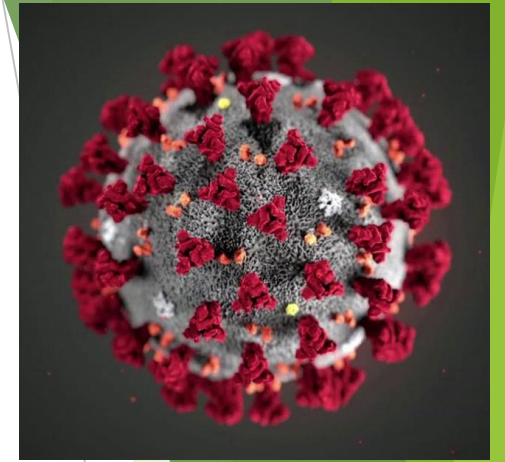


COVID-19: Dealing with Agricultural and Commercial Loans



John Lande (Moderator)
jlande@dickinsonlaw.com

Brad Kruse
bkruse@dickinsonlaw.com

Jeffrey G. Baxter
jbaxter@dickinsonlaw.com

Emily Staudacher
estaudacher@Dickinsonlaw.com

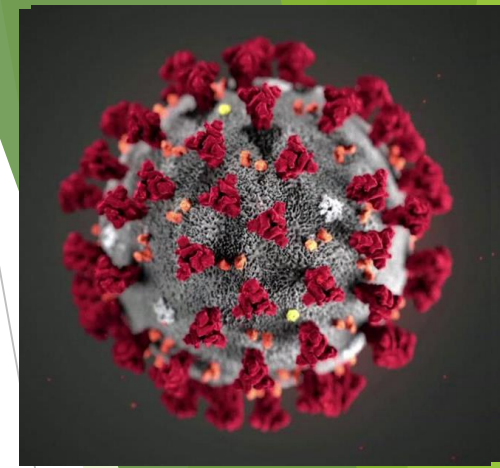
Dickinson Mackaman Tyler & Hagen, P.C.
Des Moines, Iowa
515.244.2600



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- ▶ The material presented is designed and intended for general informational purposes only.
- ▶ It is not intended and it should not be construed or relied upon as legal advice.
- ▶ For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- ▶ Consult with your own legal counsel before taking action or making changes.



Welcome

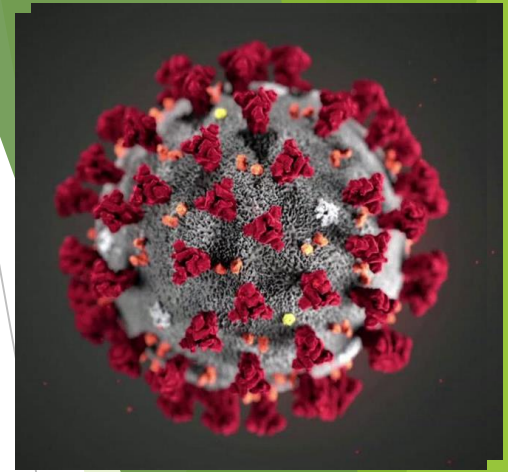
John Lande

Presenters

Brad Kruse

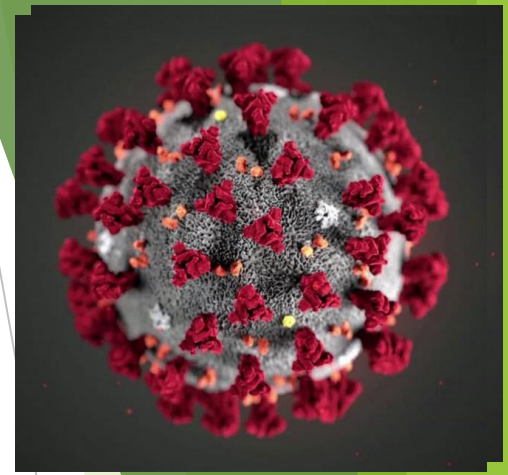
Jeff Baxter

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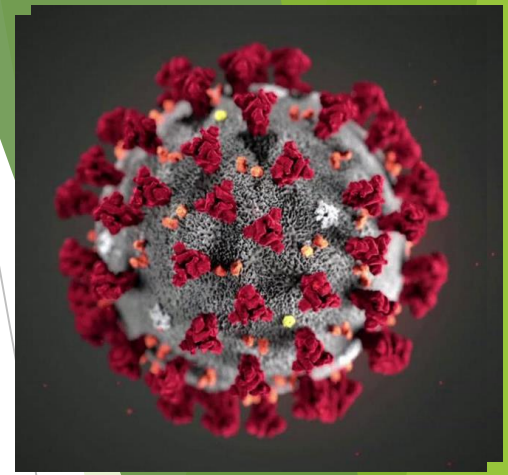


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- ▶ Be aware of representations made to borrowers, particularly in writing
- ▶ Secure government payments
- ▶ Review marketing plans
- ▶ Review business plans with borrowers: growth v. stability v. shrinking
- ▶ Monitor liquidity: yours and borrowers



Lender Remedies in the COVID-19 Environment

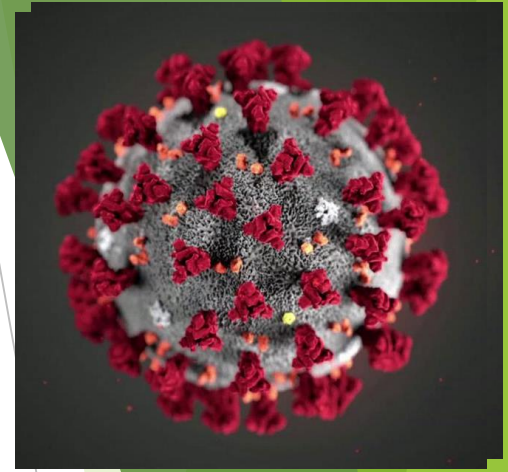


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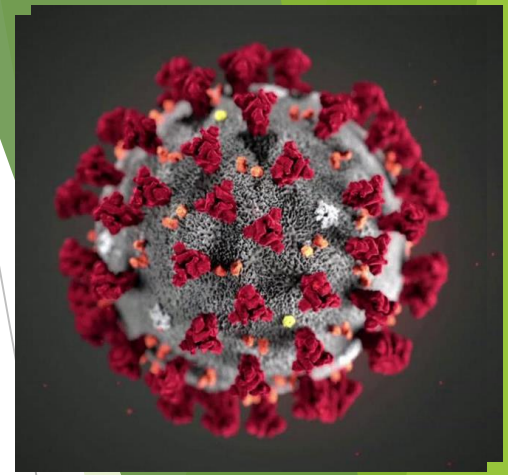
The COVID-19 Environment

- ▶ High degree of business and economic uncertainty.
- ▶ Governor's Order temporarily halting Foreclosure actions, FEDs etc.
- ▶ Cash flow concerns with Borrowers, even those that are not presently in default.
- ▶ Potential for chain reaction of defaults, e.g., tenant, landlord.
- ▶ Indicators suggest slow return to normal (or new normal), not a light switch.
- ▶ How aggressive can a lender be; How aggressive should a lender be.
- ▶ Is it likely the Borrower will be able to turn things around after the COVID-19 restrictions are lifted, or is the Borrower facing a lost cause situation. Cash flow is key.
- ▶ Due Diligence Considerations
 - Review Loan Docs
 - Evaluate Collateral; Inspect Collateral
 - Evaluate security position; other liens.



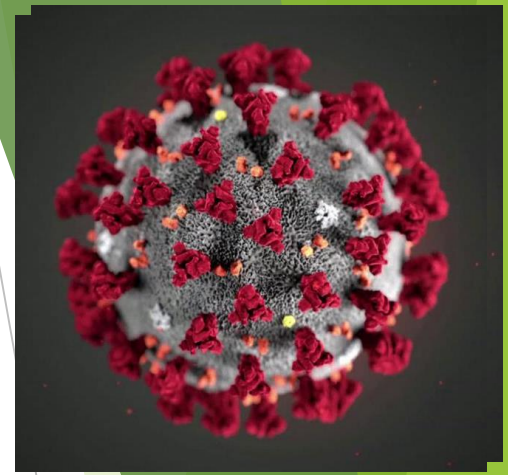
Forbearance Agreements

- ▶ Very beneficial option in today's environment, given prohibitions on foreclosure actions, FEDs, etc.
- ▶ Benefits and elements
 - Maintains Bank's priority position, by maintaining existing loan agreements, as opposed to entering into a new loan transaction or refinancing.
 - Obtain additional collateral.
 - Should obtain assignment (or pledge as security) of any business interruption insurance proceeds.
 - Debtor should agree and verify existing loan balances and waive any dispute as to same.
 - Debtor should agree that all existing loan documents are valid and enforceable, and waive any dispute as to same.
 - Seek a deed in lieu and or entry of confession of judgment if Forbearance Agreement is defaulted.



