

[Final Agency Determination: FAD-246](#)

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Subject: Two requests dated August 31, 2015, and September 10, 2015, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2014 crop year regarding the interpretation of sections 14(c)(1) and 14(c)(5) of the Fresh Market Tomato (Dollar Plan) Crop Provisions published at 7 C.F.R. § 457.139. Both requests are pursuant to 7 C.F.R. part 400, Subpart X.

Background:

Referenced policy and procedure in request:

Section 1 of the Fresh Market Tomato (Dollar Plan) Crop Provisions states, in relevant part:

Direct Marketing. The sale of the insured crop directly to consumers without the intervention of an intermediary such as a registered handler, wholesaler, retailer, packer, processor, shipper, or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market, and permitting the general public to enter the field for the purpose of picking all or a portion of the crop.

Harvest. The picking of fresh market tomatoes from the plants, excluding tomatoes salvaged by penhookers.

Penhookers. Individuals who purchase the right to salvage tomatoes remaining in the field after commercial harvests are completed.

Section 8 of the Fresh Market Tomato (Dollar Plan) Crop Provisions states, in relevant part:

In accordance with section 8 of the Basic Provisions, the crop insured will be all the field grown mature green or ripe fresh market tomato types in the county as specified in the Special Provisions for which a premium rate is provided in the actuarial documents:

(c) That are not:

- (1) Interplanted with another crop;
- (2) Planted into an established grass or legume;
- (3) Grown for direct marketing; or
- (4) Direct seeded fresh market tomatoes, unless insured by written agreement.

Section 14(c) of the Fresh Market Tomato (Dollar Plan) Crop Provisions states, in relevant part:

14. Settlement of Claim.

(c) The total value of production to count from all insurable acreage on the unit will include:

- (1) Not less than the amount of insurance per acre for the stage for any acreage:
 - (i) That is abandoned;
 - (ii) Put to another use without our consent;
 - (iii) That is damaged solely by uninsured causes; or

(iv) For which you fail to provide acceptable production records;

(5) Any penhooker salvage value paid to you will be added to the total dollar value of production to count.

Paragraph 219G of the 2014 Loss Adjustment Manual states, in relevant part:

219. Verifying Sold or Commercially Stored Production

G. Verification of Direct Marketed Production

Acceptable records of harvested and sold production are as follows:

(1) Acceptable Pick Records

(a) To be acceptable pick records, it cannot be a summary of the pick records, and must:

(i) Include the names of the individuals paid by the grower (crew leader or picker).

(ii) Show the actual running tallies of production harvested by the pickers.

(iii) Be legible, understandable, and reasonable when explained by the insured.

(iv) Be accompanied by verifiable receipts such as a photocopy of the canceled check(s) showing the banking institution's stamp of payment. The insured must identify the price paid per volume of production picked (converted to the insurable unit of measure for the commodity (bushels, lugs, or boxes)), and the average weight per bushel, lug, or box.

(b) When verifying the pick records, the complete pick record for the entire crop must be reviewed.

(c) Copies of acceptable pick records with any explanation must be retained in the insured's loss-file folder.

(2) Other Acceptable Records

(a) A daily accounting of sales records showing amount of production and price received in a ledger or log.

(b) Daily cash receipts.

Paragraph 9C of the Fresh Market Tomato (Dollar Plan) Loss Adjustment Standards Handbook (LASH) states, in relevant part:

9. CLAIM FORM ENTRIES AND PROCEDURES

C. FORM ENTRIES AND COMPLETION INFORMATION

SECTION II - DETERMINED HARVESTED PRODUCTION

GENERAL INFORMATION:

(5) If additional lines are necessary, the data may be entered on a continuation sheet. USE SEPARATE LINES FOR:

(d) U-pick production. Salvaged ("penhooker") tomatoes and other production harvested and sold to someone other than a first handler is to be reported as u-pick.

(8) If the insured cannot provide the number of cartons harvested from u-pick acreage, but can provide the total dollars received for that production, divide the dollar amount received by the minimum value per

carton shown in the Special Provisions to obtain the number of cartons to count.

