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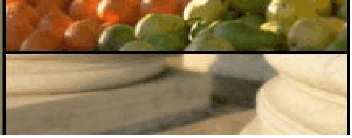

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ASCS Appeals and Payment Limitation Revisions in the 1990 Farm Bill: What Did the American Farmer Really Gain (or Lose)?

by

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ASCS APPEALS AND PAYMENT LIMITATION REVISIONS IN THE 1990 FARM BILL: WHAT DID THE AMERICAN FARMER REALLY GAIN (OR LOSE)?

ALAN R. MALASKY*

For decades, federal farm programs quietly provided stability to U.S. agricultural markets by protecting prices for American farmers and ensuring adequate food and fiber supplies for American consumers. These programs also encouraged the global expansion of markets for U.S. agriculture. In the late 1960s and early 1970s, concerns were raised regarding the levels of federal farm program payments to large agricultural producers. It was feared that these programs were leading to the elimination of the family farm. As a result, Congress enacted a provision which limited the amount of federal farm program payments a "person" could receive in any one crop year to $55,000.[1] Congress gave the Secretary of Agriculture the discretion to define the term "person."[2]

After enacting the first payment limitation restriction in the Agricultural Act of 1970, Congress amended this provision in 1973,[3] 1977,[4] and 1981.[5] Despite these changes, the federal farm programs and the payment limitation provisions were not very controversial. Only a small percentage of farmers were affected by the limitation because farmers' incomes were well supported by the market and the government. During the 1970s, production of agricultural commodities was dramatically increasing.[6] Even with these large increases in production, the prices for most agri-

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1. Agricultural Act of 1970, Pub. L. No. 91-524, § 101, 84 Stat. 1366 (1970).

2. *Id.*

3. Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, § 1(1), 87 Stat. 221 (1973) (in this amendment the limitation was reduced to $20,000 per "person" for crop years 1974 through 1977).

4. The Food and Agriculture Act of 1977, Pub. L. No. 95-113, § 101, 91 Stat. 917 (1977) (this amendment gradually moved the payment limitation levels for the program crops of wheat, feed grains, cotton and rice to $50,000 per "person" from 1978 to 1981).

5. The Agricultural and Food Act of 1981, Pub. L. No. 97-98, § 1101, 95 Stat. 1263 (1981) (this amendment maintained the $50,000 per "person" limitation for most federal farm program payments and added a $100,000 per "person" limitation for disaster benefits).

6. For example, between 1975 and 1981, U.S. wheat farmers planted an additional 14,000,000 acres to wheat, with an increase in production of approximately 650,000,000 bushels, while U.S. cotton farmers planted an additional 4,852,500 acres, with an increase in production of approximately 7,300,000 bales. U.S.D.A., *Agricultural Statistics*, 1, 61 (1990).

cultural commodities increased.[7]

By the early 1980s, the favorable agricultural market for farmers was dramatically transformed into a market of falling prices.[8] These falling prices led to a rapid increase in expenditures by the federal government for the federal farm programs. As a result, federal farm program payments to farmers began to reach the payment limitation levels with greater frequency. In response, farmers attempted to reorganize their operations so that they would be eligible for more payments. In an attempt to combat this situation, Congress completely restructured the payment limitation rules in 1987.[9]

Over time, the payment limitation rules have become increasingly more complex and more important, and disputes between farmers and the government regarding these programs have increased. These tensions have put increasing pressure on the administrative appeal system of the Agricultural Stabilization and Conservation Service (ASCS), the Department of Agriculture agency whose employees are charged with the day-to-day administration of these programs.

This article is divided into three parts. The first part will examine the recent changes to the payment limitation rules and the changes to the ASCS administrative appeals system contained in the Food, Agriculture, Conservation and Trade Act of 1990[10] (the 1990 Farm Bill). The second part will examine the payment limitation rules and the ASCS administrative appeals system in a broader context in an attempt to explain why, over the last ten years, ASCS has changed from an agency that actively supported farmers to an agency that appears to treat farmers as antagonists. The third part will suggest some proposals to reduce the tension and improve relations between farmers and ASCS.

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7. The marketing year average price between 1975 and 1980 for wheat received by the farmer increased 44¢ per bushel; cotton increased by 24.1¢ per pound. *Id.*

8. Between the 1980 and 1985 marketing years, the average price received by wheat farmers had fallen 91¢ per bushel and the average price received by cotton farmers had fallen 19.1¢ per pound. *Id.*

9. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1301, 101 Stat. 1330, 1330-12 (1987). This amendment added a new eligibility requirement that farmers must be "actively engaged in farming" to receive any federal farm program payments. *Id.* It thus shifted the focus of the payment limitation rules away from issues concerning the financial structure of the farming operation to issues regarding the sources of the farming inputs contributed to the farming operation and what percentage of those inputs were "personally" provided by the farmer. *Id.*

10. Pub. L. No. 101-624, 104 Stat. 3359 (1990).

I. CHANGES TO THE PAYMENT LIMITATION RULES AND THE ASCS APPEALS SYSTEM: THERE IS MORE THAN MEETS THE EYE

On paper, the changes to payment limitations rules and the ASCS appeals systems appear primarily minor and cosmetic. Upon closer examination, however, these changes reveal a great deal about the tensions and uncertainty concerning the future direction of U.S. agricultural policy.

A. CHANGES TO THE PAYMENT LIMITATION RULES: CONGRESS CHOSE TO STAY THE COURSE THIS TIME

The 1990 Farm Bill included several new provisions regarding the payment limitation which made only minor changes to the overall scheme. Before these relatively minor changes were adopted, however, the House of Representatives debated several amendments which would have radically changed the current payment limitation rules. The most important of these amendments was offered by Rep. Charles E. Schumer (D-N.Y.), and would have prohibited payments to individual farmers who had an "adjusted gross income" of $100,000 or more in the year in which the payment was made or the preceding year.[11]

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11. The text of Mr. Schumer's amendment is as follows:

(a) General Rule.—
  (1) A person shall not be eligible to receive, directly or indirectly, any payment, purchase, or loan for wheat, feed grains, cotton, honey, rice, oilseeds, wool, and mohair under the Agricultural Act of 1949 if that person has adjusted gross income of at least $100,000 for the taxable year during which such payment, purchase, or loan is made available to that person or the preceding year.
  (2) Except as provided by paragraph (4), in the case of a person who is not an individual, paragraph (1) shall be applied by substituting "taxable income" for "adjusted gross income."
  (3) For purposes of this section, a partnership shall be treated as a person who is not an individual.
  (4) In the case of any person who is exempt from tax under Chapter 1 of the Internal Revenue Code of 1986, that person shall not be eligible to receive any payment, purchase, or loan under the Agricultural Act of 1949 if that person has gross revenues of at least $1,000,000 for the calendar year during which such payment, purchase, or loan is made available to that person or the preceding calendar year.
  (5) In the case of estates and trusts, the Secretary of Agriculture shall prescribe rules based on the principles of paragraph (1) to carry out this section.

(b) Definitions.—For purposes of this section:
  (1) The terms "adjusted gross income" and "taxable income" shall have the meanings given such terms by the Internal Revenue Code of 1986.
  (2) The term "person" shall have the same meaning it has for purposes of section 1001 of the Food Security Act of 1985.

(c) Rules.—The Secretary of Agriculture shall prescribe rules to carry out this section.

Rep. Schumer's amendment would have represented a significant change in the federal farm programs in several ways. For the first time, the general eligibility of federal farm program benefits would have been tied to the income of the farmer.[12] In addition, this amendment would have extended the reach of the payment limitation rules to affect ASCS commodity loan and purchase activities. Previously, the payment limitation rules affected only direct payments to farmers. However, the federal farm programs also offer farmers price support in the form of nonrecourse commodity loans and purchase agreements. These federal farm program benefits have not been previously covered under the payment limitation rules. In effect, Rep. Schumer's amendment would have limited federal farm program benefits to small and poor farmers.

In response to Rep. Schumer's amendment, Rep. Jerry Huckaby (D-La.) stated that if large farmers were made ineligible for federal farm program benefits, such farmers would have no incentive to stay in the federal farm programs and withhold production pursuant to production control provisions, which are intended to enable ASCS to maintain an adequate supply of food and fiber in the market at reasonable prices.[13] The Schumer amendment was defeated 263 to 159.

This debate illustrates the two different directions that future U.S. agricultural policy could take. Rep. Schumer represents the view that the federal farm programs are far too large. Under his approach, federal farm program benefits would merely provide

(d) Effective Date.—This section shall apply to the 1991 crop and all subsequent crops.

136 CONG. REC. H5545 (daily ed. July 25, 1990).

12. There is an exception to this statement. In the case of certain disaster assistance programs, eligibility has been tied to the income or "gross revenue" of the farmer. *See* 7 U.S.C. § 1421 note (Supp. II 1990) (1988 and 1989 Disaster Assistance Programs); *see also* Emergency Livestock Feed Assistance Act of 1988, 7 U.S.C. § 1471h (1988).

13. Mr. Huckaby stated as follows:

> We in agriculture have the ability to produce more food and fiber than we can seek as far into the future as the eye can see. So what we try to do with these farm programs is to pay farmers not to plant. We try to control supply and demand and regulate it so that the farmers can get most of their income, if not all of it, from the marketplace instead of the Government. But we have this target-price deficiency payment mechanism so that farmers, by not planting all of their land, will receive Government payments.
>
> The amendment offered by the gentleman from New York [Mr. Schumer], he states, is aimed at some 4 or 5 percent of the farmers. Let me point out to the Members that 15 percent of our farmers produce 70 percent of the agricultural products in America. These are the top 15 percent. You start making a lot of them ineligible for farm programs, and we are going to significantly handicap the way the entire system works, and it is going to penalize the farmer in the middle and the farmer at the bottom.

136 CONG. REC. H5550 (daily ed. July 25, 1990) (Rep. Huckaby).

income safety nets for smaller farmers in order to preserve the family farm. He has also suggested that federal farm program payments to large farmers constitute welfare for the rich. [14] Conversely, Rep. Huckaby views the federal farm programs as part of an overall U.S. agricultural policy, under which federal farm program payments represent the incentive for farmers large and small to participate in production control programs designed to ensure stable supplies and prices for agricultural commodities in the U.S.

With the defeat of Rep. Schumer's amendment, Congress decided not to change U.S. agricultural policy and convert the federal farm programs to programs intended merely to provide a safety net for small and poor farmers. It appears that for the five-year duration of the 1990 Farm Bill, these programs will remain part of the overall supply and price control system for the production of U.S. agricultural commodities. However, the radical policy changes suggested by Rep. Schumer and others during the debate of the 1990 Farm Bill could represent the future direction of U.S. agricultural policy. Thus, while Congress may not have decided to make substantial changes in the payment limitation provisions, the fierce debate that preceded that decision contains important lessons regarding the philosophical basis of U.S. agricultural policy and how it might change in the future.