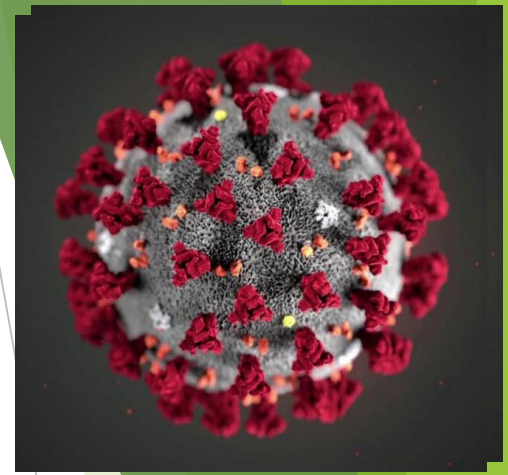
State or Federal Court Litigation

- ▶ No current prohibition against commencing lawsuit for breach of contract, i.e., breach of loan agreement and any related causes of action such as fraud, conversion (Debtor improperly sold Bank's collateral).
- ▶ Pre-Judgment Attachment
 - Strong remedy if loan default is clear and there is demonstrable concern that Debtor may hide, convert, or abscond with Bank's collateral.
 - Rule 64 Federal Rules of Civil Procedure.
 - Iowa Code Chapter 639.



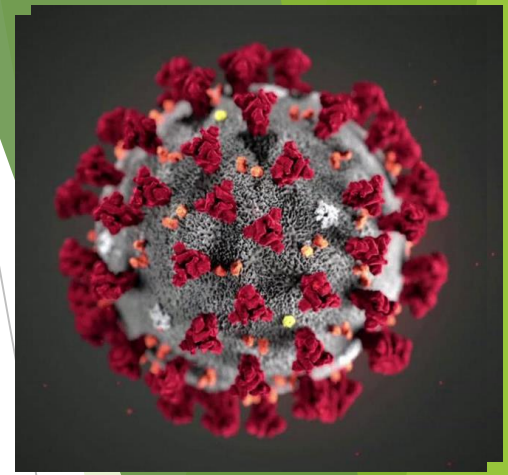
State or Federal Court Litigation (cont'd)

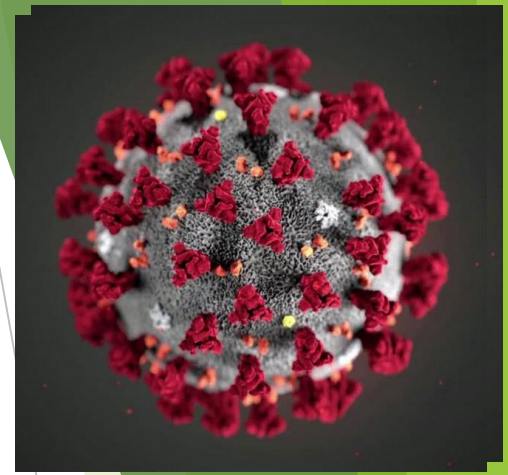
- ▶ Appointment of Receiver Iowa Code Chapter 680.
 - Grounds: If property or its rents or profits are in danger of being lost or materially injured or impaired.
 - Powers: Take and keep possession of property, bring and defend actions, collect debts, receive rents and profits of real property.



Involuntary Bankruptcy

- ▶ Bankruptcy Code Section 303
 - Can only be filed as a Chapter 7 or Chapter 11 case (not Chapter 12).
 - Can be filed against an individual, partnership or corporation, but cannot be used against a farmer or a family farmer.
 - Must be filed by at least 3 qualifying petitioning creditors who have at least \$15,775 of unsecured claims against the debtor in the aggregate, if the Debtor has 12 or more qualifying creditors.
 - May be filed by only 1 qualifying petitioning creditor who has at least \$15,775 of unsecured claims against the debtor, if the Debtor has fewer than 12 qualifying creditors
- ▶ Chapter 7 Involuntary is generally more favored by petitioning creditors, but Debtors have the Ability to Convert to Chapter 11.
- ▶ Strategic Considerations
 - Chapter 7 Cases administered by Chapter 7 Trustee. Typically shorter duration.
 - Chapter 11 Cases often last over a year or more, and Debtor continues in control of assets.





Payroll Protection Program Forgivable Loans

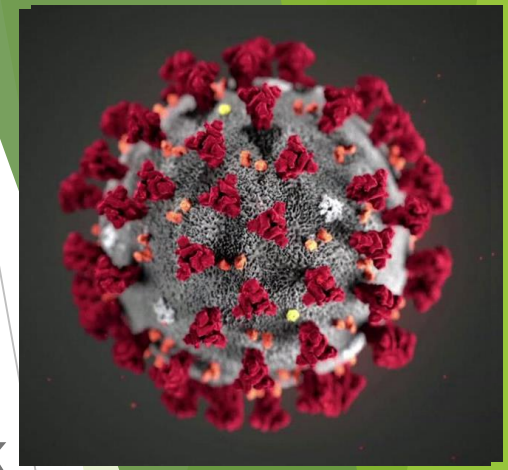


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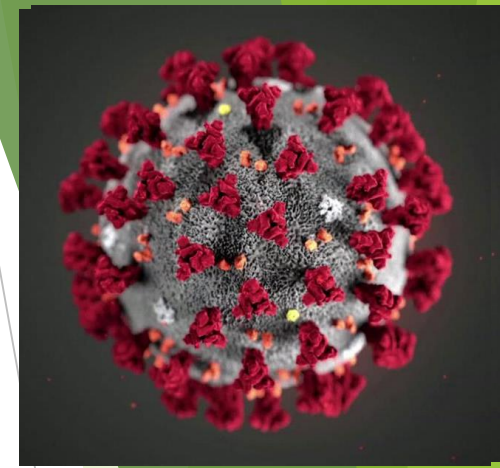
New SBA Program as part of CARES Act

- ▶ \$349* Billion Allocation to Small Businesses
- ▶ Second round of funding HR 266 - additional \$310 Billion
 - Administered through approved SBA 7(a) Lenders - Talk to your lenders to see if they qualify.
- ▶ Set Aside for Banks:
 - \$30 billion will be set aside for loans made by Insured Depository Institutions and Credit Unions that have assets between \$10 billion and \$50 billion
 - \$30 billion will be set aside for loans made by Community Financial Institutions, Small Insured Depository Institutions, and Credit Unions with assets less than \$10 billion.



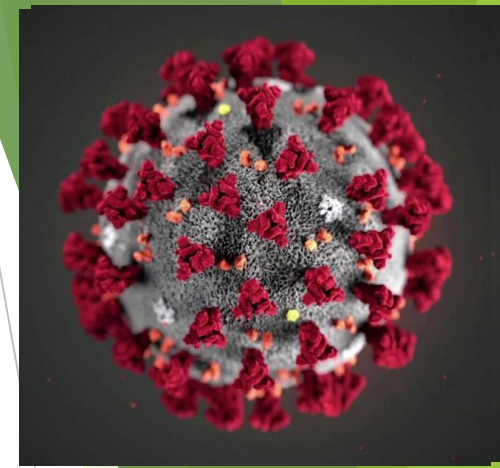
New SBA Program as part of CARES Act

- ▶ The legislation also includes an expansion of the Economic Injury Disaster Loss (“EIDL”) program, increasing the available funds thereunder from \$10.0 billion to \$20.0 billion.
- ▶ Additionally, clarifies that agricultural enterprises (as defined in the Small Business Act), are now eligible for EIDL grants and loans.
- ▶ \$100B in Dept. of Health and Human Services (HHS) funding for various health care providers generally and others engaged in health care services and testing for COVID-19 expands the CARES Act Public Health Relief Funds.



