


For: County Offices

**Cash and Share Lease Provisions for Future Farm Programs, Advance Notice
of Proposed Rulemaking, Federal Register, Vol. 72, No. 188, Dated
September 28, 2007**

Approved by: John A. Stevenson, State Executive Director



RLB/CTF/KAW

1 Overview

A Background

Landlords and tenants are developing farm leases that are neither strictly crop share or cash rent leases. These new type of leases may contain traits of both a share and cash rent lease. These leases are called “combination” or “flex” leases.

B Purpose

The purpose of this notice is to provide County Offices with a copy of the Advance Notice of Proposed Rulemaking for “Cash and Share Lease Provisions for Future Farm Programs”, as published in the Federal Register, Vol. 72, No. 188, September 28, 2007 (See Exhibit 1 of this notice).

2 Action

A. County Office Action

County Offices Shall:

- Review Exhibit 1 of this notice with County Committee members and staff
- Note the comment period ends November 24, 2007
- Refer questions on specific program issues to the applicable program section, through your District Director.

Disposal	Distribution
April 1, 2008	County Offices, DD's and MPA's

Proposed Rules

Federal Register

Vol. 72, No. 188

Friday, September 28, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 718

Commodity Credit Corporation

7 CFR Parts 1412 and 1427

RIN 0560-AH75

Cash and Share Lease Provisions for Future Farm Programs

AGENCIES: Farm Service Agency and Commodity Credit Corporation, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This advance notice of proposed rulemaking seeks comments with respect to the manner in which so-called "combination" or "flex" leases are viewed by the Department of Agriculture in the administration of various programs that are administered by the Farm Service Agency (FSA) and the Risk Management Agency (RMA). This includes those programs of the Commodity Credit Corporation (CCC) that are administered by FSA on behalf of CCC and those programs of the Federal Crop Insurance Corporation (FCIC) that are administered by RMA on behalf of FCIC. Changes have occurred within agriculture that relate to the types of leases. A traditional crop share lease is a lease where the landlord receives a share of the crop production in full satisfaction of the rent. A traditional cash lease is a lease where the tenant pays the landlord a set cash amount regardless of the quantity of the tenant's production of a crop. New types of leases may contain traits of both a share lease and a cash lease. Accordingly, existing program provisions may not accurately and appropriately take these new lease types into consideration.

DATES: We will consider comments that we receive by November 27, 2007.

ADDRESSES: We invite you to submit comments on this advance notice of

proposed rulemaking. In your comment, include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

E-Mail:

Salomon.Ramirez@wdc.usda.gov.

Mail: Director, Production, Emergencies, & Compliance Division, Farm Service Agency (FSA), United States Department of Agriculture (USDA), STOP 0517, 1400 Independence Avenue, SW., Washington, DC 20250-0517.

Fax: Submit comments by facsimile transmission to (202) 690-2130.

Hand Delivery or Courier: Deliver comments to the above address.

Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Comments may be inspected in the Office of the Director, PECD, FSA, USDA, Room 3752-S, South Building, Washington, DC, between 8 a.m. and 4:30 p.m. Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Salomon Ramirez, Director, Production Emergencies and Compliance Division, USDA FSA PECD, STOP 0517, 1400 Independence Avenue, SW., Washington, DC 20250-0517, (202) 720-7641, e-mail: *Salomon.Ramirez@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The purpose of this advance notice of proposed rulemaking is to obtain comments with respect to the manner in which so-called "combination" or "flex" leases are viewed by the Department of Agriculture in the administration of various programs that are administered by RMA and FSA, including those programs of CCC that are administered by FSA on behalf of CCC and those programs of FCIC that are administered by RMA on behalf of FCIC. In order to make timely decisions as to whether changes in program provisions are needed to reflect changes in landlord-tenant lease arrangements with respect to programs that may be authorized by Congress with respect to the 2008 crop year.

The desire to obtain comments on this matter is based upon several considerations for FSA and RMA programs.

Significant changes are occurring within agriculture due to increases in land values, input costs, and commodity prices. In attempt to share the direct and indirect impacts of these and related costs, landlords and tenants have formulated leases that are neither a strict crop share lease (that is, a lease where the landlord receives a share of the crop production in full satisfaction of the rent) nor a cash lease (that is, a lease where the landlord receives a set cash amount regardless of the quantity of production of a crop achieved by the tenant). Rather, these new types of leases may contain traits of both a share lease and a cash lease. Accordingly, existing program provisions may not accurately and appropriately take these new lease types into consideration.

