax was paid. If tax was due, all tax, interest, and penalties must be paid.[163]

[163] Reg. §20.2032A-3(e)(1).

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In TAM 8207006, the National Office advised that an estate attempting to qualify for special use valuation did not have to pay all unpaid self-employment taxes if the §6501(a) three-year statute of limitations had run. Section 6501(a) provides that no tax may be assessed three years after the return was filed. If no return was filed, §6501(c)(3) provides that an assessment may be made at any time. In the case considered by the IRS, the taxpayer filed a Form 1040 for each year the self-employment tax should have been paid. The income and expenses were reported on Form 4835, *Farm Rental Income and Expenses*. The IRS held that because the taxpayer had filed Form 1040 for all years in question, a return had been filed for self-employment tax purposes and §6501(c)(3) would not apply. Therefore, §6501(a) would permit assessing and collecting unpaid self-employment tax only for the three-year period following the date the Form 1040 was filed. If no self-employment tax was paid and Form 1040 was filed, the most that the estate electing use value could be assessed would be the tax for the three-year period.[164]

[164] *See also* TAM 8244014, TAM 8052011, TAM 8046012.

The IRS later ruled in Rev. Rul. 83-32 that the requirement in Reg. §20.2032A-3(e) that all self-employment taxes be paid is limited to those self-employment taxes that can be assessed at the time of the determination. The voluntary payment of self-employment taxes after the expiration of the assessment period does not waive the statute of limitations but instead constitutes an overpayment subject to refund or credit. From that the IRS reasoned that self-employment taxes that would result in overpayment are not taxes determined to be due within the meaning of Reg. §20.2032A-3(e).

Practice Tip: Rev. Rul. 83-32 does not clarify when the executor must make the determination that an unpaid self-employment tax may no longer be assessed. Common sense would dictate that the date of filing the estate tax return is determinative, because that is when the special use election is made and should be the point in time at which the determination of whether any self-employment tax is due can be made.

Rev. Rul. 82-185 addressed the related issue of whether filing a Form 1040 begins the running of the three-year statute of limitations on the self-employment tax where no Schedule SE was filed. Distinguishing Rev. Rul. 79-39, which ruled that the filing of a Form 1040 did not trigger the limitation period where the taxpayer had failed to separately report the Social Security tax on unreported tip income, the IRS ruled that because the self-employment tax was an integral part of the income tax, the filing of a Form 1040 reporting all income would start the limitation period.

9. **Material Participation and Social Security Benefits** —

If the decedent personally meets the material participation requirement, §2032A(b)(4) provides that the five-of-eight-year material participation requirement is determined as of the decedent's date of retirement (receiving Social Security benefits) or disability, if the retirement or disability is for a continuous period before the decedent's death. Thus, it is possible for an individual to retire, not continue to materially participate, and still qualify for special use valuation, if for five or more of the eight years prior to the decedent's retirement or disability there was material participation.[165]

[165] §2032A(b)(4). Prior to passage of the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, (for decedents dying prior to January 1, 1982) if the material participation requirement was met by the decedent personally, the income from a material participation rental arrangement would satisfy the pre-death material participation requirements for §2032A, but would reduce Social Security benefits if the individual earned more than the maximum allowance. Alternatively, if the individual eliminated the material participation aspects of the rental arrangement to avoid a reduction in Social Security benefits, his or her estate would not satisfy the §2032A material participation requirements unless the land was rented to a family member as a tenant. Thus, the material participation requirement forced retired or disabled persons renting land to an unrelated tenant to choose between qualifying for use valuation or receiving Social Security benefits.

Comment: This exception permitting an individual to discontinue material participation before death is limited to a period

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of continuous retirement before death. Thus, a trap exists for the individual who retires, discontinues material participation, and then later comes out of retirement and resumes work. Under this scenario, the general rule requiring material participation for five or more of the last eight years before death applies and, therefore, the lack of material participation during the retirement period could cause the estate to fail to qualify for §2032A valuation.

Example: Frank Farmer materially participated with respect to Parcel X for 10 years prior to 2015. In 2015, Frank retired at age 62. Four years later in 2019, Frank came out of retirement and farmed for one year. In 2020, Frank again retired and in 2021 he died. To qualify, Frank must participate for five of eight years prior to death. Frank cannot meet the test. Under the facts of this example, Frank had not materially participated for five or more of the last eight years before his retirement that continued until death (the second retirement). Therefore, the first retirement period from 2015 through 2019 is not excepted from the material participation requirement. As a result, Frank's estate will not qualify for special use valuation.

10. **Material Participation by Conservator** —

The Eighth Circuit, in *Mangels v. United States*,[166] found that activities of a legally appointed conservator were attributable to the decedent for purposes of satisfying the material participation requirements of §2032A. Pursuant to court approval, the conservator entered into crop share leases with the tenant and performed decedent's obligations under the leases. The court found that it would be putting form over substance to consider the conservator's actions differently from those of the decedent merely because the regulation defining material participation did not include a phrase specifically addressing the statutorily created conservatorship.

[166] 828 F.2d 1324 (8th Cir. 1987).

11. **Material Participation and Government Programs** —

In informal guidance and letter rulings, the IRS determined that participation in a land diversion program sponsored by the Department of Agriculture will be treated as materially participating in the operation of a farm with respect to the diverted acres and will not adversely affect the decedent or his or her qualified heirs from electing and retaining use valuation treatment under §2032A.[167]

[167] Announcement 83-43, PLR 8330016 (federal Payment-In-Kind Program). *See also* PLR 8946023 (state conservation easement program), PLR 8802026, PLR 8745016, PLR 8743004, PLR 8729037 (federal Conservation Reserve Program), Notice 2006-108 (federal Conservation Reserve Program). *But see Morehouse v. Commissioner*, 769 F.3d 616 (8th Cir. 2014), *rev'g* 140 T.C. 350 (2013), (citing Rev. Rul. 60-32 and distinguishing *Wuebker*, Eighth Circuit held that government Conservation Reserve Program payments received by nonfarmer were rentals from real estate under §1402(a)(1) and, thus, not subject to §1401 self-employment tax), *nonacq.* 2015-41 I.R.B. For a discussion on planning for federal agricultural programs, see XIII.S., below.

12. **Exchanges or Involuntary Conversions** —

Section 2032A contemplates the possibility of either a §1031 like-kind exchange or a §1033 involuntary conversion in either the pre-death or post-death period. These rules were significantly modified by the Economic Recovery Tax Act of 1981 (ERTA)[168] for decedents dying after 1981 in order to provide for more liberal rules with respect to the tacking of time periods to satisfy the five-of-eight-year rule for ownership, material participation and qualified use. Unfortunately, Reg. §20.2032A-3(d) was not updated to reflect these changes and still reflects pre-ERTA law, by providing that these time periods run from the date the involuntarily converted or like-kind exchange property was acquired.

[168] Pub. L. No. 97-34, § 421(h)(1), *§421(j)(4).*

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For decedents dying after 1981, the period of ownership of, use of, and/or participation in property disposed of in a §1031 exchange or as part of an acquisition that results in nonrecognition under §1033 may be tacked to that of the property acquired in the exchange or conversion to satisfy the qualified use test and the material participation test. The value of the replacement property eligible for tacking cannot exceed the value of property disposed of.[169]

[169] §2032A(e)(14)(B).

Example: Frank Farmer exchanged parcel X (100 acres) for parcel Y (200 acres). In addition to transferring parcel X, Frank gave $300,000 in cash. The value of parcel X on the exchange date was $100,000 and the value of parcel Y was $400,000. Material participation or qualified use of the exchanged property can be attributed to the qualified replacement property only to the extent of the fair market value of the exchanged property. Therefore, material participation and qualified use could be tacked from exchanged property to the qualified replacement property only with respect to one-fourth of the qualified replacement property.

If a decedent owned multiple tracts of property acquired in different years and converted through §1031 or §1033 to qualified real property, only the portion of qualified real property attributed to converted property that satisfies the five-of-eight-year test with tacking will be eligible for use valuation.[170]

[170] Rev. Rul. 81-285.

Example: Frank Farmer owned two tracts of farmland, X and Y, which were condemned in 2020. Frank received $100, 000 for tract X and $50,000 for tract Y. Prior to condemnation, Frank farmed tract X for 10 years and tract Y for three years. Frank acquired tract Z for $150,000 and died one year later in 2021. The proportionate share of tract Z attributable to tract Y will not satisfy the five-of-eight-year test with tacking. Therefore, only two-thirds of tract Z will satisfy the five-of-eight-year test.

Practice Tip: If there is an exchange or involuntary conversion of property subject to a §6324B lien, the designated agent should notify the IRS so that the lien can be transferred to the qualified replacement property.[171]

[171] PLR 8207050.

For additional discussion of involuntary conversions and like-kind exchanges in the post-death period, see VI.D.1.b. and VI.D.1.c., below.

13. **Conclusion** —

Establishing material participation is important both for qualifying for §2032A and for avoiding the recapture tax. The reference to §1402(a)(1), as guidance for determining material participation, is of only limited help, as the factual inquiry demanded by the §1402(a)(1) regulations was not well defined through case law interpreting that section. There is, however, considerable case law that analyzes material participation in the context of the Social Security Act. Although the language in §1402(a)(1) and SSA §211(a)(1) are almost identical, one should not assume that the liberal analysis of material participation in the context of the Social Security Act necessarily will be applied in the context of §2032A.

The factors that seem most influential in the Social Security Act cases[172] are assuming economic risk, significant financial commitments to the business's capital requirements, and final decision-making authority. Although the regulations in both the Social Security Act and the Self-Employment Contributions Act of 1954[173] place emphasis on advice, consultation, and inspections, the courts seem to place more significance on decision-making authority. The factors on which the courts and §2032A regulations seem to place the most significance are regular consultation and substantial participation in final management decisions. A pattern of on-site inspection and financial contribution also

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appears to be given substantial weight.

[172] *See* III.A.3., above.

[173] Pub. L. No. 83-761, also known as the Social Security Amendments of 1954.

Given that higher standards are required to establish material participation for purposes of §469, analysis of the law under §469 will be of limited use in defining material participation in the §2032A context. Nevertheless, §469 and the regulations thereunder do provide several objective tests for determining material participation that, if met, are likely to require a finding of material participation for special use valuation purposes.

It was suggested that the arrangement or lease should require involvement in making the following decisions:

- cropping patterns and rotation to be followed each year;
- levels of fertilization and formulae of fertilizer to be applied;
- participation or nonparticipation in government price/income support programs;
- plans for chemical weed and insect control, including type of chemical, rate of application and type of application (broadcast or band);
- soil and water conservation practices to be followed;
- scheduling of repairs to buildings, fences and tile lines;
- use of storage facilities as between landowner and tenant;
- changes in basic tillage practices (e.g., shift to minimum tillage);
- varieties of seed to be purchased;
- marketing of the landowner's share of the crop and coordinating delivery by the tenant; and
- with respect to livestock share leases, type of livestock production to be undertaken, level of production planned, nutrition and animal health plans, and marketing strategies.[174]

[174] Neil E. Harl, *Agricultural Law*, Vol. 2, §43.03[3][d][viii], pp. 43-160 to 43-161 (2008, updated semiannually).

Practice Tip: If material participation is being established by the owner pursuant to an arrangement/lease, the income should be reported on Schedule F rather than Schedule E of Form 1040. In addition, Schedule SE should be completed to report self-employment earnings arising from a material participation arrangement.

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B. Active Management

If the taxpayer does not meet the requirements of material participation for §2032A, as more fully described in III.A., above, he or she may alternatively meet the active management requirement to qualify for the §2032A election.

1. **Active Management in the Pre-Death Period** —

It is common for one spouse to be intimately involved in operating a farm or closely held business, while the other spouse's business activities remain limited. If a surviving spouse acquired “qualified real property” from a spouse, “active management” by the surviving spouse is treated as material participation in applying §2032A to the surviving spouse's estate.[175]

[175] §2032A(b)(5). Prior to 1981, the fact that one spouse was more involved in operating the farm or closely held business than the other spouse created a significant disparity in the estate tax treatment of otherwise similar couples depending on the spouses' order of death. Where the primary participant died *last*, electing special use valuation posed little problem, especially considering the rules relating to retirement or disability. In contrast, where the materially participating spouse died *first*, and passed the closely held business to the survivor pursuant to the marital deduction, it was necessary for the survivor (or a member of the survivor's family) to increase his or her involvement in the business to preserve the possibility of electing special use valuation upon such survivor's death. To alleviate the perceived inequity in this result, the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, introduced the “active management” test as a substitute for material participation by the surviving spouse in determining whether the historical usage requirements are met. To be eligible for the pre-death active management test as a substitute for material participation, it appears that the first deceased spouse must have died after 1976 when §2032A became part of the Code.

Comment: The active management test provides another example of Congress narrowly tailoring the benefits of special use valuation based on specific fact patterns. Only the surviving spouse of a material participant, and not any other heir, is eligible to substitute active management to qualify property for special use valuation at the heir's subsequent death. Furthermore, the exception applies only to qualified real property acquired from or passed from the first spouse to die. Consider the classic serial ownership of Spouse 1, then Spouse 2, then Son. Generally, special use qualification for S1's estate is unnecessary due to the marital deduction, but critical for S2's estate. In this fact pattern, only S1 and Son would need to materially participate, but S2 need only actively manage.

2. **Active Management in the Post-Death Period** —

There is a narrow “active management” exception for the future usage (post-death) material participation requirement. Under §2032A(c)(7)(B) and §2032A(c)(7)(C), the material participation requirement to avoid the IRS imposing recapture tax is met by active management by a qualified heir who is a surviving spouse, a minor under the age of 21, a disabled individual, a student,[176] or a fiduciary for a minor or disabled heir.

[176] For this purpose, “student” is defined with reference to §152(f)(2) as an individual who, for five calendar months during the relevant taxable year “is a full-time student at an educational organization described in section 170(b)(1)(A)(ii)” or “is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational organization described in section 170(b)(1)(A)(ii) or of a State or political subdivision of a State.” §2032A(c)(7)(D).

3. **Requirements of Active Management** —

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The Senate Finance Committee Report for Economic Recovery Tax Act of 1981[177] provides that the active management requirement can be met even though no self-employment tax is payable under §1401.[178] Therefore, if the Committee Report position is adopted by the IRS, a surviving spouse could lease the qualified real property pursuant to an active management rental arrangement, satisfy the pre-death and post-death material participation requirements with respect to real property acquired from or passed from the deceased spouse, and not have the §1401 self-employment tax imposed on the income earned from the rental arrangement.

[177] Pub. L. No.

[178] S. Rep. No. 97-144, at 134 (1981), *reprinted* in 1981-2 C.B. 412. But note that “material participation” is defined to include liability for the self-employment tax. §2032A(e)(6).

Active management is defined by §2032A(e)(12) as the making of the management decisions of a business, other than daily operating decisions. The House Committee Report provides that, in the farming context, combinations of the following activities constitute active management:

> [I]nspecting growing crops, reviewing and approving annual crop plans in advance of planting, making a substantial number of the management decisions of the business operation, and approving expenditures for other than nominal operating expenses in advance of the time amounts are expended. Examples of management decisions are decisions such as what crops to plant, or how many cattle to raise, what fields to leave fallow, where and when to market crops and other business products, how to finance business operations, and what capital expenditures the trade or business should make.[179]

[179] H.R. Rep. No. 97-201, at 170-171 (1981), *reprinted* in 1981-2 C.B. 352.

A surviving spouse's active management may be tacked to a deceased spouse's material participation to satisfy the five-of-eight-year material participation requirement.[180] A surviving spouse can tack even though there was an intervening period with no material participation by the deceased spouse prior to death during a continuous period of retirement or disability.

[180] §2032A(b)(5)(C).

Example 1: Assume that B dies two years after A (B's spouse), in whose estate Whiteacre was eligible for special use valuation. B engaged in the active management of Whiteacre during the two years following A's death. A was retired for five years immediately before A's death but had materially participated in Whiteacre's operation for eight years before her retirement. The six most recent of the eight years before A's retirement will be considered with B's two years of active management for purposes of satisfying the five-of-eight-year period pre-death material participation requirement for B's estate.[181]

[181] H.R. Rep. No. 97-201, at 170 (1981), *reprinted* in 1981-2 C.B. 352.

TAM 200911009 cites the House Committee Report example and expands it to apply to a situation where the surviving spouse was retired from the activity. In the TAM, the National Office advised that material participation existed for a farmer's surviving spouse when the farmer materially participated for five of the eight years preceding a farmer's retirement and the spouse was already retired at the time of the farmer's death.

Example 2: Assume the same facts as in Example 1 except that B did not engage in the active management of Whiteacre after A's death because B was already retired upon A's death. The eight years before A's retirement will be considered for purposes of satisfying the five-of-eight-year period pre-death material participation requirement for B's estate.

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Estates, Gifts and Trusts Portfolios
Estates, Gifts and Trusts Portfolios: Valuation
Portfolio 833-4th: Special Use Valuation (Section 2032A)
Detailed Analysis
III. Definitions

C. Qualified Use

In addition to material participation, the qualified use requirement is the other principal gate that limits access to the benefits of special use valuation. A qualified use of real property is (i) use as a farm for farming purposes or (ii) use in a trade or business other than farming.[182]

[182] §2032A(b)(2). The distinction between a "farm" and other trades or businesses is only important for the required valuation method. While farms may be valued using either a capitalization of rents method or a five-factor method, other trades or businesses must use the five-factor method. *See* IV.C., below.

1. **Farm vs. Closely Held Business** —

The legislative history of §2032A indicates Congress's intent to limit the benefits of special use valuation to real property subjected to a trade or business use.[183] In order to limit applying the "capitalization of rents" method of special use valuation to farm property, however, the statute distinguishes between property used as a farm for farming purposes and property used in a trade or business other than farming.[184]

[183] H.R. Rep. No. 94-1380, at 21, 23 (1976).
[184] §2032A(b)(2).

Section 2032A(e)(4) defines a farm as including "stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards and woodlands."

A farming purpose is defined as:

• cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm;

• handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state, but only if the owner, tenant, or operator of the farm regularly produces more than one-half of the commodity so treated; and

• either the planting, cultivating, caring for, or cutting of trees, or the preparation (other than milling) of trees for market.[185]

[185] §2032A(e)(5).

Neither revenue from the sale of farmable land nor revenue derived from the sale of development rights attached to such land constitute income from the trade or business of farming for the purposes of §2032A(e)(5).[186]

[186] *Rutkoske v. Commissioner*, 149 T.C. 133 (2017) (where farmers conveyed conservation easement in bargain sale to qualified exempt organization and sold remaining interest in

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underlying land to third party, Tax Court held that these sales are not activities listed in §2032A(e)(5), and therefore proceeds from these sales do not constitute income from the trade or business of farming for purposes of §170(b)(1)(E)(v)).

The House Committee Report for the Tax Reform Act of 1976 indicates that the activities conducted on the real property are determinative of whether the real property was used as a farm for farming purposes.[187] Consistent with this notion, the IRS held that real property used for a hunting operation is not property used for farming purposes.[188]

[187] H.R. Rep. No. 94-1380, at 21, 23 (1976).

[188] TAM 8516012. While not referenced in §2032A or its accompanying regulations, the definition of “farming business” provided in Reg. §1.263A-4(a)(4) may also provide guidance on how the Treasury Department defines farms.

2. **Land, Buildings and Other Property** —

In addition to land, qualified real property devoted to a qualified use may include a residence on the real property occupied on a regular basis by the owner, lessee, or an employee of the owner or lessee for the purpose of operating the farm or business.[189] A farm residence occupied by the decedent owner of the specially valued property is considered to be occupied for the purpose of operating the farm even though a family member (not the decedent) was the person materially participating in the operation of the farm.[190] Also included are roads, buildings and other structures and improvements functionally related to the qualified use. The regulations interpret this to require use or occupation on a regular basis for the farm or business purpose.[191]

[189] §2032A(e)(3).

[190] Reg. §20.2032A-3(b)(2).

[191] Reg. §20.2032A-3(b)(2).

The buildings must be devoted to the qualified use.[192] The Claims Court held that a residential dwelling that is leased to a third party is not qualified real property.[193] The court reasoned that there was “no devotion” of the property by the decedent to any business use, as required by §2032A(b)(2). The court pointed out that the issue is the actual physical use to which the property is put and not merely the relationship of the property as a profit source for the owner.

[192] §2032A(b)(2).

[193] *Estate of Trueman v. United States*, 6 Cl. Ct. 380 (1984); *see also Estate of Geiger v. Commissioner*, 80 T.C. 484 (1983); PLR 8306049.

A mineral interest located on the qualified real property does not qualify for special use valuation and should be reported separately at fair market value. In Rev. Rul. 88-78, the IRS ruled that if a royalty interest in mineral deposits on the property was separately reported at fair market value, there would be no recapture upon its subsequent disposition. Conceivably a working mineral interest could qualify for special use valuation, but it is unlikely that its special use value as a working mineral interest would be any less than its fair market value. Citing Rev. Rul. 88-78, the National Office advised in TAM 9443003 that the land and buildings constituting a stone quarry qualified for §2032A valuation, but that the value of the stone in the quarry (i.e., the mineral interests) must be included in the decedent's estate at its fair market value.

Groundwater underneath specially valued pastureland is also generally not a part of the qualified use. In PLR 200608012, the IRS ruled that selling specially valued land's groundwater would not trigger the recapture tax where the §2032A election did not include groundwater rights and the specially valued land was mostly pastureland that did not need irrigation.[194]

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[194] The property specifically used to remove groundwater, however, was subject to the recapture tax. See discussion in VI.D.1.g., below.

The Eleventh Circuit held that pastureland and cropland that on their own could not qualify for special use valuation cannot be considered as qualified adjacent timberland because the properties were not "functionally related."[195]

[195] *Estate of Sherrod v. Commissioner*, 774 F.2d 1057 (11th Cir. 1985), *rev'g* 82 T.C. 523 (1984). See discussion at III.C.6.b.(2), below.

3. **Special Rule for Woodlands** —

The executor of an estate can elect that the trees growing on a qualified woodland be treated as part of the woodland rather than a growing crop.[196] To be a qualified woodland, the woodland must be an identifiable area used as a timber operation for planting, cultivating, caring for, and cutting trees, or preparing trees for market (not milling).[197] The election must be made at the time the federal estate tax return is filed and is irrevocable.[198]

[196] §2032A(e)(13). *See, e.g.*, FSA 199924019. This is applicable to deaths after 1981. Before 1981 and the passage of the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, the IRS ruled in TAM 8046012 that merchantable timber and young growth should not be considered a part of qualified real property, but rather should be valued at fair market value as growing crops.

[197] §2032A(e)(13)(B).

[198] Reg. §22.0(a) provides detailed guidance on making the election. The election is made with the estate tax return and must specify both the property subject to the election and such information as may be necessary for the IRS to determine whether the election was proper.

4. **Community Property** —

If at the time of death the decedent and the surviving spouse held qualified real property as community property, §2032A(e)(10) provides that "the interest of the surviving spouse in such property shall be taken into account . . . to the extent necessary to provide a result . . . with respect to such property which is consistent with the result which would have obtained . . . if such property had not been community property."

For purposes of §2032A, community property is treated as if the property were wholly owned by the decedent in his or her individual capacity. The community property's full value will be considered for purposes of satisfying the 50% and 25% tests. In technical advice,[199] the National Office advised that where one-half of all community property assets are included in a noncontributing (within the meaning of §2040(a)) predeceasing spouse's gross estate, the reduction limit under §2032A(a)(2) applies in full against the decedent's one-half community property share.

[199] TAM 8227014; *see also* TAM 8301008, TAM 8229009 and TAM 8023027.

5. **Point-in-Time and Period Tests** —

Unlike material participation, the qualified use test is both a point-in-time test[200] and a period test.[201] There must be a qualified use both at the *point in time* of death and over a *period* comprised of five or more of the eight years prior to death. In contrast, material participation is solely a period test because it is required only for five of eight years prior to retirement, disability, or death.[202]

[200] §2032A(b)(1)(A)(i); *see also* TAM 8435013, TAM 8435008.

[201] §2032A(b)(1)(C)(i).

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[202] §2032A(b)(1)(C)(ii).

An example of a cash lease arrangement that failed both qualified use tests is found in *Estate of Heffley v. Commissioner*.[203] There, the lease provided for the payment of a specified amount of cash and a specified number of bushels of a commodity. The taxpayer failed both the period and point-in-time tests because her §2032A farm was rented to a nonfamily member at the time of her death and for four of the five years prior to her death.[204]

[203] 884 F.2d 279 (7th Cir. 1989), *aff'g* 89 T.C. 265 (1987).

[204] No qualified use was found due to the lack of an "equity interest" under the lease. See III.C.6., below, for a discussion of leasing arrangements under the "equity interest" rules.

In *Brockman v. Commissioner*,[205] the dispute focused on whether the pre-death five-of-eight-year test for qualified use was met with respect to 100 acres of a 443-acre farm. At audit, the IRS agreed that the decedent's family had used 343 acres for a qualified use, with material participation, for the eight years before his death. However, the IRS disallowed special use valuation for the 100 acres that had been leased to a neighbor for cattle grazing as a fixed cash rental for five summers and was not used during the winter months. The Tax Court held that, because the rental periods totaled less than 36 months, the estate had met the five-of-eight-year test. Reversing, the Seventh Circuit held that unproductive months (the winter months) may be counted as qualified use periods only when the decedent or his or her family member actually used the property during the productive months. Here, the family's activities during the winter months did not expose the family to any farming risks, thus indicating a landlord's role and a lack of qualified use.[206]

[205] 903 F.2d 518 (7th Cir. 1990), *rev'g sub nom. Estate of Donahoe v. Commissioner*, T.C. Memo 1988-453.

[206] See the discussion of the equity interest requirement at III.C.6., below.

Both parts of the qualified use test were satisfied in TAM 9433003, even though the decedent, at the time of his death, was planning to develop as residential real estate unimproved land used in a horse boarding and riding business, had entered into a contract with a land development company to begin the necessary planning and engineering, and had applied for a preliminary subdivision plan. The National Office advised that (i) the horse operation began in 1985 and continued uninterrupted until the decedent's death in 1991, and (ii) at no time during the decedent's life was any physical action taken that prevented the land from being used in the horse operation business.

In the post-death period, the continuous qualified use requirement is tempered by a grace period of up to two years after death.[207] To the extent the grace period is used, however, the recapture period is extended for a like time.[208]

[207] §2032A(c)(7)(A). See III.C.7., below, concerning the grace period.

[208] §2032A(c)(7)(A)(ii).

6. **Equity Interest "At Risk" vs. Passive Interests**

a. **In General** —

In order to be eligible for §2032A valuation, *either* the decedent *or* a member of the decedent's family must use the property for a qualified use during the pre-death period. The regulations state that the decedent or a member of the decedent's family must hold an "equity interest in the farm operation."[209] Thus, the qualified use test can be satisfied if the decedent had cash rented the farm to a family member,[210] as the renting family member would maintain the required "equity interest." In contrast, the decedent's passive rental to any other party is insufficient to maintain §2032A eligibility.[211]

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[209] Reg. §20.2032A-3(b)(1). Note that, prior to ERTA, §2032A did not expressly provide for pre-death qualified use by a member of the decedent's family. When the IRS issued proposed regulations regarding the “equity interest” rule in 1980, the proposed regulations required that the equity interest be held by the decedent. This created a problem in that the common procedure of cash renting the family farm to a child would not satisfy the equity interest aspect of the qualified use test. Accordingly, the IRS announced in April 1981 that the qualified use test could be satisfied in the predeath period by the decedent or a member of the decedent's family. IRS News Release *IR 81-147* (Apr. 27, 1981). This policy was then codified by ERTA and is reflected in the present regulations. Note that no such change was made to the qualified use test applicable to the post-death period.

[210] TAM 8803004, TAM 8735001, TAM 8652005, TAM 8540003, PLR 8508081, TAM 8435013, TAM 8435008, PLR 8408020, TAM 8201016.

[211] Reg. §20.2032A-3(b)(1).

In the post-death period, however, the qualified use test must be satisfied by continuous qualified use by the qualified heir.[212] Unlike in the pre-death period, the post-death test cannot be satisfied by a member of the qualified heir's family maintaining an equity interest.[213] Therefore, it is not possible to qualify by cash renting to members of the qualified heir's family in the recapture period, except during the two-year grace period following death or under the special §2032A(c)(7)(E) provisions allowing qualified heirs who are also the decedent's surviving spouse or a lineal descendant to cash rent special use property to family members of such qualified heirs.[214]

[212] §2032A(c)(1)(B).

[213] TAM 8240015.

[214] The two-year grace period is discussed in III.C.7., below. For a more specific discussion on applying the equity interest rule to post-death recapture, including the §2032A(c)(7)(E) surviving spouse and lineal descendant exception, see VI.D.2.b.(2), below.

Practice Tip: It is inadvisable for a member of the qualified heir's family merely to pay a cash rent or use the property in the post-death period without compensation. The qualified heir must have something at risk. If there is nothing at risk, the IRS may take the position that there is not an “equity interest in the farming operation.”[215]

[215] TAM 8108004 (pre-ERTA denial of special use valuation when decedent allowed lineal descendants to use land rent free).

b. **Lease Arrangements** —

Like material participation, the elements of qualified use in a lease arrangement have been subject to substantial analysis in case law and IRS rulings. Understanding the elements of qualified use in the context of a lease is important for qualifying the estate for special use valuation in the pre-death period and avoiding recapture in the post-death period. The analysis in the rulings and cases gives an indication of the elements that must be present to satisfy the qualified use test.

(1) **Crop Share** —

If the landlord leases farmland to a nonfamily member pursuant to a crop share lease in which the landlord shares in the economic risk of the farm operation, the qualified use test should be satisfied.[216] The lease would also have to be a material participation crop share lease to satisfy material participation requirements.

[216] *See, e.g.*, PLR 9033030 (finding qualified use under farming share lease where

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lessee farmed but decedent equally shared all expenses, profits and losses).

To satisfy the “equity interest” requirement, the decedent or the decedent's family member in the pre-death period, and the qualified heir in the post-death period, must have something at risk. A standard crop share lease should satisfy the “equity interest” requirements set forth in the regulations. In a crop share lease, the landlord shares in the expenses and the crops produced. Two types of business risks are present under a crop share lease: (i) a market risk attributed to changes in market price for the crops or livestock produced; and (ii) production risk relating to quantity produced, which is dependent upon such factors as weather and management skills. There are numerous variations to the standard crop share lease. Most of those variations result in shifting risk from the landlord to the tenant. As the landlord shifts risk to the tenant, there is less assurance that the equity interest requirement will be satisfied.

(2) **Cash Rent** —

At the other end of the spectrum, except for (i) leases by the decedent to a member of the decedent's family in the pre-death period, (ii) leases during the two-year grace period, or (iii) leases by a surviving spouse or lineal descendant in the post-death period to a member of such surviving spouse or lineal descendant's family, if the farmland is leased through an ordinary cash rent lease, the qualified use test ordinarily will not be satisfied.[217]

[217] *See, e.g.*, *Hohenstein v. Commissioner*, T.C. Memo 1997-56 (initiating cash lease arrangement to unrelated parties during recapture period triggers recapture).

In *Estate of Sherrod v. Commissioner*,[218] the Eleventh Circuit reversed the Tax Court's finding that certain pastureland and cropland owned by the decedent were used for a qualified use. The decedent's land was divided into the following three categories: (i) 270 acres of cropland partially rented under a cash lease, (ii) 1, 108 acres used for timberland, and (iii) 100 acres of pastureland partially rented under a cash lease. As the timberland was in a state of natural forestation and the decedent had inspected it at least twice annually, the IRS conceded that it was qualifying real property.[219] The court held that the cropland and pastureland were not employed in an active trade or business and therefore did not satisfy the qualified use test.[220] As a result, the 26% of the overall adjusted gross estate held as the timberland did not satisfy the 50% test of §2032A(b)(1)(A) and the timberland failed to qualify for alternate valuation.[221]

[218] 774 F.2d 1057 (11th Cir. 1985), *rev'g* 82 T.C. 523 (1984).

[219] *See also* IRS NSAR 20250 (Dec. 2, 2002) (“[I]t is clear that forestry is treated as farming.”).