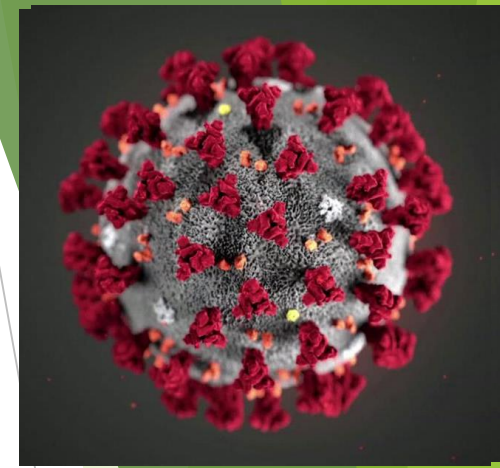
Payroll Protection Program

- ▶ Eligibility - Businesses of 500 employees or Less and non-profits.
- ▶ Amount of Loan - Maximum loan amount to be the *lesser* of:
 - 2.5x average monthly payroll expense
 - Over 12 months prior to applying for loan, or calendar year 2019. Or special rule if a seasonal employer.
 - \$10,000,000.00

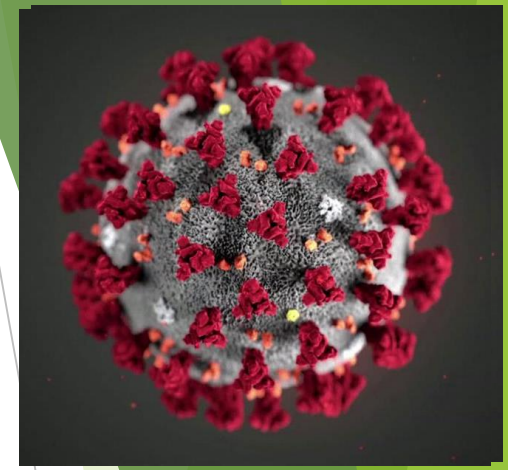


Payroll Protection Program

- ▶ What expenses can be included in “Payroll”?
 - The sum of payments of any compensation with respect to employees that is a salary or wage;
 - Payment of cash tip or equivalent;
 - Payment for vacation, parental, family, medical, or sick leave;
 - Allowance for dismissal or separation;
 - Payment required for the provisions of group health care benefits, including insurance premiums;
 - Payment of any retirement benefit; or
 - Payment of state or local tax assessed on the compensation of employees.
 - Balance of EIDL loans taken out prior to April 3, 2020.



Payroll Protection Program - Forgiveness

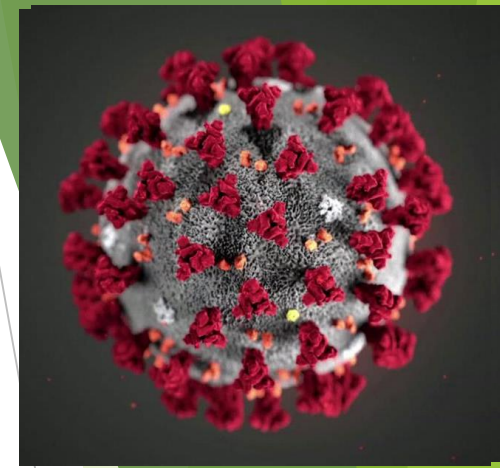


- ▶ vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.
- ▶ Additional Requirement:
 - ▶ Minimum seventy-five percent (75%) of PPP loan funds must be used on payroll costs. Any amounts in excess of 25% spent on non-payroll expenses will not be forgiven.
 - ▶ Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.



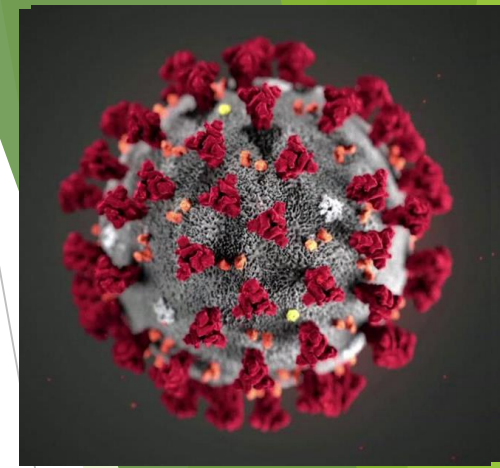
Payroll Protection Program

- ▶ Restricted from being included in the payroll calculation are:
 - ▶ Any salaries above \$100,000 per year;
 - ▶ Any compensation of an employee whose principal place of residence is outside of the United States; and
 - ▶ Any qualified sick leave wages for which a tax credit is allowed under section 7001 or 7003 of the Families First Coronavirus Response Act Integrated Employer Factors (EFMLA)
- ▶ Covered Period: February 15, 2020 through June 30, 2020.



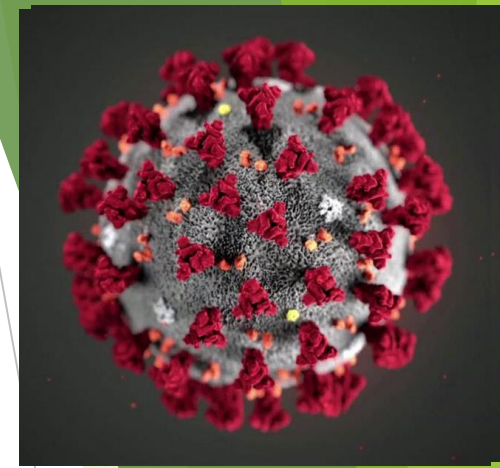
What happens if PPP loan funds are misused?

- If PPP funds are used for unauthorized purposes, SBA will direct you to repay those amounts on the applicable loan terms - two (2) year maturity, one (1%) percent interest.
- If a borrower knowingly uses the funds for unauthorized purposes, it will be subject to additional liability such as charges for fraud.
- If one of the borrower's shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.



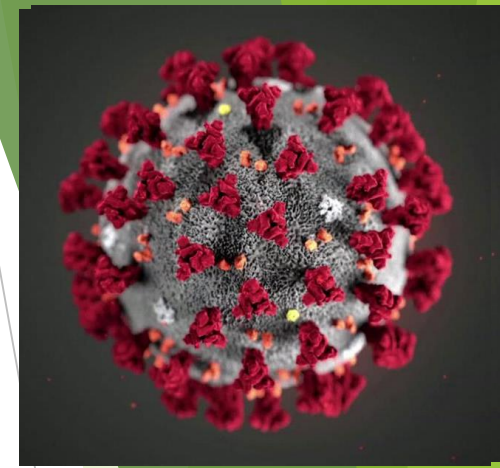
Payroll Protection Program - Forgiveness

- ▶ Forgiveness - Borrower eligible for maximum forgiveness of eight (8) weeks of (up to full amount of the loan):
 - ▶ i. payroll costs (as defined above);
 - ▶ ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
 - ▶ iii. mortgage interest payments (but not mortgage prepayments or principal payments);
 - ▶ iv. rent payments;
 - ▶ v. utility payments;
 - ▶ vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or



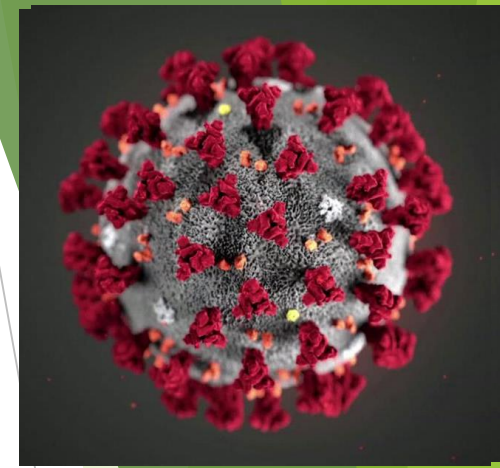
Payroll Protection Program - Reduction in Forgiven Amount

- ▶ Based on Number of FTE's. The amount of loan forgiveness will be reduced by the proration:
 - ▶ The average number of FTE's employed by the Borrower per month during the covered period,
 - ▶ Divided by (at Borrower's option):
 - ▶ (i) The average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019; or
 - ▶ (ii) the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on January 1, 2020 and ending on February 29, 2020; or
 - ▶ (iii) in the case of an eligible recipient that is seasonal employer, as determined by the Administrator, the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019.



