Final Agency Determination: FAD-320

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Subject: Request dated January 9, 2024, submitted to the Risk Management Agency (RMA) for a final agency determination for the 2021 crop year of section 20(a) of the Common Crop Insurance Policy (CCIP) Basic Provisions, published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, Subpart X.

Reference:

The relevant policy provisons are:

The 2021 CCIP Basic Provisions (21.1-BR) (Released November 2020) state, in relevant part

> **Preamble**
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> This insurance policy is reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act (Act) (7 U.S.C. 1501-1524). All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act. The provisions of the policy may not be waived or varied in any way by us, our insurance agent or any other contractor or employee of ours, or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. We will use FCIC procedures (handbooks, manuals, memoranda and bulletins), published on RMA's website at www.rma.usda.gov or a successor website, in the administration of this policy, including the adjustment of any loss or claim submitted under this policy. 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.

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3. Insurance Guarantees, Coverage Levels, and Prices

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(g) It is your responsibility to accurately report all information that is used to determine your approved yield.

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(4) At any time we discover you have misreported any material information used to determine your approved yield or your approved yield is not correct, the following actions will be taken, as applicable:

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(iii) Any overpaid or underpaid indemnity or premium must be repaid; and

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6. Report of Acreage

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(h) If we discover you have incorrectly reported any information on the acreage report for any crop year, you may be required to provide documentation in subsequent crop years substantiating your report of acreage for those crop years, including, but not limited to, an acreage measurement service at your own expense. If the correction of any misreported information would affect an indemnity, prevented planting payment or replanting payment that was paid in a prior crop year, such claim will be adjusted and you will be required to repay any overpaid amounts.

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9. Insurable Acreage

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(a) All acreage planted to the insured crop in the county in which you have

a share:

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(2) Is not insurable if:

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(viii) The acreage is of a second crop, if you elect not to insure such acreage when an indemnity for a first insured crop may be subject to reduction in accordance with the provisions of section 15 and you intend to collect an indemnity payment that is equal to 100 percent of the insurable loss for the first insured crop acreage. This election must be made on a first insured crop unit basis (e.g., if the first insured crop unit contains 40 planted acres that may be subject to an indemnity reduction, then no second crop can be insured on any of the 40 acres). In this case:

(A) If the first insured crop is insured under this policy, you must provide written notice to us of your election not to insure acreage of a second crop at the time the first insured crop acreage is released by us (if no acreage in the first insured crop unit is released, this election must be made by the earlier of the acreage reporting date for the second crop or when you sign the claim for indemnity for the first insured crop) or, if the first insured crop is insured under Area Risk Protection Insurance (7 CFR part 407), this election must be made before the second crop insured under this policy is planted, and if you fail to provide such notice, the second crop acreage will be insured in accordance with the applicable policy provisions and you must repay any overpaid indemnity for the first insured crop;

(B) In the event a second crop is planted and insured with a different insurance provider, or planted and insured by a different person, you must provide written notice to each insurance provider that a second crop was planted on acreage on which you had a first insured crop; and

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14. Duties in the Event of Damage, Loss, Abandonment, Destruction, or Alternative Use of Crop or Acreage

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(e) Claims:

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(4) To receive any indemnity (or receive the rest of an indemnity in the case of acreage that is planted to a second crop), prevented planting payment or replanting payment, you must, if applicable:

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(iii) Establish:

(A) The total production or value received for the insured crop on the unit;
(B) That any loss occurred during the insurance period;
(C) That the loss was caused by one or more of the insured causes specified in the Crop Provisions; and
(D) That you have complied with all provisions of this policy.

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(f) If you have complied with all the policy provisions, we will pay your loss within 30 days after the later of:

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(3) Completion of any investigation by USDA, if applicable, of your current or any past claim for indemnity if no evidence of wrongdoing has been found (If any evidence of wrongdoing has been discovered, the amount of any indemnity, prevented planting or replant overpayment as a result of such wrongdoing may be offset from any indemnity or prevented planting payment owed to you); or

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

(a) If you do not agree with 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 the disagreement cannot be resolved through mediation, or you and we do not agree to mediation, you must timely seek resolution 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.