FCIC crop insurance policies provide coverage to persons who have an insurable interest in the crop. Generally, a cash rent landlord does not have such an interest, but a share rent landlord does. Thus, leases that have attributes of both a cash lease and a share lease raise the issue of whether the landlord has an insurable interest and, if so, what percentage of the crop production should be considered to be insurable by the landlord.

Over the course of the past 25 years, FSA has been aware of situations where non-traditional leases have been used by persons in attempts to avoid the impact of statutory payment limitation provisions. Generally, in the making of commodity program payments subject to these limitations, FSA looks to the division of crop production as specified in a lease to determine to whom these payments should be paid and accounted for under statutory payment limitation provisions. Thus, FSA takes these concerns into account in relation to the considerations listed above.

FSA and RMA are engaged in efforts to have compatible, if not uniform, terms and conditions between our programs wherever possible. This is of particular importance with respect to the administration of FCIC crop insurance policies and the simultaneous implementation by FSA of the Noninsured Crop Disaster Assistance Program (NAP), where the same crop loss may trigger assistance under FCIC crop insurance policies and under FSA-administered programs.

Types of Leases

Currently, for FSA and RMA programs, three categories of leases are considered: Cash leases, share leases, and combination leases.

A cash lease is a lease in which the tenant agrees to pay to the landlord a set sum of money for the right to use specified land. A cash lease also includes those leases where an in-kind payment is made to the landlord for a specifically agreed upon quantity of an agricultural commodity and title to that quantity must be provided to the landlord by the tenant regardless of the quantity of crops produced on the leased land. In cash leases, the payment must be made regardless of the quantity of crops produced on such land and without regard to the price received for the production of the commodity. The payment of the rent may be made at anytime during the year, either before or after access to the land is provided by the landlord.

A share lease is a lease in which the tenant agrees to provide to the landlord a specified percentage of the crops produced on the leased land. If there is no production, the landlord receives nothing in return for the use of the land.

A combination lease is a lease that contains attributes of both a cash lease and a share lease. Examples of such leases would include those that provide:

- A fixed cash payment of \$150 per acre plus 10 percent of the crop production from the leased land.
- A fixed cash payment of \$150 per acre plus one-half of the bushels above 150 bushels per acre produced on the farm.
- A fixed cash payment of \$150 per acre plus 10 bushels per acre if the crop produces above 150 bushels per acre on the farm.
- A fixed cash payment of \$150 per acre plus \$0.50 per bushel if the corn price received by the operator exceeds \$3.50 per bushel.
- A fixed cash payment of \$150 per acre plus \$30 per acre if the gross revenue of the crop produced on the farm exceeds \$500 per acre.
- A fixed cash payment of \$150 per acre plus \$30 per acre if the county average yield exceeds 150 bushels per acre.
- A fixed cash payment of \$150 per acre plus \$10 per acre if the Chicago Board of Trade futures for October delivery exceeds \$4.00 per bushel.
- A rental term where the landlord receives one-third of all crops produced on the leased land plus \$25 dollar per acre if production is greater than 130 percent of the historical crop yield for the leased land.

- A rental term where the landlord receives one-third of all crops produced on the leased land plus \$50 dollar per acre if the market price received by the tenant exceeds a set dollar amount.

Current Treatment of Leases by FSA and CCC in Provisions Applicable to Multiple Programs

The FSA regulations in 7 CFR 718.2 defines a producer as an owner, operator, landlord, tenant, or sharecropper who shares in the risk of producing a crop and who is entitled to share in the crop available for marketing from the farm or would have shared had the crop been produced. A producer also includes a grower of hybrid seed.