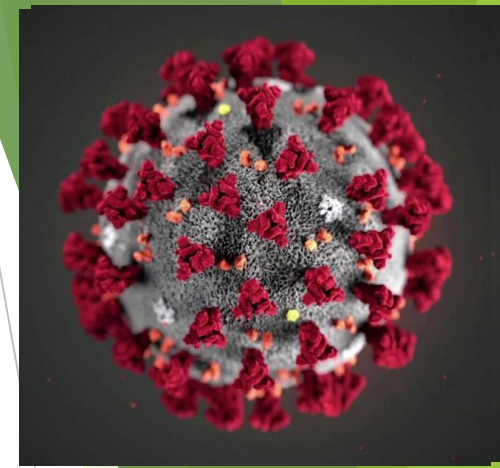
Payroll Protection Program - Reduction in Forgiven Amount

- ▶ Based on Salary Reduction:
 - ▶ The amount of loan forgiveness will be reduced by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.
 - ▶ Excludes Employees making over \$100,000 in salary.

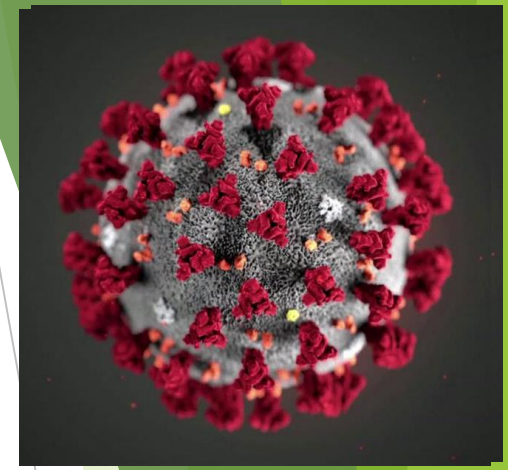


Payroll Protection Program - Reduction in Forgiven Amount

- ▶ Exemption for Rehires/Return to Normal Pay:
 - ▶ The reduction in the forgivable amount based on the number of FTE's or the salary of an eligible employee will be ignored, for any employees let go, or had their pay reduced, between February 15, 2020 and April 27, 2020, if the borrower rehires sufficient number of FTE's, or eliminates the reduction in salary, as applicable, by June 30, 2020.



Payroll Protection Program - Forgiveness



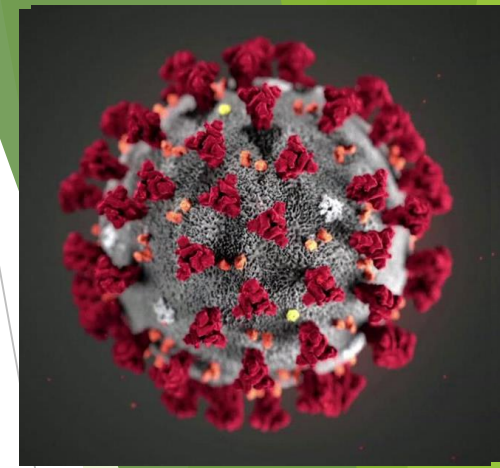
- ▶ In order to obtain forgiveness, a borrower shall apply to the lender and document the proceeds used for payroll (and other allowable expenses).
- ▶ Tip: Open a separate account at the PPP loan Lender that holds the PPP loan proceeds, and adjust payroll, rent, utility, etc. payments to come from this account. This will make the application to the lender to prove where the funds were spent easier, and expedite the approval process.
- ▶ Lenders have 60 days from application for forgiveness to approve or deny application.



Payroll Protection Program

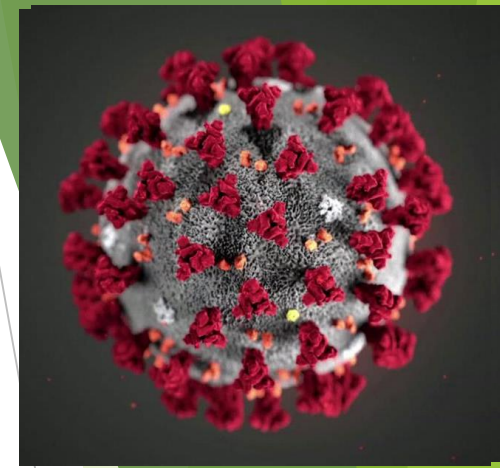
▶ Loan Terms

- ▶ The PPP Loan will have a maturity date that is two (2) years after the funds have been disbursed.
- ▶ The Loan will accrue interest at one (1) percent per annum.
- ▶ There is a six (6) month deferral of payments from the date of disbursement. Interest will accrue during the six month period. Portions that are forgiven will see a corresponding forgiveness of the interest on that portion. Interest will continue to accrue on the unforgiven portions of the Loan until paid.
- ▶ No prepayment penalties.

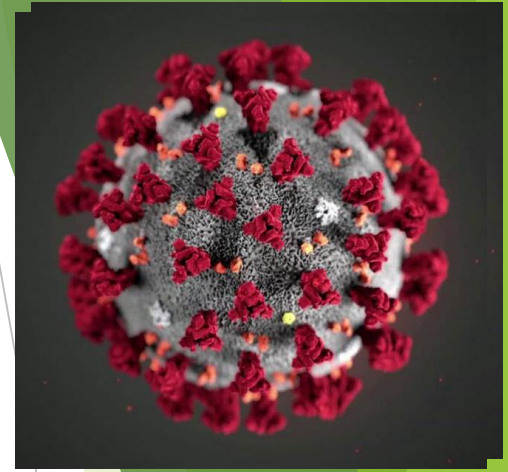


Payroll Protection Program

- ▶ No “Double Dipping”
 - ▶ Borrower can’t receive this assistance and an Economic Injury Disaster Loan (EIDL) through SBA for the same purpose. However, it allows a borrower who has an EIDL to apply for a PPP loan, with an option to refinance that loan into the PPP loan.
 - ▶ The emergency EIDL grant award of up to \$10,000 would be subtracted from the amount forgiven under the Paycheck Protection Program.



Coronavirus Food Assistance Program (CFAP)

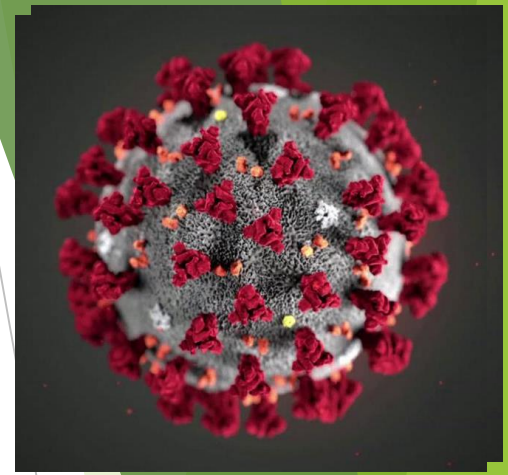


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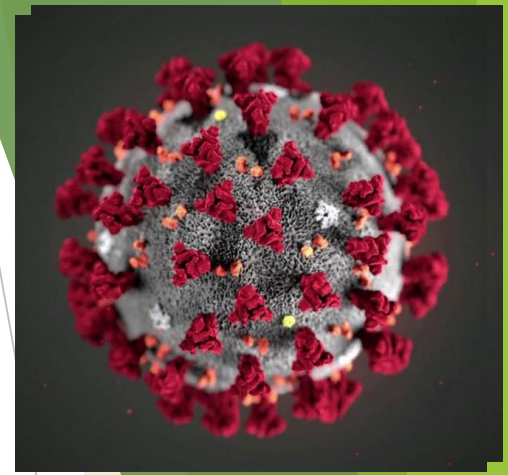
CFAP

- ▶ This new U.S. Department of Agriculture (USDA) program will take several actions to assist farmers, ranchers, and consumers in response to the COVID-19 national emergency.
 - Direct Support to Farmers and Ranchers: The program will provide \$16 billion in direct support based on actual losses for agricultural producers where prices and market supply chains have been impacted and will assist producers with additional adjustment and marketing costs resulting from lost demand and short-term oversupply for the 2020 marketing year caused by COVID-19.