[220] The executors argued, and the lower court supported, the position that it is irrelevant that the activity with respect to an isolated part of the enterprise does not meet the required standard so long as the sum of the activities constitutes a trade or business. The Eleventh Circuit pointed out that real property, such as the pastureland and cropland, physically connected to qualifying farmland is not automatically classified as qualifying real property for purposes of §2032A and that §2032A(e)(3) provides that nonqualifying real property must be “functionally related” to other qualifying real property.

[221] For a discussion of the §2032A(b)(1)(A) rules applied in *Sherrod*, see II.A.3., above.

In *Estate of Trueman v. United States*,[222] the decedent rented two residences, a parking lot, and two gas stations to unrelated parties. The court held that such a passive rental income business did not amount to a qualified use under §2032A, even though the gas stations and parking lot operations by the unrelated parties were active businesses that themselves would be qualified under the statute. Similarly, the two residences,

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which were rented solely as dwellings, could not be treated as qualified real property under §2032A(e)(3). The court reasoned there was no "devotion" of the property to any business use.

[222] 6 Cl. Ct. 380 (1984).

(3) **Mixed** —

The IRS issued a series of private letter rulings and the National Office issued technical advice memoranda which, together, illustrate the permitted boundaries of a rental based at least in part on a percentage of income. In TAM 8516012, the National Office advised that where lease payments are based upon a percentage of the operation's income, the lease payments are dependent on production, and therefore, the property is used in a trade or business for §2032A purposes. It is notable that the National Office's position might have been different if the initial installment was a fixed minimum. In PLR 8639022, the IRS found that a rental based on a percentage of income with a cap on the total rent earned satisfied the qualified use test. In another arrangement where the farm was leased for a base rent of $50.00 per tillable acre plus 5% of profits, the National Office advised that the equity interest requirement was not satisfied.[223]

[223] TAM 8652005.

Practice Tip: A lease with a fixed minimum rent may not satisfy the equity interest requirement and, as a result, fail the qualified use test.

In a letter ruling, the IRS ruled that where the landlord receives the first X bushels of grain, but cannot receive more than the crop amount produced, the landlord satisfies the qualified use test. The IRS stated that because the landlord's return was contingent upon what the land produced, the landlord had an "equity interest in the farming operation."[224]

[224] PLR 8217193.

The National Office, in a technical advice memorandum,[225] advised that the landlord did not have sufficient risk to satisfy the equity interest requirements under a hybrid crop share lease arrangement. The lease formula was based on a two-tier computation. The first tier determined a base payment to the landowner. This payment was determined by multiplying 50% of the total acres leased, the hypothetical yield for market corn, and the average price of market corn for May delivery on the commodity grain futures market quoted by the Chicago Board of Trade during the preceding month of December. The landlord would receive this base payment regardless of the farm's yield, except if there was no hybrid seed corn harvested by the tenant on the farm during the crop year. In addition to the base payment, the landlord would receive a second-tier payment. This additional payment used the actual tenant's average seed corn production on all the farms it operates. For the first 16 bushels of the average production, the landlord would receive one-half of the number of bushels multiplied by twice the same price of May futures used in the first-tier calculation. For all bushels over 16, the landlord would receive one-half of the number of bushels multiplied by the same first-tier futures price.

[225] TAM 8230007.

The National Office advised that although the price for the crop was not fixed at the time the lease was entered into, the decedent did not bear a substantial risk as to the farming operation's production.

In *Estate of Heffley v. Commissioner*,[226] the Tax Court and the Seventh Circuit held that a lease that provided for a specified cash payment and a commodity's specified number of bushels did not satisfy the qualified use

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test. The court's rationale was that income was not dependent upon production. The only risk was the price risk for the commodities. Price risk was not enough to satisfy qualified use.

[226] 884 F.2d 279 (7th Cir. 1989), *aff'g* 89 T.C. 265 (1987).

In *Schuneman v. United States*,[227] the Seventh Circuit reversed the district court and held that rent received under a cash lease to an unrelated party satisfied the qualified use requirement of §2032A because a rental adjustment clause effectively shifted part of the farming risk to the decedent, and amounts paid under the lease were substantially dependent upon production. The lease provided for two different levels of cash rent with the applicable level being determined by yield and price for the lease year.[228] The district court had held that the passive rental of the farmland at the decedent's death did not satisfy the "qualified use" requirement.

[227] 783 F.2d 694 (7th Cir. 1986), *rev'g and rem'g* 570 F. Supp. 1327 (C.D. Ill. 1983). *See also Bruch v. United States*, 86-2 USTC ¶ 13,692, *86-2 USTC 86,244* (N.D. Ind. 1986).

[228] In AOD 1986-047, the Chief Counsel's Office recommended against seeking certiorari in *Schuneman*. However, the AOD stated that the court's emphasis on whether the rent adjustment clause was likely to be triggered was erroneous. The Chief Counsel explained that such an analysis is administratively impractical and that a better approach would be to focus on the lease arrangement itself. The Chief Counsel added that the court erred in stating that the decedent would have satisfied the qualified use test if, at the time of her death, she materially participated in operating the farm or that her rental income was substantially dependent upon farm production. Citing, inter alia, *Estate of Sherrod v. Commissioner*, 774 F.2d 1057 (11th Cir. 1985), the Chief Counsel's Office explained that qualified use and material participation are separate requirements, both of which must be satisfied to qualify for special use valuation.

As is made clear by several cases and rulings, participation in activities alone is not enough to demonstrate an "equity interest." The lessor must maintain an economic stake in the overall operations, consistent with entrepreneurial activity. As framed in *Shuneman*, "We can answer this question by determining whether she had assumed risk under the lease substantially approaching the risk that she would have incurred had she farmed the land herself".[229] Where a cash rent lease required the landlord to undertake certain limited responsibilities, the National Office advised that there was not an "equity interest in the farming operation."[230]

[229] 783 F.2d 694, 700 (7th Cir. 1986).

[230] TAM 8201016.

In another case involving the rental of otherwise qualified property to an unrelated third party, the Tax Court[231] adopted the reasoning of the Claims Court in *Estate of Trueman v. United States*,[232] in ruling that qualified use applies to the underlying use to which property is put rather than the derivative use to which rental property is put. Thus, leasing a cattle ranch to an unrelated corporation for cattle operations at a fixed sum did not qualify the ranch for §2032A treatment, even though the individual lessor continued to live on the ranch and was primarily responsible for its maintenance and upkeep during the lease's term.

[231] *Estate of Abell v. Commissioner*, 83 T.C. 696 (1984).

[232] 6 Cl. Ct. 380 (1984). *Estate of Trueman* is further discussed in III.C.6.b.(ii), above.

In *Martin v. Commissioner*,[233] the Tax Court followed its decision in *Abell* and held that the cash lease of the

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decedent's farmland to an unrelated party ended the farm's qualified use by a qualified heir and thus triggered the §2032A(c)(1)(B) recapture tax. In *Martin*, the decedent bequeathed to seven heirs, as tenants in common, a 209-acre family farm. At the decedent's death, the farm was leased to his son-in-law on a sharecrop basis. After the decedent's death in 1978, the executor elected special use valuation for the property. The executor terminated the sharecrop lease, and in August 1979, entered a one-year cash lease of the entire tillable portion of the farm with an unrelated third party. The rental was not based upon the level of crop production from the farm; instead it involved a flat fee based on the number of tillable acres.

[233] 84 T.C. 620 (1985), *aff'd*, 783 F.2d 81 (7th Cir. 1986).

While the cash lease was in effect, the lessee conducted the farming operation with the lessee's own equipment. Two of the heirs performed maintenance and operational duties and a third heir (the executor) regularly conferred with the lessee, providing advice regarding crop locations, plowing and fertilizing methods, etc. At the end of the cash lease, the lessor executed a sharecrop lease with the same lessee for approximately 143 acres. The court held that the recapture tax was due, because a qualified use must be a trade or business use, and not merely a passive rental.

The Seventh Circuit, in affirming the Tax Court's decision in *Martin*, relied heavily upon the legislative history of §2032A [234] and gave substantial weight to the fact that Reg. §20.2032A-3 closely followed the committee reports in stating that “the mere passive rental of property to a party other than a member of the decedent's family will not qualify.”

[234] H.R. Rep. No. 94-1380, at 21-23 (1976); H.R. Rep. No. 97-201 (1981); S. Rep. No. 97-144 (1981).

The Tax Court in *Hight v. Commissioner* [235] held that a surviving spouse/executrix's net cash leasing ended qualified use, rejecting the taxpayer's argument that her frequent visits to the ranch met the physical or financial participation threshold expounded in *Martin*.

[235] T.C. Memo 1990-81.

In *Brockman v. Commissioner*,[236] the fixed cash rental of pastureland to an unrelated party was found not to be a qualified use. The family did pay for and physically participate in upkeep during the winter months, but this was not enough to give them an economic stake in the actual farming operations. Citing *Sherrod*, the court held that merely proving a legitimate business purpose is insufficient to bring the situation within the statute. The decedent and her family were not “in the business of farming” on the acreage, even if the property's use was consistent with good land management and benefited the rest of the farm.

[236] 903 F.2d 518 (7th Cir. 1990), *rev'g sub nom. Estate of Donahoe v. Commissioner*, T.C. Memo 1988-453.

In TAM 9428002, the National Office, citing *Brockman*, advised that there was no qualified use where a decedent leased ranchland to independent ranchers during grazing season for a fixed-dollar amount determined by the number of cattle brought onto the land. The tenants took the land in “as is” condition and were solely responsible for stocking, feeding, watering, and otherwise maintaining their cattle. The National Office also advised that collecting a flat fee from hunters to hunt on the ranch was a passive rental activity that was not qualified use.

A farmland lease may make use of both a cash lease and a crop share, depending upon the lessee's or

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lessor's election. This was the situation in *Estate of Gavin v. United States*,[237] where the decedent, shortly before his death, leased farmland to his son under a lease that gave the son the option of a cash lease or a crop share for the first year, and then gave the same option to the father (and hence, upon his death, to the estate) for the ensuing lease term. The land was left to the children and grandchildren as qualified heirs. Although the son had farmed the land on crop shares when his father died, he switched to a cash lease shortly thereafter. The IRS denied the §2032A election, finding that the cash lease ended the qualified use. The Eighth Circuit, reversing an unreported district court decision, held that the land qualified for special use valuation. The court concluded that the interests held by heirs were substantially dependent upon production because, during the first year, it was likely that the son would choose to use a crop share if production were poor, and likewise during later years the heirs would choose to use a crop share if production were high. The court also found significant the fact that the son was granted a purchase option under the terms of the will, locking the heirs into an arrangement dependent upon the son's purchase decision, which in turn was at least partially dependent on the farm's profitability; and, when the son eventually did exercise his right to purchase the property, his continuous active farming clearly satisfied the qualified use requirement.

[237] 113 F.3d 802 (8th Cir. 1997), *rev'g in part*, No. 194-cv-00161, Entry No. 34 (Aug. 13, 1996).

Comment: Gavin arose before adding the lineal descendant cash leasing rules under the Taxpayer Relief Act of 1997.[238] As the decedent's son should be deemed a member of all of the other qualified heirs' families, under the amended rules it appears that the same decision would have been reached without the need to find "substantial dependence on production." However, the Eighth Circuit's analysis should still be relevant in situations where the lessor is not a member of the qualified heirs' families.

[238] Pub. L. No. 105-34.

In PLR 201129019, the IRS followed the reasoning in *Gavin* in finding that a leasing arrangement that gave the lessee the option to pay cash or a percentage of crops grown would not end qualified use. There, the decedent entered a cash lease of his farm with a general partnership owned by his family and he actively and materially participated in the farming operation until his death. Upon his death, part of the farm passed to the decedent's child and a trust for the benefit of that child's children. The executor of the decedent's estate elected to value the farm under §2032A. The child and trust transferred their undivided interests in the farm to a limited liability company in exchange for proportionate interests in the limited liability company. The limited liability company then entered into a lease with the partnership, allowing the partnership *in its sole discretion* to pay the limited liability company a certain sum of cash per year or a certain percentage of crops grown. Relying in part on *Gavin*, the IRS ruled that the payment terms met the requirements of §2032A because the owner's rent was substantially dependent on production as the lessee would undoubtedly choose the cash option in bountiful years and the crop share option in lean years.[239]

[239] PLR 201129019 (citing *Estate of Gavin v. United States*, 113 F.3d 802 (8th Cir. 1997)).

Practice Tip: Whenever there is a deviation from the standard crop share lease that shifts risk from the landowner to the tenant, there is a substantial risk that the equity interest aspect of the qualified use test may not be satisfied. It is recommended that, in order to assure satisfying the qualified use test, the lease should not deviate from the standard crop share lease arrangement through which the landlord and tenant both share in the market and production risks.

Comment: For additional cases and rulings dealing particularly with issues tending to arise in satisfying the

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equity interest requirement under leasing arrangements in the post-death recapture period, see VI.D.2.b., below.

c. **Property Sold Prior to Death** —

An estate is not entitled to special use valuation for farm property that was sold on the installment method before the decedent's death, even though some of the installment payments were not yet due at the decedent's death.[240] Similarly, in a technical advice memorandum, the National Office advised that a land contract acquired by a decedent as a result of a farm sale to a son and daughter-in-law was not real property for purposes of the 25% or 50% tests.[241]

[240] *Estate of Brandes v. Commissioner*, 87 T.C. 592 (1986).

[241] TAM 8246020.

d. **Use in a Trade or Business** —

In TAM 8820002, the National Office advised that, because the estate did not establish that cattle-raising activities carried out on the land were carried on for a profit, special use valuation could not be elected for the land. In the same memorandum, it was also advised that, because the estate could not establish that the trees on a tract of land were grown with the intention to profit from their sale, the estate could not elect special use valuation for the land on which the trees grew.

7. **Grace Period** —

Section 2032A(c)(7)(A) permits a qualified heir a grace period of up to two years in the post-death period before requiring commencing qualified use. The two-year period begins on the date of the decedent's death. The period for recapture of tax benefits is extended by the amount of time taken to commence the qualified use during the grace period.[242]

[242] §2032A(c)(7)(A)(ii). In addition, §7508 provides individuals or their spouses with relief from performing certain necessary acts during a time of military service in a combat zone, service in support of the Armed Forces in a combat zone, or qualified deployment in a contingency operation, and §7508A provides authority for the IRS to grant relief as a result of a "federally declared disaster" or a "terroristic or military action." Rev. Proc. 2018-58, *superseding* Rev. Proc. 2007-56, supplements the "time sensitive acts" covered by §7508(a)(1) and Reg. §301.7508A-1(b) to include starting qualified use upon the two-year grace period expiring. The IRS will publish a notice or other guidance to provide relief for a disaster or terroristic action.

One example of the planning benefits of the grace period is that it allows time for a conversion of a cash rent lease to a crop share lease. As discussed at III.C.6., above, in the pre-death period, a decedent may meet the equity interest requirement for determining whether a qualified use exists by cash leasing property to a family member. However, in the post-death period, only surviving spouses and lineal descendants are afforded similar treatment. Thus, if property subject to a cash lease passes to someone other than a surviving spouse or a lineal descendant, the cash rent lease must be terminated in order to avoid the recapture tax. The grace period allows a period of up to two years for the qualified heir to terminate the lease or to convert the arrangement to a crop share lease.[243]

[243] §2032A(c)(7)(A).

8. **Exchanges and Involuntary Conversions** —

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As discussed at III.A.12., above, it is possible to tack qualified real property ownership to real property acquired in a §1031 exchange or §1033 involuntary conversion to satisfy the qualified use test.[244]

[244] §2032A(e)(14).

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D. Acquired from or Passed from Decedent to Qualified Heir

The requirement that §2032A property must be "acquired from or passed from" the decedent to a qualified heir is found in the "qualified real property"[245] definition and in both the 25% and 50% threshold tests.[246] These provisions require two separate elements: (i) the property must be transferred *from* a decedent and, (ii) the property must be transferred *to* a qualified heir.

[245] §2032A(b)(1).

[246] §2032A(b)(1)(A)(ii), §2032A(b)(1)(B).

1. **Acquired from or Passed from** —

The National Office discussed the §2032A(b)(1) element that the property be acquired from or pass from the decedent.[247] The National Office advised that if property was purchased from the estate, it would not be considered to have passed from the decedent. This position prevented the common practice of granting the heirs living on the farm the option of purchasing the farmland and operating assets from the estate.[248] However, Congress dealt with this problem by amending §2032A retroactively for estates of decedents dying after 1976 to provide that property is considered to have been acquired from or passed from the decedent if: (i) the property is considered to have passed under §1014(b), relating to the income tax basis of property acquired from the decedent; (ii) the property was acquired by "any person" from the estate; or (iii) the property was acquired by "any person" from a trust (to the extent the property was includible in the decedent's estate).[249]

[247] TAM 8110023.

[248] The farm property may be sold to the heirs during an estate's administration in order to raise cash or a note to pay administrative costs, including taxes, or to provide funds for other estate distributions.

[249] §2032A(e)(9), *added by* the Revenue Act of 1978, Pub. L. 95-600, § 702(d)(2), *amended by* the Economic Recovery Act of 1981 (ERTA), *Pub. L. 97-34, Sec. 421(j)(2)(A)*. In TAM 8407006, the National Office found that the "acquired from or passed from" test was not satisfied where, after the decedent's death, the decedent's daughter, the executors, and the named charitable residuary beneficiaries agreed to terminate the trust in which the daughter held a life income interest. As a result, the daughter received a fee interest in the subject real farm property, and the charities received cash. The trust would not have satisfied the Reg. §20.2032A-8(a)(2) requirement that qualified heirs receive all successive interests. The National Office advised that the interest in farm real property acquired by the decedent's daughter as a result of the trust termination agreement was neither acquired from the decedent's estate nor from the residuary trust.

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Practice Tip: Although it is now clear that if qualified real property is purchased from the estate (or a trust includible in the estate) and the acquired-from-or-passed-from requirement is satisfied, there may be a question as to whether the test is satisfied if the property was acquired from a devisee pursuant to an option contained in the will. There should be no distinction between a purchase from an estate or trust and a distribution followed by a purchase from a devisee.

2. **To a Qualified Heir** —

A qualified heir is defined as the member of the decedent's family (discussed in the next section) who acquired the property from the decedent.[250] If a qualified heir transfers the property to another member of the qualified heir's family, the transferee becomes the qualified heir with respect to the property.[251]

[250] §2032A(e)(1).

[251] §2032A(e)(1).

Practice Tip 1: Due to the dual elements of the transfer requirements, if either real or personal property is sold to someone other than a qualified heir, the property will fail to be qualified real property and will not be included in the numerator of the 25% and 50% threshold tests. For this reason, an executor or administrator should be cautious when selling real or personal property out of the estate rather than distributing it to qualified heirs.

Practice Tip 2: The threshold qualification requirements of §2032A(b) specify that at least 50% of the adjusted value of the gross estate be from real and personal property used for a qualified use and that amount or more must pass to qualified heirs. If this requirement is in jeopardy, and the liquidity requirements of the estate require the sale of assets, a qualified heir should purchase farm personal property from the estate, and then sell the personal property. The amendment to §2032A(e)(9) permits a purchase from the estate to qualify as a passing if the purchase is by a qualified heir.[252] The subsequent sale of only the qualified personal property will not result in the recapture of tax benefits. If the qualified real property was sold to someone other than a family member, a benefits recapture would occur.

[252] §2032(e)(9), *amended by* ERTA, *Pub. L. 97-34, Sec. 421(j)(2)(A).*

3. **Redemptions** —

If the estate redeemed the decedent's stock in a corporation owning qualified property and some of the nonredeeming shareholders were qualified heirs, the real property attributable to the increase of the qualified heirs' interest through the disproportionate redemption may not be eligible for special use valuation because it was not acquired from or passed from the decedent to a qualified heir.[253] The same result would be accorded a buy-sell agreement.

[253] Rev. Rul. 85-73; *see also* GCM 39366 (May 28, 1985), TAM 8223017; PLR 8217017. *See* X.E ., below.

4. **Basis Issues** —

Pursuant to §1040, if a qualified heir purchases the property from the estate, the qualified heir's adjusted basis is the special use value (and not the purchase price) increased by the amount of gain recognized by the estate.[254] The estate (or any trust included as part of the decedent's gross estate) recognizes gain only on the fair market value on sale that exceeds the date-of-death fair market value.[255]

[254] §1040(c).

[255] §1040(a), §1040(b). *See* IX., below.

Because the qualified heir who purchases qualified real property from the estate will normally get an adjusted basis

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equal only to use value and not the purchase price, the means by which the property passes from the estate will determine the gain on any subsequent transfer. If the property passes to the on-farm heirs by purchase from the estate, no gain is ordinarily recognized, but the purchasing qualified heir has a low income tax basis for the property (special use value plus any the gain recognized by the estate) for purposes of depreciation or cost recovery deductions and for calculating gain or loss on later sale.

In contrast, if the estate is settled and the property passes to all family members as qualified heirs, the estate does not recognize gain and the income tax basis of the qualified heirs is equal to special use value. If the property is later sold to the on-farm heirs at fair market value, the selling qualified heirs would have a substantial gain on the transaction and the purchasing on-farm heirs receive a new income tax basis equal to the purchase price. Thus, the planning choice for any sale of the property passing from the estate is quite important.[256]

[256] *See* XIII.O., below.

5. **Buyouts of Nonqualified Heirs** —

If there is a bequest of qualified real property to an individual who is not a qualified heir, a plan to buy out the nonqualified heir's interest in return for a disclaimer will not work because the “acquired from or passed from” test will not be satisfied. In *Estate of Thompson (James) v. Commissioner*,[257] the decedent bequeathed farm properties in trust with income interests to two daughters and a nonqualified heir. The nonqualified heir executed a disclaimer of her income interest for which she was paid $18,000 by the two daughters. The Tax Court held that the disclaimer was not a qualified disclaimer under §2518(b)(3) because the nonqualified heir accepted the benefits of the property disclaimed by receiving the $18,000 payment.[258]

[257] 89 T.C. 619 (1987), *rev'd on other grounds*, 864 F.2d 1128 (4th Cir. 1989).

[258] Reg. §25.2518-2(d)(1) provides that the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed. On appeal, the Fourth Circuit allowed the estate to elect special use valuation for the daughters’ interest. See the discussion at III.F., below.

6. **Holding Period** —

Section 1223(10) provides that if property is acquired by any person in a transfer to which §1040 applies, upon the property's sale to a qualified heir within one year after the decedent's death, the person is considered to have held the property for more than one year.[259]

[259] In a tortuous example of congressional whimsy, the decrease in the maximum long-term capital gains rate enacted as part of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, was accompanied by an increase in the required holding period needed to qualify for long-term capital gain treatment from 12 to 18 months, effective for property transferred after July 28, 1997. Former §1223(12) (current §1223(10)) was not similarly amended at that time to ensure that any gain on sale by a recipient of §1040 property between 12 and 18 months after the decedent's death would receive favorable capital gains treatment. This oversight was corrected in the Internal Revenue Service Restructuring and Reform Act of 1998 (1998 Act), Pub. L. No. 105-206. However, the 1998 Act also restored the general 12-month holding period requirement for long-term capital gain treatment, effective for transfers after December 31, 1997. Thus, the 1998 Act was obliged to further amend former §1223(12) (current §1223(10)) to provide that the section's provisions would again only apply to transfers of property held for 12 months or less, effective for transfers after December 31, 1997. The net result is that if §1040 property failed to qualify as long-term capital gain property on a subsequent transfer to a qualified heir — whether before,

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during, or after 1997 — the transferor would receive relief. After the redesignations made by the American Jobs Creation Act of 2004, Pub. L. No. 109-357, §413(c), and the Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, §402(a), former §1223(12) became §1223(10). For a discussion of the current long-term capital gains rates in §1(h), as amended (effective for tax years beginning after 2012) by the American Taxpayer Relief Act of 2012 (ATRA), Pub. L. No. 112-240, §101(a)(1), §101(a)(3), §102, see 507 T.M., *Income Tax Liability: Concepts and Calculation* (U.S. Income Series).

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E. Member of the Family

The definition of "member of the family" is important for determining who can satisfy the qualified use and material participation tests in both the pre-death and post-death periods. In addition, the definition determines both who is a qualified heir (and thereby is eligible to receive the real property for which special use valuation is to be elected) and who can purchase real property from a qualified heir without recapturing the special use value benefits.

There are two different definitional terms, depending upon whether the point in time is pre-death or post-death. In the pre-death period, individuals who can satisfy the tests are the decedent or members of the decedent's family. In the post-death period, individuals who can satisfy the tests are the qualified heirs or members of the qualified heirs' family. A "qualified heir" is defined as a member of the decedent's family.[260]

[260] §2032A(e)(1). For deaths occurring before 1982, "member of the family" with respect to an individual included: ancestors of such individual; the spouse of such individual; lineal descendants of such individual; lineal descendants of a grandparent of such individual; the spouse of a lineal descendant of such individual; and the spouse of a lineal descendant of a grandparent of such individual. §2032A(e)(2) before amendment by Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, Pub. L. No. 97-34. In *Estate of Cowser v. Commissioner*, 736 F.2d 1168 (7th Cir. 1984), *aff'g* 80 T.C. 783 (1983), the court determined that the grandniece of decedent's predeceased spouse was not a "qualified heir" at his death in 1978 because the plain language of the pre-1981 version of the statute did not include a lineal descendant of a grandparent of the decedent's spouse. If the grandniece had been the grandniece of the decedent, she would have been a qualified heir. The court also ruled that the classifications set forth in §2032A did not violate the Due Process clause because they were rationally related to the legitimate governmental interests of continuing a historically based preference for a decedent's blood relatives. *See also Whalen v. United States*, 826 F.2d 668 (7th Cir. 1987); PLR 9027004 (individual's uncle as member of family). See Worksheet 8, below, for a diagram illustrating the pre-1982 statutory definition.

A "member of the family" with respect to any individual includes:

- ancestors of such individual;
- the spouse of such individual;

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- lineal descendants of such individual;
- lineal descendants of the parent of such individual;
- lineal descendants of the spouse of such individual;
- the spouse of a lineal descendant of such individual;
- the spouse of a lineal descendant of a parent of such individual; and
- the spouse of a lineal descendant of a spouse of such individual.[261]

[261] §2032A(e)(2). *See Estate of Cone v. Commissioner*, T.C. Memo 1990-359 (decedent's husband's nephew failed to come within statutory definition); PLR 9642055 (sale to heir's brothers will not trigger recapture because they are lineal descendants of selling heir's parents). ERTA narrowed the set of "member of the family" by eliminating lineal descendants of grandparents, which removed uncles, aunts and cousins. At the same time, the 1981 amendment broadened the members of the family by adding the lineal descendants of the spouse of the decedent.

See Worksheet 8, below, for a diagram illustrating the statutory definition.

While the rules include nonadopted children from the surviving spouse's prior marriage, because a divorce severs the marriage relationship, the natural children of the decedent's spouse who were not adopted by the decedent cease being members of the decedent's family upon the decedent's divorce.[262]

[262] PLR 8444034.

Example 1: Dave Decedent died. For eight years prior to Dave's death, the husband of Dave's aunt farmed the property pursuant to a crop share lease. By the definition of a "member of the family," an aunt is not a member of the family. Therefore, the spouse of an aunt would not be a member of the family, and the pre-death period would not be a period of material participation.

Although it is not clear from the statute, the IRS ruled that the unremarried surviving spouse of a deceased lineal descendant is a member of the family and, therefore, can be a qualified heir. However, if the surviving spouse remarries, he or she would no longer be considered a member of the decedent's family.[263]

[263] Rev. Rul. 81-236. *But see* TAM 8412014 (advising that son-in-law, who remarried after death of decedent's daughter (who predeceased decedent), is no longer considered member of decedent's family for purposes of electing special use valuation for farmland and thus is not qualified heir under §2032A; *distinguishing* Rev. Rul. 81-236 (marriage relationship is not considered terminated solely because of spouse's death) on the grounds that remarriage terminates prior marriage).

Example 2: Assume Frank Farmer died in 2021; his daughter died in 2018. Frank's will, which was written in 2010, provided that the farm was to go to Frank's daughter and her husband, Harry. At the time of Frank's death, Harry had not remarried. Harry would be a qualified heir even though his spouse, the lineal descendant, predeceased Frank.

Example 3: Assume that Frank Farmer satisfied the material participation and qualified use tests in the pre-death period. Frank died in 2021 and the farmland passed to Frank's spouse, Wilma. Wilma leased the farmland to Frank's brother. Frank's brother is not a member of Wilma's family, and therefore cannot satisfy the material participation test in the post-death period. Nevertheless, Wilma, as a surviving spouse, may be able to substitute active management for material participation in the post-death period to qualify for special use valuation.[264]

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[264] See III.B.2., above.

A legally adopted child is treated the same as a child by blood for purposes of the §2032A definition of “member of the family.”[265] However, an acknowledged child, as defined by Illinois law, who was not adopted will not be considered a member of the family.[266] Likewise, a child of an unadopted foster child of the decedent is not considered a member of the family.[267]

[265] §2032A(e)(2). The same rule of construction was also added to the provisions allowing for qualified use by a surviving spouse or lineal descendant cash leasing to a family member. §2032A(c)(7)(E).

[266] Rev. Rul. 81-179; TAM 8032026.

[267] TAM 8033018.

In certain situations, adopting stepchildren may qualify real property for special use valuation. For example, in PLR 8610073, a decedent's brother had a stepdaughter whose spouse farmed the decedent's land upon the decedent's retirement. By the brother adopting the stepdaughter prior to the decedent's death, the stepdaughter's spouse became a member of the decedent's family, thus qualifying the property for special use valuation.

F. Qualified Heir

For real property to be qualified real property, the property must be acquired from or passed from the decedent to a “qualified heir.” Under §2032A(e)(1), a qualified heir is defined as a member of the decedent's family, as described in III.E., above.

Practice Tip: If the will provides for an interest in a nonqualified heir, a special use election may be preserved if a disclaimer of the property would result in the property passing to a qualified heir. In this case, the disclaimant must take care to ensure the requirements of §2518 are satisfied.

In *Estate of Thompson (James) v. Commissioner*,[268] an attempted disclaimer by a nonqualifying heir was deemed ineffective.[269] Because the properties did not pass from the decedent solely to qualified heirs for purposes of §2032A(b), the Tax Court initially held that the property did not qualify for special use valuation. However, the Fourth Circuit ultimately allowed the election for 98% of the property. While it agreed with the Tax Court's determination that the disclaimer was ineffective, the Fourth Circuit ruled that the devise of a 2% income interest to a nonqualifying heir was so minor as to allow an election for the remaining property

[268] 89 T.C. 619 (1987), *rev'd*, 864 F.2d 1128 (4th Cir. 1989).

[269] The disclaimer was made in exchange for value. See discussion at III.D.5., above.

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III. Definitions

G. Present/Successive Interests

Section 2032A generally speaks of “qualified real property” rather than “interests in qualified real property.”[270] Given the variety of levels of ownership available to both the decedent and qualified heirs, it is perhaps not surprising that defining the boundaries of “qualified real property” proved difficult. This section addresses issues of direct ownership of less than a fee simple interest in real property. Indirect ownership, through corporations, partnerships, and trusts is discussed in X., below.

[270] *But see* §2032A(c)(2) (allocating recapture tax by “interest”).

1. **Present Interest** —

A long-standing controversy exists with respect to whether a “present interest” requirement is imbedded in §2032A.

a. **History** —

The Conference Committee Report accompanying the Tax Reform Act of 1976[271] stated that “[t]rust property shall be deemed to have passed from the decedent to a qualified heir to the extent that the qualified heir has a present interest in the trust property.”[272] Based on this language, in 1980 the IRS issued a regulation stating that “real property is considered to be qualified real property only if a qualified heir receives or acquires a present interest in the property (determined under section 2503) from the decedent.”[273] Contemporaneously, the IRS issued a regulation that provided:

[271] Pub. L. No. 94-455.

[272] S. Rep. No. 94-1236, at 610 (1976), *reprinted in* 1976-3 C.B. vol. 3, 807, 960.

[273] Former Reg. §20.2032A-3(b)(1), T.D. 7710, 45 Fed. Reg. 50,736 (July 31, 1980).