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(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:

(1) You must initiate arbitration proceedings within year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

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(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.

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(h) Except as provided in section 20(i), no award or settlement in mediation, arbitration, appeal, administrative review or reconsideration process or judicial review can exceed the amount of liability established or which should have been established under the policy, except for interest awarded in accordance with section 26.

(i) In a judicial review only, you may recover attorneys fees or other expenses, or any punitive, compensatory or any other damages from us only if you obtain a determination from FCIC that we, our agent or loss adjuster failed to comply with the terms of this policy or procedures issued by FCIC and such failure resulted in you receiving a payment in an amount that is less than the amount to which you were entitled. Requests for such a determination should be addressed to the following: USDA/RMA/Deputy Administrator of Compliance/Stop 0806, 1400 Independence Avenue, SW., Washington, DC 20250- 0806.

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

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(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:

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(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

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

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24. Amounts Due Us

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(e) The portion of the amounts owed by you for a policy authorized under the Act that are owed to FCIC may be collected in part through administrative offset from payments you receive from United States government (38 of 44) agencies in accordance with 31 U.S.C. chapter 37. Such amounts include all administrative fees, and the share of the overpaid indemnities and premiums retained by FCIC plus any interest owed thereon.

A final rule published by FCIC on August 30, 2004, in the **Federal Register** at 69 FR 48652-48752 states, in relevant part:

Response: ... In addition, the preamble to the policy specifies that no policy provisions may be waived or varied in any way by an insurance provider, agent or any other contractor or employee of the insurance provider or USDA unless the policy specifically authorizes a waiver or

modification by written agreement. To allow for equitable relief could permit government employees, insurance providers or agents to modify or waive policy provisions, which would conflict with the preamble…

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Response: FCIC agrees that all disputes should be subject to arbitration and has revised the provisions accordingly. FCIC considered listing the factual disputes but realized that it was impossible to list all possible factual disputes and that even factual disputes may involve some policy interpretations. Further, as commenters and FCIC have realized, it may be difficult to distinguish factual disputes from other types of disputes. Therefore, FCIC has elected to revise the provisions to allow all disputes to go to arbitration but require policy and procedure interpretations be made by FCIC and provide guidelines such as requiring arbitrators issue written decisions, timing of arbitrations, the binding effect of arbitrations, etc…

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FAD-211, dated March 24, 2014, states, in relevant part:

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First Requestor's Interpretation:

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The non-waiver provision and the limitations on arbitral authority in section 20 of the Basic Provisions therefore prohibit an arbitrator from issuing an award based on a theory of equitable estoppel, because such an award would waive or otherwise interpret the policy terms, which is not within the authority of the arbitrator.

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Final Agency Determination

FCIC agrees with the first requestor's interpretation. The policy is codified in the Code of Federal Regulations and has the force of law. Therefore, no one has the authority to waive or modify the provisions except as authorized in the regulations themselves. In accordance with section 506(l) of the Federal Crop Insurance Act (Act) (7 U.S.C. §1506(l)) state and locals laws are preempted to the extent that they are in conflict with the Act, regulations or contracts of

FCIC. A vast majority of the policy provisions, including the preamble to the policy, are codified in regulation so they preempt state and local laws.

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FAD-217, dated June 27, 2014, states, in relevant part:

Final Agency Determination

…Moreover, based on section 14(e)(4)(iii) of the Basic Provisions, it is the policyholder who bears the burden of proof to prove that they satisfy each requirement for completing a Federal crop insurance claim…Nothing in these FADs was intended to, or can, change the burden of proof established in the Basic Provisions.

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FAD-287, dated October 16, 2019, states, in relevant part:

Final Agency Determination

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When overpayments are discovered as a result of non-compliance with any policy provision, the policyholder may be required to repay such overpaid amounts.