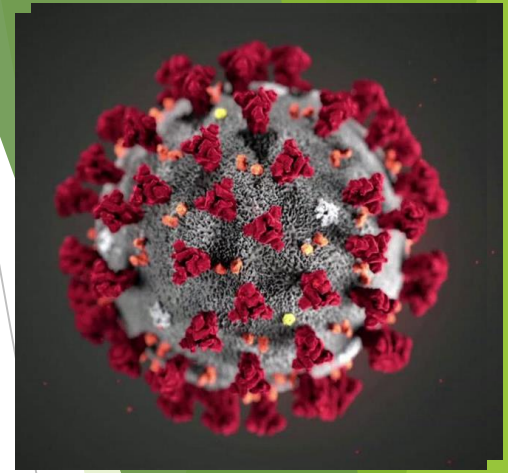
CFAP

- **USDA Purchase and Distribution:** USDA will partner with regional and local distributors, whose workforce has been significantly impacted by the closure of many restaurants, hotels, and other food service entities, to purchase \$3 billion in fresh produce, dairy, and meat. We will begin with the procurement of an estimated \$100 million per month in fresh fruits and vegetables, \$100 million per month in a variety of dairy products, and \$100 million per month in meat products. The distributors and wholesalers will then provide a pre-approved box of fresh produce, dairy, and meat products to food banks, community and faith based organizations, and other non-profits serving Americans in need.

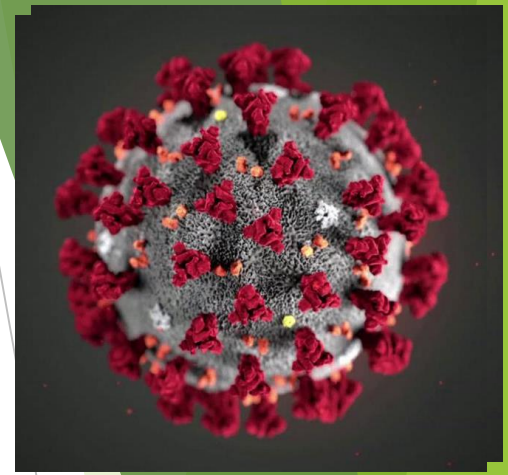


CFAP

- ▶ Sen. John Hoeven (R-N.D.) (Chair of Senate Appropriations Committee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Subcommittee:
 - ▶ \$9.6 billion for the livestock industry
 - ▶ \$5.1 billion for cattle, \$2.9 billion for dairy, and \$1.6 billion for hogs);
 - ▶ \$3.9 billion for row crop producers;
 - ▶ \$2.1 billion for specialty crops producers; and
 - ▶ \$500 million for others crops.
- ▶ Producers will receive single payments capped at \$125,000 per commodity and \$250,000 per individual or entity to cover 85% of price loss from this year through April 15 and 30% of expected losses through the next two quarters.
- ▶ Farmers will apply by Application to Dept. of Agriculture directly. Specifics will follow. Funds to be released by end of May, 2020.



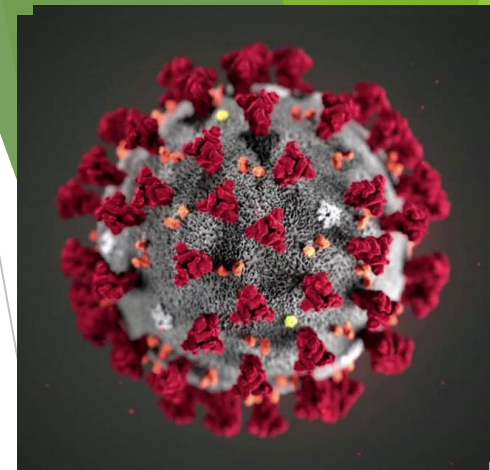
Perfecting Security Interests in Farm Program Payments



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Commodity Prices Tumble

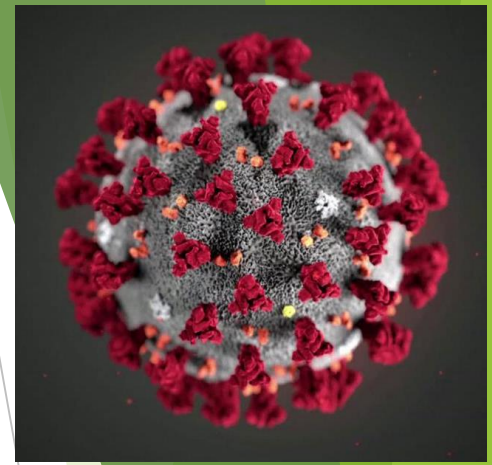


	Futures Contract	April 1-15, 2019	Jan 1-30, 2020	April 1-15, 2020	% change year	% change since Jan
Corn	Dec Futures	\$3.90	\$4.00	\$3.49	-11%	-13%
Soybeans	Nov Futures	\$9.32	\$9.56	\$8.66	-7%	-9%
Wheat	July Hard Red Wheat	\$4.39	\$5.00	\$4.86	11%	-3%
Cotton (Cents/lb)	Dec Futures	\$0.766	\$0.713	\$0.539	-30%	-24%
Live Cattle	June	\$120.40	\$117.20	\$83.80	-30%	-28%
Lean hogs	May	\$87.80	\$79.60	\$43.70	-50%	-45%
Milk (Class III)	June	\$15.83	\$17.53	\$12.99	-18%	-26%

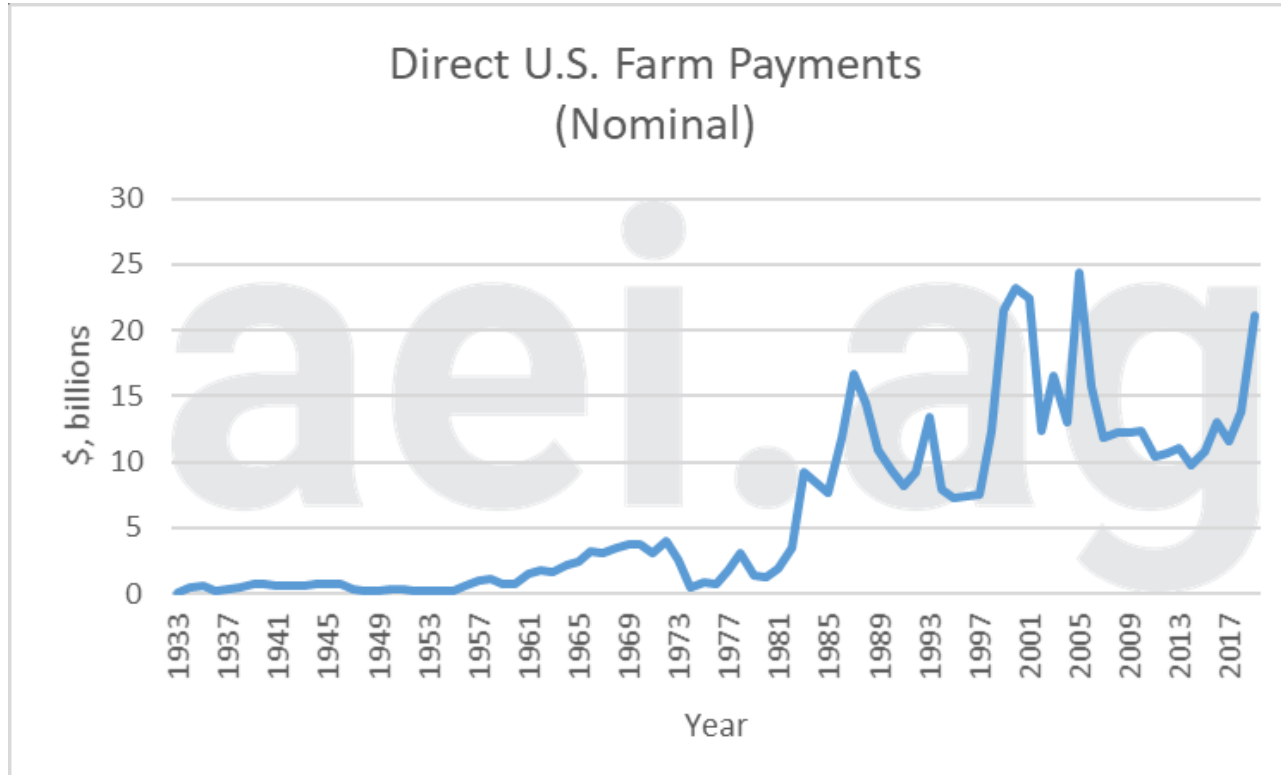
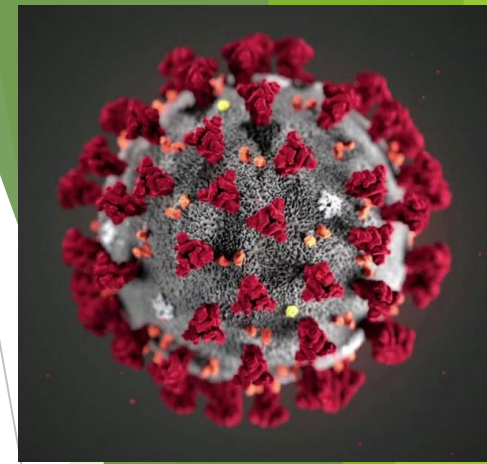


Hog Supply Chain Issues

- ▶ Pork processing has shrunk by about 25% due to closures
- ▶ Farm economists with Kerns & Associates and Iowa State University estimate that hog farmers will lose nearly \$37 per pig because of the market turmoil, adding up to about \$5 billion for the rest of 2020.
- ▶ Conversations regarding euthanasia
- ▶ Recommendation: reach out to producers in an effort to monitor collateral and remind them to consult with lender before taking action.