Even though the Schumer amendment was defeated, the following relatively minor changes to the payment limitation rules were enacted:

1. Findley payments, loan deficiency payments, and marketing loan gains are now subject to a separate limitation of $75,000, which is also included in the overall $250,000 limitation. Previously such payments were only included in the overall $250,000

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14. Mr. Schumer stated as follows:

> This amendment is a very, very simple thing. It says that farmers and others who make over $100,000 in adjusted gross income will not get a support payment. This amendment helps to focus the farm program where it ought to be focused, on the family farmer . . . .
>
> Members, this is a unique chance to tell our country that we mean what we say when our farm programs are not aiding the wealthy, in terms of agribusiness, but are aiding the people who need help. We use adjusted gross income, that is profit. Some have said that the Reid amendment in the Senate was misdrawn. I agree. There can be farmers who have gross sales of half a million dollars who are not wealthy, who are family farmers who are middle class farmers, but with adjusted gross income we are aiming at only the most profitable, the small handful who do not need or deserve a subsidy.

136 CONG. REC. H5545 (daily ed. July 25, 1990) (Rep. Schumer).

limitation.[15]

2. A separate payment limitation was created for the honey program, starting at $200,000 and falling to $125,000 during the life of the 1990 Farm Bill.[16]
3. The Secretary was instructed to disregard the existence of hybrid seed contracts when determining whether a producer is a "person" for payment limitation purposes.[17]
4. The Secretary was given the option to treat as two separate "persons" married couples that individually and jointly participate in only one farming entity, provided they meet the other requirements of the payment limitation statute.[18]
5. The Secretary can determine that for payment limitation purposes the minimal beneficial ownership interest of an entity was between zero and ten percent.[19]
6. The Secretary was given the option to make payments in excess of the limitation to a new owner of land under a multi-year contract if the new owner obtained the land by way of devise or descent, provided that such payments were no greater than the payments the previous owner would have received under the contract.[20]

On April 18, 1991, USDA promulgated new payment limitation regulations.[21] Like the statute, there were no major changes, except that the exemption from the payment limitation rules for Indian tribes on land the tribes owned or Trust land was deleted without comment.

B. THE CREATION OF THE NATIONAL APPEALS DIVISION: ASCS KEEPS ITS OPTIONS OPEN

In addition to making these changes in the payment limitation

15. Food Security Act of 1985, § 1001, 7 U.S.C. § 1308 (Supp. II 1990), *as amended by* 1990 Farm Bill, Pub. L. No. 101-624, § 1111(a), 104 Stat. 3359, 2497-98 (1990).
16. Agricultural Act of 1949, § 207(e), 7 U.S.C. § 1446h (Supp. II 1990), *as amended by* 1990 Farm Bill, Pub. L. No. 101-624, § 1111(d), 104 Stat. 3359, 3498 (1990).
17. Food Security Act of 1985, § 1001A(b), 7 U.S.C. § 1308-1(b)(6) (Supp. II 1990), *as amended by* 1990 Farm Bill, Pub. L. No. 101-624, § 1111(d), 104 Stat. 3359, 2498 (1990).
18. Food Security Act of 1985, § 1001(5)(B), 7 U.S.C. § 1308(5)(b)(iii) (Supp. II 1990), *as amended by* 1990 Farm Bill, Pub. L. No. 101-624, § 1111(c), 104 Stat. 3359, 3498 (1990).
19. Food Security Act of 1985, § 1001A(a)(2), 7 U.S.C. § 1308-1(a)(2) (Supp. II 1990), *as amended by* 1990 Farm Bill, Pub. L. No. 101-624, § 1111(f), 104 Stat. 3359, 3499 (1990).
20. Food Security Act of 1985, § 1001E, 7 U.S.C. § 1308-5 (Supp. II 1990), *as amended by* 1990 Farm Bill, § 1111(h), Pub. L. No. 101-624, 104 Stat. 3359, 3499 (1990).
21. 56 Fed. Reg. 15,964 (1991) (to be codified at 7 C.F.R. Pt. 1497).

statute, the 1990 Farm Bill also included a provision requiring the establishment of a National Appeals Division to replace the ASCS Appeals Staff.[22] Neither the legislation nor the recently promulgated ASCS regulations clearly explain how ASCS appeals will be conducted. Before addressing the specifics of the National Appeals Division, a brief explanation of the overall structure of the ASCS appeals system, as well as some background regarding the development of the National Appeals Division legislation, is appropriate.

1. *The Structure of the ASCS Administrative Appeals System*

Neither the National Appeals Division legislation nor the ASCS regulations implementing that legislation, substantially changes the basic three-level structure of the ASCS administrative appeal process. Under the new regulations, an administrative appeal is initiated by a farmer's request that the County ASC Committee (County Committee) reconsider an adverse determination.[23] For example, the farmer might be dissatisfied with a County Committee's determination of the number of payment limitation "persons" for his or her farming operation. A farmer can request that the County Committee hold an informal hearing in order to discuss the adverse decision.

The County Committee is composed of farmers who reside in the county and are elected by the farmers of the county. The County Committee acts as the representative of ASCS for the administration of the federal farm programs in the county. The County Committee, however, only meets several days a month. The rest of the time, the ASCS County Office is run by the County Executive Director (CED), who works for the County Committee. CEDs are very important because in most cases County Committees rely heavily upon the advice of their CED.

If the farmer is dissatisfied with the reconsideration determination of the County Committee, the farmer has the right to appeal the determination to the State ASC Committee (State Committee). The State Committee is composed of farmers (usually three of five) selected by the Secretary of Agriculture.

If the farmer is dissatisfied with the State Committee's determination, the farmer can appeal to the ASCS National Office in

22. 1990 Farm Bill, 7 U.S.C. § 1433c (Supp. II 1990).
23. 56 Fed. Reg. 59,207 (1991) (to be codified at 7 C.F.R. § 780).

Washington, D.C. Until the creation of the National Appeals Division, all Washington level ASCS administrative appeals were decided by the Deputy Administrator, State and County Operations (DASCO), who is also responsible for oversight and administration of the federal farm programs.[24]

These administrative appeals were rarely heard by DASCO personally. Rather, they were usually heard by a member of the ASCS Appeals Staff, who prepared administrative record and issued a recommended determination to DASCO. The final determination, however, was made by DASCO.

There are several general points that apply to ASCS administrative appeals at all levels. First, the farmer has the option of presenting the case personally or retaining counsel. The farmer also has the right to have a "personal" hearing where he or she can present the case in person before the reviewing body. In addition, the farmer has the right to request that a verbatim transcript be made of the hearing, provided the farmer is willing to pay for this service.

2. *Background of the National Appeals Division Legislation*

Over the past several years, concerns have been expressed in Congress regarding the fairness of this appeals process. Specifically, Congress felt that it was not appropriate for ASCS officials responsible for the administration of the ASCS federal farm programs policy to be in charge of administrative adjudications relating to these same programs. This concern was expressed by Senator Pryor in the following statement when he introduced his amendment to the 1990 Farm Bill which authorizes the creation of the National Appeals Division:

> The purpose of this bill is to assure [that] producers who participate in ASCS price support and production programs are given the opportunity to seek an appeals process which is administratively independent from the program side of ASCS. Currently, when a farmer finds that he must appeal a decision rendered by the county committee or the State office, he finds that his case will be heard on the Federal level by ASCS employees who more than likely have offered input on his case while it was being reviewed on the State level. This is not the most

24. 7 C.F.R. Pt. 780 (1991).

> comforting thought. Given the fact that we on the Agriculture Committee often seek active participation from the Department while we craft legislation, and after a bill is passed, some of these same people then make interpretations of the bill before issuing the regulations that will guide the enactment of the law. After all of this participation, some of these very same people will then exercise judgment on cases brought before them by producers. This is simply too much involvement from ASCS for anyone's good.[25]

In response, ASCS expressed its concerns that a completely independent administrative adjudicatory system would make it impossible for ASCS policymakers to have control over the direction of the federal farm programs that they are responsible for administering.

The provisions in the 1990 Farm Bill authorizing the creation of the National Appeals Division represent a compromise between these two perspectives. Administrative adjudications are removed from DASCO and placed in a new, free-standing division within ASCS.[26] While this theoretically separates administrative adjudications from the office most directly responsible for the administration of federal farm programs policy, Congress did not totally separate the National Appeals Division from the policymaking activities of ASCS, since it inserted a provision in the law allowing the ASCS Administrator or his designee to amend or overturn, presumably with input from DASCO, any determination issued by the National Appeals Division.[27]

In structuring the National Appeals Division, Congress granted the Director of the National Appeals Division the power to:

- examine all records and documents relating to an appeal;
- request the assistance of any Federal, State or local governmental agency or body;
- require the attendance of witnesses, the production of documents, if necessary via subpoena;
- administer oaths;

25. 136 CONG. REC. S10704 (July 26, 1990).
26. 1990 Farm Bill, 7 U.S.C. § 1433e (Supp. II 1990).
27. 1990 Farm Bill, 7 U.S.C. § 1433e(f) (Supp. II 1990).

— enter into contracts with reporting and other services;
— issue procedural rules;
— make all determinations with respect to appeals before the National Appeals Division;
— order further proceedings for the purposes of hearing new or additional evidence; and
— delegate the first four of the above-listed powers to hearing officers as the Secretary deems appropriate.[28]

The legislation also envisions that individual appeals will be heard by "hearing officers."[29] Congress gave ASCS the option defining the role of the "hearing officers" in this process, a role that could range from being merely responsible for the compilation of the administrative record to being independent investigators with the power to compel the production of documents and the appearance of witnesses.

3. *National Appeals Division Regulations*

On November 25, 1991, nearly one year after the enactment of the 1990 Farm Bill, ASCS promulgated interim regulations establishing the National Appeals Division.[30] These regulations amended the pre-existing procedures to be followed by all review authorities conducting administrative adjudications of federal farm programs as well as adding the specific procedures relating to the National Appeals Division.

The first issue the regulations address is the categories of administrative appeals to be covered by them. The general administrative appeal procedures are applicable to appeals of adverse determinations issued by all reviewing authorities (*i.e.*, County Committees, State Committees and the National Appeals Division) regarding programs administered by ASCS and programs ASCS administers on behalf of the Commodity Credit Corporation (CCC). The regulations do not specifically list these programs but, rather generally describe them as programs "set forth in Chapters VII and XIV of this title [Title Seven of the Code of Federal Regulations]."[31] This reference can be interpreted to mean that these regulations are applicable to the federal farm programs administered by ASCS, including the Price Support and

28. *See* 1990 Farm Bill, 7 U.S.C. § 1433e(c)(3) (Supp. II 1990).
29. 1990 Farm Bill, 7 U.S.C. § 1433e(c)(2) (Supp. II 1990).
30. 56 Fed. Reg. 59,207 (1991) (to be codified at 7 C.F.R. § 780).
31. *See* 56 Fed. Reg. 59,208 (1991) (to be codified at 7 C.F.R. § 780.1).

Production Adjustment Programs,[32] the Conservation Reserve Program,[33] and the Dairy Programs.[34]

These regulations are, however, applicable only to adverse determinations issued after November 28, 1990 (the date of enactment of the 1990 Farm Bill) that had not been finally decided by the agency by November 25, 1991.[35] For example, if a farmer were appealing an adverse State Committee determination dated November 27, 1990, the appeal would be decided under the old Part 780 rules by DASCO, not by the Director of the National Appeals Division.

