



**Billing Code 3410-08-P**

**DEPARTMENT OF AGRICULTURE**

**Federal Crop Insurance Corporation**

**7 CFR Part 400**

**[Docket No. FCIC-14-0001]**

**RIN 0563-AC45**

**General Administrative Regulations; Interpretations of Statutory Provisions, Policy Provisions, and Procedures**

**AGENCY:** Federal Crop Insurance Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Federal Crop Insurance Corporation (FCIC) finalizes the General and Administrative Regulation Subpart X- Interpretations of Statutory and Regulatory Provisions (Subpart X) to incorporate interpretations of procedures previously issued and administered in accordance with Manager's Bulletin MGR-05-018, and to provide a mechanism for interpretations of policy provisions that are not codified in the Code of Federal Regulations. The effect of this action is to provide requestors with information on how to request a final agency determination or an interpretation of FCIC procedures within one administrative regulation, and bring consistency and clarity to the processes used and existing provisions.

**DATES:** This rule is effective [insert date 30 days after publication in the Federal Register].

**ADDRESSES:** Anyone can to search the electronic form of all comments received for any dockets by the name of the person submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the complete User Notice and Privacy Notice for Regulations.gov at <http://www.regulations.gov/#!privacyNotice>.

**FOR FURTHER INFORMATION CONTACT:** Francie Tolle, Director, Product Management, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0812, Room 421, PO Box 419205, Kansas City, MO 64141-6205, telephone (816) 926- 7730.

**SUPPLEMENTARY INFORMATION:**

**Background:**

This rule finalizes changes to Subpart X that were published by FCIC on March 18, 2015, as a notice of proposed rulemaking in the **Federal Register** at 80 FR 14030-14033. The public was afforded 30 days to submit comments after the regulation was published in the **Federal Register**.

A total of 18 comments were received from 5 commenters. The commenters included persons or entities from the following categories: financial, insurance provider, legal, trade association, and other. The public comments received regarding the proposed rule and FCIC's responses to the comments are as follows:

Comment: A commenter stated Subpart X-Interpretations of statutory provisions could provide asset management improvements. Driving these types of assets would be a dynamic and unprecedented improvement in the field of asset management.

Response: FCIC does not understand the comment and does not see a connection between asset management and interpretations of policy and procedures. Subpart X intended to ensure that the Federal crop insurance program policy provisions and procedures are interpreted in a consistent manner for all participants. No change has been made.

Comment: A commenter questioned the use of "calendar year(s)" in § 400.766(a)(1) when § 400.766(a)(2) refers to "crop years". For the calendar years 2011-2014 used in the example, these could include policies for crop years from 2010-2016, depending on the time of the

calendar year the request was submitted. The commenter suggested only referencing crop years in these two sections.

Response: FCIC agrees that the use of the term calendar year can be confusing since all crop insurance, except for Whole-Farm Revenue Protection, is conducted on a crop year basis. Further, although crop years may differ, since the opinion is about a specific provision in a policy and effects producers with that policy, crop years is more appropriate. FCIC has revised the provisions accordingly.

Comment: A commenter stated in proposed rule § 400.766(a)(2), FCIC states that it will reject requests for interpretations of crop year policy provisions that are older than four years prior to the calendar year in which the request was submitted. The commenter did not understand the purpose of this time limit. It is not unusual for litigation or arbitration to drag on for quite some time due to continuances, changes in attorneys, changes in arbitrators, etc. There may be situations in which it does not become clear that an interpretation of a policy provision or procedure is necessary until the time limit set forth in this section has already passed, particularly if the dispute involves a claim overpayment discovered in a subsequent crop year. As a result, the commenter believed this time limit should be stricken or revised to include any crop year(s) of policies subject to current litigation or arbitration.

Response: As stated above, FCIC is moving to a crop year basis instead of a calendar year basis. However, FCIC does not agree the time limit should be stricken or revised to include any crop years of policies subject to current litigation or arbitration. The policy provisions require filing of a request for mediation, arbitration or litigation within one year of the determination by the insurance provider in the event of a dispute. 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. FCIC believes that 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. Further, the published interpretations state that to the extent the language in the provisions interpreted is identical to the language applicable for any other crop year, including previous crop years, the same interpretation can be applied to such other crop year provided the person seeking to use the published interpretation for a different 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. No change has been made.

Comment: A commenter recommended the wording in § 400.766(a)(3) be changed to “... starting with the 2014 crop year, you must submit...”

Response: FCIC agrees and has revised the provisions accordingly.

Comment: A commenter recommended the wording in § 400.766(b)(2) be changed to “...matters of general applicability and are not...”

Response: FCIC agrees with the revisions, however this provision has been moved and can now be found in § 400.766(b)(5).

Comment: A commenter stated, the proposed rule neither defines “nullify” or “nullification” nor explains the legal process by which FCIC will nullify a mediation, arbitration, or judicial decision. Is the term “nullify” synonymous with the term “vacate” as used in the Federal Arbitration Act (“FAA”)? Which division within the RMA Compliance Division will manage the nullification process? Will the insurance provider or policyholder be afforded appeal rights if FCIC nullifies an award? If a policyholder disputes the nullification of an award, does a cause of action lie against the insurance provider or FCIC? Because the proposed rule does not describe

the process by which FCIC will nullify an award, the commenter cannot adequately evaluate the impact of the proposed rule or assess its risk in the event nullification occurs.

Another commenter also questioned whether FCIC has the authority to nullify an arbitration award as set forth in proposed section § 400.766(b). On a prefatory note, FCIC is not a party to the Common Crop Insurance Policy Basic Provisions (Basic Provisions), is not a party to arbitration arising under the policy and, consequently, may not intervene in an arbitration proceeding. Assuming *arguendo* that FCIC, as a non-party, may vacate an arbitration award, its ability to do so is subject to Federal Arbitration Association (FAA), which governs arbitration proceedings, including judicial review, arising under section 20 of the Basic Provisions. With respect to the vacation or modification of arbitration awards, section 10 of the FAA provides, in pertinent part:

(a) In any of the following cases the United States court in and for the district where in the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) where the award was procured by corruption, fraud, or undue means:

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. 10. The Supreme Court has held that the FAA's grounds for vacating any award are exclusive. Section 10 does not empower FCIC to nullify an arbitration award simply because the

arbitrator did not enforce or request a final agency determination.