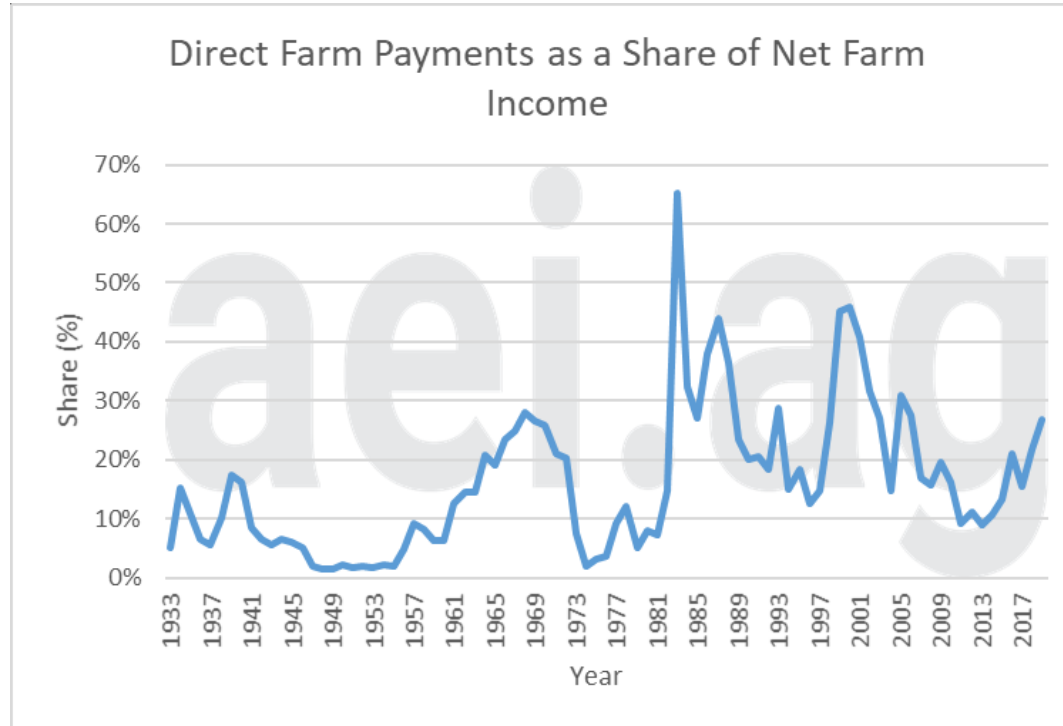
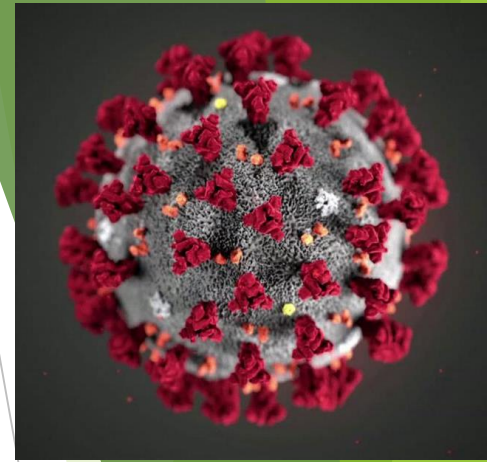
Farm Program Payments are Expected to be the Highest in a Decade



U.S. Direct Farm Payments, 1933-2019. Data Source: USDA ERS and aei.ag Calculations.



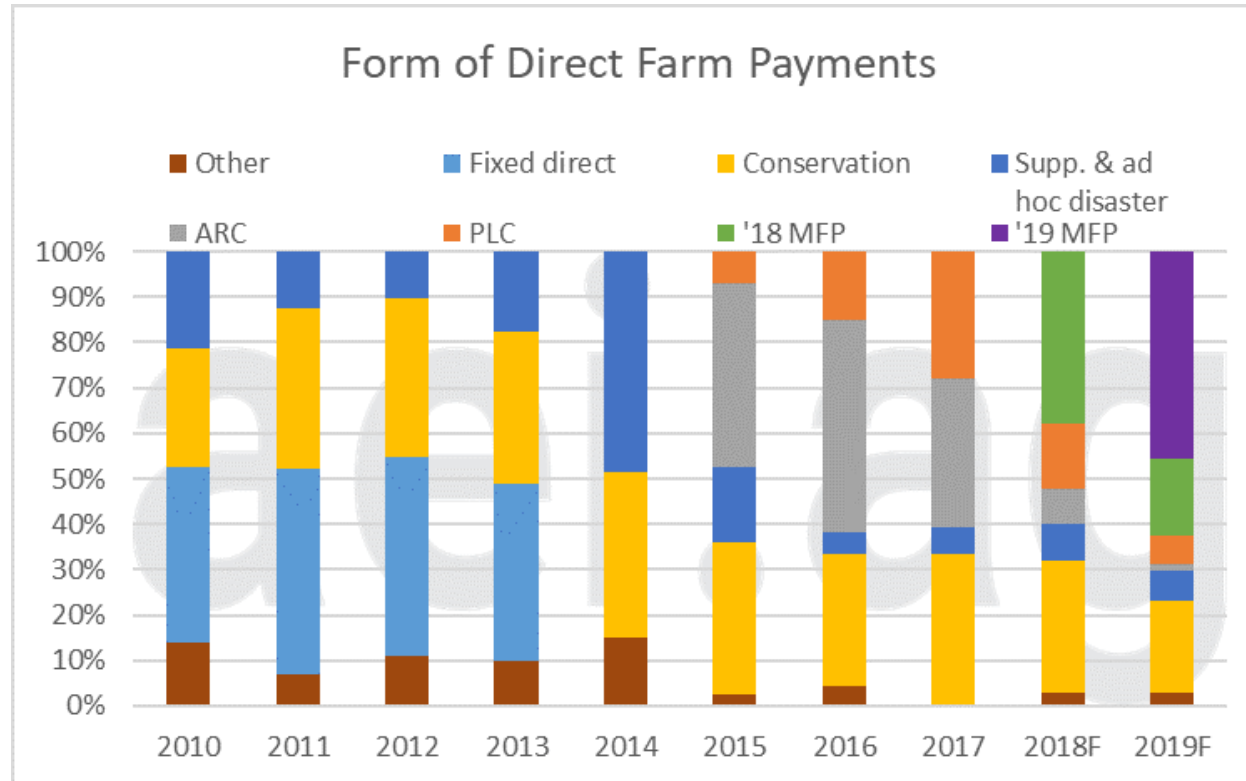
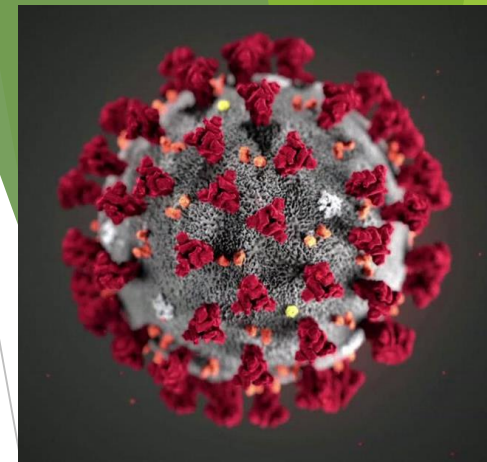
Farm Program Payments are Expected to be the Highest in a Decade



Direct Farm Payments as a Share of Net Farm Income, 1933-2019. Data Source: USDA ERS and aei.ag Calculations.