Conversely, if the same farmer were appealing an adverse State Committee determination dated November 29, 1990, that, as of November 25, 1991, had not been decided by DASCO, the appeal would now be decided by the Director of the National Appeals Division. ASCS apparently is taking the position that with respect to any appeal that has been finally decided (*i.e.*, decided by DASCO, prior to November 25, 1991), the farmer does not have the right to have the appeal re-heard by the National Appeals Division unless the farmer is able to convince ASCS to exercise its discretion to reopen the appeal and thereby render the DASCO determination "not final."

The new regulations appear to limit appeal rights to those determinations that are specific to a particular farmer:

> Reconsideration and review under this part are limited to individual program determinations made with respect to those persons meeting the requirements of paragraph (a) of this section. Accordingly, there is no right to reconsideration or review under this part with respect to general program requirements which are applicable to all program participants or producers.[36]

Therefore, a farmer could appeal a County Committee determination that reduced the farmer's "person" status for payment limitation purposes. However, ASCS is apparently taking the position that a farmer could not appeal the determination by the Secretary of Agriculture to not exceed Farm Stored Loans, even if the farmer had a Farm Stored Loan that was affected by this decision. In the past, ASCS has taken the position that general policy deci-

32. 7 U.S.C. §§ 1421-1469 (Supp. II 1990).
33. 16 U.S.C. §§ 3831-3836 (Supp. II 1990).
34. 7 U.S.C. §§ 1446-1449 (Supp. II 1990).
35. 1990 Farm Bill, § 1132(b), 7 U.S.C. § 1433e (Supp. II 1990).
36. 56 Fed. Reg. 59,209 (1991) (to be codified at 7 C.F.R. § 780.2(b)).

sions are not appealable administratively.[37] This is the first time, however, that a specific provision of this type has been included in the ASCS appeal regulations to address this issue.

Farmers are required to request the County Committee to reconsider its initial adverse determination before appealing the matter to the State Committee.[38] On the other hand, the farmer has the option of requesting that the State Committee reconsider an adverse determination before appealing the matter to the National Appeals Division.[39] All such reconsideration requests must be filed "within 15 days after written notice of the determination which is the subject of such request . . . is mailed to or otherwise made available to the participant."[40]

Apart from filing a request for reconsideration, a farmer may, in the alternative, seek to have a hearing reopened in order to receive new information.[41] Unlike a request for reconsideration, a request for a reopening can be filed at any time, as long as the case has not been appealed to a higher reviewing authority.[42]

The second issue addressed by the regulations concerns the creation of the National Appeals Division. In this regard, ASCS has adopted a minimalist approach. The regulations confer the same powers upon the Director of the National Appeals Division that the 1990 Farm Bill conferred upon the Director.[43]

Neither the 1990 Farm Bill nor the regulations directly give "hearing officers" much power. The Director of the National Appeals Division has the authority to determine which of the powers granted to the Director may be delegated to hearing officers. However, unless the "hearing officers" are delegated some authority from the Director, it would appear that they will only have the power to hear farmers' presentations, and compile an administrative record, while the Director has the power to order and conduct additional hearings as well as issue the final determination.

The regulations also give the public only a little more detail regarding the issuance of administrative subpoenas by the

37. *See* 53 Fed. Reg. 45,073-74 (1988).
38. 56 Fed. Reg. 59,209 (1991) (to be codified at 7 C.F.R. §§ 780.7(a), (b)).
39. 56 Fed. Reg. 59,209 (1991) (to be codified at 7 C.F.R. § 780.7(c)).
40. 56 Fed. Reg. 59,210 (1991) (to be codified at 7 C.F.R. § 780.15(a)).
41. 56 Fed. Reg. 59,210 (1991) (to be codified at 7 C.F.R. § 780.18).
42. *Id.* There is no specific provision authorizing the granting of a request for reconsideration by the National Appeals Division. Thus, it would appear that if an appellant is dissatisfied with a National Appeals Division determination, the appellant is faced with the choice of requesting that the case be reopened or filing a lawsuit.
43. *See* 56 Fed. Reg. 59,210 (1991) (to be codified at 7 C.F.R. § 780.19); 7 U.S.C. § 1433e(c)(3) (Supp. II 1990).

National Appeals Division. It appears that the Director has full authority to issue administrative subpoenas at any time.[44] The regulations also indicate that farmers can request that the Director issue an administrative subpoena in a particular case.[45] However, the regulations do not give any details regarding how a farmer can make such a request. These procedures will have to be worked out as time progresses.

II. THE CHANGE IN ASCS'S ATTITUDE TOWARD FARMERS AND WHY IT HAPPENED

As we have just seen, the statutory changes in the areas of payment limitation and administrative appeals in the 1990 Farm Bill were relatively minor, especially in comparison to the sweeping changes found in the Omnibus Budget Reconciliation Act of 1987.[46] The real story is the continuation of ASCS's transformation, begun in the mid-1980s, from an agency that sought to help producers wherever possible to an agency that is perceived as fighting producers and restricting benefits at every turn, all in the name of budgetary restraint. This transformation is alarming not only because it has fundamentally changed ASCS, but also because of the wide range of administrative discretion assumed by ASCS over the past five to six years.

A. THE CHANGE

Prior to the mid-1980s, USDA, and in particular the ASCS, viewed the American farmer as a valuable resource who could not only provide for domestic food needs but also satisfy the food needs of countries around the world. As a result, ASCS implemented federal farm policies, including price support programs, in a manner that sought to assist and protect American agriculture while at the same time ensuring that domestic food supplies were high and domestic prices remained low. These goals were accomplished by providing producers with price support to make up the difference between the market price and the price necessary to sustain the desired level of production.

Beginning roughly with the start of the second term of the Reagan Administration, a change in U.S. agricultural policy developed at USDA. No longer was the American farmer seen as a val-

44. *See* 56 Fed. Reg. 59,210 (1991) (to be codified at 7 C.F.R. § 780.19(a)(4)).
45. *See* 56 Fed. Reg. 59,210 (1991) (to be codified at 7 C.F.R. § 780.20).
46. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

ued resource. Rather, USDA began to view farmers as ungrateful and expensive burdens on the federal government. This attitude was evident in the Administration's initial proposals for the 1985 Farm Bill. Under those proposals, most of the major components of the federal farm programs would have been dismantled over the five-year life of the legislation. The chaos such proposals would have wrought was apparent to everyone, including Congress, which summarily rejected them.

While many within the Administration did not expect these proposals to succeed, the fact that they were offered at all was clear evidence of the new attitude of the Administration toward the American farmer. During the 1984 and 1985 crop years, ASCS issued $3.9 billion and $7.6 billion respectively in federal farm program payments.[47] Thus, while the Reagan Administration was attempting to reduce overall federal domestic spending, USDA's federal farm program spending was increasing at a startling rate. However, there was very little the Administration could do, since these were entitlement programs whose authorizations did not expire until the end of the 1985 crop year.

In addition to the increases in federal farm program outlays, the Administration was also concerned with a drop in U.S. farm exports. Between 1984 and 1985 alone, U.S. agricultural exports declined from $38 billion to $31.2 billion.[48] The Administration blamed the federal farm programs, which imposed significant production controls on U.S. producers. Furthermore, as a consequence of these programs, the government was required to take significant amounts of agricultural commodities off the market in order to prop up U.S. prices. For example, in December 1985 the Commodity Credit Corporation (CCC) owned 557 million bushels of wheat, compared to just 191 million bushels in December 1981.[49] Similar increases were seen in feed grains and other price-supported commodities.

The Administration saw a chance to reduce expenditures for federal farm programs during the reauthorization process in 1985. Initially, the Administration proposed to drastically cut these programs so that the "market," rather than the ASCS, would tell producers how much of which commodities to grow, thus leading, at least in theory, to more efficient agricultural production and increased exports. The Administration hoped that Congress would

47. U.S.D.A., *Agricultural Statistics*, 436 (1990).
48. *Id.* at 479.
49. *Id.* at 427.

see these proposals as a starting point from which to negotiate substantial cuts in the federal farm programs. This did not happen.

While most in Congress generally acknowledged that the costs of these programs were increasing at an alarming rate, Congress flatly rejected the Administration's proposals and drafted its own farm legislation, which largely extended most of the existing programs. This legislation did include changes which would gradually reduce the costs of the programs over the long run and which gave USDA more flexibility regarding the administration of these programs, such as the setting of the loan rate so it would not be an impediment to U.S. exports.[50]

With the enactment of the Food Security Act of 1985,[51] the Administration grew impatient and saw these programs literally "running away" from them. In 1986, USDA expenditures for federal farm program payments grew to $11.7 billion, from $7.6 billion just a year earlier.[52] As these expenditures grew, the pressure on USDA from the Administration to do something mounted.

On the other hand, the mid-1980s were also a time of great hardship on American farms. Producers were carrying staggering debt loads, and the income received by farmers was plummeting. Despite the substantial increase in payments to farmers under the federal farm programs, farm income dramatically fell between 1985 and 1987. For example, farm income for growers of feed crops fell from $22.6 billion in 1985 to $14.5 billion in 1987.[53] There was a similar decline in the income of farmers who raised food grains as well. In response, Congress put pressure on USDA to do more to help producers. For example, Congress urged the Secretary to issue federal farm program payments sooner, in the form "advance payments." Between the Administration, on the

50. Under the provisions of the Agricultural and Food Act of 1981 (P.L. 97-98) the Secretary did not have much discretion in setting the loan rate for price-supported crops. Particularly in the case of wheat and feed grains, the loan rate represented the lowest sustainable price, because if the national average price for wheat and feed grains fell below the loan rate, producers would likely "forfeit" their grain to the government instead of selling it in the market until the market price exceeded the loan rate. This fact gave U.S. competitors an advantage in the world market, because they would know, in advance, what the lowest price for U.S. grains would be. As a result, they merely priced their commodities below the U.S. loan rate to virtually lock out the United States from the world market.

The Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985), and the Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990), gave the Secretary the authority to reduce the loan rate in response to world competition. 7 U.S.C. § 1441-1(a) (Supp. II 1990). These reductions are called "Findley" reductions.

51. Pub. L. No. 99-198, 99 Stat. 1354 (1985).

52. U.S.D.A., *Agricultural Statistics*, 436 (1990).

53. *Id.* at 391.

one hand, and the Congress, on the other, USDA was being squeezed.

The pressure from these competing forces led directly to an "anti-farmer" attitude that began to take shape at ASCS. Since ASCS, politically, could blame neither Congress nor the Administration, the producers became the target by default. ASCS officials reasoned that if producers were not so dependent upon federal farm program payments, USDA would be able to find a way out of its predicament. Under this pressure, producers slowly but surely went from being viewed as constituents of USDA to parasites of the federal farm programs.

This observation should not be construed as an indictment of USDA officials themselves. Indeed, these officials were placed in the unenviable position of being required to implement high profile, costly policies and programs enacted by Congress but no longer supported by the Administration.

Nonetheless, faced with pressure from the Office of Management and Budget and others in the Administration, ASCS began to see the payment limitation rules as one means of gaining control over the rising outlays for the federal farm programs without the need for legislative changes in the underlying federal farm programs. In order to make this work, however, the agency's internal appeals system had to cooperate by generating restrictive payment limitation determinations. Consideration of the individual merits of producer appeals had to be subordinated to support the overall restrictive payment limitation policy. As a result, the administrative appeals system, especially at the Washington, D.C., level, used the informal nature of its procedures to prevent farmers from obtaining truly fair reviews of their appeals.