The Farm Security and Rural Investment Act of 2002 requires that the Secretary of Agriculture provide adequate safeguards to protect the interests of tenants and sharecroppers and provides for the sharing of payments for Direct and Counter-Cyclical Program (DCP) among the producers on a farm on a fair and equitable basis. The regulations in 7 CFR 1412.402(a) define an eligible producer for DCP purposes as:

- (1) An owner of a farm who assumes all or a part of the risk of producing a crop;
- (2) A producer, other than an owner, on a farm with a share-rent lease for such farm, regardless of the length of the lease, if the owner of the farm enters into the same contract;
- (3) A producer, other than an owner, on a farm who cash rents such farm under a lease expiring on or after September 30 of the year of the contract in which case the owner is not required to enter into the contract;
- (4) A producer, other than an owner, on an eligible farm who cash rents such farm under a lease expiring before September 30 of the year of the contract. The owner of such farm must also enter into the same contract; or
- (5) An owner of an eligible farm who cash rents such farm and the lease term expires before September 30 of the year of the contract, if the tenant declines to enter into a contract for the applicable year. In the case of an owner covered by this paragraph, direct and counter-cyclical payments will not begin under the contract until the lease held by the tenant ends.

The regulations in 7 CFR 1412.504 currently outline provisions regarding the sharing of DCP payments, including the conditions upon which a lease is considered a cash or share lease. Program regulations do not prohibit the use of any type of lease agreement, but the type of lease arrangement determines who is eligible to receive a

share of the payments. The regulations in 7 CFR 1412.504 provide the following:

Each eligible producer on a farm will be given the opportunity to annually enroll in a contract and receive direct and counter-cyclical payments determined to be fair and equitable as agreed to by all the producers on the farm and approved by the county committee.

Each producer must provide a copy of their written lease to the county committee and, in the absence of a written lease, must provide to the county committee a complete written description of the terms and conditions of any oral agreement or lease.

A lease will be considered to be a cash lease if the lease provides for only a guaranteed sum certain cash payment, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).

If a lease contains provisions that require the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or the interest such producer would have had if the crop had been produced, or combination thereof, such agreement will be considered to be a share lease. The leasing of grazing or haying privileges is not considered cash leasing.

If a lease provides for the greater of a guaranteed amount or share of the crop or crop proceeds, such agreement shall be considered a share lease if the lease provides for both:

- (1) A guaranteed amount such as a fixed dollar amount or quantity; and
- (2) A share of the crop proceeds.

If the lease is a cash lease, the landlord is not eligible for direct or counter-cyclical payments.

When contract acreage is leased on a share basis, neither the landlord nor the tenant shall receive 100 percent of the contract payment for the farm.

CCC will approve a contract for enrollment and approve the division of payment when all of the following apply:

- (1) The landlords, tenants and sharecroppers sign the contract and agree to the payment shares shown on the contract;
- (2) CCC determines that the interests of tenants and sharecroppers are being protected; and
- (3) CCC determines that the payment shares shown on the contract do not circumvent the provisions of 7 CFR part 1400.

These regulations do not prevent tenants and landowners from taking advantage of the various types of leases, including the combination leases,

available in order to adjust for the changing market conditions. The conditions set forth in the lease determine whether the arrangement is considered a share-rent or cash-rent situation for DCP program participation and dictates who is eligible to share in DCP program benefits.

Current Treatment of Leases by RMA and FCIC

RMA and FCIS's Loss Adjustment Manual (LAM) Standards Handbook (FCIC-25010) provides the procedural guidance for verifying or determining the insurable share or interest of the crop being insured. The LAM is located on the RMA public Web site at http://www.rma.usda.gov/handbooks/25000/2007/07_25010.pdf. Within section 1, 13 Verifying or Determining Insurable Share, of the LAM provides different scenarios for determining whether the arrangement is a "cash lease" or "crop share lease" between the landlord and tenant. Share arrangements may be written or verbal. The procedures for verifying or determining the insurable share are:

100 Percent Crop Share

A 100 percent crop shares lease is a cash lease that includes 100 percent share as owner or operator or land that is rented for cash, a fixed commodity payment, or any consideration other than a share in the crop.

A lease that provides for either a minimum payment (including, but not limited to, a specified amount of cash, bushels, pounds) or a crop share is considered a cash lease (for example, lease provides for a 50/50 crop share or \$100 dollars, whichever is greater).

A lease that contains a crop share, but the percentage is not a fixed amount at the time coverage begins is considered a cash lease. Such leases may contain a cash consideration with an undetermined crop share percentage at the time coverage begins.

Crop Share Lease

In order to have a crop share, the crop share percentage must be specified at the time coverage begins and cannot change based on the amount of production harvested. For examples, see situations 4 and 8 below.

