DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 400, 402, 407 and 457

RIN 0563–AB94

General Administrative Regulations, Catastrophic Risk Protection Endorsement; Group Risk Plan of Insurance Regulations for the 2004 and Succeeding Crop Years; and the Common Crop Insurance Regulations, Basic Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes the Group Risk Plan of Insurance Regulations (GRP Provisions); and the Common Crop Insurance Regulations, Basic Provisions (Basic Provisions) to make revisions that will reduce program vulnerabilities and clarify existing policy provisions to better meet the needs of the insured. Further, FCIC is making conforming amendments to the General Administrative Regulations, Subpart L—Reinsurance Agreement—Standards for Approval; Regulations for the 1997 and Subsequent Reinsurance Years and Subpart P—Preemption of State Laws and Regulations, and the Catastrophic Risk Protection Endorsement. The changes will apply for the 2005 and succeeding crop years for all crops with a contract change date on or after the effective date of this rule, and for the 2006 and succeeding crop years for all crops with a contract change date prior to the effective date of this rule. In addition, FCIC is finalizing the interim rule published on June 30, 2000, implementing statutory mandates of the Agricultural Risk Protection Act of 2000 (ARPA).

EFFECTIVE DATE: *August 30, 2004.*

FOR FURTHER INFORMATION CONTACT: For further information or a copy of the Cost-Benefit Analysis, contact Janice Nuckolls, Insurance Management Specialist, Research and Development, Product Development Division, Risk Management Agency, United States Department of Agriculture, 6501 Beacon Drive, Stop 0812, Room 421, Kansas City, MO, 64133–4676, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, it has been reviewed by the Office of Management and Budget (OMB).

Cost-Benefit Analysis

A Cost-Benefit Analysis has been completed and is available to interested persons at the Kansas City address listed above. In summary, the analysis finds that changes in the rule will have positive potential benefits for insureds who do not engage in program abuse. Increased penalties for misreporting information affecting insurance liability should reduce the incidence of misreporting and should reduce the cost and amount of work needed to administer the program. Misreporting can result in increased indemnities and higher premium rates resulting from these higher than necessary payments. When misreporting is reduced, there will be fewer instances of fraud, waste and program abuse. The changes in this final rule will, over time, assist in (1) maintaining actuarial soundness as required by the Act, (2) protect the taxpayer dollar by reducing APH errors and other instances in which insurance liability is misstated and (3) reduce instances in which ineligible persons can obtain insurance benefits. Over time, if program abuse is decreased, premium rate reductions may result. Such reductions would be beneficial to producers who do not abuse the program. However, because the amount of abuse that currently occurs cannot be measured with existing data, immediate rate adjustments are not appropriate. Rather, such adjustments should be made when adequate loss experience is available to support actuarial calculations that satisfy appropriate credibility standards.

The analysis also examines changes made by the interim rule published on June 30, 2000. The analysis finds that the benefits provided outweigh associated costs. The crop insurance policy changes were required under ARPA. The analysis finds that the increases in the administrative fees for the catastrophic risk protection level of coverage from $60 per crop per county to $100 per crop per county, for additional coverage from $20 per crop per county to $30 per crop per county, and for limited coverage from $50 per crop per county, not to exceed $200 per county, and $600 for all counties, to $30 per crop per county with no limits may modestly increase the costs to producers but they will also reduce the overall costs of the program to taxpayers. The analysis also finds that giving producers the option of replacing certain yields in their actual production history (APH) with 60 percent of the transitional yield for the county will result in greater coverage for producers who have been impacted by multiple year disasters. Based on the cost benefit analysis and the requirements of the ARPA, FCIC finds this regulation is in the best interest of the overall crop insurance program.

Paperwork Reduction Act of 1995

Pursuant to 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 0563–0053 through February 28, 2005. Government Paperwork Elimination Act (GPEA) Compliance.

FCIC is committed to compliance with the GPEA, which requires Government agencies, in general, to provide the public with the option of submitting information or transacting business electronically to the maximum extent possible. FCIC requires that all reinsured companies be in compliance with the Freedom to E-File Act and section 508 of the Rehabilitation Act.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) 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.

Regulatory Flexibility Act

FCIC certifies this regulation will not have a significant economic impact on a substantial number of small entities. This rule affects insurance for approximately 1,200,000 crop policies, of which 503,000 are held by individual farmers who generally independently own and operate their farms. The other crop policies are held by partnerships, trusts, corporations and various other types of entities. Based on the size

standards specified in 13 CFR 121.201, almost all of the individual policyholders would be considered a small entity or business (revenue of $0.75 million per crop per year).

New provisions included in this rule will not significantly increase costs to small entities or significantly change the amount of work required to have an insurance policy, nor will the changes impact small entities to a greater extent than large entities. The provisions in this rule focus on several program integrity issues, including, the consequences of failing to pay required premiums or other amounts owed, attempts to conceal identity when a person is ineligible to receive program benefits, failing to report accurate information needed to determine insurance liability and premium, *etc.,* and such changes will do very little, if anything, to increase costs to small entities or large entities. Insurance program requirements are the same for all producers regardless of the size of the farming operation. For example, producers are required to submit historical yield information to compute insurance coverage and premium amounts. These requirements are the same whether a producer has 10 or 10,000 acres and there is no difference in the kind of information collected.

Further, the Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*) provides the authority to waive collection of administrative fees for "limited resource farmers.'' FCIC believes this extra consideration helps assure certain small entities (those that meet USDA's definition of a "limited resource farmer'') can obtain insurance that might not otherwise be able to afford it. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

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. With respect to any direct action taken by FCIC or to require the insurance provider to take specific action under the terms of the crop insurance policy, the administrative appeal provisions published at 7 CFR part 11 and 7 CFR part 400, subpart J for the informal administrative review process of good farming practices, as applicable, must be exhausted before any action against FCIC for judicial review may be brought.

Environmental Evaluation

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

Background:

This rule finalizes changes to the Catastrophic Risk Protection Endorsement, Group Risk Plan of Insurance Regulations and the Common Crop Insurance Regulations; Basic Provisions mandated by ARPA, that were published by FCIC on June 30, 2000, as a notice of interim rulemaking in the **Federal Register** at 65 FR 40483–40486. The public was afforded 60 days to submit written comments after the regulation was filed in the Office of the Federal Register. No comments were received.

This rule also finalizes certain changes FCIC published on September 18, 2002, as a proposed rule in the **Federal Register** at 67 FR 58912–58933 to amend the General Administrative Regulations, subpart T–Federal Crop Insurance Reform, Insurance Implementation; the Group Risk Plan of Insurance Regulations; and the Common Crop Insurance Regulations, Basic Provisions to implement program changes mandated by the Federal Crop Insurance Act (Act), as amended by ARPA, and make other changes and clarify existing policy provisions to better meet the needs of the insureds, effective for the 2003 and succeeding crop years for all crops with a contract change date of November 30, 2002, or later.

Following publication of the proposed rule on September 18, 2002, the public was afforded 30 days to submit written comments and opinions. Based on comments received and specific requests to extend the comment period, FCIC published a notice in the **Federal Register** at 67 FR 65732 on October 28, 2002, extending the initial 30-day comment period for an additional 15 days, until November 12, 2002.

A total of 3,407 comments were received from 209 commenters. The commenters were reinsured companies, attorneys, trade organizations, commodity associations, State agricultural associations, regional agricultural associations, agents, insurance service organizations, universities, producers, USDA agencies, State Departments of Agriculture, grower associations, and other interested parties.

Due to the large number of comments received and the significant impacts of the changes being made, FCIC finalized certain provisions of the proposed rule in a final rule that was published in the **Federal Register** on June 25, 2003, and is finalizing all of the remaining provisions in this final rule. To the maximum extent practicable, any changes made in response to comments have been applied to both the Group Risk Plan (part 407) and the Basic Provisions (part 457) even though the comment may have been directed at only one of these policies.

Below is a summary of the major issues addressed in this rule, the general theme of the public comments received in response to the major issues and the changes, if any, made to address those comments. Following this summary of the major issues identified are the specific comments and FCIC's more detailed responses:

Summary of Major Issues:

(1) *Identification Information Collection:* The proposed rule included the requirement to collect identification numbers (SSNs, EINs) from additional persons, including the children of insured persons. The proposed provisions also required policy voidance if the required identification numbers were not provided.

Commenters indicated the penalty was much too harsh and that children's SSNs should not be required.

In response to the comments, FCIC has eliminated the requirement to report children's identification numbers unless the child has a separate legal interest in the insured. Additionally, FCIC has eliminated the provisions requiring the policy to be voided for failure to provide the required identification numbers unless the person whose identification numbers is not provided is ineligible to receive insurance benefits and maintained the current provisions regarding the reduction of insurable share in cases where the person whose identification number was not reported is eligible for insurance;

(2) *Establishment and Adjustment of Approved Yields:* Proposed provisions

provided for the adjustment of insurance guarantees when past yield history for a unit is inconsistent with other comparable insurance units, when the history is based on small acreage and is being applied to larger acreage, or when the history is based on a farming practice that is being changed.

Commenters agreed with the need for such provisions but asked several questions regarding administration of the provisions, including how comparable units would be determined and how inconsistent yields would be defined.

In response to the comments, provisions regarding "inconsistent yields'' were removed and provisions pertaining to changes in farming practices and yield history based on small acreages were clarified to provide specific criteria to determine when the difference in yields will be adjusted and to provide exceptions;

(3) *Misreporting of Information:* The proposed rule included provisions intended to decrease misreporting of information necessary to determine insurance coverage. The proposed provisions would have denied an indemnity if misreporting exceeded a five percent tolerance, and would have still required the insured person to pay the premium.

Commenters stated the penalty was too harsh and that many inadvertent errors would exceed the five percent tolerance. Additional comments indicated the provisions made the policy coverage unreliable to producers and to lenders.

In response to those comments, the provisions related to denial of an indemnity were removed, a new sanction was added that would reduce the amount of indemnity paid commensurate with the amount misreported, and the tolerance was increased to 10 percent. The provisions were also clarified to specify the new penalty would not apply if the insurance provider or USDA employee was responsible for the error, or if the insured person had reported a preliminary acreage amount while waiting for an acreage measurement;

(4) *Removal of Arbitration Provisions:* The arbitration provisions were removed in the proposed rule and instead any dispute would have to be resolved through the judicial process.

Commenters were split between retaining, removing or replacing the arbitration provisions with provisions that would allow mediation or other means of dispute resolution. Commenters challenged FCIC's basis for removal, claiming the problems cited should be fixed or that the reasons were not justified. Commenters also indicated the judicial process is time consuming and expensive.

In response to these comments, arbitration provisions have been retained in this final rule. FCIC has addressed the concerns expressed by requiring that FCIC provide any policy or procedure interpretations to prevent disparate treatment of producers and having such interpretation be binding unless appealed to the National Appeals Division, clarifying when arbitration must be commenced, eliminating any conflicts of interest, requiring more detailed statements of arbitrator's decisions, allowing mediation, clarifying that arbitration is not binding, allowing only contractual damages unless FCIC determines the insurance provider failed to follow approved policy or procedure, and adding provisions specifying that when FCIC directly participates in the adjustment of a claim, the dispute is against FCIC, not the insurance provider;

(5) *Verification of Production Records:* The proposed rule included provisions requiring insurance providers to verify production records for the previous three years for any loss unit and added a penalty that failure to maintain such records would result in no indemnity due and the producer would still be required to pay the premium.

Commenters stated the penalty was too extreme, would substantially increase costs and delay claims, and that the work force is insufficient to accomplish the increased workload.

In response to the comments, the proposed change is not incorporated in the final rule. The policy provisions already contain record retention requirements and FCIC has determined the same effect could be achieved by having the insurance providers conduct reviews to ensure the producer is properly retaining records and that such records reflect the production reported;

(6) *Combining Insured Entities:* The proposed rule required that all entities composed of the same people be insured under one policy to avoid producers creating new entities to avoid the application of existing policy or procedure, such as the use of past production records.

Commenters stated the proposed change violates entities that are legally separate and protected and that the proposal is inconsistent with IRS and FSA rules.

In response to the comments, the proposed change is not incorporated in the final rule. Instead, FCIC has revised its procedures to require that past records be used anytime an insured received a share of the insured crop production or was a member of or had a substantial beneficial interest (SBI) in an entity that received a share in the insured crop production. This change results in the inability to drop past production history simply by creating a new entity.

Due to the number and complexity of the comments received, FCIC has provided a list of the issues covered in this rule and headings so that the reader can better determine the subject of the comments.