1. *How the Change Affected Enforcement of the Payment Limitation Rules*

In order to appreciate how the development of the "anti-farmer" attitude affected the implementation of the payment limitation rules by ASCS, it is important to understand the background of the payment limitation provisions of the federal farm programs.

Payment limitation requirements first became a part of federal farm programs in the 1971 crop year, with the enactment of the Agricultural Act of 1970.[54] The purpose behind payment limitation was simple: Congress wanted to target federal farm pro-

54. Pub. L. No. 91-524, 84 Stat. 1358 (1970).

gram benefits to "family farms." The legislation itself gave the Secretary broad discretion to develop payment limitation regulations: "The Secretary shall issue regulations defining the term 'persons' and prescribing such rules as he determines necessary to assure a fair and reasonable application of such limitation . . . ."[55] As noted earlier, under this legislation federal farm program benefits were limited to $55,000 per "person." After the enactment of this provision, the payment limitation legislation and regulations were amended several times.

By 1978, the legislation and the ASCS regulations implementing it were settled. Between 1978 and 1985, there were no major problems with the payment limitation regulations; in fact, the regulations were not substantially amended during that period.

By the 1986 crop year things started to change. With the enactment of the Food Security Act of 1985,[56] it appeared that the Administration was not going to get control over the federal farm program expenditures through legislation, so payment limitation was converted from a means of targeting federal farm programs benefits to a means of reducing federal farm program expenditures. This transformation was accomplished by tightening the payment limitation rules.

As a result, for the first time since 1978 ASCS instituted major changes in the administration of the payment limitation rules. The initial changes were called "interpretations" of the rules and were issued as simple ASCS Notices to state and county offices throughout the country.[57] The first significant substantive interpretation was ASCS Notice CM-75.[58] This Notice contained the following new payment limitation rules:

- The Capitalization Rule: If a new general partnership is formed and the partners contributed only capital, these capital contributions must total 30 to 35 percent of the operating capital.
- The Financing Rules: In order for an individual or

55. 7 U.S.C. § 1307 (1988).
56. *See supra* note 51.
57. An ASCS Notice is a document sent to State and County ASC Committees by the Deputy Administrator for State and County Operations (DASCO), which provides specific instructions regarding the administration of ASCS programs. ASCS Notices are designed to augment the ASCS Handbook, which is a multi-volume document that provides general instructions for State and County ASC Committees regarding the administration of ASCS programs. ASCS Notices and the ASCS Handbook, while available to the public pursuant to the Freedom of Information Act, are generally not distributed to the public. *See* 5 U.S.C. § 552 (1988). However, State and County ASC Committees follow instructions contained in these materials without exception, unless otherwise specifically instructed by DASCO.
58. ASCS Notice CM-75 (1987).

entity to be a separate "person" for payment limitation purposes, the contributions of such individual or entity must not be "financed" in any way by any other individual or entity that has an interest in the farming operation. Financing means raising, providing, securing or guaranteeing funds or capital.

— The Twenty Percent Rule: For the purposes of meeting the "substantive change in farm operation" rules, a substantial increase or decrease in land means a change of approximately twenty percent.[59]

ASCS did not stop with this Notice; it issued several others which contained additional requirements. For example, on March 13, 1987, ASCS issued Notice CM-93, which contained a rule that the timing of land rental payments could be a basis to "combine" a landlord and a tenant into one "person" for payment limitation purposes.[60] These "interpretations" found no support in either the payment limitation regulations or the underlying statute, but they were enforced by ASCS at all levels as if they had the force and effect of law.

The result of these "interpretations" was near chaos. The fate of producers, for all intents and purposes, was in the hands of the local County ASC Committees, which determined which farming operations were approved (and thus could survive) and which ones were denied and doomed to fail. Since these determinations in most cases came well after the start of the crop year, if a farming operation was denied, there was nothing the producer could do, other than initiate a time-consuming, often costly, and almost always unsuccessful administrative appeal. Most producers simply lost their benefits. It quickly became apparent to ASCS that by tightening the payment limitation rules, at least part of the growth in the federal farm program expenditures could be reduced, especially if these "interpretations" of the rules were vague and kept from wide public distribution.

The chaos and confusion in the manner ASCS administered the payment limitation rules became the subject of an investigation by the General Accounting Office (GAO). In testimony before the Subcommittee on Cotton, Rice, and Sugar of the House Committee on Agriculture, an official from GAO stated that the GAO determined that the State and County ASC Committees were

59. *Id.*
60. ASCS Notice CM-93 (1987).

inconsistently interpreting or applying the payment limitation rules.[61] GAO believed that this confusion was primarily the result of a lack of clear direction from the ASCS Headquarters Office in Washington, D.C., regarding the proper interpretation and application of the payment limitation rules.[62]

In 1987, Congress, in an attempt to get some control over the payment limitation situation, enacted a sweeping revision of the payment limitation rules as a part of the Omnibus Budget Reconciliation Act of 1987.[63] This legislation, which became effective for the 1989 crop year, changed the focus of the payment limitation rules from the structure of the producer's farming operation, which had led to the creation of the bizarre "financing rules," to the types of inputs, or "contributions," being made to the farming operation by each producer. Thus, in order to be eligible for the limited federal farm program benefits, a producer must be "actively engaged in farming" by making a "significant contribution" of "active personal labor," "active personal management," or a combination thereof, as well as a "significant contribution" of land, capital, equipment or a combination thereof.[64]

Starting with the 1988 crop year, there was a dramatic improvement in prices for most commodities, in part because of a drought in parts of the country. The price of food grains and feed grains increased by nearly thirty-five percent over their 1987 levels.[65] This led to a decrease of over $3.0 billion in payments under the federal farm programs in 1988 compared to 1987.[66] While this general trend of lower expenditures continued through the 1991 crop year, it has not changed ASCS's attitude toward producers. The payment limitation regulations are still seen as a means of controlling federal farm program expenditures.

Because the 1987 legislation changed the focus of the payment limitation rules beginning with the 1989 crop year, producers were required to change their farming operations in order to comply. ASCS saw the approval of these changes as a new opportunity to increase its control over the expansion of federal farm programs by imposing additional burdens on producers.

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61. Written Testimony of Brian P. Crowley, Senior Associate Director of the GAO, Before the House of Representatives Subcommittee on Cotton, Rice, and Sugar of the Committee on Agriculture, April 22, 1987.

62. *Id.*

63. *See supra* note 46.

64. *See* 7 C.F.R. § 1497.6 (1991).

65. U.S.D.A., *Agricultural Statistics*, 386 (1990).

66. *Id.*

As was the case in 1986, these tighter rules were issued as ASCS Notices rather than as agency regulations. The first of these significant Notices was ASCS Notice PL-8. This Notice contained new rules affecting producers who did not meet the requirements of the "substantive change" rules:

> If there is an increase in the number of "persons" in a farming operation, resulting in the substantive change provisions applying, and a substantive change is not met:
> 1. Continue to recognize the 'persons' for payment limitation purposes that were recognized in the previous year.
> 2. Consider the 'new person' that did not meet the substantive change ineligible for payment.[67]

Under this provision, where a farming operation adds a "new person" which ASCS refuses to recognize, the farming operation, in most cases, will actually lose benefits it would have received if it had not added the new person. Assume, for example, a farming operation earns $120,000 in deficiency payments in each of two crop years. In year one, the farming operation is conducted by a two-person partnership, where the two partners are separate "persons" who are "actively engaged in farming." The partnership thus receives $100,000 in deficiency payments (the limit for two "persons"). In year two, the partnership adds a third partner who meets the requirements of being "actively engaged in farming" but who is not recognized under the substantive change rules as a separate "person." Under the "interpretation" issued in Notice PL-8, this partnership will receive only $80,000 in benefits in year two, because ASCS will "attribute" $40,000 in benefits to the "new person" and deem that the partnership is ineligible to receive these benefits because, under the substantive change rules, ASCS does not recognize the new third partner. However, nothing in the substantive change regulations authorizes ASCS to reduce an entity's eligibility to receive benefits simply because it adds a new member who is not recognized as a separate "person."

Throughout the history of the payment limitation rules, the "substantive change" rule has only restricted a farming entity's eligibility to "additional" benefits. In fact, it is clear from the language in Notice PL-8 that this "interpretation" was not even consistent with the previous instructions ASCS initially issued to

67. ASCS Notice PL-8, ¶ 7A (1989).

the State and County Committees.[68] Notice PL-8 also contains a new rule regarding the application of the "substantive change" rule to "new" versus "old" producers. However, the regulations do not contain any support for this distinction.[69]

As Notice PL-8 graphically illustrates, ASCS still refuses to incorporate into its published regulations important elements of its payment limitation rules. Since the issuance of Notice PL-8 in February 1989, ASCS has issued at least forty-five more interpreted Notices, twelve amendments to the payment limitation provisions of the ASCS Handbook 1-PL, and one complete revision of ASCS Handbook 1-PL, which has already been amended five times since it was issued in the fall of 1991.[70] It appears that ASCS intends to keep producers and the public in the dark as much as possible regarding the manner in which the payment limitation rules are actually applied. Producers, as well as State and County Committees, are in a constant state of confusion because of this never-ending barrage of complex Notices and Handbook provisions, and this confusion has led to inconsistent interpretations of the payment limitation rules by County and State ASCS offices across the country.

In addition to the "substantive change" rules, ASCS has found a new weapon to use against producers in an effort to discourage them from taking full advantage of the federal farm programs. Recently, ASCS has begun to rule that if a producer reorganizes his farming operation in a manner which results in an increase in the number of payment limitation "persons," that producer has adopted a scheme or device designed to evade, or that has the effect of evading, the payment limitation rules.[71] With such a finding, the producer is *ineligible* for most federal farm program benefits for *two* crop years.

Until recently, the "scheme or device" provisions of the payment limitation regulations had been interpreted to apply only in situations in which a producer had misrepresented his farming operation to ASCS or had committed some form of fraud to obtain additional federal farm program benefits outside the payment limitation rules.[72] Increasingly, ASCS is focusing on the phrase in its

68. ASCS Notice PL-8, ¶ 8 (1989).
69. 7 C.F.R. Pt. 1497 (1991).
70. *See* ASCS Notices PL-9 through PL-53, ASCS Handbook 1-PL amendments 7 through 18, and ASCS Handbook 1-PL Rev. 1 (with its 5 amendments).
71. *See* 56 Fed. Reg. 15,973 (1991) (to be codified at 7 C.F.R. § 1497.6(a)).
72. Even the examples of what constitutes a "scheme or device" in the current regulations support this interpretation:

scheme or device regulations which makes it a scheme or device to take any action "which has the effect of evading" the payment limitation rules. As a result, ASCS is now making "scheme or device" determinations when a change is made to a farming operation by a producer which simply increases the number of "persons" eligible for payment. ASCS takes the position that such a change, in and of itself, "has the effect of evading" the payment limitation regulations, *despite the fact* that such an increase in the number of "persons" may be authorized by, and be perfectly legitimate under, some other provision of the payment limitation regulations, for example, the "three entity rule."[73]

In fact, there is nothing in the payment limitation statute which authorizes ASCS to look at the "effect" of a change in a farming operation when making a scheme or device finding. To the contrary, the statute, by its terms, looks only to the producer's intent at the time the action at issue is taken.[74] ASCS's interpretation is not only at odds with the "scheme or device" section of the statute, but with other provisions of the payment limitation statute as well. It is, in reality, simply an attempt by the agency to rewrite the law to conform to the way the current Administration would like it to read.