The commenter also believed section 10(a)(4) of the FAA is the only provision tangentially related to an arbitrator's enforcement of a final agency determination, and case law demonstrates that FCIC cannot rely on section 10(a)(4) to nullify an arbitration award. When a party invokes section 10(a)(4) of the FAA as a basis for vacating an award on the basis that the arbitrator exceeded his power, the court must:

“...determine if the form of the arbitrator's award can be rationally derived either from the agreement between the parties or from the parties' submissions to the arbitrators, and we do not revise the terms of the award “unless they are ‘completely irrational.’”

The commenter stated this standard of reviews is so deferential, that a Court may overturn an award only if there is “absolutely no support at all in the record justifying the arbitrator's determinations.” (A court may not overrule the arbitrator simply because it disagrees. “There must be absolutely no support at all in the record.”) Thus, even if an arbitrator does not apply a final agency determination to a particular dispute, case law suggests that this alone does not merit vacating an award.

Response: The definition of “null” and “nullification” is not provided for in the administrative regulation as it intends the common meaning to apply. The term “null” is defined in Merriam- Webster's Online Dictionary, as “having no legal or binding force; invalid.” This means that if an arbitration award was based upon an interpretation of a policy provision or procedure that was not provided by FCIC, the arbitration award would have no legal or binding force and would be invalid.

While FCIC is not a party to the insurance contract, this is a Federal crop insurance program, and FCIC is the regulator of the program. It is FCIC's duty and obligation to ensure compliance

with all policy and procedure, especially since taxpayer dollars are used in part to fund the program. Government funds can only be spent in the manner authorized by law.

In the past, one problem in the program that was reoccurring was inconsistent interpretations of policy and procedures by arbitrators and courts, resulting in the inequitable application of the policy provisions and procedures based on geography. As a result, Congress enacted section 506(r) of the Federal Crop Insurance Act (Act), which mandates that FCIC will provide an interpretation of all statutes and regulations. This ensures that taxpayer dollars are spent in accordance with the law.

With respect to the American Arbitration Act, there is a long-standing legal principle of statutory construction that states that later in time statutes preempt earlier enacted statutes. That is the case here. Section 506(r) of the Act was enacted after the American Arbitration Act and to the extent there is a conflict, section 506(r) of the Act takes precedence. Therefore, while the American Arbitration Act may apply to certain circumstances, it cannot be used to require the payment of awards that would use taxpayer dollars that are not authorized by law. Those provisions of the American Arbitration Act that could be interpreted to require the payment of awards that are otherwise not authorized by law are not applicable.

Congress has determined that FCIC interprets its statutes and regulations, but it left to FCIC the manner in which it does so. In carrying out that mandate, FCIC promulgated Subpart X to administer the process of obtaining the requisite interpretations and, under prevailing Supreme Court precedence, FCIC's administration of section 506(r) of the Act is to be given deference if it is reasonable and not arbitrary, capricious, or not in accordance with the law. FCIC's determination that there must be consequences for failure to obtain an interpretation when required is reasonable. Further, since all parties to the legal proceeding have the obligation to

seek an interpretation when there is a dispute regarding the meaning of a provision, the consequences cannot unfairly affect one party over another. Nullification of an award has been the only process FCIC has determined that will not unfairly affect one party over another. It simply resets the process and the appeal proceeds using the interpretation obtained from FCIC. Requiring nullification of an award when no final agency determination or FCIC interpretation has been sought or it has been disregarded is reasonable and not arbitrary and capricious or is in accordance with the law.

Requiring FCIC to provide interpretations of statutes and regulations ensures that all producers nationwide are treated the same. FCIC determined the only way to effectuate this provision and ensure that its interpretations are binding on all parties, including in the appeals process, is to require that awards that failed to obtain an interpretation or disregarded an interpretation will be nullified. Therefore, if any party in a dispute believes an agreement or award was rendered based on an interpretation of a statutory or regulatory provision that is in dispute and an official interpretation from FCIC was not sought or was disregarded, it is incumbent upon the aggrieved party to request from FCIC whether an official interpretation was sought or disregarded.

Comment: A commenter stated history suggests that FCIC does not nullify arbitration awards if the parties do not request a final agency determination or the arbitrator does not abide by the final agency determination. Instead, RMA issues compliance findings directed at the insurance provider and denies reinsurance on any amount awarded to the policyholder. Although this sanction may be justified if an insurance provider does not request a final agency determination or offers an argument contrary to FCIC interpretation of policy or procedures, this penalty is unconscionable if the insurance provider obtains either a final agency determination or the

testimony of an FCIC employee and the arbitrator disregards the FCIC's interpretation. The Standard Reinsurance Agreement (SRA) authorizes the denial of reinsurance or the imposition of other penalties if an insurance provider does not comply with the SRA or FCIC policies and procedures. If an insurance provider obtains and offers a final agency determination during a legal proceeding, and the arbitrator, judge or jury ignores the final agency determination, the insurance provider has not violated the SRA and may not be penalized.

Response: FCIC agrees that if an insurance provider obtains a final agency determination or FCIC interpretation and it is disregarded by the person hearing the appeal, or if no final agency determination or FCIC interpretation has been sought by any party, the proper remedy is nullification of the award under Subpart X.

Comment: A commenter recognized that FCIC expects arbitrators, judges, and juries to adhere to a final agency determination's interpretation of policies and procedures. However, the commenter did not believe that an insurance provider may force an arbitrator or judge to halt proceedings and request a final agency determination if a dispute arises as to the meaning of a policy or procedure. At best, an insurance provider may request that the arbitrator motion the court for a stay in the proceedings. An insurance provider cannot control whether or not an arbitrator or judge grants such a request or motion, and the refusal of an arbitrator or judge to stay proceeding should not be the basis for sanctioning an insurance provider.

Response: FCIC agrees an insurance provider cannot force an arbitrator or judge to halt proceedings and request a final agency determination or FCIC interpretation if a dispute arises as to the meaning of a policy or procedure. However, an insurance provider may request a stay in the proceedings. As stated above, while no judge or arbitrator may be forced to delay a proceeding for the parties to obtain a final agency determination or FCIC interpretation, this rule

puts all persons involved in the appeal on notice that failure to obtain a final agency determination or FCIC interpretation when there is a dispute regarding the meaning of a provision will result in the nullification of any agreement or award. It is incumbent upon the aggrieved party to request from FCIC whether an official interpretation was sought or disregarded.