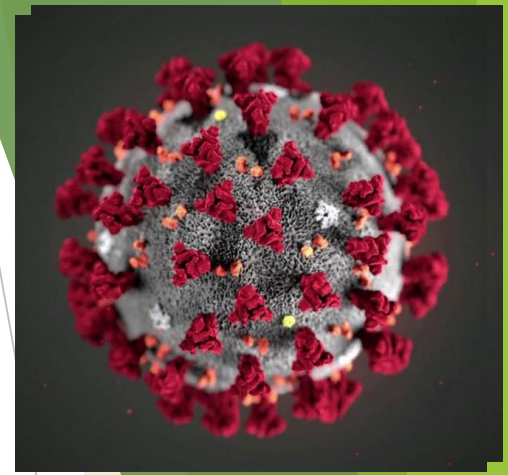
Farm Program Payments are Expected to be the Highest in a Decade



Form of Direct Farm Payments, 2010 - 2019. Data Source: USDA ERS and aei.ag Calculations.

Coronavirus Aid for Agriculture

- ▶ USDA announced \$16 billion in direct payments to farmers
 - ▶ Cattle - \$5.1B
 - ▶ Row Crop - \$3.9B
 - ▶ Dairy - \$2.1B
 - ▶ Specialty Crops - \$2.1B
 - ▶ Hogs - \$1.6B
 - ▶ Other Crops - \$500M
- ▶ Payments are capped at \$125,000 per commodity, or \$250,000 overall per individual or entity.
- ▶ Producers will be compensated for 85 percent of their price losses that occurred from Jan. 1 through April 15, plus 30 percent of their expected losses from April 15 through the next two quarters.
- ▶ Perdue said on Friday that he wants to start mailing checks by the end of May, if possible.
- ▶ USDA will also buy \$3 billion in surplus farm products and redistribute them to food banks.



Farm Program Payments

Courts are divided over the proper collateral classification of the various farm program payments.

In general, for governmental agricultural payments to qualify as proceeds, three conditions must be met:

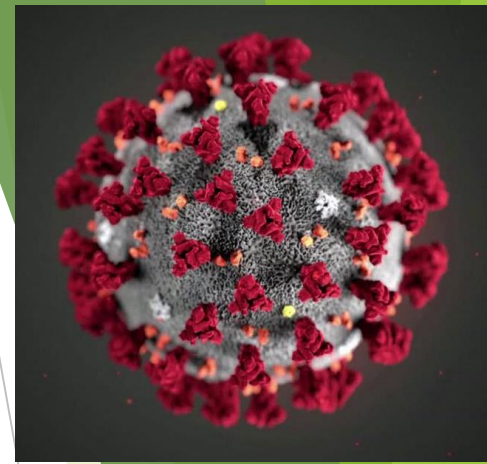
- ▶ The crop must have been planted
- ▶ The crop must have been lost or destroyed
- ▶ The government payment being claimed must have been received by the producer for the lost or destroyed crop

The majority of courts hold that if deficiency payments are made to supplement a planted crop's depressed market price, they are proceeds.

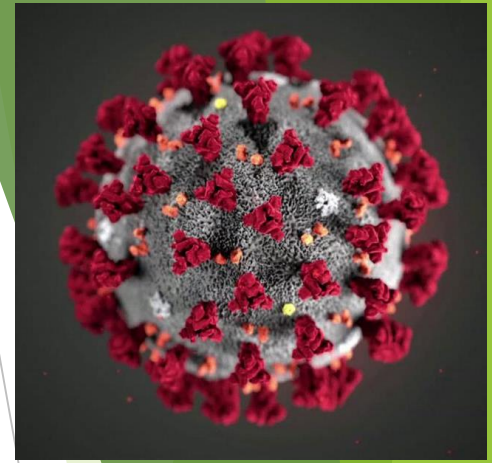
BUT, other courts have held that deficiency payments are not proceeds primarily because the payments are made regardless of whether the farmer harvests or sells a crop.

Similarly, government payments received for the inability to produce crops have been determined not to be proceeds.

Payments that replace lost crops (proceeds) vs. payments that are paid in substitution of a crop (general intangibles).



Farm Program Payments - Bankruptcy



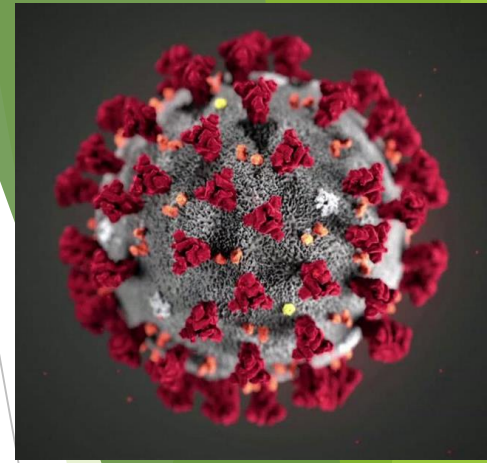
Because the assignment of payments are made solely in the name of the lender, the lender is entitled to receive those payments even if the debt is not in default. So, lender can reasonably conclude that they are not property of the borrower's bankruptcy estate.

Note: the automatic stay is not limited to actions taken against "property of the estate", but a debtor will have a hard time opposing the lender's motion for relief from the automatic stay in this context because the debtor has no property interest in the checks issued by the USDA to the lender-assignee.

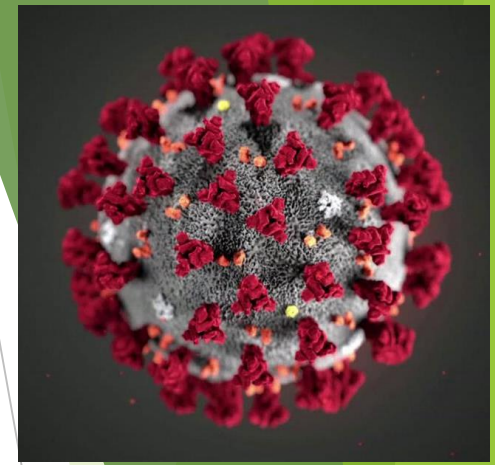


Best Practices

- ▶ Perfection best achieved by:
 - ▶ 1. Execute a Security Agreement and file a UCC Financing Statement with the Secretary of State
 - ▶ Description of Collateral on Security Agreement: farm products and their proceeds, and general intangibles
 - ▶ Blanket financing statement
 - ▶ 2. Execute Joint Payment Authorization (CCC-37) or Assignment of Payments (CCC-36)
 - ▶ 3. Include loan covenants in standard loan documents that:
 - ▶ Prohibit the debtor from granting additional assignments of farm program payments
 - ▶ Require the debtor to timely file applications for farm program payments (Ex. MFP)
 - ▶ Require all farm program payments to be deposited into accounts over which the lender has control under the UCC
 - ▶ Require the debtor to inform the lender in any changes to participation in farm program payments
 - ▶ Require the debtor to execute a Joint Payment Authorization or Assignment of Payments at the request of the lender



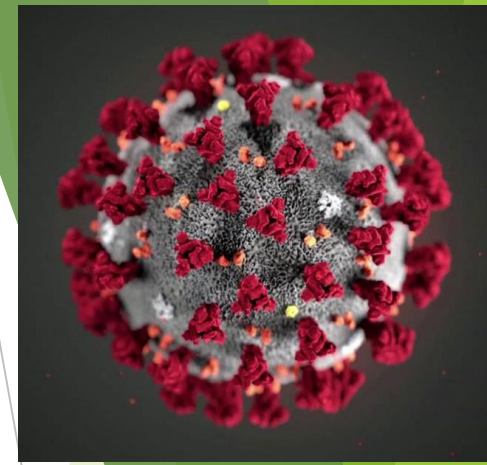
In order for assignments to be effective:



- ▶ Form must be signed by assignor (Borrower) and assignee (Lender).
- ▶ Form must be filed with the appropriate county FSA office before the county committee approves the making of the payment covered by the assignment.
- ▶ Must be submitted for each program and each crop year.
- ▶ Keep apprised of programs the producer participates in and know the payment limitations.
 - ▶ Ex. MFP = \$125,000
 - ▶ CRP = \$50,000



Crop Insurance



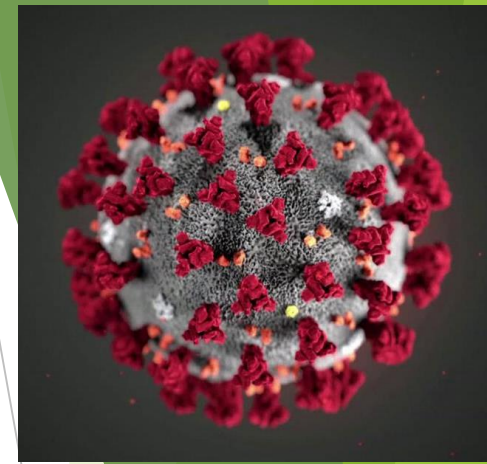
- ▶ At least two courts have held that the Federal Crop Insurance Act (FCIA) preempts UCC Article 9. Thus, according to these courts, the exclusive method for a creditor to obtain a lien in undisclosed proceeds is through the FCIA authorized assignment process. *In re Duckworth, No. 10-83603, 2012 Bankr. LEXIS 1219 (C.D. Ill. Mar. 22, 2012)*; *In re Cook, 169 F.3d 271 (5th Cir. 1999)*.