List of the Issues Covered in This Rule

In General—Burdens Imposed in Administering the Policy:

1. Burden on Producers; and
2. Burden on Insurance Providers;

Application of Rule;
Elimination of Good Faith Reliance Provisions;
Revisions to the Preamble;
General Comments to the Definitions;
Revisions to Specific Definitions:

1. Actuarial Documents;
2. Agent;
3. Agricultural Commodity;
4. Annual Crop;
5. Another use, notice of;
6. Application;
7. Border;
8. Code of Federal Regulations;
9. Contract;
10. Contract Change Date;
11. County;
12. Coverage;
13. Crop;
14. Crop Year;
15. Damage, Notice of;
16. Deductible;
17. Delinquent Account;
18. Discernible;
19. Disinterested Third Party;
20. Enterprise Unit;
21. Earliest Planting Date;
22. Field;
23. FCIC and RMA;
24. FCIC Procedures;
25. Farming or Farmed;
26. Household;
27. Indemnity;
28. Insurable Loss;
29. Insurance Provider;
30. Insured;
31. Insured Crop;
32. Irrigated Practice;
33. Liability;
34. Limited Resource Farmer;
35. New Producer;
36. Non-contiguous;
37. Offset;
38. Perennial Crop;
39. Person/Entity;
40. Policy;
41. Practical to Replant;
42. Premium;
43. Premium Billing Date;
44. Prevented Planting;
45. Replanting;
46. Second Crop;
47. Substantial Beneficial Interest;
48. Surrounding Area;

49. Summary of Coverage;
50. Timely Manner;
51. Verifiable Records;
52. Void;
53. Whole Farm Unit; and
54. Written Agreement;
Identity Collection Information—Section 2(b);
Delinquent Debts—Proposed Section 2(e) and Redesignated Section 2(f);
Clarification of Insurance Guarantees, Coverage Levels, Verification of Records,
Establishment and Adjustment of Approved Yields—Section 3;
Contract Changes—Section 4;
Eliminating the Liberalization Provisions—Section 5;
Revisions to Acreage Reports and Misreporting of Information—Section 6;
Clarification of Premium and Administrative Fees—Section 7;
Clarification of Insured Crop—Section 8;
Clarification of Insurable Acreage—Section 9;
Clarification of Share Insured—Section 10;
Clarification of Causes of Loss—Section 12;
Clarification of Replanting Payments—Section 13;
Clarification of the Insured's and Insurance Provider's Duties—Section 14;
Clarification of Production Included in Determining an Indemnity Provisions—Section 15;
Clarifications of the Prevented Planting Provisions—Section 17;
Clarifications to the Written Agreement Provisions—Section 18;
Elimination of the Arbitration Provisions—Section 20;
Clarification of Access to Insured Crop and Records, and Record Retention—Section 21;
Clarification Regarding Other Insurance—Section 22;
Clarification of the Amounts Due Us Provisions—Section 24;
Limitation of the Right to Collect Extra Contractual Damages—Section 25;
Clarification of the Interest Provisions—Section 26;
Policy Voidance Provisions—Section 27;
Transfer of Coverage and Right to an Indemnity Provisions—Section 28;
Clarification of the Subrogation Provisions—Section 30;
Applicability of State and Local Statutes—Section 31;
Notice Provisions—Section 33;
Clarification of the Unit Division Provisions—Section 34; and
New Provisions for Beginning and New Producers.

The specific comments received and FCIC's responses are as follows:

In General—Burdens Imposed in Administering the Policy

1. *Burden on Producers:*

Comment: Several commenters were concerned by what they perceive as unreasonable compliance requirements on producers' reporting procedures and agricultural practices.

Response: To protect program integrity, stronger provisions regarding misreporting and changes in farming practices are necessary. New provisions in this final rule should reduce errors and program abuse that can adversely affect premiums and indemnities. In this final rule, FCIC has attempted to limit the information collection burden and implements only those changes needed to properly administer the program and minimize waste and abuse.

Comment: (1) Many general comments were received regarding added program complexity, severe reporting requirements and associated penalties, increased workloads and program delivery cost, unclear definitions and terms and conditions, legality of certain changes, unpredictability of coverage, reduction in confidence by producers and lenders, customer dissatisfaction, conflicts with Congressional intent, *etc.;* (2) Some of the commenters agreed program integrity issues needed to be addressed. However, the commenters stated that the approaches presented in the proposed rule were far too harsh, could not be administered, and would result in an unreliable, unsaleable product. The commenters recommended focusing penalties on those who are abusing the program as Congress has directed rather than the Draconian measures and overly broad approach presented by FCIC in the proposed rule. Commenters stated that while it may be reasonable to have some penalties associated with unintentional errors, the severest penalties should be reserved for willful and intentional deception, as intended by Congress; (3) Several commenters stated the proposed changes would result in reduced participation, which is directly in conflict with Congressional efforts and direction.

Response: Most of the general comments received are repeated in greater detail in comments to specific proposed changes and are responded to later in this section.

2. *Burden on Insurance Providers:*

Comment: A commenter noted FCIC stated the amount of work required of the insurance providers delivering and servicing these policies will not increase significantly from the amount of work currently required. They believe this is incorrect, as they believe more auditing, verifying, *etc.,* is being required from insurance providers and if more is being required of the insurance providers, they need to be compensated accordingly.

Response: FCIC agrees some additional work will be required to administer new provisions contained in this final rule. However, such changes are necessary to protect program integrity and should ultimately result in savings to the insurance providers. Further, it is anticipated that the new provisions regarding misreporting of information used to determine liability, and improper use of Actual Production History (APH) yields, etc., will reduce some of the work insurance providers must do because there will be fewer errors to correct.

3. *Application of Rule:*

Comment: A commenter noted that FCIC stated the provisions of this rule would not have a retroactive effect. However, they believe this will have a retroactive effect because of the way things are stated in this proposal. The commenter stated that if it is true that it is not retroactive, then it needs to be stated that the rules will only apply from this point forward and not penalize anyone for not keeping records, *etc.*

Response: FCIC agrees the record-keeping provisions contained in the proposed rule would have had a retroactive effect. As stated more fully below, these provisions have been revised in this final rule to eliminate this effect.

Comment: Other commenters were concerned with inclusion of "FCIC'' in so many places in the policy because the contract is between the producer and the insurance provider, and recommended minimizing the visibility of "FCIC.''

Response: FCIC agrees the insurance contract is between the producer and insurance provider. However, to place the insured on notice that procedures issued by FCIC will be used in administering the policy and to denote other areas in which FCIC involvement is required, it is necessary to reference FCIC.

Comment: Some commenters stated FCIC unilaterally developed the proposed provisions without input from insurance providers, producer groups, *etc.,* and recommended all work together to develop any new provisions.

Response: Over the past few years, insurance providers and producer groups provided input on the Basic Provisions and this input was utilized to prepare many of the proposed provisions, and many of the proposed provisions dealing with program integrity issues were developed based on past litigation, arbitration and appeal cases involving insurance providers.

Comment: Some commenters also recommended not finalizing any of the proposed changes without publishing another proposed rule, and allowing for additional comments.

Response: Interested parties were provided adequate time to provide comments and to allow an additional

comment period would delay the implementation of needed changes. FCIC has given consideration to all comments received on all proposed changes and has revised the provisions in this final rule accordingly.

Comment: A few commenters requested their comments to the Basic Provisions be considered for the GRP Provisions where applicable.

Response: FCIC has considered all the comments to the Basic Provisions as if they are applicable to the GRP Provisions. Where applicable, FCIC has made the same or similar changes in both the GRP Provisions and the Basic Provisions.

Elimination of Good Faith Reliance Provisions

Comment: A commenter stated the deletion of the "good faith and reliance on misrepresentation'' provisions will definitely not meet the needs of the insured. The commenter believes the reasons given for the deletion are wholly one sided and inadequate. They cited one reason given for the deletion was "because of the confusion surrounding the applicability of the provisions.'' They believe this is a language problem and not a reason to delete the provision. They cited another reason, which was to "avoid the perception that FCIC was waiving the protection against the applicability of estoppel against it and permitting employees to bind FCIC with their errors,'' does not provide a reason to delete the provision. The commenter believes the purpose of this provision is to clarify how to equitably resolve problems that occur when a producer relies in good faith upon misinformation given to the person by FCIC, by an insurance provider or by an agent. The commenter believes sometimes agents or insurance providers give wrong information to an insured, and sometimes it is so grossly erroneous that it can almost be considered intentional. They believe producers need some sort of equitable protection against that occurrence. The commenter believes if this provision is deleted, producers will have no way to protect themselves from even intentional and malicious misinformation. They believe deletion of this provision would indicate that FCIC believes it has no responsibility for its errors, but at the same time requires that producers be fully responsible for their errors. The commenter believes that perhaps rewording the provision for clarification is appropriate, but that deletion is not appropriate.

Response: FCIC agrees that policyholders should be able to rely on the advice provided by government employees, insurance providers and agents. FCIC uses considerable resources to ensure that these persons have the correct information to provide to policyholders. It publishes policies in the **Federal Register** and on its Web site to ensure that all employees, agents, insurance providers, and policyholders have access to policy terms and conditions. However, even if a government employee provides erroneous advice the authority to provide equitable relief against the government is extremely limited. Only the Secretary has the authority to provide equitable relief on behalf of the government and such relief can only be granted when the producer and employee do not know that the advice provided is contrary to the Act or regulations. The Supreme Court has held that all FCIC personnel, insurance providers, agents and producers are presumed to know the provisions of the Act and the regulations, including all policy provisions, and are bound by the language even when a government employee had provided erroneous advice. Further, most of the advice given to policyholders is provided by agents. Therefore, the interests of insureds are protected because any erroneous advice would be covered by the agents' errors and omissions insurance. 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. No change has been made.

Revisions to the Preamble

Comment: A commenter asked how the first statement in the preamble, that reads, "The provisions of the policy are published in the **Federal Register** * * *'' applies to pilot programs that are not published in the **Federal Register**.

Response: FCIC agrees certain policy documents for pilot crop insurance programs and some policies submitted to FCIC under section 508(h) of the Act are not published in the **Federal Register**. Language indicating the policy provisions are published in the **Federal Register** and codified has been removed.

Comment: A commenter believes that in view of the legislative initiatives made by ARPA, FCIC has done the right thing in expanding the list of persons who may not waive or vary any terms of the policy to include RMA and FSA. The commenter stated this portion of the first paragraph, however, also substitutes the term "crop insurance provider'' for "insurance provider,'' and this may introduce some confusion, because neither the current version of the Basic Provisions nor the proposed one defines these terms. The commenter believes that because agricultural producers are familiar with usage of the term "insurance provider'' and since it is used elsewhere in the Basic Provisions, including the very next paragraph of the preamble, it is appropriate to use that term (even if undefined) in the first paragraph. They believe an alternative would be to define "crop insurance provider'' as the "insurance provider'' in the definitions portion.

Response: FCIC agrees that the term "crop insurance provider'' is undefined. The term has been replaced with "we,'' "us'' or "our,'' as applicable to be consistent with the rest of the policy, which refers to the insurance company as "we,'' "us,'' and "our.'' However, the term "insurance provider'' is still used when referring to other than insurance companies.

Comment: A commenter stated the preamble paragraph inaccurately states that the policy cannot be waived or varied in any way when, in fact, written agreements that modify the insurance offer, rates, actuarials (all a part of the policy) are allowed.

Response: FCIC agrees the policy specifically allows for modification by written agreements. FCIC has revised the provision to state that the terms of the policy may not be waived or modified unless a written agreement is specifically authorized by the policy.

Comment: A commenter believes FCIC is proposing a useful addition to the preamble by adding the sentence regarding handbooks, manuals, and directives.

Response: FCIC agrees it is important to provide notice to policyholders that the procedural materials issued by FCIC will be used to administer the crop insurance program.

Several comments were received regarding language in the policy preamble as it relates to the roles of RMA and the insurance providers. The comments are as follows:

Comment: Some commenters stated the proposed language overlooks the fact that this is a privately delivered product and implies the policy is a Federal contract or that a producer should take up policy conflicts directly with RMA.

Response: While this may be a privately delivered product, policyholders must be made aware that they are participating in a Federal program. It is in no way intended to imply that the government is a party to the contract. The agreement to insure clearly indicates that the contract is between the producer and the insurance provider through its reference to "we,'' which is defined in the previous paragraph as the insurance provider. However, the government still has regulatory control over the program. Further, there is nothing in the preamble regarding disputes. Provisions regarding resolution of disputes are contained in section 20 of the Basic Provisions and section 16 of the GRP Provisions. Those provisions make clear which disputes are properly brought against FCIC and those that must be brought against the insurance provider. No changes have been made.

Comment: A few commenters recommended revising the language to indicate procedures approved by FCIC will be used rather than those issued by FCIC. Some of these commenters stated that it appears the new language would require private insurance providers to issue FCIC policy forms and use FCIC handbooks as opposed to National Crop Insurance Services (NCIS) forms and handbooks.

Response: The reference to procedures as issued by FCIC is appropriate. This is to ensure that the same procedures are applicable to all producers regardless of the insurance provider. The procedures allow the insurance providers to create their own forms, in accordance with the procedures.

Comment: A commenter stated a reference to NCIS publications as authoritative guidance should be added, for the consultative process and studied professionalism of those publications frequently is the most complete, consistent and meaningful treatment of key program issues. The commenter stated the terms "procedures'' and "provisions'' in the fourth sentence are not defined, and they believe are ambiguous and open to infinite interpretations, many of which are equally reasonable. The commenter stated the proposal appears to attempt distinguishing between these two terms, but because it defines neither that attempt fails. They also noted the proposal states that procedures and provisions "will be used'' but does not say by whom, when or in what manner.

Response: While NCIS may put out procedures under its own name, those procedures must be the same as those issued by FCIC. Even NCIS forms must contain, at a minimum, the information contained in FCIC's procedures. Therefore, it would be inappropriate to refer to NCIS because it would imply that NCIS is a regulator of the program. The proposed language referencing "provisions'' is clearly modified by the phrase "of the policy.'' Therefore, further clarification of this term is not needed. However, FCIC has revised the provision to specify that "procedures'' refer only to handbooks, manuals, memoranda and bulletins. This will prevent infinite interpretations. FCIC has also revised the provisions to specify that the insurance provider will use the procedures as issued by FCIC in the administration of the policy.

Several comments were received regarding order of precedence of documents referred to in the policy preamble (the Act, regulations, policy, and procedures). The comments are as follows:

Comment: Several commenters stated the proposed preamble is rather confusing as to conflicts between the policy, the Act and/or the regulations. They stated the preamble needs to address the order in which each takes precedence.

Response: FCIC agrees the preamble needs to address the order of precedence of the referenced documents and has revised the language accordingly.

Comment: Some commenters indicated the "agreement to insure'' section establishes an order of precedence among policy documents but omits the Act, Regulations, etc. They recommend this paragraph be reconciled with the changed initial paragraph of the preamble. One of the commenters stated the policy must clearly state what action is to be taken when one of the listed documents is inconsistent with one or more other Agency publications.

Response: FCIC also agrees that there should be one section that sets the order of precedence for all documents and has moved all the provisions to the "agreement to insure'' section.

Comment: Some commenters stated the policy provisions should take highest precedence since the policy is what is given to the policyholder to serve as the "contract'' between insurance provider and policyholder.