Comment: A commenter stated FCIC should clarify the process for nullification of an award or deem it to occur automatically. The proposed rule indicates that the failure to obtain or adhere to a final agency determination will result in nullification of any award. However, it is not clear from the proposed rule how a party can seek nullification of an arbitration award, or whether nullification is a self-executing, automatic occurrence.

In *Great American Ins. Co. v. Moye*, a Federal district court ruled that the Federal Arbitration Act (FAA) (9 U.S.C. 1 et seq.) applies to crop insurance arbitrations. The FAA severely limits a reviewing court's ability to review an arbitration award. In that case, which has been cited by many cases since, the court ruled that a "court will not sit as the arbitrator to re-evaluate the merits," and that "an arbitrator does not exceed his authority every time he makes an interpretive error." Therefore, even though the policy terms and regulations in Subpart X require nullification of an award if the arbitrator engages in unauthorized interpretation, the FAA requires a reviewing court to defer to the arbitrator's judgment except in extraordinary circumstances.

The commenter stated it is clear that FCIC intends that the parties have some process for determining whether an arbitration award is nullified, as it recently stated in FAD-232, "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." It is not clear where there

is a process available for a party seeking nullification to make that type of showing. Once the arbitrator has rendered the final award under American Arbitration Association (AAA) rules, the arbitrator's duties are complete (except in very specific circumstances requiring revision for obvious mathematical errors). AAA rules do provide a procedure for appeals, but only in the event that both parties agree, which would be unlikely in the event one party is satisfied with an award in its favor.

FCIC should revise the proposed rule so that nullification is an automatic process, where an arbitration award containing unauthorized interpretation is automatically void and unenforceable in Federal Court. Alternatively, FCIC should make it clear where and how the process for determining nullification must occur, whether that be before the arbitrator who issued the award, through the AAA appeals process made mandatory for crop insurance cases, or through a reviewing court. Otherwise, nullification will usually be unenforceable in practice.

Response: While the courts have agreed that the American Arbitration Act applies in arbitrations, its application cannot be absolute. Taxpayer dollars are used to fund the Federal crop insurance program and FCIC has an obligation to ensure such funds are expended in accordance with policy and procedure. Congress strengthened this obligation by imposing on FCIC the express mandate to provide interpretations of law and regulations in section 506(r) of the Act. This later in time statute supersedes the American Arbitration Act preclusion against reviewing arbitrator's interpretations.

FCIC agrees that if there is a failure to obtain, or adhere to, a final agency determination or FCIC interpretation, any award is nullified but there is no way for anyone to know or the parties may not agree whether such a failure existed. Therefore, FCIC has revised this rule to allow persons to obtain a determination by FCIC when that person believes that a failure to comply

with this subpart took place during an arbitration by not obtaining, adhering, or requesting a final agency determination or FCIC interpretation. Once FCIC determines that a final agency determination or FCIC interpretation was required in an arbitration or litigation, the provisions are revised to specify the award is automatically nullified.

Comment: The commenter stated there is a word missing after “any other” in the first sentence of proposed rule § 400.766(c)(1).

Response: FCIC has revised § 400.766 and this phrase is no longer used. Therefore, the comment is not applicable.

Comment: A commenter recommended the wording in § 400.767(b)(1) be changed to “...proceeding (e.g., mediation...)”

Response: FCIC agrees and has revised the provision accordingly.

Comment: A commenter suggested FCIC clarify that nullification of an arbitration award occurs when the decision made by the arbitrator disregards, or the parties fail to obtain, any form of interpretation from FCIC, not just those that are final agency determinations. The proposed rule provides that the parties’ failure to submit a timely request for a final agency determination results in “nullification of any agreement or award” (proposed § 400.767(b)(3)(ii)(B)). The proposed rule also provides that “failure of the National Appeals Division, arbitrator, or mediator to adhere to the final agency determination provided under this subpart will result in the nullification of any award or agreement in arbitration or mediation.” The commenter agreed failure to obtain or adhere to a final agency determination should result in nullification of the award, but the commenter suggested FCIC revise the final rule so that it is clear that the failure to obtain or adhere to any type of interpretation from FCIC results in nullification. Another commenter stated final agency determinations are not the only form of interpretation that FCIC

provides under existing processes nor will they be the only form under the proposed revisions to Subpart X. In FAD-225, FCIC acknowledged that the agency has multiple avenues under which it may deliver binding interpretations of policy and procedure, including formal interpretations of procedure under Manager's Bulletin MGR-05-018 and witness testimony pursuant to 7 CFR part 1, subpart H. FCIC further indicated, "any interpretation provided by FCIC, in writing or orally, will be binding in any mediation or arbitration. Subsequently, the failure to obtain the required interpretation from FCIC or if an arbitrator disregards an interpretation provided by FCIC, the award is nullified." As written, the proposed rule does not clearly state that the failure to obtain or adhere to other forms of interpretations from FCIC will result in nullification. Since, the agency has already made clear in a binding final agency determination that it is so, FCIC should incorporate that principle into the final rule.

Response: FCIC agrees with the commenter. Section 20(a)(1)(ii) of the Common Crop Insurance Policy Basic Provisions states "Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award." Therefore, FCIC has revised the relevant provisions to clarify that FCIC interpretations may take other forms and the nullification provisions apply to all FCIC interpretations. However, FCIC has revised the language to state that if an official interpretation from FCIC was not sought or was disregarded it is incumbent upon the aggrieved party to request a determination of whether such interpretation was required or disregarded and, if it was, the award is automatically nullified.

Comment: A commenter stated § 400.767(b)(3)(ii) of the proposed rule is missing "or interpretations of procedure or policy provision not codified in the Code of Federal Regulations" before "may result in".

Response: As stated above, FCIC has revised the provisions to apply to all FCIC

interpretations. However, FCIC determined these provisions regarding nullification are more appropriately contained in § 400.766 and has revised the provisions accordingly. Additionally, FCIC has revised the regulation to define “FCIC interpretation” as an interpretation of a policy provision not codified in the Code of Federal Regulations or any procedure used in the administration of any Federal crop insurance program. Therefore, any references to “interpretations of procedure or policy provision not codified in the Code of Federal Regulations” have been removed and replaced with the term “FCIC interpretation” throughout the regulation.