2. *How the Change Affected ASCS National Level Appeals*

ASCS has instituted a very informal procedure to hear appeals regarding agency decisions relating to the federal farm programs.[75] Under this administrative appeal system, a producer is required to present his or her appeal first to the County ASC Committee and then, if necessary, to the State ASC Committee.[76] Only if the producer is still dissatisfied is it possible, in most cases, to

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> Such acts shall include, but are not limited to:
> (1) Concealing information which affects the application of this part;
> (2) Submitting false or erroneous information; or
> (3) Creating fictitious entities for the purpose of concealing the interest of a person in a farming operation.

56 Fed. Reg. 15,973 (1991) (to be codified at 7 C.F.R. § 1497.6(a)).

73. 56 Fed. Reg. 15,977 (1991) (to be codified at 7 C.F.R. § 1497.301).

74. Section 1001B of the Food Security Act of 1985, as amended, provides as follows:

> If the Secretary of Agriculture determines that any person has adopted a scheme or device *to evade, or that has the purpose of evading,* section 1001, 1001A, or 1001C, such person shall be ineligible to receive farm program payments (as described in paragraphs (1) and (2) of section 1001 as being subject to limitation) applicable to the crop year for which such scheme or device was adopted and the succeeding crop year.

7 U.S.C. § 1308-02 (1988) (emphasis added).

75. 56 Fed. Reg. 59,207 (1991) (to be codified at 7 C.F.R. Pt. 780).

76. 56 Fed. Reg. 59,209 (1991) (to be codified at 7 C.F.R. § 780.7).

appeal the matter to the national level.[77] As indicated earlier, the County and State Committees are required to follow the procedures established in the ASCS Handbook and applicable Notices.[78] Prior to November 25, 1990, the only person who had the authority to examine fully the merits of a producer's appeal was DASCO.[79] For that reason, it is appropriate to focus on the manner that the former ASCS Appeals Staff in Washington handled producer appeals for DASCO.

ASCS had done a skillful job of giving its administrative appeals before DASCO the appearance of objectivity. Organizationally, the ASCS Appeals Staff was not under the direct supervision of DASCO, but rather was supervised by the Deputy Administrator for Program Planning and Development. Procedurally, ASCS appeared to offer the farmer/appellant an informal setting in which to discuss a problem. The farmer was given the opportunity to present any documents or testimony to support his or her position.

While the farmer was invited to present information and testimony, usually ASCS refused to answer any questions which could reveal its true concerns. Nor did farmers or their counsel have the right to request that certain County or State Committee officials be present to answer questions regarding their actions which were relevant to the matter under appeal.

DASCO also reserved the right to review administrative appeals *de novo*. As a result, it was quite common for a State Committee to base a determination on one issue, such as "substantive change," while the final DASCO determination was based on an entirely new issue, such as a failure of the members of a partnership or other joint operation to meet the requirements of the "commensurate share" rule. Thus, the farmer/appellant not only had to take care to present evidence showing why the County or State Committee's determination was incorrect, but also was required to anticipate other possible issues and present evidence to preempt DASCO from raising such issues in its determination.

Over the past several years, it became clear that the ASCS Appeals Staff had been charged with the task of finding ways to support ASCS's policy of restrictively interpreting the federal farm programs to reduce the amount of benefits paid to producers, regardless of the merits of the particular matter under appeal.

77. 56 Fed. Reg. 59,209 (1991) (to be codified at 7 C.F.R. § 780.8).
78. ASCS Handbook 3-CP.
79. 7 C.F.R. Pts. 780, 790 and 791 (1991).

According to ASCS Administrator Keith Bjerke, only about thirteen percent of all determinations appealed to DASCO were in any way modified in the producer's favor by DASCO. If one assumes that only the most difficult issues facing the County Committees are appealed to the State Committee and that the most difficult of those issues were in turn appealed to DASCO, it is difficult to imagine that in only thirteen percent of these cases was the State Committee incorrect. Furthermore, this figure did not reflect the number of cases in which the State Committee ruled against a producer but recommended that DASCO grant the producer relief and DASCO refused to grant relief. Only time will tell whether this almost startling record of anti-farmer animus in the ASCS appeals process will change with the new National Appeals Division, but this author would not bet the ranch (or the family farm) on it.

B. PROPOSALS

What follows are proposals that could encourage ASCS to take a more supportive attitude toward farmers, at least in the areas of payment limitation and ASCS administrative appeals.

1. *Payment Limitation Proposals*

Over the past several years, the federal courts have been sending ASCS strong messages regarding the manner in which it has administered its payment limitation regulations.[80] These courts have made it clear that ASCS is not simply following the statute and its own published rules.[81] Unfortunately, these cases have not caused ASCS to change the manner in which it administers the payment limitation rules. ASCS still uses the payment limitations as a means of budget control by relying on its "internal" regulations—ASCS Notices and the ASCS Handbook.

Since ASCS apparently is not willing to listen to the courts, the only viable alternative is for Congress to amend the payment limitation statute to limit the Secretary's discretion. This legislative approach should be in two steps.

First, Congress should enact an amendment to section 1001 of the Food Security Act of 1985 providing as follows:

> Any field instructions relating to, or other supplemental

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80. *See, e.g.*, Golightly v. Yeutter, 1991 U.S. Dist. LEXIS 12206, (D. Ariz. 1991); Stegall v. United States, 19 Cl. Ct. 765 (1990); and Justice v. Lyng, 716 F. Supp. 1570 (D. Ariz. 1989).

81. *See* Justice v. Lyng, 716 F. Supp. 1570 (D. Ariz. 1989).

> clarifications of, the regulations issued under sections 1001 through 1001C of the Food Security Act of 1985 shall not be used in resolving issues involved in the application of the payment limitations or restrictions under such sections or regulations to individuals, other entities, or farming operations until such instructions or clarifications have been published in the *Federal Register* and newsletters published by local county committees (as defined by 16 U.S.C. § 590h) sent to producers for notice and comment.[82]

Such an amendment would at least ensure that producers would receive notice of these "interpretations" and an opportunity to comment on them before they are implemented. This amendment could be enacted quickly and would not require any reexamination of the payment limitation rules as a whole.

Second, Congress should eliminate the Secretary's discretion to alter unilaterally the payment limitation rules. Congress should enact specific legislation to codify all payment limitation rules and thereby complete the job it started in the Omnibus Budget Reconciliation Act of 1987.[83]

Based on the manner in which USDA has administered the payment limitation rules since 1986, this author believes that the agency is incapable of developing and enforcing consistent payment limitation rules that are understandable and fair to producers. The only way to address this situation is to remove from the agency the discretion for developing payment limitation rules.

It is critical to remember that the payments being limited are an important part of an overall agricultural policy. These payments are inducements to producers to control production. If payment limitation becomes too complex or too restrictive, producers simply will not participate in the USDA Production Control Programs, and USDA will have no means of accomplishing the Congressional mandate to control the supply and price of agricultural

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82. This provision is similar to § 1305(a)(2) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-18 (1987), which provided the following:

> Any field instructions relating to, or other supplemental clarifications of, the regulations issued under sections 1001 through 1001C of the Food Security Act of 1985 shall not be used in resolving issues involved in the application of the payment limitations or restrictions under such sections or regulations to individuals, other entities, or farming operations until copies of the publication are made available to the public.

That provision, however, was not carried forward in the 1990 Farm Bill and, thus, is not presently in effect.

83. *See supra* note 46.

commodities. Legislation to codify the payment limitation rules must, therefore, strike a balance between "targeting benefits" and keeping an incentive for producers of all sizes to remain in the programs.

Appended to this article is a copy of the current payment limitation statute and proposed revisions that would reduce the discretion of ASCS to promulgate payment limitation rules, especially in the area of defining a "person." Under these revisions, ASCS would be prohibited from promulgating any person rule not contained in the statute.

The proposed amendment would also require the abolition of the "substantive change" rule. Since the "actively engaged rules" require that a "person," whether new or not, make significant "left hand" and "right hand" contributions to the farming operation, any "new" person that meets the requirement of being "actively engaged in farming" must, *a fortiori*, be the result of a substantive and *bona fide* change. Furthermore, the requirements that have developed in connection with the substantive change rule now have more to do with tangential issues, such as whether the "new" person produced a program crop in the prior year or whether the "new" entity bought equipment or merely rented it, than the central issue of whether the change in the farming operation that led to the addition of the "new" person was a legitimate and significant one.

If legislation cannot be crafted to strike the proper balance of focusing benefits to smaller producers, while still giving larger producers an incentive to stay in the federal farm programs, Congress should strongly consider repealing the payment limitation entirely. Concerns about the expenditure levels of the federal farm programs should be addressed head-on in the programs themselves, not by way of counter-productive interpretations grafted onto those programs. To the extent that smaller farming entities need special assistance to survive, Congress should authorize special programs to assist such farmers rather than distorting the programs which form the foundation of U.S. agricultural policy. If not checked, payment limitation as it is currently administered by USDA could lead to the destruction of the supply and price management programs upon which the American farmer has so long relied and, ultimately, the destruction of the country's agricultural infrastructure.

2. *ASCS Administrative Appeal Proposals*

There have been a number of attempts to encourage ASCS to better protect appellants' rights during administrative appeals. As previously mentioned, Congress recently enacted the legislation creating the National Appeals Division.[84] The implementation of this legislation was delayed by nearly a year because of an alleged appropriations impediment. This was a poor excuse because the 1991 USDA Appropriations Act[85] gave ASCS clear appropriations authority to implement all programs authorized by the Agricultural Act of 1949, which included the National Appeals Division.[86] This is just the most recent example of ASCS's resistance to implement procedures that will give farmer-appellants even limited additional procedural protection during administrative appeals.

Given the strong resistance by ASCS to giving appellants a fair administrative appeals process, this author is of the view that administrative appeals regarding the denial of federal farm program benefits should be taken out of the hands of the ASCS entirely and turned over to USDA administrative law judges.

The administrative law judges within USDA are independent of ASCS and would be in a far better position to fairly examine a farmer's appeal. Furthermore, administrative law judges have the necessary powers to be certain all relevant information is included in the administrative record.

Proceedings before administrative law judges are more formal and would thus likely be more expensive for appellants than DASCO appeals. However, since ASCS appeals at the national level rarely offer the appellant a fair hearing, administrative adjudications before an administrative law judge (ALJ) may be less expensive in the long run, particularly if the need to file suit in Federal court can be reduced or avoided. In addition, proceedings before an ALJ would probably be faster than the current appeal system, especially if the legislation also authorized the creation of eight to ten ALJ positions dedicated to hearing producer appeals.

The proposals suggested herein will not change ASCS's attitude toward producers overnight. However, by taking away the agency's discretion to issue continuous *ad hoc* interpretations of

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84. *See supra* note 27.

