

Final Agency Determination: FAD-232

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Subject: Two requests dated February 3, 2015, and February 20, 2015 to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2012 crop year regarding the interpretation of section 20(a)(1) of the Common Crop Insurance 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:

The preamble of the Basic Provisions states, in relevant part:

We will use the procedures (handbooks, manuals, memoranda and bulletins), as issued by FCIC and published on RMA's Web site at www.rma.usda.gov or a successor Web site, in the administration of this policy, including the adjustment of any loss or claim submitted hereunder. In the event that we cannot pay your loss because we are insolvent or are otherwise unable to perform our duties under our reinsurance agreement with FCIC, your claim will be settled in accordance with the provisions of this policy and FCIC will be responsible for any amounts owed. No state guarantee fund will be liable for your loss.

Section 20(a)(1) 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.

(iii) An interpretation by FCIC of a policy provision is considered a determination that is a matter of general applicability.

(2) Unless the dispute is resolved through mediation, the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. The statement must also include any amounts awarded for interest. Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator. All agreements reached through settlement, including those resulting from mediation, must be in writing and contain at a minimum a statement of the issues in dispute and the amount of the settlement.

(b) Regardless of whether mediation is elected:

(3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

(f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with section 31. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

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

(a) The regulations contained in this subpart prescribe the rules and criteria for obtaining a final agency determination of the interpretation of any provision of the Act or the regulations promulgated thereunder.

(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.

(c) All final agency determinations issued by FCIC, and published in accordance with Sec. 400.768(f), will be binding on all participants in the

Federal crop insurance program.

7 C.F.R. § 400.768 FCIC obligations states, in relevant part:

(a) FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or any reinsurance agreement.

Interpretation Submitted

Two interpretations were submitted in this FAD request.

First requestor's interpretation:

The first requestor states section 20(a)(I)(ii) of the Basic Provisions is not a basis for a policyholder to challenge an arbitration award. The first requestor states section 20(a)(I) of the Basic Provisions places the burden of requesting an interpretation from the Federal Crop Insurance Corporation (FCIC) on both the Approved Insurance Provider (AIP) and the participant/policyholder. The requestor interprets this provision to place the burden or obligation to seek any required interpretation equally on both the AIP and the participant/policyholder. That is, if either the AIP or the participant/policyholder assert or contend that an interpretation from FCIC is required or warranted under the provisions of the policy, each party would have an equal and separate responsibility to seek the required interpretation. For example, the requestor believes that if a participant/policyholder contends that an interpretation is required, the participant/policyholder would have a burden and obligation to request a timely interpretation. Pursuant to Manager's Bulletin 05-018, such a request must be submitted no later than ninety days prior to the arbitration proceeding. Also, if an issue that requires an interpretation arises during the arbitration itself, the parties may raise that issue at that time and the arbitrator would be required to promptly make that request. See section 2(B)(3) of Manager's Bulletin 05-018. The requestor interprets these provisions to require a participant/insured to affirmatively request any required FCIC interpretation in advance of the arbitration hearing or to otherwise to make that known to the arbitrator when that issue arises during arbitration. The requester does not believe

that a participant/policyholder can use the provisions of the policy requiring an FCIC interpretation as a basis to seek a nullification of an arbitration award when they have failed to timely request such an interpretation in compliance with the provisions of section 20 of the Basic Provisions and MGR-05-018. To construe this provision otherwise would allow a participant/policyholder who contended that an interpretation was required to intentionally fail to request a policy or procedure interpretation from FCIC and then wait and see if they receive a favorable arbitration award. If the arbitration award is not favorable, then they could claim that their failure to obtain a policy interpretation of procedure allows them to challenge and nullify the award. The requestor believes this result is clearly not the intent of these provisions and that a participant/policyholder cannot, when they have failed to timely request a FCIC interpretation or make known to the arbitrator their belief that an interpretation is required, use the failure to obtain such an interpretation as a basis to seek nullification of an unfavorable arbitration award by judicial review.

Second requestor's interpretation:

The second requestor states section 20(a)(1)(ii) of the Basic Provisions states any agreement or award is nullified by the failure to obtain a required interpretation.

The second requestor believes section 20(a)(1)(ii) of the Basic Provisions provides for nullification of any agreement or award if both parties fail to request an interpretation when an interpretation of "a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable, how it is applicable, or the meaning of any policy provision or procedure" is necessitated by the dispute. Consequently, the requestor believes section 20(a)(1)(ii) was specifically provided for situations when a determination is made that an interpretation was necessary after an agreement or award is entered.

