

Chapter 7

Farm Service Agency (FSA) Emergency (EM) Loans

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This chapter explains the EM loan program requirements under the current statute, rule, and handbook provisions. See earlier editions of this book for EM loan requirements in effect before September 2004.⁸

III. EM Loan Deadlines

An EM loan application must be filed with FSA no later than eight months after the date a disaster is officially declared or designated.⁹ This declaration or designation date may vary from county to county.

The EM loan handbook states that if a county has been designated or named as a disaster county more than once for the same disaster, farmers will have eight months from the most recent designation to submit an EM loan application.¹⁰

IV. Eligibility for EM Loans

EM loans are available to farmers who meet the eligibility rules even if they have not borrowed from FSA—or FmHA—in the past. To be eligible for an EM loan, farmers must meet all of the following requirements.¹¹

EM Loan Eligibility Criteria

To qualify for an EM loan, the farmer must:

- A. Operate a family farm in a disaster area.
- B. Be an established farmer and intend to continue farming.
- C. Have sufficient managerial ability.
- D. Have a satisfactory credit history.
- E. Be unable to get credit elsewhere.
- F. Agree to meet borrower training requirements.
- G. Have received only limited FSA debt forgiveness in the past.
- H. Have no property subject to a federal judgment lien.
- I. Have no drug convictions in the past five crop years.
- J. Agree to repay duplicative assistance from other federal sources.
- K. Possess legal capacity.
- L. Meet citizenship requirements.
- M. Have suffered a qualifying loss.

A. Operate a Family Farm in a Disaster Area

EM loans are only available to a borrower who operates a family farm in a disaster area.¹²

1. Owner-Operator or Tenant-Operator

An EM loan borrower must be the operator of the farm affected by the disaster.¹³ If the loan proceeds are going to be used for repair or replacement of real estate, the borrower also must either be the owner of the farming operation or have a lease on the real estate meeting certain requirements.¹⁴ These requirements are: (1) the lease must go beyond the loan repayment term, (2) the lease must provide that FSA will receive prior notice of lease termination during the term of the loan, and (3) the landlord must give FSA a mortgage on the real estate as security for the loan.¹⁵

The EM loan handbook states that, in addition to being the farm operator, the borrower must have an ownership interest in any chattel that will be the basis for a loss claim.¹⁶

2. Family Farm

An EM loan borrower's operation must qualify as a family farm.¹⁷ The FSA definition of family farm has four parts. First, the farm must produce enough agricultural commodities for sale to be recognized in the community as a farm rather than a rural residence.¹⁸ Second, the farm (including rented land) must provide enough income—by itself or together with other dependable income—to pay necessary family living and farm operating expenses, maintain essential chattel and real estate, and pay debts.¹⁹ Third, the farm must be managed by the farmer.²⁰ The EM loan handbook elaborates on this point, stating that all of the day-to-day management and operational decisions should be made by members of the farm family and that if consultants, advisors, and similar experts are used, someone in the farm family must remain the decision maker.²¹ Fourth, the farmer and his or her family must provide a substantial part of the farm's labor requirements.²² The farm may use a reasonable amount of full-time hired labor and seasonal labor during peak periods and still qualify as a family farm.²³ The EM loan handbook states that, although the farmer need not perform a majority of the operation's labor requirements, the amount of labor provided by the farmer should be significant.²⁴

The EM loan handbook adds a fifth factor that FSA will consider when determining whether a farmer satisfies the family farm requirement: credit needs.²⁵ Noting that the FSA loan limits established by Congress generally ensure that the loans are made to family farm operations, the handbook states that if maximum FSA farm loans are a small portion of the farmer's total credit requirements, this may indicate that the farm is larger than family-size or that credit would be available from another source.²⁶

EM loans are not available for losses to a nonfarm enterprise.²⁷ FSA defines nonfarm enterprises as any business enterprise, including recreation, that is closely associated with the farm operation, is located on or adjacent to the farm, and provides income to supplement farm income.²⁸ Examples given in the EM loan regulations of nonfarm enterprises include: raising earthworms, exotic birds, tropical fish, dogs, and horses for nonfarm purposes; welding shops; roadside stands; horse boarding; and riding stables.²⁹

3. In a Disaster Area

EM loans are only available for losses to a farming operation located in a disaster area.³⁰ For EM loan purposes, a "disaster area" is any county declared or designated a disaster and eligible for EM loan assistance, along with all counties bordering the declared or designated county.³¹ This means that to be eligible for an EM loan, a farmer must operate in a county that is a declared or designated disaster county or any county that borders a disaster county.

Although the regulatory definition of "disaster area" was not changed to reflect the new authority for making EM loans for losses from a quarantine, it seems that FSA will interpret the requirements to read "disaster area" as "quarantine area" when appropriate.³²

B. Established Family Farmer Intending to Continue Farming

EM loan borrowers must be established farmers who intend to continue farming.

1. Established Farmer

The borrower must be an established farmer.³³ The EM loan regulations define "established farmer" as a farmer who operates a farm and meets the following three requirements: (1) was actively participating in the operation and management of the farm at the time of the disaster;³⁴ (2) spends a substantial portion of time carrying out the farming operation; and (3)

planted the crops or produced the livestock on the farm.³⁵ If the borrower is a business entity, in addition to meeting these three requirements it must be primarily engaged in farming, and more than 50 percent of its gross income from all sources must be from the farming operation, based on a projected cash flow.³⁶

The regulations and EM loan handbook list certain types of operations that cannot be considered established farmers for EM loan purposes. These ineligible operations are: (1) a corporation in which more than 50 percent ownership is held by one or more estates, trusts, other corporations, partnerships, joint operations, or limited liability companies; (2) a partnership or joint operation in which more than 50 percent ownership is held by one or more estates, trusts, corporations, other partnerships, other joint operations, or limited liability companies; (3) integrated livestock, poultry, or fish processors operating through contracts or other arrangements with farmers; and (4) any farming operation that employs a full-time farm manager.³⁷

Although integrated processors are not eligible for EM loans, a grower under contract with an integrated processor may be considered an established farmer for EM loan purposes so long as the grower does not employ an outside full-time manager or management service.³⁸ EM loans made to such a grower will be based on the grower's share in the agricultural production, as provided for in the contract with the processor.³⁹

2. Intend to Continue Farming

EM loan borrowers must demonstrate the intent to continue the farming operation after the disaster.⁴⁰ Farmers who temporarily stopped farming because of the disaster should be able to satisfy this eligibility requirement if they intend to resume farming.

C. Managerial Ability

In order to be eligible for an EM loan, a farmer must have sufficient managerial ability to ensure reasonable prospects of repaying the loan, as determined by FSA. Managerial ability must be demonstrated by education, on-the-job training, or farming experience covering at least one entire production cycle in the previous five years.⁴¹

According to the EM loan handbook, the farmer must demonstrate that he or she has carried out the farm operation according to standard farming practices in the

area.⁴² Examples given in the handbook of failures to follow standard farming practices include: (1) planting crops that are not typically grown in the area due to climate conditions, (2) late planting unrelated to disaster, (3) poor tillage practices, (4) poor breeding practices, and (5) lack of good record keeping.⁴³ Based on these examples, any farmer whose operation is appropriate for the growing conditions and who has practiced good husbandry and good record keeping should not have difficulty satisfying this requirement, even if the operation is not typical for the area.

D. Satisfactory Credit History

A farmer must demonstrate a satisfactory credit history to be eligible for an EM loan.⁴⁴ The regulations state that FSA will use credit reports or “any other available information” to evaluate a farmer’s credit history.⁴⁵

1. Truthful Credit Information and History of Fulfilling Credit Obligations

Part of the credit history consideration is whether the farmer has dealt in good faith with FSA in the past, including providing current, complete, and truthful information in the EM loan application and in all past dealings with FSA.⁴⁶ Farmers will be found not creditworthy if they deliberately falsify information,⁴⁷ intentionally omit information relevant to the loan decision, or do not make every reasonable effort to meet the terms and conditions of the proposed loan.⁴⁸ FSA will also examine whether the farmer has fulfilled his or her obligations to other parties, including other federal agencies.⁴⁹

According to the EM loan handbook, the farmer will be considered to have made a reasonable effort to satisfy loan terms and conditions if any failure to do so resulted from circumstances beyond the farmer’s control.⁵⁰

2. Certain Credit Problems Are Not Necessarily Unacceptable

General FSA regulations applicable to all FSA farm loan programs state that certain problems in making past payments do not automatically indicate an unacceptable credit history.⁵¹

a. More Than Three Years Ago

Foreclosures, judgments, or delinquent payments that occurred more than 36 months before the EM loan application is filed do not constitute

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unacceptable credit history if no similar situations have occurred recently.⁵²

b. Resolved Through FSA Loan Servicing

Delinquencies on FSA debt that have been resolved through loan servicing do not mean that the farmer has an unacceptable credit history.⁵³

c. Isolated Incidents

Isolated incidents of delinquent payments that do not represent a general pattern of unsatisfactory or slow payment do not mean that the farmer has unacceptable credit history.⁵⁴

d. Lack of Credit History

According to FSA regulations, a lack of credit history is not automatically unacceptable.⁵⁵

e. Circumstances Beyond the Farmer's Control

A recent foreclosure, judgment, or delinquent payment does not mean the farmer has unacceptable credit history if the circumstances causing it were temporary and beyond the farmer's control.⁵⁶ Examples given in the regulations of circumstances beyond the farmer's control include loss of a job, delay or reduction in government benefits, other loss of income, and increased living expenses due to illness or death.

f. Justifiable Dispute About Goods or Services

A recent foreclosure, judgment, or delinquent payment does not mean the farmer has unacceptable credit history if the farmer refused to make full payment due to defective goods or services or based on another justifiable dispute relating to the goods or services purchased.⁵⁷

g. Bankruptcy

A prior bankruptcy filing by the farmer is not automatically a sign of unacceptable credit history.⁵⁸

E. Unable to Get Credit Elsewhere

EM loan borrowers must be unable to get sufficient credit elsewhere at reasonable rates and terms.⁵⁹ The new EM loan regulations reduce the amount of documentation that farmers will be required to provide to demonstrate that they are unable to obtain credit elsewhere. According to FSA, the documentation requirements under the prior regulations were stricter than required by statute.⁶⁰

Even if the required documentation is provided, FSA reserves the right in all cases to contact lenders in the area and make an independent determination of the farmer's ability to obtain credit elsewhere.⁶¹

1. Application to Borrow \$300,000 or More—Two Written Denials

If the farmer is requesting a loan of \$300,000 or more, the EM loan regulations require the farmer to provide written loan denials from two commercial lending institutions located near the farmer.⁶² The reason for the denial must be specified.⁶³ The EM loan handbook states that one of the denials must be from the farmer's normal lender, and both denials must be from lenders who typically make farm loans.⁶⁴

2. Application to Borrow Less Than \$300,000—One Written Denial

If the application is for less than \$300,000, the EM loan regulations require the farmer to provide a written loan denial from one commercial lending institution located near the farmer.⁶⁵ The reason for the denial must be specified.⁶⁶ The EM loan handbook states that the farmer must contact his or her normal lender unless that lender has already denied a request to continue with the farmer or extend additional credit with or without a guarantee.⁶⁷ In that case, the farmer may contact another lender that makes agricultural loans.⁶⁸

3. Waiver Possible for Applications to Borrow \$100,000 or Less

For loans of \$100,000 or less, FSA may waive the requirement for a written denial of credit if certain conditions are met.⁶⁹ In order for the waiver to be available, FSA must conclude that obtaining the written denial would pose an undue burden on the farmer, the farmer must certify that credit is not available elsewhere, and FSA must conclude that credit from other lenders is not likely to be available based on the farmer's circumstances.⁷⁰

According to the EM loan handbook, a waiver of the credit denial requirement will only be granted after the FSA loan approval official has reviewed the farmer's financial statement, credit report, and other financial information and has determined that these clearly indicate that other credit would not be available.⁷¹ The loan approval official must compare the credit standards of local agricultural lenders to the farmer's financial condition and must document how the farmer fails to meet those standards.

The EM loan handbook emphasizes that a farmer's ability to obtain credit for the farming operation through credit cards, finance companies, or other "sub-prime" lenders does not constitute failure of the no-credit-elsewhere test, unless the rates and terms for that credit are similar to the rates and terms offered by other agricultural lenders in the community on loans for farm purposes.⁷²

F. Borrower Training

The farmer must agree to meet FSA borrower training requirements.⁷³ A waiver of training requirements may be granted in some cases.⁷⁴ If the farmer previously received FSA assistance that was conditioned on attending borrower training, the farmer will be ineligible for an EM loan until the earlier borrower training requirement is satisfied.⁷⁵ Depending on how long it has been since the earlier assistance was received, the farmer must either be enrolled in and attending an approved borrower training course or have satisfactorily completed a course.

G. Only Limited Debt Forgiveness

The farmer must not have received debt forgiveness from USDA on more than one occasion on or before April 4, 1996, and not at all after April 4, 1996.⁷⁶ Debt forgiveness, for this purpose, includes a write-down, write-off, or debt settlement of a debt to FSA or a loss paid by FSA on a guaranteed loan.⁷⁷

If the farmer caused FSA a loss by receiving debt forgiveness on more than one occasion on or before April 4, 1996, or on any occasion after that date, the farmer could become eligible for an EM loan by repaying FSA's loss and curing the debt forgiveness.⁷⁸ In such cases, FSA may still consider the debt forgiveness in reviewing the farmer's credit history.⁷⁹

H. No Outstanding Federal Judgment Liens

The farmer's property must not be subject to an outstanding federal judgment lien, though United States Tax Court liens are permitted.⁸⁰

I. No Recent Drug Convictions

The farmer must not have been convicted under federal or state law of planting, cultivating, growing, producing, harvesting, or storing a controlled substance during the current crop year or the previous four crop years.⁸¹ The farmer will be required to self-certify on the EM loan application form that this eligibility requirement is satisfied.⁸²

The EM loan handbook states that denials based on this eligibility requirement are not appealable.⁸³ However, USDA's National Appeals Division (NAD) has the final say in what decisions can be appealed.⁸⁴ Applicants who believe they have been wrongly denied EM loan assistance may seek a determination of appealability directly from NAD.

J. Agree to Repay Duplicative Federal Assistance

The farmer must agree that if disaster assistance in addition to the EM loan is received from another federal agency for the same losses, the duplicative benefits will be repaid to the agency that provided them.⁸⁵ The EM loan handbook states that, if at the time the EM loan is processed the farmer expects to receive additional disaster benefits but the amount of those benefits is not known, the farmer must assign those benefits to FSA.⁸⁶ FSA's comments accompanying the new EM loan regulations state that FSA will use federal debt collection procedures to recover any duplicative assistance that it provides.⁸⁷

The EM loan handbook also states that benefits from programs enacted after an EM loan is approved will not affect the EM loan amount.⁸⁸ The use of the word "enacted" suggests that this exception applies only to benefits from programs that are not authorized by Congress until after the EM loan approval.

K. Possess Legal Capacity

The farmer must possess the legal capacity to qualify for the loan.⁸⁹ This means that the farmer must be of legal age, possess the mental capacity, and have the authority to enter into a legally binding agreement.⁹⁰

L. Meet Citizenship Requirements

The farmer must be a citizen of the United States, a non-citizen national, or a qualified alien under federal immigration laws.⁹¹

M. Suffer a Qualifying Loss

To be eligible for an EM loan, a farmer must have suffered a qualifying loss.⁹² There are two different types of qualifying losses: physical losses and production losses. Farmers can qualify for an EM loan on the basis of either type of loss, or both.

