



Agribusiness Alert: Market Facilitation Program Payments as Collateral

February 13, 2019

Market Facilitation Program

The federal government has historically provided a variety of support programs for farmers. The programs have included price support programs, commodity set-asides, production controls, payment-in-kind programs, loan deficiency programs, and, most recently, disaster relief, direct payments, non-recourse marketing assistance loans, and subsidized crop/revenue insurance, and now, the Market Facilitation Program (MFP). The MFP is a federal farm program administered through the Farm Service Agency (FSA), which is an agency within the United States Department of Agriculture. The MFP provides "payments to farmers with commodities that have been significantly impacted by actions of foreign governments resulting in the loss of traditional exports."^[1] The MFP payments are supplemental payments to farmers based on certified 2018 crop production. The payment amounts are significant. For instance, farmers are eligible for \$1.65/bushel for certified 2018 soybean production. ***The original deadline to apply was January 15, 2019, but the deadline has been extended to February 14, 2019, because of the recent federal government shutdown.***

How to Properly Perfect a Security Interest in the Market Facilitation Program Payments

As diverse as the federal farm programs have been over the years, so has the manner and mechanism to perfect a security interest in these federal farm program payments. The MFP is a new farm program. ***There are no reported legal cases as to the proper perfection of a security interest in the MFP payments.*** The MFP is a supplemental payment to farmers for their 2018 crops. Stated differently, the payments are a substitute for proceeds of the crop which logically would have been received by the farmer had the recent and ongoing trade wars not occurred. As such, the MFP payments are analogous to disaster relief payments; payments made to farmers and ranchers to substitute for proceeds of the crops or livestock that the farmer or rancher would have otherwise received not for the disaster. Disaster relief payments are considered the proceeds of the crop or livestock. If a lender has a perfected security interest in the crops (or farm products) of the farmer, the perfected security interest would include the disaster relief payments.^[2]



The distinguishing factor is whether the federal farm program payment amount is determined based on the production of an existing crop or, instead, in substitution of not planting a crop. Minnesota has adopted this reasoning.[3] For this reason, it is our position that a lender is perfected as to the MFP if the lender has a security interest in the specific crop (or "farm products") of the farmer and perfected its security interest by filing a UCC-1 with the appropriate state secretary of state as to the "farm products" of the farmer. A lender should review the security agreement and UCC-1 filing, or take steps necessary to have a security agreement signed and UCC-1 filed, to verify that the lender is properly perfected as to the "farm products" of the farmer.

Do not rely on a security agreement that only grants a security interest in the "government payments or programs" of the farmer. The language in the software generated security agreements normally recite that the security interest attaches to payments, accounts, general intangibles and specific government programs that have not been relevant for several years. This category, in a software generated security agreement, does not reference the crops or farm products of the farmer. Arguably a security interest in only "government payments or programs" of the farmer is not enforceable as to the MFP payments. ***The best practice is (and has always been) to check all of the categories on the software generated security agreement and to file a corresponding UCC-1 with the same collateral categories.***

Competing Agricultural Liens; Landlord MFP Applications

Due to the nature of the MFP payments, agricultural lien claimants arguably do not have a lien in the MFP payments. MFP payments are determined based on certified 2018 production. Agricultural liens are liens on specific crops that received the benefit of the agricultural inputs or services. However, some states have liberally extended agricultural liens (and not limited the lien to the specific crops that benefitted from the inputs or services). For that reason, in some states, a court may find that a perfected agricultural lien takes priority over that of a security interest as to the MFP payments. In addition, the federal regulations allow a landlord to submit a separate MFP application for the landlord's respective share of the crop; whether or not the landlord has a priority lien as against the lender.

MFP Payment Checks; Direct Deposit; Keeping the Priority Security Interest

Although eligibility for MFP payments is based on certified 2018 crop production, FSA is not subject to state CNS/EFS central filings and direct notices that provide recourse to a lender if the buyer of the crop does not make the check jointly payable to the farmer and the lender. FSA discourages paying the MFP payments by a physical check. Instead, payments are generally made by direct deposit into the operating account of the farmer. The lender needs to understand that once the MFP payments are deposited into the operating



account of the farmer, the MFP payments may now be subject to a priority security interest granted by the farmer to the depository account bank. A security interest granted to a depository bank in funds held by the depository bank takes priority over a perfected security interest in the farm products of the farmer. For this reason, the lender should actively monitor and inquire as to the status of MFP applications and require that the MFP payments be directly deposited into an account with or under the control of the lender.[4]

Summary

In summary:

1. the lender should verify that the lender has a blanket security interest and UCC-1 filing (and not just a security interest limited to the "government payments or programs" of the farmer);
2. the lender should actively monitor and inquire as to the status of MFP applications; and
3. the lender should require that the MFP payments be directly deposited into an account with the lender.

Contact Gray Plant Mooty's Commercial Lending team with any questions you have about the Market Facilitation Program or agricultural finance.

[1] See <https://www.federalregister.gov/documents/2018/08/30/2018-18842/market-facilitation-program>.

[2] See *In re Nivens*, 22 B.R. 287 (Bankr. ND Tex. 1982) (pre-petition security interest attaches to post-petition government disaster relief payments because "disaster payments are merely the substitute for



proceeds of the crop which logically would have been received had the disaster or low yields not occurred").

[3] *In re Mattick*, 45 B.R. 615 (Bankr. Minn. 1985) (government payments that supplement or replace lost or damaged crops are proceeds of the crop; whereas, government payments like PIK certificates that are paid in substitution of a crop are general entangles).

[4] FSA Form SF-1199A identifies the financial institution that the MFP payments will be deposited. Section 3 of Form SF-1199A is to be completed and certified by the financial institution.