> Where successive interests in specially valued property are created, remainder interests are treated as being received by qualified heirs only if (i) a qualified heir receives a present interest in that real property, (ii) all preceding interest in the property are vested absolutely in qualified heirs, and (iii) such remainder interests are not contingent upon surviving an alternate taker who is not a member of the decedent's family or are not vested subjected to divestment in favor of a nonfamily member. For the definition of present interest, *see* section 2503 and the regulations thereunder.[274]

[274] Former Reg. §20.2032A-8(a)(2), T.D. 7710, 45 Fed. Reg. 50,736 (July 31, 1980).

The House Report to the Economic Recovery Tax Act of 1981 (ERTA)[275] provided that “[u]nder current law, property qualifies for current use valuation only to the extent that an heir receives a ‘present interest’ in the trust property.” Notably, the House's sole citation to this proposition was Reg. §20.2032A-3(b), as cited above. To alleviate a perceived deficiency in this rule in the case of trusts that would otherwise fail the §2503 “present interest” test, the House recommended an amendment to §2032A stating that “an interest in a discretionary trust all the beneficiaries of which are qualified heirs shall be treated as a present interest.” This amendment was ultimately enacted as an additional sentence at the end of §2032A(g).[276]

[275] Pub. L. No. 97-34.

[276] *See Pub. L. No. 97-34, §421(j)(1).*

In final regulations issued August 25, 1981, the reference to a present interest requirement was excised from both

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Reg. §20.2032A-3 and §20.2032A-8.[277] Curiously, the preamble to this amendment spoke of only the present interest in the context of discretionary trusts where all of the beneficiaries were qualified heirs. While the preamble suggested that the regulations would later be "revised to provide guidance where the parties involved include persons other than qualified heirs and members of the decedent's family,"[278] this additional guidance has not occurred.

[277] T.D. 7786, 46 Fed. Reg. 43,036 (Aug. 26, 1981).

[278] T.D. 7786.

Comment: While, as discussed below, it appears the IRS continues to maintain that a "present interest" rule exists with respect to both the decedent and the qualified heirs, the chain of events discussed above calls into question whether such a rule is based in authority. Commentators differ on whether the IRS's position with respect to the "present interest" rule is justifiable.[279]

[279] *Compare, e.g.,* Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts, ¶135.6.3 (concluding that the 1981 amendment to §2032A(g) implicitly affirmed the rule) *with* Richard Stephens, Guy Maxfield, Stephen Lind, & Dennis Calfee, Federal Estate and Gift Taxation, ¶4.04[3][c] ("It appears that the present interest rule, now not directly referred to in the Code or regulations, no longer exists.").

b. **Decedent's Interest** —

Citing the 1976 Conference Committee Report and former Reg. §25.2503-3(a), in TAM 8045018 the National Office advised that a decedent's bequest of his vested remainder interest in farm real property (the decedent's mother was the life tenant) was not eligible for special use valuation.

This position was affirmed in TAM 8223004 under similar facts. There, the National Office acknowledged the amendments to §2032A(g) but maintained that the then-new provision merely created an exception to the general requirement that a "qualified heir receive a present interest."

Comment: The legislative history is silent with respect to whether a decedent must have a present interest throughout the pre-death period. Nevertheless, in TAM 8724006 the National Office clearly imposed a present interest requirement for the decedent. There, the decedent managed farm property in which he held a vested remainder interest for 33 years while a second cousin, once removed, held a life interest. At the death of the life tenant the decedent held fee simple ownership over the property for over one year before dying. Under these facts, the National Office advised that because a second cousin, once removed, does not qualify as a member of the decedent's family, special use valuation could not be elected, even though there was qualified use on the date of death and a full fee simple interest passed to qualified heirs. In the IRS's view, the decedent's remainder interest and management of the farm before the cousin's death were not enough to meet the pre-death period qualified use test.

c. **Qualified Heir's Interest** —

As discussed in III.G.2., below, the IRS maintains that property held by a decedent in fee simple cannot qualify for special use valuation unless qualified heirs receive all successive interests in the property. The property transfer by a decedent to heirs in trust also proved problematic.

The National Office initially took the position in the regulations that a qualified heir holding an income interest in a trust that owned the qualified property did not have a present interest in the property if the trustee was not required to distribute all the income. Therefore, the property held by the trust could not qualify for use valuation.[280] This

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prevented bequests to the typical family trust which provided for discretionary payment of income.

[280] *See* TAM 8020011.

As discussed at III.G.1.a., above, ERTA changed this interpretation by adding §2032A(g), which provides that as long as all the income beneficiaries of a discretionary trust are qualified heirs they will be considered as having present interests in the trust property. This provision applied to all estates of decedents dying after 1976 and thus nullified the IRS's attempts to restrict the definition of qualified property.

Section 2032A(g), however, does not provide relief to a trust remainder beneficiary. In TAM 8803004, the National Office advised that where the decedent's wife, the life tenant of the trust that acquired the property, cash leased the property to her son, a remainderman, there was a cessation of qualified use because the son was not “a qualified heir with a present beneficial interest in the qualifying property.”[281]

[281] Note that the result of this TAM was changed by provisions of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §6151, providing that a cash lease of the property by a surviving spouse to his or her family member is a qualified use. *See* VI.D.2.b.(2), below.

Practice Tip: In a standard testamentary trust, a spouse often is given a life income interest with remainder to children. Because all interests are held by qualified heirs, a §2032A election is possible. However, care should be taken not to give a child a vested remainder interest, because that interest will not qualify for special use valuation in the child's estate if the child dies before the life tenant, as there will be no present interest being valued at such time.[282] Similarly, if the executor has the discretion to transfer property to a trust in which the beneficiaries are not expressly limited to members of the decedent's family and which would not satisfy the present interest requirement, the real property may not be eligible for special use valuation. The IRS may argue that it cannot be determined with certainty that the real property will pass to a qualified heir.

[282] TAM 8223004.

In TAM 8532007, the National Office advised that farm property held in an inter vivos trust qualified for §2032A treatment despite the trustee having discretion to delay trust distributions until the final satisfaction of state and federal taxes owed by the decedent-settlor's estate. The memorandum stated that even if it were assumed that a discretionary power to withhold trust distribution results in failure to satisfy the present interest requirement, §2032A treatment should still be available by reason of §2032A(g).

It was suggested by a commentator that the present interest requirement may not be satisfied if the real property is owned by a closely held corporation which has not distributed dividends.[283] This position is analogous to cases that analyzed the “present interest” requirement in the gift tax context where gifts were made of interests in entities over which the donee did not have control and/or there was a history of not distributing income. Gifts of closely held corporation stock that does not make dividend distributions, or does not have the capacity to generate income, may not be a gift of a present interest.[284]

[283] Neil E. Harl, *Agricultural Law,* Vol. 2, §43.03[3][d][iv][E][III], 43-149 to 150 (2008, updated semiannually).

[284] *Berzon v. Commissioner*, 534 F.2d 528 (2d Cir. 1976), *aff'g* 63 T.C. 601 (1975); *Stark v. United States*, 477 F.2d 131 (8th Cir. 1973), *aff'g* 345 F. Supp. 1263 (W.D. Mo. 1972), *cert. denied*, 414 U.S. 975 (1973); *Rosen v. Commissioner*, 397 F.2d 245 (4th Cir. 1968), *rev'g* 48 T.C. 834 (1967); Rev. Rul. 69-344.

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Practice Tip: If a corporation holds farmland, it might be desirable to periodically distribute dividends. Land trusts could create similar problems. In the gift tax context, transfers of a land trust interest where the grantors maintain control over the land were held to be transfers of a future interest.[285] This problem arguably was not remedied by the §2032A(g) amendments contained in ERTA with respect to "discretionary trusts."

[285] *Maryland Nat'l Bank v. United States*, 609 F.2d 1078 (4th Cir. 1979), *aff'g* 450 F. Supp. 52 (D. Md. 1978); *Estate of McClure*, 608 F.2d 478 (Ct. Cl. 1979); *McManus v. Commissioner*, T.C. Memo 1980-296, *aff'd*, 698 F.2d 1221 (6th Cir. 1982).

2. **Successive Interests** —

The treatment of successive interests in property was highly contested, with the Tax Court and several circuit courts holding certain aspects of IRS regulations invalid, and the IRS vigorously maintaining its position.

a. **IRS Regulations** —

Pursuant to Reg. §20.2032A-8(a)(2), qualified heirs must receive all successive interests in the qualified real property to elect special use valuation. In the IRS's view, if a bequest creates successive interests, such as a life estate followed by a remainder interest, an election for special use valuation may be made only if *all* interests in the qualified real property are held by qualified heirs and the election includes *all* the interests. Note that any remainder interest cannot be contingent upon surviving a nonfamily member nor can it be subject to divestment to a nonfamily member.[286]

[286] *See also* TAM 8435007.

The IRS ruled in Rev. Rul. 81-220 that if a charity receives a remainder interest, the §2032A election is not available because all successive interests are not held by qualified heirs.[287] In PLR 9407015, the IRS ruled that a charitable remainder interest in a trust holding ranchland did not cause any part of the ranchland to be ineligible for §2032A valuation, where the decedent's spouse (who had a life income interest in the trust) disclaimed other trust property sufficient to satisfy the charity's remainder interest. The IRS explained that the spouse's disclaimer converted the charity's pecuniary interest in the trust remainder into an immediate bequest, payable from assets other than the ranchland.

[287] *See also* TAM 8407006 (purchase of remainder interest from charitable remainder beneficiary does not qualify under §2032A(e)(9) as purchase from decedent's estate or from trust includible in decedent's estate, and property is ineligible for special use valuation because members of decedent's family did not receive all successive interests), TAM 8337015 (where decedent transferred life interest in trust to nonqualified heir and remainder to qualified heir, successive interests test was not satisfied).

If a qualified heir is given a life income interest in real property and a special power of appointment for the remainder, the IRS ruled that because the remainder is subject to divestment to a nonfamily member, the remainder is treated as not being received by a qualified heir as required by Reg. §20.2032A-8(a)(2). Because all successive interests were not held by qualified heirs, the IRS ruled that the real property did not qualify for §2032A.[288]

[288] Rev. Rul. 82-140.

Practice Tip: It is possible that remedial action can be taken by making a qualified disclaimer of the special power of appointment pursuant to §2518 and §2046. The IRS ruled privately that if, as a result of a qualified disclaimer of

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the special power of appointment, the remainder interest vests in the decedent's qualified heir, the Reg. §20.2032A-8(a)(2) successive interest requirements are satisfied.[289] However, in *Estate of Thompson (James) v. Commissioner*,[290] the IRS took the position that such a disclaimer was not effective to meet the successive interest requirement. As discussed below, the *Thompson* court avoided the disclaimer issue by striking down the Reg. §20.2032A-8(a)(2) successive interest requirement.

[289] *See* TAM 8349008, TAM 8146020.

[290] 864 F.2d 1128 (4th Cir. 1989), *rev'g* 89 T.C. 619 (1987).

In a Technical Advice Memorandum,[291] the National Office advised that where the decedent devised otherwise qualified real property to a trust for the benefit of his spouse with the remainder as she appoints by a general power of appointment, such property is eligible for special use valuation under §2032A. The National Office stated that because the decedent's spouse received both a life estate and a general power of appointment over the qualified real property in the trust, the interest created by the decedent was equivalent to a fee simple and was not a successive interest under Reg. §20.2032A-8(a)(2). The National Office, citing the House Report on the Tax Reform Act of 1976, observed that the rationale behind the successive interest rule was to prevent specially valued property from being released from the recapture tax at the death of the qualified life interest heir when that property would not be taxed in that heir's estate. Property that is subject to a general power of appointment is part of the decedent's estate under §2041. Therefore, the recapture tax consequences should be the same for any life tenant with a general power of appointment as for an individual who died with a fee interest in the property.

[291] TAM 8209004.

In subsequent rulings, the IRS followed the principle that a life estate coupled with a testamentary general power of appointment is equivalent to ownership, such that a family member holding such a trust interest will be treated as a qualified heir.[292]

[292] *See* PLR 9027004 (transfer of property by qualified heir to trust for qualified heir's parent not triggering recapture), PLR 9022007 (property bequeathed to trust for decedent's spouse eligible for special use valuation).

In TAM 8249012, the decedent's will granted an income interest in a farm to two children. At the first child's death, the farm was to be sold and proceeds distributed to the surviving child and grandchildren, thus terminating the qualified use. The heirs waived their right to the proceeds and the property was deeded so that the grandchildren would take a remainder interest. Because all the successive interests would be received by family members and no successive interests were contingent upon surviving a nonfamily member or subject to divestments to a nonfamily member, the remainder interests were treated as received by family members.

b. **Court Rulings** —

Throughout the 1980s, the IRS strictly interpreted the Reg. §20.2032A-8 requirement that all successive interests must be held by “qualified heirs” to qualify for special use valuation. In a series of Technical Advice Memoranda, the National Office advised that even if the contingency that caused a remainder interest to pass to a nonqualified heir was remote, the “all successive interests” requirement would not be satisfied.[293] In addition, the IRS maintained that any remainder interest could not be contingent upon surviving a nonfamily member or be subject to divestment to a nonfamily member.

[293] TAM 8441006, TAM 8349008, TAM 8346006, TAM 8332012. In these rulings, the trusts in question provided for distributions to qualified heirs for a specified period followed by a

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terminating distribution to qualified heirs and, if none, to either nonqualified heirs or a charity.

The Tax Court, however, in two reviewed decisions, invalidated Reg. §20.2032A-8(a)(2) to the extent it would prohibit the property's testamentary disposition to "qualified heirs" where the testamentary scheme provided for the possibility of a lack of qualified heirs by a remote contingent gift to charity. In *Estate of Davis v. Commissioner*,[294] the decedent's will bequeathed farm property to a trust created for the benefit of the decedent's three children. The trust was to terminate on the last child's death, with the corpus distributed to the children's surviving descendants. If there were no surviving descendants, the corpus was to go to three charities. The parties in the case agreed that the actuarial probability of the trust property passing to the unqualified contingent remainder beneficiaries (the charities) was 1.52%. The IRS denied §2032A treatment because of the contingent nonqualifying beneficiaries' existence.

[294] 86 T.C. 1156 (1986).

In holding for the estate, the Tax Court reasoned that Reg. §20.2032A-8(a)(2) was inconsistent with the statute because it required, as a prerequisite to a special use election, that all successive interests created by a decedent's will be received by qualified heirs. The court noted that there was no such requirement in the statute and that the testator made an "obvious and continuing effort" to comply with §2032A. The court concluded that testators should be allowed a reasonable means to prevent intestacy and possible escheat to the state in the event of a lack of heirs. Rather than penalize the estate as a result of a remote possibility, the *Davis* court concluded that a "wait and see" approach was more in keeping with the congressional intent.

Similarly, in *Estate of Clinard v. Commissioner*,[295] the Tax Court held that a life income interest in farmland bequeathed to each of three grandchildren with a special power of appointment in the remainder interests qualified for special use valuation because of the possibility of the property passing to a university and others if the grandchildren failed to exercise their powers and died without descendants. It was not possible to compute the actuarial probabilities of an interest passing to a disqualified heir in this case, the court determined, although it noted that the possibility was "remote." The majority again invalidated Reg. §20.2032A-8(a)(2) to the extent it requires that all successive interests be in qualified heirs. The IRS's position was that a qualified disclaimer of the special power of appointment would have to be made, with the remainder interest vesting in the decedent's qualified heir, to satisfy the regulations' successive interests requirement.[296] The court rejected the IRS approach and noted that the IRS's interpretation permitted a farm that is bequeathed outright to the decedent's children to be disposed of without adverse tax consequences 16 years after the decedent's death, but at the same time disallowed special use valuation to a farm that (due to the exercise of a special power of appointment) remained in a decedent's family for two or three generations. The court further noted that under the election agreement's terms, a qualified heir remains personally liable for the recapture tax if a disqualifying event occurred.

[295] 86 T.C. 1180 (1986).

[296] *See* Rev. Rul. 82-140.

The concurring opinion in *Clinard* found no legislative support for the IRS's position that an interest which could be created by the exercise of a special power of appointment is a successive interest while one created under a general power is not.

In *Estate of Pliske v. Commissioner*,[297] the Tax Court, citing *Davis* and *Clinard*, upheld an estate's §2032A election despite the fact that there was a remote chance (between .008098% and .002817%) that the property would pass to charity if there was a failure of the decedent's lineal descendants who were bequeathed successive life interests.

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[297] T.C. Memo 1986-311.

In TAM 8643005, the National Office relented somewhat and advised that the remote possibility (0.0000001%) of the remainder interest's distribution to nonqualified heirs does not bar a §2032A special use value election.

This trend continued in TAM 8713001, where the National Office advised that property bequeathed in trust to the decedent's nieces until age 30 (at which time the property would be distributed to them) passed to "qualified heirs" for purposes of determining the estate's eligibility to use §2032A even though there was no provision for the property's disposition in the event the beneficiaries died before age 30. The National Office determined that, although the decedent did not provide for a taker-in-default, no successive interest problems existed because, under state law, each niece held a vested interest in the remainder.

In TAM 8230006, where the decedent's will provided that the trustee could sell the trust assets at termination if the heirs were unable to agree on a division of trust assets, the National Office advised that the possibility of the trustee selling special use valuation property to a nonfamily member would not cause the estate to fail the requirement that all successive interests pass to the decedent's qualified heir.

In *Smoot v. United States*,[298] the Seventh Circuit, affirming the district court, allowed the estate to elect special use valuation where there was a remote possibility that a contingent remainder interest would pass to individuals who were not qualified heirs and one of the qualified heirs held a special power of appointment in favor of individuals who were not qualified heirs within the meaning of §2032A.

[298] 892 F.2d 597 (7th Cir. 1989), *aff'g* 88-1 USTC ¶13,748, *88-1 USTC 84,086* (C.D. Ill. 1987).

Citing *Clinard*[299] with approval, the Fourth Circuit in *Estate of Thompson (James) v. Commissioner*,[300] held that a §2032A election was effective even though a qualified heir with an income interest in the property had the power to appoint the remainder interest to charity. Rejecting the Reg. §20.2032A-8(a)(2) successive interest requirement, the court adopted a wait-and-see approach, stating that the §2032A(c) recapture rules were sufficient to deal with the problem of the property passing to nonqualified heirs. Important to the *Thompson* majority was the "plainly evident" intent of Congress to preserve the family farm and therefore a "common sense interpretation, one with an eye towards protecting the family farm and business" should be applied to allow remote, contingent interests.

[299] 86 T.C. 1180 (1986).

[300] 864 F.2d 1128 (4th Cir. 1989), *rev'g* 89 T.C. 619 (1987).

In TAM 9038002, the National Office, citing *Davis*,[301] advised that where there was a 0.001126% probability that qualifying property would pass to contingent remainder beneficiaries, the "exceedingly remote" contingent remainder beneficiaries were not required to sign the recapture agreement.

[301] 86 T.C. 1156.

Comment: As discussed at VII.F., below, in 1997, Congress amended §2032A(d)(3) to eliminate the "substantial compliance" hurdle to perfecting a deficient election. Because of this change, in cases where the IRS believes the contingent remainder beneficiaries are not exceedingly remote, the IRS must provide a reasonable period of time for the executor to obtain any required signatures that were omitted from the original election.

Practice Tip: Reg. §20.2032A-8(a)(2) was last amended in 1981.[302] Since that time, the regulation was attacked by courts both for its position on remote successive interests and its requirement that the special use election include

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at least 25% of the estate.[303] Until the IRS provides clearer guidance in this area, planning for special use valuation will remain difficult.[304]

[302] T.D. 7786, 46 Fed. Reg. 43,036 (Aug. 26, 1981).

[303] See *Miller v. United States*, 680 F. Supp. 1269 (C.D. Ill. 1988) and *Finfrock v. United States*, 860 F. Supp. 2d 651 (C.D. Ill. 2012), discussed at II.C., above, and VII.D., below.

[304] For more on planning for successive interests in the §2032A context, see Jerald I. Horn, *Flexible Trusts and Estates for Uncertain Times,* C.10 (ALI-ABA, 2007, 3d ed.).

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9th Annual Mid-South Conference Materials

Update from the Potomac: 2023 Farm Bill & Related Issues in Ag & Food

Hunt Shipman

2023 Farm Bill Presentation Outline and Supplemental Materials

1. Farm Bill –
    - a. Omnibus, multi-year law governing food, conservation and agricultural programs
    - b. 13 titles - Commodities to Rural Development
    - c. Farm bills generally suspend permanent law and substitute temporary policies for 5-7 years
    - d. If Congress fails to act, some programs terminate, some revert to permanent law and some continue if Congress appropriates funding
    - e. To understand what the next farm bill may look like and how it comes together requires consideration of what the environment may be at the time – political, fiscal and policy (among others)
2. Environment for the 2023 Farm Bill
    - a. Political
        - i. General
            - 1. 2010 rural/small Town R+5
            - 2. 2021 rural/small town R+26
            - 3. Biden approval 22/72
            - 4. Congressional Preference:
                - a. Urban core: D+24
                - b. Urban ring: D+12
                - c. Outer suburbs: R+10
                - d. Rural: R+34
            - 5. Key Issues: inflation, border, murder rate, covid confidence
            - 6. Since 1946, On average President's party loses 26 seats
                - a. But…polarization, favorable Senate map and fewer swing districts
        - ii. House
            - 1. 221/209
            - 2. New districts –
                - a. 41 states are done, 6 have only 1 district, NY, MO, KS, NH
                - b. 110 million will vote in a new district in November
            - 3. Rural or largely districts make up more than half of the toss-up House Races
            - 4. 150+ new members since the 2018 farm bill
        - iii. Senate
            - 1. 50/50
            - 2. Control decided in AZ, GA, NV, PA, WI, NC, OH
            - 3. 15 new members since 2018 farm bill
        - iv. Ag Committee:
            - 1. Several Ag Committee Members face tough races: Spanberger (D-VA), Craig (D-MN), Harder (D-CA), Axne (D-IA), Schrier (D-WA), Warnock (D-GA)
            - 2. Several Ag Committee Members not returning: Bustos (D-IL), Delgado (D-NY), Hartzler (R-MO), Rush (D-IL), Leahy (D-VT)
            - 3. 27 (of 49) new members of the House committee; 7 (of 22) new members of the Senate committee
    - b. Fiscal
        - i. CBO Budget update released 5/25 - FY 2022 Deficit $1 Trillion (4.2 % of GDP)– rising to $2.3 T by 2032 (6.1% of GDP)

ii. Debt was 79.4 % of GDP at the end of FY 19, it rose to 99.6% by the end of FY 21 and will be 107.5 by end of FY 31 and 109.6 by FY 32
iii. Debt is $23.8 T today and will grow to $40.2 T by the end of FY 32.
iv. 8.3% inflation – 5.1% wage growth
v. The high inflation is also increasing tax receipts – expected to grow $800 Billion this year - equivalent to the entire pentagon budget.
vi. Supply chain pressures continue to exacerbate inflation.
    1. Policies to fix supply chain disruptions are typically ineffective at reducing inflation – investments in infrastructure are long-term and could exacerbate labor and supply shortages in the short term and COVID-19 and retirements have decreased labor force participation rates (and will be difficult to reverse)
vii. The Federal Reserve has raised interest rates by 0.75 percentage points this year with more aggressive increases expected – increasing the cost to consumers and to servicing the national debt.
viii. Markets continue to fall
ix. Recession remains a significant fear

c. Regulatory Environment Contributing to Economic challenges
    i. Biden Administration aggressive regulatory agenda
        1. Environmental & Energy
            a. Canceling oil and gas leases on federal lands – no new leases since 2020
            b. Renewable energy fallacy – renewable is 11% of current energy (only 1/3 of that is solar or wind)
            c. Sue and settle
            d. WOTUS
        2. Labor
            a. Contractors vs full time
            b. Apprenticeships
            c. Federal bureaucracy has the upper hand

d. Policy Environment
    i. Food costs at record highs
        1. State of the economy will put emphasis on programs that support low-income Americans
    ii. Farm input costs at record highs
        1. Fuel
        2. Fertilizer
        3. Crop protection
    iii. Focus on climate change and carbon credits
    iv. DEI
    v. Outside spending on ag – Infrastructure, Climate grants, (BBB)
    vi. Disaster relief payments – crop insurance reform

3. 6 Questions for the next farm bill
    a. What do high commodity prices and high input costs mean for the farm bill baseline?
        i. Cash farm receipts forecast to be the highest on record at $462 billion
        ii. Production expenses also highest on record at $412 B – up 5% from 2021
        iii. Government payments down $15.5 Billion – 57%
        iv. Net farm income $114 billion (high was 2013)
    b. Does fiscal discipline return to Washington after November elections?
        i. Coronavirus Preparedness and Response Supplemental--March 2020--$8.3 Billion
        ii. Families First Coronavirus Response Act—March 2020--$225 Billion
        iii. CARES Act—March 2020--$2.2 Trillion
        iv. Paycheck Protection Program and Health Care Enhancement Act—April 2020--$483B

   v. American Rescue Plan—March 2021--$1.9 Trillion
   vi. Nutrition programs currently constitute almost ¾ of farm bill spending – commodity programs just 7% or less. It takes significant changes to achieve meaningful savings.
   vii. Commodity groups are developing farm bill proposals that include increases in reference prices and higher loan rates.

c. What Impact will strong dollar have on exports? Will this change the S&D picture and future farm income?
d. Will groups who got attention in BBB look to the farm bill to get their $$?
   i. Current Agriculture provisions—($1.7 Trillion)—approx. $90 Billion
   ii. $10 Billion Child Nutrition Programs (USDA created another $25 B), $2 B Research, $18 B Rural Development, $27 B Forestry, $12 B Farmer Assistance, $28 Billion Conservation Programs
e. Will pressures continue to lower payment limits and AGI?
f. Will DEI interests converge with those who support payment limits to make the next farm bill less attractive for commercial-size farms?

Preparing for the Next Farm Bill

March 31, 2022

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R47057

CRS REPORT
Prepared for Members and
Committees of Congress

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Preparing for the Next Farm Bill

SUMMARY

R47057

March 31, 2022

Genevieve K. Croft, Coordinator
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The farm bill is an omnibus, multiyear law that governs an array of agricultural and food programs. Although freestanding legislation or components of other major laws sometimes create or change agricultural policies, the periodic farm bill provides a predictable opportunity for policymakers to address agricultural and food issues in a comprehensive manner. The Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334)—the most recent farm bill—generally expires at the end of FY2023. The 2018 farm bill succeeded the Agricultural Act of 2014 (2014 farm bill; P.L. 113-79).

There is no fixed format for the farm bill. Its breadth has grown from the original two titles of the Agricultural Adjustment Act of 1933 (P.L. 73-10) to the 12 titles of the 2018 farm bill. The issues addressed in the 2018 farm bill encompass agricultural commodity supports, credit, trade, conservation, research, rural development, foreign and domestic food programs, and many other policies and programs. Provisions in the 2018 farm bill modified certain commodity programs, expanded crop insurance, amended conservation programs, reauthorized and revised nutrition assistance, and extended authority to appropriate funds for many U.S. Department of Agriculture (USDA) discretionary programs through FY2023.

When the 2018 farm bill was enacted, the Congressional Budget Office (CBO) estimated that the total cost of its mandatory programs would be $428 billion over its five-year duration (FY2019-FY2023). Four titles accounted for 99% of the 2018 farm bill's mandatory spending: Nutrition (Title IV), Commodities (Title I), Crop Insurance (Title XI), and Conservation (Title II). At enactment, the Nutrition title, which includes the Supplemental Nutrition Assistance Program (SNAP), comprised 76% of the estimated total, with the remaining portion mostly addressing agricultural production and conservation issues across other titles.

Historically, omnibus farm bill legislation has focused on commodity-based revenue support policy—namely, the methods and levels of federal support provided to agricultural producers. The 2018 farm bill reauthorized and amended various components of U.S. *farm safety net* programs, which include commodity support programs, the federal crop insurance program, and permanent disaster assistance programs. Certain agricultural interest groups point to additional policy priorities—covering a range of equity issues across the farm sector—and call for enhanced support for small- and medium-sized farms, specialty crops, organic agriculture, local and regional food systems, healthy and nutritious foods, research, conservation, and rural development, among other priorities.

Debate over the next farm bill may include a wide range of other policy priorities and issues in addition to commodity-based revenue support. These include topics raised in prior farm bill debates and more recent issues. Among long-standing issues are the overall budget outlook and the scope and structure of nutrition programs within the farm bill. Among recent issues is the federal government's role in supporting beginning, veteran, and historically underserved farmers and ranchers. New to the next farm bill debate might be a variety of agriculture sector impacts associated with the Coronavirus Disease 2019 (COVID-19) pandemic. These include agricultural supply chain challenges, price inflation, international trade, industry consolidation, and whether, and to what extent, to continue temporary policies enacted in pandemic response laws.

The Biden Administration has prioritized climate change as an overarching federal policy priority. Debate over the next farm bill may include policies related to agriculture and climate change—how federal programs and policies can or should support agriculture's adaptation to changing climatic conditions, as well as agriculture's potential contributions to climate change mitigation.

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Introduction

The farm bill is an omnibus, multiyear law that governs an array of agricultural and food programs.[1] Although freestanding legislation or components of other major laws sometimes create or change agricultural policies, the periodic farm bill provides a predictable opportunity for policymakers to address agricultural and food issues in a comprehensive manner. In recent years, Congress has renewed the farm bill every four to six years.[2]

The farm bill has no fixed format. Over time, farm bill legislation has grown in complexity and scope. The law generally recognized as the first omnibus farm bill—the Agricultural Adjustment Act of 1933 (P.L. 73-10)—consisted of two titles and the equivalent of 24 printed pages. The most recent farm bill—the Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334, H.Rept. 115-1072)—comprised 12 titles and about 529 pages of text. In legislation enacted between those two laws, the farm bill has developed from addressing specific farm commodity supports and soil conservation to encompassing additional issues, such as nutrition, trade, rural development, research, credit, horticulture, bioenergy, and other topics.

The omnibus nature of the bill can create broad coalitions of support among sometimes-conflicting interests for policies that individually might not survive the legislative process. It also can stir competition for available funds, particularly among producers of different commodities or stakeholders with differing priorities—for example, urban versus rural interests. In recent years, the diversity of groups involved in the debate has grown along with the topical breadth of the farm bill. These entities now include national farm groups, commodity associations, state organizations, nutrition and public health officials, and advocacy groups representing conservation, recreation, rural development, local and urban farming facilities, faith-based interests, land-grant universities (LGUs), and certified organic production.

The consequences of allowing a farm bill to expire, as has occurred in the past, may motivate legislative action. When a farm bill expires, not all programs are affected equally. Some programs cease to operate unless reauthorized, while others might continue to pay old financial obligations as provided under current law. The farm commodity programs, for example, would expire and revert to permanent law dating back to the 1940s. Nutrition assistance programs require periodic reauthorization, but appropriations can keep them operating. Many discretionary programs would lose statutory authority to receive appropriations, though annual appropriations could provide funding and implicit authorization. Other programs have permanent authority and do not need to be reauthorized (e.g., crop insurance).[3]

This report provides background on each of the major titles included in the 2018 farm bill and previews some of the issues that may factor into the debate over the next farm bill. Many CRS analysts contributed to the writing of this report. The table on the previous page provides a list of agricultural policy topics and the CRS analysts who cover them.

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[1] For more background on the farm bill, see CRS Report RS22131, *What Is the Farm Bill?*.

[2] As of this writing, there have been 18 farm bills, including the one in 1933 (2018, 2014, 2008, 2002, 1996, 1990, 1985, 1981, 1977, 1973, 1970, 1965, 1956, 1954, 1949, 1948, 1938, and 1933). See also CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2018.*

[3] For more information on the consequences of expiration, see CRS Report R45341, *Expiration of the 2014 Farm Bill.*

The 2018 Farm Bill

The 2018 farm bill—enacted in December 2018 and generally expiring at the end of FY2023—is the most recent farm bill.[4] It succeeded the Agricultural Act of 2014 (2014 farm bill; P.L. 113-79). The 2018 farm bill contains 12 titles (see **text box**).[5] Provisions in the 2018 farm bill modified some of the farm commodity programs, expanded crop insurance, amended conservation programs, reauthorized and revised nutrition assistance, and extended authority to appropriate funds for many U.S. Department of Agriculture (USDA) discretionary programs through FY2023.