1. Physical Losses

Farmers whose property, including livestock, was damaged by a disaster may qualify for an EM loan due to physical losses.⁹³ There is no minimum amount of physical loss required for eligibility.

a. Types of Property Eligible for Physical Loss Assistance

Physical loss is defined for EM loan purposes as verifiable damage to or destruction of property.⁹⁴ Damage to or destruction of annual growing crops is specifically excluded from eligibility as a physical loss for EM loan purposes and must instead qualify as a production loss, discussed next.⁹⁵ Types of physical property that can count as the basis for a physical loss loan include the following.⁹⁶

(1) Property Essential to the Farm Operation

Disaster-related damage to real estate or chattel that is essential to the farming operation is a qualifying physical loss for EM loan purposes.⁹⁷ Property is essential to the farming operation if it would be needed after the disaster for the farmer to be able to continue operating the farm as it was operated immediately prior to the disaster.⁹⁸ Depending on the circumstances, this could include a dwelling, land and farm buildings, machinery, equipment, tools, and supplies needed for the farm. FSA will make the determination whether property is essential to the farmer's operation.⁹⁹

(2) Essential Household Items

Disaster-related damage to the farmer's household items that must be repaired or replaced is a qualifying physical loss for EM loan purposes.¹⁰⁰ The items must be essential to maintain viable living quarters for the farmer's household.¹⁰¹ Examples given in the EM loan regulations of eligible household items include a

stove, refrigerator, furnace, couch, chairs, tables, beds, lamps, and clothing. Damage to luxury items, such as jewelry, furs, antiques, and paintings, is not a qualifying loss for EM loan purposes.¹⁰²

Damage to essential household items is an eligible physical loss only for individual farmers.¹⁰³ Farming operations conducted as business entities cannot receive EM loans for losses to essential household items.

(3) Livestock

Under the prior EM loan regulations, disaster losses affecting livestock could qualify as production losses or physical losses, depending on the type of loss experienced.¹⁰⁴ Under the new EM loan regulations, all disaster-related livestock losses are now treated as physical losses for EM loan purposes.¹⁰⁵ This includes both losses to breeding stock and losses to livestock that would otherwise have generated normal production income. FSA explains the change in policy for livestock losses by saying that it will make it easier for livestock producers to qualify for EM loans because they will not have to experience a minimum 30 percent loss, as is required for EM loans based on production losses.¹⁰⁶ FSA's comments accompanying the final EM loan regulations state that livestock losses rarely qualified as production losses under the prior regulations.¹⁰⁷

Even though all livestock losses will now be treated as physical losses, there are still some different rules for different types of livestock losses. For example, as discussed in the next section of this chapter, EM loans for many types of livestock losses can be used to cover family living and farm operating expenses, but EM loans made for loss of breeding stock cannot be used for these purposes.¹⁰⁸ These loans can only be used to replace the lost breeding stock.

The EM loan handbook emphasizes that farmers cannot qualify for EM loans based on losses of livestock raised under production contracts where the integrator retains ownership in the livestock and the farmer has no ownership interest.¹⁰⁹ Farmers who raise livestock under such contracts would be eligible for EM loans for losses to livestock, commodities, and chattel that they do own.

(4) Harvested and Stored Crops

Disaster-related damage to harvested and stored crops is a qualifying physical loss for EM loan purposes.¹¹⁰

(5) Perennials That Produce an Agricultural Commodity

The new EM loan regulations include disaster-related damage to “perennial crops” as a qualifying physical loss for EM loan purposes.¹¹¹ It seems this is a slight misstatement of how losses affecting commodity-producing perennials will be treated. An example set out in the EM loan handbook shows that losses affecting perennial crops, such as apples, will actually be treated as production losses, with assistance based on the change in crop value due to the disaster.¹¹² EM loans for physical losses appear to be available for disaster-related damage to the perennial stock itself—trees, vines, bushes, etc.¹¹³

b. Hazard Insurance Requirements

Most physical property damaged in a disaster must have been covered by hazard insurance at the time of the disaster to qualify as a physical loss for EM loan purposes.¹¹⁴ In general, the level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less.¹¹⁵ If the tax or cost-depreciated value of the property is very low, the level of coverage required will also be quite low.

For EM loan purposes, hazard insurance is defined as “coverage against losses due to fire, windstorm, lightning, hail, explosion, business interruption, riot, civil commotion, aircraft, land vehicles, marine vehicles, smoke, builders’ risk, public liability, property damage, flood or mudslide, workman’s compensation, or any similar insurance that is available and needed to protect the security, or that is required by law.”¹¹⁶

(1) Real Estate: Hazard Insurance Required

In general, real estate damaged by a disaster must have been covered by general hazard insurance at the time of the disaster in order to qualify for EM loan assistance.¹¹⁷

(2) Chattel: Hazard Insurance Required if Available and Cost-Effective

Chattel property damaged by a disaster must have been covered by general hazard insurance at the time of the disaster if such insurance was readily available and its benefits justified its cost.¹¹⁸

(3) Livestock: Hazard Insurance Not Required

The hazard insurance requirement does not apply to livestock.¹¹⁹

(4) Exception Authority for Chicken Houses: Farmer Must Have Attempted to Obtain Hazard Insurance

Authority for an exception to the general hazard insurance requirement for real estate comes out of a statutory change to the EM loan program enacted on October 28, 2000.¹²⁰ That statutory provision allows FSA to make EM loans to poultry farmers to cover the cost of rebuilding lost chicken houses even if the buildings were not covered by hazard insurance, so long as the farmer had applied for hazard insurance but was unable to obtain it.¹²¹ As of September 2004, FSA had not formally implemented this statutory authority. Farmers who lose chicken houses due to natural disaster should contact their local FSA offices for up-to-date information about hazard insurance requirements.

2. Production Losses

Disaster-related damage affecting agricultural production other than livestock is eligible for EM loan assistance as a production loss if it has caused at least a 30 percent loss for at least one crop.¹²² If this threshold requirement is met, all of the farmer's disaster-related crop losses will be totaled to determine the level of EM loan assistance available, even losses to crops that did not experience a 30 percent loss.

Eligible production losses can be a lower per-acre yield, a reduction in crop quality, or losses to native pasture and rangeland.¹²³

a. Threshold Requirement: 30 Percent Production Loss in One Crop Enterprise

To qualify as a production loss for EM loan purposes, the disaster must have reduced by at least 30 percent the production of any single non-

livestock crop that is a basic part of the farming operation.¹²⁴ A crop is considered a “basic part of the farming operation” if it normally generates enough income to be considered essential to the success of the operation.¹²⁵

To determine whether a farmer’s production loss qualifies for EM loan assistance, the loss for each individual crop enterprise must be measured, as explained in the next section of this chapter. Generally speaking, the disaster year production is compared to the farmer’s normal production for each commodity. If the disaster year production is at least 30 percent less than normal production for any single commodity, the farmer qualifies for an EM loan based on production losses.¹²⁶

Prior EM loan regulations gave specific examples of what could be considered a single crop enterprise for EM loan qualification purposes.¹²⁷ For example, each separate cash crop (wheat, corn, soybeans, and so forth) was considered a single enterprise and a 30 percent loss in any one of those enterprises would qualify the farmer for an EM loan.¹²⁸ Each individual feed crop, such as alfalfa, or corn grown for livestock consumption, was also considered a separate enterprise if livestock production was a basic part of the farmer’s operation.¹²⁹ As a result, one farmer could have had two separate enterprises of corn—one a cash crop and one for livestock feed.¹³⁰ These examples were not retained in the new regulations, and the new regulations fail to specify how crop enterprises will be identified when determining production loss eligibility for EM loans. It is likely that FSA is continuing to use the prior policy.

b. Available for Losses to All Agricultural Commodities Other Than Livestock

The definition of “production loss” in the EM loan regulations only mentions annual growing crops.¹³¹ However, another section of the regulations states that EM loans for production losses may be used to address disaster losses “associated with production of agricultural commodities (except the losses associated with the loss of livestock).”¹³² When the EM loan regulations are viewed as a whole, it seems that FSA does intend for production loss loans to be available for all non-livestock commodities. “Agricultural commodity” is defined in the EM

loan regulations to include grains, cotton, oilseeds, dry beans, tobacco, peanuts, sugar beets, sugar cane, fruit, vegetables, forage, tree farming, nursery crops, nuts, aquacultural species, and other plant or animal production as determined by FSA.¹³³

The EM loan handbook emphasizes that losses of commodities grown under production contracts—where the integrator retains ownership in the commodity and the farmer has no ownership interest—do not qualify for EM loan assistance.¹³⁴ Farmers growing commodities under such contracts would be eligible for EM loans for losses to other commodities that they do own.

V. Calculating EM Loan Benefits

In general, EM loan benefits are limited to the value of the farmer's physical and production losses.¹³⁵ Therefore, establishing the value of those losses is a critical part of the EM loan application process. FSA regulations also set certain limitations on EM loan benefits that may reduce the amount of a farmer's loan.

A. Measuring Physical Losses

Farmers are eligible for EM loan assistance for their total eligible physical losses caused by the disaster.¹³⁶ The maximum amount of EM loan assistance a farmer may receive for physical losses is determined by the total allowable costs for disaster-damaged property and the total value of livestock losses.¹³⁷ The eligible physical losses are calculated in the following way.¹³⁸

1. Calculate Allowable Costs to Replace or Repair Damaged Property

EM loan assistance for physical losses is based on “allowable costs” to replace or repair damaged property.¹³⁹ Allowable costs are defined for EM loan purposes as replacement and repair costs that are supported by “acceptable” documentation.¹⁴⁰ Documentation that can be used to establish allowable costs includes, but is not limited to, written estimates, invoices, and bills.¹⁴¹

a. Cost of Replacing or Repairing Damaged Real Estate

The allowable costs needed to replace or repair damaged farm real estate, including farm buildings, are included in the total physical loss amount.¹⁴² As discussed earlier, to be included as an eligible loss, the

damaged real estate must have been covered by hazard insurance at the time of the disaster.¹⁴³

The EM loan handbook states that the amount needed for repair or replacement of essential buildings and structures must be supported by written estimates from the supplier or contractor who will provide the services.¹⁴⁴ The handbook also states that EM loan funds may be used to pay for hired labor and purchased materials only. Labor, machinery, equipment, and materials contributed by the farmer cannot be included in the cost of repair or replacement.¹⁴⁵

b. Cost of Replacing or Repairing Damaged Chattel

Eligible physical losses for EM loan purposes also include the amount of allowable costs needed to replace or repair damaged farm chattel property.¹⁴⁶ As with real estate, damaged chattel must have been covered by hazard insurance at the time of the disaster to be included as an eligible physical loss, if such insurance was available and economically feasible.¹⁴⁷ The value of any labor, machinery, equipment, or materials contributed by the farmer to repair or replace his or her own damaged property will not be included as allowable costs.¹⁴⁸

c. Cost of Essential Household Contents—Up to \$20,000

If the farmer is applying for EM loan assistance as an individual and not as a business entity, the allowable costs needed to repair or replace essential household contents will be included in the total physical loss.¹⁴⁹ A farmer cannot receive more than \$20,000 in EM loan assistance for this purpose.¹⁵⁰ As discussed earlier in this chapter, essential household contents include furniture, clothing, major kitchen appliances, and similar items.¹⁵¹

2. Add Value of Livestock Losses

The value of disaster-related livestock losses is included in eligible physical losses for EM loan assistance.¹⁵²

a. Value of Losses to Livestock and Livestock Products Set by FSA

The new EM loan regulations state that the value of livestock and livestock product losses will be based on classifications established by FSA on a national or regional basis.¹⁵³ The EM loan handbook states that

the value of livestock lost or destroyed as a result of the disaster will be the replacement cost less any salvage value received for the damaged livestock.¹⁵⁴

The handbook states that the value of lost livestock products—such as calves, pigs, lambs, eggs, milk, and wool—will be established by FSA using prices published in FSA's state-specific price list for all commercially grown commodities.¹⁵⁵ Examples given in the EM loan handbook show that for livestock production losses, FSA will compare the disaster year production to the farmer's average production for the previous three years to determine the extent of disaster losses.¹⁵⁶

According to the EM loan handbook, farmers who purchase and finish feeder livestock will qualify for a physical loss in the amount of the value of the lost livestock, as determined from FSA's state-specific commodity price list, minus the purchase price of the feeder livestock.¹⁵⁷

b. Written Documentation Required to Establish Pre-Disaster Livestock Value

Farmers who seek EM loan assistance for disaster losses to livestock must have written documentation of their livestock inventory and records of livestock product sales.¹⁵⁸ The documentation and records must be sufficient to allow FSA to value the livestock and livestock products just prior to the disaster.¹⁵⁹

Livestock Loss¹⁶⁰

Example # 1

A farmer lost 50 bred cows in a flood. The farmer's average normal calving rate over the past three years is 90 percent. The FSA price in the farmer's state for calves weighing 300–500 pounds is \$275. The cost to replace each bred cow is \$1,000.

The farmer's physical loss is calculated as follows:

Number of cows times normal calving rate equals lost production.

$$50 \text{ cows} \times .90 \text{ (90 percent)} = 45 \text{ calves}$$

Lost production times normal price equals lost production income.

$$45 \text{ calves} \times \$275 \text{ per calf} = \$12,375$$

Number of cows times replacement cost per cow equals replacement cost.

$$50 \text{ cows} \times \$1,000 \text{ per cow} = \$50,000$$

Lost production income plus replacement cost equals total physical loss for livestock.

$$\$12,375 + \$50,000 = \$62,375$$

Livestock Loss¹⁶⁰

Example # 2

A farmer lost 20 dairy cows in a storm. The farmer's average milk production over the previous three years was 18,000 lbs. per cow or 1,500 lbs. per cow per month. The FSA price in the farmer's state for milk is \$12.25 per cwt. The cost to replace the cows is \$1,200 per cow. The farmer was unable to replace the cows for three months.

The farmer's physical loss is calculated as follows:

Number of cows times normal milk production per cow times number of months before cows could be replaced equals lost production.

$$20 \text{ cows} \times 1,500 \text{ lbs. per cow per month} \times 3 \text{ months} = 90,000 \text{ lbs. or } 900 \text{ cwt.}$$

Lost production times normal price equals lost production income.

$$900 \text{ cwt.} \times \$12.25 \text{ per cwt.} = \$11,025$$

Number of cows times replacement cost per cow equals replacement cost.

$$20 \text{ cows} \times \$1,200 \text{ per cow} = \$24,000$$

Lost production income plus replacement cost equals total physical loss for livestock.

$$\$11,025 + \$24,000 = \$35,025$$

3. Add Costs of Restoring Perennials

Total physical losses for EM loan purposes also include the allowable costs of restoring perennials that produce an agricultural commodity to the stage of development the perennials were at when the disaster occurred.¹⁶¹

4. Subtract Disaster Compensation or Insurance

When calculating a farmer's total eligible physical losses for EM loan assistance, FSA will subtract any disaster-related compensation or insurance payments that the farmer has received or will receive for the damaged property.¹⁶² In a slight change from previous policy, the new EM loan

regulations seem to require subtracting other disaster-related compensation only when that compensation is specifically for the property that suffered the qualifying loss.

The EM loan handbook states that any salvage value received for damaged property will also be deducted from the qualifying physical loss amount.¹⁶³

B. Measuring Production Losses

Under the prior EM loan rule, the maximum EM loan amount for production losses was limited to 80 percent of the farmer's total actual production loss.¹⁶⁴ The new EM loan regulations remove this limitation and allow farmers to qualify for EM loans for the full amount of their eligible production losses.¹⁶⁵

The prior EM loan regulations also included complex formulas for calculating whether a farmer's production losses qualified for assistance.¹⁶⁶ In comments accompanying the proposed program changes, FSA stated that these calculations consumed "substantial amounts of time for FSA and the applicant" when determining eligibility and the loan level.¹⁶⁷ The new EM loan regulations use much less complicated calculations.