Response: FCIC agrees that between the policy regulations and the administrative regulations, the policy regulations should take precedence. However, the policy provisions cannot override the Act.

A few comments were received regarding references to agents in the policy preamble. The comments are as follows:

Comment: A commenter stated that the paragraph seems to reinforce that the agent is separate and apart from the insurance provider. The commenter added that the agent is defined by an agency agreement between the insurance provider and the person or entity acting as an agent for the insurance provider. They believe the proposed language may be interpreted as stating the agent is a broker for the policyholder or some sort of third party.

Response: FCIC has revised the provision to clarify that the "agent'' refers to the insurance agent and that the insurance agent is affiliated with the insurance provider.

Comment: A commenter stated that the term "agent'' as used twice in the third sentence is not clear. They believe the key phrase should be reworded to read "* * * by the crop insurance provider, any insurance agent or any agent or employee of FCIC, the Risk Management Agency * * *''

Response: FCIC has revised the third sentence to clarify that the first reference to "agent'' refers to the insurance agent and has replaced the second reference to "agent'' with "contractor'' to encompass managing general agents, loss adjusters and other contractors of the insurance provider.

Comment: A commenter believes the words "insurance provider providing insurance'' in the second paragraph of the policy preamble should be replaced with the words "insurance provider providing you insurance'' less there be confusion between all providers and this policy.

Response: Since no changes to this paragraph were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter stated it is not clear from the **Federal Register** whether the following definitions remain in the proposed Basic Provisions: "Throughout this policy, 'you' and 'your' refer to the named insured shown on the accepted application and 'we,' 'us,' and 'our' refer to the insurance provider providing insurance. Unless the context indicates otherwise, use of the plural form of a word includes the singular and use of the singular form of the word includes the plural.'' The commenter believes these definitions are extremely valuable and helpful in understanding a number of the subsequent sections of the policy,

and therefore, they believe these definitions should remain a part of the policy.

Response: As stated in the proposed rule, FCIC has only revised the first paragraph of the preamble. Therefore, the second paragraph remains unchanged.

Comment: A commenter noted that FCIC proposed to remove section 14(d), which states that the insurance provider adjusts losses in accordance with FCIC-approved loss adjustment procedures. The commenter added that to retain this concept in the Basic Provisions, they recommend that FCIC amend the fourth sentence of the preamble as follows: "Procedures, including, but not limited to, handbooks, manuals and directives, issued or approved by FCIC and published on the RMA Web site at *http://rma.usda.gov/* or a successor Web site will be used in the administration of this policy and in the adjustment of any loss or claim submitted hereunder.''

Response: FCIC has revised the fourth sentence of the preamble to specify that procedures as issued by FCIC will be used in the adjustment of any loss or claim.

Comment: A commenter noted the policy indicates "us'' refers to the insurance provider providing insurance. However, the commenter states the term is also used in the context of FCIC.

Response: Under "FCIC Policies,'' the term "us'' refers to FCIC. Under "Reinsured Policies,'' the term "us'' refers to the insurance provider providing insurance. Therefore, it will depend on who is offering the insurance as to which "us'' is actually referenced. For reinsured policies, it will only be the insurance provider. For FCIC policies, it will only be FCIC.

A few comments were received regarding the phrase "cannot pay your loss.'' The comments received are as follows:

Comment: A commenter stated that it is anticipated that the soon-to-be negotiated Standard Reinsurance Agreement ("SRA'') will contain provisions implementing section V.P. of the SRA, including language that provides for the assumption by FCIC and insurance providers of liability of an insurance provider that has become insolvent or is otherwise unable to perform its duties under the SRA. The commenter noted that currently, the Basic Provisions state only: "In the event we cannot pay your loss, your claim will be settled in accordance with the provisions of this policy and paid by the FCIC.'' They believe this statement may not accurately reflect the disposition of policies in the event that an insurance provider becomes insolvent, because in such a scenario, insureds may be transferred in bulk to other insurance providers. The commenter stated that transfer of policies from an insolvent insurance provider to other insurance providers affects the rights and duties of insureds, and FCIC should amend the Basic Provisions to provide: "In the event we cannot pay your loss, your claim will be settled and paid in accordance with the provisions of the Standard Reinsurance Agreement and this policy.''

Response: FCIC has clarified that in the event an insurance provider cannot pay the policyholder's loss, FCIC will be responsible for the amount of such loss. This applies regardless of whether FCIC assumes the policy or it is transferred to another insurance provider.

Comment: A commenter recommended the words "cannot pay your loss'' be clarified. They presume it means to address a case where the provider is insolvent, but it does not say that.

Response: FCIC has clarified that the phrase "cannot pay your loss'' means an insurance provider has become insolvent or is otherwise unable to perform its duties under the SRA.

Comment: A commenter believes the proposed language in the policy preamble seems to preclude FCIC/RMA from making any changes to provisions, procedures, etc. They asked if this is RMA's intent. The commenter stated that for example, it would seem the language would preclude the issuance of bulletins.

Response: FCIC has revised the provision to specify that changes may not be made to the policy except as authorized by the policy. However, bulletins are usually used for the purpose of clarification, interpretation or to fill a gap that may exist in the policy or procedures. Under this revised preamble provision, FCIC may only revise the policy through a bulletin if specifically authorized in the policy. There is nothing in the preamble that affects or restricts the manner in which FCIC revises its procedures. The preamble only specifies that such procedures, which include bulletins, will be used to administer the policy.

Comment: A commenter asked if the availability on the referenced Web site is intended to preclude the need to issue actual policy documents or change notifications to insureds.

Response: The Web site address included in the policy tells the reader where all crop insurance materials can be found. Some of these documents are not provided to the policyholder even though they may affect the terms and conditions of insurance such as the actuarial documents and the manuals and handbooks. Nothing in this rule affects the requirement that insurance providers provide policy information to insureds or the notification requirements. Such information must still be provided to producers.

Comment: A commenter asked why, in the added language, is a specific reference to "FSA'' made, rather than "USDA.''

Response: FCIC has revised the provision to refer to employees of USDA.

Comment: A commenter stated that handbooks, manuals, and directives should not be used to circumvent rulemaking. They stated the policy preamble would add a reference to handbooks, manuals and directives, and that while the use of some interpretive handbooks is common in administrative agencies today, they should not be used to avoid notice and comment rulemaking when promulgating or changing substantive rules. The commenter believes these handbooks must be made readily available to farmers if they are to be relied upon by insurance providers.

Response: Since the policies published in the Code of Federal Regulations have the force of law, procedures cannot be used to modify the terms of the policy. However, they have always been used to administer the policy through interpretations, clarifications or to fill gaps that may exist because of situations that arise that were not contemplated in the policy or procedures. Any change to the policy must be made through the rulemaking process unless otherwise authorized in the policy. Procedures are readily available to the public on RMA's Web site.

Comment: A commenter stated it appears items (1) and (2) in the agreement to insure statement in the preamble are reversed from what they should be.

Response: Since no changes to this paragraph were proposed and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. Any modification to this paragraph in this final rule was the result of a conforming amendment.

General Comments to the Definitions

Comment: A few commenters made the following general statements regarding section 1 (Definitions): (1) Removing ambiguous language and definitions will strengthen the integrity of the Federal crop insurance program; (2) Loosely defined terms such as

"prevented planting'' could be refined to help reduce disputes, and confusion; (3) Some definitions use terms such as "normally'' which causes vagueness; (4) There are some definitions which reference language that is not in the policy itself but is part of the FCIC Act (Act) and many producers do not have access to the Act or consider it burdensome to find and interpret it; and (5) A producer should not need an attorney to interpret the policy.

Response: FCIC agrees terms used in the policy should be as clear as possible and readers should be able to make interpretations without assistance. The terms referred to in this comment have been modified as indicated in response to specific comments included later in this section. In some instances it is necessary to refer readers to other documents such as the Act. However, such references are only used to provide the reader with information regarding the authority for specific actions and it is not necessary to access the Act to interpret the policy or determine the terms and conditions of insurance.

Comment: Some commenters recommended capitalizing words that are used as defined terms throughout the policy to help clarify when a given definition applies.

Response: Capitalization of specific words in the document that is contrary to the general rules of grammar tends to make the document more difficult to read. No change has been made.

Revisions to Specific Definitions

1. Actuarial Documents:

Comment: A commenter stated the word "type'' is ambiguous in the definition of "actuarial documents.'' They stated if the intent is to describe the current actuarial documents, the phrase should be "particular types and varieties of the crop which may be insured.''

Response: FCIC has clarified the definition to specify that "type'' refers to the particular type or variety of the insurable crop.

Comment: Several commenters recommended the first sentence in the definition of "actuarial documents'' be modified to read "* * * agent's office and/or published * * *'' to cover circumstances where the agent may not have the documents in question.

Response: Actuarial documents are necessary to provide the policyholder with information regarding premium rates. Therefore, insurance agents must have this information to be able to advise policyholders. No change has been made.

Comment: A commenter stated that the reference to RMA's Web site in the definition of "actuarial documents,'' and throughout the provisions, leave it unclear as to whether certain documents are required in the agent's office or not.

Response: The definition of "actuarial documents'' clearly indicates the materials are available in the agent's office and on RMA's Web site. Sections 4(b) and (c) of the Basic Provisions also indicate the "actuarial documents'' will be available in both locations. However, insurance agents with offices that have access to the actuarial documents from the Web site are considered to have the documents available for public inspection in their office. No change has been made.

Comment: A commenter stated the reference to the agent's office in the definition of "actuarial documents'' is archaic and should be broadened to include agent Web sites, insurance provider offices and Web sites, RMA offices and Web sites, etc.

Response: These provisions are intended to notify the policyholder where the actuarial documents can be found. If FCIC were to make the requested change, it would require that all insurance agents and insurance providers have Web sites that have links to the actuarial documents. This would impose an unnecessary burden. Further, this information must be available in the agent's office in order to be able to respond to policyholder queries. No change has been made.

Comment: A commenter asked if availability of actuarial documents on the Web site is intended to relieve the responsibility to notify policyholders of changes, and if the Web site is now to be considered a part of the policy.

Response: The Web site is just intended to provide a convenient place to find all materials related to crop insurance. While the policy references the Web site, the content of the Web site has not been incorporated into the policy nor does the Web site revise any requirements in the policy for the insurance provider to notify policyholders of all policy changes in writing.

Comment: A commenter stated the definition of "actuarial documents'' indicates production guarantees are contained in the actuarial documents. They indicated the guarantees are not in the documents now, and asked if this would work since the APH and insurance guarantees change yearly.

Response: FCIC agrees that production guarantees are not included in the actuarial documents. Therefore, FCIC has revised the definition by deleting the reference to production guarantees.

Comment: Some commenters recommended changing "your agent's office'' to "the policy servicing agent's office'' in the definition of "actuarial documents.''

Response: FCIC is unsure of what this change is intended to accomplish. FCIC does not see the distinction between an agent and a policy-servicing agent. Therefore, the recommended change does not appear to clarify or improve the definition. No change has been made.

Comment: Several commenters recommended using a consistent reference to RMA's Web site in the definition of "actuarial documents'' and throughout the rule.

Response: FCIC has been unable to determine how the references are inconsistent but it will check references to the Web site to be certain they are consistent.

2. Agent:

Comment: Some commenters recommended adding the definition of "agent.'' A commenter recommended defining "agent'' as "agent of the insurance provider.''

Response: To the extent that the commenter was concerned that the policy was confusing as to who the agent is affiliated with, FCIC has clarified the preamble to specify that the agent is affiliated with the insurance provider. This clarification avoids the need to add a separate definition.

3. Agricultural Commodity:

Comment: A few commenters suggested expanding the definition of "agricultural commodity.'' One stated expansion was necessary to include livestock and aquatic programs, and the other recommended including any crop or other commodity, whether or not it is insured.

Response: Agricultural commodity is a very broad term and the Act allows it to encompass almost any commodity. FCIC is reluctant to put qualifiers in the definition that could exclude certain commodities in future years. As drafted, the definition includes livestock and aquatic programs through its reference to other commodities. No change has been made.

Comment: A few commenters stated the definition of "agricultural commodity'' is expanded to include commodities other than crops, yet in most cases, the Basic Provisions reference "crop.'' The comments recommended changing some of these references to "agricultural commodity.''

Response: FCIC has already revised those provisions where it has determined it is appropriate to refer to agricultural commodity instead of crop. However, there are still many places

where the reference should remain as "crop.''

4. Annual Crop:

Comment: One commenter recommended changing the definition of "annual crop'' to show the contrast between annual, perennial, and volunteer crops.

Response: The purpose of having separate definitions is to show their contrast. Therefore, it is not necessary to repeat this in each individual definition. No change has been made.

5. Another use, notice of:

Comment: A commenter recommended removing the definition of "another use, notice of'' since definitions of "loss, notice of'' and "damage, notice of'' were deleted.

Response: FCIC has removed the definition accordingly.

6. Application:

Comment: A commenter recommended the definition of "application'' be modified to recognize the application process can be an electronic/paperless process, and not necessarily requiring a "form.'' The commenter also suggested adding language indicating a new application must be filed once the producer again becomes eligible.

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

7. Border:

Comment: A commenter stated a change from 36,000 to 20,000 plants per acre would be a "border'' within the meaning of the proposal's definition, yet it would not constitute a "discernible break'' as required by established Agency procedures. The commenter stated use of the term "border'' appears to be an attempt to replace "discernable break,'' which they believe is a recognized term that is currently generally understood and consistently applied. They suggested the text of the proposal be revised wherever the term "border'' now appears to state whatever FCIC intends.

Response: FCIC agrees borders created by different plant densities may not be readily discernible and that the proposed definition of "border'' is too subjective and overly broad. FCIC believes the current provisions contained in section 34 that require "a clear and discernible break in the planting pattern at the boundaries of each optional unit'' is a more definitive requirement that has been generally consistently applied. Therefore, all references to "border'' have been removed from the final rule.