Written or verbal lease agreements containing provisions for both a minimum payment (including, but not limited to, a specified amount of cash, bushels, pounds) and a crop share is considered a crop share lease.

The following nine situations provide examples of share arrangements, including both cash leases and crop share leases.

Situation 1: The tenant (insured) agrees to give the landlord 1/3 of the crop in return for farming the land.

- The agreement is a crop share.
- The insured's share is 2/3 of the crop.

Situation 2: The tenant (insured) agrees to give the landlord 1/3 of all the crops produced on the premises and to guarantee that the landlord's share of the crops will average \$35 an acre. In the event that the landlord's share of the crops is worth less than \$35 an acre, the tenant will pay the difference in cash to the landlord.

- The agreement is a crop share.
- The insured's share is 2/3 of the crop.

Situation 3: The tenant (insured) agrees to give the landlord \$50 per acre cash and 1/4 of the crop in return for farming the land.

- The agreement is a crop share.
- The insured's share is 3/4 of the crop. RMA does not convert the \$50 per acre cash payment to a share basis.

Situation 4: The tenant (insured) agrees to give the landlord \$50 per acre cash and 1/3 of all the bushels in excess of 60 bushels per acre. (Average yields for the area are usually around 55-65 bushels.)

- The agreement is a cash lease.
- The insured's share is 100 percent.

The bushels in excess of the 60 bushels per acre are a "bonus" above and beyond the insured crop. The share percentage of the entire crop cannot be determined at the time coverage begins since it is dependent on how many bushels in excess of 60 bushels will be produced.

Situation 5: The tenant (insured) agrees to give the landlord \$50 per acre cash and 10 bushels per acre.

- The agreement is a cash lease.
- The insured's share is 100 percent.

RMA does not convert the 10 bushels to a percentage share. In this scenario the tenant will pay the landlord a fixed amount, cash (\$50) and commodity (10 bushels per acre).

Situation 6: The tenant (insured) agrees to give the landlord 25¢ for every bushel of peaches harvested.

- The agreement is a cash lease.
- The insured's share is 100 percent.

Because there is no agreement for a set share percentage of the crop at the time coverage begins, the insured's share is considered a cash lease.

Situation 7: The tenant (insured) agrees to pay the landlord \$25 per acre or 1/4 of the crop, whichever is greater.

- The agreement is a cash lease.
- The insured's share is 100 percent.

Since the lease contains an either-or type arrangement, the share is not considered a fixed element of the lease.

Situation 8: The tenant's (insured's) lease agreement states that the tenant will receive the first 85 bushels per acre of corn produced. Of any bushels in excess of 85 bushels per acre, the tenant will receive 60 percent and the landlord will receive 40 percent. The insured's guarantee is 85 bushels and is based on the highest level of coverage that can be elected.

- The agreement is a cash lease.
- The insured's share is 100 percent.

Since the insured receives the first 85 bushels and this amount is the insured's guarantee, 85 bushels is the maximum amount that could be insured under the policy.

Situation 9: The tenant's (insured's) actual production history (APH) is 17.0 tons per acre. The tenant's lease agreement contains the following schedule:

Tons produced	Tenant's share (percent)	Landowner's share (percent)
0-8 tons	98	2
8.1-12.0	96	4
12.1-16.0	94	6
16.1-20.0	90	10
20.1-25.0	88	12
25.1 or more	85	15

- The agreement is a share arrangement since there is no mention of cash.

• The base share is derived from the tenant's (insured's) APH. Therefore, the share percentage range for the insured's (tenant's) APH reported on the acreage report would be 90 percent. Since the share is to be established at the time insurance attaches and both still have a share in the crop at the end of the crop year, the share percentage established at the time insurance attached will be retained for indemnity and premium purposes.

CCC Noninsured Crop Disaster Assistance Program (NAP) Payments

NAP payments are CCC payments made to producers in those areas where RMA policies are not available with respect to the specific crop produced by a producer. Specific regulations have not been defined for NAP regarding cash and share lease agreements. Generally, an eligible producer is determined according to the regulations in 7 CFR 718.2 and is based on whether the tenant or owner shares in the risk of producing the crop.

As such, the regulations governing DCP with regard to cash and share lease agreements are not applicable for NAP.

