

Final Agency Determination: FAD-287

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Subject: Two requests dated December 27, 2018, and July 25, 2019, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2016 crop year regarding the interpretation of section 21 of the Common Crop Insurance Policy Basic Provisions (Basic Provisions) published at 7 C.F.R. § 457.8. This request is pursuant to section 506(s) of the Federal Crop Insurance Act and 7 C.F.R. § 400, subpart X.

Background:

Referenced policy related to the request:

The Basic Provisions state, in relevant part:

21. Access to Insured Crop and Records, and Record Retention.

(a) We, and any employee of USDA authorized to investigate or review any matter relating to crop insurance, have the right to examine the insured crop and all records related to the insured crop and any mediation, arbitration or litigation involving the insured crop as often as reasonably required during the record retention period.

(b) You must retain, and provide upon our request, or the request of any employee of USDA authorized to investigate or review any matter relating to crop insurance:

(1) Complete records of the planting, replanting, inputs, production, harvesting, and disposition of the insured crop on each unit for three years after the end of the crop year (This requirement also applies to all such records for acreage that is not insured);

(2) All records used to establish the amount of production you certified on your production reports used to compute your approved yield for three years after the calendar date for the end of the insurance period for the crop year for which you initially certified such records, unless such records have already been provided to us (e.g., if you are a new insured and you certify 2007 through 2010 crop year production records in 2011 to determine your approved yield for the 2011 crop year, you must retain all records from the 2007 through 2010 crop years through the 2014 crop year. If you subsequently certify records of the 2011 crop year in 2012 to determine your approved yield for the 2012 crop year, you must retain the 2011 crop year records through the 2015 crop year and so forth for each subsequent year of production records certified); and

(3) While you are not required to maintain records beyond the record retention period specified in section 21(b)(2), at any time, if we or FCIC have evidence that you, or anyone assisting you, knowingly misreported any information related to any yield you have certified, we or FCIC will replace all yields in your APH database determined to be incorrect with the lesser of an assigned yield determined in accordance with section 3 or the yield determined to be correct

(i) If an overpayment has been made to you, you will be required to repay the overpaid amount; and

(ii) Replacement of yields in accordance with section 21(b)(3) does not exempt you from other sanctions applicable under the terms of the policy or any applicable law.

(c) We, or any employee of USDA authorized to investigate or review any matter relating to crop insurance, may extend the record retention period beyond three years by notifying you of such extension in writing.

(d) By signing the application for insurance authorized under the Act or by continuing insurance for which you have previously applied, you authorize us or USDA, or any person acting for us or USDA authorized to investigate or review any matter relating to crop insurance, to obtain records relating to the planting, replanting, inputs, production, harvesting, and disposition

of the insured crop from any person who may have custody of such records, including but not limited to, FSA offices, banks, warehouses, gins, cooperatives, marketing associations, and accountants. You must assist in obtaining all records we or any employee of USDA authorized to investigate or review any matter relating to crop insurance request from third parties.

(e) Failure to provide access to the insured crop or the farm, authorize access to the records maintained by third parties or assist in obtaining such records will result in a determination that no indemnity is due for the crop year in which such failure occurred.

(f) Failure to maintain or provide records will result in:

(1) The imposition of an assigned yield in accordance with section 3(f)(1) and 7 CFR part 400, subpart G for those crop years for which you do not have the required production records to support a certified yield;

(2) A determination that no indemnity is due if you fail to provide records necessary to determine your loss;

(3) Combination of the optional units into the applicable basic unit;

(4) Assignment of production to the units by us if you fail to maintain separate records:

(i) For your basic units; or

(ii) For any uninsurable acreage; and

(5) The imposition of consequences specified in section 6(g), as applicable.

(g) If the imposition of an assigned yield under section 21(f)(1) would affect an indemnity, prevented planting payment or replant payment that was paid in a prior crop year, such claim will be adjusted and you will be required to repay any overpaid amounts.

FAD-106, dated August 17, 2016, states, in relevant part:

The Federal Crop Insurance Corporation (FCIC) disagrees with the requestor's interpretation that the only instances in which an AIP may go back and claim overpaid indemnities for prior crop years will be those in which the imposition of an assigned yield under section 21(f)(1) would affect an indemnity, prevented planting payment, or replant payment. This is only one instance where an AIP may go back and claim overpaid indemnities as a result of the use of assigned yields because the policyholder does not have the requisite records. However, there are numerous other provisions of the policy where non-compliance would affect the existence or amount of an indemnity paid. Non-compliance with any of these other provisions could entitle the AIP to collect any amounts that may have been overpaid as a result of such non-compliance. For example, incorrect yields, uninsurable acres reported on the acreage report, overstated acreage, incorrect share, etc., that are discovered must be corrected, and if such correction results in an overpaid indemnity or any other debt, it is subject to collection from the policyholder.

FAD-281, dated September 20, 2018, states, in relevant part:

However, that does not mean that the AIP does not have a duty to correct claims. The Federal crop insurance program uses taxpayer dollars and FCIC and AIPs have a duty to ensure those taxpayer dollars are paid in accordance with policy and procedures. As a result, FCIC agrees in part with the second requestor. If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim. This obligation has been confirmed by the courts in *Old Republic Insurance Company v. FCIC*, 947 F.2d 269 (7th Circuit 1991).