Comment: Several commenters recommended revising the definition by removing the words "plant density.'' A few of the commenters stated the term "plant density'' is too liberal. Other commenters stated "plant density'' is not readily identifiable or readily discernable, and therefore FCIC should consider deleting plant densities and adding, "no crop is planted or the planted crop is destroyed by the acreage reporting date.''

Response: See response to the first comment.

Comment: A few commenters stated the definition is unclear. Some commenters recommended deleting "*etc.*'' and "distinction'' because of the possibility of different interpretations. A few commenters stated the term "readily identifiable'' in the definition is too vague and is subject to differing interpretations. A commenter recommended defining "readily identifiable distinction.''

Response: See response to the first comment.

Comment: A commenter stated the definition is overly broad, vague and permits virtually any differentiation between land areas to be deemed a "border.'' They stated FCIC should amend the definition to limit subjectivity or, at a minimum, state the insurance provider shall, in its sole discretion, determine whether a difference constitutes "a readily identifiable distinction.''

Response: See response to the first comment.

Comment: A few commenters recommended changing the definition to read as follows: "A readily identifiable discernable break between two areas of land (*e.g.* different planting patterns or area where no crop is planted).''

Response: See response to the first comment.

Comment: A commenter suggested border be defined as an "unplanted area,'' and that planting it then disking or tilling to create a "border'' should not qualify. The commenter stated the subjectivity of the proposed wording makes it impossible for an agent to properly explain and sell, and it puts the adjuster in a difficult situation.

Response: See response to the first comment.

Comment: A commenter stated the definition conflicts with the definition of field. A few commenters stated the proposed definition is inconsistent with current procedure in the Crop Insurance Handbook which requires a break in the planting pattern.

Response: See response to the first comment.

Comment: A commenter stated the definition is incomplete if additional terms, such as "discernible break'' are needed. The commenter also asked if the border should not be identifiable to the extent that separate harvesting can result and records can be kept.

Response: See response to the first comment.

8. Code of Federal Regulations:

Comment: Several commenters recommended defining the "Code of Federal Regulations (CFR).'' Some stated there should be an explanation of 7 CFR part 400, subpart G in the definitions of "average yield'' and "approved yield,'' and that FCIC should also explain other regulations referenced in the policy.

Response: FCIC agrees the definition of "Code of Federal Regulations (CFR)'' should be added. The new definition includes a Web site address where interested parties can find the full text of the CFR in electronic format. An explanation of the CFR subparts referenced in the policy should not be included in the policy as it would be repetitious with those parts and unnecessarily increase the size of the policy.

9. Contract:

Comment: A commenter was concerned about the terms "contract'' and "policy'' and using them interchangeably.

Response: Since the terms mean the same thing, using the two terms interchangeably should not cause confusion. No change has been made. However, the definition of "policy'' has been revised in response to other comments.

10. Contract Change Date:

Several comments were received regarding the definition of "contract change date.'' The comments are as follows:

Comment: A few commenters recommended retaining the current definition of "contract change date.''

Response: The current definition is too restrictive because FCIC does not have any control over when agents will obtain the policy changes. It would allow for disparate treatment of producers based on whether their agent had the changes in their office by the contract change date. The revised definition gives a date certain and location where the information can be found on that date. No change has been made.

Comment: A commenter recommended not changing the definition because not requiring policy

changes to be available in an agent's office does not appear to meet the needs of limited resource farmers who may not have access to the Internet. The commenter recommended deleting the word "provisions'' because "policy'' is defined, if the new definition is retained. A commenter stated that producers cannot reasonably assess their alternatives regarding contract changes not available for review in the office of their agent. The proposal substitutes the undiscoverable decision of an unknown entity ("changes will be made,'' but by whom?) for a clear, reasonable definition currently in use. A commenter recommended revising the definition of "contract change date,'' to allow for years when no changes are made. The commenter recommended adding "if any'' to the definition. The commenter further recommended clarifying who can make changes in the policy by including the words "the date by which we may make changes * * *'' A commenter recommended changing the definition of "contract change date'' as follows: "The calendar date by which FCIC changes the policy in accordance with section 4.'' The change is recommended because the insurance provider does not have the authority to change the Basic Provisions.

Response: Reference to the location of where the changes can be found is not necessary in the definition of "contract change date.'' The purpose of the definition is just to specify that there is a date by which changes must be made. Provisions in section 4 of the policy specify changes may be viewed either in the insurance agent's office or on RMA's Web site. Further, changes to the policy will still be directly mailed to the policyholder. Therefore, the needs of all policyholders to have sufficient information to make informed decisions will be met. FCIC agrees the word "provisions'' should be deleted and has revised the definition accordingly. FCIC agrees an allowance should be made for years in which no changes are made and has revised the definition accordingly. FCIC does not agree that it is necessary to identify the entity making policy changes. Only FCIC has the authority to conduct the rulemaking necessary to revise the policies published in the Code of Federal Regulations.

Comment: A commenter recommended adding the words "of this policy'' at the end of the definition of "contract change date.''

Response: FCIC has revised the definition to add the phrase "of these Basic Provisions.''

11. County:

Comment: A commenter stated the definition of "county'' does not refer to or allow for the addition of "added land'' to a unit in a legal county that may be in another county.

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

12. Coverage:

Comment: A commenter suggested revising the definition of "coverage'' by adding "or as we determine to be correct if your summary was based on the incorrect information supplied by you.''

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

13. Crop:

Comment: A commenter recommended adding the definition of "crop.''

Response: The term "crop'' has been used for many years and connotes many different types of agricultural commodities. It would be impossible to construct a definition that could encompass all possible agricultural commodities that could qualify as a "crop'' without making it too broad to add any clarity to the policy. No change has been made.

14. Crop Year:

Comment: A commenter stated there was no need to add the new wording, "unless otherwise specified in the Crop Provisions,'' to the definition of "crop year,'' since the Crop Provisions override the Basic Provisions.

Response: Since there are currently instances where the definition of "crop year'' is changed by the Crop Provisions, the reader should be referred to the Crop Provisions. No change has been made.

Comment: One commenter recommended revising the definition of "crop year'' by stating the "period'' is a "time period'' and including the idea that fall and spring planted crops generally share the same crop year.

Response: Since the only period that could be applicable is a time period, the change would have no practical effect. Further, there may be instances where spring and fall planted crops may not share the same crop year. No change has been made.

15. Damage, Notice of:

Comment: A commenter stated it was unclear why the definition of "damage, notice of'' was deleted when notice is required in section 14. Some commenters added that retaining the definitions helps the insured read and understand his/her duties. Another commenter recommended not deleting the definition of "loss, notice of'' but shortening it to refer the reader directly to section 14, "Your Duties.'' A commenter stated if the definition of "loss, notice of'' was deleted then "but not later that 15 days after the end of the insurance period'' should be added in section 14, and asked what the effect on late notices and how late notices would be handled if this language is not added back in. Some commenters were concerned deleting the definitions would lead to an unlimited time frame for "initial discovery'' in section 14, and that the reference to the end of insurance period in section 14 is effectively removed.

Response: FCIC proposed to delete the definitions of "damage, notice of'' and "loss, notice of'' because the responsibilities associated with these terms are clearly defined in section 14 (Your Duties). Further, the definitions were inconsistent with the requirements of section 14. Therefore, FCIC does not agree the definitions should be retained. In response to other comments, FCIC has elected not to adopt the proposed revisions in section 14(a) and 14(a)(2), except as needed to remove the reference to notice of loss since that term is not used anywhere else in the section. As a result, the current provisions regarding the time frames will remain in effect, thereby negating the need to adopt the recommendations of the commenters.

16. Deductible:

Comment: A commenter stated the term "deductible'' is not used in the provisions and does not need to be defined.

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

17. Delinquent Account:

Comment: A commenter recommended revising the definition of "delinquent account'' by adding the phrase "including payments for replants and prevented planting,'' after "indemnities.'' Another commenter recommended refining the definition to clarify that the term "indemnities'' includes overpaid claims, replant payments and prevented planting payments, and to specify whether crop

hail and/or supplementary product premiums are included in "any account you have with us."

Response: FCIC has revised the definition, and all other applicable provisions, to include replanting and prevented planting payments, overpaid amounts and to specify that the provisions apply only to insurance issued under the authority of the Act. FCIC has also changed the term to "delinquent debt" to be consistent with the ineligibility regulations.

Comment: A few commenters recommended changing the definition of "delinquent account" and the provisions of section 2 to not consider an account delinquent until completion of appeals.

Response: FCIC does not agree with the recommended change. Unlike most other lines of insurance, premiums are not paid until after insurance has attached and in many cases not until the end of the insurance period. Therefore, policyholders have already received the benefit of insurance coverage. Further, accounting and program administration would be made more complex if producers are allowed to pay premium at various stages, depending on whether or not they have asked for arbitration, appeal, etc. It would also add program uncertainty if policyholders could be declared ineligible in the middle of the crop year. No changes have been made.

18. Discernible:

Comment: A few commenters recommended defining "discernible."

Response: Terms only need to be defined if they have meaning different from the common meaning of the term or there are multiple common meanings. FCIC intended the common meaning of the term "discernible" to apply, which refers to being able to perceive, detect or recognize as separate and distinct. Therefore, it is not necessary to define this term. No change has been made.

19. Disinterested Third Party:

Several comments were received regarding the definition of "disinterested third party." The comments are as follows:

Comment: A commenter recommended making it clear an interest in the insured crop or policy constitutes an interest in the insured, and eliminating "other personal interests" or quantifying it in some manner. Other commenters asked what constitutes "other interest," "other personal relationship" and "interest in the insured."

Response: FCIC agrees a person having an interest in the insured crop would not qualify as "disinterested" and has clarified the definition accordingly. The phrases "financial interest in the insured," "other personal relationship" and "other interest" have been removed from the definition because these terms are vague and would be difficult to administer.

Comment: A few commenters recommended the definition specify the subject the party must be disinterested in (the crop, the person, or what).

Response: The definition has been clarified to indicate that the person must not have a familial relationship with the insured person or receive a financial benefit from the sale of the insured crop.

Comment: A commenter recommended deleting the definition since the term is not used in the Basic Provisions.

Response: FCIC does not agree that the definition should be deleted. The term is used in several Crop Provisions and defining it in the Basic Provisions avoids unnecessary duplication. No change has been made.

Comment: A commenter recommended deleting the wording "such as familial or other personal relationship" and replacing with the word "crop."

Response: FCIC agrees that the terms "financial interest in the insured" and "personal relationships" should be removed because they would be difficult to administer. However, references to familial relationships are necessary because family members may also have an interest even though it may not be financial.

Comment: A commenter stated the term "insured" is inconsistent and should be replaced with "you" or "your."

Response: FCIC agrees with the comment and has replaced "insured" with "you."

Comment: A commenter recommended using the following definition: "any financial, familial or other personal relationship with the insured."

Response: The suggested definition cannot be adopted because the phrase "other personal relationship" is vague and would be difficult to administer. Therefore, this term was removed.

Comment: A commenter recommended using the following definition: "a person or entity that does not have any financial interest in the insured or disposition or transfer of ownership of the insured crop nor a familial interest in the insured."

Response: The suggested definition cannot be adopted because elevator employees authorized to pull samples and analyze the quality of the crops would have a financial interest in the disposition or transfer of ownership of the insured crop, creating a conflict within the policy. No change has been made.

Comment: A commenter recommended identifying interest in terms of a "substantial beneficial interest" and doing so by specifying a percentage.

Response: Not all interests are financial, such as familial relationships, and may not be measurable. No change has been made.

Comment: Regarding the definition of "disinterested third party," a commenter asked if the wording "financial interest" bars an elevator, gin or similar entity from making quality determinations. Another commenter asked if an elevator involved in the purchase of grain would be a disinterested third party.

Response: The definition has been clarified to specify that persons authorized to conduct quality analyses of the crop can be considered as disinterested third parties.

20. Enterprise Unit:

A few comments were received regarding the definition of "enterprise unit." The comments are as follows:

Comment: A few commenters suggested considering if the change should be made. A few commenters recommended revising the second sentence in the definition of "Enterprise unit" as follows: "An enterprise unit must consist of planted acreage or acreage on which a prevented planting payment is made of the same insured crop in:"

Response: FCIC has revised the definition so that enterprise units will consist of all acreage from the combined optional or basic units, as applicable, regardless of whether the acreage is planted or prevented from being planted as long as some acreage in at least two sections, section equivalents, FSA farm serial numbers, or units established by written agreement contain some planted acres. FCIC has also clarified in section 34 that the discount will only apply to acreage that has been planted. However, a unit containing only acreage that is prevented from being planted cannot be used to qualify for an enterprise unit.

Comment: A commenter recommended adding "in the county" to paragraphs (1) and (2) of the definition of "enterprise unit" but also questioned why a policyholder with a basic unit in two counties could not combine them into an enterprise unit; and (4) A commenter recommended adding "units by written agreement or Unit Division Option" to references to sections, section equivalents, or FSA farm serial numbers, in the definition of "enterprise unit."

Response: The addition of "in the county'' to paragraphs (1) and (2) of the definition is not necessary because the first sentence of the definition already specifies that an enterprise unit is all insurable acreage of the insured crop "in the county * * *'' FCIC does not believe a policyholder with a basic unit in two counties should be allowed to combine them into one enterprise unit, because the policy specifies that all unit division (basic, optional, enterprise, and whole farm units), guarantees, and premium rates are determined on a county basis. No change has been made; and (4) FCIC has revised the definition to include written agreements as a means to establish basic or optional units as applicable.

21. Earliest Planting Date:

Comment: Several commenters recommended defining the term "initial planting date'' instead of "earliest planting date'' to avoid introduction of a new term, and to be consistent with the term used in the Special Provisions. A few of the commenters stated it would be less cumbersome than changing all of the Special Provisions. Another commenter asked if all of the Special Provisions would be changed to be consistent with the new definition.