Comment: A commenter requested that FCIC delete the reference to nullification of arbitration awards contained § 400.767(b). Language, which mirrors this provision, is already contained in the Basic Provisions, so it is redundant to include the reference to nullification in this rule.

Response: Proposed section 400.767(b) reiterates and expands the provisions in section 20(a)(1)(ii) of the Basic Provisions which simply states that a failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award. FCIC has revised the provisions to include requests to be made to FCIC regarding whether there has been non-compliance with section 20 of the Basic Provisions and Subpart X and failure of the National Appeals Division, arbitrator, mediator, or judge to adhere to the final agency determination or FCIC interpretation provided under this subpart will result in the nullification of any award or agreement in arbitration or mediation. However, as stated above, all these provisions regarding nullification have been moved to § 400.766.

Comment: A commenter stated FCIC’s stated purpose for promulgating the new regulations is to “clarify existing provisions, eliminate redundancies, remove or update obsolete references,

simplify the regulation to address final agency determinations and interpretations of procedures or policy provisions not codified in the Code of Federal Regulations in the same regulation, simplify program administration, and improve clarity of the requestor and FCIC obligations.” The commenter supported this worthy goal. However, there are several portions of the proposed rule which the commenter believed require revision or clarification so that the new rule is compatible with the practicalities of policyholder and insurance provider disputes and arbitration proceedings.

The commenter noted the proposed rule describes several types of interpretations by FCIC, including final agency determinations and interpretations of procedure. The commenter stated the proposed rule will promote unnecessary litigation, since it provides that no one may request an interpretation without first initiating arbitration, suit, or mediation (see proposed § 400.767(b)).

Final agency determinations and interpretations of procedure from FCIC should be available to program participants as a tool to resolve disputes before formal dispute resolution processes commence, to avoid costly and possibly unnecessary arbitration or litigation proceedings. There are times when the policy terms, procedure, or how policies and procedures apply to specific factual situations are not entirely clear, and an insurance provider must seek guidance from FCIC. Those instances may occur during the adjustment of a claim, or when a policyholder disagrees with an insurance provider determination, but has not yet filed a Demand for Arbitration. It has been the commenter’s experience that in those cases, a formal interpretation from RMA can help avert or resolve a dispute without having to resort to arbitration, which can be costly for both parties. For that reason, the commenter suggested FCIC remove from the final rule the requirement that arbitration be initiated prior to submission of the request for

interpretation.

Another commenter stated proposed rule § 400.767(b) limits requests for interpretations to formal judicial review, mediation, or arbitration. There are frequently situations where insurance providers may need binding clarification of FCIC policies or procedures to ensure that they are accurately administering policies in a uniform manner. It is a benefit to insurance providers, insureds, and the program to be able to submit such requests before the expense and exposure of adversarial proceedings takes place. Although there are other means which insurance providers may use to request an interpretation, they may be inadequate because they do not contain the 90-day time limit imposed by the final agency determination process and may not result in published interpretations. As a result, the commenter believed this section should be deleted or revised to carve out a separate right for insurance providers to request interpretations of policy provisions or procedures even if they are not related to a formal arbitration or mediation.

Response: FCIC agrees and has removed the requirement that formal judicial review, mediation, or arbitration must be initiated before a final agency determination or FCIC interpretation can be requested.

Comment: A commenter stated language in the proposed rule suggests that only the party who initiated arbitration or suit can request an interpretation from FCIC. As currently worded, only the party who actually initiates the legal proceeding may request a final agency determination or an interpretation of procedure. A defendant or arbitration respondent cannot (see proposed §400.767(b): “You may request ... only if you have legally filed or formally initiated...”). Both parties to an arbitration should be permitted to request an interpretation from FCIC. It is not uncommon for parties to disagree about whether an interpretation is necessary, and in those cases, one party may need to seek the interpretation unilaterally. Further,

respondents in arbitration and defendant in suits, which in most cases will be the insurance providers, have just as much a right to avail themselves of FCIC's interpretation process as claimants/plaintiffs.

Response: Either party may request an interpretation, not just the party that initiated the proceeding. Further, as stated above, parties no longer have to wait until arbitration, mediation or judicial review before a request may be made. The language has been revised accordingly.

Comment: A commenter stated the new request timing requirements in proposed § 400.767(b)(3) will conflict with certain AAA rules and be impractical in many cases. FCIC should clarify how the interpretation request process should proceed in those cases. Section 20 of the Basic Provisions (7 CFR § 457.8) provides that the rules of the American Arbitration Association (AAA) apply to disputes regarding insurance provider determinations. The AAA Commercial Arbitration Rules contain a set of "Expedited Procedures" that apply in cases where the amount in controversy is \$75,000 or less. Those Expedited Procedures require that the hearing occur within 30 days of the appointment of the arbitrator. The proposed rule requires that all interpretation requests be submitted "90 days before the date the mediation, arbitration or litigation in which the interpretation will be used is scheduled to begin" (§ 400.767(b)(3)), but not until after arbitration has commenced (§ 400.767(b)). In cases where the AAA Expedited Procedures apply, it would be impossible for the parties to comply with those conflicting requirements.

The commenter suggested FCIC either remove the timeliness requirement, or state clearly in the final rule that any AAA rule that does not allow the parties sufficient time to request an interpretation prior to the hearing is in conflict with the policy terms and does not apply to crop insurance arbitrations.

A commenter also stated the new request timing requirements in § 400.767(b)(3) will be impractical in many cases. FCIC should clarify the meaning of “proceeding” in § 400.767(b)(3)(iii) to ensure that necessary interpretations from the agency are available in all cases. Even in cases where the Expedited Procedures do not apply, the timeliness rule will cause difficulty. It is not always clear at the outset of an arbitration that the dispute involves a matter of interpretation. Arbitration demands typically contain only a cursory description of the dispute and it is not until the parties have engaged in some exchange of discovery materials or legal briefing that the parties identify a dispute over interpretation. It is not uncommon for that to occur within 90 days of the arbitration hearing date.