The 2018 Farm Bill (P.L. 115-334) Functions and Major Issues, by Title

- **Title I, Commodities.** Provides farm payments when crop prices or revenues decline for major commodity crops, including wheat, corn, soybeans, peanuts, and rice. Includes disaster programs to help livestock and tree fruit producers manage production losses due to natural disasters. Other support includes margin insurance for dairy, marketing quotas, minimum price guarantees, and import quotas for sugar.
- **Title II, Conservation.** Encourages environmental stewardship of farmlands and improved management practices through various working lands programs, as well as changes in land use through land retirement and easement programs.
- **Title III, Trade.** Supports U.S. agricultural export programs and export credit guarantee programs, as well as international food aid programs that provide emergency and nonemergency foreign food aid. Other provisions address issues related to World Trade Organization (WTO) obligations.
- **Title IV, Nutrition.** Provides nutrition assistance for low-income households through programs, including the Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program) and emergency food assistance programs. Also supports food distribution in schools.
- **Title V, Credit.** Offers direct government loans to farmers/ranchers and guarantees on private lenders' loans. Sets eligibility rules and policies.
- **Title VI, Rural Development.** Supports rural business and community development programs. Establishes planning, feasibility assessments, and coordination with other local, state, and federal programs. Programs include grants and loans for infrastructure, economic development, broadband, and telecommunications.
- **Title VII, Research, Extension, and Related Matters.** Offers a wide range of agricultural research and extension programs that expand academic knowledge about agriculture and food and help farmers and ranchers become more efficient, innovative, and productive.
- **Title VIII, Forestry.** Supports forestry management programs run by USDA's Forest Service.
- **Title IX, Energy.** Encourages the development of farm and community renewable energy systems through grants, loan guarantees, and feedstock procurement initiatives. Also facilitates the production, marketing, and processing of advanced biofuels and biofuel feedstocks, as well as research, education, and demonstration programs.
- **Title X, Horticulture.** Supports specialty crops—fruits, vegetables, tree nuts, and floriculture and ornamental products—through initiatives, including market promotion, plant pest and disease prevention, and research. Also provides support to certified organic agricultural production and locally produced foods.
- **Title XI, Crop Insurance.** Amends the permanently authorized federal crop insurance program.
- **Title XII, Miscellaneous.** Covers other types of programs, including livestock and poultry production and limited-resource and socially disadvantaged farmers.

Farm Policy Considerations for Congress

As Congress considers a new farm bill, it does so in an economic setting of increasing farm-sector incomes (see "Farm Economy and International Environment") and general disruption and

[4] For more information on the major provisions of the 2018 farm bill, see CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*.

[5] For a listing of the titles and subtitles of the 2018 farm bill, see the **Appendix**.

uncertainty associated with the Coronavirus Disease 2019 (COVID-19) pandemic. The next farm bill is expected to address many competing policy priorities. Efforts to manage farm bill costs, given overall constraints on federal spending, may create heightened competition and tension among a range of U.S. farm policy stakeholders. There is also uncertainty regarding how the Biden Administration will implement its farm policy priorities.

Congress has considered the scope and structure of nutrition programs during many farm bill debates. Farm bills since 1973 have included reauthorization of the Food Stamp Program (renamed the Supplemental Nutrition Assistance Program [SNAP] in the 2008 bill). SNAP currently accounts for the overwhelming majority of total farm bill spending. The partnership between nutrition programs and farm programs generally generates rural and urban support for the farm bill as a whole. Increased food insecurity associated with the COVID-19 pandemic, as well as temporary increases in federal nutrition funding via pandemic response laws, has renewed focus on farm bill nutrition assistance programs.

Historically, omnibus farm bill legislation has focused on commodity-based revenue supports—namely, the mechanisms and levels of federal support provided to agricultural producers. Congress may face competing calls to focus on commodity-based revenue support and to address a range of equity concerns within the food and agriculture sector. With each farm bill, Congress typically reauthorizes and amends various components of U.S. *farm safety net* programs, which include commodity support programs and have incorporated the federal crop insurance program (FCIP) and, more recently, added permanent disaster assistance programs. In recent farm bill debates, certain interest groups have pointed to additional policy priorities outside of traditional commodity-based production agriculture. These interest groups call for enhanced support for small- and medium-sized farms, specialty crops, organic agriculture, local and regional food systems, healthy and nutritious foods, research, conservation, and rural development, among other priorities. Various groups also call for consideration of the federal government's role in supporting beginning, veteran, and historically underserved farmers and ranchers.

New to the next farm bill debate may be a variety of issues highlighted by the COVID-19 pandemic and disruptions in trade. These include agricultural supply chain challenges, price inflation, the effects of international trade disputes, industry consolidation, and to what extent (if at all) to continue temporary policies enacted in pandemic response laws.

Further, the Biden Administration has prioritized climate change as an overarching federal policy priority. Debate over the next farm bill may include consideration of policies related to agriculture and climate change—how federal programs and policies can or should support agriculture's adaptation to changing climatic conditions, as well as agriculture's potential contributions to climate change mitigation. Legislation that would advance the Administration's climate policy priorities in food and agriculture has been introduced in the 117th Congress. If the majority party in the House or Senate changes with the 2022 elections, congressional policy priorities for a new farm bill in the 118th Congress also may change.

Budget Situation and Outlook

Budget Basics

Federal spending for agriculture is divided into two main categories: mandatory and discretionary spending. In the farm bill, *mandatory spending*—which does not require a separate appropriation—is authorized primarily for farm commodity programs, crop insurance,

conservation, and nutrition assistance programs.[6] *Discretionary spending* is authorized for everything else that is not considered mandatory spending. Programs with discretionary spending—including most rural development, research, and credit programs—are authorized in the farm bill but are funded separately in annual appropriations acts. Some research, bioenergy, or rural development programs may have both types of funding, but their primary funding source is discretionary.

Mandatory spending programs usually dominate the farm bill debate and budget. The farm bill provides mandatory spending and determines its policy by following a framework of laws for budget enforcement that use a projected *baseline* and *scores* from the Congressional Budget Office (CBO).

The CBO baseline represents budget authority and is a projection at a particular point in time of what future federal spending on mandatory programs would be assuming current law continues. This baseline is the *benchmark* against which proposed changes in law are measured. Having a baseline essentially gives programs built-in future funding if policymakers decide that the programs are to continue.

The impact (score) of a proposed bill that alters mandatory spending is measured in relation to the baseline. Changes that increase spending relative to the baseline have a *positive* score; those that decrease spending relative to the baseline have a *negative* score. *Budget neutral* refers to having a zero score. Increases in overall cost beyond the baseline may be subject to budget constraints, such as pay-as-you-go requirements.[7] Reductions from the baseline may be used to offset a bill's other provisions that have a positive score or used to reduce the federal deficit. The annual budget resolution determines whether a farm bill would be held budget neutral or whether it would be directed to reduce spending or authorized to increase spending.

Farm Bills in Perspective

Farm bills over the past two decades have ranged from positive to negative scores relative to their baseline funding. The 2002 farm bill (P.L. 107-171) had a positive score, increasing spending by $73 billion over 10 years, which was allowed by a budget resolution during a budget surplus.[8] The 2008 farm bill (P.L. 110-246) was budget neutral, although it added $9 billion to outlays over 10 years by using offsets from a tax-related title within the omnibus legislation.[9] The 2014 farm bill had a negative score, reducing spending by $16 billion over 10 years.[10] The 2018 farm bill achieved budget neutrality by using $3 billion of reductions from an account in the Rural Development title (Title VI) to offset increases in other titles.[11]

Farm bills have 5-year and 10-year budget projections according to federal budgeting practices. When the 2018 farm bill was enacted, the projected cost for the five-year span of the act was $428 billion (FY2019-FY2023). The projected 10-year cost was $867 billion (FY2019-FY2028).

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[6] Crop insurance is funded through the Federal Crop Insurance Corporation. The Supplemental Nutrition Assistance Program (SNAP) is a mandatory entitlement paid through the U.S. Department of the Treasury. Farm commodity programs, conservation, and many other farm bill mandatory programs are funded through the Commodity Credit Corporation (CCC).

[7] For information on pay-as-you-go, see CRS Report R41157, *The Statutory Pay-As-You-Go Act of 2010: Summary and Legislative History*.

[8] CRS Report RL31704, *A New Farm Bill: Comparing the 2002 Law with Previous Law* (available upon request).

[9] For information on the 2008 farm bill, see CRS Report RL34696, *The 2008 Farm Bill: Major Provisions and Legislative Action*.

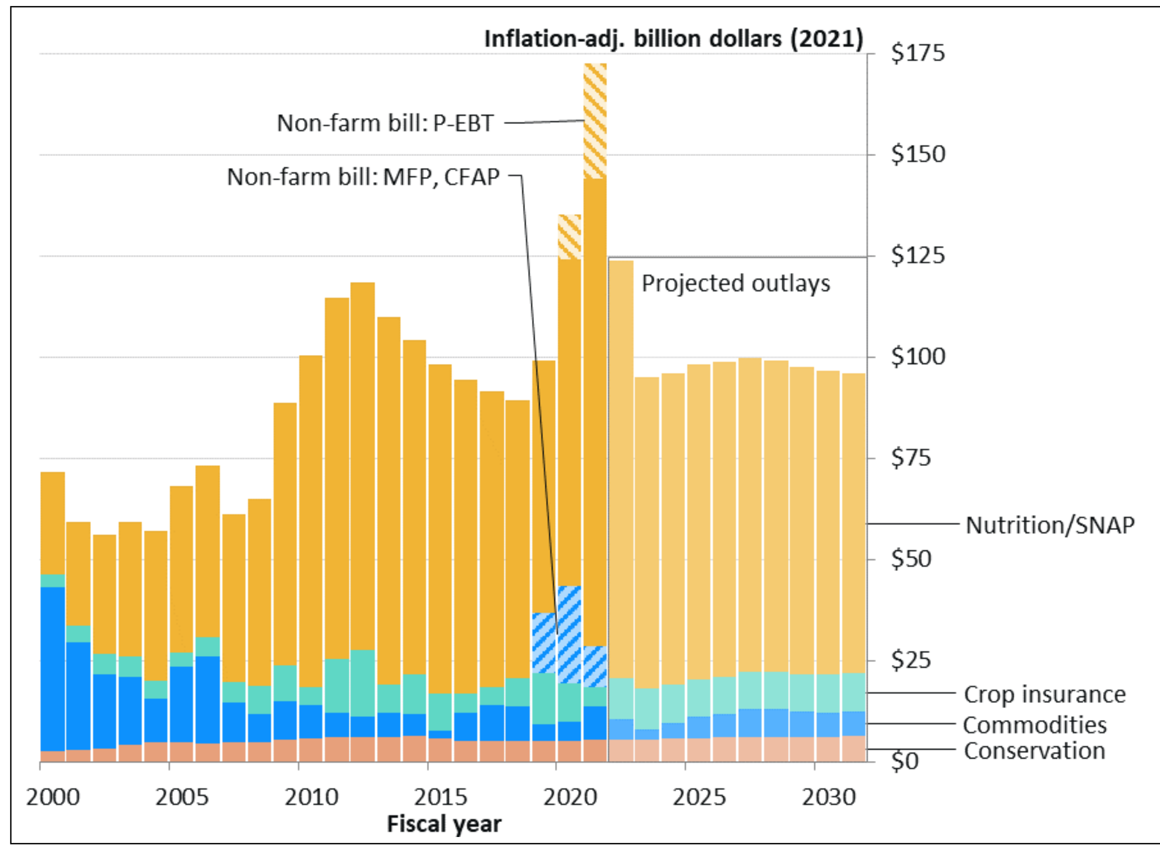
[10] For information on the 2014 farm bill, see CRS Report R42484, *Budget Issues That Shaped the 2014 Farm Bill*.

[11] For information on the 2018 farm bill, see CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*.

Four titles accounted for 99% of the 2018 farm bill's mandatory spending: Nutrition (Title IV; primarily SNAP), Commodities (Title II), Crop Insurance (Title XI), and Conservation (Title II).

Figure 1 shows how the relative proportions of farm bill spending have shifted in inflation-adjusted terms over the past two decades and in projections for the next 10 years. Conservation spending has steadily risen. Crop insurance has been variable but generally is rising as program benefits and enrollment have expanded. Farm commodity program spending has been variable but generally has declined except for recent supplemental spending. Nutrition assistance rose after the 2009 recession, waned for several years as the economy recovered, and rose again at the onset of the COVID-19 pandemic. Since FY2019, supplemental funding has increased outlays for farm and nutrition assistance.

Figure 1. Selected Farm Bill Programs and Supplemental Assistance



Source: Created by CRS using Congressional Budget Office (CBO), "Details About Baseline Projections for Selected Programs," July 2021 baselines; and USDA, *Budget Appendix* (various years).

Notes: P-EBT = Pandemic Electronic Benefit Transfer; SNAP = Supplemental Nutrition Assistance Program; MFP = Market Facilitation Program; CFAP = Coronavirus Food Assistance Program. Adjusted for inflation to 2021 dollars using the gross domestic product price deflator. For comparison, includes selected supplemental outlays outside the farm bill for trade assistance (MFP), coronavirus assistance (CFAP), and P-EBT.

Supplemental spending is not part of the farm bill baseline but may be important to note because of its size in recent years. In FY2019 and FY2020, the Trump Administration used its discretion to provide supplemental funding through the Market Facilitation Program (MFP) in response to tariff policies that disrupted U.S. agricultural exports. Then in FY2020 and FY2021, Congress and the executive branch provided supplemental funding during the pandemic through the Coronavirus Food Assistance Program (CFAP) and the Pandemic Electronic Benefit Transfer.

CBO updates its government spending projections, at least annually, based on new information about the economy and program participation.[12] However, any reductions in projected farm bill spending after its enactment do not generate savings that can be credited elsewhere. Similarly, any increases in projected farm bill spending after enactment do not require additional resources from Congress. Mandatory programs operate as entitlements, with eligibility and formulas that are followed once enacted.

Future Baseline

As of this writing, the official baseline to write the next farm bill does not exist. CBO is expected to release its official "scoring baseline" for the 2023 legislative session in early 2023, which would cover the 10-year period FY2024-FY2033. Presently, the July 2021 CBO baseline is the best indicator of future funding availability.

Figure 2. Baseline for Farm Bill Programs, by Title

($ billions; $1,033 billion over 10 years, FY2022-FY2031)

Nutrition, $815
Crop Ins., $95
Conservation, $59
Commodities, $55
$9
Trade, $4.2
Horticulture, $2.1
Research, $1.3
Miscellaneous, $0.8
Energy, $0.5

Source: Created by CRS using CBO, "Details About Baseline Projections for Selected Programs," July 2021 baselines (for the commodities, conservation, trade, nutrition, and crop insurance titles); and CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*; and amounts indicated in law for programs in other titles.

Notes: Excludes changes not yet incorporated, such as to the Thrifty Food Plan. Supplemental trade and pandemic assistance are not part of the baseline.

Using the July 2021 CBO baseline projection that covers the major farm bill programs, and funding indicated in law for other farm bill programs not included in the annual projection, an estimated current baseline for farm bill programs is $527 billion over the next 5 years (FY2022-FY2026) and $1,033 billion over the next 10 years (FY2022-FY2031; **Figure 2**).[13] New CBO baselines later in 2022 and again in 2023 would update these amounts and add future fiscal years.

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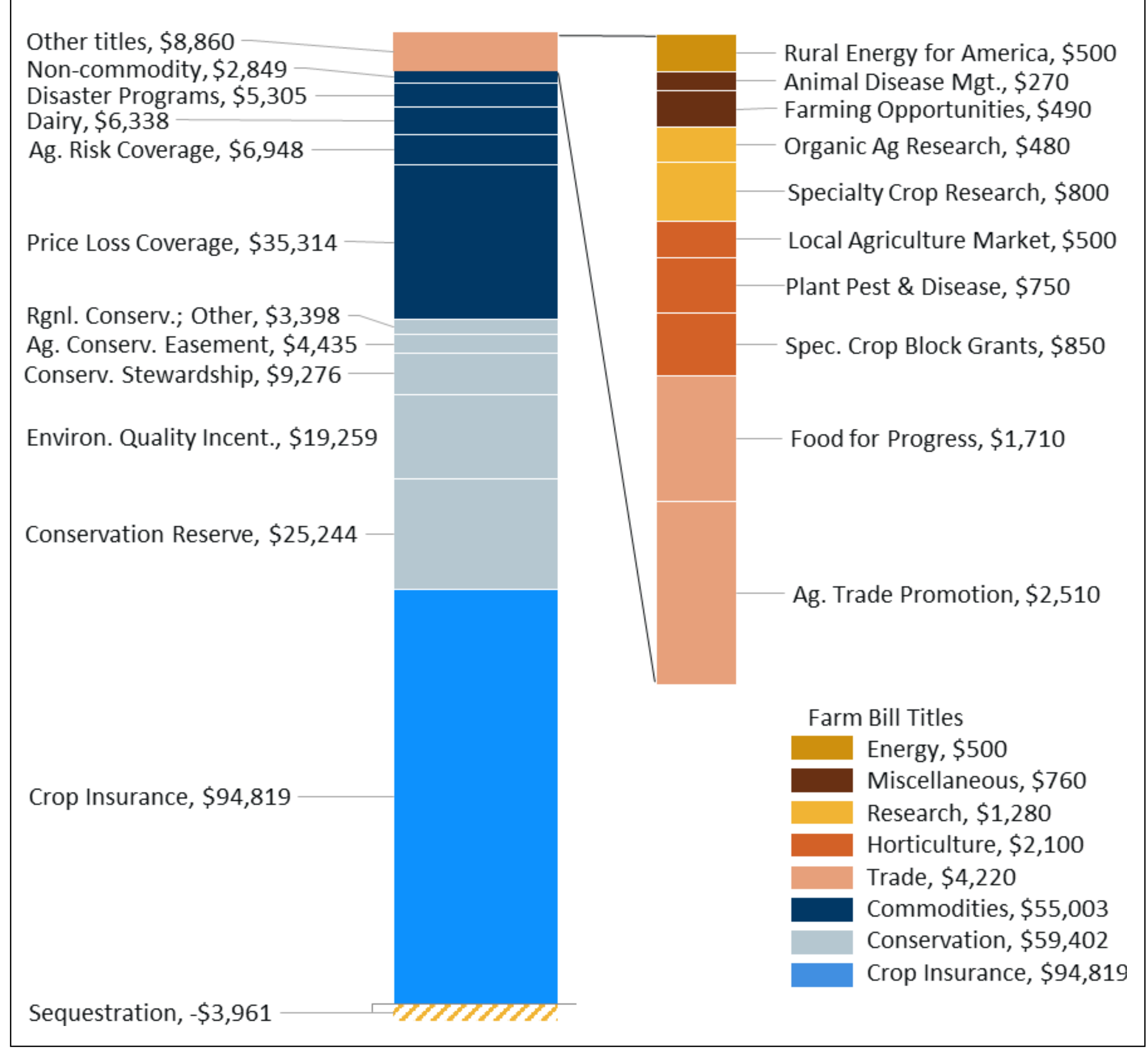
[12] Congressional Budget Office (CBO), "Details About Baseline Projections for Selected Programs," various updates, at https://www.cbo.gov/about/products/baseline-projections-selected-programs.

[13] Calculated using amounts for the 2018 farm bill's nutrition, crop insurance, conservation, commodity programs, and trade titles from CBO, "Details About Baseline Projections for Selected Programs," July 2021 baselines, at

According to CBO's July 2021 baseline, the Nutrition title has become nearly 80% of the 2021 baseline, compared with about 76% when the 2018 farm bill was enacted, mostly due to higher outlays during the COVID-19 pandemic. The 10-year baseline for SNAP is $815 billion as of July 2021, compared with $664 billion when the 2018 farm bill was enacted. For agriculture programs that make up the rest of the farm bill, baseline amounts also are higher than when the 2018 farm bill was enacted ($218 billion over 10 years as of 2021, compared with $203 billion over 10 years in 2018).

Figure 3. Baseline for Agriculture Programs in the Farm Bill

($ millions; excluding Nutrition title, $218 billion over 10 years, FY2022-FY2031)



Source: Created by CRS using CBO, "Details About Baseline Projections for Selected Programs," July 2021 baselines (for programs in the commodities, conservation, trade, and crop insurance titles); and CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*; and amounts indicated in law for programs in other titles.

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http://www.cbo.gov/about/products/baseline-projections-selected-programs. Amounts for other 2018 farm bill titles (including Horticulture; Research, Extension, and Related Matters; Energy; and Miscellaneous) are compiled using the CBO cost estimate of the 2018 farm bill, available at CBO, *H.R. 2, Agriculture Improvement Act of 2018*, December 11, 2018, at https://www.cbo.gov/publication/54880.

Compared with past farm bills, the 2018 farm bill included more programs that have a budget baseline. **Figure 3** shows the baseline for individual agricultural programs in the farm bill, excluding the Nutrition title. The 2014 and 2018 farm bills added permanent baseline for several of the relatively smaller budget programs, such as those shown for the research, horticulture, energy, and miscellaneous titles.[14]

Figure 4. Farm Bill Programs Without a Baseline Beyond FY2023

Total mandatory funding during the 2018 farm bill (FY2019-FY2023)

$ Millions, 5 years
0 50 100 150 200

Research $235 million
Foundation for Food & Ag. Research
Scholarships for 1890s Institutions
Urban, Indoor & Emerging Ag. Production

Miscellaneous $336 million
Emergency Citrus Disease Research
Wool Apparel Mfg. Trust Fund
Pima Cotton Trust Fund
Wool Research and Promotion
Sheep Production & Marketing Grants

Conservation $130 million
Feral Swine Eradication & Control
Voluntary Public Access & Habitat
Grassroots Source Water Protection

Energy $125 million
Biorefinery Assistance
Bioenergy Prog. for Advanced Biofuels
Biobased Markets Program

Horticulture $35 million
National Organic Cert. Cost-Share
Organic Prod. & Market Data Initiatives
Organic Cert./Trade Tracking & Data
Multiple Crop & Pesticide Use Survey

Commodities, $16 m.
Program Implementation

Source: Created by CRS using CBO, *H.R. 2, Agriculture Improvement Act of 2018*, December 11, 2018, at https://www.cbo.gov/publication/54880; and the text of P.L. 115-334.

Notes: Programs are identified as having budgetary outlays at any time during FY2019-FY2023 but no new budget authority beyond FY2023. Programs are noted as table notes *b* and *c* in Table 3 of CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*.

Some of these smaller and newer programs had been counted as "programs without a baseline" when past farm bills were written, meaning they received mandatory funding in a farm bill but did not retain baseline beyond that farm bill to pay for reauthorization. As Congress prepares for the next farm bill, there are fewer programs without a baseline than for previous reauthorizations. Nineteen programs received mandatory funding in the 2018 farm bill but do not have a baseline beyond their expiration at the end of FY2023 (**Figure 4**), compared with 39 programs when the 2014 farm bill expired in 2018.[15] The availability of baseline for more programs and the smaller

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[14] For example, see the several instances of table notes *d* in Table 3 of CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*, for programs without baseline that obtained future funding beyond the end of the farm bill.

[15] For details on specific programs, see CRS Report R44758, *Farm Bill Programs Without a Budget Baseline Beyond FY2018*.

number of programs without a baseline may make it easier for Congress to balance budget considerations in the next farm bill than in the 2018 farm bill.

For Further Information

CRS Expert

- Jim Monke, Specialist in Agricultural Policy

Relevant CRS Products

- CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2018*, by Jim Monke
- CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*, by Jim Monke
- CRS Report R44606, *The Commodity Credit Corporation (CCC)*, by Megan Stubbs
- CRS Report 98-560, *Baselines and Scorekeeping in the Federal Budget Process*, by Bill Heniff Jr.

Farm Economy and International Environment

The U.S. farm sector experienced large changes in farm income between 2010 and 2021. From 2010 to 2014, the sector experienced a period of unusually high incomes driven by strong commodity prices and agricultural exports. From 2015 to 2018, incomes were generally below long-run historical averages due to declining commodity prices. In 2018 and 2019, retaliatory tariffs imposed on exports of certain agricultural commodities affected U.S. farm sector income. Widespread flooding led to record-high prevented planting levels that curbed some crop production in 2019, and drought conditions led to production declines for certain crops in 2021. Beginning in 2020, the U.S. farm sector experienced additional challenges related to the COVID-19 pandemic.

Despite these challenges, U.S. farm sector income increased for the third consecutive year in 2021 and exceeded long-run historical averages in 2020 and 2021. Farm sector income in 2021 was the highest since 2013. Adjusted for inflation, 2021 cash receipts for sales of livestock and animal products were the highest since 2015. In 2021, cash receipts for all crops were the highest since 2014, although cash receipts for fruits, vegetables, and nuts declined for the fourth consecutive year. Continuing a trend since the late 1990s, median farm household income exceeded median U.S. household income in 2018, 2019, and 2020.

Direct payments from federal programs were a key factor driving farm incomes in 2019-2021. In 2020, farmers received record-setting total payments of $45.7 billion. In 2021, total payments amounted to $27.1 billion—$7.0 billion above the inflation-adjusted average for federal direct payments from 1996 to 2021. Most of these payments came from ad hoc programs created to respond to retaliatory tariffs and the COVID-19 pandemic, including the MFP and CFAP. Commodity support programs authorized under the 2018 farm bill provided relatively low payment levels because commodity price declines were not sufficiently severe or prolonged to trigger payments from key support programs. Households with large-scale family farm businesses (i.e., gross cash farm income of $350,000 or more) received the majority of government direct payments to farmers. Households with smaller-scale family farm businesses (i.e., gross cash farm income less than $350,000) earned negative income from their farm businesses on average and received a small share of government direct payments. This discrepancy in the share of payments between larger and smaller farm businesses is consistent with formulas for revenue support program payments, which are based on historical production volume.

As of March 2022, prices are higher than in recent years for many agricultural commodities, and total agricultural exports are at record levels. Trade agreements signed by the United States since 2019—including the Phase One Agreement with China, the "Stage One" U.S.-Japan Agreement,

and the U.S. Mexico-Canada Agreement[16]—were key factors supporting certain agricultural exports in 2020 and 2021. The Phase One Agreement with China expired at the end of 2021, creating uncertainty about future Chinese purchases of U.S. agricultural commodities.

Farmers, like other U.S. business operators, are coping with COVID-19-related impacts on supply chains, including delays and high shipping costs. Inflation in the overall U.S. economy is contributing to higher costs for farm inputs—particularly fuel, natural gas, and chemical inputs. The prices consumers pay for food at grocery stores increased by 6.5% in 2021,[17] which compares with an average annual increase of 1.5% over the prior decade. In 2021, meat, poultry, fish, and eggs as a category recorded the highest retail food price increases, rising by 12.5%.

For Further Information

CRS Expert

- Stephanie Rosch, Analyst in Agricultural Policy

Relevant CRS Product

- CRS Report R47051, *U.S. Farm Income Outlook: 2021 Forecast*, by Stephanie Rosch

Agricultural Production

The 2018 farm bill contained a variety of programs that provide support to crop and livestock producers. Among these, certain programs target specific commodities, production practices (e.g., organic agriculture), or marketing practices (e.g., local foods). Other programs provide price, income, or other forms of support (e.g., animal health protections) for producing or marketing specific commodities.

Farm safety net programs, which include the commodity support programs, FCIP, and permanent disaster assistance programs discussed in this section, account for the majority of the farm bill budget baseline, excluding food and nutrition programs. These farm safety net programs provide direct payments to farmers during times of low market prices, natural disasters, and other adverse events. Most farmers and ranchers are eligible for at least one farm safety net program. Federal crop insurance is available for most field crops (e.g., corn, wheat), certain horticultural crops, and certain livestock and animal products. Certain field crops, dairy, and sugar are eligible for farm commodity support programs. Horticultural crops and livestock also may receive support from the permanent disaster programs.

Commodity Support Programs

Agricultural commodity support began with 1930s Depression-era efforts to raise farm household income when commodity prices were low because of prolonged weak consumer demand. Although initially intended to be a temporary effort, commodity support programs have been retained and expanded to cover many more crops than the few originally targeted. Congress has shifted away from the original approach of providing support through supply control and commodity stocks management to the current approach of direct income and price support

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[16] For background on these agreements, see CRS In Focus IF11412, *U.S.-China Phase I Deal: Agriculture*; CRS Report R46576, *"Stage One" U.S.-Japan Agreement: Agriculture*; and CRS Report R45661, *Agricultural Provisions of the U.S.-Mexico-Canada Agreement*.

[17] U.S. Bureau of Labor Statistics, "Economic News Release: Consumer Price Index Summary," updated January 12, 2022.

payments. The Commodity Credit Corporation (CCC) provides financing for commodity support programs, and all such programs receive mandatory indefinite appropriations of "such sums as necessary."[18] Annual program outlays depend in part on commodity prices, such that outlays increase as commodity prices decrease.

Selected Farm Bill Provisions

The 2018 farm bill suspended various out-of-date price support programs authorized under permanent law and authorized multiple commodity support programs through the 2023 crop year. These programs provide support to producers of eligible commodities and to processors of cotton and sugar. For certain commodity support programs, various producer eligibility criteria limit who can participate and provide for maximum payment limits.

Price Loss Coverage Program

Price Loss Coverage (PLC) payments augment farm revenues during periods of low market prices. The PLC program makes payments when season-average market prices fall below a statutorily determined reference price. Payments are proportional to historical planted acres (i.e., base acres) and historical crop yields. The program charges no participation fee. PLC coverage is available for barley, chickpeas, corn, cotton (for seed), lentils, oats, peanuts, peas, rice, sorghum, soybeans, wheat, and certain other oilseeds. PLC coverage cannot be combined with Agriculture Risk Coverage (ARC) for the same commodity. The 2018 farm bill made certain changes to the PLC program, including allowing the following flexibilities: reference price increases of 15% under certain market conditions, for producers to update certain base acre holdings and historical yields, and for producers to change crop enrollments annually between PLC and ARC.

Agriculture Risk Coverage Program

ARC payments augment farm revenues during periods of low crop revenues. There are two types of ARC program coverage: county-level coverage (ARC-CO) and individual-level coverage (ARC-I). ARC-CO makes payments to farmers when county-level revenue for a covered crop falls below a guaranteed level that adjusts annually based on historical county revenues. ARC-I makes payments to farmers when farm-level revenue falls below a guaranteed level that adjusts annually based on historical farm revenues. Payments are proportional to historical planted acres. The program charges no participation fee. The same commodities eligible for PLC are eligible for ARC. The 2018 farm bill made certain changes to the program, including allowing producers to update certain base acre holdings and historical yields and directing USDA to prioritize use of FCIP data for calculating county yields.

Marketing Assistance Loan Program

The Marketing Assistance Loan (MAL) program helps farmers manage their cash flow at harvest time by guaranteeing that farmers can earn at least a minimum revenue for commodities used as MAL collateral. The MAL program offers producers or processors, depending on the crop, nine-month, nonrecourse loans for qualifying stored commodities. The loans are valued at commodity-specific MAL rates established in the 2018 farm bill. When market prices fall below the MAL

[18] Annual outlays for commodity support programs vary based on program enrollments and market conditions. Benefits provided to program participants are calculated according to formulas specified in statute. By providing mandatory indefinite appropriations for these programs in the farm bill, Congress assures that sufficient funds will be available to meet program obligations without further legislative action. For more information, see CRS Report R44606, *The Commodity Credit Corporation (CCC)*.

rates, producers can repay the loans at the market price or surrender the commodity used as collateral in lieu of repayment. Farmers receive the difference between the lower market price and the higher MAL rate as a marketing loan gain payment. MAL coverage is available for the same crops as ARC and PLC—excluding seed cotton—as well as upland and extra long staple cotton, honey, mohair, processed sugar, and wool. The 2018 farm bill increased the statutory loan rate for certain commodities, authorized recourse loans for certain lower quality commodities, and changed how market prices are calculated for cotton, among other changes.

Loan Deficiency Payment Program

The Loan Deficiency Payment (LDP) program augments farm revenues during periods of low market prices. When market prices fall below the MAL rates, the LDP program provides payments to producers equal to the amount of MAL marketing loan gain payments. LDPs are available for the same commodities eligible for MALs. Farmers cannot receive LDPs for commodities used as collateral for MALs. The 2018 farm bill extended the existing program.