Response: The term defined and used in the current regulations is the "earliest planting date.'' Therefore, use of the term in the proposed provisions is not new. However, FCIC is aware that an "initial planting date'' is listed in the Special Provisions. To reduce confusion and prevent the need to change the Special Provisions or to change all references to the "initial planting date'' in the regulations, FCIC has revised the definition to change the reference to "calendar date'' to the "initial planting date.''

22. Field:

A few comments were received regarding the proposed definition of "field.'' The comments are as follows:

Comment: A commenter recommended revising the definition of "field'' so acreage within a field must be contiguous.

Response: FCIC cannot accept the requested change. Acreage separated by a waterway would be considered two fields under the definition. However, the same acreage would be considered contiguous under the proposed definition of "non-contiguous.'' Therefore, if the change were accepted, the definitions would be in conflict. No change has been made.

Comment: A commenter suggested the phrase "Natural or artificial boundary'' used in the definition of "field,'' could be anything because everything is either natural or artificial.

Response: FCIC agrees that all boundaries are either natural or artificial. The intent of the provision was to only require some type of permanent or semi-permanent boundary and clarify that the use of planting patterns or different crops cannot be used to create separate fields. The reference to both artificial and natural boundaries is to provide notice that either type of boundary is acceptable.

Comment: A few commenters recommended retaining the current definition of "field.'' One of the commenters stated the definition is inconsistent with the definition of "border'' because the two definitions together would allow several "borders'' within a "field.''

Response: The definition requires revision because of the common perception that acreage planted to separate crops are separate fields. For the purposes of insurance, different planting patterns or planting different crops do not create separate fields because it would adversely affect program integrity by allowing producers to circumvent certain prevented planting provisions. Since, as stated above, FCIC is removing the definition of "border,'' any conflict has been eliminated.

Comment: A few commenters stated the new definition of "field'' is an improvement, but stated there could be a problem if a boundary, *e.g.*, fence line, no longer exists and FSA still considers it to be two fields.

Response: If a fence that separated two fields was removed, in accordance with the revised definition of "field,'' the acreage would be considered one field regardless of whether or not FSA considers it as two fields. This requirement is needed to protect the integrity of the crop insurance program. No change has been made.

23. FCIC and RMA:

Comment: A commenter recommended adding definitions of "FCIC'' and "RMA'' to alleviate confusion that exists among insured's and, to a lesser degree agents and loss adjusters. The commenter also recommended giving attention to their respective roles within the Federal crop insurance program.

Response: Since these definitions were not proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

24. FCIC Procedures:

Comment: A commenter recommended adding the definition of "FCIC procedures'' and including "procedures approved by FCIC'' in it.

Response: FCIC has clarified in the preamble that procedures include handbooks, manuals, memoranda and bulletins. Therefore, a definition is not required.

25. Farming or Farmed:

Comment: A few commenters recommended defining "Farming'' or "Farmed.''

Response: FCIC believes these terms are readily understood and that adding the suggested definitions would not improve or clarify the policy terms. No change has been made.

26. Household:

Comment: One commenter recommended defining "household'' since the term is used in the definition of "substantial beneficial interest.''

Response: The term has been removed from the definition of "substantial beneficial interest.'' However, the term has been added to the definition of "limited resource farmer.'' Therefore, FCIC has added a definition of "household.''

27. Indemnity:

Comment: Several commenters recommended defining "indemnity.'' A few of these commenters recommended defining "indemnity'' to either include or exclude replant and prevented planting payments. Some of the commenters suggested including replant payments and prevented planting payments as indemnities. One commenter suggested including overpaid claims in the definition. Another commenter asked if the replant payment is a loss mitigation payment or an indemnity. An additional commenter suggested using the following definition: "The gross amount due to you from us as a result of a loss of yield or value of your insured crop as a direct result of an insured cause and in accordance with this policy.''

Response: FCIC has clarified throughout this final rule that an indemnity is different from a replant payment or prevented planting payment. FCIC makes the distinction based on the fact that a replant payment is to reimburse for the costs of having to replant the crop, not indemnify for any crop losses. Further, a prevented planting payment is to reimburse for a portion of costs incurred when the producer was unable to plant the crop. It also is not intended to indemnify for any crop loss. Indemnities are intended to provide indemnification for crop losses. Overpayments are just indemnities, replant payments, or prevented planting payments that are

determined not to be due. Therefore, these terms are different and it should not be included in the definition. Indemnities are determined in accordance with the policy provisions and include the entire amount of the loss payable to the policyholder, regardless of whether any premium or other amounts due have been subtracted from that entire amount. Therefore, no definition is required for this term and the suggested definition has not been adopted.

28. Insurable Loss:

Comment: A commenter recommended defining "insurable loss."

Response: FCIC has added a definition of "insurable loss." In addition, section 14(d)(1) (Your Duties) has been revised to remove the requirement to reduce the first insured crop indemnity if the producer does not provide production records needed to determine a second crop indemnity. When records are not provided for a second crop loss, no indemnity can be paid for the second crop. Therefore, because no second crop indemnity can be paid, the first insured crop indemnity cannot be reduced.

29. Insurance Provider:

Comment: A few commenters recommended defining "insurance provider." One of the commenters suggested, as an alternative, replacing "crop insurance provider" in the text with "we," "us," or "our."

Response: FCIC agrees the better alternative is to replace the phrase "crop insurance provider" with "we," "us," or "our" and has revised the provisions accordingly.

30. Insured:

Comment: A few commenters recommended including the spouse and children living at home in the definition of "insured" if RMA intends for the interest of the spouse and children to be included in determining insurable share.

Response: FCIC does not intend to consider the spouse or children as the insured person. Spouses are only considered as having a substantial beneficial interest in the insured unless they can prove otherwise. Therefore, no changes have been made to the definition of "insured."

31. Insured Crop:

Comment: A commenter recommended revising the definition of "insured crop" by adding "and/or Special Provisions" after "Crop Provisions."

Response: The definition of "insured crop" was revised in response to other comments and now refers to the policy so the recommended change is no longer necessary.

32. Irrigated Practice:

Comment: A commenter suggested adding "and quality" after "quantity" in the definition of "irrigated practice."

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

33. Liability:

Comment: Several commenters recommended replacing "applicable crop" in the definition of "liability" with "agricultural commodity," "insured product," "insured agricultural commodity" or "insured crop or agricultural commodity." One of the commenters recommended using the term "liability" throughout the policy to replace terms such as "maximum amounts of insurance" and "available coverage." Another asked why there needed to be a reference to premium in the definition of liability.

Response: FCIC has revised the definition of "liability" to include the term "agricultural commodity." The term "liability" cannot be used to replace "maximum amount of insurance" or "available coverage" because in many instances the context in which these phrases are used is not consistent with the defined term. For example, maximum amount of insurance does not take into consideration coverage level, price election, number of acres, or share of the policyholder. However, liability would take these into consideration. The reference to "premium computation" is necessary because it provides notice that liability takes into consideration the price election, coverage level, number of acres, and share of the policyholder, which are used to compute premium.

34. Limited Resource Farmer:

Comment: Some commenters recommended the following regarding the definition of "limited resource farmer:" (1) Propose the new definition under a general USDA rule to provide adequate time for comments; (2) Change the maximum gross farm sales amount from $100,000 to $250,000; (3) Delete the farm asset and household income tests in the first factor; (4) Change the second test from 75 percent of the median county income to 175 percent of the relevant poverty line; (5) Clarify the inconsistent use of the words "total," "gross," and "net," particularly in subsection (b), which refers to "total gross household net income;" (6) Clarify whether "total operator household income" means gross or net (the commenter stated that net income is more relevant in determining the resources available to farmers); (7) Clarify "total farm assets" (the commenter stated equity value is a meaningful indicator); (8) Delete the requirement that the standards in subsection (a) be met for the past two years; (9) Eligibility rules for other Federal programs, such as the school lunch program and the CHIPS federal health program, may provide useful models, though they may need to be adjusted to the situations of land-rich, cash-poor farmers; and (10) A commenter recommended using the following definition rather than the proposed definition: " A Limited Resource Farmer or Rancher: (1) Is an individual with gross farm sales less than $100,000, AND (2) has a total household income at or below a qualifying county income level (to be determined annually), in each of the previous two years." The commenter stated the income level would be determined annually for each county based on two objective factors; the level would be the greater of the poverty level for a household of 4 or 50 percent of the median county income level; and a limited resource farmer would be limited to gross farm sales less than $100,000, which would be increased, beginning in fiscal year 2004, by the inflation percentage applicable to the fiscal year in which a benefit is being requested.

Response: After publishing the request for public comments regarding the definition of "limited resource farmer/producer" (LRF) being considered for use by other USDA agencies, USDA determined that it would propose one definition of LRF to be applicable to all USDA programs. USDA proposed the definition in the **Federal Register** on February 10, 2003 (68 FR 6655), comments were received, and the final rule was published in the **Federal Register** on May 30, 2003 (68 FR 32337). In accordance with that directive, FCIC is adopting that definition in this rule. Further, to mitigate the impact of this change, any policyholder who previously had their administrative fees waived because they qualified as a LRF will still be considered a LRF. In addition, FCIC has added the definition of LRF to the Catastrophic Risk Protection Endorsement.

35. New Producer:

Comment: A few commenters recommended defining "New producer."

Response: Since the term is never used in the proposed rule, no changes were required as a result of conforming

amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

36. Non-contiguous:

Several comments were received regarding the definition of "non-contiguous.'' The comments are as follows:

Comment: A few commenters recommended defining "farmed'' so there is no confusion that certain acreage (*e.g.*, pastureland, golf courses, CRP acreage, summer-fallow acreage, etc.) would not be considered farmed, and so there is no confusion regarding policyholders who do not "farm'' the land such as landlords.

Response: The term "farmed'' has been removed.

Comment: A few commenters recommended separating the definition of "non-contiguous'' into two sentences. Some of them suggested; (a) Eliminating the phrase "except that'' or replacing the words with "Nonetheless'' or "However,'' or a similar term at the beginning of the second sentence; (b) adding "or significant beneficial interest holder'' after "you'' in "neither owned by you nor rented by you'' (this would keep insureds from splitting up policies/units when it is not justified); and (c) inserting a period after "share.''

Response: FCIC agrees that separate sentences would improve clarity and has revised the definition to accomplish this. However, adding "substantial beneficial interest'' would not have any practical effect because in order to be able to farm the land of the person with the substantial beneficial interest, it is presumed that the policyholder will either need to lease or own the land.

Comment: A few commenters recommended clarifying "non-contiguous'' because it is confusing.

Response: The definition has been revised to provide greater clarity.

Comment: A commenter suggested changing "farmed by you'' to "controlled by you.''

Response: As previously stated, the term "farmed by you'' has been removed.

Comment: A few commenters recommended retaining the current definition of "non-contiguous.''

Response: The current definition cannot be retained because FCIC has discovered that it is subject to multiple interpretations. One of those interpretations would have allowed policyholders with an insignificant amount of acreage between the fields of the insurable crop to obtain separate units. This creates a program integrity problem because policyholders could use this interpretation to circumvent the unit division requirements. No change has been made.

Comment: A commenter recommended changing the definition of "non-contiguous'' to read as follows: "Acreage owned or operated by you that is separated from other acreage that is owned or operated by you by land that is neither owned or operated by you, or acreage owned or operated by you that is only separated by a public or private right-of-way, waterway, or an irrigation canal will be considered as contiguous.''

Response: FCIC has in effect implemented this change. However, the method suggested could not be used because the repetition of terms would only add confusion to the definition.

37. Offset:

Comment: A commenter recommended defining the term "offset.''

Response: FCIC has added a definition.

38. Perennial Crop:

Comment: A commenter recommended revising the definition of "perennial crop'' to add the phrase "to produce a crop or yield a commodity'' at the end for greater clarity.

Response: The recommended change would not significantly improve the clarity of the definition. However, FCIC agrees that it needs clarification and has revised "perennial crop'' to be more consistent with the common meaning of the term.

39. Person/Entity:

Comment: A few commenters recommended defining the term "person/entity'' (as in the CIH) rather than "person'' to clarify that this includes more than single individuals. Another commenter questioned whether a "group of individuals'' needs to be added to the definition since they are being considered individuals (*i.e.*, spouse and children of a household).

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

40. Policy:

Comment: Several commenters recommended the following regarding the definition of "policy:'' (1) The definition does not include handbooks, bulletins, and other FCIC writings and procedures that insurance providers are required by the SRA to use (policyholders are not held to standards in the handbooks, *etc.,* while SRA holders are)—references to the handbooks, *etc.,* should be removed from the preamble of the policy and removed from the SRA; (2) If the listing of handbooks, *etc.,* is retained in the policy preamble, the listing should be repeated in the definition; (3) Make certain this definition conforms to the definition of "contract'' in 7 CFR 457.7; (4) Include the summary of coverage which lists the guarantees and liabilities as a part of the policy; (5) Clarify that a policy includes all of an entities crops insured with the same provider; and (6) Clarify the basis of the policy. The commenter questions whether it is on a crop/county basis, multiple crops on a county basis, or multiple crops on a multiple counties basis.

Response: While the preamble states the procedures will be used to administer the policy, they have not been made a part of the policy. This reference cannot be deleted because it is necessary to put all participants on notice that procedures as issued by FCIC are applicable to the policy. Such procedures are needed to ensure that all policies are sold and serviced consistently. The procedures contain the responsibilities imposed on the insurance provider. The responsibilities of the policyholder are found in the policy, not the procedures. For example, the policy states that the policyholder must provide adequate records. The procedures assist the insurance provider in determining what records are adequate. FCIC has revised 7 CFR 457.7 to remove the definition of contract to avoid any conflict with the definition of "policy.'' With respect to the other recommended changes to the definition of "policy,'' FCIC has revised the definition to clarify that each agricultural commodity in each county constitutes a separate policy. In addition, this same change was made to last paragraph immediately preceding the "agreement to insure'' section of the Group Risk Plan Common Policy.