1. Determine Normal Yield for Each Enterprise

The first step in calculating the farmer's production loss is to establish the farmer's normal yield for each crop.¹⁶⁸ This step was substantially changed under the new EM loan regulations.¹⁶⁹ When figuring the normal year's production, the farmer must use production record sources for each crop in the following order of priority.

a. Farmer's APH Yields

Under the new regulations, the preferred normal production yield for EM loan purposes will be the farmer's actual production history (APH) yield for the year in which the disaster occurred.¹⁷⁰ The farmer's APH yield is the yield used to determine federal crop insurance coverage or coverage under FSA's Noninsured Crop Disaster Assistance Program (NAP) and is an average of historical yields using four to ten years of the farmer's actual production records.¹⁷¹

b. Farmer's Actual Reliable Farm Records

If the farmer does not have an approved APH yield for the crop for the disaster year, the normal production yield will be based on the farmer's actual production records for the previous three years.¹⁷²

c. FSA Farm Program Proven Yields

If the farmer does not have adequate production records available for any or all of the previous three years, the normal production yield for any missing year will be based on the farmer's proven yields used to calculate farm program payments for that year.¹⁷³

d. County Average Yields

If proven yields for farm program payments are not available for any or all of the previous three years, the normal production yield for any missing year will be the county average production yield for the crop for that year.¹⁷⁴ These yields are listed in FSA's "state supplement."

e. State Average Yields

According to the EM loan handbook, if county average yields are not available, the normal production yield for any missing year will be the state average production yield for the crop.¹⁷⁵ These yields are also listed in FSA's "state supplement."

2. Calculate Actual Losses for Each Crop

Actual losses for each crop are calculated for EM loan purposes in terms of lost crop value. Actual loss figures serve two important purposes. First, they are used to establish that the farmer experienced at least a 30 percent loss for at least one crop. As discussed earlier, this establishes that the farmer qualifies for an EM loan.¹⁷⁶ Second, actual loss figures determine the total amount of production losses for all crops. This becomes part of the formula that determines the farmer's EM loan amount. These calculations take into account the fact that disaster can affect the quality as well as the quantity of crop production.

a. Production Losses Generally

In general, the following steps are taken to calculate lost production value for each crop.

(1) Subtract Disaster Yield from Normal Yield

The farmer's disaster year yield for the crop is first subtracted from the normal production yield.¹⁷⁷

(2) Multiply Yield Loss by Acreage Devoted to the Crop

The per acre yield loss is then multiplied by the number of acres in the operation devoted to that crop in the disaster year, in order to calculate the volume of lost production.¹⁷⁸

(3) Multiply Lost Crop Volume by Market Price

The volume of lost production is then multiplied by the market price for the crop, as determined by FSA, to determine the value of the lost production. This is the actual loss amount for the crop.¹⁷⁹

b. Quality Loss Calculations

If the disaster reduced the quality of a farmer's production, FSA will account for this by adjusting the farmer's actual disaster yield downward.¹⁸⁰ In other words, quality losses are converted into quantity losses. This is done by comparing the average market price for a farmer's normal production grade with the average price for the grade of the disaster year production.¹⁸¹ The farmer's disaster yield is then reduced by the same proportion to produce a quality-adjusted disaster year yield.¹⁸² This quality-adjusted disaster year yield is then used in the production loss calculation set out above.

Production Loss Example: Quality Loss Calculation¹⁸³

A farmer normally produces apples for fresh market sale. Because of a disaster, the farmer's apples must be sold for processor, peeler, or juice apples. The average price for fresh market apples is \$258 per ton. The farmer receives \$60 per ton for the processor apples.

The farmer's quality adjustment is calculated as follows:

Price per unit received in the disaster year divided by normal market price per unit equals a quality loss factor:

$$\$60 \text{ per ton} \div \$258 \text{ per ton} = .23 \text{ (or 23 percent)}$$

The farmer's actual disaster year yield will be multiplied by the quality loss factor (in this case, 23 percent) to determine the quality adjusted disaster year yield.

c. Native Pasture and Rangeland Loss Calculations

Production losses for damage to native pastures, rangeland, and grazing permit lands are based on the lost feed capacity for the farmer's livestock. In making this calculation, FSA first determines the average per head cost of feed purchased in the three years prior to the disaster year.¹⁸⁴ This is compared to the farmer's average per head cost of feed in the disaster year.¹⁸⁵ For the losses to qualify for an EM loan, the disaster year feed cost per head must be at least 30 percent greater than the average pre-disaster feed cost per head.¹⁸⁶ If the 30 percent threshold is satisfied, the farmer will be eligible for an EM loan, and the losses will be determined by multiplying the number of head of livestock by the difference in feed costs between the disaster year and the pre-disaster average.¹⁸⁷

Production Loss Example: Feed Loss Calculation¹⁸⁸

A farmer provides reliable records to show that the cost for feed purchases in the previous three years was \$210 per head. The average feed cost in the disaster year was \$300 per head.

The farmer's production loss is calculated as follows:

Cost per unit in the disaster year divided by normal cost per unit equals the loss factor:

$$\text{\$300 per head} \div \text{\$210 per head} = 1.43 \text{ (or 43 percent higher costs)}$$

Because the disaster year cost is more than 30 percent greater than the normal cost, the feed loss qualifies for an EM loan.

Cost per unit in the disaster year minus normal cost per unit equals production loss per head:

$$\text{\$300 per head} - \text{\$210 per head} = \text{\$90 per head}$$

This amount is multiplied by the number of head the farmer had during the disaster year to equal the farmer's total production loss.

If the farmer had 100 head of cattle, the total production loss would be:

$$\text{\$90 per head} \times 100 \text{ head} = \text{\$9,000}$$

d. Prevented Planting

Prevented planting coverage under the new EM loan regulations is somewhat unclear. The prior EM loan regulations specifically mentioned and set out calculations for valuing prevented planting losses.¹⁸⁹ While the EM loan handbook seems to anticipate that prevented planting will be treated as a production loss—with the farmer having a zero yield for the disaster year—coverage is not made explicit.¹⁹⁰ If such coverage is available, the farmer will likely be required to demonstrate that preparations had been made for planting.

e. Substitute Crops

According to the EM loan handbook, if a substitute crop is planted and harvested in place of a crop that was destroyed or could not be planted,

the loss on the first crop will not be a qualifying production loss for EM loan purposes.¹⁹¹ If, however, the substitute crop is damaged or destroyed by disaster, that loss may qualify for EM loan assistance.

3. Total Up Production Losses for All Enterprises

The actual loss amounts for all crops are totaled to determine the amount of EM loan assistance the farmer qualifies for.¹⁹² Once the farmer has established production loss eligibility, all production losses from every enterprise—even those that are not a basic part of the operation and those that did not suffer a 30 percent loss—are counted toward the total production loss.¹⁹³

4. Subtract Disaster Compensation or Insurance

The value of lost crop production is reduced by any disaster-related compensation or insurance indemnities received or expected for the crop loss.¹⁹⁴ This then reduces the amount of EM loan assistance available for the farmer's production loss.

Other financial assistance received by the farmer for the disaster losses should not affect the value of production loss when determining whether the farmer has suffered a qualifying loss.¹⁹⁵ It does affect the farmer's total losses and, therefore, the amount of EM loan funds that will be available.

Examples given in the EM loan handbook of possible disaster-related compensation include: crop insurance payments, Noninsured Crop Disaster Assistance Program (NAP) payments, payments from other FSA disaster programs, and FEMA disaster assistance.¹⁹⁶ The handbook emphasizes that only compensation received specifically for the production losses that are the basis of the EM loan will be deducted from the qualifying loan amount.¹⁹⁷ Any compensation received for other losses will not be deducted.

5. No Deduction of Expenses Not Incurred

Under the prior EM loan regulations, the amount of the farmer's production losses was reduced to reflect any expenses that the farmer did not incur because a crop could not be planted or harvested.¹⁹⁸ Under the new regulations, these deductions from the total value of production losses are not required.

C. Maximum EM Loan Eligibility

Several different considerations limit the amount of EM loans. As discussed above, a farmer cannot borrow more than the actual value of his or her production losses and physical losses.¹⁹⁹ The following limits also apply.

1. Amount Necessary to Restore Farming Operation

An EM loan may not be larger than the amount of credit necessary to restore the family farming operation to its pre-disaster condition.²⁰⁰

2. Total EM Loan Indebtedness—\$500,000

No individual or business entity may have more than \$500,000 in outstanding principal debt for all EM loans combined.²⁰¹ The EM loan handbook states that this limit applies to anyone who signs the promissory note for the loan.²⁰²

3. Essential Household Items—\$20,000

If an EM loan for physical losses includes losses to essential household items, no more than \$20,000 will be included in the loan amount for repairing or replacing those items.²⁰³ As discussed earlier, losses to essential household items are eligible physical losses only for individual farmers and not for business entities.²⁰⁴

VI. Putting EM Loans to Work

FSA regulations restrict the use of EM loan funds.²⁰⁵ Permitted uses depend in part on the type of qualifying loss—whether physical or production.

A. Loan Purposes for Physical Losses

Permitted uses of EM loans for physical losses are different depending on the type of property affected by the disaster.²⁰⁶

1. Physical Losses Affecting Essential Real Estate

EM loan funds may be used to address disaster-related damage to or destruction of essential real estate.²⁰⁷ As discussed earlier in the eligibility section, if the loan proceeds are going to be used for repair or replacement of real estate, the borrower must either be the owner of the farming operation

or have a lease on the real estate meeting certain requirements.²⁰⁸ Permitted uses of loan funds for such losses include the following.

a. Acquire or Enlarge the Farm

EM loan funds for damage to essential real estate may be used to acquire or enlarge the disaster-afflicted farm.²⁰⁹ The acquisition or enlargement cannot cause the farm to exceed the requirements for a family farm, discussed in the eligibility section of this chapter.²¹⁰

According to the EM loan handbook, real estate may only be purchased with EM loan funds if the following conditions are met: (1) some or all of the farm's existing land was destroyed or rendered unusable for agricultural purposes; (2) the parcel being purchased is comparable in size and use to the damaged parcel; (3) the farmer owned the damaged parcel; (4) the salvage value of the damaged parcel minus any liens will be applied to the EM loan debt once the damaged parcel is sold; and (5) FSA will obtain a lien on all farm real estate that is determined to be unusable.²¹¹

b. Replace or Repair Essential Buildings or Other Structures

EM loan funds for physical losses to real estate may be used to replace or repair buildings or other structures that are essential to the ongoing viability of the farming operation.²¹² The buildings or structures must conform to industry standards and must meet the needs of the operation and the intended uses of the structures.²¹³ In comments accompanying the final new EM loan regulations, FSA clarified that, in consideration of these factors, it may sometimes be necessary to replace a damaged or destroyed structure with one that is similar to it, but not exactly the same.²¹⁴

These comments give the example of a family residence that is destroyed in a disaster, stating that: "An EM loan to rebuild the house would be based on an assessment of the current needs of the family, not necessarily on the replacement value of the lost residence."²¹⁵ Similarly, if a 300-foot poultry house was destroyed but current industry standards require a 400-foot poultry house, the EM loan would be made for a 400-foot house "since a 300-foot house no longer meets the needs of the operation."²¹⁶

c. Replace or Develop Land or Water Resources or Conservation Measures

EM loan funds for physical losses to real estate may be used to pay for activities that promote soil and water conservation and protection on the farm.²¹⁷ These funds may also be used to pay costs associated with developing land and water resources for conservation or use.²¹⁸ And EM loans for physical losses to real estate may be used to replace the farm's land or water resources that cannot be restored.²¹⁹

According to the EM loan handbook, EM loan funds may be used for these conservation, development, and resource replacement measures only if existing measures were damaged or destroyed during the disaster or if the measures are needed as part of a conservation plan on purchased land.²²⁰ The handbook also states that FSA Emergency Conservation Program (ECP) funding for these measures will be considered in conjunction with EM loan funds when available.²²¹ ECP is discussed in detail in Chapter 5 of this book.

d. Establish a New Farm Site Outside Flood or Mudslide Area

An EM loan for physical losses to real estate may be used to establish a new site for farm dwellings and service buildings in order to relocate outside of a flood or mudslide prone area.²²²

e. Replace Liquidated Land

An EM loan for physical losses to real estate may be used to replace land from the farm that was sold or conveyed as a direct result of the disaster if the land is necessary for the farming operation to be effective.²²³

f. Pay Closing Costs

EM loan funds for physical losses to real estate may be used to pay loan closing costs related to buying or improving real estate for the farm if the farmer cannot pay the costs from other sources.²²⁴

2. Physical Losses Affecting Essential Chattel Property

EM loan funds may also be used to remedy disaster-related damage to or destruction of chattel property that is essential to the farming operation.²²⁵ Permitted uses of loan funds for such losses include the following.

a. Purchase Livestock, Equipment, and Other Necessary Chattel

EM loan funds for physical losses to chattel may be used to purchase essential chattel for the farming operation, including livestock, farm equipment, quotas, and cooperative stock for credit, production, processing, or marketing purposes.²²⁶

FSA's comments accompanying the final EM loan regulations state that loan funds for loss of breeding stock can only be used to replace those livestock.²²⁷ Similarly, the EM loan handbook states that loan funds for loss of harvested and stored crops that were intended for livestock feed rather than sale may only be used to replace those feed crops.²²⁸

According to the EM loan handbook, only loan funds for physical losses to normal income security—such as livestock products and harvested and stored crops held for sale—may be used to purchase quotas and cooperative stock.²²⁹

b. Repair or Replace Essential Household Contents

EM loan funds for physical losses to chattel may be used to repair or replace essential household contents that were damaged or destroyed by the disaster.²³⁰ Household contents are the essential items necessary to maintain viable living quarters, including appliances, furniture, clothing, furnaces, and lighting.²³¹

c. Restore Damaged Agricultural Perennials

An EM loan for physical losses to chattel may be used to restore perennials that produce an agricultural commodity (such as fruit or nut trees) to the stage of development that the damaged perennials were at before the disaster.²³²

d. Pay Reasonable Costs for Obtaining the Loan

Farmers may use funds from an EM loan for physical losses to chattel to pay customary costs related to planning, obtaining, and closing a loan if the farmer cannot pay the costs from other sources.²³³ Examples given in the regulation of such customary costs include fees for legal, architectural, and other technical services. Fees for agricultural management consultation and preparation of FSA loan forms may not be paid for with EM loan funds.²³⁴

e. Livestock Producers Only: Pay Essential Living and Operating Expenses

Funds from an EM loan for physical losses to livestock that is not breeding stock may be used to pay essential farm operating and family living expenses.²³⁵ FSA explains the distinction between the use of EM loan funds for breeding stock losses and funds for market animal losses by stating that breeding stock is an essential part of a farming operation, and therefore funds for breeding stock losses can only be used to replace the breeding stock.²³⁶ Market animals are considered to generate normal production income, and therefore loan funds for their loss can be used to pay living and operating expenses.²³⁷

The term “essential farm operating and family living expenses” is not defined in the EM loan regulations. However, the term “essential family household expenses” is defined as the expenses needed to provide food, clothing, and shelter to maintain the farmer and his or her immediate family.²³⁸ Examples of annual operating expenses given elsewhere in the regulations include feed, seed, fertilizer, pesticides, farm or ranch supplies, cooperative stock, and cash rent.²³⁹

The EM loan handbook gives the following example for determining what amount of EM loan funds due to livestock losses would be available for farm operating and family living expenses: A producer suffers a loss of 100 brood cows and 90 of their calves. The calves would have been sold this year to produce farm income to pay expenses. The EM loan funds resulting from the loss of the calves may be used for operating and family living expenses, and other operating purposes, but the EM loan funds from the loss of the brood cows may only be used to purchase suitable replacements.²⁴⁰

f. Refinance Debt

EM loan funds for physical losses to chattel may be used to refinance debt.²⁴¹ FSA debt can only be refinanced with EM loan funds if the debt has not already been refinanced more than four times.²⁴²

The EM loan handbook sets out the following restrictions on refinancing non-FSA debt with EM loan physical loss funds.²⁴³ First, only non-real estate debts incurred for farm purposes may be refinanced. Second, the EM loan funds must be for loss of normal income security, such as livestock products and crops that were harvested and stored for sale.

