

## **Final Agency Determination: FAD-279**

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**Subject:** Two requests dated March 6, 2018, and March 21, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2018 crop year regarding the interpretation of section 20(a)(1) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

### **Background:**

Section 20 of the Basic Provisions states, in relevant part:

#### **20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.**

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or

such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

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(b) Regardless of whether mediation is elected:

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(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

7 C.F.R. § 400.765 states, in relevant part:

(b) Requesters may seek interpretations of those provisions of the Act and the regulations promulgated thereunder that are in effect for the crop year in which the request under this subpart is being made and the three previous crop years.

### **Interpretation Submitted**

Two interpretations were submitted in this FAD request:

#### First requestor's interpretation:

The first requestor interprets section 20(a)(1) of the Basic Provisions as requiring an interpretation from FCIC if the dispute in any way involves a policy or procedure interpretation. 7 C.F.R. § 400.765(b) limits requests for Final Agency Determinations to the current crop year in effect on the date the request is submitted and the three previous crop years. This creates a situation where an arbitrator is prohibited from ruling on a situation that requires a policy or procedure interpretation when the policy or procedure in question is outside of the scope of 7 C.F.R. § 400.765(b). If the arbitrator were to make an interpretation regarding the provisions in this situation, the award would be nullified pursuant to section 20(a)(1)(ii); however, the parties

could not obtain an interpretation from the Federal Crop Insurance Corporation (FCIC) and the arbitration cannot proceed without an interpretation. Arbitration is thereby rendered impossible.

The first requestor states section 20(a)(1) of the Basic Provisions and 7 C.F.R. § 400.765(b) as prohibiting arbitration in the situation above. The arbitrator lacks authority to interpret the policy pursuant to section 20(a)(1) of the Basic Provisions. FCIC lacks the authority to interpret the policy pursuant to 7 C.F.R. § 400.765(b). Because neither the arbitrator nor FCIC is allowed to interpret the policy, arbitration is impossible, and thus ceases to be an option. The sole remaining avenue for resolving the dispute is judicial review pursuant to section 20(b)(2) of the Basic Provisions.

#### Second requestor's interpretation:

The second requestor seeks an interpretation of the policy language discussing when a final agency determination is necessary. The second requestor states that if an interpretation is over three years prior to the current crop year, no interpretation from FCIC can be sought.

In the event that an interpretation can be given, the second requestor states section 20(a)(1) of the Basic Provisions provides that FCIC need not provide any interpretations to guide state or federal court systems when only extra contractual claims are being presented against the approved insurance provider and there is no claim for breach of the insurance contract being made because there is no contract language that forms the basis of any claim being presented.

### **Final Agency Determination**

The Federal Crop Insurance Corporation (FCIC) agrees with both requesters that section 400.765(b) limits requests for Final Agency Determinations to the current crop year in effect on the date the request is submitted and the three previous crop years. If the filing for mediation, arbitration, or litigation is timely, but the dispute involves an interpretation of a policy provision that is outside the scope of crop years authorized in section 400.765(b), FCIC cannot provide an interpretation of this policy provision.

However, to the extent the language in the provisions interpreted is identical to the language applicable for any other crop year, the arbitrator can look through the

archives to see whether an interpretation was previously provided. If not, any party can request an interpretation of the provision in the current year and that same interpretation can be applied to such other crop year provided that the language of the provisions is identical. Therefore, to the extent that policy language is the same, interpretations made for one year may apply to numerous years, regardless of whether or not this falls outside of the three-year period. For example, in 2018, a person can request an interpretation for policy language in effect for the 2018, 2017, 2016, or 2015 year. If the policy language was unchanged from 2013 through 2015, an interpretation could be requested for the 2015 year and the interpretation would apply for the 2013 year.

If there is a dispute of an interpretation over any policy or procedural provision, the parties are required to seek a Final Agency Determination or interpretation of procedure from FCIC. FCIC agrees with the first requestor that failure to obtain the required interpretation from FCIC, or an arbitrator disregarding an interpretation provided by FCIC, will result in nullification of any award.

In the event of a dispute, section 20(b)(3) of the Basic Provisions requires filing of a request for mediation, arbitration or litigation within one year of the determination by the approved insurance provider. The current time limit is set to allow an additional two years to pass before an interpretation must be requested to permit time for the appeals process to proceed. Most proceedings initiated within one-year of a determination that is in dispute would be readily able to request an interpretation within the timeframes established by this regulation. FCIC has yet to find the situation to exist where a Final Agency Determination or interpretation of procedure from FCIC has not been able to be requested nor a determination be given because the request of the filing for mediation, arbitration, or litigation is timely, but the dispute involves an interpretation of a policy provision that is outside the scope of crop years authorized in section 400.765(b). Therefore, given the timeline for timely mediation, arbitration, or litigation, the current crop year and three previous crop years is sufficient.

FCIC does not agree with the first requestor that if the parties are unable to resolve a disagreement through arbitration, the dispute may be resolved through judicial review pursuant to section 20(b)(2) of the Basic Provisions. As supported by FAD-193, published on RMA's website on October 21, 2013, an approved insurance provider or policyholder must complete the arbitration process before seeking resolution of a dispute through judicial review. Therefore, if arbitration has not been

completed, judicial review may not be sought. Because previously published FADs are generally applicable and may be used in an arbitration, completion of an arbitration hearing is not based solely on whether an interpretation from FCIC may be sought and received for a particular arbitration. In the case that an interpretation from FCIC may not be sought as it is outside of the time frame for which an interpretation may be requested (current crop year in effect on the date the request is submitted and the three previous crop years) the filing of a request for the particular arbitration must be examined to see if the filing requirements have been met in accordance with section 20(b)(3) of the Basic Provisions.

FCIC agrees in part with the second requestor's interpretation that section 20(a)(1) of the Basic Provisions provides that FCIC need not provide any interpretations to guide state or Federal court systems when only extra contractual claims are being presented against the approved insurance provider and there is no claim for breach of the insurance contract being made because there is no contract language that forms the basis of any claim being presented. FAD-225, published on RMA's website on February 4, 2015, explains if there is a dispute over any policy provision or procedure, the parties are required to seek an interpretation from FCIC in accordance with section 20(a)(1)(i) of the Basic Provisions. Claims and damages outside of the crop insurance contract between the approved insurance provider and the policyholder are not necessarily a dispute over any policy provision or procedure, but it is possible that even in an extra-contractual claim there is a dispute over an interpretation of provision of a Federal crop insurance policy or FCIC issued procedures. In these cases, an interpretation from FCIC must be obtained.

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).

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