41. Practical to Replant:

Several comments were received regarding the definition of "practical to replant.'' The comments are as follows:

Comment: Several suggested more direction with respect to whether or not it is practical to replant in the late planting period. One recommended a limit in time so it will not be considered practical to replant after fewer days remain to the end of the late planting period than have elapsed since the beginning of the late planting period, unless it would be a good farming practice with respect to the insured unit to replant.

Response: The definition is silent regarding replanting within the late

planting period because of the extreme variation between crops, areas, and climatic conditions which affect the factors used to determine whether it is practical to replant, such as time to crop maturity. Determinations of the practicality of replanting must be made on a crop-by-crop, and area-by-area basis. Providing a fixed number of days in the late planting period during which replanting would be practical would not provide the flexibility needed by insurance providers to properly consider the factors contained in the definition. No change has been made in response to this comment.

Comment: Some stated there is a conflict between requiring replanting in the late planting period as is required in the definition and no requirement to plant in the late planting period for the purposes of prevented planting coverage.

Response: FCIC agrees the planting requirements are different during the late planting period depending on whether replanting or prevented planting is involved. However, such differences are needed in the fair and equitable administration of the policy. When acreage that is prevented from being planted is planted during the late planting period, the guarantee is reduced for every day that the crop is late planted. Such reductions do not apply to crops replanted during the late planting period. Further, prevented planting payments are based on the expected costs incurred in the preparation of planting and are usually limited to 60, 65 or 70 percent of the production guarantee for planted acreage. In contrast, once the crop is planted during the initial planting period, policyholders are eligible for payment based on 100 percent of the production guarantee. In addition, when it is practical to replant the crop, the policyholder does not have a loss other than the cost of replanting. The purpose of a replant payment, if available, is to cover a portion of such costs. Therefore, it is reasonable to require policyholders to replant in the late planting period because they will still receive the full benefit of insurance for which they paid the full premium. However, policyholders who are prevented from planting would receive reduced benefits if they were required to plant during the late planting period even though they paid a full premium. No change has been made.

Comment: A few stated that clarification is needed for contracted crops when different acreage sometimes has to be replanted in order to fulfill the contract.

Response: FCIC understands that there may be situations where acreage initially planted may not be available for replanting due to flooding, *etc.*, and other acreage not initially planted to the contracted crop may be planted to replace it. However, FCIC cannot adopt this recommendation at this time because it does not know the impact of the change on premium rates or other aspects of the program. No change has been made.

Comment: A few recommended clarification or removal of "generally occurring'' and "area,'' and linking the definition to the definition of "good farming practice.'' One stated the words "unless replanting is generally occurring in the area'' are subject to second guessing and various interpretations and a possible solution would be for FCIC to declare, by area, at the time issues arise, its determinations as to the practicality of replanting.

Response: FCIC has removed the requirement that it will not be considered practical to replant after the final planting date unless others in the area are replanting. Determinations of whether it is practical to replant the policyholder's acreage should be based on the objective factors stated in the definition, not whether others are replanting. FCIC has clarified the term "area'' in a final rule published prior to this rule (Vol. 68, No. 122/Wednesday, June 25, 2003). FCIC does not agree that determination of "practical to replant'' should be linked to the definition of "good farming practice.'' The policy specifically states that replanting can be done under a practice that is not insurable. Therefore, adoption of this recommendation could cause a conflict in the policy.

Comment: A few recommended revising the definition to specify the cost of seed or plants will be considered. One recommended a waiver mechanism be made available for exceptional cases when seed is extremely costly or unavailable.

Response: FCIC does not agree with the recommendation. Crop insurance is not intended to cover the business practices of seed or plant suppliers, including their ability to maintain an adequate supply necessary to replant damaged crops. No change has been made.

Comment: One recommended revising the definition to specify replanting is practical if it reduces the payable loss, and removing the requirement of the crop reaching maturity.

Response: FCIC does not agree that practicality to replant should be dependent on mitigation of a payable loss. There is no practical method to determine whether replanting will mitigate the loss. There may be instances where the crop still fails and the policyholder is still eligible for a full indemnity in addition to the replant payment. FCIC also disagrees with removing the requirement that the crop should have time to reach maturity. If there is insufficient time for the crop to reach maturity, then it almost guarantees that the crop will fail and a full indemnity will be due. No changes have been made.

Comment: One suggested passive language be made active (The high cost or unavailability of seed shall not determine the practicality of replanting).

Response: The suggested change does not improve the clarity of the definition. No change has been made.

Comment: A few recommended expanding the term "cost'' to include components other than seed, such as irrigation.

Response: FCIC agrees input costs other than seed should not impact whether or not it is considered practical to replant. The definition has been revised accordingly.

Comment: One recommended removing "marketing window'' from the definition because FCIC has taken positions counter to this wording in several cases.

Response: FCIC cannot remove "marketing windows'' because it is statutorily required to be considered. No change has been made.

Comment: One stated the difficulty of comparing "geography, topography, soil types, and the weather conditions and exposure'' from one farm to the next is significant, and the importance of taking all of these factors into account should be reflected in the definition of practical to replant.

Response: FCIC agrees it is important to take geography, topography and other factors mentioned in the comment into consideration. There is nothing in the definition that precludes the consideration of these factors. The definition requires consideration of all factors that would impact the practicality of replanting, not just those listed. No changes have been made.

Comment: One recommended providing for a review of determinations of whether it is practical to replant because the determination should be subject to reconsideration, mediation, and appeal.

Response: Determinations of "practical to replant'' cannot be included in the appeals process applicable to good farming practices. That process was statutorily created and states it is only applicable for good farming practice determinations. In

response to other comments, the arbitration process has been retained and policyholders can seek arbitration of findings that it is practical to replant because they are factual determinations. No changes have been made.

42. Premium:

Comment: A commenter recommended defining "premium.''

Response: Terms only need to be defined if they have meaning different from the common meaning of the term or there are multiple common meanings. FCIC intended the common meaning of the term "premium'' to apply and the section on annual premium and administrative fees explains how premiums will be computed. Therefore, it is not necessary to define this term. No change has been made.

43. Premium Billing Date:

Comment: A commenter recommended removing the restriction in the definition of "premium billing date'' that does not allow the insurance provider to bill until a certain date, because the premium is payable at any time with an indemnity.

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

44. Prevented Planting:

Many comments were received regarding the definition of "prevented planting.'' The comments are as follows:

Comment: Retain the current definition.

Response: As stated in FCIC's response to comments on proposed prevented planting changes in section 17, FCIC will not incorporate the proposed definition of "prevented planting'' in the final rule, but will defer revising the definition until FCIC has had an opportunity to further review the issue and possible solutions. The current definition will remain in effect.

Comment: It is not clear if the producer must initially be prevented from planting by the final planting date to be eligible in the late planting period. It is not clear if planting has to be prevented until the end of the late planting period. It is unclear if the producer is required to plant within the late planting period.

Response: See response to first comment under this heading.

Comment: Rewrite the last sentence to require that planting be prevented by the final planting date before qualifying within the late planting period. Revise so planting must be prevented from the time planting may start until the end of the late planting period.

Response: See response to first comment under this heading.

Comment: Establish a date ten days after the final planting date and require planting be prevented until this date, or, as an alternative, allow prevented planting within the late planting period but reduce the prevented planting guarantee by one percent per day. Establish a date half way through the late planting period and require planting be prevented until this date. Establish a date 10 days past the end of the late planting period and require planting be prevented until this date.

Response: See response to first comment under this heading.

Comment: Add "with the proper equipment'' after "inability to plant'' in the first sentence.

Response: See response to first comment under this heading.

Comment: The phrase "* * * such that the seed would not be expected to germinate,'' is ambiguous because it does not indicate who would expect germination, or if most, some or none of the seed is expected to germinate. A time element should be added to clarify if seed would be expected to germinate if it is very dry throughout the normal planting period, but rains an inch a day for two weeks prior to the final planting date.

Response: See response to first comment under this heading.

Comment: Add "designated in the Special Provisions'' after "by the final planting date.'' The reference to "You may also be eligible for a payment * * *'' is inappropriate in this definition. Reference to "you may also be eligible for a payment'' indicates the payment has been mentioned earlier in the definition. If the intent is "* * * germinate or produce a crop, or because you could not plant the insured crop with the proper equipment within the late planting period,'' then that is what the definition should say. Does "unable to plant with the proper equipment'' mean a disabled tractor could prevent planting. It is unclear if drought is intended to be an acceptable cause of loss for prevented planting.

Response: See response to first comment under this heading.

Comment: Revise to prevent producers from filing claims for drought losses in successive crop years. Although prevented planting coverage due to drought remains in the policy, no one can qualify for it under the proposed provisions and it (drought) should be removed.

Response: See response to first comment under this heading.

Comment: Incorporate the concept of "good farming practices'' into the definition. Prevented planting payment amounts should be based on the late planting guarantee. Retain the last sentence of the current definition. The definition does not address the issue of two or more crops having the same planting period and which crop is actually the one that is prevented from being planted. Replace the proposed definition of "prevented planting'' with the following: "The inability to plant the insured crop by the end of the late plant period for the crop, as specified in the Special Provisions, with the proper equipment, due to excess moisture or because weather conditions are such that it would not be expected to produce a crop.''

Response: See response to first comment under this heading.

45. Replanting:

Comment: A commenter stated the proposed definition is too restrictive if it requires the same crop variety to be replanted because later planting may require use of a different variety. Another commenter thought the proposed definition is too restrictive because it requires replanting the same crop in situations in which it might be a better choice and reduce losses if a different crop were planted.

Response: The definition does not require the same variety or type to be replanted unless it is otherwise required under the policy. The definition has been clarified accordingly. However, under the common usage of the term, replanting has to mean planting the same crop. It cannot mean planting a different crop.

Comment: Several commenters recommended not deleting "with the expectation of producing at least the yield used to determine the production guarantee'' because the proposed language would appear to allow seeding at a reduced rate; could be interpreted to force a producer to replant in a manner that produces a loss; or could conflict with the definition of "good farming practices,'' which includes the requirement to plant in a manner to produce the yield used to determine the guarantee.

Response: FCIC acknowledges that the proposed language could result in the replanting of crops that would produce yields less than the guarantee. However, the requirement to replant is intended as a means of loss mitigation because without such a requirement, the insurance providers would be required to pay 100 percent of the liability. The requirement that the policyholder use good farming practices in the manner in

which the crop is planted is still applicable.

Comment: A commenter stated the current requirement of planting with the "expectation of producing at least the yield used to determine the production guarantee'' is too restrictive because it does not allow a producer to plant a shorter season variety that had greater potential of success, but may not have the same yield potential as the original seed.

Response: FCIC agrees and that is why FCIC removed it in the proposed rule.

46. Second Crop:

Comment: Some comments were received regarding the definition of "second crop.'' One commenter stated the definition of "second crop'' encroaches on the definition of "cover crop'' by implying a cover crop could be hayed, grazed or harvested.

Response: FCIC originally responded in the June 25, 2003, final rule that the provisions had been revised to consistently use the terms. However, subsequent queries have demonstrated that it is unclear whether or not a cover crop or volunteer crop can be harvested for grain after the crop year without consequence to the prevented planting payment for a first insured crop. There was never any intent to allow a cover crop or volunteer crop to be harvested for grain at any time without reducing a prevented planting payment for a first insured crop. The definition of "second crop'' and the provisions in section 15(g)(3)(i) have been revised accordingly.

47. Substantial Beneficial Interest:

Many commenters disagreed with proposed changes in the definition of "substantial beneficial interest'' (SBI) that would include children as having a SBI, and recommended removing the proposed changes. The reasons given and questions received are as follows:

Comment: The definition is overly broad as it requires the social security number ("SSN'') for minor children who have no interest and do not participate in the farming operation. The requirement to obtain SSNs for children is extremely burdensome and places an unreasonable burden on insurance providers to verify and account for every member of a household.

Response: For many of the reasons stated above, FCIC agrees the proposal to include children as having a substantial beneficial interest should not be retained, and has revised the definition accordingly.

Comment: Insurance providers have no reasonable means to determine whether a SSN was provided for each person that "resides in the same household.'' The commenter also questioned what assistance FCIC will provide and who is responsible to accurately report all members of a household. Including minor children as having a "substantial beneficial interest'' raises questions regarding children's future eligibility if a father becomes ineligible and remains ineligible, and the children's responsibility for the father's debt. It is not fair for a child's eligibility to be affected by a parents failure to pay a debt. A child has no legal obligation to satisfy the debts of a parent and no legal right to any portion of an indemnity due the parent and the same is true from the parents' standpoint with regard to rights and obligations of the child, and a parent has no right to bind an adult child to a policy (the converse is also true). Because a minor may void any contract other than a contract for necessities, FCIC may not bind a minor to an insurance contract, even if the minor's parents are parties to the contract.

Response: See response to first comment under this heading.

Comment: The term "substantial beneficial interest,'' as used in the Basic Provisions is a legal term of art and FCIC may not create such an interest out of whole cloth. The terms "household'' and "children'' should be defined and the commenter questioned whether it includes students who live at home 3 months per year, and how will "household'' be determined when divorced parents have joint custody. Need to clarify if the new provisions pertain only to children who are actively participating in the farming operation. The phrase, "derive no benefit from the farming operation of the insured or applicant'' is far too expansive and places an onerous burden on insured producers to prove spouses and children derive no material benefit from the farming operation; and needs substantial clarification to tell the insurance provider what proof will determine whether the spouse or household children derive benefit from the farming operation. Need to clarify if the definition is asking children to prove they have no beneficial interest in the farming operation.

Response: See response to first comment under this heading.