85. Rural Development, Agriculture and Related Agencies Appropriation Act of 1991, Pub. L. No. 101-506, 104 Stat. 1315 (1990).

86. *Id.* at 1326.

the payment limitation rules,[87] with no public comment or opposition, and by ensuring that "judges" at the last stage of the administrative appeal process are truly independent from the people who enforce and interpret these rules, the federal farm programs enacted by Congress will have a far better chance of achieving their objective of ensuring an adequate supply of foodstuffs to the American public at a fair price and with a fair return to the American farmer.

III. CONCLUSION

Given the fiery debates preceding enactment of the 1990 Farm Bill, as well as the possibility of changes in the world trade picture, the future of U.S. Agricultural policy is not certain. What is clear is that if the current fiscal politics regarding the implementation of the payment limitation provisions continue, it is possible that price and supply control systems that have stabilized U.S. agricultural markets for the last forty years could be destroyed. Measures must be taken soon to give ASCS the ability to once again work with farmers and not against them by freeing ASCS from the squeeze between Congress and the Administration's budget concerns.

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87. This is true even under the new National Appeals Division scheme, where the Administrator of ASCS, or his designee, with input from DASCO, can reverse or modify all decisions of the Director of the National Appeals Division. *See supra* note 28 and accompanying text.

APPENDIX I

EXCERPTS FROM THE PAYMENT LIMITATION STATUTE CONTAINED IN THE FOOD SECURITY ACT OF 1985

Compilation of Legislation Governing Domestic Agriculture Programs, prepared jointly by the Office of General Counsel, U.S.D.A. and the Congressional Legislative Council, Mar 3, 1992.

SEC. 1001. [1001-1] [1308] Notwithstanding any other provision of law:

(1) [1001-2] (A) [1001-3] Subject to sections 1001A through 1001C for each of the 1987 through 1995 [1001-4] crops, the total amount of deficiency payments (excluding any deficiency payments described in paragraph (2)(B)(iv) of this section) and land diversion payments that a person shall be entitled to receive under one or more of the annual programs established under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.) for wheat, feed grains, upland cotton, extra long staple cotton, and rice may not exceed $50,000.

(B) [1001-5] Subject to sections 1001A through 1001C for each of the 1991 through 1995 crops, the total amount of payments specified in clauses (iii), (iv), and (v) of paragraph (2)(B) that a person shall be entitled to receive under one or more of the annual programs established under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.) for wheat, feed grains, upland cotton, rice, and oilseeds (as defined in section 205(a) of the Agricultural Act of 1949) may not exceed $75,000.

(2) [1001-6](A) Subject to sections 1001A through 1001C for each of the 1991 through 1995 crops, [1001-7] the total amount of payments set forth in subparagraph (B) that a person shall be entitled to receive under one or more of the annual programs established under the Agricultural Act of 1949 for wheat, feed grains, upland cotton, extra long staple cotton, rice, and [1001-8] other commodities, when combined with payments for such crop described in paragraph (1), shall not exceed $250,000.

(B) As used in subparagraph (A), the term "payments" means—

(i) any part of any payment that is determined by the Secretary of Agriculture to represent compensation for resource adjustment (excluding land diversion payments) or public access for recreation;

(ii) any disaster payment under one or more of the annual programs for a commodity established under the Agricultural Act of 1949;

[1001-1] P.L. 99–198, 99 Stat. 1444, Dec. 23, 1985, sec. 1001 originally had six paras. and was effective for the 1986 through 1990 crops. For extension, see footnote 1001–4 and subsequent footnotes

[1001-2] Paras. (1), (2), and (3) were substituted for the former paras. (1), (2), and (3) by sec. 108 of the Joint Res. of Oct. 18, 1986, P.L. 99–500, 100 Stat. 1783–346, and sec. 108 of the Joint Res. of Oct. 30, 1986, P.L. 591, 100 Stat. 3341–346, effective with respect to the 1987 through 1990 crops. The amendments provided that they shall not apply with respect to any payment or loan received under any agreement or contract made before the enactment of the amendments.

SEC. 1301 of the Omnibus Budget Reconciliation Act of 1987, P.L. 100–203, 101 Stat. 1330–12, Dec. 22, 1987, deleted "For each" and substituted "Subject to sections 1001A through 1001C, for each" in para. (1) and para. (2)(A) effective beginning with the 1989 crops.

[1001-3] Sec. 1111(a)(1) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3497, Nov. 28, 1990, amended para. (1) by inserting "(A)" after the para. designation and by adding at the end subpar. (B).

[1001-4] Sec. 1111(a)(1)(B) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3497, Nov. 28, 1990, amended para. (1) by striking "1990" and inserting "1995".

[1001-5] See footnote 1001–3.

[1001-6] See footnote 1001–2.

[1001-7] Sec. 1111(a)(2)(A) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3497, Nov. 28, 1990, amended para. (2)(A) by striking "1987 through 1990 crops" and inserting "1991 through 1995 crops".

[1001-8] Sec. 1111(a)(2)(B) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3497, Nov. 28, 1990, amended para. (2)(A) by striking "honey, and (with respect to clause (iii)(II) of subparagraph (B))" and inserting "and".

(iii) [1001-9] any gain realized by a producer from repaying a loan for a crop of any commodity (other than honey) at a lower level than the original loan level established under the Agricultural Act of 1949;

(iv) any deficiency payment received for a crop of wheat or feed grains under section 107B(c)(1) or 105B(c)(1), [1001-10] respectively, of the Agricultural Act of 1949 as the result of a reduction of the loan level for such crop under section 107B(a)(3) or 105B(a)(3) [1001-11] of such Act;

(v) [1001-12] any loan deficiency payment received for a crop of wheat, feed grains, upland cotton, rice, or oilseeds under section 107B(b), 105B(b), 103B(b), 101B(b), or 205(e), respectively, of the Agricultural Act of 1949; and

(vi) any inventory reduction payment received for a crop of wheat, feed grains, upland cotton, or rice under section 107B(f), 105B(f), 103B(f), or 101B(f), [1001-13] respectively, of the Agricultural Act of 1949.

Such term shall not include loans or purchases, except as specifically provided for in this paragraph.

(c) [1001-14] No certificate redeemable for stocks of a commodity held by the Commodity Credit Corporation may be redeemed for honey held by the Corporation.

(3) [1001-15] Notwithstanding the foregoing provisions of this section, if the Secretary of Agriculture determines that any of the limitations provided for in paragraph (2) will result in a substantial increase in the number or dollar amount of loan forfeitures for a crop of a commodity, will substantially reduce the acreage taken out of production under an acreage reduction program for a crop of a commodity, or will cause the market prices for a crop of a commodity to fall substantially below the effective loan rate for the crop, the Secretary shall adjust upward such limitation, under such terms and conditions as the Secretary determines appropriate, as necessary to eliminate such adverse effect on the program involved.

(4) If the Secretary determines that the total amount of payments that will be earned by any person under the program in effect for any crop will be reduced under this section, any acreage requirement established under a set-aside or acreage limitation program for the farm or farms on which such person will be sharing in payments earned under such program shall be adjusted to such extent and in such manner as the Secretary determines will be fair and reasonable in relation to the amount of the payment reduction.

[1001-9] Clause (iii) was amended in its entirety by sec. 1111(a)(3)(A) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3498, Nov. 28, 1990. For the previous text, see p. 33–1 of Volume I—Domestic Agricultural Programs, as of P.L. 101–240.

[1001-10] Sec. 1111(a)(3)(B)(i) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3498, Nov. 28, 1990, amended clause (iv) by striking "section 107D(c)(1) or 105C(c)(1)" and inserting "107B(c)(1) or 105B(c)(1)".

[1001-11] Sec. 1111(a)(3)(B)(ii) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3498, Nov. 28, 1990, amended clause (iv) by striking "section 107D(a)(4) or 105C(a)(3)" and inserting "section 107B(a)(3) or 105B(a)(3)".

[1001-12] Clause (v) was amended in its entirety by sec. 1111(a)(3)(C) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, Nov. 28, 1990, 104 Stat. 3498.

[1001-13] Sec. 1111(a)(3)(D) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3498, Nov. 28, 1990, amended clause (vi) by striking "section 107D(g), 105C(g), 103A(g), or 101A(g)" and inserting "section 107B(f), 105B(f), 103B(f), or 101B(f)".

[1001-14] New subpara. (C) substituted for former subpara. (C) by sec. 108 of the Joint Res. of Oct. 18, 1986, P.L. 99–500, 100 Stat. 1783–347, and sec. 108 of the Joint Res. of Oct. 30, 1986, P.L. 99–591, 100 Stat. 3341–347, effective with respect to the 1987 through 1990 crops. Subpara. (C) was later amended by P.L. 100–71, 101 Stat. 428, July 11, 1987, by inserting clause "(i)" designation after "(C)" and adding at the end "(ii) No certificate redeemable for stocks of a commodity held by the Commodity Credit Corporation may be redeemed for honey held by the Corporation.". Subpara. (C) was then amended by sec. 1301(a)(2) and sec. 1307 of the Omnibus Budget Reconciliation Act of 1987, P.L. 100–203, 101 Stat. 1330–12, 1330–19, Dec. 22, 1987. Sec. 1301(a)(2) amended sec. (C)(i) effective with the 1989 crops. Sec. 1307 struck out clause (C)(i) and deleted the clause "(ii)" designation from clause (ii).

[1001-15] See footnote 1001-2.

(5)(A) The Secretary shall issue regulations—

(i) defining the term "person"; and

(ii) prescribing such rules as the Secretary determines necessary to assure a fair and reasonable application of the limitation established under this section.

Such regulations shall incorporate the provisions in subparagraphs (B) through (E) of this paragraph, paragraphs (6) and (7), and sections 1001A through 1001C.[1001-16]

(B)(i)[1001-17] For the purposes of the regulations issued under subparagraph (A), subject to clause (ii), the term "person" means—

(I) an individual, including any individual participating in a farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or a participant in a similar entity (as determined by the Secretary);

(II) a corporation, joint stock company, association, limited partnership, charitable organization, or other similar entity (as determined by the Secretary), including any such entity or organization participating in the farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar entity (as determined by the Secretary); and

(III) a State, political subdivision, or agency thereof.

(ii)(I) Such regulations shall provide that the term "person" does not include any cooperative association of producers that markets commodities for producers with respect to the commodities so marketed for producers.

(II) In defining the term "person" as it will apply to irrevocable trusts and estates, the Secretary shall ensure that fair and equitable treatment is given to trusts and estates and the beneficiaries thereof.

(III)[1001-18] Notwithstanding any other provision of law, to be considered a separate person under this section, an irrevocable trust (other than a trust established prior to January 1, 1987) must not allow for modification or termination of the trust by the grantor, allow for the grantor to have any future, contingent, or remainder interest in the corpus of the trust, or provide for the transfer of the corpus of the trust to the remainder beneficiary in less than 20 years from the date the trust is established except in cases where the transfer is contingent on the remainder beneficiary achieving at least the age of majority or is contingent on the death of the grantor or income beneficiary.