The second requestor believes section 20(a)(1)(ii) was created for situations when neither party knew an interpretation was necessary prior to or during an arbitration or other proceeding. Rather, the parties subsequently learned an interpretation was necessary based on the terms and findings in the agreement or award. Specifically, the second requestor believes section 20(a)(1)(ii) is applicable where the agreement or award evidences an improper interpretation of "the policy or procedure, whether a specific policy provision or procedure is applicable, how it is applicable and the meaning of any policy provision or procedure." The second requestor believes, in fact, that section 20(a)(1)(ii) serves no purpose other than to nullify an award or

agreement when both parties failed to request an interpretation prior to an award or agreement.

The second requestor believes section 20(a)(1)(ii) was drafted to give parties the opportunity to rectify an agreement or award when an arbitrator or other individual relies on a policy provision or procedure but fails to properly interpret the policy provision or procedure or how the policy or procedure is applicable. The second requestor believes that parties are not always aware there is a dispute over an interpretation of the policy provision or procedure or the applicability of a policy provision or procedure until an arbitrator or other person improperly interprets or applies the policy provision or procedure.

Section 20(a)(1)(ii) of the Basic Provisions has no purpose if nullification of an agreement or award is waived where one or both parties fails to request an interpretation 90 days before the date of arbitration or during the arbitration. The second requestor does not believe Manager's Bulletin MGR-05-018, section 2(B)(2)(a)-(b) precludes section 20(a)(1)(ii) of the Basic Provisions nullifying an award or agreement if the parties fail to timely request an interpretation. Rather, the second requestor believes section 2(B)(2)(a)-(b) of MGR-05-018 provides that an untimely request "may" result in denial of an interpretation. Furthermore, even if FCIC denies the interpretation for failure to timely request, FCIC is also required to nullify any agreement or award according to section 20(a)(1)(ii) of the Basic Provisions.

Final Agency Determination

FCIC agrees with both requestors that section 20(a)(1) places a burden on both the AIP and the policyholder when a dispute arises to obtain an interpretation of a policy or procedural provision. The FCIC interpretation is binding on any arbitration and the arbitrator has no authority to interpret any policy or procedural provision. This is consistent with FAD-196, published on RMA's website on November 13, 2013, and FAD-225 published on RMA's website on February 2, 2015, which states "FCIC is responsible for making interpretations of the policy or procedure." "...[I]f there is a dispute over any policy or procedural provision in any forum [such as an arbitration]...the parties are required to seek a Final Agency Determination or interpretation of procedure from FCIC." Thus, the arbitrator is bound to give deference to any FCIC interpretation.

FCIC agrees with the first requestor that the burden or obligation to seek any required interpretation lies equally with the AIP or the policyholder. As such, if either the AIP or policyholder asserts or contends that an interpretation is warranted, then each party has a separate and equal responsibility to timely seek the required interpretation. The failure of either party to obtain an interpretation of a known material dispute of policy or procedure interpretation in accordance with section 20(a)(1) of the Basic Provisions will result in nullification of any agreement or award in accordance with section 20(a)(1)(ii) of the Basic Provisions.

FCIC agrees in part with the second requestor that section 20(a)(1)(ii) of the Basic Provisions provides for nullification of any agreement or award if both parties fail to request a required interpretation when a dispute involves the applicability and meaning of a specific policy provision or procedure, and how it is applicable. FCIC agrees that compliance with the 90 day deadline applicable to interpretations of procedure is not always possible because an issue that requires a policy or procedural interpretation could arise for the first time during the mediation, arbitration, or litigation proceeding. In such case, the mediator, arbitrator, judge, or magistrate must promptly request, or direct the parties to request, an interpretation be obtained from FCIC.

It is also possible that such issues of interpretation may not be known until after the arbitration decision has been rendered and the parties realize that the arbitrator issued an award that contained an interpretation that is inconsistent with a published FAD. Under such circumstances, the policy allows for nullification of the award if the party seeking nullification can show that the inconsistent interpretation resulted in an improper award being made. This is distinguishable from situations where a party may simply be dissatisfied with the outcome. The party seeking nullification has a high burden to show that the arbitrator made an interpretation of statute, regulation, policy or procedure for which no FAD was previously issued or sought.

The purpose of nullification provision in the policy is to ensure that there is only one interpretation provided by FCIC. To allow arbitrators to make their own interpretations of policy or procedure could lead to disparate treatment based on the selection of an arbitrator. The nullification provision prevents any type of forum shopping so all producers and AIPs are treated the same and the same standards apply to all.

Under 7 C.F.R. § 400.768, FCIC will not interpret any specific factual situation or case, such as the actions of the insured, AIP, agent, loss adjuster, arbitrator, mediator, judge, or magistrate under the procedures. Thus, this interpretation does not include any analysis of whether the policyholder, AIP, or arbitrator were in conformance with the statute, policy provisions, or procedures cited above.

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 10, 2015