Interpretation Submitted

First requestor's interpretation:

The first requestor states section 14 of the Fresh Market Tomato (Dollar Plan) Crop Provisions (13-0086) governs how indemnities are determined based upon the records provided by a policyholder when a loss has occurred. Section 14 mandates on multiple occasions that the type of records provided by the policyholder in support of any loss under the policy must be "acceptable production records."

The Fresh Market Tomato (Dollar Plan) Loss Adjustment Standards Handbook (25180-2H) ("LASH") requires that "tomatoes harvested and sold to someone other than a first handler" must be reported as "u-pick" and that the number of cartons of such production must be entered on the Summary of Harvested Production for purposes of determining production to count. See Sections 2B(4), 8D(I)(d) and 8D(10). Section 2.B(4) of the LASH equates "u-pick" production to "Penhooker" production, and further explains that such production is a form of "direct marketing." Although the number of cartons of u-pick production must be accounted for in the loss adjustment process. Section 8.D(10) does allow the approved insurance provider to determine the number of cartons to enter through a calculation, but only if "acceptable records" set forth "the total dollars received" for the u-pick production. Section 14(c)(5) of the Fresh Market Tomato (Dollar Plan) Crop Provisions requires that penhooker/u-pick salvage value be added to the total dollar value of production to count.

Thus, although the policy clearly requires that acceptable production records be provided by the policyholder in order to determine a loss under the policy, and provides the mandatory remedy where such records are not provided (i.e., applying the amount of insurance per acre for any acreage for which records are not provided), it does not provide a definition of what records qualify as "acceptable production records" for the purpose of determining the value of "u-pick" crops.

For purposes of Section 14(c)(I)(iv) of the Fresh Market Tomato (Dollar Plan) Crop Provisions, and with respect to production considered to be "u-pick", the first

requestor interprets “acceptable production records” to mean only those records that satisfy the mandatory standards set forth in Paragraph 219G(1) or 219G(2) of the 2014 Loss Adjustment Manual.

It is further the first requestor's interpretation that the required “running tallies”, “daily Accounting”, or “daily cash receipts” records mandate that “acceptable production records” of u-pick production be contemporaneous to (i.e., “running”) the picking of the cartons or contemporaneous to (i.e., “daily”) the sale resulting in cash received. It is the first requestor’s interpretation that labor records that do not tally cartons picked and do not reflect cash received, alone, would not constitute “acceptable production records.”

Second requestor’s interpretation:

The second requestor states the Fresh Market Tomato (Dollar Plan) Crop Provisions do not insure tomatoes grown for direct marketing in accordance with section 8(c)(3). “Harvest” is defined in the Fresh Market Tomato (Dollar Plan) Crop Provisions as “The picking of fresh market tomatoes from the plants, *excluding tomatoes salvaged* by penhookers.” (Emphasis supplied)

Section 14(c)(5) of the Fresh Market Tomato (Dollar Plan) Crop Provisions provides that “Any penhooker salvage value paid to you will be added to the total dollar value of production to count.” Production records referenced under section 14 of the Fresh Market Tomato (Dollar Plan) Crop Provisions relate to the Harvest Production of the insured crop. The Fresh Market Tomato (Dollar Plan) LASH at Section II, Paragraphs 9(c)(5)(d) and (8) provides instruction that allows the policyholder to either provide the number of cartons harvested from u-pick acreage, or provide the total dollars received for that production and divide the dollar amount received by the minimum value per carton shown in the Special Provisions to obtain the number of cartons to count.

References to pick records in paragraph 219G of the Loss Adjustment Manual (LAM) relate to only crops that are direct marketed, to wit:

“When CP allow the crop to be insured when the crop is grown for direct marketing (or the CP allow coverage by SP or Written Agreement) ...”
(Emphasis supplied)

Paragraph 219G applies only when the Crop Provisions require a pre-harvest appraisal.

“The AIP will conduct a timely pre-harvest appraisal that will be used to determine the insured's production to count for production that is sold by direct marketing.” See Loss Adjustment Manual at page 304.