Comment: The recently implemented procedure requiring spousal SSNs should remain unchanged until FCIC, insurance providers and producers have developed clear and workable guidelines. With the revised definition of SBI, insurance providers now must go back to all policyholders and obtain SSNs for resident children after having gone through this process of obtaining spousal SSNs. RMA indicated previously that it would not impose a requirement to collect SSNs for children, but only for spouses. Requiring children's SSNs could be considered harassment. It is logical to assume that a spouse, especially one who is making an active contribution to the farming operation, would have a substantial beneficial interest in the operation and thus meet the SBI definition and need to have pertinent information on file, but it is not clear why the extension is made to automatically include children or other individuals that reside in a household as meeting this requirement. The new requirement to collect SSNs provides little opportunity to prevent fraud and abuse and will only provide more opportunity for inadvertent reporting mistakes to become future cause for denial of insurance applications, denial of coverage and/or collection of administrative fees and penalties without a finding of intentional wrongdoing. The whole process is very single and narrow-minded in order to trap a few renegades. Producers will be reluctant to provide children's SSNs and there are privacy concerns involved with collecting this information.

Response: See response to first comment under this heading.

Comment: If the concern is about ineligible parents who farm ground in their minor child's name, then require the parent's name be reported as a substantial beneficial interest. A commenter asked how anyone could propose a rule which would require the social security number of children as a prerequisite of participation in the program. This will be unacceptable to the American farmer, and in their opinion would be a violation of the farmer's rights to privacy under the Constitution. If an insured has a child born during a policy period and fails to notify his/her agent he/she would lose coverage the following year. The **Federal Register** explanation states the definition was revised "to clarify the status of spouses,'' and if this is the intent, then the references to "children'' and "children that reside in the same household'' should be removed.

Response: See response to first comment under this heading.

Comment: A commenter stated the proposed definition of "substantial beneficial interest'' greatly diminishes the chances for spouses to unfairly manipulate the system, and that requirements to provide SSNs for all entities with 10 percent or greater interests in an operation will help prevent fraud and abuse.

Response: FCIC agrees with the commenter and has retained

requirements to collect social security numbers for spouses and all persons having a substantial beneficial interest in the applicant or insured.

Comment: A commenter recommended clarifying that prenuptial agreements that specify spouse's interests override the requirements in this definition and stated that FCIC has previously not recognized the terms of a legal prenuptial agreement that stated the spouse had no interest in the farming operation.

Response: Prenuptial agreements containing evidence indicating that a spouse does not have an interest in the acreage farmed by the applicant or policyholder during the course of the marriage can be used for the purpose of the definition. However, most prenuptial agreements involve the disposition of property after the dissolution of the marriage. They do not specify how such property will be utilized during the course of the marriage. In such cases, prenuptial agreements cannot be used to determine whether the spouse has an interest in the farming operation. No changes have been made.

Comment: A commenter stated, as written and contrary to current procedure, only spouses residing in the same household are required to provide SSNs.

Response: FCIC did not intend the provision to apply only to spouses residing in the same household. Provisions indicating the "same household'' have been removed from the definition.

Comment: A commenter stated that requiring SSNs of anyone who has a substantial beneficial interest in the applicant or insured could make acquiring coverage virtually impossible.

Response: FCIC has clarified that only the individuals or persons other than individuals that have a substantial beneficial interest in the applicant or insured must report their SSNs. Individuals with an interest in the person with a substantial beneficial interest in the applicant or insured would not have to report their SSNs unless such persons have at least a 10 percent interest in the applicant or insured.

Comment: A commenter stated the need to clarify how extensive the requirement to collect SSNs is when dealing with corporations as policyholders, bank trusts, Indian trusts, and other entities that do not have spouses or children.

Response: FCIC agrees clarification is needed and has revised the definition to specify that only the spouses of the individual applicant or insured are required. If the applicant is an individual, then the requirement to report the SSN of the spouse would be applicable. However, if the applicant is an entity other than an individual, then it cannot have a spouse and the requirement to report the spouse's SSN is not applicable. Further, FCIC has clarified that the entities must report their EINs and the individuals who make up that entity whose interest in the applicant or insured, not the entity, is at least 10 percent must report their SSNs. For example, if the applicant is a trust, each beneficiary of the trust with at least a 10 percent interest in the trust must report his or her SSNs. If the applicant is a trust and the beneficiaries of the trust are two partnerships, each of the individuals participating in the partnerships with at least a 10 percent interest in the trust must report his or her SSN.

48. Surrounding Area:

Comment: Several commenters recommended defining "surrounding area.''

Response: FCIC added a definition of "area'' in the final rule published on June 25, 2003 (68 FR 37697).

49. Summary of Coverage:

Comment: A commenter stated units are determined by county but it is not clear in the definition of "summary of coverage,'' if the contract is by county or multiple counties.

Response: FCIC has revised the definition of "policy'' to clarify that each agricultural commodity in each county constitutes a separate policy.

50. Timely Manner:

Comment: A commenter recommended defining "timely manner.''

Response: FCIC has revised certain provisions that reference "timely manner'' so that a single common meaning of the term can apply, which refers to occurring within a reasonable amount of time.

51. Verifiable Records:

Comment: Some commenters recommended defining "verifiable records.''

Response: Verifiable records must be provided to support the production report that is used to establish the actual production history. The definition of "actual production history'' references 7 CFR part 400, subpart G, which contains a definition of "verifiable records.'' Therefore, it is not necessary to repeat the definition in the Basic Provisions. No change has been made.

52. Void:

Comment: A commenter stated the definition of "void'' is incomplete because there are other reasons that a policy may be voided. The commenter recommended replacing the proposed definition with: "When the policy is legally considered not to have existed,'' or insert a comma after "fraud'', delete "or'' and insert "or other justifiable reason'' after "misrepresentation.'' The commenter also recommended adding a definition of "Voidable.''

Response: Since no changes to this definition were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

53. Whole Farm Unit:

Several comments were received regarding the definition of "whole farm unit.'' The comments are as follows:

Comment: Several commenters were opposed to the proposed definition of "whole-farm unit'' for the following reasons: (a) Adding the phrase "no one crop can exceed 75 percent of the total liability'' unnecessarily further complicates an already complex unit determination process; (b) the proposed definition effectively would make a producer growing 80 percent corn and 20 percent beans in a single county ineligible for whole farm unit treatment; (c) adding the "75 percent provision'' makes it so eligibility cannot be determined until the acreage reporting date; and (d) the additional requirements will discourage producers from electing the whole-farm unit structure.

Response: Because a whole farm unit gives the producer a premium discount, it is important to include some limitation so a policyholder will not try to qualify for a whole farm unit discount by planting a negligible amount of another crop. FCIC has determined that the crop mix percentages should be reduced to 10 percent to be consistent with other policies currently available that offer whole farm units, which will allow more producers to qualify. FCIC agrees eligibility for the whole farm unit cannot be determined until the acreage reporting date. This is consistent with the current policy language for all units, which states that units will be reported on the acreage report.

Comment: A few commenters recommended the following revisions to clarify what happens when a person who elects a whole-farm unit does not qualify for it: (a) Add a sentence to the end of the proposed definition which reads, "If you do not qualify for a whole-farm unit, insurance will be provided on an enterprise unit basis;'' (b) Add a sentence to the end of the proposed definition which reads, "If you do not

qualify for a whole-farm unit, we will assign the most similar eligible unit structure;'' and (c) Clarify in the definition of "whole farm unit'' what unit structure would be applicable when a producer does not qualify for a whole farm unit.

Response: As proposed, section 34(a)(3)(iii) specifies if the producer does not qualify for the whole farm unit when the acreage is reported the basic unit structure will be assigned. There may be instances where producers would not qualify for enterprise units. Further, it would be impossible to determine what is the most similar unit since each different crop may have different shares or qualify for enterprise or optional units. Since the change is included in section 34, it does not need to be included in the definition.

Comment: Some commenters recommended inserting a hyphen in the term "whole-farm'' throughout the policy.

Response: A hyphen is not necessary to clarify the term or make it more grammatically correct.

Comment: A commenter asked how, and on what basis, the 75 percent level was determined in the definition of "whole-farm unit.''

Response: The 75 percent level was revised to 10 percent to ensure consistency among policies that offer whole farm units.

54. Written Agreement:

Comment: A commenter recommended adding "as submitted and approved by RMA'' to the definition of "written agreement.''

Response: FCIC has revised section 18 to specify that written agreements are approved by FCIC because only FCIC has the authority under the Act to offer written agreements.

Comment: A few commenters stated the terms "policy,'' "crop policy,'' and "crop'' are used inconsistently in section 2 and throughout the Basic Provisions.

Response: FCIC has revised the Basic Provisions to change the references of "crop policy'' to "policy'' in each section it appears and has clarified the definition of "policy'' to make it clear that each separate agricultural commodity insured under the Basic Provisions is considered as a separate policy.

Identity Collection Information—Section 2(b)

Many comments were received regarding the requirement in section 2(b)(1) to collect social security numbers for everyone with a substantial beneficial interest in the applicant. The comments received are as follows:

Comment: A few commenters believe the proposed provisions which require social security numbers be collected for all persons with a beneficial interest, is another overreaching provision that requests the corporate veil to be pierced and requires insurance providers and agents to go back to all policyholders to obtain this information. Most producers question the purpose of collecting this information, and who will use the information. They are also concerned as to whether the insurance providers and agents will be held responsible for the accuracy of this information. Insurance providers and agents have no means of determining if the Social Security information is correct, or if all persons with a "beneficial interest'' have been accounted for.

Response: The requirement to provide SSNs of persons with a SBI in the applicant or insured is in the current provisions and this requirement remains. The requirement is necessary to prevent a person who is ineligible from receiving crop insurance benefits by simply becoming a part of an entity using a different identification number. Therefore, the SSNs will be used by FCIC and insurance providers to determine eligibility. It is the producer's responsibility to provide the correct information to the insurance provider. If the correct information is not reported for each person with a substantial beneficial interest, the penalties specified for failure to provide the SSN will apply.

Comment: A commenter stated spouses and children's social security numbers are now required since the definition of substantial beneficial interest has been revised. They stated it is extremely hard to police or verify and this will increase workload for insurance providers. They asked whether FCIC considered and ruled out the possibility of merely requiring the names of family members. Their chief concern with the proposal is with how it will be implemented.

Response: As previously stated, the requirement to collect children's SSNs has been removed. The amount of work required to obtain spouse's SSNs should not increase since this is already a program requirement and the policy provisions are only being clarified in this regard. FCIC did not consider only collecting the names of family members because many persons have the same name and tracking ineligibility in this manner would not be possible.

Comment: A commenter suggested referencing "spouse, landlord, tenant, corporation/partnership members, etc.'' when referring to "individuals with a substantial beneficial interest in the applicant.'' They also stated this provision will likely lead to a number of major systems problems.

Response: The proposed provisions in section 2(b)(1) (now section 2(b)) have been clarified to specify that any person with a substantial beneficial interest in the applicant must provide a SSN, which includes individuals and entities. Since SSNs and EINs must already be reported, FCIC is unsure of how this requirement will cause major systems problems.

Comment: Several commenters stated the proposed language "* * * the application will not be accepted * * *'' suggests that discovery of ineligibility or missing SBI information must take place before the first-year application is actually accepted. If it is intended to apply to discovery any time during the initial year, better wording might be "* * * the policy will be void and not considered to have been in effect * * *'' or "* * * the application will be considered not to have been accepted * * *'' Another commenter stated it is not practical to expect the verification process to be complete prior to acceptance of the application.

Response: FCIC has revised the provision to specify that if the applicants SSN or EIN is not on the application, the application is not acceptable. With respect to the SSN or EIN of persons with a substantial beneficial interest who are eligible for insurance, failure to provide such SSN or EIN on the application will result in reducing coverage consistent with that person's interest in the applicant. If the person with the substantial beneficial interest is not eligible for insurance, the policy will be void and no payments will be due under such policy. If premium has been previously paid, the premium will be returned, less an amount to reimburse the insurance providers for their administrative costs already incurred. In those cases where the premium has not been paid, it would be too administratively difficult to determine whether the insurance providers have incurred the costs and to collect the portion of the premium owed. Therefore, if the premium has not been paid, the producer will not be required to pay the portion of the premium to reimburse the insurance providers for administrative costs they may have incurred.

Many comments were received regarding the requirement in section 2(b)(2) to collect social security numbers for everyone with a substantial beneficial interest in the applicant. The comments received are as follows:

Comment: Many commenters stated it is unclear if a corporation having a 10

percent interest in an applicant or insured would have to provide SSNs for everyone in the corporation. The commenters indicated that if this is the case, the provision would be very difficult to administer. Many commenters stated the provisions will require huge numbers of SSNs to be collected and provided examples in which thousands of individuals would be required to submit SSNs. A few commenters suggested only the individuals with a 10 percent or greater interest in a privately held entity be required to report their SSNs. Many commenters stated the proposed provisions would make the entire corporation and thousands of shareholders ineligible even if only one of the shareholders were actually ineligible. The same concerns were provided with regard to corporate trustees, partnerships, Indian tribes and other types of insureds. These commenters stated that this aspect of the proposal either should be narrowed and clarified or not be adopted. Several commenters stated the proposed policy provision will create an untenable situation with respect to large farming organizations with numerous shareholders, and it will be difficult in many situations to determine if all shareholders have been accounted for. Commenters further stated that FSA documentation that identifies shareholders often does not coincide with the information contained in the corporate charter, and it is unclear how a conflict should be resolved and how far a insurance provider must go to verify that the information reported is accurate.

Response: FCIC has revised the provision to only require those persons with a 10 percent or more interest in the applicant to report their EIN or SSNs, as applicable. This means that individuals who are part of corporations or other legal entities with a substantial beneficial interest in the applicant must only report their SSN if the individual has at least a 10 percent interest in the applicant. This will eliminate large corporations with many shareholders from having to provide each shareholder's SSN to the applicant. FCIC has also revised the provision to clarify that individuals must provide their SSNs and persons other than individuals must provide an EIN.