Ad hoc Disaster Payments

Historically, FSA has followed the determinations made by RMA for insured crops with respect to a given lease in that some disaster payments are simply an additional payment made by using FSA or CCC funds to simply supplement an indemnity payment made under an RMA policy. In those instances, FSA does not review the lease but simply issues a payment using a uniform percentage factor that is applied to the indemnity received by a person.

For noninsured crops, FSA has followed the determinations made for NAP with regard to determining whether the tenant or owner shared in the risk of producing the crop.

Marketing Assistance Loans (MLA) and Loan Deficiency Payments (LDP)

These CCC benefits are available only in the event that a crop is produced on a farm. In order to determine to whom such benefits may be made available, FSA makes a determination of whether a person has "beneficial interest" in the production. Regulations in 7 CFR 1421.6 and 1427.5, All Eligible Commodities Except Upland Cotton, and Upland Cotton, respectively, define beneficial interest as a determination by CCC that a person has the requisite title to and control of the commodity tendered to CCC as collateral for a marketing assistance loan or used to determine a loan deficiency payment. In order to have beneficial interest, a person must be the producer of the commodity and have had ownership and control of the commodity at the time it was planted through the earlier of the date the loan was repaid or the maturity date of the loan.

In making this determination of beneficial interest, FSA takes the terms of a lease into account. Generally, the analysis of the lease for these purposes is the same as that used for DCP payments.

Cash-Rent Tenant Rule

The "cash-rent tenant rule" is a current payment eligibility provision applicable to payments under multiple programs. It applies to any producer that rents land from another for cash or a crop share guaranteed as to the amount of the commodity to be paid in rent. If a producer is considered a cash-rent tenant under this rule, the producer is subject to an additional requirement that may make the producer ineligible for payment even though the producer otherwise meets the requirements to be considered "actively engaged in farming."

Impact on Small and Beginning Producers

Renting land under a flexible lease may be advantageous for a small or beginning producer because risks are shared with the owner. Changes to policies related to leases need to ensure that small or beginning producers may benefit from flexible terms and receive all of the direct and counter-cyclical payments on a farm for which they would otherwise be eligible.

Request for Comments

FSA and RMA are reviewing current regulations to determine the feasibility of developing a standardized regulation for defining cash and share lease agreements, including the conditions upon which a lease shall be considered a cash or share lease.

Accordingly, FSA and RMA are soliciting comments with respect to the manner in which lease agreements are viewed by the Department of Agriculture in the administration of various programs. Specifically, we request comments that would facilitate the implementation of terms and conditions that treat a lease in the same, to the maximum extent possible, and still are consistent with FSA and RMA program requirements. Comments should address the following questions:

1. Should combination or flex leases be treated in the same manner for all FSA/CCC and RMA/FCIC purposes? Explain.
2. What adverse consequences or inequities result from treating combination or flex leases as share leases for FSA/CCC program purposes?
3. What adverse consequences or inequities result from treating combination or flex leases as either cash or share leases, depending on the terms, for RMA/FCIC purposes?
4. How can FSA/CCC ensure that combination or flex lease provisions are not being used to circumvent payment limitation provisions?
5. What measures should FSA/CCC take to protect the interests of tenants and sharecroppers?
6. What should the rule for treatment of combination and flex leases be?

Executive Order 12866

This advance notice of proposed rulemaking has been determined to be not significant under Executive Order

12866 and has been reviewed by the Office of Management and Budget.

Thomas B. Hofeller,
Executive Vice President, Commodity Credit Corporation Administrator, Farm Service Agency.

Eldon Gould,
Administrator, Risk Management Agency Manager, Federal Crop Insurance Corporation.

[FR Doc. 07-4755 Filed 9-27-07; 8:45 am]

BILLING CODE 3410-05-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2007-29334; Directorate Identifier 2006-NM-268-AD]

RIN 2120-AA64

Airworthiness Directives; Airbus Model A330 Airplanes and A340-200 and -300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

All permanent fuselage skin * * * and lap joint doubler * * * repair principles published in the SRM (Structural Repair Manual) * * * have been replaced with Oct/05 Revision by updated, simplified and harmonized repair principles.

These updates led to the de-validation of some repairs and to reassess the repair inspection requirements. This situation if not corrected, can affect the aircraft structural integrity with a possible risk of decompression.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI. **DATES:** We must receive comments on this proposed AD by October 29, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- *Fax:* (202) 493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-