Interpretation Submitted

The first requestor interprets section 21(b)(3) of the Basic Provisions as describing one but not the only circumstances under which an Approved Insurance Provider (AIP) may correct, and recover an indemnity overpayment associated with, a claim from a prior crop year that was previously adjusted and paid. Section 21(b)(3) addresses a single scenario: the knowing misreporting of information related to an insured's certified yield; and allows for the replacement of yields in the Actual Production History (APH) database even if the affected crop years are outside the records retention period. Section 21(b)(3) has no applicability to claim corrections or overpayment demands stemming from other forms of producer non-compliance. When the AIP discovers any instance of producer noncompliance affecting a previously-paid indemnity, it is entitled to correct the affected claims and collect any resulting overpayments.

The first requestor cites FAD-106 published on RMA's website (January 21, 2010), in which FCIC addressed a similar question of whether sections 21(f)(1) and (g) (which allow for the assessment of overpayments stemming from an imposition of assigned yields) provide "the only instances in which an [AIP] may go back and claim overpaid indemnities for crop years prior to the current or most recent crop year." FCIC rejected the requester's interpretation and found that sections 21(f)(1) and (g) furnish "only one instance where an AIP may go back and claim overpaid indemnities."

Thus, the first requestor maintains it is clear that section 21(b)(3) only addresses consequences for the knowing misreporting of information used in the establishment of the insured's approved yield. This provision does not address claim corrections or overpayment demands stemming from other forms of producer non-compliance, and it does not affect or limit the remedies or sanctions available based on other forms of producer non-compliance.

The second requestor interprets section 21 as follows. There is nothing in the Basic Provisions that permits an AIP to revisit and readjust claims which have already been proven by records that the AIP found to be satisfactory and that have already been paid, absent a knowing misreporting of information or a violation of the record retention provisions. The rules contemplate revisiting already settled claims in only two scenarios: (1) a knowing misreporting of information, pursuant to section 21(b)(3); and (2) a failure to provide and to retain records, pursuant to section 21(f).

The second requestor states that section 21(f) specifies that the insured must provide records to the AIP when requested, and that the insured must retain those records for a perceived period. In the context of section 21(f), it is clear that this subsection refers to the requirement of record retention and provision. No policy provision allows an AIP to readjust a previously settled claim if an insured properly provides records to an AIP, the AIP reviews those records and pays the claim, and the insured properly retains those same records.

The second requestor states FAD-106 makes it clear that only non-compliance by an insured can result in an AIP being able to reclaim alleged overpayments. They further state that readjustment of previously settled claims is only allowed where an insured has not been compliant with the policy provisions and that an AIP may not unilaterally change its mind and overturn a past claims adjustment based solely on, for instance a different adjuster's (or different administration's) opinion of those records. There may be cases in which, upon review of an insured's records, different adjusters may differ on how much or whether indemnity is due. But this difference of opinion does not justify AIP readjustment of an already paid claim. This is why it is incumbent on an AIP, when a claim is made, to thoroughly review the insured's records and come to a final decision. Once the AIP has paid the indemnity to the insured, the policy provisions (and indeed the FCIC itself) demand that the AIP may not go back and reclaim those indemnity payments in the absence of non-compliance by the insured.

The second requestor states they have not located a policy provision that allows for readjustment of a previously settled claim other than in situations involving non-compliance with record provision and retention provisions or involving knowing misreporting of information.

Final Agency Determination

FCIC agrees with the first and second requestor that section 21(b)(3) only addresses ramifications for the knowledgeable misreporting of information used to establish yields. FCIC also agrees with the first requestor that this provision is only one instance where claim corrections or overpayments are discussed. Remedies to such errors are not addressed by this section alone. FCIC has issued determinations similar (FAD-106 and FAD-281) to the determination sought.

As FCIC explained in FAD-106, “there are numerous other provisions of the policy where non-compliance would affect the existence or amount of an indemnity paid. Non-compliance with any of these other provisions could entitle the AIP to collect any amounts that may have been overpaid as a result of such non-compliance...When overpayments are discovered as a result of non-compliance with any policy provision, the policyholder may be required to repay such overpaid amounts.”

FCIC does not agree with the second requestor that only non-compliance by an insured can result in an AIP being able to reclaim alleged overpayments. The AIP has a duty to correct claims. As stated in FAD-281, the Federal crop insurance program uses taxpayer dollars and FCIC and AIPs have a duty to ensure those taxpayer dollars are paid in accordance with policy and procedures. If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim. This obligation has been confirmed by the courts in *Old Republic Insurance Company v. FCIC*, 947 F.2d 269 (7th Circuit 1991).

In closing, FCIC agrees with the first requestor that if an error is recognized at any point it must be corrected. It is the AIP’s responsibility to audit and correct any claim that was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim.

In accordance with 7 C.F.R. § 400.765(c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

Date of Issue: 10/16/2019

This FAD was originally issued April 8, 2019, and was revised to add the second requestor’s interpretation and FCIC’s interpretation.