Cotton Policy

Congress did not include upland cotton in the list of commodities eligible for ARC and PLC under the 2014 farm bill in response to a World Trade Organization (WTO) dispute settlement case.[19] Instead, cotton producers were eligible to receive ARC and PLC payments using "generic" base acres.[20] The 2014 farm bill also provided cotton producers with separate *shallow loss coverage* through the FCIP.[21] The Bipartisan Budget Act of 2018 (P.L. 115-123) authorized ARC and PLC support for cotton grown for seed. The 2018 farm bill provided support for seed, upland, and extra long staple cotton producers through the ARC, PLC, MAL, and LDP programs. The 2018 farm bill also continued certain import quotas on upland cotton, adjustment assistance for domestic textile mills using upland cotton, and special competitiveness payments for domestic users and exporters of extra long staple cotton.

Dairy Margin Coverage Program

In the 2014 farm bill, Congress shifted the way U.S. dairy policy supports milk prices—from USDA buying dairy commodities to a margin protection program providing payments to dairy producers when the difference between the milk price and a calculated feed ration falls below a producer-selected margin. Actual margins remained higher than initially estimated when the 2014 program was established, resulting in few support payments to producers experiencing weak net returns on milk. In response, the 2018 farm bill established the Dairy Margin Coverage (DMC) program, which lowered producer-paid premium rates for annual milk production of 5 million pounds or less, increased available margin coverage to $9.50 per hundredweight (cwt.), and covered a larger quantity of milk production than the 2014 farm bill. In addition to the DMC program, the 2018 farm bill established a milk donation program to reimburse costs for fluid milk

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[19] For more information on cotton and the WTO dispute, see CRS Report R45143, *Seed Cotton as a Farm Program Crop: In Brief*.

[20] The 2014 farm bill renamed cotton base acres as "generic" base acres. Farmers were eligible to receive Agriculture Risk Coverage (ARC) and Price Loss Coverage (PLC) payments per generic base acre if they planted crops that were otherwise eligible to receive ARC and PLC payments.

[21] The federal crop insurance program's (FCIP's) shallow loss coverage is an area-based insurance product that is used in combination with a regular individual crop insurance policy to partially offset the cost of the regular policy's deductible.

donations by producers, processors, and cooperatives; amended the formula for the Class I skim milk price used to calculate the Class I price under Federal Milk Marketing Orders (FMMOs); and reauthorized the Dairy Forward Pricing Program, the Dairy Indemnity Program, and the Dairy Promotion and Research Program through FY2023.

Sugar Program

Congress extended the U.S. sugar program's existing nonrecourse loans under the MAL program, as well as marketing allotments, and the Feedstock Flexibility Program (FFP) provisions in the 2018 farm bill.[22] The 2018 farm bill raised the loan rate by one cent to 19.75 cents per pound for raw cane sugar and by 1.29 cents to 25.38 cents per pound for refined beet sugar. USDA is required, to the maximum extent possible, to operate the U.S. sugar program at zero cost to the federal government by avoiding sugar loan forfeitures to the CCC. The sugar program uses domestic marketing allotments and import limitations to maintain prices above loan forfeiture levels. Marketing allotments to domestic sugar beet and sugar cane processors limit the amount of sugar marketed for domestic human consumption, while U.S. sugar imports are limited through a tariff-rate quota (TRQ) system that allows for sugar imports at low tariff rates and out-of-quota imports at rates that are usually prohibitive to imports. USDA sets the annual TRQ volume of sugar that meets U.S. WTO obligations. The U.S. Trade Representative allocates the TRQs to various countries and may reallocate unused, country-specific TRQs during the marketing year. A separate bilateral agreement with Mexico regulates the volume of sugar imported from that country. FFP requires USDA to purchase surplus sugar to sell to ethanol producers. The 2008 farm bill established the program, which was activated once, in 2013.

Issues and Options

Distribution of Payments Across Eligible Commodities

When constructing the 2018 and prior farm bills, Congress has considered the distribution of support payments across eligible commodities. Different regions tend to produce different mixes of commodities, which raises the potential for geographic disparities in support payments. Under the 2018 farm bill, commodity support program outlays varied across crops depending on the extent of historical and annual production, market prices, the selection of programs that producers chose to enroll in each year, and program payment trigger levels set in statute. Certain commodities were more likely to receive payments from the MAL and PLC programs than other commodities given the market prices prevalent in 2018 when the farm bill was enacted and the payment triggers specified in statute. Congress could consider whether the payment triggers for the MAL and PLC programs are appropriate in view of the prevailing levels of commodity prices under the current farm bill.

Timeliness of ARC and PLC Payments

Farmers receive ARC and PLC payments at least one year after the crop has been harvested due to technical requirements for calculating average prices over the crop marketing year. This delay may reduce the utility of these payments in addressing farmers' cash flow needs during years when prices are low. The delay in payments also may affect the farm bill's budget score by shifting one year of payments outside of the 10-year scoring window.

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[22] In this report, FFP is the acronym for both this program, the Feedstock Flexibility Program, and Food For Peace. For information on Food for Peace, see "International Food Assistance."

Payment Limits and Eligibility Criteria

Commodity support programs approach payment limitations, eligibility criteria, or both in different ways or not at all. ARC and PLC limit the maximum payments that an individual person or legal entity can receive per year. ARC, PLC, MALs, and LDPs impose a means test by limiting the maximum income that an individual can earn and remain eligible for program benefits. In contrast, the FCIP does not limit payments or impose a means test for benefits. The limits on commodity support program payments may raise questions about the size of farms that should receive support, whether payments should be proportional to production or limited per individual, and which farm owners and operators should receive payments. USDA has adopted payment limits and eligibility criteria for certain ad hoc payment programs created since 2018, including the MFP and CFAP, that differ from the payment limits and eligibility criteria applied to commodity support programs authorized by the 2018 farm bill. Some policymakers have advocated for tightening payment limits for commodity support programs to save money, to respond to general public concerns about payments to large farms, and to reduce potential incentives to expand large farms at the expense of small farms. Others have countered that larger farms should not be penalized for the efficiencies they have achieved through economies of size.

Dairy Policy

For 2021, DMC paid about $1.2 billion to dairy producers though January 18, 2022, as low milk prices and high feed costs resulted in an average producer margin of about $6.80 per cwt. During 2021, 77% of U.S. dairies participated in DMC, and producers who bought margin coverage above 2020's average margin, particularly at the $9.50 level, received significant payments for covered milk production. Some in Congress may want to evaluate the program for ways to incentivize greater participation and for whether DMC provides an adequate safety net for dairy producers, who often face milk production costs that are higher than the price they receive for milk, including particularly those dairies with fewer than 500 milk cows.

Most milk is priced through the Federal Milk Marketing Order (FMMO) system, and some dairy stakeholders believe reforming the system might improve milk pricing for producers. The 2018 farm bill amended the Class I skim milk price calculation. That formula change negatively affected producer milk prices in 2020 and 2021 when the COVID-19 pandemic disrupted milk markets. The Dairy Pricing Opportunity Act of 2021 (S. 3292) would reverse the 2018 farm bill's change to the Class I skim milk price formula, and it calls on USDA to hold hearings to allow dairy stakeholders to address their FMMO concerns. If Congress chooses to address producers' FFMO concerns in the debate over the next farm bill, it could consider these and other proposals.

Sugar Policy

Sugar producers and sugar end users (e.g., confectioneries and bakeries) have differing views on the U.S. sugar program. Sugar producers point out that the sugar program, unlike other farm commodity support programs, supports domestic sugar production at no cost to the federal government. Sugar end users contend that program restrictions on marketing allotments and imports raise the costs of their manufactured products, which puts U.S. manufacturers at a competitive disadvantage compared with imported sugar-intensive products while shifting the cost of the sugar support program from the federal government to U.S. consumers.

During past farm bill debates, proposals to amend or end the sugar program have come before Congress. In the 117th Congress, the Fair Sugar Policy Act of 2021 (H.R. 4680/S. 2466) would amend the sugar program by lowering the loan rate of raw cane sugar from 19.75 cents per pound currently to 18.75 cents; repealing marketing allotments for processors and the FFP; and allowing

countries with TRQ allotments to supply sugar to the United States to share their allotments with other exporting countries voluntarily and temporarily. Given the contentious history of sugar policy, this bill or similar legislation to revise the program could become part of the farm bill debate on U.S. sugar policy.

For Further Information

CRS Experts

- Stephanie Rosch, Analyst in Agricultural Policy
- Joel L. Greene, Analyst in Agricultural Policy

Relevant CRS Products

- CRS Report R45730, *Farm Commodity Provisions in the 2018 Farm Bill (P.L. 115-334)*, by Randy Schnepf
- CRS Report R46561, *U.S. Farm Policy: Revenue Support Program Outlays, 2014-2020*, by Randy Schnepf
- CRS Report R46248, *U.S. Farm Programs: Eligibility and Payment Limits*, by Randy Schnepf and Megan Stubbs
- CRS Report R45143, *Seed Cotton as a Farm Program Crop: In Brief*, by Randy Schnepf
- CRS In Focus IF11188, *2018 Farm Bill Primer: Dairy Programs*, by Joel L. Greene
- CRS Report R45044, *Federal Milk Marketing Orders: An Overview*, by Joel L. Greene
- CRS In Focus IF10223, *Fundamental Elements of the U.S. Sugar Program*, by Mark A. McMinimy

Crop Insurance

The 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, covering about 62% of the total premium on average for all policies sold in 2021.[23] Farmers can choose among many types of policies and policy options to customize coverage to their farm businesses' specific needs. Private-sector companies sell and service the policies; USDA subsidizes, regulates, and reinsures the policies.

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." CBO projects that net spending for the FCIP will be almost $49 billion for FY2021-FY2025 and more than $95 billion for FY2021-FY2030—including expenditures to subsidize farmers' policy premiums, compensate private insurance providers for administrative and operating expenses, and reinsure losses from policies sold.[24]

The FCIP plays a prominent role in helping producers manage financial risk and provides financial support to U.S. farmers in times of low farm prices and natural disasters. In crop year 2021, the program sold more than 2.2 million policies and insured crops and livestock valued at more than $150 billion.[25] In all, the FCIP provided coverage for 131 commodities and offered 33 different types of insurance coverage. Fourteen companies sold crop insurance to farmers through the program, and farmers insured a record high 444 million acres in 2021.[26]

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[23] CRS calculations using data from USDA Risk Management Agency (RMA), "Summary of Business," database, downloaded January 11, 2022, at https://prodwebnlb.rma.usda.gov/apps/SummaryOfBusiness/ReportGenerator.

[24] CRS calculations using CBO, *Baseline Projections: USDA's Farm Programs*, July 2021.

[25] USDA, RMA, "Summary of Business" database.

[26] USDA, Office of Inspector General, *Federal Crop Insurance Corporation/Risk Management Agency's Financial*

Selected Farm Bill Provisions

The Crop Insurance title (Title XI) of the 2018 farm bill made several minor modifications to the FCIP that CBO projected would reduce FCIP outlays relative to baseline levels by $104 million during the FY2019-FY2028 period.[27] Changes that were projected to increase budgetary outlays included authorizing catastrophic coverage for grazing crops and grasses; allowing separate coverage for crops that are grazed and mechanically harvested in the same season; redefining the term *beginning farmer or rancher* for whole-farm revenue protection policies; and waiving certain requirements for hemp coverage proposals submitted by the private sector. Changes that were projected to reduce budgetary outlays included increasing the administrative fee for catastrophic coverage; authorizing multicounty enterprise units; reducing funds for certain research and development contracts and partnerships; reducing funds for review, compliance, and program integrity; and changing how producer benefits are reduced when producing crops on native sod. The 2018 farm bill also added hemp to the list of crops eligible for FCIP premium subsidies; made hemp eligible for post-harvest loss coverage; and directed USDA to conduct research for developing FCIP coverage for priority topics, commodities, and areas.

Issues and Options

Over the last three farm bills, Congress has expanded the FCIP to cover more commodities and more types of risks. Although crop insurance market penetration for row crops has been high historically, opportunities exist to expand participation, especially for specialty crops, livestock, and animal products.

Numerous stakeholders have proposed reducing the cost of the FCIP by capping underwriting gains for private-sector insurers, reducing premium subsidies for producers, introducing premium subsidy eligibility criteria based on the producer's adjusted gross income, and other proposals. Additionally, the Standard Reinsurance Agreement (SRA)—the agreement between the FCIC and private-sector firms that sell FCIP policies that specifies how the cost of reinsuring the FCIP is shared between the private-sector firms and USDA—has been in place since 2011. To identify additional opportunities to reduce the cost of operating the program, Congress may consider requiring greater transparency about the actual cost of federal underwriting and the share of costs borne by the private sector.

The number of private-sector insurers participating in the FCIP has decreased over time, largely due to consolidation in the insurance industry. Congress may choose to examine the drivers of this consolidation, as well as any implications of consolidation on outreach to producers in underserved areas and on insurers' willingness to market new types of crop insurance coverage.

For Further Information

CRS Expert

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Relevant CRS Products

- CRS Report R46686, *Federal Crop Insurance: A Primer*, by Stephanie Rosch
- CRS Report R45291, *Federal Crop Insurance: Delivery Subsidies in Brief*, by Isabel Rosa
- CRS In Focus IF11919, *Federal Crop Insurance for Hemp Crops*, by Renée Johnson

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Statements for Fiscal Years 2021 and 2020, Audit Report 05401-0013-11, November 2021.

[27] For detailed budget analysis of modifications to the FCIP in the 2018 farm bill, see CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*.

Disaster Assistance

In addition to direct farm support, farm bills authorize programs designed to help farmers and ranchers recover from the financial effects of natural disasters. These programs are permanently authorized but generally amended in omnibus farm bills.

Selected Farm Bill Provisions

The 2014 farm bill (P.L. 113-79) permanently authorized four agricultural disaster programs for livestock and fruit trees.

- **Livestock Indemnity Program (LIP).** LIP provides payments to eligible livestock owners and contract growers for livestock deaths in excess of normal mortality or sold at reduced price caused by an eligible loss condition (e.g., adverse weather, disease, or animal attack).
- **Livestock Forage Disaster Program (LFP).** LFP makes payments to eligible livestock producers who have suffered grazing losses on drought-affected pastureland or on rangeland managed by a federal agency due to a qualifying fire.
- **Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP).** ELAP provides payments to producers of livestock, honey bees, and farm-raised fish as compensation for losses due to disease, adverse weather, feed or water shortages, or other conditions not covered under LIP or LFP.
- **Tree Assistance Program (TAP).** TAP makes payments to qualifying orchardists and nursery-tree growers to replant or rehabilitate trees, bushes, and vines damaged by natural disasters.

The programs provide compensation for a portion of lost production following a natural disaster and receive mandatory funding amounts of "such sums as necessary" from the CCC. Total payments under LIP, LFP, ELAP, and TAP vary each year based on eligible loss conditions.

Production losses from natural disasters also may be covered under the FCIP (see "Crop Insurance") and the Noninsured Crop Disaster Assistance Program (NAP). Producers who grow a crop that is ineligible for crop insurance may apply for NAP. NAP offers coverage for *catastrophic* losses—losses in excess of 50% of normal yield. Producers may purchase higher coverage levels for less severe losses (referred to as *buy-up* coverage).[28] Producers must purchase NAP policies prior to a disaster event and purchase or renew coverage annually. The program is authorized permanently and receives mandatory funding amounts of "such sums as necessary" from the CCC.

Issues and Options

Over the past 20 years, Congress has authorized permanent disaster assistance programs and expanded FCIP and NAP policies to reduce the need for ad hoc disaster assistance. Following enactment of the 2008 farm bill (P.L. 110-246), Congress appropriated little in the way of supplemental disaster assistance for agriculture for a number of years. This changed in 2018 when Congress authorized supplemental appropriations for agricultural production losses in 2017

[28] Buy-up coverage is available in increments of 5% to cover between 50% and 65% of a crop.

that were not covered by the FCIP or NAP.[29] Congress appropriated additional supplemental funding for natural disaster-related losses in 2018 through 2021, totaling more than $13 billion.[30] Most of this funding was made available through ad hoc assistance, including the Wildfires and Hurricanes Indemnity Program (WHIP) and block grants to states.

With the resurgence in ad hoc assistance, Congress might reassess the effectiveness of the permanent disaster assistance programs as well as NAP and crop insurance coverage. By covering the losses of farmers who chose not to purchase insurance, Congress could consider whether WHIP and other ad hoc assistance creates a potential disincentive for future participation in the FCIP or NAP. The scope and scale of supplemental disaster assistance since enactment of the 2018 farm bill has outpaced spending in some of the permanent disaster support programs, which may call into question whether the permanent disaster assistance programs can or should be expanded to cover additional losses or losses from events that are not currently covered. Overall, the next farm bill could provide a platform for Congress to debate the role of the federal government in supporting natural disaster-related losses for the farm industry, which is acutely vulnerable to natural disasters and fluctuations in weather.

For Further Information

CRS Expert

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Relevant CRS Products

- CRS Report RS21212, *Agricultural Disaster Assistance*, by Megan Stubbs
- CRS In Focus IF10565, *Federal Disaster Assistance for Agriculture*, by Megan Stubbs
- CRS In Focus IF11539, *Wildfires and Hurricanes Indemnity Program (WHIP)*, by Megan Stubbs

Intersecting Issues and Options for Farm Safety Net Programs

In addition to addressing issues confined to individual aspects of commodity support programs, crop insurance, or disaster assistance in the next farm bill, Congress also could consider addressing issues that intersect multiple aspects of these farm safety net programs. A selection of issues that intersect these program areas follow.

Farm Revenue Support Programs

In the next farm bill, Congress may consider whether the existing structure of farm revenue support programs serves its intended goals—or whether it may potentially introduce unintended outcomes. The U.S. farm sector produces commodities to supply domestic and international demand for food, animal feed, fuel, fiber, and other industrial products. Farm revenue support programs provide support to farmers, ranchers, and other types of agricultural operations to partially offset the financial costs of risks, such as adverse weather and market conditions. Shifting some of the financial costs of these risks from agricultural producers to the federal government can help to stabilize farm revenues. Payments from farm support programs also may improve farmers' access to credit. Proponents of farm revenue support programs have asserted that these programs are necessary to maintain a viable U.S. agricultural sector and an affordable

[29] The Bipartisan Budget Act of 2018 (P.L. 115-123) authorized $2.36 billion for agricultural losses in 2017.

[30] The FY2019 supplemental appropriations (P.L. 116-20) authorized $3 billion for losses in 2018 and 2019, and the FY2022 continuing resolution (P.L. 117-43) authorized $10 billion for losses in 2020 and 2021.

supply of food and fiber.[31] Critics have countered that revenue support programs are harmful and that they waste taxpayer dollars, distort producer behavior in favor of certain crops, inflate returns to landownership, encourage concentration of production, and place producers who do not receive farm support payments—including smaller domestic producers and farmers in lower-income foreign nations—at a comparative disadvantage in applying for credit from private-sector lenders and/or self-funding farm business investments.[32] In addition, certain environmental groups and agricultural economists have argued that subsidies encourage production on environmentally fragile lands and result in pollution from runoff of fertilizer and pesticides.[33] In contemplating a new farm bill, Congress may want to consider how best to balance these competing perspectives.

Supplemental Funding

Nonfarm bill supplemental funding has increased significantly since passage of the 2018 farm bill.[34] Some of this supplemental funding duplicated payments from existing farm safety net programs (e.g., supplemental payments in 2019 to augment regular prevented planting payments through the FCIP). Other supplemental funding provided support that differed from the existing farm safety net programs. This included price and income support for commodities not covered under existing commodity support programs, including for livestock and specialty crops under various USDA pandemic response programs, as well as MFP payments for losses due to trade disputes that were not specifically compensated under existing farm safety net programs.

The farm bill safety net programs—revenue support programs, the federal crop insurance program, and disaster assistance programs—have been established over time to provide a measure of stability in the farm sector and to promote an adequate supply of certain agricultural products while allowing commodity prices to respond to market signals. In view of the prominence of supplemental payments to the farm sector in recent years, Congress may consider what level of farm income is adequate to fulfill these policy objectives and whether the farm bill safety net programs are sufficiently flexible to respond to changing circumstances. Congress also may consider whether the combination of spending on farm revenue support programs and supplemental spending runs a risk of exceeding annual spending limits on trade-distorting domestic support payments that the United States has agreed to under WTO rules.[35] An added consideration for lawmakers is that any expansion in farm safety net programs under the existing farm bill baseline may require making funding reductions for other farm bill priorities.

Animal Agriculture

Farm bills traditionally do not provide livestock and poultry producers with farm revenue support programs like those for major crops, such as grains, oilseeds, and cotton. (The exception is dairy;

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[31] For example, see letter from the American Farm Bureau Federation to Chairmen Pat Roberts and Michael Conaway and ranking members Debbie Stabenow and Collin Peterson of the House and Senate Agriculture Committees, August 1, 2018, at https://www.fb.org/files/Farm_Bill_Conference_Letter_8-1-2018.pdf.

[32] For example, see Scott Lincicome, "Examining America's Farm Subsidy Problem," Cato Institute, December 18, 2020, at https://www.cato.org/commentary/examining-americas-farm-subsidy-problem.

[33] For example, see Union of Concerned Scientists, *Subsidizing Waste: How Inefficient US Farm Policy Costs Taxpayers, Businesses, and Farmers Billions*, Policy Brief, August 2016; and Daniel Sumner and Carl Zulauf, "Economic & Environmental Effect of Agricultural Insurance Programs," The Council on Food, Agricultural & Resource Economics, July 2012.

[34] For additional supplemental funding discussion, see "Budget Situation and Outlook" and funding amounts represented as "Non-farm bill" in **Figure 1**.

[35] For more information on WTO rules and limits for domestic agriculture supports, see CRS Report R45305, *Agriculture in the WTO: Rules and Limits on U.S. Domestic Support*.

see "Dairy Policy.") Instead, the livestock and poultry industries look to the federal government for leadership in protecting animal health; establishing transparent, science-based rules for trading animal products; resolving foreign trade disputes; and assuring that supplies of domestic and imported meat and poultry are safe.

Selected Farm Bill Provisions

The 2018 farm bill includes provisions in the Miscellaneous title (Title XII) that addressed animal health, a sheep production and grant program, cattle grading, a statutory dealer trust, and the USDA's Food Safety and Inspection Service (FSIS) guidance for small meat processors. It also included animal welfare provisions that prohibited the slaughter of dogs and cats for human consumption, extended a ban on animal fighting in U.S. territories, required USDA to submit a report on the importation of dogs, and provided shelter assistance grants for pets of victims of domestic violence.

The 2018 farm bill established the National Animal Disease Preparedness and Response Program, which authorized and funded USDA to enter into cooperative agreements with states, tribes, universities, and livestock organizations to conduct activities to mitigate risks to U.S. livestock from animal pests and disease. It also established the National Animal Health Vaccine bank to stockpile vaccines to enable the United States to respond to animal diseases, particularly foot-and-mouth disease (FMD), and expanded funding for the diagnostic National Animal Health Laboratory Network.

The 2018 farm bill established three cattle- and carcass-grading training centers that were set up in USDA's Agricultural Marketing Service in 2019. Other livestock-related provisions in the enacted law authorized USDA to conduct studies on establishing a livestock dealer statutory trust,[36] as well as directed FSIS to provide a report on guidance and outreach to small meat processors. USDA issued these reports in 2020, and the dealer trust was enacted into law in Division N, Section 763, of the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Issues and Options

The U.S. livestock and poultry sector is at risk of highly contagious animal disease outbreaks—such as FMD, African swine fever (ASF), and highly pathogenic avian influenza—that would disrupt U.S. farm animal production and live animal and livestock product exports. Increased resources for border and herd monitoring and surveillance activities for ASF are priorities for the hog industry, especially since ASF was found in the Western Hemisphere (the Dominican Republic and Haiti) for the first time ever in 2021. In September 2021, USDA announced $500 million in additional CCC funding for ASF efforts, and Congress could consider further expanding the preparedness programs initiated in the 2018 farm bill for animal disease threats.

COVID-19 outbreaks in some large meatpacking plants in 2020 and the related disruption to meat processing have heightened ongoing concerns about concentration in the meat-processing sector, leading to calls for increased processing capacity in the form of small- to medium-sized facilities. In the Consolidated Appropriations Act, 2021 (P.L. 116-260), Congress provided grants and loans for food processors with small-sized facilities. The act also provided grant funding to enable existing meat processors to upgrade their facilities to qualify for federal inspection, which would allow them to ship meat products in interstate commerce. In response, USDA established the

[36] In December 2020, Congress enacted the Dealer Statutory Trust in the Consolidated Appropriations Act, 2021 (P.L. 116-260). The dealer trust requires livestock dealers to hold all livestock purchased, and if livestock has been resold, the receivables or proceeds from such sale, in trust for the benefit of all unpaid cash sellers of livestock until full payment has been received by those sellers.

Meat and Poultry Inspection Readiness Grant program in June 2021 and the Pandemic Response and Safety Grant Program in September 2021. In January 2022, the White House announced that $1 billion in American Rescue Plan Act (ARPA; P.L. 117-2) funds—including grants, loans, worker support, overtime inspection costs for small plants, and innovation funds—would be available for expanding meat processing. During the upcoming farm bill debate, Congress could consider the effects of concentration on the meat processing supply chain, the effects of concentration on prices producers receive for livestock and poultry, and on retail prices for consumers. Congress could consider any trade-offs in expanding programs developed during the pandemic for small- to medium-sized meat processors and/or creating new programs in order to increase marketing opportunities for livestock producers.

During past farm bill debates, there was interest in addressing competition in the livestock and poultry sectors. In Executive Order 14036, "Promoting Competition in the American Economy," the Biden Administration directed USDA to consider proposing rules that would address competition through the Packers and Stockyards Act (P&S Act, 7 U.S.C. §181 et seq.). The rules would address the scope of the P&S Act; practices that are unfair or unjustly discriminatory or cause undue or unreasonable preferences or advantages; and the poultry tournament price system. These rules would be similar to the marketing and competition rules, or "GIPSA rules,"[37] that USDA released in 2010 to implement provisions in the 2008 farm bill but that never were finalized. As in the past, support among stakeholders in livestock and poultry industries for these rules is likely to vary, and some may look to the farm bill as an opportunity to address their concerns about competition.

The executive order on competition also directed USDA to consider proposing a rule for a voluntary Product of the USA label for meat. In 2015, the WTO ruled that United States was in violation of its WTO obligations in a country-of-origin labeling (COOL) dispute settlement case involving cattle and hogs. Congress repealed mandatory COOL for beef and pork in December 2015, but some stakeholders have continued to advocate for the re-imposition of mandatory COOL for beef and pork. Several bills introduced in the 117th Congress would restore mandatory COOL (S. 2716 and H.R. 4421/S. 2332). Other bills would define voluntary labels for U.S. beef products (H.R. 4973/S. 2623). As such, meat-origin labeling may become a subject of debate in the upcoming farm bill.

The Animal Welfare Act (7 U.S.C. §2131 et seq.) requires minimum care standards for most types of warm-blooded animals bred for commercial sale, used in research, transported commercially, or exhibited to the public. Although farm animals are exempt, they are covered by other federal laws addressing humane transport and slaughter. As in past farm bills, Congress may consider addressing animal welfare issues for nonfarm animals. For example, bills introduced in the 117th Congress would address adding requirements for commercial dog handlers (H.R. 2840/S. 1385), adopting animals used in research (H.R. 5244/S. 1378), prohibiting the use of wild animals in traveling acts (H.R. 5999/S. 3220), and importing healthy dogs (H.R. 4239/S. 2597). Congress has used general provisions in appropriations acts to ban domestic horse slaughter, and Congress could consider other horse-related measures during the debate over a new farm bill. For example, a House-introduced bill (H.R. 3355) would ban selling, possessing, or transporting horses for slaughter for human consumption and curtail the shipment of horses to Canada or Mexico for slaughter. Other horse-related bills (H.R. 5441/S. 2295, and H.R. 6341) would strengthen the Horse Protection Act (15 U.S.C. §1821 et seq.).

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[37] GIPSA (the Grain Inspection, Packers and Stockyards Administration) was the USDA agency that administered the Packers and Stockyards Act. A USDA reorganization in 2017 merged GIPSA into the Agricultural Marketing Service (AMS).

For Further Information

CRS Expert

- Joel L. Greene, Analyst in Agricultural Policy

Relevant CRS Products

- CRS Report R41673, *USDA's "GIPSA Rule" on Livestock and Poultry Marketing Practices*, by Joel L. Greene
- CRS Report RS22955, *Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling*, by Joel L. Greene
- CRS Report R46672, *Federal Statutes Protecting Domesticated and Captive Animals*, by Erin H. Ward
- CRS In Focus IF12002, *Animal Use in Federal Biomedical Research: A Policy Overview*, by Kavya Sekar and Genevieve K. Croft

Other Horticultural Products

Beginning in 2008, enacted farm bill legislation has included a horticulture title covering provisions supporting the fruit, vegetable, and other specialty crop industries, as well as USDA-certified organic products, which cover both organic-certified crops and animal products. Over the years, this title has included provisions supporting locally sourced products (not limited to crops) and provisions establishing a USDA regulatory framework for hemp cultivation. Upon enactment of the 2018 farm bill, CBO-projected outlays for the Horticulture title (Title X) provisions totaled $1.0 billion (FY2019-FY2023), accounting for less than 0.5% of total projected farm bill spending. Support for these sectors is not limited to the horticulture title; it is also contained within other farm bill titles covering a range of programs administered by USDA. Other 2018 farm bill provisions supporting these sectors are part of federal crop insurance and disaster assistance, as well as federal programs supporting the agricultural research and extension, conservation, rural development, trade, and nutrition titles.

Fruits, Vegetables, and Other Specialty Crops

The 2018 farm bill reauthorized and expanded funding for many of the existing USDA programs supporting *specialty crops*—defined as "fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including floriculture)" (7 U.S.C. §1621 note). In the Horticulture title, provisions included Specialty Crop Block Grants to states, Specialty Crop Market News data collection, food safety education initiatives, and chemical regulation and information collection. Provisions in other 2018 farm bill titles included the Specialty Crop Research Initiative and other USDA programs supporting emergency citrus disease research; USDA purchases of fresh fruits and vegetables for use in domestic nutrition assistance programs; federal crop insurance and supplemental disaster assistance; agricultural trade promotion; and other marketing programs in various titles.

Issues and Options

In previous farm bills, produce industry groups, representing a range of crops and regional interests, tended to support reauthorization and expansion of existing USDA programs. The next farm bill could focus on other legislative priorities within the industry, such as ways to address continued COVID-19-related supply chain disruptions, including access to workers and distribution challenges. Some of these priorities may involve reforms outside the farm bill, but others could be addressed by increasing grant funding, changing USDA procurement rules (e.g., H.R. 5309), and expanding research into mechanization technologies. Additional legislation

pending before the 117th Congress would address seasonal import competition in certain regions of the country (e.g., H.R. 4580 and H.R. 3926/S. 2080).

USDA-Certified Organic Agriculture

The 2018 farm bill reauthorized and expanded funding for provisions supporting agricultural products certified and labeled as USDA Organic, indicating that those products are grown in accordance with USDA regulations (7 C.F.R. §205) and verified by a USDA-accredited certifying agent according to USDA's National Organic Program (NOP). NOP is a voluntary certification program for producers and handlers that uses approved methods and standards. The program covers organically produced specialty crops, field crops, and animal products (e.g., meat and dairy products), as well as nonfood consumer products. The Horticulture title of the 2018 farm bill primarily focused on addressing perceived shortcomings in USDA's organic certification by making changes intended to enhance enforcement, limit program fraud, and fund technology upgrades. Other provisions changed the eligibility and consultation requirements of the National Organic Standards Board (NOSB) and reauthorized the National Organic Certification Cost-Share Program and the Organic Production and Market Data collection. Provisions in other 2018 farm bill titles included the Organic Agriculture Research and Extension Initiative in the Research, Extension, and Related Matters title; transition assistance and incentives for organic production in the Conservation title; and federal crop insurance and other marketing and promotion support in other titles.