Lenders must get assignment of crop insurance on insurer's forms if proceeds have not yet been disbursed.

- ▶ Security interest/UCC is only enforceable after payments have been made to borrower.
- ▶ Priority of competing claims has not been addressed by FCIA.
- ▶ Landlord and/or creditor consent is not required.



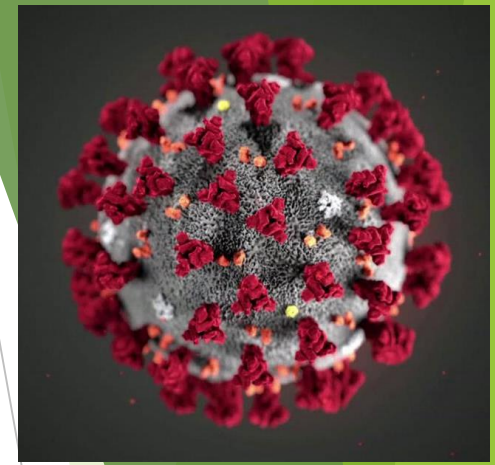
Crop Insurance



- ▶ 1. Execute a Security Agreement and file a UCC Financing Statement with the Secretary of State.
- ▶ 2. Execute an Assignment of Indemnity from borrower (NCIS Form 757).
- ▶ 3. Execute an Assignment of crop insurance policies.
- ▶ 4. Include loan covenants in standard loan documents that:
 - ▶ Prohibit the debtor from granting additional assignments of crop-insurance policies or their proceeds.
 - ▶ Require the debtor to timely file all claims under crop insurance policies and provide copies of all proofs of loss to the lender.
 - ▶ Require all insurance proceeds to be deposited into accounts over which the lender has control under the UCC.



Crop Insurance- Bankruptcy



- ▶ Uncertainty surrounds how the insurance proceeds will be distributed.
 - ▶ If a secured lender has taken an assignment of indemnity under the policy, it is likely that the lender will be able to realize the crop-insurance proceeds when they become otherwise payable to the insured debtor.
 - ▶ If no assignment of indemnity, lender will likely have a hard time persuading a trustee that it holds an enforceable interest and the proceeds may be available to satisfy the claims of all creditors, not just those of the secured lender.

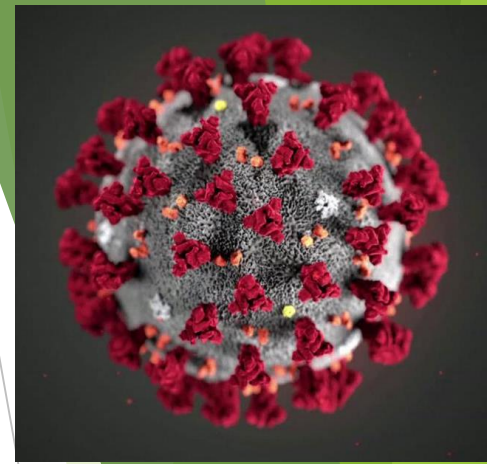


Food Security Act of 1985

- ▶ Provides that Buyers in the Ordinary Course of Business of farm products may acquire farm products “free of” security interests created by the seller-farmer.
- ▶ Iowa is a Direct Notice state. The notice must include the following information, organized by type of farm product:
 - ▶ The name and address of both the secured party and the debtor;
 - ▶ The social security number or taxpayer ID of the debtor; and
 - ▶ A description of the farm products subject to the security interest created by the debtor, including:
 - ▶ The amount of such products;
 - ▶ The crop year, and
 - ▶ The name of each county or parish in which such farm products are produced or located.

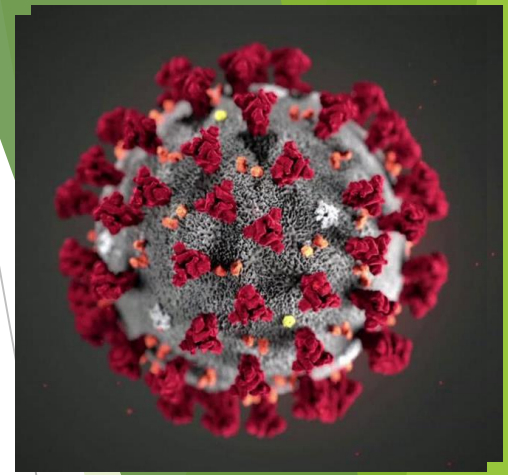
Strict compliance with the notice requirements is essential. State Bank of Cherry v. CGB Enterprises, Inc., No. 113836, 984 N.E.2d 449 (Ill. Sup. Ct. 2013).

- ▶ Loan documents should require the borrower to provide a list of buyers and potential buyers of its farm products, and to update that list whenever new buyers are added.



MIDWESTSTONE BANK vs. HEARTLAND CO-OP

- ▶ MidWestOne Bank filed suit against Heartland Co-op for deducting the costs of storage and drying grain prior to issuing a check for the proceeds jointly to MidWestOne and the debtor.
- ▶ It was undisputed that MidWestOne had a prior perfected security interest in the grain and proceeds, but Heartland argued that the bank was unjustly enriched by the services provided by Heartland which increased the value of MidWestOne's collateral.
- ▶ Ruling:
 - ▶ A grain elevator or co-op may not offset its costs of drying and storing grain against the proceeds from the sale of grain which is subject to a bank's prior perfected security interest, rejecting Heartland's unjust enrichment claim.
 - ▶ Two-year statute of limitations will apply in all cases which are founded on a secured interest in farm products, regardless of the bank's knowledge that costs were being deducted from the jointly issued check.



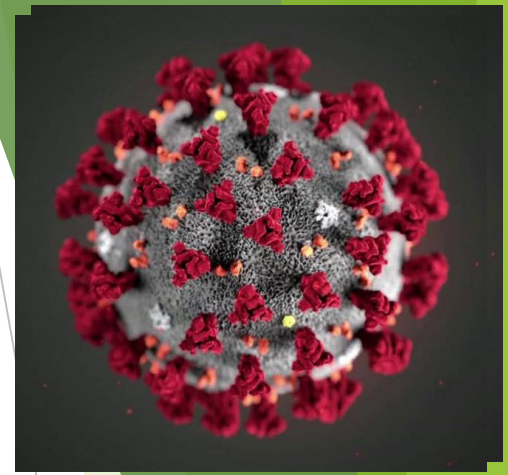
MIDWESTSTONE BANK vs. HEARTLAND CO-OP

► Takeaways

- Monitor Collateral Closely
- Send Direct Notices to Buyers of Farm Products
- Co-op was not a “buyer in the ordinary course”
- Court did not completely close the door on future unjust enrichment claims

► Legislation

- Superpriority for grain warehouses and storage facilities
- Central filing system for farm products

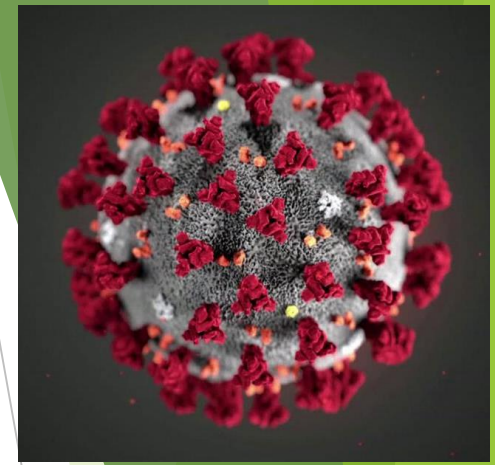




John Lande



Brad Kruse



Thank You!



Jeff Baxter



Emily Staudacher



DICKINSONLAW