

April 8th, 2020

Rosemarie Drake
Chief 7(a) Program Branch
Office of Financial Assistance, Office of Capital Access
Small Business Administration
409 Third Street, SW
Washington, DC 20416

Submitted via Federal Register at <http://www.regulations.gov/>

Re: Docket No. SBA-2018-0009, RIN 3245-AG74: Express Loan Programs; Affiliation Standards

Dear Ms. Drake,

These comments pertain to the Interim Final Rule to clarify provisions of the Small Business Administration (SBA) 7(a) Loan Program regarding affiliation principles are submitted by the following organizations: the Campaign for Contract Agriculture Reform (CCAR), Farm Aid, Farm and Ranch Freedom Alliance (FARFA), the Food Integrity Campaign (FIC) of Government Accountability Project (GAP), National Family Farm Coalition (NFFC), the Open Markets Institute (OMI), the Rural Advancement Foundation International USA (RAFI-USA), and Ranchers-Cattlemen Action Legal Fund USA (R-CALF USA).

We represent farmers, ranchers, and poultry growers across the United States with a personal stake in this rule and its implications. Each organization listed engages livestock farmers, ranchers, and poultry growers to inform our policy recommendations, as well as, facilitates meetings between Congressional members, representatives of government agencies, and those farmers, ranchers, and poultry growers. Together, we advocate for bringing parity to the contract negotiating process and against the exploitation of farmers, ranchers, and poultry growers in the meat industry.

With this in mind, we are writing to express our gratitude to the Agency for the thoughtful process that produced this interim final rule, the standards defining affiliation, and the criteria by which poultry contracts will be evaluated. We also want to thank the Agency for the opportunity to comment on this interim final rule.

We support this interim final rule and recommend the Agency take a strong stance on affiliation in poultry contracts that reflects the more than 60 years of poultry farmers' public statements, the 2018 SBA OIG report findings on poultry loans, and the research literature references in this comment.

Sincerely,

Campaign for Contract Agriculture Reform (CCAR)¹

Farm Aid²

Farm & Ranch Freedom Alliance (FARFA)³

Food Integrity Campaign (FIC) of Government Accountability Project (GAP)⁴

National Family Farm Coalition⁵

Open Markets Institute (OMI)⁶

Rural Advancement Foundation International USA (RAFI-USA)⁷

Ranchers-Cattlemen Action Legal Fund Stockgrowers of America (R-CALF USA)⁸

¹ CCAR was established in 1999 as an ad hoc coalition of organizations with a shared concern about the effects of vertical integration on farmers and their communities. The coalition actively engages in both legislative and administrative efforts at the federal level to establish basic contract protections and standards for livestock and poultry farmers in their interactions with packers and poultry companies, and to advocate for greater competition in livestock and poultry markets.

² Farm Aid was founded in 1985 to keep family farmers on the land and support a thriving system of family farm agriculture in America. For 35 years, Farm Aid has operated the only national farmer hotline, 1-800-FARM-AID, connecting with farmers and ranchers across the country and working to connect them to the resources they need to thrive. Farm Aid hears from farmers and ranchers everyday who are negatively impacted by growing consolidation in the marketplace and who seek a fair and competitive market for their goods.

³ The Farm and Ranch Freedom Alliance is a Texas-based nonprofit that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems.

⁴ The Food Integrity Campaign is a program of [Government Accountability Project](#) (GAP), a 501(c)(3) nonprofit located in Washington, DC. GAP is the nation's leading whistleblower protection and advocacy organization with a mission to promote corporate and government accountability by protecting whistleblowers, advancing occupational free speech and empowering citizen activists. Founded in 1977, GAP is a nonpartisan, public interest group.

⁵ The National Family Farm Coalition is an alliance of grassroots farmer- and advocate-led groups representing the rights and interests of independent family farmers, ranchers and fishermen in Washington, DC since 1986. Today, NFFC's 42-state membership comprises over 30 state and regional farm and rural organizations.

⁶ The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public.

⁷ RAFI-USA cultivates markets, policies, and communities that support thriving, socially just, and environmentally sound family farms.

⁸ R-CALF USA is the largest trade association that exclusively represents United States cattle farmers and ranchers within the multi-segmented beef supply chain. Its more than 5,300 members reside in 43 states and primarily include cow-calf operators, cattle backgrounders and stockers, and feedlot owners. R-CALF USA works to sustain the profitability and viability of independent U.S. cattle producers. Various main street businesses are associate members of R-CALF USA.

Comments on the Interim Final Rule on Express Loan Program; Affiliation Standards

We appreciate and agree with the newly expanded “identity of interest” regulations, which include businesses that are economically dependent through contractual relationships. We agree with the interim final rule that if a “small business Applicant derived more than 85 percent of its revenue from another business over the previous three fiscal years, SBA would find that the small business Applicant is economically dependent on the other business and, therefore, that the two businesses are affiliated.” This threshold makes rational sense that a small business applicant would be an affiliate of the larger entity if such a high level of economic dependence existed.

We also applaud the Agency for noting that the unique relationship between poultry farmers and large poultry producers (integrators) necessitates an equally unique standard of evaluation. The modern poultry industry has evolved in such a way that it relies on contracts which bestow near total control to the integrator while transferring liability and extreme debt to farmers without protections or guarantee of profitability.