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The 2021 General Standards Handbook (GSH) states, in relevant part:

PART 6: MEDIATION, ARBITRATION, AND JUDICIAL REVIEWS OF AIP DETERMINATIONS

601 General Information

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B. Decisions and Determinations

An insured may request mediation or arbitration of any decision or determination made by an AIP except for decisions regarding what constitutes a GFP…

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Interpretation Submitted

First Requestor's Interpretation:

The issue on which the parties seek a determination is the scope of the arbitrator's authority in rendering an award in connection with an arbitration initiated pursuant to section 20 of the CCIP Basic Provisions. The requestor interprets the CCIP Basic Provisions to require the arbitrator to render an award in compliance with all provisions of the policy, including sections 20(f) and (h) of the CCIP Basic Provisions. This contrasts with the second requestor's interpretation of section 20 that the arbitrator is limited to, and can only consider, the specific determinations as set out in writing in the approved insurance provider's (AIP's) last written communication to the policyholder. The second requestor's interpretation of section 20 would in effect render sections 20(f) and (h) regarding the scope of the arbitration and the authority of an arbitrator meaningless and would have the effect of allowing the AIP or the arbitrator to waive the requirements that a policyholder must establish to be entitled to an indemnity payment, all in direct conflict with the express terms of the preamble and section 20 of the CCIP Basic Provisions.

The first requestor states there is absolutely no provision in the policy, nothing in the Federal Crop Insurance Act ("FCIA"), no FCIC/RMA handbook or other procedure, or applicable regulations that limits the scope of arbitration to "defenses" set out in last written correspondence from the AIP. Further, FCIC procedure is crystal clear that the AIP has no authority to waive or alter any provisions of the policy and any attempt to limit an arbitrator's authority to only what an AIP may put in a claim determination letter would be in direct contradiction to that principle. In fact, there are no provisions or procedures even requiring the AIP to submit determinations in writing. Section 20(a)(1) and the second response referenced above from a final rule, published August 30, 2004, support this position.

The first requestor states to permit a policyholder to avoid the application of mandated policy and FCIC procedures and requirements for collection of an indemnity based solely on the alleged failure of the AIP to specifically reference in writing all potential shortcomings or defenses to a policyholder's claims amounts to nothing more than a claim of estoppel or waiver, which is expressly prohibited by the policy and FCIC procedure. FCIC has previously rejected the application of the

doctrines of estoppel, wavier and other state law contract and tort theories in FAD-211.

The second requestor's interpretation that the AIP should be limited to relying only on provisions or defenses set out in its last written communication with the policyholder based on a fairness standard is without merit. First, the policy provisions in section 14 of the CCIP Basic Provisions entitled "Duties in Event of Damage…" have been a part of the Basic Provisions for many years. Further, these policy provisions are codified and hold legal force and effect, carrying the same weight as statutory law for all parties, including policyholders. *Federal Crop Insurance Corp v. Merrill*, 322 U.S. 380 (1947). In fact, the United States Supreme Court in *Merrill* specifically held that policy provisions and regulations are "binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in *Rock Island, Arkansas & Louisiana R. Co. v. United States, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188*, that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Merrill, at 385*.

Further, there is no provision in the policy, the FCIA, or applicable regulations that limit the time period in which an AIP can make a determination regarding a claim. Quite the contrary, a determination may be made even after the payment of an indemnity which would require the policyholder to repay any overpayments. (See sections 3(g)(4)(iii), 6(h), 9(a)(2)(viii), 14(f)(3), 21(b)(3)(i) and (g) and 24(e) of the Basic Provisions; Also see FAD-287.) As is the case in almost all arbitration proceedings, there are new facts and information obtained through discovery and during evidence presented at the hearing which implicate and require application of policy provisions not known at the time the AIP issues its initial written determinations. To attempt to limit the arbitrator's authority to consider only issues or defenses expressly raised in written correspondence would have the effect of rewriting the relevant policy provisions and placing a burden on the AIP that is found nowhere in policy or regulations, with the end result being arbitration awards in favor of policyholders even where the policyholder has failed to comply with applicable policy provisions. This is clearly not the intent of the CCIP Basic Provisions and the Federal crop insurance program.

Importantly, once a policyholder has elected the process of arbitration and seeks payment of an indemnity, the parties and the arbitrator are bound by the express provisions contained in the arbitration provisions of the policy. (See sections 20(f) and (h) of the CCIP Basic Provisions.)