(iii)[1001-19] The regulations shall provide that, with respect to any married couple, the husband and wife shall be considered to be one person, except that, for the purpose of the application of the limitations established under this section—

(I) in the case of any married couple consisting of spouses who, prior to their marriage, were separately engaged in unrelated farming oper-

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[1001-16] Sec. 108(a)(2) of the Joint Res. of Oct. 18, 1986, P.L. 99-500, 100 Stat. 1783-347, and sec. 108(a)(2) of the Joint Res. of Oct. 30, 1986, P.L. 99-591, 100 Stat. 3341-347, added at the end of para. (5)(A), effective for the 1987 through 1990 crops, the following sentence:

"Such regulations shall provide that the term 'person' does not include any cooperative association of producers that markets commodities for producers with respect to the commodities so marketed for producers."

The sentence was deleted and a new sentence added by sec. 1303(a) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330-16, Dec. 22, 1987, effective beginning with 1989 crops.

[1001-17] Sec. 1303(a) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330-16, Dec. 22, 1987, added a new subpara. (B); redesignated the original subpara. (B) as subpara. (C); and added subparas. (D) and (E), effective beginning with the 1989 crops.

[1001-18] Subclause (III) was added by sec. 1111(e) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3499, Nov. 28, 1990.

[1001-19] Clause (iii) was amended in its entirety by sec. 1111(c) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3498, Nov. 28, 1990. For the previous text, see p. 33-3 of Volume 1—Domestic Agricultural Programs as of P.L. 101-240.

ations, each spouse shall be treated as a separate person with respect to the farming operation brought into the marriage by the spouse so long as the operation remains as a separate farming operation; and

(II) at the option of the Secretary, in the case of any married couple consisting of spouses who do not hold, directly or indirectly, a substantial beneficial interest in more than one entity (including the spouses themselves) engaged in farm operations that also receives farm program payments (as described in paragraphs (1) and (2)) as separate persons, the spouses may be considered as separate persons if each spouse meets *the other requirements established under this section and section 1001A to be considered to be a separate person.*

(C) [1001-20] *The regulations issued by the Secretary on December 18, 1970, under section 101 of the Agricultural Act of 1970 (7 U.S.C. 1307) shall be* used to establish the percentage ownership of a corporation by the stockholders of such corporation for the purpose of determining whether such corporation and stockholders are separate persons under this section.

(D) [1001-21] Any person that conducts a farming operation to produce a crop subject to limitations under this section as a tenant that rents the land for cash (or a crop share guaranteed as to the amount of the commodity to be paid in rent) and that makes a significant contribution of active personal management but not of personal labor shall be ineligible to receive any payment specified in paragraph (1) or (2) or subtitle D of title XII with respect to such land unless the tenant makes a significant contribution of equipment used in the farming operation.

(E) [1001-22] The Secretary may not approve (for purposes of the application of the limitations under this section) any change in a farming operation that otherwise will increase the number of persons to which the limitations under this section are applied unless the Secretary determines that the change is bona fide and substantive. In the implementation of the preceding sentence, the addition of a family member to a farming operation under the criteria set out in section 1001A(b)(1)(B) shall be considered a bona fide and substantive change in the farming operation.

(6) [1001-23] The provisions of this section that limit payments to any person shall not be applicable to land owned by a public school district or land owned by a State that is used to maintain a public school.

(7) [1001-24] Regulations of the Secretary shall establish time limits for the various steps involved with notice, hearing, decision, and the appeals procedure in order to ensure expeditious handling and settlement of payment limitation disputes. Notwithstanding any other provision of law, actions taken by an individual or other entity in good faith on action or advice of an author-

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[1001-20] See footnote 1001-17.

[1001-21] Effective beginning with the 1990 crops, sec. 2 of P.L. 101-217, 103 Stat. 1857 (as amended by sec. 1111(i) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3500, Nov. 28, 1990) amended subpar. (D) to read as provided above. For provisions governing the 1989 crops, see sec. 1 of P.L. 101-217. For the original text of subpar. (D), see footnote 1001-6. Sec. 3 of P.L. 101-217 providing that nothing in [P.L. 101-217] shall be construed in any way to limit the authority of the Secretary of Agriculture to provide equitable relief under any provision of law.

[1001-22] See footnote 1001-17.

[1001-23] A new para. (6) was substituted for the former subpara. (6) by sec. 1003(b) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330-17, Dec. 22, 1987, effective beginning with the 1989 crops. The earlier subpara. (6) had been amended by sec. 109 of the Joint Res. of Oct. 18, 1986, P.L. 99-500, 100 Stat. 1783-347, and by sec. 109 of the Joint Res. of Oct. 30, 1986, P.L. 99-591, 100 Stat. 3341-347, effective for the 1986 through 1990 crops. It read as follows:

"(6) The provisions of this section that limit payments to any person shall not be applicable to lands or animals owned by States, political subdivisions, or agencies thereof, so long as such lands are farmed or animals are husbanded primarily in the direct furtherance of a public function, as determined by the Secretary."

[1001-24] Sec. 1365(c) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330-12, Dec. 22, 1987, added sec. 1001A to the Food Security Act of 1985, effective beginning with the 1989 crops.

ized representative of the Secretary may be accepted as meeting the requirement under this section or section 1001A, to the extent the Secretary deems it desirable in order to provide fair and equitable treatment.

SEC. 1001A. [1308-1] PREVENTION OF CREATION OF ENTITIES TO QUALIFY AS SEPARATE PERSONS; PAYMENTS LIMITED TO ACTIVE FARMERS. [1001A-1]

(a) PREVENTION OF CREATION OF ENTITIES TO QUALIFY AS SEPARATE PERSONS.—For the purposes of preventing the use of multiple legal entities to avoid the effective application of the payment limitations under section 1001:

(1) IN GENERAL.—A person (as defined in section 1001(5)(B)(i)) that receives farm program payments (as described in paragraphs (1) and (2) of this section as being subject to limitation) for a crop year under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.) may not also hold, directly or indirectly, substantial beneficial interests in more than two entities (as defined in section 1001(5)(B)(i)(II)) engaged in farm operations that also receive such payments as separate persons, for the purposes of the application of the limitations under section 1001. A person that does not receive such payments for a crop year may not hold, directly or indirectly, substantial beneficial interests in more than three entities that receive such payments as separate persons, for the purposes of the application of the limitations under section 1001.

(2) MINIMAL BENEFICIAL INTERESTS.—For the purpose of this subsection, a beneficial interest in any entity that is less than 0 to 10 percent [1001A-2] of all beneficial interests in such entity combined shall not be considered a substantial beneficial interest, unless the Secretary determines, on a case-by-case basis, that a smaller percentage should apply to one or more beneficial interests to ensure that the purpose of this subsection is achieved.

(3) NOTIFICATION BY ENTITIES.—To facilitate administration of this subsection, each entity receiving such payments as a separate person shall notify each individual or other entity that acquires or holds a substantial beneficial interest in it of the requirements and limitations under this subsection. Each such entity receiving payments shall provide to the Secretary of Agriculture, at such times and in such manner as prescribed by the Secretary, the name and social security number of each individual, or the name and taxpayer identification number of each entity, that holds or acquires a substantial beneficial interest.

(4) NOTIFICATION OF INTEREST.—

(A) IN GENERAL.—If a person is notified that the person holds substantial beneficial interests in more than the number of entities receiving payments that is permitted under this subsection for the purposes of the application of the limitations under section 1001, the person immediately shall notify the Secretary, designating those entities that should be considered as permitted entities for the person for purposes of applying the limitations. Each remaining entity in which the person holds a substantial beneficial interest shall be subject to reductions in the payments to the entity subject to limitation under section 1001 in accordance with this subparagraph. Each such payment applicable to the entity shall be reduced by an amount that bears the same relation to the full payment that the person's beneficial interest in the entity bears to all beneficial

[1001A-1] Sec. 1001A was added by sec. 1301(a)(3) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330-12, Dec. 22, 1987, effective beginning with the 1989 crops.

[1001A-2] Sec. 1111(f) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3499, Nov. 28, 1990, amended para. (2) by striking "10 percent" and inserting "0 to 10 percent".

interests in the entity combined. Before making such reductions, the Secretary shall notify all individuals or entities affected thereby and permit them to adjust among themselves their interests in the designated entity or entities.

(B) NOTICE NOT PROVIDED.—If the person does not so notify the Secretary, all entities in which the person holds substantial beneficial interests shall be subject to reductions in the per person limitations under section 1001 in the manner described in subparagraph (A). Before making such reductions, the Secretary shall notify all individuals or entities affected thereby and permit them to adjust among themselves their interests in the designated entity or entities.

(b) [1001A-3] PAYMENTS LIMITED TO ACTIVE FARMERS.—

(1) IN GENERAL.—To be separately eligible for farm program payments (as described in paragraphs (1) and (2) of section 1001 as being subject to limitation) under the Agricultural Act of 1949 with respect to a particular farming operation (whether in the person's own right or as a partner in a general partnership, a grantor of a revocable trust, a participant in a joint venture, or a participant in a similar entity (as determined by the Secretary) that is the producer of the crops involved), a person must be an individual or entity described in section 1001(5)(B)(i) and actively engaged in farming with respect to such operation, as provided under paragraphs (2), (3), and (4).

(2) GENERAL CLASSES ACTIVELY ENGAGED IN FARMING. [1001A-4]—For the purposes of paragraph (1), except as otherwise provided in paragraph (3):

(A) INDIVIDUALS.—An individual shall be considered to be actively engaged in farming with respect to a farm operation if—

(i) the individual makes a significant contribution (based on the total value of the farming operation) of—

(I) capital, equipment, or land; and

(II) personal labor or active personal management;

to the farming operation; and

(ii) the individual's share of the profits or losses from the farming operation is commensurate with the individual's contributions to the operation; and

(iii) the individual's contributions are at risk.

(B) CORPORATIONS OR OTHER ENTITIES.—A corporation or other entity described in section 1001(5)(B)(i)(II) shall be considered as actively engaged in farming with respect to a farming operation if—

(i) the entity separately makes a significant contribution (based on the total value of the farming operation) of capital, equipment, or land;

(ii) the stockholders or members collectively make a significant contribution of personal labor or active personal management to the operation; and

(iii) the standards provided in clauses (ii) and (iii) of paragraph (A), as applied to the entity, are met by the entity.

(C) ENTITIES MAKING SIGNIFICANT CONTRIBUTIONS.—If a general partnership, joint venture, or similar entity (as determined by the Secretary) separately makes a significant contribution (based on the total value of the farming operation involved) of capital, equipment, or land, and the standards provided in clauses (ii) and (iii) of

[1001A-3] Subsec. (b) added by sec. 1302 of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330-14, Dec. 22, 1987, effective beginning with the 1989 crops.

[1001A-4] Copy read "CLASSES ACTIVELY ENGAGED IN FARMING."

paragraph (A), as applied to the entity, are met by the entity, the partners or members making a significant contribution of personal labor or active personal management shall be considered to be actively engaged in farming with respect to the farming operation involved.

(D) EQUIPMENT AND PERSONAL LABOR.—In making determinations under this subsection regarding equipment and personal labor, the Secretary shall take into consideration the equipment and personal labor normally and customarily provided by farm operators in the area involved to produce program crops.

