October 28, 2020

The Honorable Sonny Perdue
Secretary
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington D.C. 20250

Dear Secretary Perdue:

The Department's new "Payment Limit and Payment Eligibility" regulation released on August 24, 2020 threatens the well-being of thousands of American family farms. KCoe Isom respectfully requests that you withdraw and re-issue the regulation recognizing the unique contributions family members make to their farms.

This regulation fundamentally changes the landscape on which American family farming businesses operate. We are especially concerned that this far-reaching regulation was released without an opportunity for public comment, depriving American farmers the opportunity to provide input on a proposal that significantly impacts them and our nation's food supply system.

As you are aware, the new regulation excludes farm managers from disaster benefit calculations unless they engage in either: 25 percent of the total management of the farm or 500 hours of active farm management.

This rule applies regardless of direct or indirect ownership, and regardless of the percentage of the farm owned by the individual.

This hard cap marks a significant departure from USDA's previous eligibility requirements. Prior to the August 24 regulation, an individual could remain eligible for disaster benefits by providing management contributions commensurate with their share of ownership in the farm business. The commensurability provision was the lynchpin for bringing new family members into farming businesses; it allowed for younger generations to learn from older generations while still having an ownership stake in the business. Consequently, our firm has helped hundreds of family farms across this country structure their businesses in a manner that promotes inter-generational learning and participation, as well as the longevity of these family enterprises.

As a result of this new regulation, thousands of families across this country will now be forced to either restructure their businesses or qualify for lower levels of USDA disaster assistance.

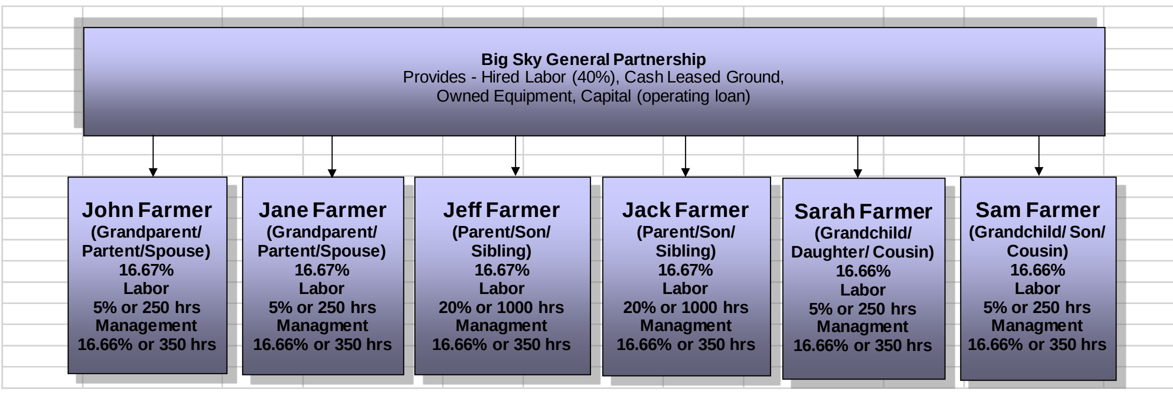
Given the historic challenges facing family farms today, the decision to release this regulation as a final rule without the input of those most impacted is baffling. The vast majority of farms that we work with simply do not have the capital available to buy out the founding generation of their farming business, nor do they want to forgo the opportunity to have the next generation actively participate in the business (at a level that is less than 500 hours or 25% of the total management).

Consider two hypothetical, but common scenarios:

Scenario 1:
Big Sky General Partnership is a farming operation is a third-generation family farm owned by six partners – two grandparents (John and Jane), their children (Jeff and Jack), and two grandchildren (Sarah and Sam). The grandparents are starting to slow down and reduce their role