In order for the award to be in compliance with sections 20(f) and (h) of the CCIP Basic Provisions, i.e., applying all terms of the policy as binding and the rendition of any award in an amount not to exceed the amount of liability established under the policy, all terms of the policy must be applied and satisfied, regardless of what the AIP asserts as defenses or deficiencies in any written determination regarding a claim. One of the policy provisions specifically applicable to all claims for indemnities is section 14(e)(4)(iii), which places the burden of proof on the policyholder. See FAD-217 where the FCIC stated that "It is the policyholder who bears the burden of proof that they satisfy each requirement for completing a Federal crop insurance claim…Nothing in these FADS was intended to, or can, change the burden of proof established in the Basic Provisions."

In short, the first requestor states the standard for arbitration is the resolution of factual disputes applying all of the express terms of the policy and procedures mandated by FCIC, without waiver or variance. The underlying purpose of this requirement is the consistent implementation of these federally reinsured policies and use of United States treasury dollars. The FCIC has explained these limitations in the first response referenced above from a final rule, published August 30, 2004.

In conclusion, the first requestor interprets section 20 of the CCIP Basic Provisions to mean that if any determination made by an AIP results in the denial of a portion or all indemnities claimed by a policyholder and the policyholder initiates arbitration seeking an indemnity payment, the arbitrator's authority in rendering an award is governed by all provisions of section 20 of the CCIP Basic Provisions, including, the requirement that all policy provisions are binding and that any award not exceed the amount of liability established under the policy. The first requestor further interprets section 20, when read together with section 14 to place the burden of proof on the policyholder in all arbitration proceedings in which the policyholder seeks an indemnity payment, to establish the requirements contained in section 14(e)(4)(iii)(A) through (D) of the CCIP Basic Provisions. An arbitrator not only has the authority, but also the obligation to deny a policyholder's claims in arbitration when the policyholder has failed to establish that it has complied with the provisions of the policy.

Second Requestor's Interpretation:

The second requestor states under the CCIP Basic Provisions, a policyholder can challenge an AIP's determination (save for certain excepted determinations, for example, failure to follow good farming practices, that are not at issue here) through mediation or arbitration in accordance with section 20(a) of the CCIP Basic Provisions. This request for interpretation relates specifically to the proper interpretation of section 20(a) of the CCIP Basic Provisions, and the scope of issues that an arbitrator may consider in conducting an arbitration proceeding in accordance with section 20(a) of the CCIP Basic Provisions.

The second requestor interprets section 20(a) of the CCIP Basic Provisions so that an arbitration proceeding initiated by a policyholder is limited to the issue of resolving the validity of determinations made by the AIP that are challenged by the policyholder. Thus, the second requestor's interpretation of section 20(a) of the CCIP Basic Provisions would prevent an AIP from raising new, post-hoc determinations in the arbitration proceeding as alternative grounds for denying a policyholder's claim in the arbitration proceeding.

In essence, section 20(a) of the CCIP Basic Provisions encompasses the policyholder's and AIP's agreement to arbitrate disputes regarding solely the "determination made by" the AIP and actually challenged by the policyholder. In defending the validity of the challenged determination, the second requestor's interpretation would not allow the AIP to raise new, alternative determinations as a basis for the denial of a claim.

First, the second requestor states a plain reading of the language utilized in section 20(a) of the CCIP Basic Provisions reveals the scope of an arbitration initiated under a policyholder's policy is limited to "disagreements" concerning "determinations made by" the AIP in accordance with section 20(a)(1) of the CCIP Basic Provisions (emphasis added). As made clear by the CCIP Basic Provisions, a policyholder may only initiate arbitration over an AIP's determination once the AIP has actually made a determination with which the policyholder disagreed in accordance with section 20(b)(1) of the CCIP Basic Provisions (requiring the policyholder to initiate arbitration proceedings within one year of the date the AIP "rendered the determination with which [the policyholder] disagree[d]").