Third, the farmer must be unable to develop a feasible plan without the refinancing. Fourth, the farmer must not have the resources—such as cash, stored crops, and bank accounts—to cure any delinquency on the debt. Fifth, the creditor to be refinanced must be unwilling to restructure the debt at rates and terms that would permit the farmer to develop a feasible plan.²⁴⁴ And sixth, using EM loan funds to pay only the farmer's delinquency and/or the current year's payment(s) on the debt must be insufficient to result in a feasible plan.

The EM loan handbook also states that, although EM loan funds may not be used to refinance a real estate debt, EM loan funds may be used to pay past due or currently due payments on real estate debts as part of the farmer's operating expenses.²⁴⁵

The EM loan handbook also sets out additional restrictions on refinancing FSA direct and guaranteed loans with EM loan physical loss funds.²⁴⁶ First, only FSA loans made for authorized Operating (OL) loan purposes may be refinanced. Second, the farmer must be the sole person liable on the loan being refinanced. Third, using EM loan funds to pay only the farmer's delinquency and/or the current year's payment(s) on the FSA debt must be insufficient to result in a feasible plan. Fourth, for FSA direct loans, loan servicing or set aside must be insufficient to result in a feasible plan.²⁴⁷ And fifth, for FSA guaranteed loans, the need to refinance the guaranteed loan must be a result of the disaster, refinancing must be in the government's best interest, and the lender must be unwilling to refinance the guaranteed loan at rates and terms that would permit the farmer to develop a feasible plan.

Finally, the EM loan handbook emphasizes that FSA employees have no authority to guarantee that advances made to the farmer by other credit sources can be repaid out of EM loan funds.²⁴⁸ Farmers cannot rely on being able to use an EM loan to repay any specific debt or advance until the loan application has been processed and approved.

B. Loan Purposes for Production Losses

As discussed earlier, losses in annual production of agricultural commodities other than livestock can qualify for EM loans as production losses.²⁴⁹ Permitted uses of loan funds for such losses include the following.

1. Pay Annual Operating Expenses

EM loans for production losses may be used to pay annual operating expenses for the farm.²⁵⁰ The regulations give specific examples of eligible expenses—feed, seed, fertilizer, pesticides, farm or ranch supplies, cooperative stock, and cash rent—but state that other operating expenses are also eligible.²⁵¹ The EM loan handbook states that annual operating expenses also include the purchase of livestock used for normal operating income, including poultry and aquatic organisms.²⁵²

2. Pay Essential Household Expenses

EM loans for production losses may be used to pay the farmer's essential family household expenses.²⁵³ The regulations state that essential family household expenses are the expenses of providing food, clothing, and shelter necessary to maintain the farmer and the farmer's immediate family.²⁵⁴

3. Pay Training Costs

Funds from an EM loan for production losses may be used to pay the costs of any training that is required or recommended by FSA.²⁵⁵

4. Pay Costs to Reorganize Farm to Improve Profitability

Funds from an EM loan for production losses may be used to pay the costs of reorganizing the family farm to improve its profitability.²⁵⁶ Bankruptcy expenses are not considered eligible costs for this purpose.²⁵⁷

The EM loan handbook states that reorganizing a farm means changing enterprises, production practices, marketing methods, or other parts of the farm business to promote recovery from the disaster and reduce the potential impact of future disasters.²⁵⁸ The handbook further states that EM loan funds cannot be used to finance expansion of an existing farm enterprise, unless it is clearly shown that the expansion will promote recovery from the disaster and reduce the potential impact of future disasters.²⁵⁹

The handbook gives the following examples of acceptable uses of EM loan funds for this purpose: (1) purchase equipment to convert from conventional to no-till production, (2) change from stocker to cow/calf production, (3) shift from row crop to vegetable production, (4) purchase grain drying and storage equipment, and (5) purchase shares in processing and marketing

cooperatives.²⁶⁰ FSA emphasizes in the handbook, however, that these are only examples of acceptable purposes, and “any similar operational changes are acceptable as long as a realistic farm plan indicates the changes will improve the financial viability of the farm.”²⁶¹

5. Replace Working Capital

A new eligible loan purpose under the EM loan regulations allows loan funds for production losses to be used to replace lost “working capital.”²⁶² Working capital is defined as the “cash available to conduct normal daily farming or ranching operations.”²⁶³

6. Refinance Debt

EM loans for production losses may be used to refinance debt.²⁶⁴ FSA debt can only be refinanced with EM loan funds if the debt has not already been refinanced more than four times.²⁶⁵

The EM loan handbook sets out the following restrictions on refinancing non-FSA debt with EM loan production loss funds.²⁶⁶ First, only non-real estate debts incurred for farm purposes may be refinanced. Second, the farmer must be unable to develop a feasible plan without the refinancing. Third, the farmer must not have the resources—such as cash, stored crops, and bank accounts—to cure any delinquency on the debt. Fourth, the creditor to be refinanced must be unwilling to restructure the debt at rates and terms that would permit the farmer to develop a feasible plan.²⁶⁷ And fifth, using EM loan funds to pay only the farmer’s delinquency and/or the current year’s payment(s) on the debt must be insufficient to result in a feasible plan.

Although EM loan funds may not be used to refinance a real estate debt, the EM loan handbook states that EM loan funds may be used to pay past due or currently due payments on real estate debts as part of the farmer’s operating expenses.²⁶⁸

The EM loan handbook also sets out additional restrictions on refinancing FSA direct and guaranteed loans with EM loan production loss funds.²⁶⁹ First, only FSA loans made for authorized Operating (OL) loan purposes may be refinanced. Second, the farmer must be the sole person liable on the loan being refinanced. Third, using EM loan funds to pay only the farmer’s delinquency and/or the current year’s payment(s) on the FSA debt must be insufficient to result in a feasible plan. Fourth, for FSA direct loans, loan

servicing or set aside must be insufficient to result in a feasible plan.²⁷⁰ And fifth, for FSA guaranteed loans, the need to refinance the guaranteed loan must be a result of the disaster, refinancing must be in the government's best interest, and the lender must be unwilling to refinance the guaranteed loan at rates and terms that would permit the farmer to develop a feasible plan.

Finally, the EM loan handbook emphasizes that FSA employees have no authority to guarantee that advances made to the farmer by other credit sources can be repaid out of EM loan funds.²⁷¹ Farmers cannot rely on being able to use an EM loan to repay any specific debt or advance until the loan application has been processed and approved.

7. Pay Costs to Meet Safety Standards

EM loans for production losses may be used to pay the costs of complying with federal or state standards for occupational health and safety if the farmer can show that complying with the standards or facing penalties of non-compliance would cause substantial economic injury.²⁷²

8. Purchase Livestock, Equipment, Quotas, and Cooperative Stock

The EM loan handbook adds an eighth, separate approved use of EM loan funds for production losses.²⁷³ The handbook states that production loss loan funds may be used to purchase livestock, equipment, quotas, and cooperative stock for credit, production, processing, and marketing purposes.²⁷⁴

C. Other Limits on the Use of EM Loans

The following restrictions also limit the use of EM loan funds.

1. Highly Erodible Land and Wetlands

EM loan funds may not be used for any purpose that contributes to erosion of highly erodible land or to the conversion of wetlands to agricultural production.²⁷⁵

2. Construction Standards

Any construction financed through EM loan funds must comply with applicable building standards established by federal, state, and local authorities.²⁷⁶ It must also meet industry standards for the intended use of

the building.²⁷⁷ Construction financed through an EM loan must also meet FSA requirements for construction planning and monitoring.²⁷⁸

3. Credit Cards and Other Consumer Debt

EM loan funds may not be used to refinance consumer debt, such as automobile loans.²⁷⁹ Credit card debt may only be refinanced with EM loan funds if the debt can be attributed directly to the farming operation.²⁸⁰

VII. EM Loan Interest Rates, Terms, and Security Requirements

The EM loan regulations set out specific terms for EM loans.

A. Interest Rates

As of September 2004, the annual interest rate for EM loans was 3.75 percent.²⁸¹ This rate is subject to change.²⁸² The interest rate on EM loans can never exceed 8 percent annually.²⁸³

B. Repayment Terms

The EM loan regulations set out maximum repayment periods and minimum payment requirements.²⁸⁴

1. Repayment Periods

Repayment periods for EM loans depend upon the type of loss, the farmer's repayment ability, and the useful life of the farmer's loan security.²⁸⁵

a. EM Loans for Physical Losses to Real Estate

The repayment period for EM loan funds for losses to real estate will be based on FSA's assessment of the farmer's repayment ability and the useful life of the security.²⁸⁶ The repayment period for such EM loans can never be longer than 40 years.²⁸⁷ The EM loan handbook states that the repayment period for such loans will be the minimum period of time allowed by the farmer's ability to repay the loan, considered in five-year increments.²⁸⁸

b. EM Loans for Production Losses and Physical Losses to Chattel

For production losses and physical losses to chattel, including livestock, the EM loan repayment period can generally be no longer than seven years.²⁸⁹ Exceptions can be made by FSA if “necessary to improve the repayment ability” and the farmer is able to also pledge real estate security.²⁹⁰ In such cases, the repayment period for these loans could be extended up to a maximum of 20 years from the date of the loan.²⁹¹ The EM loan handbook states that if payment within seven years is not feasible, a 10-year term will be considered and then consecutively longer intervals in two-year increments until a feasible plan is developed or the term is extended to 20 years.²⁹²

c. EM Loans for Operating Expenses

If a farmer receives an EM loan to pay annual operating expenses, that loan must generally be repaid within 12 months.²⁹³ The repayment period may be extended an additional six months (for a total of 18 months) if necessary to accommodate the farmer’s production cycle.²⁹⁴ The EM loan handbook states that payment on annual operating loans must be scheduled for the time when the farm plan shows that income will be available to make the payment.²⁹⁵

This limitation does not apply to expenses associated with reestablishing perennials.²⁹⁶ These expenses presumably fall under the seven-year repayment limit discussed above.

2. At Least One Payment Per Year

The regulations require that EM loans be scheduled for at least one payment every year.²⁹⁷ The EM loan handbook states that the minimum annual payment must be at least the amount of interest accrued on the principal loan balance at the time the payment is scheduled to be made.²⁹⁸

The EM loan handbook also states that if unequal or interest-only installments are scheduled, the farmer must be able to show that he or she will have the resources available to pay the loan in full by the final maturity date.²⁹⁹

3. Balloon Payments Prohibited

The EM loan handbook states that balloon installments are prohibited in EM loan repayment schedules.³⁰⁰ The handbook defines a balloon installment as resulting when scheduled payments are so low that the final installment is greater than twice the amount of a regularly amortized installment.³⁰¹

C. Repayment Ability

Before an EM loan application will be approved, the farmer must submit a feasible plan that demonstrates his or her ability to repay the loan and satisfy all other credit needs and obligations that the farmer is responsible for.³⁰² “Feasible plan” has a detailed definition for EM loan purposes.³⁰³ In general, the plan must be based on the farmer’s actual production and expense records, realistic price projections, and reliable off-farm income.³⁰⁴ The plan must show that the expected income will be at least sufficient to allow the farmer to cover all operating expenses, taxes, and debt payments.³⁰⁵ The income must also cover either living expenses for the family of an individual farmer or a wage for the operator of a farm business entity.³⁰⁶ The EM loan handbook states that if the farmer’s plan is dependent on the availability of additional credit, the farmer must show that the additional credit has been approved.³⁰⁷

D. Security for EM Loans

Each EM loan must be secured by the farmer’s assets.³⁰⁸ Although the security requirements in the new EM loan regulations are somewhat less burdensome for farmers than the requirements in the prior regulations, they are substantial.

1. Minimum Security Requirements

The EM loan regulations set out minimum security requirements for EM loans.³⁰⁹ An EM loan will not be approved unless the farmer can satisfy these minimum requirements.

a. “Adequate Security” – Collateral Value Equals Loan Amount

At a minimum, FSA requires that the farmer provide a security interest in property that is at least equal to the EM loan amount.³¹⁰ FSA refers to this as “adequate security.”³¹¹ In determining whether a farmer has provided adequate security, FSA will only count the value of the farmer’s equity interest in the property being pledged.³¹²

b. Property Made Available or Improved With EM Loan Funds Must Be Pledged

FSA will generally expect the farmer to provide a security interest in any property that is purchased, refinanced, produced, or otherwise affected by the farmer's use of the EM loan funds. If an EM loan is made for real estate losses, the loan must be secured, at a minimum, by the real estate that is being purchased, repaired, replaced, or improved with the loan funds.³¹³ If an EM loan is made for chattel or production losses, the loan must be secured, at a minimum, by the chattel that is being purchased, repaired, replaced, refinanced, or produced with the loan funds.³¹⁴

c. Other Collateral Taken If Required Property Not Sufficient to Provide Adequate Security

If the value of the real estate and chattel security that is required for an EM loan is not enough to provide adequate security for the loan, FSA will take a security interest in other property.³¹⁵

(1) Non-Ownership Interests in Property

The EM loan regulations state that a farmer's interest in property that is not owned by the farmer can be given as security for an EM loan and will be considered when determining whether the farmer has pledged adequate security.³¹⁶ Examples given in the regulations of possible non-ownership interests include leases that provide a mortgageable value, water rights, easements, mineral rights, and royalties.³¹⁷

(2) Third-Party Pledge of Real Estate or Chattel

If needed to provide adequate security for an EM loan, FSA will take a pledge of real estate or chattel property from someone other than the farmer or farm entity seeking the loan.³¹⁸

(3) Securities, Insurance, and Other Intangible Property

If needed to provide adequate security for an EM loan, FSA will take a security interest in patents, copyrights, insurance policies, stocks, other securities, or cooperative memberships owned by the farmer.³¹⁹

(4) Residence Located Apart From Real Estate Collateral

Only if it is necessary to provide adequate security for an EM loan, FSA will take a security interest in a farmer's residence and related real estate that is located separate and apart from the farm.³²⁰

(5) Essential Assets That Cannot Be Converted to Cash

If needed to provide adequate security, FSA can take a security interest in any assets owned by the farmer that could not be sold for cash (to decrease the farmer's credit needs) without jeopardizing the farming operation.³²¹ The regulations state that such assets might include subsistence livestock, cash or special cash collateral accounts, retirement accounts, personal vehicles, household goods, and small tools and equipment, among others.³²²

The prior EM loan regulations stated that a lien would not be taken on chattel property for a loan used for real estate purposes if the lien would prevent the farmer from obtaining operating credit.³²³ The provision was not retained in the new regulations, and it is not clear whether FSA will continue this policy.

d. When Adequate Security Is Not Available—Repayment Ability as Loan Security

A statutory change from 1998 prohibits FSA from rejecting an EM loan application because of inadequate security if FSA is "reasonably certain" that the farmer can repay the loan.³²⁴ In response to this statutory change, FSA adopted policies allowing an EM loan to be approved if the farmer's plan showed that the loan would be paid in full by the end of the loan, even if the total value of all available collateral was not enough to provide adequate security.³²⁵ The new EM loan regulations continue this policy but impose stricter eligibility requirements.

Under the new EM loan regulations, an EM loan application may be approved—even if the value of all available collateral does not equal the loan amount—if several conditions are met.

