

## **Final Agency Determination: FAD-233**

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### **Subject**

**Subject:** Joint requests dated January 28 and February 25, 2015, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2013 and succeeding crop year regarding the interpretation of section 28 of the Common Crop Insurance Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8, as it relates to unit structure. This request is pursuant to 7 C.F.R. § 400, subpart X.

### **Background:**

#### **Referenced policy and procedure in request:**

Section 1 of the Basic Provisions states, in relevant part:

#### **1. Definitions**

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**Enterprise Unit** - All insurable acreage of the same insured crop in the county in which you have a share on the date coverage begins for the crop year, provided the requirements of section 34 are met.

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Section 28 of the Basic Provisions states, in relevant part:

#### **28. Transfer of Coverage and Right to Indemnity**

If you transfer any part of your share during the crop year, you may transfer your coverage rights, if the transferee is eligible for crop insurance. We will not be liable for any more than the liability determined in accordance with your policy that existed before the transfer occurred. The transfer of coverage rights

must be on our form and will not be effective until approved by us in writing. Both you and the transferee are jointly and severally liable for the payment of the premium and administrative fees. The transferee has all rights and responsibilities under this policy consistent with the transferee's interest.

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Section 34(a)(4)(vii) of the Basic Provisions states, in relevant part:

**34 Units:**

(a) You may elect an enterprise unit or whole-farm unit in accordance with the following:

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(4) For an enterprise unit:

(i) To qualify, an enterprise unit must contain all of the insurable acreage of the same insured crop in:

(A) Two or more sections, if sections are the basis for optional units where the insured acreage is located;

(B) Two or more section equivalents determined in accordance with FCIC issued procedures, if section equivalents are the basis for optional units where the insured acreage is located or are applicable to the insured acreage;

(C) Two or more FSA farm serial numbers, if FSA farm serial numbers are the basis for optional units where the insured acreage is located;

(D) Any combination of two or more sections, section equivalents, or FSA farm serial numbers, if more than one of these are the basis for optional units where the acreage is located or are applicable to the insured acreage (e.g., if a portion of your acreage is located where sections are the basis for optional units and another portion of your acreage is located where FSA farm serial numbers are the basis for optional units, you may qualify for an enterprise unit based on a combination of these two parcels);

(E) One section, section equivalent, or FSA farm serial number that contains at least 660 planted acres of the insured crop. You may qualify under this paragraph based only on the type of parcel that is utilized to establish optional units where your insured acreage is located (e.g., if having two or more sections is the basis for optional units where the insured acreage is located, you may qualify for an enterprise unit if you have at least 660 planted acres of the insured crop in one section); or

(F) Two or more units established by written agreement; and

(ii) At least two of the sections, section equivalents, FSA farm serial numbers, or units established by written agreement in section 34(a)(4)(i)(A), (B), (C), (D), or (F) must each have planted acreage that constitutes at least the lesser of 20 acres or 20 percent of the insured crop acreage in the enterprise unit. If there is planted acreage in more than two sections, section equivalents, FSA farm serial numbers or units established by written agreement in section 34(a)(4)(i)(A), (B), (C), (D), or (F), these can be aggregated to form at least two parcels to meet this requirement. For example, if sections are the basis for optional units where the insured acreage is located and you have 80 planted acres in section one, 10 planted acres in section two, and 10 planted acres in section three, you may aggregate sections two and three to meet this requirement.

(iii) The crop must be insured under revenue protection or yield protection, unless otherwise specified in the Special Provisions;

(iv) If you want to change your unit structure from enterprise units to basic or optional units in any subsequent crop year, you must maintain separate records of acreage and production:

(A) For each basic unit, to be eligible to use records to establish the production guarantee for the basic unit; or

(B) For optional units, to qualify for optional units and to be eligible to use such records to establish the production guarantee for the optional units;

(v) If you do not comply with the production reporting provisions in section 3(f) for the enterprise unit, your yield for the enterprise unit will be determined in accordance with section 3(f)(1);

(vi) You must separately designate on the acreage report each section or other basis in section 34(a)(4)(i) you used to qualify for an enterprise unit; and

(vii) If we discover you do not qualify for an enterprise unit and such discovery is made:

(A) On or before the acreage reporting date, your unit division will be based on the basic or optional units, whichever you report on your acreage report and qualify for; or

(B) At any time after the acreage reporting date, we will assign the basic unit structure; and

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## **Interpretation Submitted**

### First Requestor's Interpretation:

The first requestor interprets section 28 of the Basic Provisions to mean that the transferee can only acquire whatever interests and right that the transferor had in the policy at the time of the transfer, but that the transferee must independently comply with all of the terms of the policy including eligibility for enterprise unit elections. The issue is about eligibility for coverages or elections which the first requestor believes cannot be waived or avoided merely because a transferor was eligible at the time of the transfer. The first requestor believes that the transferee must independently maintain eligibility for the coverages and elections under the policy notwithstanding the transferor's eligibility status. For example, a transferee who did not qualify as a "new producer" could not obtain the benefits as a new producer based solely on the fact that the transferor met those qualifications. To conclude otherwise would render section 34(4)(vi) of the Basic Provisions meaningless.

The first requestor also believes that a transferee only acquires the rights of the transferor upon an approved transfer. If, during the growing season, a policyholder sells and transfers all of his units that make up the enterprise unit, but retains one small acreage that does not qualify as an enterprise unit, the first requestor believes that section 34 would require the one retained unit be reassigned to an optional unit or basic unit. In the same respect, a transferee who purchased the single acreage

that did not qualify for an enterprise unit, could not seek benefits under a transferred policy based upon an enterprise unit election. The requestor believes that the transferee could have no greater rights than the transferor would have.

The first requestor also interprets that unit structure must be verified and corrected at the time of the loss adjustment. Pursuant to section 34(a)(4)(vii) of the Basic Provisions, if it is determined that the policyholder does not qualify for an enterprise unit, the unit structure must be modified and assigned either as a basic unit, or an optional unit. The first requestor interprets these provisions to mean that the insured crops must qualify as an enterprise unit not only at the time of the application and the acreage reporting date (ARD), but must also qualify during the growing season and at the time of the loss adjustment. The first requestor contends that at any time the loss adjuster is making a farm inspection, including at the time when a loss is being adjusted, that the adjuster must verify that the units qualify for an enterprise unit. The unit structure may be changed based upon information determined to be correct when adjusting a loss or at any other time. Specifically, the first requestor believes that if it is determined during a farm inspection, the loss adjustment process or at any other time that the insured crop does not qualify for an enterprise unit, that the loss adjuster must make the correction to the unit structure at that time.

The first requestor interprets the requirement to verify and reassign the unit structure during loss adjustment process to be required, even if the insured crop initially qualified as an enterprise unit. For example, when a single policyholder insures multiple units as an enterprise unit, and subsequently transfers those units to multiple transferees and the transferred units no longer qualify as an enterprise unit, that the unit structure must be corrected and assigned either an optional unit or a basic unit.

#### Second Requestor's Interpretation:

The second requestor interprets section 28 of the Basic Provisions to mean that when a single policyholder insures multiple tracts properly qualifying for an enterprise unit, and subsequently transfers those tracts to multiple transferees, the enterprise unit still remains and if a loss occurs it must be paid according to the properly qualified enterprise unit. The transferee acquires all the rights and responsibilities under the policy consistent with the transferor's interest.

The second requestor contends that the approved insurance provider's (AIP) exposure is not limited to the lesser of the liability under the optional or enterprise unit structure in the event a Transfer of Coverage and Right to Indemnity occurs during the insurance period. If the transferee purchased the transferor's coverage, then the AIP is under the obligation to pay the transferee a loss according to the coverage elected by the transferor.

The second requestor agrees with the first requestor that a loss adjuster can reassign the unit structure if the loss adjuster determines on or after the acreage reporting date that the policyholder does not qualify for an enterprise unit. However, the second requestor asserts this only applies if the underlying premise on which the policy was purchased was false. The second requestor contends that the Transfer of Coverage and Right to Indemnity in and of itself does not constitute a reason for the AIP to change the unit structure.

### **Final Agency Determination**

FCIC agrees with the first requestor that if there is a Transfer of Coverage and Right to Indemnity the transferee must independently be eligible for crop insurance. Therefore, in a situation where the transferee was not eligible for crop insurance, the transferee would not be eligible for a Transfer of Coverage and Right to an Indemnity under the policy.