The second requestor's interpretation of what constitutes acceptable production records that relate to the salvage of otherwise uninsured tomatoes, salvaged by penhookers as contemplated under section 14(c)(5) and used for the purpose of counting toward the production to count is found in the paragraph 9C Section II of the Fresh Market Tomato (Dollar Plan) LASH.

Relevant facts that support this interpretation that apply to the Fresh Market Tomato (Dollar Plan) are:

- The Fresh Market Tomato (Dollar Plan) Crop Provisions does not require a pre-harvest appraisal.
- The Fresh Market Tomato (Dollar Plan) Crop Provisions does not insure tomatoes, such as those salvaged by penhookers after harvest.
- Salvaged tomatoes are not otherwise insured but the value of such tomatoes paid to the policyholder will be added to the total dollar value of production to count.
- Direct Marketing is defined in the Fresh Market Tomato (Dollar Plan) LASH as:

Sale of the insured crop directly to consumers without the intervention of an intermediary such as a registered handler, wholesaler, retailer, packer, processor, shipper, or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market and permitting the general public to enter the field for the purpose of picking all or a portion of the crop (refer to the definition of U-Pick).

- Accurate records are required. The criteria set forth in the Fresh Market Tomato (Dollar Plan) LASH allows for a summary of total dollars received when it is not feasible to provide the number of salvage cartons harvested.
- Paragraph 9C Section II(8) of the Fresh Market Tomato (Dollar Plan) LASH provides an acceptable protocol to arrive at an accurate production to count of penhooker salvage.

- Penhooker salvage is distinct from “Direct Marketing” of fresh market tomatoes. Tomatoes salvaged by penhookers are not considered an insured crop under the Fresh Market Tomato (Dollar Plan) Crop Provisions. Penhooker salvaged tomatoes do apply toward the production to count.

From an operations and procedure perspective it makes sense that records associated with penhooker salvage would be slightly less stringent than production records associated with the insured harvest. If the policyholder cannot provide the number of cartons harvested by penhookers for salvage, but can provide the total dollars received for that salvaged production, the policyholder may divide the dollar amount received by the minimum value per carton shown in the Special Provisions to obtain the number of cartons to count.

Final Agency Determination

Under section 8(c) of the Fresh Market Tomato (Dollar Plan) Crop Provisions tomatoes grown for direct marketing, or that are direct marketed are not insurable under the Fresh Market Tomato (Dollar Plan) Crop Provisions. Under the definition of “direct market” u-pick tomatoes would be considered as direct market tomatoes because they are sold directly to consumers without the intervention of an intermediary such as a registered handler, wholesaler, retailer, packer, processor, shipper, or buyer. The example in the definition references u-pick when the general public is allowed to enter the field for the purpose of picking all or a portion of the crop. To the extent that the procedures conflict or are ambiguous, the policy provisions control. Therefore, if the crop has been direct marketed, including u-pick, the crop is not insurable.

Insured tomatoes may eventually be salvaged by penhookers after the completion of commercial harvest. Penhookers are specifically defined as individuals who purchase the right to salvage tomatoes remaining in the field after commercial harvest is completed. Section 14(c)(5) of the Fresh Market Tomato (Dollar Plan) Crop Provisions requires that the value of any production salvaged by penhookers will be added to the total dollar value of production to count for claim purposes. Therefore, only records that can be used to establish either the value of any production salvaged by penhookers, or the total number of cartons of tomatoes salvaged by penhookers who purchase the right to salvage such tomatoes, can be considered acceptable records for determining the dollar value of production to count.

The Federal Crop Insurance Corporation (FCIC) disagrees with the second requestor that record keeping is less stringent. At all times producers are required to provide acceptable records. However, the LASH specifically states that if the policyholder cannot provide the number of cartons harvested by penhookers for salvage, but can provide the total dollars received for that salvaged production, the policyholder may divide the dollar amount received by the minimum value per carton shown in the Special Provisions to obtain the number of cartons to count. Therefore, FCIC agrees with the second requestor on this interpretation.

FCIC also agrees with the first requestor's interpretation that labor records that do not tally cartons picked or do not reflect total dollars received, alone, would not constitute "acceptable production records".

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: November 24, 2015