Therefore, we appreciate that SBA is proposing to review contracts between poultry farms and integrators to determine whether “the buyer does not have control or the power to control the seller.” We appreciate the criteria that SBA will consider when reviewing contractual relationships to determine control or the power to control. These criteria appear to be consistent with the findings of the 2018 SBA Office of Inspector General’s (OIG) evaluation report and with evaluating the types of contracts pervasive throughout the poultry industry.

In this report, the OIG noted that “[poultry] growers did not meet regulatory and SBS requirements for eligibility... integrators exercised such comprehensive control over the growers that the SBA OIG believes the concerns were affiliated.”⁹

In regards to the poultry industry, there are a number of factors that contribute to extreme control of poultry farmers by integrators and, therefore, result in extreme affiliation between these two groups. The OIG report found that integrators exercise comprehensive control over poultry farmers through “contractual mandates and restrictions, management agreements, operating procedures, oversight, inspections and market controls” that make it virtually impossible for poultry farmers to manage their operation absent of integrator mandates. This finding is heavily supported by government, research, and trade publications.

When considering whether or not integrators have control or the ability to control in the poultry industry two of the most important factors to consider are market controls and contractual mandates. Due to extreme market consolidation that has occurred in the poultry industry, integrators have extreme negotiating power and, therefore, control. For example, consolidation within the poultry industry has been so extreme such that a 2012 study found that 24.5 percent of all poultry farmers have only one integrator

⁹ U.S. Small Business Administration Office of Inspector General, *Evaluation of SBA 7(A) Loans Made to Poultry Farmers*, March 6, 2018. Washington, DC: 2018.

available in their area and 28.7 percent have two integrators in their area. Therefore, 53.2 percent of the contract poultry industry have two or fewer integrators available.¹⁰

This extreme market power creates extreme imbalances of negotiating power that results in one-sided contracts with extreme integrator control. These contracts are “take-it-or-leave-it” to the point that poultry farmers are not capable of independently implementing farm management practices for fear of losing their contract and their means of loan repayment. As an example, research often describes issues created by relationship-specific investments. Relationship-specific investments are investments that have more value within the contracting relationship than outside the relationship. Relationship-specific investments are common in the contract poultry industry, are costly for the investing party (farmers), make it difficult for the investing party to switch contracting partners (integrators), and increase the negotiating power and control of the non-investing party (integrator).¹¹

These relationship-specific investments also “lock-in” investing parties into the contracting relationship. In agricultural economics terms relationship-specific investments and locking-in are forms of ex post market power which increases the control of the non-investing party (integrators). In everyday terms, the lived reality of these poultry farmers, these are integrator specific upgrades required by the “additional capital investment” clauses of their contracts which make it nearly impossible to escape debt or present an unreasonable burden to change contracting integrators.

For decades farmers have made complaints to the Federal government about the level of control integrators have over their operations and their ability to earn profit.^{12 13} This interim final rule accurately interprets the first-hand testimonials of poultry farmers, the literature of the agricultural economics community, and its own OIG report in this proposed rule.

However, more clarity is required for the second exception to the economic-dependence affiliation rule. Under the current second exception SBA lays out six factors. While these factors are sufficient for determining a contracting integrator’s control or ability to control more clarity on how these factors will be weighted is necessary. It is our belief that SBA should extend to these factors the same concept of totality of circumstances that are noted in section 121.301(f)(6). Under the concept of totality of circumstance, no single factor would outweigh the control evident in other factors. While rationalizations can be made for the control evident under some factors the totality of control exercised under all factors should be considered when making a determination of affiliation.

¹⁰ James M. MacDonald and Nigel Key, “Market Power in Poultry Production Contracting? Evidence from a Farm Survey,” *Journal of Agri. and Applied Econo.*, 44, 4, November, 477-490, 2012.

¹¹ Steven Wu and James MacDonald, “Economics of Agricultural Contract Grower Protection Legislation,” *Choices*, Third Quarter, 2015.

¹² William Boyd and David Watts, *GLOBALISING FOOD Agrarian Questions and Global Restructuring*, (London, Routledge, 1997) 155.

¹³ U.S. Dept. of Justice, *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward*, 2012.

Conclusion

As noted in SBA's mission, "The SBA was created... to preserve free competitive enterprise and to maintain and strengthen the overall economy of our nation." Therefore, we believe this interpretation of affiliation will support more competitive enterprises, more responsible use of the SBA 7(a) loan guarantee program, and is more in line with the Agency's mission.

Finally, it is important to restate the conclusions of the 2018 SBA OIG report, "[OIG] found that integrators exercised significant control over the growers' operations, broiler houses, equipment, and grounds. In addition, [OIG] found that the growers' economic viability and facility value depended on a performing contract with the integrator. As such, affiliation was evident."¹⁴

We look forward to working with SBA to support thriving small businesses and create open, fair, and transparent markets for farmers, ranchers, and poultry growers.

¹⁴ U.S. SBA OIG, *Evaluation of SBA 7(A) Loans Made to Poultry Farmers*, 9.