Second, the second requestor states that section 20(a) of the CCIP Basic Provisions limits the scope of an arbitration proceeding to determinations made by the AIP and challenged by the policyholder is also supported by Part 6 Paragraph 601B of the 2021 General Standards Handbook (GSH). Like the language utilized in the CCIP Basic Provisions, the GSH acknowledges that policyholders can initiate arbitration proceedings to challenge determinations "made" (past tense) by AIPs.

Under the plain language of the CCIP Basic Provisions and the GSH, when an AIP issues a single determination and the policyholder disagrees with that determination and initiates arbitration, the arbitration proceeding is limited to the issue of the validity of that determination. In such circumstances, the AIP cannot raise post-hoc determinations for the first time in the arbitration proceeding as an alternative basis for denial of the claim because the fundamental requirements of section 20(a) of the CCIP Basic Provisions are lacking.

Indeed, the policyholder has not yet initiated arbitration regarding the new determination(s) that it learned of for the first time at an arbitration hearing. To allow otherwise would transform the known issue(s) in an arbitration regarding the validity of an AIP's "made" and known determination(s) into any number of new issues concerning the validity of all after-the-fact determinations the AIP could possibly assert all in the same arbitration proceeding—regardless of when the policyholder was first apprised of the later, post-hoc determinations.

Any other interpretation of section 20(a) of the CCIP Basic Provisions would unduly (and unfairly) burden policyholders, by allowing AIPs, to engage in trial by ambush at arbitration hearings. An AIP could, for example, pick and choose what determination to disclose to the policyholder and what determinations to withhold until the day of the arbitration hearing. Savvy AIPs could strategically withhold determinations in an effort to mislead and prevent policyholders from being able to adequately prepare their case. Such a result is neither supported by the plain language used in section 20(a)(1) of the CCIP Basic Provisions, (limiting arbitration to "disputes" regarding " determinations made" (i.e., previously issued) by the AIP) (emphasis added), nor by common sense. Setting aside the limitations imposed by the policyholder's policy, this interpretation is further supported by the fundamental requirements of fairness that underlies all arbitration proceedings, as such "fairness" requires at a minimum "adequate notice." *See Collins v. National Football league*, 566 F. Supp. 3d 586, 596 (E.D. Tex. 2021) (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 299 (5th Cir. 2004)).

Finally, the first requestor's reliance on section 14(e) of the CCIP Basic Provisions is misplaced. The first requestor contends that because section 14(e)(4)(iii)(D) requires a policyholder to establish during the adjustment process with the AIP that the policyholder "complied with all provisions of this policy," then the policyholder carries this same burden—to prove that it complied with all provisions of the policy—in arbitration regardless of the actual determination of the AIP. Such a strained reading of the Basic Provisions would necessarily transform every section 20(a) of the CCIP Basic Provisions arbitration proceeding into a dispute regarding whether the policyholder complied with all provisions of the policy—as opposed to the sole dispute the parties agreed to arbitrate in section 20(a) of the CCIP Basic Provisions: determinations issued by the AIP that the policyholder disagreed with. Such an interpretation would also effectively relieve the AIP of any burden or standards for underwriting the policy because the AIP would always have a blank check to relitigate those issues in arbitration.

Contrary to the first requestor's contention, section 14(e)(4)(iii) of the CCIP Basic Provisions must be read in context. Specifically, it must be read in context based on (i) where it is located within the Basic Provisions; and (ii) the existence of section 20 of the CCIP Basic Provisions. Section 14(e)(4)(iii) of the CCIP Basic Provisions is situated in section 14 of the CCIP Basic Provisions, which governs the relevant obligations of the policyholder and AIP in the event of damage, loss, abandonment, destruction, or alternative use of crop or acreage. Section 14(e) of the CCIP Basic Provisions, specifically, governs the claim and claim adjustment process. But, given the plain language of section 20 of the CCIP Basic Provisions, section 14(e)(4)(iii) of the CCIP Basic Provisions can only be relied on by an AIP in a crop insurance arbitration when the AIP made a determination based on the policyholder's failure to comply with section14(e)(4)(iii) of the CCIP Basic Provisions i.e., that the AIP determined the policyholder failed to "compl[y] with all provisions of th[e] policy" in accordance with section 14(e)(4)(iii)(D) of the CCIP Basic Provisions.