The proposed rule contains a contingency to allow the arbitrator, mediator, or judge to request an interpretation in instances when an interpretation dispute arises “during the mediation, arbitration, or litigation proceeding.” It is not clear whether the term “proceeding” as used in the proposed rule refers only to the mediation, arbitration hearing, or trial, or whether the term refers to any proceedings, including discovery and briefing occurring in the course of the mediation, arbitration, or litigation. FCIC should clarify the meaning of that term.

The commenter suggested the final rule allow the parties to seek interpretations whenever a dispute arises in the process. If FCIC has a compelling reason to restrict require requests from the parties to be submitted 90-days prior to the hearing, the final rule should provide an avenue for making a request if an interpretation dispute arises within 90-days of the hearing.

Response: The AAA rules only apply to the extent they do not conflict with the policy. The policy requires obtaining an interpretation of policy and procedure if there is a dispute regarding its meaning and Subpart X prescribes how such requests are to be made. Therefore, Subpart X supersedes the AAA rules if there is a conflict. Further, the 90-day time-period is necessary to

allow FCIC time to provide an interpretation in writing given its limited resources. In addition, as stated above, FCIC has revised the rule to allow requests for interpretations be made at any time, not just when mediation, arbitration or litigation has been initiated. This should mitigate the timing issues in many cases. However, when it is discovered that an interpretation is required after the proceedings have been initiated, FCIC acknowledges there are times when such a time limit is impracticable. Therefore, FCIC has revised the rule to provide some flexibility when cases are operating under the expedited procedures under AAA rules or there is an appeal between a producer and RMA before NAD. However, these appeals processes have set deadlines and FCIC is adding flexibility to accommodate them but in all other cases, the parties have the flexibility to set the actual date of the mediation, arbitration, etc. Therefore, FCIC is maintaining the 90-day rule for all other proceedings to allow FCIC sufficient time to go through the administrative process of making an interpretation. Further, FCIC has added a definition of “proceeding” that clarifies that the proceeding commences on the day the complaint or notice of appeal is filed for arbitration or litigation and ends when the decision has been rendered so it encompasses the discovery process. This should allow the parties sufficient time to make a request 90 days prior to the date of mediation, hearing, arbitration or trial.

As noted by the commenter, the proposed rule contains a contingency to allow the NAD hearing officer, arbitrator, mediator, or judge, to request an interpretation in instances when a dispute arises during the mediation, arbitration, or litigation proceeding.

Comment: A commenter recommended the wording in § 400.767(c) be changed to “...opposing interpretations, a joint request...”

Response: FCIC agrees and has revised the provisions accordingly.

Comment: A commenter recommended the wording in §400.768(a) be changed to

“...regarding, or that contains, specific factual information...”

Response: FCIC agrees and has revised the provisions accordingly.

Comment: A commenter recommended the wording in § 400.768(a)(2) be changed to “...those are fact-specific and could...”

Response: FCIC agrees and has revised the provisions accordingly.

Comment: A commenter recommended FCIC not forbid parties seeking interpretation requests from offering hypothetical examples. The proposed rule provides at §400.768(a)(2), “FCIC will not consider any examples provided in your interpretation because those are fact specific and could be construed as a finding of fact by FCIC,” and that FCIC will provide any examples that are necessary. Parties should be permitted to provide hypothetical examples. Because an arbitrator cannot decide whether or how a policy provision applies to a specific set of facts, restricting the parties from using illustrative hypotheticals will make it difficult for FCIC to render interpretations regarding whether how policy provisions apply with enough specificity for the arbitrator to render a compliant award.

Section 20(a)(1) of the Basic Provisions exempts from the arbitrator’s authority any disputes “regarding whether a specific policy provision or procedure is applicable to the situation” or “how it is applicable.” If the arbitrator does not have authority to determine how procedure applies to a specific factual situation, the parties must be able to request an interpretation from FCIC with enough specificity so that the response gives the arbitrator clear direction on how the policy terms apply to that type of situation. The best way to do that is with an analogous hypothetical. In many cases, it will not be clear to an arbitrator how to apply an interpretation of the policy to a specific set of facts without an analogous example, and in those cases, the arbitrator will have no choice but to engage in unauthorized interpretation.

In many cases, an interpretive dispute is not even apparent, because the policy terms appear to be unambiguous, but only when presented with a particular set of circumstances, does the need for interpretation arise. It seems unlikely that FCIC would be able to generate examples on its own that will direct an arbitrator with sufficient specificity regarding how to apply the policy to a peculiar factual situation, since FCIC will have no knowledge of the factual situation involved in the case.

The commenter recognized FCIC must avoid making determinations of specific facts relating to individual policies and circumstances, but suggests that in cases where a requesting party's example is too fact-specific, FCIC can still reject the request or disregard the example pursuant to proposed at § 400.768(a)(1) ("Regardless of whether or not FCIC accepts a request, FCIC will not consider specific factual information to situations or cases in any final agency determination."). The commenter suggested parties be permitted to provide hypothetical examples to aid arbitrators in applying the policy to the facts before them.

Response: Currently, FCIC receives requests for final agency determinations with large amounts of specific factual situation or case information, so if FCIC were to consider that factual information, FCIC would be infringing on the role of the mediator, arbitrator, hearing officer, or judge who decides the facts and applies the law to those facts. Further, what the commenter is suggesting is the use of hypotheticals to let the FCIC inform the arbitrator, mediator, etc. know how to apply the interpretation to the facts. However, that is not the role given to FCIC in section 506(r) of the Act. FCIC's role is simply to provide interpretations of regulations and statutes and policy provisions and procedures. It is the role of the mediator, arbitrator, etc. to apply that interpretation to the particular facts of the case. In addition, hypotheticals can present some facts and not others, which can skew the outcome and FCIC is in no position to make such

determinations. FCIC is revising the rule to clarify that it will not accept any request for a final agency determination or FCIC interpretation that contains facts or hypotheticals to ensure that its interpretation is objective and unbiased. To the extent that FCIC believes that a hypothetical will provide clarification of its interpretation, FCIC will provide such hypothetical so it cannot to be construed as any determination of a factual situation. No change has been made.

Comment: A commenter recommended the wording in § 400.768(b) be changed to “...Code of Federal Regulations, but will notify you...”