Issues and Options

The organic industry represents highly diverse interests with often divergent priorities. Some shared priorities have focused on USDA not finalizing regulations to address transitioning dairy cows to organic standards, livestock handling and poultry living conditions, and oversight and enforcement of NOP-certified products. Some related legislative initiatives in the 117th Congress focus on restoring funding for organic certification cost-share programs and ensuring organic agriculture is part of ongoing U.S. agricultural climate solutions (e.g., H.R. 2803/S. 1251). In the next farm bill, Congress might consider further structural changes to NOP, including establishing a new framework for developing standards, elevating the role of the NOSB, and addressing the current backlog in developing NOP standards (e.g., H.R. 2918). Other actions could advance organic agriculture within USDA research, nutrition, and procurement programs (e.g., H.R. 5309), as well as improve crop insurance and risk management tools. Some producer groups are pursuing an alternative certification regime under a Regenerative Organic label, in part to address perceived NOP shortcomings related to animal welfare protections and objections by some that soilless hydroponic growing systems qualify as USDA Organic.

Local, Urban, and Innovative Production

The 2018 farm bill reauthorized and expanded funding for many of the existing provisions supporting locally sourced foods—both crops and animal products. No consensus exists for what constitutes locally sourced foods. In most cases, USDA farm programs supporting local food systems base their program eligibility on a statutory definition of *locally or regionally produced agricultural food products*, which states that any food product that is raised, produced, and distributed in "the locality or region in which the final product is marketed" where "the total distance that the product is transported is less than 400 miles from the origin of the product; or … the State" where the food was produced (7 U.S.C. §1932). The Horticulture title of the 2018 farm bill created the Local Agriculture Market Program (LAMP), which combined and expanded the existing USDA farmers' market, local food marketing, and value-added processing grant

programs. Provisions in other farm bill titles enhanced crop insurance and disaster assistance for urban and small-scale production and made changes to food programs and grants in the Nutrition title. The 2018 farm bill created new support for urban food systems in the Research, Extension, and Related Matters and in other titles, establishing an Office of Urban Agriculture and Innovative Production at USDA and providing new grant authority to facilitate urban production, harvesting, transportation, and marketing.

The 2018 farm bill also included provisions supporting historically underserved producers (Miscellaneous, Title XII, Subtitle C). These provisions, which often support farming operations within USDA programs that benefit local and urban farmers, also expanded USDA support for beginning, socially disadvantaged, and veteran farmers and ranchers.

Issues and Options

Legislative priorities among groups representing, in general, small-sized local and urban producers—and beginning, socially disadvantaged, and veteran farmers and ranchers—span diverse food systems and community needs. Shared priorities include increasing access to USDA programs and addressing equity and competition—often related to small-sized and limited-resource producers. Priorities also often focus on agricultural sustainability and access to USDA conservation funding, including for organic production systems. Several bills introduced in the 117th Congress would address these priorities. Ensuring climate-focused agricultural policies and that locally sourced food systems are part of U.S. agricultural climate solutions (e.g., H.R. 2803/S. 1251) remain priorities for certain groups. The next farm bill also could provide resources to improve agricultural and rural infrastructure and enhance supply chain resilience by expanding access to farm credit and crop insurance and to USDA nutrition and procurement programs (e.g., H.R. 2896, H.R. 5309), as well as addressing industry consolidation and antitrust concerns (e.g., H.R. 1258). In previous farm bill debates, a range of proposed legislative changes across all farm bill titles were introduced in comprehensive marker bills, reflecting the interests of small-sized local and urban producers.

Hemp Production and Processing

The 2018 farm bill created new authorities to legalize hemp, a variety or cultivar of *Cannabis sativa*—the same plant as marijuana—grown for use in the production of a range of nonpsychoactive food, beverage, consumer, and manufactured products. In statute, *hemp* is defined to include seeds, derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3% on a dry weight basis (7 U.S.C. §1639o). The Horticulture title of the 2018 farm bill directed USDA to establish a framework to regulate hemp cultivation under federal law and facilitate commercial cultivation, processing, marketing, and sale of hemp and hemp-derived products. USDA published final regulations under the Domestic Hemp Production Program in 2021. All U.S. states plan to allow growth of hemp in the 2022 crop year under either a USDA-approved state plan or a USDA general license. USDA has implemented provisions in other 2018 farm bill titles that made hemp producers eligible for federal crop insurance and agricultural research programs.

Issues and Options

Hemp industry interests reflect many national and regional groups with differing priorities, often depending on the products they produce and whether hemp is used for its fiber, grain, or flower. Some shared priorities call for relaxing USDA's regulatory requirements—which are perceived by the hemp industry and some state regulators to be overly restrictive and impractical—and to

reduce the role of the U.S. Drug Enforcement Administration in regulating hemp. In the next farm bill, Congress could consider whether to further amend the statutory definition of hemp (7 U.S.C. §1639o) to raise the allowable legal THC level from 0.3% to 1% (e.g., H.R. 6645; S. 1005) to provide additional regulatory flexibility to growers. Congress also could increase research funding for hemp, including targeted support for processing capacity of hemp fibers for use in insulation, construction materials, and plastics. The National Association of State Departments of Agriculture supports adding hemp to the statutory definition of a *specialty crop* (7 U.S.C. §1621 note), which could qualify hemp for USDA programs that tie eligibility to the specialty crop definition. The next farm bill also could consider ways to ensure hemp is part of ongoing climate proposals involving agriculture.

Other leading efforts by some hemp groups seek to address long-standing concerns that the Food and Drug Administration (FDA) continues to restrict the marketing of food and dietary supplements containing hemp-derived cannabidiol (CBD) (e.g., H.R. 841 and S. 1698). Related proposals in the 117th Congress would establish federal standards under FDA's jurisdiction for hemp-derived CBD products (H.R. 6134). Some interest groups contend that FDA is not properly regulating CBD, which could pose a threat to public safety. An open question is whether changes to FDA laws and regulations are within the farm bill's jurisdiction.

For Further Information

CRS Expert

- Renée Johnson, Specialist in Agricultural Policy

Relevant CRS Products

- CRS Report R44719, *Defining "Specialty Crops": A Fact Sheet*, by Renée Johnson
- CRS In Focus IF11317, *2018 Farm Bill Primer: Specialty Crops and Organic Agriculture*, by Renée Johnson
- CRS Report R46538, *Local and Urban Food Systems: Selected Farm Bill and Other Federal Programs*, by Renée Johnson et al.
- CRS In Focus IF11252, *2018 Farm Bill Primer: Support for Local Food Systems*, by Renée Johnson and Randy Alison Aussenberg
- CRS In Focus IF11210, *2018 Farm Bill Primer: Support for Urban Agriculture*, by Renée Johnson
- CRS In Focus IF11227, *2018 Farm Bill Primer: Beginning Farmers and Ranchers*, by Renée Johnson
- CRS Report R44742, *Defining Hemp: A Fact Sheet*, by Renée Johnson
- CRS In Focus IF11088, *2018 Farm Bill Primer: Hemp Cultivation and Processing*, by Renée Johnson

Conservation

The conservation title of a farm bill generally contains numerous reauthorizations, amendments, and new programs that encourage farmers and ranchers to voluntarily implement resource-conserving practices on private land. Starting in 1985, farm bills have broadened the conservation agenda to include multiple resource concerns. Although the number of conservation programs has increased and techniques to address resource problems continue to emerge, the basic approach has remained unchanged: to provide financial and technical assistance to implement conservation systems supported by education and research programs.

Selected Farm Bill Provisions

The current conservation portfolio includes over 20 distinct programs, subprograms, and initiatives, many of which were created in farm bill legislation. These programs can be grouped

into the following categories based on similarities: working lands programs, land retirement programs, easement programs, partnership and grant programs, and conservation compliance.

Selected Farm Bill Conservation Programs

Working lands programs allow private land to remain in production while implementing various conservation practices to address natural resource concerns specific to the area.

- Environmental Quality Incentives Program (EQIP), Conservation Stewardship Program (CSP), and Agricultural Management Assistance (AMA)

Land retirement programs provide payments to private agricultural landowners for temporary changes in land use and management to achieve environmental benefits.

- Conservation Reserve Program (CRP)—includes the Conservation Reserve Enhancement Program, Farmable Wetland Program, Clean Lakes Estuaries And Rivers Pilot (CLEAR30), Soil Health and Income Protection Program, and Transition Incentives Program

Easement programs impose a permanent or long-term land use restriction that is placed voluntarily on land in exchange for a payment.

- Agricultural Conservation Easement Program (ACEP) and Healthy Forests Reserve Program (HFRP)

Partnership and grant programs use partnership agreements to leverage program funding with nonfederal funding or provide grants to states or research organizations.

- Regional Conservation Partnership Program (RCPP), Conservation Innovation Grants, On-Farm Conservation Innovation Trials, Feral Swine Eradication and Control Pilot Program, Voluntary Public Access, and Habitat Incentive Program

Conservation compliance prohibits a producer from receiving selected federal farm program benefits (including conservation assistance and crop insurance premium subsidies) when conservation program requirements for highly erodible lands and wetlands are not met.

- Highly erodible land conservation (Sodbuster), wetland conservation (Swampbuster), and Sodsaver

Other types of conservation programs, such as watershed programs, emergency land rehabilitation programs, and technical assistance, are authorized in nonfarm bill legislation. Most of these programs have permanent authorities and receive appropriations annually through the discretionary appropriations process. These programs generally are not addressed in farm bill legislation unless amendments to the program are proposed.

The Conservation title (Title II) of the 2018 farm bill reauthorized and amended portions of most conservation programs, though the main focus was on the following large programs: the Conservation Reserve Program (CRP), Environmental Quality Incentives Program (EQIP), and Conservation Stewardship Program (CSP). Most farm bill conservation programs are authorized to receive mandatory funding (i.e., they do not require an annual appropriation) and include authorities that expire at the end of FY2023.

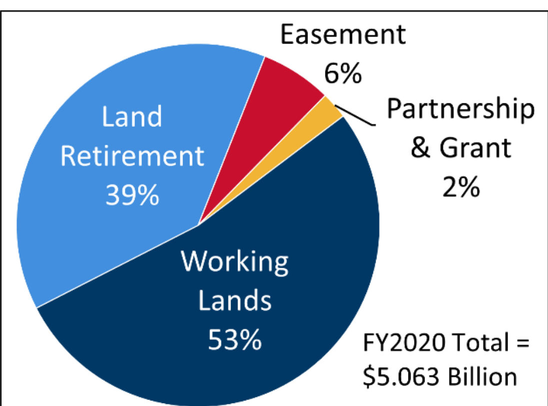
Issues and Options

Budget and Baseline

The Conservation title is one of the larger nonnutrition titles of the farm bill, accounting for 7% of the total projected 2018 farm bill cost, or $60 billion of the total $867 billion in 10-year mandatory funding authorized (FY2019-FY2023). Mandatory spending for conservation programs was permanently enacted for the first time in the 1996 farm bill (P.L. 104-127). It has since increased and included total outlays in FY2020 of over $5 billion.[38] The majority of this spending occurs in working lands and land retirement programs (see **Figure 5**).

Figure 5. FY2020 Conservation Outlays

Total by program type



Source: Created by CRS using CBO, *Baseline Projections: USDA's Farm Programs*, July 2021.

In addition to funding authorized in the 2018 farm bill, legislation before the 117th Congress, if enacted, would increase funding for selected conservation programs. For example, the House-passed Build Back Better Act (BBBA, H.R. 5376) would extend and increase funding for conservation programs, such as EQIP, CSP, the Agricultural Conservation Easement Program, and the Regional Conservation Partnership Program, by more than $21 billion over 10 years. This level of increase, if enacted, could alter the farm bill debate for conservation funding.[39]

Climate Change and Carbon Markets

Current strategies for addressing climate change through agricultural programs, through both adaptation and mitigation, rely on the delivery of voluntary conservation technical assistance and financial support programs. Most farm bill conservation programs are designed to address multiple natural resource concerns through locally adaptable practices. Thus, no existing conservation program is specific to climate change adaptation or mitigation, but most programs can integrate climate change-related goals within their current structures.

As part of the next farm bill, Congress may evaluate how well farm bill conservation programs assist producers in climate change-related goals. Recent USDA initiatives related to climate change include the working lands programs (e.g., EQIP and CSP) and proposed discretionary use of the CCC to fund pilot projects to support production and marketing of "climate-smart" agricultural commodities.[40] How USDA implements these climate-focused initiatives and pilot projects may affect the conservation title.

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[38] The 1985 farm bill (P.L. 99-198, 99 Stat. 1514) authorized limited mandatory funding for the Conservation Reserve Program in FY1986 and FY1987. FY2020 levels are from CBO, *Baseline Projections*: *USDA's Farm Programs*, July 2021.

[39] For additional information, see CRS In Focus IF11988, *Build Back Better Act: Agriculture and Forestry Provisions*.

[40] CCC serves as the primary funding mechanism for mandatory farm bill funding. For additional information, see CRS Report R44606, *The Commodity Credit Corporation (CCC)*. See also USDA, "Partnership for Climate-Smart

In addition to proposed changes, such as those in the BBBA that would increase funding for existing conservation programs, the 117th Congress has debated legislation related to carbon markets and the potential role that agriculture could play in them (e.g., Growing Climate Solutions Act, S. 1251/H.R. 2820). The role of agriculture in carbon markets has produced a variety of perspectives, including support for and opposition to a USDA role in standardizing voluntary carbon markets for agriculture and forestry. This debate could carry over into the next farm bill, including what role the conservation title could play in assisting producers to generate tradable carbon credits or in supporting carbon markets.[41]

Program Backlogs

Arguments for expanding conservation programs proved to be persuasive to Congress in enacting the 2018 farm bill in light of large backlogs of interested and eligible producers that were unable to enroll because of a lack of funds. Debate on a new farm bill could see similar arguments. Demand to participate in many of the conservation programs exceeds the available program dollars several times over for some programs.

Acceptance rates and backlogs for conservation programs vary by program and program type. In general, working lands programs continue to experience low acceptance rates, whereas recent sign-ups under land retirement programs have had higher acceptance rates. For example, in FY2020, USDA funded 27% of eligible program applications received for EQIP, 35% for CSP, and 43% for Agricultural Management Assistance. By comparison, the 2021 CRP general sign-up had more than 2 million acres offered for enrollment, and almost 1.9 million acres were accepted (93%). Policy issues beyond funding levels also can affect application acceptance rates. Large, ongoing backlogs of unfunded applications could provide a case for additional funding, whereas certain policy changes could reduce demand.

Conservation Compliance

The Food Security Act of 1985 (1985 farm bill; P.L. 99-198) created the highly erodible lands conservation and wetland conservation compliance programs, which tied various farm program benefits to conservation standards. This provision has been amended numerous times to remove certain farm program benefits from the compliance requirements and to add others. The 2018 farm bill made relatively few changes to compliance requirements. Some view these conservation compliance requirements as burdensome, and they continue to be unpopular among producer groups. Conservation compliance has remained a controversial issue since its introduction in the 1985 farm bill, and debate on its existence and effectiveness appears likely to continue.

Direct Spending and Flexibility

The 2018 farm bill required some existing conservation programs to direct a specific level of funding or acres, or percentage of a program's funding, to a resource- or interest-specific issue, initiative, or subprogram. Through these directed policies, Congress specified a support level or required investment that USDA is to achieve through program implementation. The specified levels may reduce USDA's flexibility to allocate funding based on need or reduce the total funds or acres available for activities that may not meet a resource-specific provision. Congress could consider the effect of these policies in the next farm bill.

Commodities," at https://www.usda.gov/climate-solutions/climate-smart-commodities.

[41] For additional information, see CRS Report R46956, *Agriculture and Forestry Offsets in Carbon Markets: Background and Selected Issues*.

For Further Information

CRS Expert

- Megan Stubbs, Specialist in Agricultural Conservation and Natural Resources Policy

Relevant CRS Products

- CRS Report R40763, *Agricultural Conservation: A Guide to Programs*, by Megan Stubbs
- CRS Report R45698, *Agricultural Conservation in the 2018 Farm Bill*, by Megan Stubbs
- CRS Report R46971, *Agricultural Conservation: FY2022 Appropriations*, by Megan Stubbs

Nutrition

All farm bills since 1973 have included reauthorization of the Food Stamp Program (renamed Supplemental Nutrition Assistance Program [SNAP] in 2008). In addition to SNAP, which is the largest nutrition program, the nutrition title typically includes other programs that provide food or funds to purchase food to low-income households. At the federal level, USDA's Food and Nutrition Service (FNS) administers most nutrition title programs.[42]

Most farm bill domestic food assistance programs are treated as mandatory spending for budget purposes. SNAP is open-ended mandatory spending and funded through appropriations laws. As such, amending SNAP eligibility, benefits, or other program rules can have a budgetary impact at the same time the availability of appropriated funding can affect operations. Discretionary spending programs in the farm bill include the Commodity Supplemental Food Program (CSFP), the administrative cost component of the Emergency Food Assistance Program (TEFAP), and a portion of the Food Distribution Program on Indian Reservations (FDPIR).

The child nutrition programs (National School Lunch Program and others) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) are usually reauthorized by a child nutrition reauthorization law, not by the farm bill.[43]

Selected Farm Bill Provisions

Supplemental Nutrition Assistance Program

SNAP provides benefits to eligible low-income households via electronic benefit transfer (EBT) cards redeemable for SNAP-eligible foods (most edible goods) at SNAP-authorized retailers. In FY2021, a monthly average of 44.5 million individuals participated in SNAP, and federal costs for SNAP were $112.6 billion.[44] The vast majority of the spending ($107.6 billion, 96%) was the cost of the benefits, which are 100% federally financed. SNAP participation and costs increased during the COVID-19 pandemic, reflecting greater economic need and higher benefit amounts instituted by pandemic response laws than in previous years. Although the majority of federal funding is for benefits, SNAP funding includes some non-benefit funding, such as federal

[42] Exceptions are the Gus Schumacher Nutrition Incentive Program (GusNIP) and Community Food Projects—administered by USDA's National Institute of Food and Agriculture (NIFA)—and a new micro-grant program administered by USDA's AMS.

[43] These programs, located in the Child Nutrition Act of 1966 and the Richard B. Russell National School Lunch Act, were last reauthorized in 2010 in P.L. 111-296, the Healthy, Hunger-Free Kids Act of 2010.

[44] USDA, Food and Nutrition Service (FNS), "Supplemental Nutrition Assistance Program Participation and Costs (data as of January 7, 2022)," at https://www.fns.usda.gov/sites/default/files/resource-files/SNAPsummary-1.pdf.

matching funds for state administrative costs, funds for states' SNAP Employment and Training (E&T programs), and SNAP nutrition education funding.

SNAP is administered as a federal-state partnership, with roles for each partner. For example, SNAP state agencies determine household eligibility, and USDA determines retailer authorization. The program operates in 50 states, the District of Columbia, Guam, and the U.S. Virgin Islands. In lieu of SNAP, Puerto Rico, American Samoa, and the Commonwealth of the Northern Mariana Islands receive block grants to fund household food assistance.

The farm bill could amend any aspect (e.g., eligibility for households and retailers, administrative funding, state administrative requirements) of the program's authorizing law (the Food and Nutrition Act of 2008),[45] but recent farm bills typically have maintained much of current law and made a limited number of changes in selected areas.

Title IV (Nutrition) of the 2018 farm bill largely maintained the SNAP eligibility and benefit calculation rules that had been in place. After debate over work requirements, the enacted conference report largely maintained the program's work-related rules with a few amendments to E&T policies and funding.[46] On benefit calculation, the new law required states to conduct a simplified calculation for homeless households and required certain updates or studies of certain aspects of benefit calculation. One of these studies is of the Thrifty Food Plan (TFP), the basis of SNAP's maximum benefit amounts. In August 2021, the Biden Administration released its reevaluation of the TFP and issued higher benefit amounts for FY2022.[47]

The 2018 farm bill also made some changes to SNAP program integrity policies, such as expanding nationwide a National Accuracy Clearinghouse to identify concurrent enrollment in multiple states. It also changed certain EBT system and retailer policies, including requiring the nationwide implementation of online acceptance of SNAP benefits.[48]

Gus Schumacher Nutrition Incentive Program

In recent years, governments and nonprofit organizations have set up SNAP bonus incentive projects. These initiatives typically provide matching food funds when consumers use SNAP benefits to purchase fruits and vegetables, encouraging such purchases. The 2014 farm bill first authorized federal competitive grants for these incentive projects, called the Food Insecurity Nutrition Incentive (FINI) grant program. The 2018 Nutrition title reauthorized FINI, renaming it the Gus Schumacher Nutrition Incentive Program (GusNIP) and providing for evaluation, training, and technical assistance. The 2018 farm bill expanded these SNAP incentive programs, increasing mandatory funding by $417 million over 10 years and, within GusNIP, dedicating funding for produce prescription projects to serve individuals eligible for SNAP or Medicaid in households with, or at risk of, developing a diet-related health condition.

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[45] See most recent statutory compilation available at Govinfo, "Food and Nutrition Act of 2008," at https://www.govinfo.gov/app/details/COMPS-10331/.

[46] USDA implemented these changes in USDA, FNS, "Employment and Training Opportunities in the Supplemental Nutrition Assistance Program," Final Rule, 86 *Federal Register* 35812, January 5, 2021.

[47] See USDA, FNS, "USDA Food Plans: Cost of Food," at https://www.fns.usda.gov/cnpp/usda-food-plans-cost-food-reports.

[48] The 2014 farm bill initially authorized a pilot for online transactions. The pilot began accepting benefits in 2019 and expanded geographically and to different retailer types throughout the COVID-19 pandemic.

The Emergency Food Assistance Program

Under TEFAP, the federal government provides USDA-purchased foods to states for distribution to emergency feeding organizations (e.g., food banks, food pantries, and soup kitchens), which provide food to people in need. States make eligibility decisions for TEFAP assistance under federal parameters and choose local administering agencies. In addition to state allocations of entitlement commodities, each state receives a share of administrative funds to cover storage, distribution, and other expenses. States also receive bonus commodities that USDA acquires in its agriculture support programs on an intermittent basis.

The farm bill specifies an annual amount of funding for TEFAP's entitlement commodities, which is adjusted for inflation according to changes to the TFP.[49] CBO estimated that the 2018 farm bill increased TEFAP's mandatory funding by $105 million from FY2019 to FY2023. The 2018 farm bill also authorized new TEFAP projects, funded at $4 million annually, to facilitate the donation of raw/unprocessed commodities from agricultural producers, processors, and distributors to emergency feeding organizations (Farm to Food Bank Projects).

Separate from the farm bill, TEFAP typically receives annual discretionary administrative funds through appropriations acts. In addition, since 2018, TEFAP has received supplemental aid through USDA actions and pandemic response acts. In FY2019 and FY2020, the Trump Administration used the CCC to purchase $2.3 billion in food for distribution through TEFAP as part of its trade mitigation efforts.[50] Subsequently, COVID-19 response acts have provided $1.25 billion specifically for TEFAP, and the Biden Administration has used an additional $1 billion in COVID-19 response funding for TEFAP and related initiatives.[51] In FY2020, TEFAP expenditures (nearly $2.8 billion) were more than triple what they were in FY2018 ($711 million).[52]

Other Farm Bill Nutrition Programs

The 2018 farm bill and most prior farm bills included provisions pertaining to several other domestic nutrition programs. For some of these programs, the 2018 farm bill extended their authorizations or authorizations of appropriations through FY2023.

- **Nutrition Assistance Block Grants for Puerto Rico, American Samoa, and the Northern Mariana Islands.** As opposed to SNAP's financing, which is open-ended, these territories receive a fixed amount adjusted for inflation each year. In the case of disasters or emergencies, Congress has provided supplemental funding at times. The 2018 farm bill did not amend these programs.
- **Food Distribution Program on Indian Reservations.** Indian tribal organizations may choose to operate FDPIR instead of having the state offer

[49] USDA estimates that the Emergency Food Assistance Program's (TEFAP's) FY2022 funding will increase by $57.75 million because of USDA's recent reevaluation of the Thrifty Food Plan (TFP). USDA, FNS, *Guidance Document FNS-GD-2021-0086, The Emergency Food Assistance Program (TEFAP): Thrifty Food Plan (TFP) Adjustment of TEFAP Funding*, August 16, 2021.

[50] USDA, FNS, *2022 USDA Explanatory Notes – Food and Nutrition Service*, pp. 34-129, at https://www.usda.gov/sites/default/files/documents/34FNS2022Notes.pdf.

[51] USDA, "USDA to Invest $1 Billion to Purchase Healthy Food for Food Insecure Americans and Build Food Bank Capacity," press release, June 4, 2021.

[52] USDA, FNS, *2022 USDA Explanatory Notes – Food and Nutrition Service*, at https://www.usda.gov/sites/default/files/documents/34FNS2022Notes.pdf. For more information about TEFAP, see CRS Report R45408, *The Emergency Food Assistance Program (TEFAP): Background and Funding*.

SNAP benefits. FDPIR distributes USDA foods, rather than benefits redeemable in retail stores, to income-eligible households living on Indian reservations and American Indian households residing in approved areas near reservations or in Oklahoma. Eligible households may receive either SNAP or FDPIR. The 2018 farm bill increased federal administrative funding and made it available for a longer period. It also authorized a demonstration project for tribal organizations to enter into self-determination contracts to purchase commodities for FDPIR.[53]

- **Commodity Supplemental Food Program.** CSFP provides supplemental foods primarily to low-income seniors (aged 60 or older). USDA purchases the foods and distributes them to project grantees for distribution to individuals. The 2018 farm bill reauthorized CSFP and lengthened participants' certification periods.
- **Senior Farmers' Market Nutrition Program (SFMNP).** Under SFMNP, low-income seniors receive vouchers redeemable for fresh produce at farmers' markets and roadside stands. The 2018 farm bill maintained mandatory funding at $20.6 million per year.
- **School Food Programs.** School meals programs typically are reauthorized independently of the farm bill. The 2018 farm bill continued a $50 million set-aside for USDA's fresh fruit and vegetable purchases for schools and required certain USDA actions to enforce Buy American requirements for school meals.
- **Community Food Projects (CFP).** This competitive grant program, established in 1996, funds community food projects intended to promote innovative local food initiatives to meet food insecurity and community needs. The 2014 farm bill amended CFP and increased mandatory funding from $5 million per year to $9 million per year. The 2018 farm bill returned funding to $5 million per year.
- The 2018 farm bill created two new programs: the **Micro-Grants for Food Security Program** funds efforts to increase locally grown foods in eligible states and territories, and the **Healthy Fluid Milk Incentive** pilot funds bonus incentives for milk purchases.

Issues and Options

Policymakers may face the following major policy themes, among others, in the next farm bill's nutrition title: to what extent, if at all, to continue policies enacted in the pandemic response laws; supply chain changes for food distribution programs; and SNAP eligibility debates from past farm bills and regulatory proposals. The budget outlook also affects potential policy proposals. CBO estimated that the enacted 2018 farm bill's nutrition title was budget neutral—policies forecasted to increase direct spending were balanced by policies forecasted to decrease direct spending. Policymakers may debate whether to achieve such a balance within the nutrition title again.

SNAP

COVID-19 Pandemic Policies

The COVID-19 pandemic has posed numerous challenges for SNAP. To address the economic downturn and increased unemployment, the COVID-19 response laws in the 116th and 117th

[53] USDA announced awards to eight tribal nations. USDA, FNS, "USDA Invests $3.5 Million to Provide Food Purchasing Options to Tribal Communities," press release, November 1, 2021.

Congresses included temporary benefit increases,[54] as well as a requirement for the partial suspension of certain work-related eligibility rules. In response to food insecurity concerns among college students, student eligibility was expanded temporarily during the pandemic. The laws also have granted USDA authority to offer administrative flexibilities to SNAP state agencies as agencies respond to the constraints of social distancing, remote work, and higher rates of new SNAP participants. Congress may consider whether to use the farm bill to make permanent or extend temporary policies included in COVID-19 response laws.

Major Eligibility Issues in 2014 and 2018 Farm Bill Debates

The House-passed 2014 and 2018 farm bills would have changed the law around SNAP categorical eligibility, but such changes were not included in the enacted bill. In current law, SNAP categorical eligibility is available to applicants who receive benefits from low-income programs, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and state-financed General Assistance programs. As of January 2022, 44 jurisdictions have adopted the "broad-based" categorical eligibility option, available due to statute and regulation, which gives states increased flexibility with the income and asset limits. Because of this broad-based option, most states are assessing applicants' eligibility without assessing their assets. In July 2019, the Trump Administration proposed a rule to restrict broad-based categorical eligibility. In June 2021, the Biden Administration withdrew the proposed rule. Congress may look at this state option again, as well as the income and asset rules in general.

Like farm bills in the recent past, a new farm bill may revisit work-related rules. SNAP's authorizing law has long included work-related eligibility requirements, the strictest being a time limit for "able-bodied" (nondisabled) adults (aged 18-49) without dependents (ABAWDs) who work less than 80 hours per month. SNAP law also authorizes certain waivers and exemptions from the time limit.[55] The House-passed 2014 and 2018 farm bills included changes to SNAP's work-related rules, proposing work requirements that would have applied to more people and were forecasted to reduce participation. In both years, Congress ultimately enacted changes considered more modest than proposed in the House-passed versions. These previous House-passed farm bills and a December 2019 Trump Administration rule, which was not finalized, also would have made it difficult for states to receive time limit waivers.[56]

In addition, the 2014 farm bill authorized and funded E&T pilot programs in 10 states. USDA has released evaluation reports on the pilots, but the final report is still pending.[57] The next farm bill could propose changes to work-related rules or further changes to E&T program policy, particularly in light of a final evaluation of the pilot programs.

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[54] Certain benefit increases have sunset, and others are tied to federal and state public health emergency declarations and will sunset accordingly. The Biden Administration's implementation of a 2018 farm bill provision on the TFP allows for an increase above the FY2019 amounts to continue beyond the emergency, but some households will see lower benefits compared with the amounts received during the pandemic.

[55] The time limit has been suspended during the public health emergency. P.L. 116-127, Division B, Title III, §2301. See USDA, FNS, *Guidance Document FNS-GD-2020-0016, SNAP – Families First Coronavirus Response Act and Impact on Time Limit for Able-Bodied Adults Without Dependents (ABAWDs)*, March 20, 2020.

[56] That regulation was struck down in federal court, and the Biden Administration withdrew the Trump Administration's appeal. For more information, see USDA, "Statement by Agriculture Secretary Tom Vilsack on D.C. Circuit Court's Decision Regarding ABAWDs Rule," press release, March 24, 2021.

[57] USDA, FNS, *Expanding Opportunities and Reducing Barriers to Work: Interim Summary Report (Evaluation of SNAP Employment & Training Pilots)*, September 3, 2021.

Retailer and Redemption Policies

Both the 2018 farm bill and COVID-19 pandemic pose numerous policy questions for SNAP's retailer and redemption aspects. In the case of GusNIP, the 2018 farm bill increased funds for SNAP bonus incentives and set aside funding for produce prescription programs (see "Gus Schumacher Nutrition Incentive Program"). Congress may consider changing funding levels again or changing matching fund requirements, a policy changed in a COVID-19 response law. USDA has initiated and expanded the SNAP Online Purchasing Pilot in recent years. Congress may take interest in providing additional requirements for the pilot or moving beyond the pilot stage. Under current law, restaurants cannot be authorized as SNAP retailers except through the Restaurant Meals Program state option (i.e., a state can contract with restaurants to accept SNAP for meals for senior, homeless, and disabled SNAP participants). Because the pandemic has created challenges for the restaurant industry and its workforce, policymakers may be interested in expanding the role for restaurants within SNAP.

Programs in Lieu of SNAP

Past farm bills (2008 and 2014) have required feasibility studies to explore transitions to the SNAP program for Puerto Rico and the Commonwealth of the Northern Mariana Islands.[58] Policymakers may consider potentially revising or phasing out the Nutrition Assistance Block Grants provided to Puerto Rico, American Samoa, and/or the Commonwealth of Northern Mariana Islands, allowing these jurisdictions to participate in the open-ended SNAP program instead.

Congress may consider using the experiences of USDA and the tribal nations participating in the 2018 farm bill's FDPIR demonstration project to explore policies that further tailor FDPIR to tribal needs and interest in self-governance.