(3) SPECIAL CLASSES ACTIVELY ENGAGED IN FARMING.—Notwithstanding paragraph (2), the following persons shall be considered to be actively engaged in farming with respect to a farm operation:

(A) LANDOWNERS.—A person that is a landowner contributing the owned land to the farming operation if the landowner receives rent or income for such use of the land based on the land's production or the operation's operating results, and the person meets the standard provided in clauses (ii) and (iii) of paragraph (2)(A).

(B) FAMILY MEMBERS.—With respect to a farming operation conducted by persons, a majority of whom are individuals who are family members, an adult family member who makes a significant contribution (based on the total value of the farming operation) of active personal management or personal labor and, with respect to such contribution, who meets the standards provided in clauses (ii) and (iii) of paragraph (2)(A). For the purposes of the preceding sentence, the term "family member" means an individual to whom another family member in the farming operation is related as lineal ancestor, lineal descendant, or sibling (including the spouses of those family members who do not make a significant contribution themselves).

(C) SHARECROPPERS.—A sharecropper who makes a significant contribution of personal labor to the farming operation and, with respect to such contribution, who meets the standards provided in clauses (ii) and (iii) of paragraph (2)(A).

(4) PERSONS NOT ACTIVELY ENGAGED IN FARMING.—For the purposes of paragraph (1), except as provided in paragraph (3), the following persons shall not be considered to be actively engaged in farming with respect to a farm operation:

(A) LANDLORDS.—A landlord contributing land to the farming operation if the landlord receives cash rent, or a crop share guaranteed as to the amount of the commodity to be paid in rent, for such use of the land.

(B) OTHER PERSONS.—Any other person, or class of persons, determined by the Secretary as failing to meet the standards set out in paragraphs (2) and (3).

(5) CUSTOM FARMING SERVICES.—A person receiving custom farming services will be considered separately eligible for payment limitation purposes if such person is actively engaged in farming based on paragraphs (1) through (3). No other rules with respect to custom farming shall apply.

(6) [1001A-5] GROWERS OF HYBRID SEED.—To determine whether a person growing hybrid seed under contract shall be considered to be actively

[1001A-5] Para. (6) was added by sec. 1111(d) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3498, Nov. 28, 1990.

engaged in farming, the Secretary shall not take into consideration the existence of a hybrid seed contract.

SEC. 1001B. [1308–2] SCHEMES OR DEVICES.[1001B-1]

If the Secretary of Agriculture determines that any person has adopted a scheme or device to evade, or that has the purpose of evading, section 1001, 1001A, or 1001C, such person shall be ineligible to receive farm program payments (as described in paragraphs (1) and (2) of section 1001 as being subject to limitation) applicable to the crop year for which such scheme or device was adopted and the succeeding crop year.

SEC. 1001C. [1308–3] FOREIGN PERSONS MADE INELIGIBLE FOR PROGRAM BENEFITS.[1001C-1]

Notwithstanding any other provision of law:

(a) IN GENERAL.—For each of the 1991 through 1995 crops,[1001C-2] any person who is not a citizen of the United States or an alien lawfully admitted into the United States for permanent residence under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) shall be ineligible to receive any type of production adjustment payments, price support program loans, payments, or benefits made available under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831 et seq.), or under any contract entered into under title XII during the 1989 through 1995 crop years,[1001C-3] with respect to any commodity produced, or land set aside from production, on a farm that is owned or operated by such person, unless such person is an individual who is providing land, capital, and a substantial amount of personal labor in the production of crops on such farm.

(b) CORPORATION OR OTHER ENTITIES.—For purposes of subsection (a), a corporation or other entity shall be considered a person that is ineligible for production adjustment payments, price support program loans, payments, or benefits if more than 10 percent of the beneficial ownership of the entity is held by persons who are not citizens of the United States or aliens lawfully admitted into the United States for permanent residence under the Immigration and Nationality Act, unless such persons provide a substantial amount of personal labor in the production of crops on such farm. Notwithstanding the foregoing provisions of this subsection, with respect to an entity that is determined to be ineligible to receive such payments, loans, or other benefits, the Secretary may make payments, loans, and other benefits in an amount determined by the Secretary to be representative of the percentage interests of the entity that is owned by citizens of the United States and aliens lawfully admitted into the United States for permanent residence under the Immigration and Nationality Act.

(c) PROSPECTIVE APPLICATION.—No person shall become ineligible under this section for production adjustment payments, price support program loans, payments or benefits as the result of the production of a crop of an agricultural commodity planted, or commodity program or conservation reserve contract entered into, before, the date of the enactment of this section.

[1001B-1] Sec. 1001B was added by sec. 1304(b) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100–203, 101 Stat. 1330–17, Dec. 22, 1987, effective beginning with the 1989 crops.

[1001C-1] Sec. 1001C was added by sec. 1306 of the Omnibus Budget Reconciliation Act of 1987, P.L. 100–203, 101 Stat. 1330–19, Dec. 22, 1987, effective beginning with the 1989 crops.

[1001C-2] Sec. 1111(b)(1) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3498, Nov. 28, 1990, amended subsec. (a) by striking "1989 and 1990 crops" and inserting "1991 through 1995 crops".

[1001C-3] Sec. 1111(b)(2) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101–624, 104 Stat. 3498, Nov. 28, 1990, amended subsec. (a) by inserting after "(16 U.S.C. 3831 et seq.)" the following: ", or under any contract entered into under title XII during the 1989 through 1995 crop years,".

SEC. 1001D. [1308–4] EDUCATION PROGRAM.

(a) IN GENERAL.—The Secretary shall carry out a payment provisions education program for appropriate personnel of the Department of Agriculture and members and other personnel of county and State committees established under section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)), for the purpose of fostering more effective and uniform application of the payment limitations and restrictions established under sections 1001 through 1001C.

(b) TRAINING.—The education program shall provide training to the personnel in the fair, accurate, and uniform application to individual farming operations of the provisions of law and regulation relating to the payment provisions of sections 1001 through 1001C.

(c) ADMINISTRATION.—The State office of the Agricultural Stabilization and Conservation Service shall make the initial determination concerning the application of payment limitations and restrictions established under sections 1001 through 1001C to farm operations consisting of more than 5 persons, subject to review by the Secretary.

(d) COMMODITY CREDIT CORPORATION.—The Secretary shall carry out the program provided under this section through the Commodity Credit Corporation.

SEC. 1001E. [1308–5] TREATMENT OF MULTIYEAR PROGRAM CONTRACT PAYMENTS.

(a) IN GENERAL.—Notwithstanding any other provision of law, in the event of a transfer of ownership of land (or an ownership interest in land) by way of devise or descent, the Secretary of Agriculture may, if the new owner succeeds to the prior owner's contract entered into under title XII, make payments to the new owner under such contract without regard to the amount of payments received by the new owner under any contract entered into under title XII executed prior to such devise or descent.

(b) LIMITATION.—Payments made pursuant to this section shall not exceed the amount to which the previous owner was entitled to receive under the terms of the contract at the time of the death of the prior owner

APPENDIX 2

Proposed Amendments to the Payment Limitation Statute

Section 1001 of the Food Security Act of 1985 (P.L. 99-198) is amended by deleting subsections 5 through 6 and replace them with the following:

(5) For the purposes of sections 1001 through 1001C, the term "person" means:

(A) an individual who as a sole proprietorship or as a member of joint operation such as a general partnership or joint venture contributes to the farming operation from assets either owned by the individual, leased at rates customary for the area, or, in the case of capital, borrowed at rates generally charged, and under terms and conditions generally prevailing, in the area; and

(B) a corporation, limited partnership, association, charitable organization, trust, estate or State (including its political subdivisions and agencies) that contributes to the farming operation from assets that it either owned, leased at rates customary for the area, or, in the case of capital, borrowed at rates generally charged, and under terms and conditions generally prevailing, in the area.

(6) The Secretary shall issue regulations prescribing such rules as the Secretary determines are necessary to assure the fair and reasonable application of the limitations in sections 1001 through 1001C; provided, however, that such regulations adopt only the following rules regarding the combinations of individuals and legal entities into one person notwithstanding the provisions in subsection (5):

(A) With respect to any married couple, the husband and wife shall be considered to be one person, except that--

(i) in the case of any married couple consisting of spouses who, prior to their marriage, were separately engaged in unrelated farming operations, each spouse shall be treated as a separate person with respect to the farming operation brought into the marriage by the spouse so long as the operation remains as a separate farming operation; and

(ii) in the case of any married couple consisting of spouses who do not hold, directly or indirectly, a substantial beneficial interest in more than one entity (including the spouses themselves) engaged in farm operations that also receives farm program payments (as described in paragraphs (1) and (2)) as separate

persons, the spouses may be considered as separate persons if each spouse meets the other requirements established under this section and section 1308-1 of this title to e considered to be a separate person.

(B) With respect to trusts the following rules shall apply:

(i) an irrevocable trust will be combined with its grantor into one person unless it (I) does not allow for modification or termination by the grantor; (II) does not allow for the grantor to have any future, contingent, or remainder interest in the corpus of the trust; and (III) does not provide for the transfer of the corpus of the trust to the remainder beneficiary in less than 20 years from the date the trust is established except in cases where the transfer is contingent on the remainder beneficiary achieving at least the age of majority or is contingent on the death of the grantor or income beneficiary; and

(ii) a revocable trust will be combined with its grantor into one person.

(C) An individual less than 18 years old shall be combined with his/her parents or court-appointed party who is responsible for the individual, unless the individual has established a separate household and the individual's parents or court-appointed party who is responsible for the individual has no direct or indirect interest in the individual's farming operation.

(7) The provisions of this section that limit payments shall not be applicable to (A) land owned by a public school district (B) land owned by a State that is used to maintain a public school; or (C) land owned by, or held in trust by the United States on behalf of, an Indian Tribe, where such land is being used in connection with a tribal farming venture.

Technical Conforming Amendments

I. Technical amendments to Section 1001A:

1. In paragraph (a)(1) delete the following phrase in the first sentence: "A person (as defined in section 1001(5)(B)(i)) that" and replace it with the following: "An individual that directly or indirectly";

2. In subsection (a)(1) delete the phase in the second sentence "A person" and replace it with the following phase: "An individual";

3. In subsection (a)(4)(A) delete the first sentence and replace it with the following:

> "If an individual is notified that he or she holds substantial beneficial interests in more than the number of entities receiving payments that is permitted under this subsection of the purposes of the application of the limitations under section 1001, the individual immediately notify the Secretary, designating those entities that should be considered as permitted entities for the individual for the purposes of applying the limitations."

4. In subsection (a)(4)(A) delete the words "person" and "person's" in the second sentence and replace them with "individual" and "individual's" respectively;

5. In subsection (a)(4)(B) replace the word "person" with the word "individual" wherever it appears;

6. In subsection (b)(1) replace "1001(5)(B)(i)" with "1001(5)"; and

7. Delete subsection (b)(4) and redesignate subsections (b)(5) and (b)(6) as (b)(4) and (b)(5) respectively.

II. Technical amendments to Section 1001B

Replace the word "person" with the term "individual or entity" wherever it is found.

III. Technical amendments to Section 1001C

1. In subsection (a) replace the word "person" with the word "producer" wherever found; and

2. In subsection (c) replace the word "person" with the term "individual or entity.