Response: As stated above, FCIC has revised the regulation to include the term “FCIC interpretation.” Therefore, the phrase the commenter is referencing is no longer used and is replaced with the term “FCIC interpretation.”

Comment: A commenter recommended the wording in § 400.768(c) be changed to “...under § 400.768(b), the 90-day time period...”, and similarly change the two additional references to 90-day time period in this section.

Response: FCIC agrees and has revised the provisions accordingly.

Comment: A commenter stated in proposed rule § 400.765, the definition of a “final agency determination” is limited to interpretations of “regulations, or any policy provision that is codified in the Federal Register” but Subpart X is being expanded to include interpretations of “procedure or policy provision not codified in the Code of Federal Regulations”, as referenced throughout the proposed rule. The only distinction for these two types of interpretations is whether or not they are published on RMA’s website and binding on all program participants, as indicated in § 400.768(g) and (h). The commenter recommended eliminating § 400.768(h) and include publication of procedure and policies that are not codified in the Federal Register in § 400.768(g). These changes ensure that RMA interpretations of procedure or 508(h) and pilot

policies, which are not codified in the Federal Register, would be published and binding on all program participants so that all policies and procedures would be administered uniformly by every insurance provider.

Alternatively, eliminating § 400.768(h) would also allow the definition for “final agency determination” to be expanded to include “...or interpretations of procedure or policy provision not codified in the Code of Federal Regulations”. Modifying the definition of final agency determination in this way allows the phrase “or interpretations of procedure or policy provision not codified in the Code of Federal Regulations” referenced throughout the proposed rule to be eliminated. For example, § 400.766(a) could be simplified to read “The regulations contained in this subpart prescribe the rules and criteria for obtaining a final agency determination.”

Response: FCIC agrees that the provisions are too narrowly drafted but not for the reasons provided by the commenter. The proposed rule failed to take into consideration other forms of interpretations, such as testimony. Therefore, FCIC is revising a number of provisions to identify final agency determinations and FCIC interpretations. These revisions will also make distinctions between interpretations of statute and regulations and interpretations of unpublished policy provisions and procedures as final agency determinations and FCIC interpretations respectively. Additionally, FCIC has revised the regulation to define “FCIC interpretation” as an interpretation of a policy provision not codified in the Code of Federal Regulations or any procedure used in the administration of any Federal crop insurance program. Therefore, any references to “interpretations of procedure or policy provision not codified in the Code of Federal Regulations” have been removed and replaced with the term “FCIC interpretation” throughout the regulation.

However, the distinction between published and unpublished final determinations and their

binding effect stems from section 506(r) of the Act, which gives FCIC express authority to provide interpretations of statute and regulations. Based on this statutory authority, FCIC publishes its final agency determinations and makes them binding on all participants. However, there are policies that are published as regulations and some policies and policy provisions that are not. Those policies that are published as regulations have the force of law. Those policies that are not published as regulations have the force of contracts but not law. However, to ensure consistency and equitable treatment in the program, FCIC interpreted section 506(r) to authorize it to issue all interpretations of policy provisions. The same is true for procedures. FCIC discovered there was disparate interpretations of its procedures and for the sake of consistency and equitable treatment, FCIC included procedures as subject to its interpretation. Since, interpretations of provisions not included in statute or regulation is not statutorily mandated, such FCIC interpretations are only binding on the parties to the dispute, including the arbitrator, mediator, judge, or the National Appeals Division. No change has been made.

Comment: A commenter recommended the wording in § 400.768(i) be changed to “...loss adjuster as it relates to their performance of following FCIC policy provisions...”

Response: FCIC agrees and has revised the provisions accordingly.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Orders 12866, 13563, and 13771**

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866, “Regulatory Planning and Review,” and therefore, OMB has not reviewed this rule. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” requires that, in order to manage the costs required to comply with Federal regulations, that for every new significant or economically significant regulation issued, the new costs must be offset by the elimination of at least two prior regulations. This rule is not subject to Executive Order 13771.

### **Paperwork Reduction Act of 1995**

Pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the collections of information in this rule have been approved by the Office of Management and Budget (OMB) under control number 0563-0055.

### **E-Government Act Compliance**

FCIC is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

### **Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

### **Executive Order 13132**

It has been determined under section 1(a) of Executive Order 13132, Federalism, that this rule does not have sufficient implications to warrant consultation with the States. The provisions contained in this rule will not have a substantial direct effect on States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

### **Executive Order 13175**

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Federal Crop Insurance Corporation has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. If a Tribe requests consultation, the Federal Crop Insurance Corporation will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

### **Regulatory Flexibility Act**

FCIC certifies that this regulation will not have a significant economic impact on a

substantial number of small entities. The regulation does not require any more action on the part of the small entities than is required on the part of large entities. A Regulatory Flexibility Analysis has not been prepared since this regulation does not have an impact on small entities, and, therefore, this regulation is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605).

### **Federal Assistance Program**

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

### **Executive Order 12372**

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

### **Executive Order 12988**

This rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. Interpretations of statutory and regulatory provisions are matters of general applicability and, therefore, no administrative appeals process is available and judicial review may only be brought to challenge the interpretation after seeking a determination of appealability by the Director of the National Appeals Division (NAD) in accordance with 7 CFR part 11. An interpretation of a policy provision not codified in the Code of Federal Regulations or any procedure used in the administration of any Federal crop insurance program (hereinafter referred to as "FCIC interpretations") are administratively appealable and the appeal provisions published at 7 CFR part 11 must be exhausted before any action for judicial review may be brought against

FCIC.

### **Environmental Evaluation**

This action is not expected to have a significant economic impact on the quality of the human environment, health, or safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

#### **List of Subjects in 7 CFR Part 400**

Administrative practice and procedure, Crop insurance, Reporting and recordkeeping requirements.

### **Final Rule**

Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR part 400 as follows:

#### **PART 400 – GENERAL ADMINISTRATIVE REGULATIONS**

1. The authority citation for part 400 continues to read as follows:

Authority: 7 U.S.C. 1506(1), 1506(o).

2. Revise subpart X to read as follows:

#### **Subpart X - Interpretations of Statutory Provisions, Policy Provisions, and Procedures**

Sec.

400.765 Definitions.

400.766 Basis and applicability.

400.767 Requestor obligations.

400.768 FCIC obligations.

#### **Subpart X - Interpretations of Statutory Provisions, Policy Provisions, and Procedures**

##### **§ 400.765 Definitions.**

The definitions in this section apply to this subpart.