TEFAP

Several TEFAP developments may inform the next farm bill. For example, Congress may consider whether or not to make permanent recent temporary funding increases for TEFAP. Congress also may consider changes to the funding or operation of Farm to Food Bank Projects, which have operated for three years.

In addition, Congress may consider adjustments to TEFAP's procurement process. Under the current model, USDA purchases foods on behalf of states and emergency feeding organizations. The process can take roughly one to five months from solicitation through delivery.[59] This time frame caused some concern during the early months of the COVID-19 pandemic when food banks were experiencing increasing demand. The Trump Administration created the Farmers to Families Food Box Program with the goal of expediting deliveries, among other purposes.[60] While the Biden Administration ended the Farmers to Families Food Box Program, it

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[58] Anne Peterson et al., *Implementing Supplemental Nutrition Assistance Program in Puerto Rico: A Feasibility Study*, USDA, FNS, June 2010; and Anne Peterson et al., *Assessing the Feasibility of Implementing SNAP in the Commonwealth of the Northern Mariana Islands*, USDA, FNS, August 2016.

[59] USDA, AMS, "AMS CPP Procurement Schedule for 2021 to 2022 (xlsx)," https://www.ams.usda.gov/selling-food/solicitations.

[60] The procurement process under the food box program differs from TEFAP in that USDA awarded contracts to distributors to deliver food boxes to emergency feeding organizations. U.S. Congress, House Agriculture Committee, Subcommittee on Nutrition, Oversight, and Department Operations, *An Overview of the Farmers to Families Food Box Program*, hearings, 116th Cong., 2nd sess., July 21, 2020, Serial No. 116–34, p. 34.

incorporated the pre-packaged food box concept into TEFAP by enabling states to use their entitlement commodity funds for fresh produce boxes. Congress may deliberate on the potential advantages (e.g., efficiency) and drawbacks (e.g., less recipient choice) of food boxes.[61] Other procurement changes include efforts to incorporate more local foods into TEFAP.[62]

For Further Information

CRS Experts

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- Kara Clifford Billings, Analyst in Social Policy

Relevant CRS Products

- CRS In Focus IF11087, *2018 Farm Bill Primer: SNAP and Nutrition Title Programs*, by Randy Alison Aussenberg and Kara Clifford Billings
- CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits*, by Randy Alison Aussenberg
- CRS Report R45408, *The Emergency Food Assistance Program (TEFAP): Background and Funding*, by Kara Clifford Billings
- CRS Report R46681, *USDA Nutrition Assistance Programs: Response to the COVID-19 Pandemic*, by Randy Alison Aussenberg and Kara Clifford Billings
- CRS Report R42054, *The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility*, by Randy Alison Aussenberg and Gene Falk
- CRS Report R46817, *Food Insecurity Among College Students: Background and Policy Options*, coordinated by Kara Clifford Billings and Joselynn H. Fountain

Agricultural Trade

USDA and the U.S. Agency for International Development (USAID) administer programs designed to alleviate hunger, improve global food security, and expand foreign markets for U.S. agricultural producers and food manufacturers. The Trade title (Title III) of the 2018 farm bill covered international food assistance programs, export credit guarantee programs, export market development programs, and international scientific and technical exchange programs and provisions. Title III programs derive their statutory authorities from the Food for Peace Act of 1954 (P.L. 83-480) for international food assistance programs and from the Agricultural Trade Act of 1978 (P.L. 95-501) for foreign market expansion programs.

Trade and Export Promotion

The federal government provides support for U.S. agricultural exports through two types of programs: export market development and export credit guarantees. Legislative authorization for agricultural trade promotion programs is included in the trade title of the farm bill, with the exception of the Quality Samples Program (QSP), which is authorized under the Commodity

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[61] For a discussion of related issues, see Food Bank News, "Cardboard Boxes are Centerpiece of USDA's Coronavirus Food Program," April 22, 2020.

[62] For example, the Biden Administration's TEFAP Fresh Produce Box initiative encourages vendors to include locally grown foods. Outside of TEFAP, the Biden Administration announced on December 6, 2021, a Local Food Purchase Cooperative Agreement Program that is to award $400 million to state and tribal governments for purchases of local foods for distribution to emergency feeding organizations. Although TEFAP foods are domestically produced, they are not necessarily local.

Credit Corporation Charter Act of 1948 (P.L. 80-806, as amended).[63] USDA's Foreign Agricultural Service (FAS) administers its export promotion programs, which are generally funded using mandatory monies.[64]

Selected Farm Bill Provisions

Export market development programs include the Market Access Program (MAP), Foreign Market Development Program (FMDP), Emerging Markets Program, QSP, and Technical Assistance for Specialty Crops. These programs primarily aim to assist U.S. industry efforts to build, maintain, and expand overseas markets for U.S. agricultural products. The 2018 farm bill brought existing USDA export promotion programs together under a single Agricultural Trade Promotion and Facilitation Program and created a new Priority Trade Fund (PTF)—with a total mandatory permanent budgetary baseline of $255 million annually for all the programs. The 2018 farm bill extended budget authority for these programs through FY2023.

The amendments in the 2018 farm bill allow MAP and FMDP funding for certain activities in Cuba, but export credit guarantees for Cuba remain prohibited.[65] Under PTF, the 2018 farm bill provides $3.5 million in mandatory funding per year for one or more new programs to access, develop, maintain, and expand markets for U.S. agricultural products at the discretion of the Secretary of Agriculture.

The 2018 farm bill also reauthorized the FAS-administered short-term Export Credit Guarantee Program—known as GSM-102[66]—and the Facility Guarantee Program (FGP), with a total annual joint funding of at least $1 billion per year. Under these programs, the CCC provides payment guarantees for commercial financing of U.S. agricultural exports. The total GSM guarantees for FY2020 were $2.2 billion, over 86% of which went to Latin America.[67] Over 99% of the guarantees in FY2020 supported export sales of grains, soybeans and flour, soybean meal, or soybean oil. Regulatory constraints limiting the use of established facilities to U.S. imports, eligibility criteria for foreign banks, and other constraints have limited FGP's use, with the program inactive in some years.

Issues and Options

Over the years, Congress has altered export promotion programs to facilitate exports of high-value agricultural products rather than raw commodities and to conform to U.S. obligations under international trade agreements, such as those under the WTO. These changes have led associations that promote olives, strawberries, and highbush blueberries to receive funding and increased allocations for some processed products, such as distilled spirits.[68] Of the $175.6 million total MAP allocations for FY2022, almost 30% are shared among five groups: Cotton

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[63] 15 U.S.C. §714c(f) states that the CCC is authorized to use its general powers to "[e]xport or cause to be exported, or aid in the development of foreign markets for, agricultural commodities (other than tobacco) (including fish and fish products, without regard to whether such fish are harvested in aquacultural operations)."

[64] Occasionally, USDA may use additional ad hoc export promotion funding.

[65] For more on U.S. policy on Cuba, see CRS Report R45657, *Cuba: U.S. Policy in the 116th Congress and Through the Trump Administration*.

[66] GSM refers to the General Sales Manager, an official within the Foreign Agricultural Service (FAS)—appointed by the FAS administrator—charged with increasing exports and managing the programs that encourage foreign countries and companies to import U.S. farm products.

[67] CRS communication with USDA, FAS, January 2021.

[68] See Table A-1 in CRS Report R46760, *U.S. Agricultural Export Programs: Background and Issues*.

Council International, U.S. Meat Export Federation, Food Export Association of the Midwest, American Soybean Association, and U.S. Grains Council.[69] Almost 80% of the $26.8 million in FMDP allocations for FY2022 go to six commodity associations that promote exports of soybeans, wheat, cotton, grains, hardwood, and rice.[70]

A private study released in 2016 on behalf of three agricultural associations asserted that USDA export programs disproportionately benefit growers in the Midwest and deliver relatively small benefits to the food processing and services sectors in the Northeast.[71] To the extent this reflects the current beneficiaries of these programs, one possible response to equity concerns could be to expand export promotion programs that target growers and processors of specialty crops, particularly small- and medium-sized enterprises that historically have not engaged in trade. Some experts assert that the United States' core advantage in agricultural exports may lie in quality, safety, and other nonprice factors.[72] Communication of these differences to potential foreign buyers via labeling may benefit U.S. exports of specialty food products.

The COVID-19 pandemic and recent trade disputes highlight the importance of maintaining diverse U.S. import sources and export markets to minimize risks from supply chain disruptions in a specific market. Congress may wish to assess how existing USDA export programs could be used to diversify U.S. import and export markets.

For Further Information

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Relevant CRS Products

- CRS Report R46760, *U.S. Agricultural Export Programs: Background and Issues*, by Anita Regmi
- CRS In Focus IF11223, *2018 Farm Bill Primer: Agricultural Trade and Food Assistance*, by Anita Regmi and Alyssa R. Casey
- CRS Report R46456, *Reforming the WTO Agreement on Agriculture*, by Anita Regmi, Nina M. Hart, and Randy Schnepf
- CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*, by Randy Schnepf
- CRS Report R45903, *Retaliatory Tariffs and U.S. Agriculture*, by Anita Regmi

International Food Assistance

The United States has led global funding support for international food assistance programs for over 60 years.[73] These programs originated with blended goals: to support domestic producers by creating additional demand, further agricultural trade goals, support the U.S. maritime industry and help alleviate hunger abroad. These blended objectives are manifested through statutory

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[69] USDA, FAS, "MAP Funding Allocations – FY 2022," at https://www.fas.usda.gov/programs/market-access-program-map/map-funding-allocations-fy-2022.

[70] USDA, FAS, "FMD Funding Allocations – FY 2022," at https://www.fas.usda.gov/programs/foreign-market-development-program-fmd/fmd-funding-allocations-2022.

[71] Informa Economics IEG, *Economic Impact of USDA Export Market Development Programs*, prepared for U.S. Wheat Associates, USA Poultry & Egg Export Council, and Pear Bureau Northwest, July 2016.

[72] Jeffrey J. Reimer et al., "Agricultural Export Promotion Programs Create Positive Economic Impacts," *Choices*, vol. 32, no. 3 (3rd Quarter 2017).

[73] For country-by-country data on food aid donations over time, see World Food Program, "Food Aid Information System," at http://www.wfp.org/fais/ .

requirements that the majority of U.S. international food assistance be donated as U.S. agricultural commodities to be distributed as food or sold to generate funds for development programs and that they be shipped primarily on U.S.-flag vessels.[74]

USAID and FAS administer the international food assistance programs—including market-based and in-kind food assistance programs—authorized under the farm bill. Market-based assistance programs are cash-based, while in-kind programs operate with U.S. commodity donations.[75] The CCC procures commodities for all in-kind food assistance programs, regardless of which agency implements the program. Annual outlays for U.S. international food assistance—across programs managed by USAID and FAS—averaged $3.3 billion between FY2010 and FY2020. Outlays during this period varied, from a low of $2.29 billion in FY2013 to a high of $5.06 billion in FY2020.[76]

Selected Farm Bill Provisions

Congress reauthorized the suite of programs that govern U.S. international food assistance under the Trade title (Title III) of the 2018 farm bill. USAID administers Food for Peace (FFP) Title II; Farmer to Farmer (FFP Title V); the Emergency Food Security Program (EFSP); and the Community Development Fund. USDA administers Food for Progress (FFPr), the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program), and the Local and Regional Procurement Program (LRP). USAID and USDA jointly administer the Bill Emerson Humanitarian Trust (BEHT).

Among market-based assistance programs, as opposed to in-kind donation programs, EFSP is the largest, providing assistance in the form of food vouchers, cash transfers, or local and regional procurement (LRP) to approximately 50 countries. LRP finances the provision of locally and regionally procured foods to beneficiaries, usually in nonemergency situations. The 2014 farm bill (P.L. 113-79) permanently authorized LRP and authorized discretionary funding of $80 million annually (FY2014-FY2018). The 2018 farm bill reauthorized this level of funding through FY2023. Since FY2016, Congress has appropriated LRP funding as a set-aside within McGovern-Dole Program funding. In addition to the 10% LRP set-aside, the 2018 farm bill authorized USDA to use up to 10% of annual McGovern-Dole Program funding for LRP.

Among in-kind food assistance programs, FFP and the McGovern-Dole Program provide a majority of donations to respond to emergency food needs or to be used in development projects. Under FFP, the federal government donates U.S.-sourced commodities to qualifying international organizations and nongovernmental organizations (NGOs) for direct distribution to food-insecure populations. One major revision to the 2018 farm bill eliminated the requirement to monetize at least 15% of FFP Title II commodities—that is, sell them on local markets to fund development projects (§3103). The McGovern-Dole Program provides in-kind aid for school meals in priority countries. Congress funds the programs in annual Agriculture appropriations bills, and the programs' administering agencies determine funding allocations.

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[74] The requirement is called "agricultural cargo preference," the specifics of which have fluctuated several times. Congress increased the share of food aid commodities required to ship on U.S.-flag vessels from 50% to 75% in the 1985 farm bill (P.L. 99-198) and lowered it to 50% in a 2012 surface transportation reauthorization act (P.L. 112-141).

[75] International food assistance market-based programs include EFSP and LRP; in-kind programs include FFP, BEHT, FFPr, and McGovern-Dole.

[76] CRS calculations based on data available from USAID, "Reports to Congress," at https://www.usaid.gov/open/reports-congress.

Under Food for Progress, another in-kind program, FAS donates U.S. agricultural commodities to eligible entities, which can then distribute them to beneficiaries or sell them locally to raise funds for development projects.[77] The 2018 farm bill authorized a new pilot program to finance Food for Progress projects directly rather than through commodity monetization. The 2018 farm bill authorized appropriations of $10 million per year (FY2019-FY2023) for Food for Progress pilot agreements. Congress has not funded these pilot agreements to date.

Issues and Options

The Global Food Security Act of 2016 (GFSA; P.L. 114-195) amended Section 491 of the Foreign Assistance Act of 1961 (P.L. 87-195) to create EFSP. The program is authorized to provide emergency food assistance "including in the form of funds, transfers, vouchers, and agricultural commodities" to address emergency food needs as a result of natural, human-induced, and complex emergencies (e.g., earthquakes, civil unrest, famine). The Global Food Security Reauthorization Act of 2017 (P.L. 115-266) will expire at the end of FY2023. As Congress considers a new farm bill, it also may choose to consider whether to reauthorize GFSA.

The United States' use of market-based assistance has increased under EFSP in recent years. In FY2010, in-kind aid comprised roughly 89% of U.S. international food assistance, with market-based assistance making up the remaining 11%. In FY2020, in-kind aid accounted for roughly 41% of assistance, and market-based assistance comprised approximately 59%.[78] Proponents of market-based assistance emphasize that it allows for quicker response times than shipping in-kind aid via ocean freight. Critics of market-based assistance argue that it could undermine the coalition of commodity groups, NGOs, and shippers that advocate for international food assistance programs, potentially resulting in reductions in funding for U.S. food assistance programs. As Congress debates the next farm bill, it could consider whether existing programs and the current split between in-kind and market-based assistance strike the right balance to address global hunger.

For Further Information

CRS Expert

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Relevant CRS Products

- CRS Report R45422, *U.S. International Food Assistance: An Overview*, by Alyssa R. Casey and Emily M. Morgenstern
- CRS In Focus IF10475, *Global Food Security Act of 2016 (P.L. 114-195)*, by Sonya Hammons

Credit

The federal government has a long history of assisting farmers with obtaining loans. Government intervention in otherwise private lending markets has been justified by citing unequal information, lack of competition, insufficient rural lending resources, and efforts by Congress to direct lending to various groups, such as small farms, beginning farmers, or socially disadvantaged farmers.

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[77] USDA provides commodities to partner entities for distribution or monetization. In practice, the majority of Food for Progress projects have monetized all commodities.

[78] USAID, *International Food Assistance Report to Congress for Fiscal Year 2020*.

Selected Farm Bill Provisions

The agricultural lender over which Congress has the most authority is USDA's Farm Service Agency (FSA). FSA is a relatively small lender based on market share, providing about $13 billion of direct loans (about 3% of the overall $441 billion market for farm debt at the end of 2020) and $17 billion of loan guarantees (about 4% of the market).[79] FSA makes direct farm ownership and operating loans to family-sized farms that are unable to obtain credit elsewhere.[80] FSA also guarantees payment of principal and interest on qualified loans made by other lenders who may not have lent without the government guarantee.

For individual borrowers, FSA loan limits are set in law: $400,000 for direct farm operating loans; $600,000 for direct farm ownership loans; and $1.825 million for guaranteed loans (amount adjusted for inflation in FY2022). The standard guarantee ratio is 80%-90% of the amount borrowed depending on the borrower's credit risk, but for socially disadvantaged and beginning farmer borrowers, the guarantee ratio is 95%. The 2018 farm bill increased each of these guarantee ratios.

The Farm Credit System (FCS) is another agricultural lender with a federal mandate. FCS is a cooperatively owned, federally chartered private lender with a statutory mandate limited to serving agriculture-related borrowers. It is a government-sponsored enterprise receiving tax benefits, among other preferences, in return for restrictions on its lending base. FCS makes loans to creditworthy farmers and accounts for about 44% of farm debt.

Issues and Options

The statutory authorities for FSA and FCS are permanent. Farm bills often amend these statutes for eligibility criteria, the scope of operations, and—for FSA—authorization for appropriations.

The following issues could be debated in the next farm bill: further targeting FSA lending resources to beginning and socially disadvantaged farmers who face financial difficulties due to obtaining or repaying farm loans;[81] increasing focus at FSA or FCS on specific agriculture sectors or practices, such as local or urban farms, conservation practices, or trait-specific production; and addressing loan forgiveness and related qualification criteria for provisions that were enacted in the American Rescue Plan Act (P.L. 117-2) but have been stalled pending ongoing judicial review.

For Further Information

CRS Expert

- Jim Monke, Specialist in Agricultural Policy

Relevant CRS Product

- CRS Report R46768, *Agricultural Credit: Institutions and Issues*, by Jim Monke

[79] USDA, Farm Service Agency (FSA), "FY2020 Farm Loan Programs Servicing Data," at https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/program-data/index; and USDA, Economic Research Service (ERS), "Farm Sector Balance Sheet," December 1, 2021, at https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/assets-debt-and-wealth.

[80] Family-sized farms are required for the USDA farm loan program in 7 U.S.C. §1922 and are defined in regulation (7 C.F.R §761.2) as a business operations that produce enough agricultural commodities to be recognized as a farm rather than a rural residence and has labor and management provided primarily by the borrower with assistance from persons related by blood or marriage and may use full-time hired labor only to supplement family labor.

[81] U.S. Government Accountability Office, *Agricultural Lending: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers Is Limited*, GAO-19-539, July 2019.

Rural Development

Approximately 14% of U.S. residents (46 million) live in rural areas.[82] Rural communities face unique challenges compared with urban communities, including higher poverty rates, declining populations, and lower per person incomes.[83] USDA Rural Development (RD) administers programs that are meant to help to improve the economic condition and quality of life in rural America.

RD programs can be grouped into the following categories: rural business, rural utilities, and rural housing. Rural business programs—administered by the Rural Business-Cooperative service—promote the expansion and development of rural businesses. Rural utilities programs—administered by the Rural Utilities Service—construct and modernize utility systems, including water, waste disposal, electrical, telephone, and broadband systems. Rural housing programs—administered by the Rural Housing Service—build and improve housing and essential community facilities in rural areas.

Selected Farm Bill Provisions

Since 1973, farm bills have included a rural development title to address challenges facing rural communities, as well as to reauthorize and amend existing programs administered by RD. Most RD programs rely on discretionary funding, which Congress has authorized in previous farm bills and funded through the annual appropriations process.

Among its many provisions, the Rural Development title (Title VI) of the 2018 farm bill includes provisions to combat substance use disorder in rural areas. In the 2018 farm bill, Congress prioritized funding for selected RD programs for projects providing services to prevent, treat, and recover from substance use disorder and extended this prioritization for FY2019-FY2025 (two years longer than FY2023, which is when authorization for most other 2018 farm bill programs and provisions expire).

Most RD programs require projects to serve rural areas. Prior to the 2018 farm bill, a *rural area* was defined for many RD programs as any area other than a city or town with a population of more than 50,000 and the urbanized area contiguous and adjacent to such a city or town (7 U.S.C. §1991(a)(13)). For the direct loans and grants aspects of the Community Facilities Program and the Water and Waste Disposal Program within RD, a *rural area* is defined as an area with a population threshold lower than 50,000 people. The 2018 farm bill amends the definition of *rural* to exclude certain populations when determining an area's population: incarcerated populations on a long-term or regional basis and the first 1,500 people living in housing on military bases.

The 2018 farm bill reauthorized and amended a wide range of RD programs, including the Rural Broadband Program and the Community Connect Grant Program. The reauthorization for most RD programs, including the Rural Broadband Program, expires at the end of FY2023. The Rural Broadband Program provides assistance to help construct, improve, and acquire facilities and equipment needed to provide broadband service to rural areas. Prior to enactment, the program's authority was limited to direct loans and loan guarantees. The 2018 farm bill established a grant program within the Rural Broadband Program. To date, Congress has provided funding for direct loans and loan guarantees but not for grants. The 2018 farm bill also increased the minimum broadband access speed for Rural Broadband Program eligibility. This change resulted in a

[82] John Cromartie et al., "2020 Edition: Rural America at a Glance," USDA, ERS, Economic Information Bulletin (EIB) Number 221, December 2020.

[83] Ibid.; and John Pender et al., "2019 Edition: Rural America at a Glance," ERS, EIB-212, November 2019.

greater number of rural areas becoming eligible for the program. In addition, the 2018 farm bill provided permanent authority for the Community Connect Grant Program, which awards grants to entities to provide broadband service to economically challenged rural communities.

Issues and Options

The ReConnect Program was not included in the 2018 farm bill. Congress established the pilot program that became known as the ReConnect Program through the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018 (P.L. 115-141), which became law after the 2018 farm bill was enacted. Congress has appropriated more than $4.3 billion for the ReConnect Program. The program provides funding and financing to facilitate broadband deployment in rural areas that do not have sufficient broadband access. Congress has reauthorized the pilot program through annual appropriations acts. Congress could consider whether to permanently authorize the ReConnect Program in the next farm bill.

Congress also may consider whether USDA Rural Development programs could play a larger role in helping to prevent and treat COVID-19 in rural areas. USDA's Economic Research Service (ERS) found that from September 2020 to October 2021, rural persistent poverty counties experienced higher numbers of COVID-19 cases compared with other rural counties and urban counties, including urban persistent poverty counties.[84] Congress could consider whether RD programs could be utilized to help rural persistent poverty counties address COVID-19 challenges.

For Further Information

CRS Expert

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Relevant CRS Products

- CRS Report R46912, *USDA Rural Broadband, Electric, and Water Programs: FY2022 Appropriations*, by Lisa S. Benson
- CRS *In Focus IF11918, Infrastructure Investment and Jobs Act: Funding for USDA Rural Broadband Programs*, by Lisa S. Benson
- CRS In Focus IF11988, *Build Back Better Act: Agriculture and Forestry Provisions*, by Jim Monke et al.
- CRS Report RL31837, *An Overview of USDA Rural Development Programs*, by Tadlock Cowan
- CRS Report R47017, *USDA's ReConnect Program: Expanding Rural Broadband*, by Lisa S. Benson

Research, Extension, and Education

Since 1977, enacted farm bill legislation has included a research title focused on agricultural research, extension, and education.[85] This title reauthorizes funding for existing programs, establishes new programs, and amends USDA policies and programs. It addresses *extramural* activities conducted at land-grant universities (LGUs) and other nonfederal institutions, as well as USDA policies, programs, and *intramural* research conducted by federal researchers.

Four agencies carry out USDA's research, extension, and education activities. The National Institute of Food and Agriculture (NIFA) administers extramural programs; the Agricultural

[84] Elizabeth A. Dobis et al., "2021 Edition: Rural America at a Glance," ERS, EIB-230, November 2021.

[85] Agricultural *extension* provides nonformal education to the nonuniversity public.

Research Service (ARS) conducts intramural scientific research; ERS conducts economic and social science research; and the National Agricultural Statistics Service (NASS) provides official statistics on U.S. agriculture. The Office of the Chief Scientist (OCS) coordinates science policy and activities across USDA.

Most research title programs require annual discretionary appropriations; a few programs receive mandatory spending. Upon enactment of the 2018 farm bill, projected mandatory outlays for the research title totaled $694 million (FY2019-FY2023). In contrast, USDA research agencies received approximately $3.4 billion in discretionary appropriations for FY2021 alone. In addition to federal funding, certain grants require nonfederal matching funds.

Selected Farm Bill Provisions

The farm bill addresses extramural activities administered by NIFA, OCS, and the Foundation for Food and Agriculture Research (FFAR) and intramural activities of ARS, ERS, and NASS.

NIFA administers capacity grant programs for LGUs and competitive grant programs for LGUs as well as a range of eligible applicants.[86] Capacity grant programs (e.g., Hatch Act, Evans-Allen Act, Tribal College Endowment Fund) are permanently authorized and require annual appropriations. The 2018 farm bill addressed capacity grant issues, including reporting and administrative requirements, nonfederal matching funds, and program eligibility. Competitive grant programs generally require annual appropriations and reauthorization with each farm bill. Specific to LGUs, the 2018 farm bill established new competitive grant programs (e.g., Scholarships for Students at 1890 Institutions; New Beginning for Tribal Students; and Centers of Excellence at 1890 Institutions) and amended existing programs. The Agriculture and Food Research Initiative (AFRI), NIFA's flagship competitive grants program, is open to a range of applicants. The 2018 farm bill amended AFRI and reauthorized appropriations through FY2023. The 2018 farm bill also provided mandatory funds for certain competitive grant programs (e.g., the Specialty Crop Research Initiative, Organic Agriculture Research and Extension Initiative, and Farming Opportunities Training and Outreach).

Within OCS, the 2018 farm bill authorized a new pilot program—the Agriculture Advanced Research and Development Authority (AGARDA)—to carry out innovative research and develop solutions to agricultural threats. Congress authorized $50 million per year (FY2019-FY2023) for AGARDA. Congress provided $1 million for AGARDA in FY2022 appropriations (P.L. 117-103). As of this writing, USDA has not established AGARDA.

FFAR is a nonprofit research corporation designed to leverage federal investments in agricultural research with private funding. Congress established FFAR in the 2014 farm bill (P.L. 113-79) and provided a total of $200 million in mandatory funding. The 2018 farm bill provided an additional $185 million in mandatory funding and required FFAR to submit to Congress a strategic plan describing a path to self-sustainability.[87]

Other research title provisions address USDA policies, programs, and intramural research. For example, the 2018 farm bill amended the purposes of federally funded agricultural research, extension, and education to add international scientific collaboration; reauthorized and amended provisions for a federal advisory board; and directed ERS to update a report on U.S. dairy farms.

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[86] NIFA distributes *capacity grants* (formula funds) among eligible institutions based on formulas in statute. NIFA awards *competitive grants* directly to individual projects selected by NIFA through a peer-review process.

[87] This strategic plan is available at Foundation for Food and Agriculture Research, "Governance," at https://foundationfar.org/about/governance.

Issues and Options

In the next farm bill, Congress may choose to address a variety of issues related to agricultural research, extension, and education. These may include LGU funding equity; research infrastructure; research innovation; and climate change research and extension.

Some stakeholders and Members of Congress have expressed concerns about funding equity among LGU types. The 2018 farm bill addressed differences in grant requirements for 1890 (historically Black) and 1862 (original) LGUs. Organizations representing Native American education have called for increased funding of 1994 (Tribal) Institutions. Congress may consider whether (and if so, how) to address concerns about LGU funding equity, including the amounts, types, and policies associated with funding different types of LGUs.

Congress may choose to address the role of federal funding, if any, in improving agricultural research infrastructure. Many grants prohibit spending federal funds on research facilities. The Build Back Better Act (H.R. 5376) would provide $1 billion for agricultural research facilities at minority-serving LGUs and certain other institutions.

The 2018 farm bill authorized AGARDA to support innovative, high-risk, high-reward research that otherwise may not be funded. As of this writing, Congress has appropriated a total of $1 million for AGARDA; its authorization expires at the end of FY2023. Congress may consider whether there is need for federal funding of innovative research and the flexible hiring and funding authorities granted to AGARDA.

Extreme weather and climate change have emerged as concerns for farmers and ranchers. Stakeholders including the Food and Agriculture Climate Alliance—a diverse coalition of producers, agribusiness, state governments, and others—have advocated for an increased focus on these topics. Congress may consider whether existing authorities, programs, and funding levels for climate change research and extension adequately address the needs of agricultural producers.

For Further Information

CRS Expert

- Genevieve K. Croft, Specialist in Agricultural Policy

Relevant CRS Products

- CRS Report R40819, *Agricultural Research: Background and Issues*, by Genevieve K. Croft
- CRS In Focus IF12023, *Farm Bill Primer: Agricultural Research and Extension*, by Genevieve K. Croft
- CRS In Focus IF11319, *2018 Farm Bill Primer: Agricultural Research and Extension*, by Genevieve K. Croft
- CRS Report R45897, *The U.S. Land-Grant University System: An Overview*, by Genevieve K. Croft
- CRS In Focus IF11847, *1890 Land-Grant Universities: Background and Selected Issues*, by Genevieve K. Croft
- CRS In Focus IF12009, *1994 Land-Grant Universities: Background and Selected Issues*, by Genevieve K. Croft

Forestry

One-third of the land area in the United States is forestland (765 million acres).[88] These lands provide ecological services, including air and water resources, fish and wildlife habitats, opportunities for recreation and cultural use, and timber resources for lumber, plywood, paper, and other materials, among other uses and benefits. Most U.S. forestland is privately owned (444

[88] Sonja Oswalt et al., *Forest Resources of the United States, 2017: A Technical Document Supporting the Forest Service 2020 RPA Assessment*, Forest Service, GTR-WO-97, 2019.

million acres); the rest is publicly owned—primarily by the federal government—of which 238 million acres are federal and 84 million acres are state and local.

The federal government engages in four types of forestry activities: managing federal forests; providing financial, technical, or other resources to promote forest ownership and stewardship (referred to as "forestry assistance"); sponsoring or conducting research to advance the science of forestry; and engaging in international forestry assistance and research. The Forest Service (within USDA) is the principal federal forest management agency and is responsible for administering most forestry assistance programs, conducting forestry research, and leading U.S. international forestry assistance and research efforts. The Forest Service is responsible for managing 19% of all U.S. forestlands (145 million acres) as part of the National Forest System (NFS).[89]

Selected Farm Bill Provisions

The previous three farm bills each contained a standalone forestry title that included provisions related to forestry research, providing assistance for nonfederal forest management, and federal forest management.[90] Title VII (Forestry) of the 2018 farm bill modified one and repealed several forestry research programs, including a grant program to support minority and female students studying forestry and a project demonstrating wood bioenergy. In addition, the 2018 farm bill repealed, modified, and reauthorized some forestry assistance programs. This included providing explicit statutory authorization and congressional direction for programs that had been operating under existing, broad authorization (e.g., the Landscape Scale Restoration program). The law also established, reauthorized, and modified assistance programs intended to promote the use of wood products for energy, building construction, and other purposes and to mitigate wildfire risk by incentivizing the removal of forest biomass on both federal and nonfederal lands. The 2018 farm bill included other provisions related to federal and tribal forest management—such as modifying planning requirements and reauthorizing, extending, expanding, and establishing certain management, partnership, and collaboration programs—as well as several provisions related to the Forest Service's authorities to convey NFS lands through lease, sale, or exchange.

Issues and Options

Most forestry assistance, research, and federal forest management programs are permanently authorized and do not require reauthorization in the farm bill. Some programs, however, are set to expire at the end of FY2023.[91] If expiring programs are to continue, Congress may consider the following: extending these programs, with or without changes; modifying existing programs and possibly establishing new options to support assistance to nonfederal forest owners, forest research, and federal forest management. Congress also could consider addressing specific and/or emerging forestry issues, such as those related to forest risks or climate change. Congress also may choose to address any potential issues with provisions enacted in the Infrastructure Investment and Jobs Act (IIJA; P.L. 117-58). IIJA authorized, provided program direction, and

[89] In addition to forests, the 193 million acre National Forest System contains nonforested woodlands and grasslands. Other federal agencies manage forestlands, including the Bureau of Land Management, National Park Service, and Fish and Wildlife Service (all within the Department of the Interior).