FCIC agrees that section 28 of the Basic Provisions states that the AIP will not be liable for any more than the liability determined in accordance with the policy that existed before the transfer occurred. However, FCIC agrees with the second requestor that once coverage is transferred the AIP is under the obligation to pay the transferee a loss according to the coverage elected by the transferor.

FCIC agrees with both requestors that if at any time it is discovered the acreage insured under the policy does not qualify for an enterprise unit, the unit structure must be modified in accordance with section 34(a)(4)(vii) of the Basic Provisions. The definition of "enterprise unit" contained in section 1 of the Basic Provisions specifically states an enterprise unit consists of all insurable acreage of the same insured crop in the county in which the policyholder (transferor) has a share on the date coverage begins for the crop year, provided the requirements of section 34 of the Basic Provisions are met.

However, FCIC disagrees with the first requestor that a Transfer of Coverage and Right to Indemnity affects the unit structure when the amount of acreage transferred to the other persons does not meet the requirements of the original unit structure of the transferor and the unit must be changed to conform to that acreage of the transferee. Section 34(a)(4)(vi) of the Basic Provisions has no relevance to a Transfer of Coverage and Right to Indemnity, as indicated by the first requestor, but rather it simply requires the original policyholder to separately designate on the acreage report each section or other basis used to qualify for an enterprise unit.

In accordance with section 28 of the Basic Provisions, even after coverage is transferred, the terms of the policy remain the same as they were in effect when insurance attached. Nothing in the policy is changed by a Transfer of Coverage and Right to Indemnity, not the liability, not the coverage level, not the unit structure. The transferee gets the policy terms and conditions selected by the transferor. If the transferee is a single person, then they acquire all the rights and responsibilities under the policy consistent with the transferor's interest. The transferor and transferee are required to comply with the terms of the policy and will receive any indemnity due. If there are multiple transferees, they collectively acquire all the rights and responsibilities of the one policy consistent with the transferor's interest. Even if the named insured retains a small portion of the acreage nothing in the policy changes. Separate policies are not created whether there is one or multiple transferees. After the Transfer of Coverage and Right To Indemnity there are just multiple persons with interest in one policy and those policy terms remain the same.

The exception is if there is a scheme or device. Section 521 of the Federal Crop Insurance Act states:

If the Secretary determines that a person has knowingly adopted a material scheme or device to obtain catastrophic risk, additional coverage, or noninsured assistance benefits under this subtitle to which the person is not entitled, has evaded this subtitle, or has acted with the purposes of evading this subtitle, the person shall be ineligible to receive all benefits applicable to the crop year for which the scheme or device was adopted.

If there is evidence of any scheme or device, neither the transferor nor the transferee would be eligible for an indemnity for the crop year. For example, several people conspire to lease acreage to a person who qualifies as a new producer in order to take advantage of the new producer status. The person then gives up the

leases and transfers coverage back to the original lease land owners so they all get the benefit of new producer status. This could be considered a scheme or device and none of the persons would be eligible for an indemnity for the crop year.

FCIC agrees with the second requestor. When a single policyholder insures multiple tracts properly qualifying as an enterprise unit, and subsequently transfers those tracts to multiple transferees, the enterprise unit still remains valid unless it is determined the insured acreage did not qualify as an enterprise unit at the time insurance attached or there was a scheme or device.

This means, unless there was a scheme or device, as long as the requirements for an enterprise unit contained in section 34 of the Basic Provisions are met at the time insurance attached, the enterprise unit structure would remain intact for the duration of the crop year, regardless if a Transfer of Coverage and Right to Indemnity is executed.

For example, a policyholder has properly insured and qualified for an enterprise unit with 600 acres made up of 300 acres each in two sections. The policyholder transfers 300 acres in one section to John Doe and 300 acres in the other section to Paul Smith. In this case, the 600 acres remains insured under the original policy with both John and Paul now having rights to the coverage and any indemnity amounts payable under an enterprise unit for their respective shares. This means that all production from the entire 600 acres is used to determine whether an indemnity is owed and John and Paul are jointly and severally responsible for the premium on the whole 600 acres. The enterprise unit containing 600 acres stays the same.

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:** April 29, 2015