(1) Security Interests Have Been Given in All Personal and Business Assets

As a condition of being able to rely on repayment ability as collateral for an EM loan, the farmer must pledge all available personal and business property as security for the loan.³²⁶ All personal and business assets must be pledged both by an individual farmer who seeks to use repayment ability as collateral for an EM loan and by all of the members, stockholders, partners, and joint operators of a farm business entity that seeks to do so.³²⁷

(2) Lack of Security Caused by Disaster

To be able to rely on repayment ability as collateral for an EM loan, the farmer's lack of adequate security must be due to the disaster.³²⁸

(3) Farmer's Plan Shows Repayment Ability Under Normal Operation

FSA must believe that the farmer's approved plan, discussed above, provides "reasonable assurance" that the farmer will be able to repay the loan and all other obligations.³²⁹ This repayment ability must be based on the farmer's on-going operation, must reflect the farmer's production and income history, and must not include special, one-time income sources or expenses.³³⁰

(4) Farmer's Plan Addresses Pricing Risks

The farmer's approved plan must also address pricing risks applicable to the operation.³³¹ The regulations state that acceptable ways to address pricing risks include marketing contracts, hedging, options, revenue insurance, and "similar risk management practices."³³²

(5) Positive Net Cash Flow in Three of Past Five Years

To be able to use repayment ability as collateral for an EM loan, the farmer must have had a positive net cash farm income in at least three of the previous five years.³³³ The EM loan handbook states that the farmer's annual cash flow will be determined from

the farmer's tax records for the five years immediately preceding the disaster year.³³⁴

According to the EM loan handbook, if the farmer has been in operation for fewer than five years, there must have been a positive net farm cash income in at least half of the years of operation.³³⁵

(6) USDA Program Payments Assigned to FSA

Farmers who use repayment ability as collateral for an EM loan must give FSA an assignment of any payments to be received under USDA programs, including FSA farm programs.³³⁶

2. Additional Security Requirements

Once a farmer is able to pledge enough collateral to meet the minimum "adequate security" requirements, FSA will seek collateral that can further secure the EM loan.³³⁷

a. "Additional Security" – Collateral Value Equals 150 Percent of Loan Amount

FSA may require security valued at up to 150 percent of the amount of the loan if it is available.³³⁸ This is referred to as "additional security."³³⁹ An EM loan will not be denied if the farmer is unable to provide this additional security. However, if additional collateral is available and the farmer refuses to pledge it, FSA may deny or cancel the EM loan.³⁴⁰ FSA will generally want to have collateral up to the full "additional security" amount.

(1) Assets of Farm Entity Owners Must Be Pledged If Needed

According to the EM loan handbook, the personal assets of individual owners of a farm business entity will be taken as security for an EM loan made to the entity when the value of the entity's assets is not enough to satisfy the additional security requirement.³⁴¹ In such cases, the entity may select which assets will be pledged as security for the loan.³⁴²

(2) Assets That Will Not Be Taken as Additional Security

The EM loan regulations set out certain categories of property that FSA will not require the farmer to offer as collateral to satisfy the additional security requirement.³⁴³

(a) Real Estate with Liability or Impaired Value Concerns

FSA will not take a security interest in real estate that is subject to environmental, contamination, historical, or other concerns that could impair its value or expose FSA to potential liability.³⁴⁴

(b) Valid Lien Not Available

FSA will not take a security interest in property if it is not possible to obtain a valid lien.³⁴⁵

(c) Residence Located Apart From Real Estate Collateral

If the adequate security requirement has been satisfied, FSA will not require the farmer to pledge his or her residence and related real estate as security if it is located “separate and apart” from the farm.³⁴⁶

(d) Assets Used for Farming or Essential Living Expenses

If the adequate security requirement has been satisfied, FSA will not require the farmer to pledge property that is used for farming or essential living expenses.³⁴⁷ The regulations state that such assets might include subsistence livestock, cash or special cash collateral accounts, retirement accounts, personal vehicles, household goods, and small tools and equipment, among others.³⁴⁸

b. Non-Essential Assets Valued Over \$5,000 Must Be Pledged as Security

If the farmer has non-essential assets that have a total value of more than \$5,000, FSA will take a security interest in those assets.³⁴⁹ This is true even if the adequate security and additional security requirements have been met.³⁵⁰ According to the EM loan handbook, the nonessential assets must be pledged in addition to any other security requirements,

and they will not be counted when determining whether the farmer has provided security up to 150 percent of the loan amount.³⁵¹

Non-essential assets are defined as assets: (1) in which the farmer has an ownership interest, (2) that do not contribute a net income to pay essential family living expenses or to maintain a sound farming operation, and (3) that are not exempt from creditor judgment or bankruptcy actions.³⁵² Examples of non-essential assets might include recreational vehicles or vacation property.

The EM loan handbook states that the requirement to pledge all non-essential assets with a total value of more than \$5,000 also applies to all of the individual members, partners, stockholders, or joint operators of a farm business entity that is seeking an EM loan.³⁵³

3. Indian Trust Land as EM Loan Security

FSA may take a lien on Indian trust lands as security for an EM loan if certain requirements related to Bureau of Indian Affairs approval are satisfied.³⁵⁴

4. FSA's Required Lien Positions

The EM loan regulations set out required lien positions that must be available to FSA in security property.³⁵⁵

a. Required Lien Position for Real Estate Security

If the farmer gives real estate as security for an EM loan and a first lien is available, FSA must take the first lien on the property.³⁵⁶ If the first lien is not available, FSA can take a junior lien on real estate security when the following conditions are met: (1) the prior lien(s) will not jeopardize FSA's interest or the farmer's ability to repay the EM loan, (2) all prior lienholders agree to notify FSA of any acceleration or foreclosure, and (3) the farmer agrees to get permission from FSA before giving any further security interests in the property.³⁵⁷

b. Requirements for Real Estate Security Under a Purchase Contract

If the farmer is pledging real estate that is held under a recorded purchase contract, the following conditions must be met for the property to be accepted as security: (1) the farmer must provide a

security interest in the real estate; (2) the farmer and the seller must agree in writing that any insurance proceeds for real estate losses will be used only to repair or replace the damaged real estate, or the farmer must refinance the purchase contract or demonstrate that refinancing is not available; (3) the purchase contract must not be subject to summary cancellation on default and must not contain any provisions that are contrary to FSA's best interests; and (4) the seller must agree in writing to notify FSA of any breach by the farmer and give FSA the option to resolve any breach within 30 days.³⁵⁸

c. Required Lien Position for Chattel Security

FSA must get a first lien on any chattel that is being purchased, replaced, financed, or produced with the EM loan funds.³⁵⁹ The EM loan handbook states that a first lien is not required if the chattel is only being repaired.³⁶⁰

The prior EM loan regulations stated that, if there were several alternatives available for chattel property to serve as security for an EM loan and the farmer had a preference, FSA should honor the preference.³⁶¹ This provision giving explicit power to the farmer to choose was removed from the new EM loan regulations, but there is no reason why a farmer's preference should not be honored under the new regulations, so long as all other security requirements are met.

5. Same Collateral for Two Loans Possible

The same collateral may be used to secure two or more FSA loans made to the same borrower.³⁶² For example, a junior lien on property serving as collateral for an FSA Farm Ownership (FO) loan could be acceptable security for an EM loan.

6. Establishing the Value of Security Property

In determining whether a farmer has sufficient security for an EM loan, how property is valued can be very important. The EM loan regulations set out how real estate and chattel property will be valued for this purpose, defining "security value" to be the market value of the property on the date of loan closing, minus any prior liens.³⁶³

a. Security Value of Real Estate

The value of real estate security for EM loans usually must be established through a real estate appraisal by FSA that conforms to the Uniform Standards of Professional Appraisal Practice and FSA's own appraisal requirements.³⁶⁴

If certain requirements are met, FSA State Executive Directors may waive the real estate appraisal requirement for farmers who are receiving only an EM loan.³⁶⁵ First, specific conditions under which an appraisal may be waived must be established, and the waiver must be available to all farmers meeting those conditions. Second, the estimated security value must be established by someone other than the loan approval official. Third, procedures must be established to allow the farmer to dispute the estimated security value and have an appraisal completed.

b. Security Value of Livestock and Equipment

The value of livestock and equipment will be the market value as determined by FSA according to FSA appraisal requirements.³⁶⁶

c. Security Value of Annual Commodity Production

Under prior EM loan regulations, the security value of a farmer's annual crop production was presumed to be 100 percent of the amount loaned for family living and farm operating expenses.³⁶⁷ Under the new EM loan regulations, the security value of annual crop production will be the lesser of the amount loaned for living and operating expenses and the amount of expected crop revenue.³⁶⁸ For this purpose, the amount of expected crop revenue includes gross receipts from all crop and livestock production as shown on the farmer's cash flow plan used for loan approval, but does not include farm program payment or crop insurance.³⁶⁹

d. Security Value of Property Damaged by the Disaster

The value of disaster-damaged farm assets that are pledged as collateral for an EM loan will be the value of those assets as established for the day before the disaster occurred.³⁷⁰

7. Title Requirements for Real Estate Security

If real estate is given as security for an EM loan and the loan amount is more than \$25,000, FSA must obtain title clearance on the property.³⁷¹ If real estate is given as security for an EM loan and the loan amount is \$25,000 or less, FSA must receive a certification of ownership.³⁷² The certification of ownership can be an affidavit signed by the farmer that names the record owner of the real estate and lists the balances due on all known debts against the property. If the FSA official responsible for approving the loan is uncertain about the record owner or the debts against the real estate security, a title search will be required.³⁷³

E. Insurance Requirements

The EM loan regulations impose requirements for certain insurance coverage depending on the type of loan security.³⁷⁴ In general, the farmer must obtain insurance at least equal to the EM loan principal amount or the value of the security at loan closing, whichever is less.³⁷⁵

1. Crop Insurance

Farmers who receive EM loan funds will often be required to carry crop insurance.³⁷⁶ Crop insurance is discussed in detail in Chapter 3 of this book.

a. Obtain Crop Insurance or Waive Emergency Crop Loss Assistance

All farmers who get an EM loan must either: (1) obtain crop insurance coverage, if it is available, for each crop that is a basic part of the farming operation for the year in which the loan is sought; or (2) waive future eligibility for emergency crop loss assistance in connection with any uninsured crops.³⁷⁷ The crop insurance must be at least the catastrophic risk protection (CAT) level of coverage.³⁷⁸

The EM loan handbook states that FSA may include as a loan closing condition a requirement that the farmer obtain crop insurance for all subsequent crop years in which the loan is outstanding, if that would be “in the best interest” of the farmer and FSA.³⁷⁹

b. If Growing Crops Are EM Loan Security—Crop Insurance Required If Available

Farmers are required to obtain crop insurance on any growing crop that is part of the “adequate security” for an EM loan.³⁸⁰ The option of signing a waiver of eligibility for disaster payments and retaining loan eligibility is not available for any such crop if crop insurance is available.

c. If Crop Insurance Carried—Proceeds Must Be Assigned to FSA

EM loan borrowers must execute an assignment of their crop insurance indemnities to FSA.³⁸¹

2. Hazard Insurance

The EM loan regulations require that all security for an EM loan must be covered by hazard insurance if the insurance is readily available and economically feasible.³⁸² As mentioned earlier, hazard insurance is defined for EM loan purposes as “coverage against losses due to fire, windstorm, lightning, hail, explosion, business interruption, riot, civil commotion, aircraft, land vehicles, marine vehicles, smoke, builders’ risk, public liability, property damage, flood or mudslide, workman’s compensation, or any similar insurance that is available and needed to protect the security, or that is required by law.”³⁸³

A statutory change from 2000, discussed earlier in this chapter, created authority for special hazard insurance requirements when EM loan funds will be used to replace chicken houses.³⁸⁴ Under this authority, which has not yet been explicitly implemented by FSA, poultry farmers who obtain EM loans to rebuild chicken houses must obtain hazard insurance on any new chicken house for its full market value for the term of the loan.³⁸⁵

3. Flood or Mudslide Insurance

Federal law restricts the use of loan funds, including EM loan funds, on farms in flood or mudslide prone areas and requires flood or mudslide insurance for any loan security.³⁸⁶ Specific reference to general FSA regulations implementing these restrictions was removed from the EM loan regulations when the new rule was issued.³⁸⁷ The EM loan regulations now state only that flood or mudslide insurance must be obtained for any real estate security located in flood or mudslide prone areas.³⁸⁸

4. FSA Must Be Listed as Beneficiary of Insurance Policies

FSA must be named as the loss payee for any insurance indemnity payment under a policy required by the EM loan regulations and as a beneficiary of any mortgagee loss payable claim.³⁸⁹

F. Fees

The farmer will be responsible for paying all filing, recording, notary, and lien search fees necessary to process and close an EM loan.³⁹⁰ These fees may be paid for out of the EM loan funds.

G. Loan Forms and Processing Procedures

Application requirements and procedures for EM loan approval, processing, closing, and disbursement were removed from the EM loan regulations by the new rule. However, FSA procedures for many of these steps are set out in the EM loan handbook. For example, the EM loan handbook states that loan funds will be made available to the farmer within 15 calendar days after loan approval, unless the farmer agrees to a longer period.³⁹¹

H. EM Loan Denials

The EM loan handbook states that a farmer must be notified in writing of an EM loan denial.³⁹² The denial notice must: (1) set out clear, specific reasons for the denial; (2) give citations of regulations and handbook sections that were not satisfied in the farmer's application; (3) set out the farmer's rights to appeal the denial (as discussed below); and (4) include USDA's statement of nondiscrimination and equal credit opportunity.³⁹³

VIII. EM Loan Interaction With Other Government Programs

A. EM Loans and Small Business Administration (SBA) Loans

It is possible to borrow from both the FSA EM loan program and the Small Business Administration (SBA) disaster loan programs. Since SBA does not make agricultural loans, SBA eligibility likely will be for physical damage or loss to the farmer's dwelling and its contents. As discussed in this chapter, EM loans are also available for damage to a farmer's dwelling and household contents. SBA and FSA insist that there be no duplication in these loans. These programs might be coordinated in cases when the farm is operated as a business entity and,

therefore, EM loan funds are not available to replace essential household contents, or when the farmer's dwelling is located apart from the farm property. The farmer and his or her family might then be able to apply for an SBA disaster loan to cover the household losses. See Chapter 9 of this book for a discussion of SBA disaster loans.

As mentioned earlier, EM loans are not available for "nonfarm enterprises." These enterprises should be eligible for assistance under SBA disaster business loan programs.

B. EM Loans and Other FSA Loans

Farmers may receive other FSA loans—such as Operating (OL) loans or Farm Ownership (FO) loans—along with EM loans. In addition, farmers who are not eligible for an EM loan may still be eligible for other FSA loans.

C. EM Loans, Crop Insurance, and Noninsured Crop Disaster Assistance (NAP)

Under restrictions imposed by Congress in 1996, farmers who are entitled to receive crop insurance benefits under catastrophic risk protection (CAT) coverage and are also eligible for other USDA assistance related to the crop loss must choose which assistance to receive; they cannot receive both.³⁹⁴ Similarly, farmers who are eligible for benefits under the Noninsured Crop Disaster Assistance Program (NAP) as well as other USDA assistance related to the crop loss have to choose which benefit to receive.³⁹⁵ FSA initially treated EM loans as loss benefits under these provisions. This meant that farmers had to choose between receiving CAT or NAP benefits and obtaining an EM loan for the production losses.³⁹⁶ The 1999 Appropriations Act changed the law governing CAT insurance coverage and NAP to specifically allow farmers to receive both the available benefits from CAT or NAP and an EM loan for the same crop disaster.³⁹⁷ FSA now allows farmers to receive both CAT or NAP benefits and an EM loan; however, CAT or NAP benefits received for a qualifying production loss will result in a one-to-one reduction in the qualifying EM loan amount.³⁹⁸

IX. Mediation and Appeals of EM Loan Decisions

A farmer may seek mediation of a dispute with FSA related to an EM loan if the mediation program in the state where the farmer resides has been certified by USDA to hear agricultural credit disputes.³⁹⁹

Farmers may also appeal any adverse decision by FSA about an EM loan.⁴⁰⁰ An adverse decision may include, among other things, a determination that a farmer is not eligible for an EM loan, failure to process a loan application, or approval of a smaller loan amount than the farmer requested.⁴⁰¹

EM loan appeals are handled by USDA's National Appeals Division (NAD).⁴⁰² NAD regulations set out a formal appeals process with important deadlines and other requirements. For example, farmers must file their appeals with NAD within 30 days after they first receive notice of the adverse decision.⁴⁰³

X. Discrimination Is Illegal

FSA is prohibited by the Equal Credit Opportunity Act (ECOA) from discriminating against any EM loan applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the applicant's receipt of income from any public assistance program, or the applicant's exercise, in good faith, of any right under the Consumer Protection Act, which includes the ECOA.⁴⁰⁴ In addition to these prohibited bases for discrimination, general USDA regulations also prohibit discrimination in any program administered by USDA on the basis of familial status, sexual orientation, disability, or because all or part of an individual's income is derived from any public assistance program.⁴⁰⁵

Chapter 7 Notes

- ¹ EM loans are authorized by 7 U.S.C. §§ 1961-1970.
- ² See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (Apr. 4, 1996) (1996 FAIR Act); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998) (1999 Appropriations Act). See also earlier editions of this book discussing specific statutory changes.
- ³ 67 Fed. Reg. 791 (2002) (codified at 7 C.F.R. pt. 764) (as corrected by 67 Fed. Reg. 7941 (2002)). The final rule was based on changes proposed in September 2000. 65 Fed. Reg. 54,973 (2000).
- ⁴ 67 Fed. Reg. 791 (2002). The corrections were effective on the date they were issued, February 21, 2002. The agency comments accompanying the final rule state that the new provisions do not apply to any EM loan agreements entered into before February 7, 2002. 67 Fed. Reg. 791 (2002) (prefatory comments to final rule).
- ⁵ The handbook, called "Direct Loan Making," 3-FLP (Amendment 1), was issued on February 8, 2002. As of the date this chapter was written, four additional handbook amendments had been issued, the most recent one (Amendment 5) on November 17, 2003. EM loans are addressed in Part 9 of the handbook.
- ⁶ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 5201, 116 Stat. 344 (May 13, 2002) (2002 Farm Bill). Applicable laws include the Plant Protection Act and the federal animal quarantine laws. For a complete list of these laws, see 21 U.S.C. § 136a(f)(1).
- ⁷ 68 Fed. Reg. 7693, 7695-96 (2003) (codified at 7 C.F.R. § 764.2, "Disaster," "Quarantine").
- ⁸ To obtain earlier editions of this book, contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, Minnesota, 55101; or by electronic mail at lawyers@flaginc.org.
- ⁹ 7 U.S.C. § 1961(a); 7 C.F.R. § 764.4(b)(1) (2004).
- ¹⁰ EM Loan Handbook, page 9-22, para. 163.Q (May 7, 2002).