[90] Forestry-related provisions may be included in other farm bill titles. For example, in the 2018 farm bill, the Conservation (Title II), Research (Title VII), Energy (Title IX), and Miscellaneous (Title XII) titles each contained provisions related to forestry or forest ownership.

[91] The four programs set to expire at the end of FY2023 are the Healthy Forests Reserve Program, Rural Revitalization Technology, National Forest Foundation, and funding for implementing statewide forest resource assessments.

appropriated funding for several Forest Service assistance and research programs and activities. Alternatively, Congress may elect not to address forestry issues, if, for example, existing authorities and programs are considered adequate in addressing the nation's forestry needs.

Congress may choose to address concerns related to forest health management generally on federal and nonfederal lands. This could include assistance or management programs to reduce the risk of catastrophic disturbance events, such as an uncharacteristically severe wildfire or insect or disease infestations. For nonfederal forests, this may include establishing or modifying assistance programs to enhance wildfire protection, preparedness, and forest resiliency. For federal forests, this may involve establishing new authorities or expanding existing authorities to reduce hazardous fuel levels or other forest restoration activities. Because many forest risks span multiple ownership boundaries, Congress may consider new approaches to expand or facilitate cross-boundary forest management activities. This could be through authorizing and/or incentivizing a variety of federal and nonfederal partnerships and collaborations.

Congress may choose to continue facilitating the development or advancement of wood products. In previous farm bills and other legislation, Congress has established several programs to promote new markets and uses for woody biomass, in part to encourage forest restoration and reduce wildfire threats. A new farm bill could extend, expand, alter, or terminate these programs or replace them with alternative approaches.

Forests can contribute to mitigating climate change and be affected by changing climatic conditions. To address some of the uncertainties regarding climate impacts on forest management, Congress may consider modifying existing or establishing new research programs. As another option, Congress could establish programs to increase or optimize carbon sequestration on federal and nonfederal lands through market or nonmarket mechanisms.

For Further Information

CRS Experts

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- Anne A. Riddle, Analyst in Natural Resources Policy

Relevant CRS Products

- CRS In Focus IF12054, *Farm Bill Primer: Forestry Title*, by Katie Hoover
- CRS Report R45219, *Forest Service Assistance Programs*, by Anne A. Riddle and Katie Hoover
- CRS Report R43872, *National Forest System Management: Overview, Appropriations, and Issues for Congress*, by Katie Hoover and Anne A. Riddle
- CRS Report R46976, *U.S. Forest Ownership and Management: Background and Issues for Congress*, by Katie Hoover and Anne A. Riddle
- CRS Report R45696, *Forest Management Provisions Enacted in the 115th Congress*, by Katie Hoover et al.

Energy

Four farm bills have contained an energy title: the 2002, 2008, 2014, and 2018 farm bills. Over time, the focus of the energy titles has shifted and expanded. The 2002 farm bill established several new programs, including programs focused on biofuels, biobased products, and energy efficiency. The 2008 farm bill increased the number of energy programs and expanded the focus to include more non-corn feedstock programs (e.g., Community Wood Energy Program) and a biomass feedstock logistics program (i.e., Biomass Crop Assistance Program). The 2014 farm bill extended funding for most of those programs. The 2018 farm bill also extended funding—

providing less mandatory funding than previous farm bills—and established the Carbon Utilization and Biogas Education Program.

The farm bill primarily centers on *agriculture-based renewable energy*, which is generally defined as energy (e.g., transportation fuel, electricity, or heat) produced from biomass feedstocks (e.g., woody biomass, crop residue) or energy produced from resources located in rural areas (e.g., wind) or from agricultural operations (e.g., manure). Examples of such energy include corn-based ethanol, wind farms, and anaerobic digesters. Producing this type of energy can encourage rural economic development, environmental improvements, energy security, and more. Challenges include feedstock access, supply, and cost, as well as technology development and infrastructure, among other things.

Selected Farm Bill Provisions

The Energy title (Title IX) of the 2018 farm bill has a dozen provisions pertaining mostly to agriculture-based renewable energy production and use.[92] Program coverage areas include biobased products, biofuels, renewable chemicals, energy efficiency, renewable energy systems, biomass research and development, biomass feedstocks, wood energy, carbon utilization and sequestration, biogas, and more. Many of the existing programs build upon programs established in the 2002 farm bill's energy title. USDA administers these programs, most of which expire at the end of FY2023 and lack baseline funding.

Congress provided mandatory funding ($375 million) and authorized discretionary funding ($1.7 billion) over the five-year reauthorization period for the 2018 farm bill for many of the energy title programs. Mandatory funding has supported most programs, as Congress has rarely appropriated discretionary funding. Programs that have routinely received discretionary funding include the Rural Energy for America Program (REAP), the Rural Energy Savings Program, and the Sun Grant Program.

Issues and Options

As Congress prepares for the next farm bill, it may consider some of the issues facing the energy title programs. Among these are funding and authorization. For instance, REAP is the only program that has authorization past FY2023. The mandatory baseline funding for many of the other energy title programs expires at the end of FY2023. Additionally, Congress has authorized a fraction of the discretionary funds available for the energy title programs for FY2019-FY2021 (approximately $48 million of a possible approximately $1 billion). Congress may assess whether a different authorization period (e.g., longer than five years) and different funding amounts could be considered for the energy title programs to reflect the complexity and design life associated with many of the projects they support.

Congress may further explore how agriculture-based renewable energy fits into the U.S. energy portfolio and if it addresses consumer demands and climate policy goals, among other things. For example, Congress may consider a more rapid transition from conventional biofuels to advanced biofuels, partly for the environmental benefits, and may consider related opportunities and challenges with such a transition. Additionally, Congress may ponder the extent to which agriculture-based renewable energy can contribute to energy production and consumption trends given the impacts of the COVID-19 pandemic, commodity supply and pricing, and international trade negotiations. Lastly, Congress may examine the progress and impacts of existing mandates

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[92] 7 U.S.C. Ch. 107 Renewable Energy Research and Development.

(e.g., the Renewable Fuel Standard) and tax incentives (e.g., Renewable Electricity Production Tax Credit) that involve biomass or agriculture-related renewable energy.

For Further Information

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Relevant CRS Products

- CRS In Focus IF10288, *Overview of the 2018 Farm Bill Energy Title Programs*, by Kelsi Bracmort
- CRS Report R45943, *The Farm Bill Energy Title: An Overview and Funding History*, by Kelsi Bracmort
- CRS Report R43325, *The Renewable Fuel Standard (RFS): An Overview*, by Kelsi Bracmort
- CRS Report R46865, *Energy Tax Provisions: Overview and Budgetary Cost*, by Molly F. Sherlock

Miscellaneous

The miscellaneous titles in farm bills have included a variety of provisions that are not united by a common theme. The title has included provisions addressing the livestock and poultry sectors, particularly on animal health and disease preparedness issues (see "Animal Agriculture"). The 2008 farm bill (P.L. 110-246) was an exception for livestock, as that farm bill included a standalone Livestock title (Title XI). Animal welfare provisions have been included regularly in the Miscellaneous title.

The miscellaneous titles of the last three farm bills have included provisions for beginning farmers and ranchers, socially disadvantaged producers, and veteran farmers. Some provisions have created outreach and technical programs, various commissions, advisory committees, and required civil rights reports. The 2018 farm bill contained provisions that amended the Department of Agriculture Reorganization Act of 1994 (P.L. 103-354, as amended), making various changes to USDA agencies. The Miscellaneous title also is the location of many USDA report requests on issues or new programs not directly linked to other titles in the farm bill.

Appendix. 2018 Farm Bill Titles and Subtitles

Agriculture Improvement Act of 2018, P.L. 115-334

I. Commodities

A. Commodity Policy

B. Marketing Loans

C. Sugar

D. Dairy Margin Coverage and Other Dairy Related Provisions

E. Supplemental Agricultural Disaster Assistance

F. Noninsured Crop Assistance

G. Administration

II. Conservation

A. Wetland Conservation

B. Conservation Reserve Program

C. Environmental Quality Incentives Program and Conservation Stewardship Program

D. Other Conservation Programs

E. Funding and Administration

F. Agricultural Conservation Easement Program

G. Regional Conservation Partnership Program

H. Repeals and Technical Amendments

III. Trade

A. Food for Peace Act

B. Agricultural Trade Act of 1978

C. Other Agricultural Trade Laws

IV. Nutrition

A. Supplemental Nutrition Assistance Program

B. Commodity Distribution Programs

C. Miscellaneous

V. Credit

A. Farm Ownership Loans

B. Operating Loans

C. Administrative Provisions

D. Miscellaneous

VI. Rural Development

A. Improving Health Outcomes in Rural America

B. Connecting Rural Americans to High Speed Broadband

C. Miscellaneous

D. Additional Amendments to the Consolidated Farm and Rural Development Act

E. Additional Amendments to the Rural Electrification Act of 1936

F. Program Repeals

G. Technical Corrections

VII. Research, Extension, and Related Matters

A. National Agricultural Research, Extension, and Teaching Policy Act of 1977

B. Food, Agriculture, Conservation, and Trade Act of 1990

C. Agricultural Research, Extension, and Education Reform Act of 1998

D. Food, Conservation, and Energy Act of 2008

E. Amendments to Other Laws

F. Other Matters

VIII. Forestry

A. Cooperative Forestry Assistance Act of 1978

B. Forest and Rangeland Renewable Resources Research Act of 1978

C. Global Climate Change Prevention Act of 1990

D. Healthy Forests Restoration Act of 2003

E. Repeal or Reauthorization of Miscellaneous Forestry Programs

F. Forest Management

G. Other Matters

IX. Energy

X. Horticulture

XI. Crop Insurance

XII. Miscellaneous

A. Livestock

B. Agriculture and Food Defense

C. Historically Underserved Producers

D. Department of Agriculture Reorganization Act of 1994 Amendments

E. Other Miscellaneous Provisions

F. General Provisions

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9th Annual Mid-South Conference Materials

Foreign Ownership of Agricultural Land in the Mid-South: Legal and Legislative Update

Harrison Pittman and Micah Brown

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Foreign Ownership of Ag Land

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Foreign Ownership of Ag Land

Micah Brown

National Agricultural Law Center

Agriculture is faced with a host of legal issues on an annual basis and the foreign ownership of agricultural land is a recent issue garnering much attention.

Foreign Ownership of Agricultural Land

Alabama Senate Bill 14 by Micah Brown

Recently, an Alabama state lawmaker proposed a bill (S.B. 14) that is aimed at restricting foreign ownership of agricultural land within the state. According to a 2019 U.S. Department of Agriculture ("USDA") report, foreign investors own over 1.7 million acres of Alabama agricultural land, which is the third-highest amount among U.S. states. Most of this foreign-owned property is forests at 1,734,581 acres, followed by 11,359 acres of cropland and 3,222 acres of pastureland. Specifically, the bill would restrict nonresident aliens, foreign businesses, and foreign governments from purchasing or acquiring an interest in agricultural land located within the state.

Background

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.

Ownership of U.S. land, specifically agricultural lands, by foreign persons or entities has been an issue that traces to the origins of the United States. Today, approximately thirteen states specifically forbid or limit nonresident aliens, foreign businesses and corporations, and foreign governments from acquiring or owning an interest in agricultural land within their state. To see a compilation of the various restrictions enacted by each state, check out the National Agricultural Law Center's "Statutes Regulating Ownership of Agricultural Land" chart here.

Although these states have instituted restrictions, each state has taken its own approach. In other words, a uniform approach to restricting foreign ownership has not been established because state laws vary widely. For instance, each state's statute may define "agricultural land" and "farming" differently, make distinctions between resident and nonresident aliens, allow foreign purchasers to acquire up to a certain acreage amount of farmland, and provide different enforcement procedures and penalties for alleged violators. Despite this, Alabama's S.B. 14 takes a similar approach to the foreign ownership restrictions instituted by Iowa. In fact, the current version of the bill contains many of the same statutory provisions contained in Iowa's law.

Most states have not enacted restrictions or prohibitions on foreign ownership of privately held agricultural land. Rather, most of these states expressly allow foreign ownership of real property within their state. Alabama is currently a prime example of such a state. In general, these states provide foreign persons and entities the same real property rights as natural born citizens of their state. For example, current Alabama law permits "[f]oreigners who are, or may hereafter become, bona fide residents of this state, shall enjoy the same rights in respect to the possession…of property, as native born citizens." Ala. Const. Art. I § 34. Further, Alabama allows resident or nonresident aliens to purchase and hold real property in the state in the same manner as native citizens. Ala. Code § 35-1-1. Accordingly, even though Alabama law expressly allows foreign ownership of real property, S.B. 14 would—if enacted—exclude agricultural land as a type of property which foreign investors could purchase.

Proposed Bill Provisions

According to the current text of S.B. 14, its purpose is to "restrict ownership of agricultural land to United States citizens and resident aliens only." To accomplish this, the bill provides that "a nonresident alien, foreign business, or foreign government, or an agent, trustee, or fiduciary thereof, may purchase or otherwise acquire agricultural land in this state."

In general, knowing the definitions contained in the bill is essential to understanding precisely which parties are restricted from purchasing property that qualifies as agricultural land. Under S.B. 14, "agricultural land" is defined as "[l]and suitable for use in farming," and "farming" is defined as producing agricultural crops, eggs, milk, horticultural crops, including fruit, raising poultry, and grazing or producing livestock. Further, the production of timber, forest products, nursery products, and sod also qualify as "farming" under the proposed bill. However, the term does not include contracts for farm services from a provider of farm products or supplies, such as spraying or harvesting. Therefore, if a piece of property is being used to produce agricultural

commodities, timber, sod, or nursery products, it likely qualifies as "agricultural land" under S.B. 14.

The proposed bill identifies three types of parties who are prohibited from purchasing or acquiring an interest in agricultural land. First, a "nonresident alien" is an individual who is not (1) a U.S. citizen, or (2) admitted into the U.S. for permanent residence by the U.S. Immigration and Naturalization Service. The second type of party includes "foreign businesses." Under S.B. 14, this includes a "corporation incorporated under the laws of a foreign country, or a business entity…in which a majority interest is owned directly or indirectly by nonresident aliens." Third, "foreign governments" are also restricted under the bill, which includes any government that is not the U.S. government, its states or territories.

While S.B. 14 restricts these types of parties from purchasing farmland within the state, there are some exceptions to this restriction. The exceptions contained within this proposed legislation are common to appear in some form in other states' laws. One exception allows prohibited parties to acquire agricultural land by inheritance. Another exception under the bill permits these parties to acquire an interest in land by taking a security interest in agricultural land as collateral to secure a loan. When this occurs, the foreign individual or entity may obtain ownership of the land by foreclosing on the property to satisfy the debt owed by the borrower. Although these exceptions give ownership rights to prohibited foreign parties, these exceptions are limited. Specifically, if a foreign party acquires ownership of agricultural land under either of these exceptions, they must sell or dispose of their interest in the property within two years from the date they gained their ownership interest.

The proposed legislation also provides an exception for foreign parties who currently own or hold an interest in agricultural land. In general, if the current version of S.B. 14 is enacted, foreign parties that own agricultural land on the effective date of the bill may continue to own that property. However, the bill prohibits these parties from purchasing or acquiring additional agricultural land once the bill is in effect.

Aside from the exceptions, S.B. 14 also considers status changes of residents and businesses. Essentially, the bill provides that a U.S. resident or business that becomes a nonresident alien or foreign business after the effective date of the bill has two years to sell or otherwise dispose of any agricultural land they own or hold within the state.

Under S.B. 14, parties who purchase farmland or continue to hold land in violation of this bill remain in violation "for as long as the person holds an interest in the land."

Another important provision contained under S.B. 14 is a registration or reporting requirement. While certain foreign persons are required to disclose their interests in U.S. agricultural land to USDA under the federal Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA"), several states have their own reporting requirements. Under the current text of S.B. 14, foreign parties will be required to register their agricultural landholdings with the Alabama Secretary of State. This means that a foreign person who meets any exception or changes their status after the

effective date of the bill has 60 days to register their ownership interest. To satisfy this requirement, parties will have to provide their name, location, and the amount of agricultural acreage they own by municipality and county. Parties who fail to timely register may be subject to a penalty of up to $2,000 for each offense.

Like many other states who have enacted restrictions on foreign ownership, S.B. 14 provides instructions on how it would be enforced. According to the current text of the legislation, a court that finds a party acquired land in violation of the bill "shall declare the land escheated to the state." This means the government takes automatic ownership of the property. Afterwards, the state would be required to sell the property. The proceeds from the sale would be used to pay court costs and pay the violating foreign party up to the amount they paid for the property. If any proceeds remain, the state would distribute the funds to the county or counties where the property is located.

Although S.B. 14 provides an enforcement process, the bill does not indicate who may bring a legal action against a suspected violator. Thus, under the current version of the bill, it is unclear whether a private citizen may bring an action or if the state must file suit against a suspected violating party.

Conclusion

Over the past year, the issue of restricting foreign investments and ownership of farmland emerged in a few states, such as Missouri, Oklahoma, and most recently, Indiana. Alabama is now included in this list of states considering the issue with the introduction of S.B. 14. Under the current version of the bill, foreign individuals and entities would be restricted from purchasing Alabama agricultural land. However, because this bill has a long way to go before it becomes law, it may be amended and some provisions discussed in this article may be revised or replaced. Accordingly, readers should reference the most current version of the bill here.

To read S.B. 14, click here.
To view a NALC webinar discussing laws limiting foreign ownership of agricultural land, click here.
For information on state laws governing foreign ownership of agricultural land, click here.

Foreign Adversary Risk Management Act by Micah Brown

Over the past decade, foreign investments in agricultural land have grown. At the start of 2020, foreign persons held over 35 million acres of U.S. agricultural land according to the Farm Service Agency. In response to these types of purchases, a bill known as the Foreign Adversary Risk Management ("FARM") Act was recently introduced in Congress. Proponents of the FARM Act claim that it will help secure the nation's food supply chain and agricultural industry from inappropriate foreign interference. Congressional representatives Ronny Jackson (R-TX) and Filemon Vela (D-TX) introduced the FARM Act in the U.S. House while Senator Tommy Tuberville (R-AL) introduced the bill in the Senate. It seeks to amend the Defense Production Act ("DPA") of 1950 to place agriculture in the Committee on Foreign Investment in the United States ("CFIUS").

Specifically, the legislation seeks to require CFIUS to consider agriculture-specific criteria when determining whether a foreign investment poses a risk to the United States national security.

CFIUS

CFIUS is a multi-government agency entity that is authorized by the DPA (50 U.S.C. § 4565) to review certain transactions involving foreign investments and acquisitions of American companies and real estate to determine whether there is a threat to national security. Originally established by Executive Order 11858 issued by President Gerald Ford, CFIUS was codified and given statutory authority in 2008 under the Foreign Investment and National Security Act (FINSA). In other words, Congress assigned specific powers and duties to CFIUS to enforce the provisions of the FINSA. Specifically, the FINSA reformed CFIUS by implementing new vetting procedures and expanding the Committee's role in reviewing foreign investments. CFIUS was reformed again in 2018 with the passage of the Foreign Investment Risk Review Modernization Act ("FIRRMA"), which expands the Committee's power to review certain transactions.

Essentially, CFIUS has the power to suspend, renegotiate, and impose conditions to transactions (whether pending or already completed) that may pose a risk to the national security of the U.S. In other words, the Committee uses these measures to mitigate any threat to national security that arises from a transaction. Transactions that may pose a risk to the national security, for example, are investments and acquisitions of *critical infrastructure*, such as transportation, telecommunication, public health, and energy. Another type of transaction CFIUS closely reviews include investments in *critical technologies*. In general, these technologies are created or used by certain U.S. businesses and industries that are essential to the nation's economic and national security.

Typically, CFIUS beings the review process when a foreign investor voluntarily notifies the Committee of its potential investment. However, CFIUS has the authority to review certain transactions that may raise national security concerns but are not reported by a foreign investor. After initiating the review process, CFIUS has 45 days to determine whether it will allow a transaction move forward, or if a subsequent investigation is needed. If so, it will have an additional 45 days to determine whether the foreign investment presents national security risks.

After the review or investigation is complete, if CFIUS determines a transaction still poses a risk to national security, it may refer a transaction to the President. Although CFIUS has the ability to use measures to mitigate some risks a transaction may impose, the President is the only official with authority to block a foreign merger, acquisition, or takeover (50 U.S.C.(d)(1)). Accordingly, CFIUS may refer a transaction to the President and recommend the President suspend or block the transaction. However, the President is not required to follow a recommendation from CFIUS. Nevertheless, if the President decides to review a foreign transaction and finds that there is credible evidence that the transaction will impair national security, they can choose to suspend or block the transaction.

FARM Act

In an effort to control foreign investments in U.S. agricultural production and food supply chains, federal lawmakers have introduced the FARM Act in both chambers of Congress. There are four main components to the piece of legislation.

First, the bill adds the Secretary of Agriculture as a member to CFIUS. Currently, the agricultural industry is not directly represented on CFIUS, and legislators in the past have criticized the lack of agricultural representation on the Committee. Much of this criticism stems from the acquisition of Smithfield Foods, one of the largest pork processors in the nation, by a Chinese-based corporation in 2012. More criticism from lawmakers surfaced in 2017 when Bayer and Monsanto, DuPont and Down Chemical, and ChemChina and Syngenta announced their plans to merge. Each of these acquisitions were reviewed and approved by CFIUS without representation from the agricultural sector on the Committee. According to the FARM Act sponsors, placing the Secretary of Agriculture as a CFIUS member will provide leverage to protect the interests of the agricultural industry in foreign investments and acquisitions of U.S. agricultural businesses.

Second, the bill adds language to the DPA to protect the agricultural sector from foreign control through investments, acquisitions, mergers, or agreements. Essentially, this provision of the legislation directs CFIUS to review or investigate transactions that could result in foreign control of a U.S. business that engages in agriculture.

The third component of the bill designates agricultural supply chains as critical infrastructure and critical technologies under the DPA. This provision places the agricultural industry and food supply chains as areas CFIUS can consider as it relates to national security. In other words, agriculture and food security will be considered as matters of national security.

Fourth, the bill mandates the United States Department of Agriculture ("USDA") and the Government Accountability Office ("GAO") to conduct an inspection of foreign influences in the U.S. agriculture industry and submit a report to Congress. In this report, USDA and GAO must specify current and potential foreign agriculture investments, the greatest international threats for increased foreign control in agriculture, and agriculture-related tactics or schemes used by foreign governments to target the U.S. agricultural industry.

Other Legislation

The FARM Act is not the first piece of legislation that would give USDA representation on CFIUS and require CFIUS to consider the agricultural industry as a matter of national security. In 2017, a bipartisan bill known as the Food Security is National Security Act (S.616) was introduced in Congress. This bill sought to add agriculture and food systems as threats considered by CFIUS and sought to add the Secretary of Agriculture as a member of the Committee. Ultimately, this bill was referred to the Senate Banking Committee, but did not move forward in the legislative process. Nevertheless, there are other pieces of legislation besides the FARM Act that seek to prevent foreign investments in U.S. agriculture currently being considered by Congress.

In May 2021, congressional representative Frank Lucas (R-OK) introduced the Agricultural Security Risk Review Act (H.R. 3413). This bill, which was previously introduced in Congress in 2019, would add the Secretary of Agriculture to CFIUS. Another bill being considered in Congress is the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2022 (H.R. 4356). The text of this legislation provides the Secretary of Agriculture the ability to block any purchase of agricultural land by companies fully or partly controlled by the Chinese government. Additionally, this bill would prohibit these companies from participating in USDA-led support programs.

To read the FARM Act, click here.
To track the FARM Act as it progresses through the legislative process, click here.

Statutes Regulating Ownership of Agricultural Land by Micah Brown and Nick Spellman

Foreign ownership of U.S. land, specifically private agricultural lands, is an issue that traces to the origins of the United States. State laws vary widely and without a generalized or uniform approach. The following compilation includes state statutory prohibitions on foreign ownership of agricultural land, foreign ownership of other real property, reporting requirements, and corporate farming restrictions. It bears noting that some states' laws restrict only ownership of agricultural lands while allowing for at least some level of ownership of non-agricultural land. Some states, such as Arizona, contain prohibitions on foreign ownership of public lands, which is outside the scope of this compilation.

In some states, foreign persons and entities have the same property rights as the citizens of those states. In other states, however, foreign ownership of agricultural land is prohibited or significantly limited within the boundaries of the state. Approximately fourteen states specifically forbid or limit nonresident aliens, foreign businesses and corporations, and foreign governments from acquiring or owning an interest in agricultural land within their state. Additionally, some states require foreign persons and entities to report their purchase or ownership interest in farmland within their state. These state reporting statutes often correspond with the federal reporting law under the Agricultural Foreign Investment Disclosure Act.

These compilations are only an aid to research. State courts and federal courts, including United States Supreme Court decisions, have interpreted and continue to interpret these statutes. Further, this publication does not include case annotations, which a researcher must consult to thoroughly understand any particular statute. As such, these charts are intended for use solely as an educational tool and research aid, and not as a substitute for individual legal advice. Additionally, the reader is cautioned that these laws are subject to changes that are often significant.

For each state, the first column of the chart includes a reference and link to the text of the relevant state constitutional and statutory provisions. Each compilation contains the code sections relevant to the topics found at the head of the chart and are linked to the specific language at issue. This compilation was last updated in March 2022.

State	Relevant Provision(s)	Prohibition	Permission	Reporting	Corporate Farming
Alabama	Ala. Const. § 34 Ala. Code § 35-1-1	None	Yes	None	None
Alaska	None	None	Not Expressly	None	None
Arizona	Ariz. Const. art. X, § 11 Ariz. Rev. Stat. Ann. § 37-240	Yes—public land only	Not Expressly	None	None
Arkansas	Ark. Const. art. II, § 20 Ark. Code Ann. § 2-3-111 Ark. Code Ann. § 18-11-101	None	Yes	Yes	None
California	Cal. Const. art. I, § 20 Cal. Civ. Code § 671	None	Yes	None	None
Colorado	Colo. Const. art. II, § 27	None	Yes	None	None
Connecticut	Conn. Gen. Stat. Ann. § 47-7a	None	Yes	None	None
Delaware	Del. Code Ann. tit. 25, § 305 Del. Code Ann. tit. 25, § 306 Del. Code Ann. tit. 25, § 308	None	Yes	None	None
Florida	Fla. Const. art. I, § 2	None	Yes	None	None

Georgia	Ga. Code Ann. § 1-2-11	Yes	None	None	None
Hawaii	HI Organic Act § 73(f) Haw. Rev. Stat. § 171-68	Yes—public land only	Not Expressly	None	None
Idaho	Idaho Code Ann. § 55-103 Idaho Code Ann. § 58-313	Yes—public land only*	Yes*	None	None
Illinois	765 Ill. Comp. Stat. Ann. 50/1 to 50/8 765 Ill. Comp. Stat. Ann. 60/7	None	Yes	Yes	None
Indiana	Ind. Code Ann. § 32-22-2-1 Ind. Code Ann. § 32-22-2-5 Ind. Code Ann. §§ 32-22-3-0.5 to 32-22-3-6	Yes—business entities only	Yes*	Yes—business entities only	Yes
Iowa	Iowa Code Ann. §§ 9H.1 to 9H.5 Iowa Code Ann. §§ 9I.1 to 9I.12 Iowa Code Ann. §§ 10.1 to 10.14 Iowa Code Ann. §§ 10B.1 to 10B.7 Iowa Code Ann. §§ 202B.101 to 202B.402	Yes	None	Yes	Yes
Kansas	Kan. Const. Bill of Rts. § 17 Kan. Stat. Ann. § 17-	Yes—business entities only	Not Expressly	Yes—foreign for-profit	Yes

	5904 **Kan. Stat. Ann. § 17-7505** (*effective until Jan. 1, 2023*) **Kan. Stat. Ann. § 17-7505** (*effective Jan. 1, 2023*)			corporations and cooperatives only	
Kentucky	**Ky. Rev. Stat. Ann. §§ 381.290 to 381.300**	Yes	None	None	None
Louisiana	**La. Const. Ann. art. I, § 4**	None	Yes	None	None
Maine	**Me. Rev. Stat. tit. 7, §§ 31 to 36** **Me. Rev. Stat. tit. 33, § 451**	None	Yes	Yes—foreign corporations and partnerships only	None
Maryland	**Md. Code Ann., Real Prop. § 14-101**	Yes	None	None	None
Massachusetts	**Mass. Gen. Laws Ann. ch. 184, § 1**	None	Yes	None	None
Michigan	**MI CONST Art. 10, § 6** **Mich. Comp. Laws Ann. § 554.135**	None	Yes	None	None
Minnesota	**Minn. Stat. Ann. §§ 500.24** **Minn. Stat. Ann. §§ 500.221**	Yes	None	Yes	Yes
Mississippi	**Miss. Const. Art. 4, § 84** **Miss. Code Ann. § 29-1-75**	Yes	None	None	None

	Miss. Code Ann. § 89-1-23				
Missouri	Mo. Rev. Stat. §§ 350.010 to 350.040 Mo. Rev. Stat. §§ 442.560 to 442.592	Yes	None	Yes	Yes
Montana	None	None	Not Expressly	None	None
Nebraska	Neb. Rev. Stat. §§ 76-402 to 76-415 Neb. Rev. Stat. §§ 76-1520 to 76-1524	Yes	None	Yes	Yes
Nevada	Nev. Rev. Stat. Ann. § 111.055	None	Yes	None	None
New Hampshire	N.H. Rev. Stat. Ann. § 477:20	None	Yes	None	None
New Jersey	N.J. Stat. Ann. § 46:3-18	Yes	None	None	None
New Mexico	None	None	Not Expressly	None	None
New York	N.Y. Real Prop. Law § 10	None	Yes	None	None
North Carolina	N.C. Gen. Stat. Ann. §§ 64-1 to 64-1.1	None	Yes	Yes	None
North Dakota	N.D. Cent. Code Ann. §§ 10-06.1-01 to 10-06.1-27 N.D. Cent. Code Ann. §§ 47-10.1-01 to 47-10.1-06	Yes	None	Yes	Yes

Ohio	Ohio Rev. Code Ann. § 2105.16 Ohio Rev. Code Ann. §§ 5301.254; 5301.99	None	Yes	Yes	None
Oklahoma	Okla. Const. art. XXII, § 1 Okla. Const. art. XXII, § 2 Okla. Stat. tit. 18, §§ 951 to 956 Okla. Stat. tit. 60, §§ 121 to 125	Yes	None	None	Yes
Oregon	Or. Rev. Stat. Ann. § 273.255	Yes—public land only	Not Expressly	None	None
Pennsylvania	68 Pa. Stat. Ann. §§ 41 to 47	Yes*	Yes*	State monitors AFIDA reporting	None
Rhode Island	34 R.I. Gen. Laws Ann. § 34-2-1	None	Yes	None	None
South Carolina	S.C. Const. art. III, § 35 S.C. Code Ann. §§ 27-13-10 to 27-13-40	Yes	None	None	None
South Dakota	S.D. Codified Laws §§ 43-2A-1 to 43-2A-7 S.D. Codified Laws §§ 47-9A-1 to 47-9A-23	Yes	None	State monitors AFIDA reporting	Yes
Tennessee	Tenn. Code Ann. § 66-2-101	None	Yes	None	None
Texas	Tex. Prop. Code Ann. § 5.005	None	Yes	None	None

Utah	None	None	Not Expressly	None	None
Vermont	Vt. Const. CH II, § 66	None	Yes	None	None
Virginia	Va. Code Ann. § 55.1-100	Yes	None	None	None
Washington	Wash. Rev. Code Ann. § 64.16.005	None	Yes	None	None
West Virginia	W. Va. Const. art. II, § 5 W. Va. Code Ann. § 36-1-21	None	Yes	None	None
Wisconsin	Wis. Stat. § 182.001 Wis. Stat. §§ 710.01 to 710.02	Yes*	Yes*	Yes	Yes
Wyoming	Wyo. Const. art. I, § 29	None	Yes	None	None

* State Code contains law(s) that permit and prohibit foreign individuals and/or entities from acquiring, holding, or owning an interest in real estate located within the boundaries of their state.