*Act.* The Federal Crop Insurance Act, 7 U.S.C. 1501-1524.

*Approved insurance provider.* A private insurance company that has been approved by FCIC to sell and service Federal crop insurance policies under a reinsurance agreement with FCIC.

*FCIC.* The Federal Crop Insurance Corporation, a wholly owned government corporation within the United States Department of Agriculture.

*FCIC interpretation.* An interpretation of a policy provision not codified in the Code of Federal Regulations or any procedure used in the administration of the Federal crop insurance program.

*Final agency determination.* Matters of general applicability regarding FCIC's interpretation of provisions of the Act or any regulation codified in the Code of Federal Regulations, including certain policy provisions, which are applicable to all participants in the Federal crop insurance program and the appeals process.

*NAD.* The USDA National Appeals Division. See 7 CFR part 11.

*Participant.* Any applicant for Federal crop insurance, an insured, or approved insurance provider or their agent, loss adjuster, employee or contractor.

*Procedure.* All FCIC issued handbooks, manuals, memoranda, and bulletins for any crop insurance policy reinsured by FCIC.

*Proceeding.* The process that starts with the filing of a complaint, notice of appeal, or other such document that commences the appeals process, and ends with the adjudicatory body issuing its decision, and includes all necessary activities, such as discovery, that occur within that time frame.

*RMA.* The Risk Management Agency, an agency of the United States Department of Agriculture.

*You.* The requestor of a final agency determination or FCIC interpretation.

**§ 400.766 Basis and applicability.**

(a) The regulations contained in this part prescribe the rules and criteria for obtaining a final agency determination or a FCIC interpretation.

(1) FCIC will provide a final agency determination or a FCIC interpretation, as applicable, for statutory, regulatory, or other policy provisions or procedures that were in effect during the four most recent crop years from the crop year in which your request was submitted. For example, for a request received in the 2014 crop year, FCIC will consider requests for the 2014, 2013, 2012, and 2011 crop years.

(2) If FCIC determines a request is outside the scope of crop years authorized in paragraph (a)(1) of this section, you will be notified within 30 days of the date of receipt by FCIC.

(3) If the statutory, regulatory or other policy provisions or procedures have changed for the time period you seek an interpretation you must submit a separate request for each policy provision or procedure by year. For example, if you seek an interpretation of section 6(b) of the Small Grains Crop Provisions for the 2012 through 2015 crop years but the policy provisions were revised starting with the 2014 crop year, you must submit two requests, one for the 2012 and 2013 crop years and another for the 2014 and 2015 crop years.

(b) With respect to a final agency determination or a FCIC interpretation:

(1) If there is a dispute between participants that involves a final agency determination or a FCIC interpretation:

(i) The parties are required to seek an interpretation of the disputed provision from FCIC in accordance with this subpart (This may require that the parties seek a stay of the proceedings until an interpretation is provided, if such proceedings have been initiated); and

(ii) The final agency determination or FCIC interpretation may take the form of a written interpretation or, at the sole discretion of FCIC, may take the form of testimony from an employee of RMA expressly authorized in writing to provide interpretations of policy or procedure on behalf of FCIC.

(2) All written final agency determinations issued by FCIC are binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. All written FCIC interpretations and testimony from an employee of RMA are binding on the parties to the dispute, including the arbitrator, mediator, judge, or NAD.

(3) Failure to request a final agency determination or FCIC interpretation when required by this subpart or failure of NAD, arbitrator, mediator, or judge to adhere to the final agency determination or FCIC interpretation provided under this subpart will result in the nullification of any award or agreement in arbitration or mediation in accordance with the provisions in the “Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review” section or similar section in all crop insurance policies.

(4) If either party believes an award or decision was rendered by NAD, arbitrator, mediator, or judge based on a disputed provision in which there was a failure to request a final agency determination or FCIC interpretation or NAD, arbitrator, mediator, or judge’s decision was not in accordance with the final agency determination or FCIC interpretation rendered with respect to the disputed provision, the party may request FCIC review the matter to determine if a final agency determination or FCIC interpretation should have been sought in accordance with § 400.767.

(i) Requests should be submitted through one of the methods contained in § 400.767(a)(1);

(ii) If FCIC determines that a final agency determination or FCIC interpretation should have been sought and it was not, or the decision was not in accordance with the final agency determination or FCIC interpretation rendered with respect to the disputed provision:

(A) The award is automatically nullified; and

(B) Either party may appeal FCIC's determination that a final agency determination or FCIC interpretation should have been sought and it was not, or the decision was not in accordance with the final agency determination or FCIC interpretation rendered with respect to the disputed provision to NAD in accordance with 7 CFR part 11.

(5) All written final agency determinations that are published on RMA's website are considered matters of general applicability and are not appealable to NAD. Before obtaining judicial review of any final agency determination, you must obtain an Administrative Final Determination from the Director of NAD on the issue of whether the final agency determination is a matter of general applicability.

(6) With respect to an administrative review of a FCIC interpretation:

(i) If either party to the proceeding does not agree with the written FCIC interpretation, a request for administrative review may be filed in accordance with 7 CFR part 400, subpart J. If you seek an administrative review from FCIC, such request must be submitted in accordance with § 400.767(a).

(ii) FCIC will not accept requests for administrative review from NAD, a mediator, or arbitrator.

(iii) The RMA Office of the Deputy Administrator for Product Management will make a determination on the request for administrative review not later than 30 days after receipt of the request.

(iv) Regardless of whether you have sought administrative review, you may appeal a FCIC interpretation under this subsection to NAD in accordance with 7 CFR part 11.