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- ¹¹ Under the new EM loan regulations, delinquency on other FSA loans is no longer a bar to eligibility. Prior EM loan regulations had made it an eligibility requirement that the farmer not be delinquent on any other direct or guaranteed FSA loan. See 7 C.F.R. § 1945.162(a) (2002). This requirement was only in the regulations and was not required by statute.
- ¹² A family farm that changes ownership structure between the time the disaster occurs and the EM loan closing will still be eligible for the EM loan if the following conditions are met: (1) the new applicant, including all owners, meets all applicable EM loan eligibility requirements; and (2) the new individual applicant (or all owners of a new entity applicant) had an ownership interest in the farming operation at the time of the disaster. 7 C.F.R. § 764.4(b)(3) (2004). The amount of an EM loan after a change in ownership structure will be based on the percentage of the disaster-afflicted farming operation that was transferred to the new applicant. 7 C.F.R. § 764.4(b)(3)(iii) (2004). In no case will any new EM loan amounts equal more, in total, than would have been authorized for the original farming operation.
- ¹³ 7 C.F.R. § 764.4(a)(5) (2004). If the borrower is a business entity and the owners of a majority interest in the entity are related by blood or marriage, at least one of the related owners must operate the farm. 7 C.F.R. § 764.4(a)(6)(i) (2004). If the borrower is a business entity and the majority interest holders are not related by blood or marriage, all of the majority interest holders must operate the farm. 7 C.F.R. § 764.4(a)(6)(ii) (2004).
- ¹⁴ 7 C.F.R. § 764.5(a)(5)(i)(B) (2004).
- ¹⁵ 7 C.F.R. § 764.5(a)(5)(i)(B) (2004).
- ¹⁶ EM Loan Handbook, page 9-15, para. 163.F (Feb. 8, 2002).
- ¹⁷ 7 C.F.R. § 764.4(a)(3) (2004). If the borrower is a business entity that has an operator interest in any other farming operation, that other farming operation must not exceed the requirements of a family farm. 7 C.F.R. § 764.4(a)(6)(iii) (2004). For more details about the family farm definition for FSA's direct loan programs, see FSA Notice FLP-252, "Clarifying Family Farm Definition" (Mar. 12, 2002) (expired Mar. 1, 2003). Although this notice does not specifically mention EM loans, it states that its guidelines apply to FSA's

direct loan programs, which include EM loans. The notice also replaced, with almost no changes, a prior notice (FLP-117) that did explicitly cover EM loans.

- 18 7 C.F.R. § 764.2, "Family farm (1)" (2004).
- 19 7 C.F.R. § 764.2, "Family farm (2)" (2004).
- 20 7 C.F.R. § 764.2, "Family farm (3)" (2004). If the borrower is a business entity, the farm must be managed by the members, stockholders, partners, or joint operators of the entity who are responsible for operating the farm. 7 C.F.R. § 764.2, "Family farm (3)(ii)" (2004).
- 21 EM Loan Handbook, page 9-13, para. 163.D (May 7, 2002).
- 22 7 C.F.R. § 764.2, "Family farm (4)" (2004). If the borrower is a business entity, a substantial part of the farm's labor requirements must be provided by the members, stockholders, partners, or joint operators of the entity, along with their families. 7 C.F.R. § 764.2, "Family farm (4)(ii)" (2004).
- 23 7 C.F.R. § 764.2, "Family farm (5)" (2004).
- 24 EM Loan Handbook, page 9-13, para. 163.D (May 7, 2002).
- 25 EM Loan Handbook, page 9-13, para. 163.D (May 7, 2002).
- 26 EM Loan Handbook, page 9-13, para. 163.D (May 7, 2002).
- 27 7 C.F.R. § 764.4(a)(3) (2004).
- 28 7 C.F.R. § 764.2, "Nonfarm enterprise" (2004).
- 29 7 C.F.R. § 764.2, "Nonfarm enterprise" (2004).
- 30 7 C.F.R. § 764.4(b)(2)(i) (2004). This requirement was a separate item in determining a farmer's eligibility for EM loans under the prior program regulations. See 7 C.F.R. § 1945.162(e) (2002). Under the new rule, the requirement that the farmer's operation be in a disaster area is a component of determining whether the farmer suffered a qualifying loss, discussed in more detail later in the chapter. The requirement continues to be listed separately here to ensure that readers familiar with earlier editions of this book are not confused about its continuing applicability.
- 31 7 C.F.R. § 764.2, "Disaster area" (2004).

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- ³² Although the definition of “disaster area” was not changed, “disaster” is defined for EM loan purposes to include quarantine. 7 C.F.R. § 764.2, “Disaster” (2004).
- ³³ 7 C.F.R. § 764.4(a)(4) (2004).
- ³⁴ The regulations state that active participation includes exercising control over the farming operation, making decisions regarding the operation, and establishing the direction of the operation. 7 C.F.R. § 764.2, “Established farmer (1)” (2004).
- ³⁵ 7 C.F.R. § 764.2, “Established farmer (1)-(3)” (2004). If the farm is operated by a business entity, the entity owners as a group must satisfy the established farmer requirements.
- ³⁶ 7 C.F.R. § 764.2, “Established farmer (4)” (2004). The farming operation’s cash flow for this purpose must be for either the next crop year or the next 12-month period, as “mutually determined” between FSA and the borrower. The EM loan handbook states that FSA will impose additional, state-specific requirements in cases of EM loans to limited liability companies or trusts. EM Loan Handbook, page 9-14, para. 163.E and page 9-16, para. 163.G (June 21, 2002).
- ³⁷ 7 C.F.R. § 764.2, “Established farmer (5)” (2004); EM Loan Handbook, Exhibit 2, page 5, “Established farmer” (June 21, 2002). The EM loan handbook also states that estates cannot be considered established farmers. EM Loan Handbook, page 9-14, para. 163.E (June 21, 2002).
- ³⁸ 7 C.F.R. § 764.2, “Established farmer (5)(iii)” (2004).
- ³⁹ 7 C.F.R. § 764.2, “Established farmer (5)(iii)” (2004).
- ⁴⁰ 7 C.F.R. § 764.4(a)(7) (2004).
- ⁴¹ 7 C.F.R. § 764.4(a)(12) (2004).
- ⁴² EM Loan Handbook, page 9-20, para. 163.M (Feb. 8, 2002).
- ⁴³ EM Loan Handbook, page 9-20, para. 163.M (Feb. 8, 2002).
- ⁴⁴ 7 C.F.R. § 764.4(a)(8) (2004).
- ⁴⁵ 7 C.F.R. § 764.4(a)(8) (2004).
- ⁴⁶ 7 C.F.R. § 764.4(a)(8) (2004).

- ⁴⁷ The handbook states that farmers who deliberately falsify information submitted to FSA will be referred to USDA's Office of Inspector General and may be subject to criminal prosecution. EM Loan Handbook, page 9-16.5, para. 163.I (June 21, 2002).
- ⁴⁸ 7 C.F.R. § 764.4(a)(8) (2004). The EM loan handbook states that a farmer will be determined uncreditworthy if he or she has not made a reasonable effort to meet the conditions and terms of any previous FSA loan. EM Loan Handbook, page 9-16.5, para. 163.I (June 21, 2002).
- ⁴⁹ 7 C.F.R. § 764.4(a)(8) (2004).
- ⁵⁰ EM Loan Handbook, page 9-16.5, para. 163.I (June 21, 2002).
- ⁵¹ 7 C.F.R. § 1910.5(c) (2004).
- ⁵² 7 C.F.R. § 1910.5(c)(1) (2004).
- ⁵³ 7 C.F.R. § 1910.5(c)(1) (2004). This applies to delinquencies that are resolved through FSA's loan servicing programs, as defined in 7 C.F.R. § 1951.906 (2004). These programs are set out in 7 C.F.R. part 1951, subpart S (2004).
- ⁵⁴ 7 C.F.R. § 1910.5(c)(2) (2004).
- ⁵⁵ 7 C.F.R. § 1910.5(c)(3) (2004).
- ⁵⁶ 7 C.F.R. § 1910.5(c)(4)(i) (2004).
- ⁵⁷ 7 C.F.R. § 1910.5(c)(4)(ii) (2004).
- ⁵⁸ 7 C.F.R. § 1910.5(c)(5) (2004).
- ⁵⁹ 7 C.F.R. § 764.4(a)(9) (2004). If the EM loan is for a farm business entity, all individuals, members, stockholders, partners, and joint operators must meet this eligibility requirement. EM Loan Handbook, page 9-19, para. 163.J (May 7, 2002).
- ⁶⁰ 65 Fed. Reg. 54,973, 54,974 (2000) (prefatory comments to proposed rule). The new rule, on the other hand, is said to be "consistent with the minimum requirements of the Act" while giving FSA "maximum flexibility." 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- ⁶¹ 7 C.F.R. § 764.4(a)(9)(iv) (2004). In comments accompanying the final rule, FSA stated that this provision allows it to "contact other commercial lending institutions within reasonable proximity of the applicant and make an

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independent determination of the applicant's ability to obtain credit elsewhere" and to "investigate cases where the applicant's net worth or other circumstances indicate that credit may be available elsewhere without increasing the applicant's burden in obtaining additional written declinations of credit." 67 Fed. Reg. 791, 794 (2002) (prefatory comments to final rule).

- 62 7 C.F.R. § 764.4(a)(9)(i) (2004).
- 63 7 C.F.R. § 764.4(a)(9) (2004).
- 64 EM Loan Handbook, page 9-17, para. 163.J (Feb. 8, 2002).
- 65 7 C.F.R. § 764.4(a)(9)(ii) (2004).
- 66 7 C.F.R. § 764.4(a)(9) (2004).
- 67 EM Loan Handbook, page 9-18, para. 163.J (Feb. 8, 2002).
- 68 EM Loan Handbook, page 9-18, para. 163.J (Feb. 8, 2002).
- 69 7 C.F.R. § 764.4(a)(9)(iii) (2004).
- 70 7 C.F.R. § 764.4(a)(9)(iii) (2004).
- 71 EM Loan Handbook, page 9-18, para. 163.J (Feb. 8, 2002).
- 72 EM Loan Handbook, page 9-18, para. 163.J (Feb. 8, 2002).
- 73 7 C.F.R. § 764.4(a)(13) (2004). The training requirements are set out in 7 C.F.R. § 1924.74 (2004).
- 74 7 C.F.R. § 1924.74(b)(2) (2004).
- 75 See FSA Notice FLP-278, "Borrower Training Requirements" (Oct. 24, 2002) (expired Oct. 1, 2003).
- 76 7 C.F.R. § 764.4(a)(10) (2004).
- 77 7 C.F.R. § 764.2, "Debt forgiveness" (2004). Debt forgiveness does not include consolidation, rescheduling, reamortization, or deferral of a loan.
- 78 7 C.F.R. § 1910.5(c) (2004); EM Loan Handbook, page 9-19, para. 163.K (May 7, 2002).
- 79 7 C.F.R. § 1910.5(c) (2004).
- 80 7 C.F.R. § 764.4(a)(11) (2004).
- 81 7 C.F.R. § 764.4(a)(14) (2004). Controlled substances for this purpose are defined in 21 C.F.R. part 1308 (2004). If the EM loan application is from a

farm business entity, this requirement applies to all individuals, members, stockholders, partners, and joint operators in the entity. EM Loan Handbook, page 9-21, para. 163.O (Nov. 17, 2003).

⁸² EM Loan Handbook, page 9-21, para. 163.O (Nov. 17, 2003).

⁸³ EM Loan Handbook, page 9-21, para. 163.O (Nov. 17, 2003).

⁸⁴ See 7 C.F.R. § 11.6 (2004).

⁸⁵ 42 U.S.C. § 5155(b)(1); 7 C.F.R. § 764.4(a)(15) (2004).

⁸⁶ EM Loan Handbook, page 9-21, para. 163.P (Nov. 17, 2003).

⁸⁷ 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).

⁸⁸ EM Loan Handbook, page 9-21, para. 163.P (Nov. 17, 2003).

⁸⁹ 7 C.F.R. § 764.4(a)(1) (2004). The borrower must legally be able to sign a loan contract.

⁹⁰ EM Loan Handbook, page 9-12, para. 163.A (Nov. 17, 2003). If the borrower is a business entity, all members, stockholders, partners, and joint operators must satisfy this requirement.

⁹¹ 7 C.F.R. § 764.4(a)(2)(i) (2004). If the borrower is a business entity, the individuals who own the majority interest in the entity must be citizens, non-citizen nationals, or qualified aliens. Non-citizen nationals and qualified aliens will be required to provide appropriate documentation of their immigration status. 7 C.F.R. § 764.4(a)(2)(ii) (2004).

⁹² 7 C.F.R. § 764.4(b)(2) (2004).

⁹³ 7 C.F.R. § 764.4(b)(2)(iii) (2004).

⁹⁴ 7 C.F.R. § 764.2, "Physical loss," "Chattel" (2004).

⁹⁵ 7 C.F.R. § 764.2, "Physical loss" (2004).

⁹⁶ 7 C.F.R. § 764.4(b)(2)(iii) (2004).

⁹⁷ 7 C.F.R. § 764.4(b)(2)(iii) (2004).

⁹⁸ 7 C.F.R. § 764.2, "Chattel or real estate essential to the farming operation" (2004).

⁹⁹ 7 C.F.R. § 764.2, "Chattel or real estate essential to the farming operation" (2004).