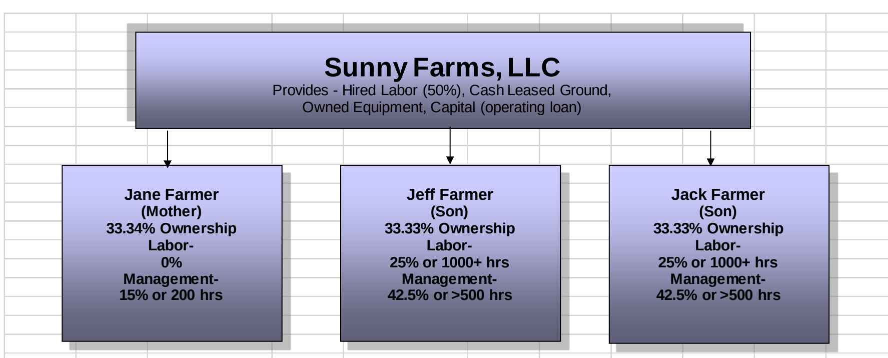
on the farm. One grandchild (Sarah) is in college and the other (Sam) is freshly out of college, but has to have a job off the farm to help support his family.

Each person, to be active with management alone, would have to put in 25% of the total management or 500 hrs. They are a smaller family farm, so there are only approximately 2100 hours of management needed. If they were to all split management equally, none of them would meet the 25%/500 hour test. Jeff and Jack do provide a significant amount of labor to make themselves “actively engaged.” In this scenario, Jeff and Jack would be the only ones able to meet the actively engaged requirements. Because of the new rule, the Big Sky General Partnership would lose two-thirds of their historic program payments -- those of John, Jane, Sarah, and Sam’s shares. They would not have lost them with the old rule as they were contributing management commensurate with their ownership.



Scenario 2:
Sunny Farms is a family farming operation held as a limited liability company equally owned by three members: mom and two adult sons.

Mom and dad founded the farming operation but dad passed away and mom is now older and starting to decrease her involvement in the operation. Both sons are active with labor and management. Mom still lives on the farm and provides management, but not 25% or 500 hours. The LLC only has one payment limit and would be considered the direct limit. The members would be the indirect limits. If the new management rule does in fact apply to indirect limits, even though all members are active and the sons contribute a significant amount, Sunny Farms, LLC would lose one third of payments because of the mom’s ineligible share. The LLC could receive the full payment if the sons force the mom out of the operation she helped found.



Restructuring is not always a simple process:
We have been asked by dozens of our clients how they ought to respond to this new regulation. For many farming operations, the only option will be to restructure to ensure maximum eligibility for disaster assistance.

Restructuring may seem easy, but it has real life consequences. As seen in the examples above, the new regulations incentivize farming operations to push their mothers, brothers, sons and granddaughters out of the business. Often times the small equity that these family members have built up represents more than just an investment—it is a tie to their family legacy and that is not something that is given up easily.

For families with more complex ownership structure, restructuring can be a costly, time-consuming process that can take months to complete. Restructuring alone may cost larger operations tens of thousands of dollars on top of the capital that will be required to buy out equity partners who participate in less than 25% of the management of the operation.

Due to the long lead times required for crop planning and capital financing, family farms need to start considering the impact of the new regulation immediately. Unless the Department takes action in short order, we expect that many farms will be forced to begin the restructuring process in the very near future.

Conclusion:
The Department's decision to issue the regulation as a new final rule without consultation or comment is deeply concerning to our clients and those of us who work closely with family farm businesses. Given the current economic climate in rural America, farm families cannot afford to expend limited capital to restructure their businesses and cannot afford to face reduced eligibility for disaster payments.

While we recognize that portions of the rule were mandated by the 2018 Farm Bill, the new eligibility criteria were imposed purely at the discretion of the Department. As these criteria are not statutorily mandated, it is our hope that the Department will reconsider the regulation and either repeal it entirely, or issue a new final rule that reinstates the vital "commensurability" test for farm programs.

Thank you in advance for your consideration of this request, and please do not hesitate to reach out to us if you or your staff would like to discuss further how this regulatory change will impact America's farm families.

Sincerely,

Brian Kuehl, Director
Government and Public Affairs
KCoe Isom, LLP

cc: U.S. Representative Collin Peterson, Chairman, House Committee on Agriculture
U.S. Representative Mike Conaway, Ranking Member, House Committee on Agriculture
U.S. Senator Pat Roberts, Chairman, Senate Committee on Agriculture
U.S. Senator Debbie Stabenow, Ranking Member, Senate Committee on Agriculture