**§ 400.767 Requestor obligations.**

(a) All requests for a final agency determination or FCIC interpretation submitted under this subpart must:

(1) Be submitted to the Deputy Administrator using the guidelines provided on RMA's website at [www.rma.usda.gov](http://www.rma.usda.gov) through one of the following methods:

(i) In writing by certified mail or overnight delivery, to the Deputy Administrator, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0801, Room 421, P.O. Box 419205, Kansas City, MO 64141-6205;

(ii) By facsimile at (816) 926-3049; or

(iii) By electronic mail at [subpartx@rma.usda.gov](mailto:subpartx@rma.usda.gov);

(2) State whether you are seeking a final agency determination or FCIC interpretation;

(3) Identify and quote the specific provision in the Act, regulations, procedure, or policy provision for which you are requesting a final agency determination or a FCIC interpretation;

(4) Contain no more than one request for an interpretation (You must make separate requests for each provision if more than one provision is at issue. For example, if there is a dispute with the interpretation of Paragraph 3 of the Loss Adjustment Manual, then one request for an interpretation is required. If there is a dispute with the interpretation of Paragraph 3 of the Loss Adjustment Manual and Paragraph 2 of the Macadamia Nut Loss Adjustment Standards Handbook, then two separate requests for an interpretation are required);

(5) State the crop, crop year(s), and plan of insurance applicable to the request;

(6) State the name, address, and telephone number of a contact person for the request;

(7) Contain your detailed interpretation of the specific provision of the Act, regulations, procedure, or policy provision for which the request for interpretation is being requested; and

(8) Not contain any specific facts, alleged conduct, or hypothetical situations or the request will be returned to the requestor without consideration.

(b) You must advise FCIC if the request for a final agency determination or FCIC interpretation will be used in a judicial review, mediation, or arbitration.

(1) You must identify the type of proceeding (e.g., mediation, arbitration, or litigation), if applicable, in which the interpretation will be used, and the date the proceeding is scheduled to begin, or the earliest possible date the proceeding would likely begin if a specific date has not been established;

(2) The name, address, telephone number, and if applicable, fax number, or e-mail address of a contact person for both parties to the dispute;

(3) Unless the parties elect to use the expedited review process available under the AAA rules or the appeal is before NAD, requests must be submitted not later than 90 days before the date the mediation, arbitration, or litigation proceeding in which the interpretation will be used is scheduled to begin.

(i) If the rules of the court, mediation, or arbitration require the interpretation prior to the date the proceeding begins, add 90 days to the number of days required prior to the proceeding. For example, if a court requires the interpretation 20 days prior to the date the proceeding begins, you must submit the request 110 days before the proceeding is scheduled to begin.

(ii) Failure to timely submit a request for a final agency determination or FCIC interpretation may result in:

(A) FCIC issuing a determination that no interpretation could be made because the request was not timely submitted; and

(B) Nullification of any agreement or award in accordance with § 400.766 if no final agency determination or FCIC interpretation can be provided.

(iii) Notwithstanding paragraph (b) of this section, if during the mediation, arbitration, or litigation proceeding, an issue arises that requires a final agency determination or FCIC interpretation the mediator, arbitrator, judge, or magistrate must promptly request a final agency determination or FCIC interpretation in accordance with § 400.767(a).

(4) FCIC at its sole discretion may authorize personnel to provide an oral or written final agency determination or FCIC interpretation, as appropriate; and

(5) Any decision or settlement resulting from such mediation, arbitration, or litigation proceeding before FCIC provides its final agency determination or FCIC interpretation can be nullified in accordance with § 400.766.

(c) If multiple parties are involved and have opposing interpretations, a joint request for a final agency determination or FCIC interpretation including both requestor interpretations in one request is encouraged. If multiple insured persons are parties to the dispute, and the request for a final agency determination or FCIC interpretation applies to all parties, one request may be submitted for all insured persons instead of separate requests for each person. In this case, the information required in this section must be provided for each person.

**§ 400.768 FCIC obligations.**

(a) FCIC will not provide a final agency determination or FCIC interpretation for any request regarding, or that contains, specific factual information to situations or cases, such as acts or

failures to act of any participant under the terms of a policy, procedure, or any reinsurance agreement.

(1) FCIC will not consider specific factual information to situations or cases in any final agency determination or FCIC interpretation.

(2) FCIC will not consider any examples or hypotheticals provided in your interpretation because those are fact-specific and could be construed as a finding of fact by FCIC. If an example or hypothetical is required to illustrate an interpretation, FCIC will provide the example in the interpretation.

(b) If, in the sole judgment of FCIC, the request is unclear, ambiguous, or incomplete, FCIC will not provide a final agency determination or FCIC interpretation, but will notify you within 30 days of the date of receipt by FCIC that the request is unclear, ambiguous, or incomplete.

(c) If FCIC notifies you that a request is unclear, ambiguous or incomplete under paragraph (b) of this section, the 90-day time period for FCIC to provide a response is stopped on the date FCIC notifies you. On the date FCIC receives a clear, complete, and unambiguous request, FCIC has the balance of the days remaining in the 90-day time period to provide a response to you. For example, FCIC receives a request for a final agency determination on January 10. On February 10, FCIC notifies you the request is unclear. On March 10, FCIC receives a clarified request that meets all requirements for FCIC to provide a final agency determination. FCIC has sixty days from March 10, the balance of the 90-day time period, to provide a response.

(d) FCIC reserves the right to modify the request if FCIC determines that a request for a final agency determination is really a request for a FCIC interpretation or vice versa.

(e) FCIC will provide you a written final agency determination or a FCIC interpretation within 90 days of the date of receipt for a request that meets all requirements in § 400.767.

(f) If FCIC does not provide a response within 90 days of receipt of a request, you may assume your interpretation is correct for the applicable crop year. However, your interpretation shall not be considered generally applicable and shall not be binding on any other program participants. Additionally, in the case of a joint request for a final agency determination or a FCIC interpretation, if FCIC does not provide a response within 90 days, neither party may assume their interpretations are correct.

(g) FCIC will publish all final agency determinations as specially numbered documents on the RMA website because they are generally applicable to all program participants.

(h) FCIC will not publish any FCIC interpretation because it is only applicable to the parties in the dispute. You are responsible for providing copies of the FCIC interpretation to all other parties.

(i) When issuing a final agency determination or a FCIC interpretation, FCIC will not evaluate the insured, insurance provider, agent, or loss adjuster as it relates to their performance of following FCIC policy provisions or procedures. Interpretations will not include any analysis of whether the insured, insurance provider, agent, or loss adjuster was in compliance with the policy provision or procedure in question.

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Martin R. Barbre

Manager

Federal Crop Insurance Corporation

[FR Doc. 2018-27858 Filed: 12/26/2018 8:45 am; Publication Date: 12/27/2018]