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- 100 7 C.F.R. § 764.4(b)(2)(iii) (2004).
- 101 7 C.F.R. § 764.2, “Household contents” (2004).
- 102 7 C.F.R. § 764.2, “Household contents” (2004).
- 103 7 C.F.R. § 764.5(e)(1)(v) (2004).
- 104 See 7 C.F.R. §§ 1945.163(a)(1)(iv), 1945.163(b)(6)(i) (2002).
- 105 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule).
- 106 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule).
- 107 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule).
- 108 7 C.F.R. § 764.3(a)(2)(v) (2004).
- 109 EM Loan Handbook, page 9-15, para. 163.F (Feb. 8, 2002).
- 110 7 C.F.R. § 764.4(b)(2)(iii) (2004).
- 111 7 C.F.R. § 764.4(b)(2)(iii) (2004).
- 112 EM Loan Handbook, page 9-28, para. 165.F (May 7, 2002).
- 113 7 C.F.R. § 764.3(a)(2)(iv) (2004); EM Loan Handbook, Exhibit 7 (May 7, 2002).
- 114 7 C.F.R. § 764.4(b)(4) (2004). This requirement was created by the 1996 FAIR Act. 1996 FAIR Act § 621 (codified at 7 U.S.C. § 1961(b)).
- 115 7 C.F.R. § 764.4(b)(4) (2004).
- 116 7 C.F.R. § 764.2, “Hazard insurance” (2004).
- 117 7 C.F.R. § 764.4(b)(4) (2004).
- 118 7 C.F.R. § 764.4(b)(4) (2004).
- 119 7 C.F.R. § 764.4(b)(4) (2004).
- 120 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for 2001, Pub. L. No. 106-387, § 1(a), 114 Stat. 1549 (Oct. 28, 2000) (incorporating by reference H.R. 5426, Title VIII, § 833) (codified at 7 U.S.C. § 1961(b)(3)).
- 121 Pub. L. No. 106-387, § 1(a), 114 Stat. 1549 (Oct. 28, 2000) (incorporating by reference H.R. 5426, Title VIII, § 833) (codified at 7 U.S.C. § 1961(b)(3)).
- 122 7 C.F.R. § 764.4(b)(2)(ii) (2004).

- ¹²³ See EM Loan Handbook, pages 9-25 through 9-28, paras. 165.B-F (May 7, 2002).
- ¹²⁴ 7 C.F.R. § 764.4(b)(2)(ii) (2004).
- ¹²⁵ 7 C.F.R. § 764.2, "Basic part of the applicant's total farming operation" (2004). Although the regulatory definition provides that both crop and livestock enterprises could be considered "basic parts" of a farming operation, only crop enterprises can qualify as production losses for EM loans.
- ¹²⁶ 7 C.F.R. § 764.4(b)(2)(ii) (2004).
- ¹²⁷ 7 C.F.R. § 1945.154(a), "Farming enterprise (1)" (2002).
- ¹²⁸ 7 C.F.R. § 1945.154(a), "Farming enterprise (1)(i)" (2002).
- ¹²⁹ 7 C.F.R. § 1945.154(a), "Farming enterprise (1)(v)" (2002).
- ¹³⁰ 7 C.F.R. § 1945.154(a), "Farming enterprise (1)" (2002).
- ¹³¹ 7 C.F.R. § 764.2, "Production loss" (2004).
- ¹³² 7 C.F.R. § 764.3(b) (2004).
- ¹³³ 7 C.F.R. § 764.2, "Agricultural commodity" (2004). "Aquacultural species" are further defined to be "aquatic organisms (including fish, mollusks, crustaceans or other invertebrates, amphibians, reptiles, or aquatic plants) raised in a controlled or selected environment which the applicant has exclusive rights to use." 7 C.F.R. § 764.2, "Aquacultural species" (2004).
- ¹³⁴ EM Loan Handbook, page 9-15, para. 163.F (Feb. 8, 2002).
- ¹³⁵ 7 C.F.R. § 764.5(b) (2004).
- ¹³⁶ 7 C.F.R. § 764.5(b)(2) (2004).
- ¹³⁷ 7 C.F.R. § 764.5(e) (2004).
- ¹³⁸ 7 C.F.R. § 764.5(e)(1) (2004).
- ¹³⁹ 7 C.F.R. § 764.5(e) (2004).
- ¹⁴⁰ 7 C.F.R. § 764.2, "Allowable costs" (2004).
- ¹⁴¹ 7 C.F.R. § 764.2, "Allowable costs" (2004).
- ¹⁴² 7 C.F.R. § 764.5(e)(1)(ii) (2004).

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- ¹⁴³ 7 C.F.R. § 764.5(e)(1)(ii) (2004). The level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less. 7 C.F.R. § 764.4(b)(4) (2004).
- ¹⁴⁴ EM Loan Handbook, page 9-2, para. 162.A (Feb. 8, 2002).
- ¹⁴⁵ EM Loan Handbook, page 9-2, para. 162.A (Feb. 8, 2002).
- ¹⁴⁶ 7 C.F.R. § 764.5(e)(1)(i) (2004).
- ¹⁴⁷ 7 C.F.R. §§ 764.4(b)(4), 764.5(e)(1)(i) (2004). The level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less. 7 C.F.R. § 764.4(b)(4) (2004).
- ¹⁴⁸ 7 C.F.R. § 764.5(e)(1)(i) (2004).
- ¹⁴⁹ 7 C.F.R. § 764.5(e)(1)(v) (2004).
- ¹⁵⁰ 7 C.F.R. § 764.5(e)(1)(v) (2004).
- ¹⁵¹ 7 C.F.R. § 764.2, “Household contents” (2004).
- ¹⁵² 7 C.F.R. § 764.5(e)(1)(iii) (2004).
- ¹⁵³ 7 C.F.R. § 764.5(e)(1)(iii) (2004).
- ¹⁵⁴ EM Loan Handbook, page 9-29, para. 165.G (May 7, 2002).
- ¹⁵⁵ EM Loan Handbook, page 9-29, para. 165.G (May 7, 2002).
- ¹⁵⁶ EM Loan Handbook, page 9-30, para. 165.H (May 7, 2002).
- ¹⁵⁷ EM Loan Handbook, page 9-29, para. 165.G (May 7, 2002).
- ¹⁵⁸ 7 C.F.R. § 764.5(e)(2) (2004).
- ¹⁵⁹ 7 C.F.R. § 764.5(e)(2) (2004).
- ¹⁶⁰ EM Loan Handbook, page 9-30, para. 165.H (May 7, 2002). The handbook emphasizes that the loan funds for the lost cows can only be used to replace cows; the lost calves and lost milk production are considered loss of normal income, and EM loan funds for these losses can be used for any authorized production loss loan purpose.
- ¹⁶¹ 7 C.F.R. § 764.5(e)(1)(iv) (2004).
- ¹⁶² 7 C.F.R. § 764.5(e)(1)(vi) (2004).
- ¹⁶³ EM Loan Handbook, page 9-29, para. 165.G (May 7, 2002).

- ¹⁶⁴ See 7 C.F.R. § 1945.163(a)(2)(x) (2002).
- ¹⁶⁵ 7 C.F.R. § 764.5(b)(3) (2004).
- ¹⁶⁶ See 7 C.F.R. § 1945.163 (2002).
- ¹⁶⁷ 65 Fed. Reg. 54,973, 54,974 (2000) (prefatory comments to proposed rule).
- ¹⁶⁸ 7 C.F.R. § 764.5(d)(1) (2004).
- ¹⁶⁹ Under the prior EM loan regulations, normal yield was based on the farmer's best four years out of the previous five. See 7 C.F.R. § 1945.163(a)(1) (2002).
- ¹⁷⁰ 7 C.F.R. § 764.2, "Normal production yield" (2004).
- ¹⁷¹ 7 C.F.R. § 764.2, "Normal production yield (1)" (2004). APH yield calculations for crop insurance purposes are set out in 7 C.F.R. part 400, subpart G (2004). APH yield calculations for NAP purposes are set out in 7 C.F.R. part 1437, subpart B (2004).
- ¹⁷² 7 C.F.R. § 764.2, "Normal production yield (2)" (2004).
- ¹⁷³ 7 C.F.R. § 764.2, "Normal production yield (2)" (2004); EM Loan Handbook, page 9-26, para. 165.B (May 7, 2002). The EM loan handbook emphasizes that these proven yields are the farmer's actual production yields and not the established yields set by the Commodity Credit Corporation. EM Loan Handbook, page 9-25, para. 165.B (May 7, 2002).
- ¹⁷⁴ 7 C.F.R. § 764.2, "Normal production yield (3)" (2004); EM Loan Handbook, page 9-26, para. 165.B (May 7, 2002).
- ¹⁷⁵ EM Loan Handbook, page 9-25, para. 165.B (May 7, 2002).
- ¹⁷⁶ 7 C.F.R. § 764.4(b)(2)(ii) (2004).
- ¹⁷⁷ 7 C.F.R. § 764.5(d)(1) (2004).
- ¹⁷⁸ 7 C.F.R. § 764.5(d)(2) (2004).
- ¹⁷⁹ 7 C.F.R. § 764.5(d)(3) (2004). The EM loan handbook states that, in December of each year, FSA will issue a state supplement for each state setting out unit prices for all commodities produced commercially in the state. EM Loan Handbook, page 9-26.5, para. 165.C (May 7, 2002). The prices in these supplements are used to determine EM loan amounts for production losses for the next calendar year.

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- ¹⁸⁰ The quality loss adjustment is not included in the new EM loan regulations, although it was an explicit provision of the prior rules. See 7 C.F.R. § 1945.163(a)(2)(iii) (2002). Under the new regulations, the quality loss adjustment is set out in the program handbook. See EM Loan Handbook, page 9-28, para. 165.D (May 7, 2002).
- ¹⁸¹ EM Loan Handbook, page 9-28, para. 165.D (May 7, 2002).
- ¹⁸² EM Loan Handbook, page 9-28, para. 165.F (May 7, 2002).
- ¹⁸³ EM Loan Handbook, page 9-28, para. 165.F (May 7, 2002).
- ¹⁸⁴ EM Loan Handbook, page 9-28, para. 165.E (May 7, 2002).
- ¹⁸⁵ EM Loan Handbook, page 9-28, para. 165.E (May 7, 2002).
- ¹⁸⁶ EM Loan Handbook, page 9-28, para. 165.E (May 7, 2002).
- ¹⁸⁷ EM Loan Handbook, page 9-28, para. 165.E (May 7, 2002).
- ¹⁸⁸ EM Loan Handbook, page 9-28, para. 165.F (May 7, 2002).
- ¹⁸⁹ See 7 C.F.R. § 1945.163(a)(2)(xii) (2002).
- ¹⁹⁰ EM Loan Handbook, page 9-22, para. 163.R (May 7, 2002).
- ¹⁹¹ EM Loan Handbook, page 9-22, para. 163.R (May 7, 2002).
- ¹⁹² 7 C.F.R. § 764.5(b)(3) (2004).
- ¹⁹³ 7 C.F.R. § 764.5(b)(3) (2004).
- ¹⁹⁴ 7 C.F.R. § 764.5(d)(4) (2004).
- ¹⁹⁵ This was made explicit in comments to a prior EM loan regulation change. See 59 Fed. Reg. 16,771, 16,771-72 (1994) (prefatory comments to final rule). This approach seems to be continued under the new rule given the absence of any discussion of a policy change and the separate regulatory provisions for the 30 percent eligibility threshold and the total production loss calculation.
- ¹⁹⁶ EM Loan Handbook, page 9-27, para. 165.C (May 7, 2002).
- ¹⁹⁷ EM Loan Handbook, page 9-27, para. 165.C (May 7, 2002).
- ¹⁹⁸ See 7 C.F.R. § 1945.163(a)(2)(v), (xii), (xiv) (2002).
- ¹⁹⁹ 7 C.F.R. § 764.5(b)(1) (2004).
- ²⁰⁰ 7 C.F.R. § 764.5(b)(2), (3) (2004).

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- 201 7 C.F.R. § 764.5(c) (2004). Until March 1997, a farmer could borrow up to \$500,000 per disaster. See 62 Fed. Reg. 9351, 9353 (1997) (prefatory comments to interim rule).
- 202 EM Loan Handbook, page 9-24, para. 164.C (May 7, 2002).
- 203 7 C.F.R. § 764.5(e)(1)(v) (2004).
- 204 7 C.F.R. § 764.5(e)(1)(v) (2004).
- 205 7 C.F.R. § 764.3 (2004).
- 206 7 C.F.R. § 764.3(a) (2004).
- 207 7 C.F.R. § 764.3(a)(1) (2004).
- 208 7 C.F.R. § 764.5(a)(5)(i)(B) (2004).
- 209 7 C.F.R. § 764.3(a)(1)(i) (2004). The acquisition or enlargement must also meet the requirements of 7 C.F.R. § 1943.16(a) (2004).
- 210 7 C.F.R. § 764.3(a)(1)(i) (2004).
- 211 EM Loan Handbook, page 9-1, para. 162.A (Feb. 8, 2002).
- 212 7 C.F.R. § 764.3(a)(1)(ii) (2004).
- 213 7 C.F.R. § 764.3(a)(1)(ii) (2004).
- 214 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 215 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 216 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 217 7 C.F.R. § 764.3(a)(1)(iii) (2004). Examples of permissible activities can be found at 7 C.F.R. § 1943.16(c) (2004).
- 218 7 C.F.R. § 764.3(a)(1)(vi) (2004).
- 219 7 C.F.R. § 764.3(a)(1)(v) (2004).
- 220 EM Loan Handbook, page 9-3, para. 162.A (Feb. 8, 2002).
- 221 EM Loan Handbook, page 9-3, para. 162.A (Feb. 8, 2002).
- 222 7 C.F.R. § 764.3(a)(1)(vii) (2004).
- 223 7 C.F.R. § 764.3(a)(1)(viii) (2004).
- 224 7 C.F.R. § 764.3(a)(1)(iv) (2004).
- 225 7 C.F.R. § 764.3(a)(2) (2004).

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- 226 7 C.F.R. § 764.3(a)(2)(i) (2004).
- 227 67 Fed. Reg. 791, 792 (2002) (prefatory comments to final rule). See also the EM Loan Handbook, page 9-5, para. 162.B (Feb. 8, 2002).
- 228 EM Loan Handbook, page 9-4, para. 162.B (May 7, 2002).
- 229 EM Loan Handbook, page 9-4, para. 162.B (May 7, 2002).
- 230 7 C.F.R. § 764.3(a)(2)(iii) (2004).
- 231 7 C.F.R. § 764.2, “Household contents” (2004).
- 232 7 C.F.R. § 764.3(a)(2)(iv) (2004).
- 233 7 C.F.R. § 764.3(a)(2)(ii) (2004).
- 234 7 C.F.R. § 764.3(a)(2)(ii) (2004).
- 235 7 C.F.R. § 764.3(a)(2)(v) (2004).
- 236 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 237 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule).
- 238 7 C.F.R. § 764.2, “Essential family household expenses” (2004).
- 239 7 C.F.R. § 764.3(b)(2) (2004).
- 240 EM Loan Handbook, page 9-5, para. 162.B (Feb. 8, 2002).
- 241 7 C.F.R. § 764.3(a)(2)(vi) (2004).
- 242 7 U.S.C. § 1942(a)(9)(A) (made applicable to EM loans by 7 U.S.C. § 1963); 7 C.F.R. § 764.3(a)(2)(vi) (2004).
- 243 EM Loan Handbook, page 9-6, para. 162.B (May 7, 2002).
- 244 Restructuring includes, for this purpose, receiving an FSA guarantee of the debt if the creditor is eligible.
- 245 EM Loan Handbook, page 9-6, para. 162.B (May 7, 2002).
- 246 EM Loan Handbook, page 9-7, para. 162.B (Feb. 8, 2002).
- 247 This refers to loan servicing under 7 C.F.R. part 1951, subpart S, and set aside under 7 C.F.R. part 1951, subpart T (2004).
- 248 EM Loan Handbook, page 9-6, para. 162.B (May 7, 2002).
- 249 7 C.F.R. § 764.3(b) (2004).
- 250 7 C.F.R. § 764.3(b)(2) (2004).