Section 14(e)(4)(iii) of the CCIP Basic Provisions also cannot be read in a way that renders section 20(a) of the CCIP Basic Provisions meaningless. Because section 20(a) of the CCIP Basic Provisions limits the policyholder to arbitrating determinations made by the AIP, it follows that the AIP must make a determination regarding the requirements set forth in section 14(e)(4)(iii) of the CCIP Basic Provisions in order to rely on section 14(e)(4)(iii) of the CCIP Basic Provisions in the arbitration proceeding initiated by the policyholder. Otherwise, regardless of the

determination actually made by the AIP, when a policyholder challenges that determination's validity, the AIP may raise new determinations in the arbitration proceeding to the effect that the policyholder failed to comply with the provisions of the policy (i.e., based on section 14(e)(4)(iii)(D) of the Basic Provisions) despite the fact that the challenged determination had nothing to do with the policyholder's compliance with the policy. Such a result is not authorized by the Basic Provisions and is actually rejected by a plain reading of section 20 of the CCIP Basic Provisions. Likewise, the first requestor's other contention—that the preamble to the Basic Provisions (stating that no provision of the policy may be waived or varied by AIPs) somehow authorizes the result they seek—similarly fails. Where the CCIP Basic Provisions do not authorize the injection of new, post-hoc determinations by the AIP at the arbitration hearing of a dispute concerning a prior determination, it does not matter than an AIP cannot waive or modify the CCIP Basic Provisions.

Final Agency Determination

FCIC disagrees with both requestors' interpretations.

The first issue to be resolved is whether the CCIP Basic Provisions limit the scope of review of an arbitrator when arbitration has been initiated in accordance with section 20 of the CCIP Basic Provisions to resolve a dispute arising out of an AIP determination.

Section 20(a) of the CCIP Basic Provisions sets forth minimal guidelines on the functions of an arbitrator, such as conflict of interest, requirements for written documentation of the case and any award, and award limits. Beyond these guidelines, the policy provisions do not restrict the scope of review of an arbitrator. It may be that, as result of information arising out of arbitration proceedings, the AIP is obligated to issue another determination in accordance with the policy provisions and procedures. As to whether the new determination is to be resolved within the same arbitration proceedings as the initial determination is beyond the scope of the CCIP Basic Provisions. However, like any determination, the producer has one year to seek arbitration from the date of such determination if the producer does not agree with the new determination.

The second issue to be resolved is whether arbitration proceedings absolve an AIP of their duty to administer the policy, including the adjustment of any loss or claim submitted under the policy. The preamble to the CCIP Basic Provisions states "[t]he

provisions of the policy may not be waived or varied in any way by us, our insurance agent or any other contractor or employee of ours, or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement." There are no provisions of the policy that allow for a stay to be imposed on the AIP for the administration of the policy when arbitration proceedings have commenced. Because such a halt is not set forth in the CCIP Basic Provisions, arbitration proceedings do not absolve the AIP from their duty to administer the policy, including their obligation to correct claims if an error is discovered. Further, as established in FAD-287, 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.

Accordingly, FCIC and AIPs have a duty to ensure taxpayer dollars are paid in accordance with the regulations that govern the FCIP, including all provisions of crop insurance policies and procedures. As such, if an AIP discovers a claim was not properly adjusted, the AIP is required to correct the claim, even if such correction is the result of information arising out of arbitration proceedings. This obligation has been confirmed by the courts in *Old Republic Insurance Company v. FCIC*, 947 F.2d 269 (7th Circuit 1991). However, regardless of when a claim was first paid or denied, if the AIP later revises the claim because it discovered that policy and procedures were not followed, then this becomes a new determination, and the producer has one year to seek arbitration from the date of such determination if the producer does not agree with the changes. Arbitration must be sought within this deadline before any judicial review may be sought.

In accordance with 7 C.F.R. § 400.766(b)(2), this FAD 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. § 400.766(b)(5).

Date of Issue: March 18, 2024