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- 251 7 C.F.R. § 764.3(b)(2) (2004).
- 252 EM Loan Handbook, page 9-9, para. 162.C (Feb. 8, 2002).
- 253 7 C.F.R. § 764.3(b)(5) (2004).
- 254 7 C.F.R. § 764.2, "Essential family household expenses" (2004).
- 255 7 C.F.R. § 764.3(b)(4) (2004).
- 256 7 C.F.R. § 764.3(b)(1) (2004).
- 257 7 C.F.R. § 764.3(b)(1) (2004).
- 258 EM Loan Handbook, page 9-8, para. 162.C (Feb. 8, 2002).
- 259 EM Loan Handbook, page 9-8, para. 162.C (Feb. 8, 2002).
- 260 EM Loan Handbook, page 9-9, para. 162.C (Feb. 8, 2002).
- 261 EM Loan Handbook, page 9-9, para. 162.C (Feb. 8, 2002).
- 262 7 C.F.R. § 764.3(b)(7) (2004).
- 263 7 C.F.R. § 764.2, "Working capital" (2004).
- 264 7 C.F.R. § 764.3(b)(6) (2004).
- 265 7 C.F.R. § 764.3(b)(6) (2004).
- 266 EM Loan Handbook, page 9-10, para. 162.C (May 7, 2002).
- 267 Restructuring includes, for this purpose, receiving an FSA guarantee of the debt if the creditor is eligible.
- 268 EM Loan Handbook, page 9-10, para. 162.C (May 7, 2002).
- 269 EM Loan Handbook, pages 9-10 through 9-11, para. 162.C (May 7, 2002).
- 270 This refers to loan servicing under 7 C.F.R. part 1951, subpart S, and set aside under 7 C.F.R. part 1951, subpart T (2004).
- 271 EM Loan Handbook, page 9-10, para. 162.C (May 7, 2002).
- 272 7 C.F.R. § 764.3(b)(3) (2004).
- 273 EM Loan Handbook, page 9-11, para. 162.C (May 7, 2002).
- 274 EM Loan Handbook, page 9-11, para. 162.C (May 7, 2002).
- 275 7 C.F.R. § 764.5(a)(1) (2004).
- 276 7 C.F.R. § 764.5(a)(2) (2004).

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- 277 7 C.F.R. § 764.5(a)(2) (2004).
- 278 7 C.F.R. § 764.5(a)(2) (2004). These requirements are set out at 7 C.F.R. part 1924, subpart A (2004).
- 279 7 C.F.R. § 764.5(a)(3) (2004).
- 280 7 C.F.R. § 764.5(a)(3) (2004).
- 281 FSA Notice BU-673, "September 2004 Interest Rate Changes for Agricultural Credit Insurance Fund (ACIF) Program" (Aug. 23, 2004) (set to expire Oct. 1, 2004). The rate is listed under "Actual Loss" Emergency Loans.
- 282 If the loan rate does change, the farmer is entitled to have the rate which is in effect upon loan approval or loan closing, whichever is lower. 7 C.F.R. § 764.6 (2004).
- 283 7 C.F.R. § 764.6 (2004).
- 284 7 C.F.R. § 764.7 (2004).
- 285 7 C.F.R. § 764.7(a) (2004).
- 286 7 C.F.R. § 764.7(e) (2004).
- 287 7 C.F.R. § 764.7(e) (2004).
- 288 EM Loan Handbook, page 9-34, para. 167.E (Feb. 8, 2002).
- 289 7 C.F.R. § 764.7(d) (2004). This category includes, but is not limited to, property with an expected life of one to seven years.
- 290 7 C.F.R. § 764.7(d) (2004).
- 291 7 C.F.R. § 764.7(d) (2004).
- 292 EM Loan Handbook, page 9-33, para. 167.D (Feb. 8, 2002).
- 293 7 C.F.R. § 764.7(c) (2004).
- 294 7 C.F.R. § 764.7(c) (2004).
- 295 EM Loan Handbook, page 9-32, para. 167.C (Feb. 8, 2002).
- 296 7 C.F.R. § 764.7(c) (2004).
- 297 7 C.F.R. § 764.7(b) (2004).
- 298 EM Loan Handbook, page 9-32, para. 167.B (Feb. 8, 2002).
- 299 EM Loan Handbook, page 9-32, para. 167.B (Feb. 8, 2002).

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- ³⁰⁰ EM Loan Handbook, page 9-33, para. 167.D (Feb. 8, 2002); EM Loan Handbook, page 9-34, para. 167.E (Feb. 8, 2002).
- ³⁰¹ EM Loan Handbook, page 9-33, para. 167.D (Feb. 8, 2002); EM Loan Handbook, page 9-34, para. 167.E (Feb. 8, 2002).
- ³⁰² 7 C.F.R. § 764.8(a)(1) (2004).
- ³⁰³ 7 C.F.R. § 764.2, "Feasible plan" (2004).
- ³⁰⁴ 7 C.F.R. § 764.2, "Feasible plan" (2004).
- ³⁰⁵ 7 C.F.R. § 764.2, "Feasible plan" (2004).
- ³⁰⁶ 7 C.F.R. § 764.2, "Feasible plan" (2004). The wage or family living expenses must be "in accordance with essential family needs."
- ³⁰⁷ EM Loan Handbook, page 9-35, para. 168.A (Feb. 8, 2002).
- ³⁰⁸ 7 C.F.R. § 764.8(b), (c) (2004).
- ³⁰⁹ 7 C.F.R. § 764.8 (2004).
- ³¹⁰ 7 C.F.R. § 764.8(a)(2) (2004).
- ³¹¹ 7 C.F.R. §§ 764.2, "Adequate security," 764.8(a)(2) (2004).
- ³¹² 7 C.F.R. § 764.8(a)(2) (2004).
- ³¹³ 7 C.F.R. § 764.8(b) (2004).
- ³¹⁴ 7 C.F.R. § 764.8(c) (2004).
- ³¹⁵ 7 C.F.R. § 764.8(g)(1)(ii) (2004).
- ³¹⁶ 7 C.F.R. § 764.8(a)(3) (2004).
- ³¹⁷ 7 C.F.R. § 764.8(a)(3) (2004).
- ³¹⁸ 7 C.F.R. § 764.8(g)(2)(i) (2004).
- ³¹⁹ 7 C.F.R. § 764.8(g)(2)(ii) (2004).
- ³²⁰ 7 C.F.R. § 764.8(h)(3) (2004); EM Loan Handbook, page 9-39, para. 168.G (Feb. 8, 2002).
- ³²¹ 7 C.F.R. § 764.8(g)(2)(iii) (2004).
- ³²² 7 C.F.R. § 764.8(h)(4) (2004).
- ³²³ See 7 C.F.R. § 1945.169(d)(7) (2002).
- ³²⁴ 1999 Appropriations Act § 802 (codified at 7 U.S.C. § 1964(d)(2)(A)).

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- ³²⁵ The regulatory provisions regarding this issue remained unchanged after the 1999 Appropriations Act until the new EM loan regulations were finalized in January 2002. Until then, FSA's changes in policy could be found in FSA Notice FLP-88, "Statutory and Administrative Changes to Emergency (EM) Loan Processing Regulations," 3.B (Oct. 18, 1999) (expired Oct. 1, 2000).
- ³²⁶ 7 C.F.R. § 764.8(f)(1) (2004). Property that presents liability concerns for FSA or for which no valid lien is available is excluded from this requirement.
- ³²⁷ 67 Fed. Reg. 791, 794 (2002) (prefatory comments to proposed rule); EM Loan Handbook, page 9-38, para. 168.F (Feb. 8, 2002).
- ³²⁸ 7 C.F.R. § 764.8(f) (2004).
- ³²⁹ 7 C.F.R. § 764.8(f) (2004).
- ³³⁰ 7 C.F.R. § 764.8(f), (f)(2) (2004).
- ³³¹ 7 C.F.R. § 764.8(f)(2) (2004).
- ³³² 7 C.F.R. § 764.8(f)(2) (2004).
- ³³³ 7 C.F.R. § 764.8(f)(3) (2004).
- ³³⁴ EM Loan Handbook, page 9-38, para. 168.F (Feb. 8, 2002). Net farm income will be determined by subtracting all cash farm expenses from all farm income reported on the farmer's federal income tax return. Depreciation shown on Schedule F of a federal income tax return will not be included as an expense.
- ³³⁵ EM Loan Handbook, page 9-38, para. 168.F (Feb. 8, 2002).
- ³³⁶ 7 C.F.R. § 764.8(f)(4) (2004).
- ³³⁷ 7 C.F.R. § 764.8(a)(2) (2004).
- ³³⁸ 7 C.F.R. § 764.8(a)(2) (2004).
- ³³⁹ 7 C.F.R. §§ 764.2, "Additional security," 764.8(a)(2) (2004).
- ³⁴⁰ 7 U.S.C. § 1964(d)(2)(B).
- ³⁴¹ EM Loan Handbook, page 9-35, para. 168.B (Feb. 8, 2002).
- ³⁴² EM Loan Handbook, page 9-35, para. 168.B (Feb. 8, 2002).
- ³⁴³ 7 C.F.R. § 764.8(h) (2004).
- ³⁴⁴ 7 C.F.R. § 764.8(h)(1) (2004).

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- 345 7 C.F.R. § 764.8(h)(2) (2004).
- 346 7 C.F.R. § 764.8(h)(3) (2004).
- 347 7 C.F.R. § 764.8(h)(4) (2004).
- 348 7 C.F.R. § 764.8(h)(4) (2004).
- 349 7 C.F.R. § 764.8(g)(1)(i), (g)(2)(iv) (2004). If the total value of all the farmer's nonessential assets is \$5,000 or less, FSA will not require a lien. FSA will likely value non-essential assets according to their market value rather than replacement value or cost.
- 350 7 C.F.R. § 764.8(g)(1) (2004).
- 351 EM Loan Handbook, page 9-36, para. 168.B (Feb. 8, 2002).
- 352 7 C.F.R. § 764.2, "Non-essential asset" (2004).
- 353 EM Loan Handbook, page 9-36, para. 168.B (Feb. 8, 2002).
- 354 7 C.F.R. § 764.8(j) (2004). These requirements are set out at 7 C.F.R. § 1943.19(a)(7) (2004).
- 355 7 C.F.R. § 764.8(d) (2004).
- 356 7 C.F.R. § 764.8(d)(1) (2004).
- 357 7 C.F.R. § 764.8(d)(1)(i)-(iii) (2004).
- 358 7 C.F.R. § 764.8(d)(2) (2004).
- 359 7 C.F.R. § 764.8(d)(3) (2004).
- 360 EM Loan Handbook, page 9-42, para. 170.B (May 7, 2002).
- 361 7 C.F.R. § 1945.169(a)(1)(ii)(B) (2002).
- 362 7 C.F.R. § 764.8(e) (2004).
- 363 7 C.F.R. § 764.2, "Security value" (2004).
- 364 7 C.F.R. § 764.9(a) (2004). The appraisal may be performed by a designated FSA appraiser or by a private appraiser on contract with FSA. FSA appraisal requirements can be found at 7 C.F.R. § 761.7.
- 365 EM Loan Handbook, page 9-42, para. 171.A (May 7, 2002).
- 366 7 C.F.R. § 764.9(b)(2) (2004). FSA appraisal requirements can be found at 7 C.F.R. § 761.7 (2004).

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- 367 7 C.F.R. § 1945.169(a)(1)(iii)(A) (2002).
- 368 7 C.F.R. § 764.9(b)(1) (2004).
- 369 7 C.F.R. § 764.9(b)(1) (2004); 67 Fed. Reg. 791, 794 (2002) (prefatory comments to final rule).
- 370 7 U.S.C. § 1964(d)(1); 7 C.F.R. § 764.9(c) (2004).
- 371 7 C.F.R. § 764.8(i)(1) (2004).
- 372 7 C.F.R. § 764.8(i)(2) (2004).
- 373 7 C.F.R. § 764.8(i)(2) (2004).
- 374 7 C.F.R. § 764.10 (2004).
- 375 7 C.F.R. § 764.10(a) (2004).
- 376 7 C.F.R. § 764.10(d) (2004).
- 377 7 C.F.R. § 764.10(d)(1) (2004). EM loans are not considered emergency crop loss assistance for this purpose. See FSA Notice FC-39, "Federal Agriculture Improvement and Reform Act (1996 Farm Bill) Provisions Affecting Requirement for CAT Coverage," Exhibit 1 (FSA 570), "Waiver of Eligibility for Emergency Assistance" (Apr. 11, 1996).
- 378 7 C.F.R. § 764.10(d)(1) (2004).
- 379 EM Loan Handbook, page 9-44, para. 172.D (Feb. 8, 2002).
- 380 7 C.F.R. § 764.10(d)(2) (2004).
- 381 7 C.F.R. § 764.10(e)(2) (2004).
- 382 7 C.F.R. § 764.10(b) (2004). "Readily available" means that the insurance is sold by agents in the farmer's normal trade area.
- 383 7 C.F.R. § 764.2, "Hazard insurance" (2004).
- 384 Pub. L. No. 106-387, § 1(a), 114 Stat. 1549 (Oct. 28, 2000) (incorporating by reference H.R. 5426, Title VIII, § 833) (codified at 7 U.S.C. § 1961(b)(3)).
- 385 Pub. L. No. 106-387, § 1(a), 114 Stat. 1549 (Oct. 28, 2000) (incorporating by reference H.R. 5426, Title VIII, § 833) (codified at 7 U.S.C. § 1961(b)(3)(A), (B)).
- 386 42 U.S.C. § 4012a. Through the National Flood Insurance Program, the Federal Emergency Management Agency (FEMA) designates special flood or

mudslide prone areas and oversees the offering of flood insurance in communities where it is required. 44 C.F.R. pt. 59 (2003).

387 These regulations can be found at 7 C.F.R. part 1806, subpart B.

388 7 C.F.R. § 764.10(c) (2004).

389 7 C.F.R. § 764.10(e)(1) (2004).

390 7 C.F.R. § 764.11 (2004).

391 EM Loan Handbook, page 9-48, para. 176.A (Feb. 8, 2002).

392 EM Loan Handbook, page 9-50, para. 177.B (Feb. 8, 2002).

393 EM Loan Handbook, page 9-50, para. 177.B (Feb. 8, 2002).

394 7 U.S.C. § 1508(n). This restriction does not apply to additional crop insurance coverage purchased by the farmer above the minimum CAT level.

395 7 U.S.C. § 7333(i)(3).

396 See FSA Notice FC-207, "Multiple Benefits on Emergency (EM) Loans" (Aug. 19, 1998) (rescinded by FSA Notice FLP-10, "Statutory Changes Because of FY 1999 Appropriations Legislation" (Dec. 4, 1998) (expired Oct. 1, 1999)). FSA Notice FLP-10 was superseded by FSA Notice FLP-88, "Statutory and Administrative Changes to Emergency (EM) Loan Processing Regulations," 3.A (Oct. 18, 1999) (expired Oct. 1, 2000).

397 1999 Appropriations Act, Title VIII, § 803 (amending 7 U.S.C. §§ 1508(n), 7333(i)(3)).

398 See EM Loan Handbook, page 9-27, para. 165.C (May 7, 2002).

399 7 C.F.R. § 780.6 (2004).

400 7 U.S.C. § 6996(a). Farmers may also ask FSA to reconsider EM loan adverse decisions. 7 C.F.R. § 780.2(b) (2004).

401 7 C.F.R. § 11.3 (2004). An "adverse decision" is defined as

an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within

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a reasonable time if timeframes are not specified in such statutes or regulations.

7 C.F.R. § 11.1, “Adverse decision” (2004).

⁴⁰² 7 C.F.R. pt. 11 (2004). FSA regulations related to NAD appeals are set out at 7 C.F.R. part 780.

⁴⁰³ 7 C.F.R. § 11.6(b)(1) (2004). For a detailed discussion of NAD procedures, see *USDA’s National Appeals Division Practice and Procedures* by FLAG attorney Karen Krub, available on the Internet at www.flaginc.org/pubs/arts/NADarticle_NatlAgLawCtr2003.pdf, or contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, Minnesota, 55101; or by electronic mail at lawyers@flaginc.org.

⁴⁰⁴ 15 U.S.C. § 1691(a).

⁴⁰⁵ 7 C.F.R. § 15d.2(a) (2004).