Comment: Many commenters stated the provision creates a second layer of social security number collection and verification. Some of these commenters raised questions regarding privacy issues and the legality of requiring individuals with interests in a corporation to provide SSNs as this appears to pierce the corporate veil and limited liability protection provided by corporate law. A commenter further stated the following: the law recognizes corporations as independent, legal entities that have duties and rights different than the duties and rights of the shareholders. The law restricts the conditions upon which the corporate form may be disregarded because corporations, and to a lesser degree partnerships, often are formed to keep separate the liability of the entity from that of the persons that own the entity. If a corporation has a substantial beneficial interest in an insured and, as a result, the corporations incur liability either to them or FCIC, that liability may not taint the corporation's shareholders. The corporation's liability does not de jute result in liability for the corporation's shareholders, and unless they or FCIC satisfy the state law standards for piercing the corporate veil, the shareholders will not incur any liability. Corporate law notwithstanding, nothing in the Act, even as amended by ARPA, authorizes the changes set forth in section 2(b)(2). Specifically, the Act authorizes FCIC to collect the name only "of each individual that holds or acquires a substantial beneficial interest in the insured.'' 7 U.S.C. 1506 (m)(3). The Act is concerned with only the top two rungs of potential liability, not the third. In sum, requiring them to collect the name and SSN of each person that has an interest in the individual that has a substantial beneficial interest in an insured or applicant adds another level of bureaucratic busy-work and expense that runs afoul of the law of corporations and that is not authorized by the Act or ARPA.

Response: The purpose of collecting SSNs is not to pierce the corporate veil, affect the corporate structure or for the purposes of assessing liability. The purpose of such a collection is only to identify all the persons who are obtaining benefits under the Federal crop insurance program to ensure that such persons are eligible. Only reporting the names of persons with a substantial beneficial interest in the applicant would not have any meaning because there are many persons with the same name. Further, if only the EINs of entities were collected, many producers could form entities for the express purpose of hiding ineligibility. Interpreting the Act in this manner would thwart the purpose of the Act and render the language in section 506(m) of the Act ineffective. Therefore, to effectuate the purpose of the Act, FCIC has interpreted section 506(m) of the Act to allow for the collection of SSNs and EINs from all persons with a substantial beneficial interest.

Comment: A commenter stated references to "social security numbers'' should include "or employer identification numbers'' as well.

Response: FCIC has revised the provisions accordingly.

Comment: A commenter stated the term "entity'' is not a defined term.

Response: The reference to entity has been removed from this final rule.

Comment: Several commenters stated it is unclear who is responsible for discovery and what assistance will be provided in that discovery process. They thought this section would penalize those that do not, as a matter of practice, abuse the system. Some commenters asked how an agent or insurance provider is supposed to know if an entity is omitted, who is responsible for the verification of the required information and when the verification process must be completed, if the insurance provider must undertake its own independent investigation in each instance, and who would incur the additional cost.

Response: The only responsibility of the agent or insurance provider is to explain the requirements of section 2(b) to the policyholder. No independent investigation is required. It is the policyholder's responsibility to obtain and report all the required information. In this final rule, FCIC has reduced the burden on policyholders to report this information. Further, this is not an issue of abuse. This is an issue of being able to identify all persons who are receiving benefits from the Federal crop insurance program. The reporting of such information is the only effective way of accurately identifying such persons.

Comment: A commenter stated the new provision would require applications to be re-designed to routinely request information regarding relevant business and family arrangements. They further recommend that producers be required to sign new contracts with bold type or a larger font to draw attention to the new requirement.

Response: Applications do not need to be redesigned because they already request the SSN or EINs from persons with a substantial beneficial interest. FCIC has revised the provisions to require policyholders to update their applications if the persons with a substantial beneficial interest have changed or where all the applicable information was not provided on a previous application. It is the responsibility of the insurance provider

and agent to explain this requirement to the policyholder.

Many comments were received regarding the sanctions provisions in proposed section 2(b)(3). The comments received are as follows:

Comment: Many commenters stated the proposed penalty in this section was too harsh. Some of the commenters asked why the penalty is the same for those who are eligible and inadvertently omit a SSN and those who are ineligible and intentionally omit a SSN. Others thought it inappropriate to deny insurance for an entire entity when only a small share of the entity failed to provide a SSN, particularly when the small share is eligible for insurance. Additional commenters stated that the penalties should apply only to those who willfully or intentionally violate the requirement. These commenters agreed that if persons with substantial beneficial interests are omitted, and it is determined that the missing person is ineligible, then denying benefits to the insured entity is appropriate, but that denying benefits for simply omitting an SSN appears harsh. Another commenter stated that this surely is not the legislative intent and it should not be the regulatory result. Another of these commenters stated it would seem that if a SSN is left off the application and it is determined that the person omitted is not ineligible, there would not be any harm in correcting the SBI information.

Response: FCIC agrees the proposed sanction is too harsh for those who omit a SSN and are eligible to receive insurance benefits. The provisions have been amended to only reduce the insured share by the percentage interest of the person who did not provide the SSN when such person would otherwise be eligible for insurance. It would be impossible to administer the provisions if the consequences were only applied if the omission was willful and intentional because it is difficult to prove willful or intentional. FCIC does not agree there is no harm in adding SSNs that are inadvertently left off the application. If allowed, it would reduce the incentive to initially properly identify all required persons with substantial beneficial interests.

Comment: Some commenters stated the proposed provision is grossly unfair to absentee landlords, passive shareholders in farming corporations, persons who have given powers of attorney regarding crop insurance to tenants or insurance agents and others who reasonably rely on the active farm operators to do what is necessary to insure their interest in the crop. These commenters further stated that it is grossly unfair to insurance providers who have no reasonable means of ascertaining or verifying either the existence of significant business interests or the social security numbers provided by producers and agents, yet are put at risk by this section of the proposal of losing administrative and operating reimbursement and being unable to recover indemnity payments they could not have known were inappropriate under the proposal's standard.

Response: As stated above, the burden is on the policyholder to correctly report the required information. FCIC has reduced the risk to insurance providers by allowing insurance for the persons with substantial beneficial interests that did provide SSNs, provided any other person whose interest in the applicant was not reported was eligible for insurance. However, as with all overpayments, insurance providers are at risk that they will not be able to collect the overpaid amount. While FCIC attempts to mitigate the effects on the insurance provider, there is no way to eliminate the effects. The use of specific consequences is one way to provide an incentive for policyholders to comply with program requirements. It is not unfair to absentee landlords, passive shareholders, or persons who have given powers of attorney, who rely on the operator to insure their share. Such landlords, passive shareholders, or persons who have given powers of attorney have expressly given permission for their share to be insured and should be held to the same standards as the policyholder with respect to the requirement to provide the applicable SSNs or EINs. If they have a substantial beneficial interest, they should provide the applicable information to the operator.

Comment: Some commenters recommended denial of coverage apply only to those persons who knew or reasonably should have known of the requirement and failed to comply. These commenters further stated that insurance providers who implement and consistently follow realistic and responsible measures to obtain required information also should not suffer adverse consequences if those measures are defeated by those intent upon program abuse or fraud.

Response: All policyholders are legally presumed to know the terms and conditions of insurance. Further, it would be difficult for insurance providers to determine which persons "knew or reasonably should have known'' of the requirement. No change has been made.

Comment: Some commenters stated the proposed section has no temporal element and provided the following example: If the existence of a 10 percent silent partner is first discovered years after the loss is paid, the provision requires the insurance provider to reimburse FCIC for the paid loss in the initial and all subsequent years, and the severe penalties would apply to the insured even though several years may have passed. Other commenters stated it would be reasonable to provide notice of deficiencies and a chance to correct applications in the first two crop years the requirement is enforced, unless there is evidence of willful or intentional deception. An additional commenter stated it is unclear whether the insured is required to repay an indemnity if an overlooked SSN is subsequently discovered.

Response: Consequences that were in effect prior to the effective date of this final rule would apply to any instance of noncompliance in those prior years. The provisions contained in this final rule are only effective for violations that occur after its effective date. Further, after the effective date of this final rule, all policyholders are presumed to know of the requirement and, therefore, there is no basis for a two year period to allow for corrections. FCIC has revised the provision to require that policyholders that currently may not be in compliance amend their applications to provide the required information. In addition, this requirement is consistent with compliance findings. In many cases such investigations occur years after the crop year is over. In those cases, if non-compliance is discovered, appropriate adjustments must be made for the crop year in which the error occurred. FCIC has revised the provision to state that if an indemnity has been paid, the indemnity will be adjusted and the overpaid amounts must be repaid.

Comment: Several commenters stated no premium should be due when no indemnity is paid. One of these commenters asked how they could charge an insured a premium if an insured is deemed ineligible. The commenter further stated that if a private insurance provider tried this scheme, they would be flooded with lawsuits.

Response: FCIC is not requiring premiums be paid when the policy is voided. However, consistent with other administrative regulations, in certain cases, FCIC is simply requiring the policyholder to reimburse the insurance provider for the administrative expenses associated with the policy. Such amounts are not considered premium payments.

Comment: Several commenters stated this provision is harsh because the

insured or applicant is penalized for the actions of others not subject to or under his/her control. Current procedure that reduces the share by the amount of the ineligible person's interest is fair.

Response: The policyholder has the ability to choose with whom it does business. Therefore, it is fair to require the policyholder to obtain the compliance of those persons with whom it elects to do business. However, as stated above, in certain circumstances, the policy will allow the share insured to be reduced instead of the denial of all indemnities. FCIC has revised the policy to provide that the share can be reduced by the interest of an ineligible person as long as the required information is included on the application.

Comment: A commenter stated many things are unclear regarding the 20 percent premium amount and asked if the 20 percent applies to the gross premium or farmer-paid premium, and what it will be based on if no acreage report is filed. The commenter stated that this penalty is inconsistent with other penalties in the proposed changes because the insured is required to pay 20 percent of the premium, but not the administrative fee, and elsewhere in the policy no indemnity is due and 100 percent of the premium is charged (section 21(e)(2), for example) and the administrative fee presumably is still due since it is not mentioned. The commenter further stated there does not appear to be any explanation or logical reasons for these differences. It also appears that the only penalty on CAT policies is no claim payment, as CAT policyholders do not pay premium, and this paragraph states that no administrative fee will be due. A commenter asked if the 20 percent "penalty'' is not paid for a CAT policy, should the insurance provider report the entity as a debtor to the Ineligible Tracking System. Another commenter asked if the insurance provider keeps the 20 percent penalty since they have done the work on the policy.

Response: The provision has been revised to clarify that it is based on the farmer paid portion of the premium. Further, FCIC has clarified that the 20 percent only applies to the premium if the premium has already been paid. If no acreage report has been filed, no premium can be paid. FCIC has revised the provisions to make them consistent within the Basic Provisions to the extent practicable. Further, the sanction for additional coverage policies has been made consistent with other administrative regulations published at 7 CFR chapter IV. In addition, since producers do not pay a premium for CAT coverage, the 20 percent sanction would not be applicable to them. However, they will still have their coverage reduced. FCIC recognizes that this results in disparate treatment but there is no basis to charge CAT producers a premium or allow administrative fees to be used to provide reimbursement for administrative costs. Sections 508(b)(5)(D) and 508(e)(2)(A) of the Act, respectively, specifically preclude the use of CAT fees to reimburse the insurance providers and required FCIC to subsidize 100 percent of the premium. With respect to buy-up policies, the insurance providers will be permitted to retain the 20 percent of the farmer paid premium.

Comment: A commenter stated that investigation, enforcement, and implementation present significant issues, and one is whether individuals (those with any interest in an entity with an SBI in the insured) are placed on the Ineligible Tracking System.

Response: If the issue is the failure or incorrect reporting of the individual's SSN, then the Ineligible Tracking System is not applicable because such persons would not be considered ineligible unless separate grounds exist. However, if the issue involves indebtedness or other basis for ineligibility, individuals with an interest in a person with a substantial beneficial interest in the applicant will not be placed on the Ineligible Tracking System unless it is currently permitted under the ineligibility regulations or grounds exist to pierce the corporate veil or other entity structure.

Comment: A commenter stated "no indemnity'' should be more explicit in either including or excluding replant and prevented planting payments, and that confusion could be eliminated with a definition of "indemnity.''

Response: FCIC agrees with the commenter and has clarified that no indemnity, prevented planting payment, or replanting payment can be made.

Comment: Some commenters stated this provision would seem to indicate that all instances of not reporting a SSN are deliberate.

Response: The provisions are not based on whether or not the failure to provide SSNs is deliberate. Applicants are required to provide this information and it would be difficult for insurance providers to determine those instances in which omission of the SSN was deliberate. Therefore, the provisions are written to address the consequences of not providing the SSNs and do not depend on the insurance providers determination of whether or not the omission was deliberate.

Delinquent Debts—Proposed Section 2(e) and Redesignated Section 2(f)

Many comments were received regarding the sanctions provisions in proposed section 2(e). The comments received are as follows:

Comment: A commenter recommended clarifying what "eligibility may be affected'' means. Another commenter stated the second sentence refers to "benefits under USDA programs'' and that it should be "crop insurance and other USDA programs.'' Also, "may affect'' is a far cry from the former "you will be determined to be ineligible.''

Response: FCIC has moved certain provisions that were in section 2(e) and created a new section 2(f) for clarification, readability, and to address many of the following comments. FCIC has revised the provision to clarify that failure to make payment when it is due will make the policyholder ineligible for crop insurance. However, with respect to other USDA programs, it would be up to the agency that administers the particular program to determine whether ineligibility for crop insurance affects the eligibility for their applicable program. For this reason, FCIC can only state that eligibility may be affected.

Comment: A commenter stated they believe the policy should not be terminated if a claim is pending because farmers who have suffered losses due to natural disasters may be extremely strapped for cash for farm operating and family living expenses until they receive their crop insurance indemnity payment, and they should not be penalized if payment is delayed or the disaster arrives shortly before a premium is due.

Response: FCIC agrees that in some cases the indemnity will exceed the amount of premium due. However, the offset of premium from an indemnity is for the convenience of the policyholder and insurance provider and was never intended to abrogate the requirement that premiums and other payments be made by the due date. To allow anything different will result in the disparate treatment of policyholders based solely on whether they file a claim. Further, it adds a significant administrative burden for insurance providers to have to track all open claims, determine whether the claim is legitimate, and whether it will cover the amount of premium owed. No change has been made in response to this comment.

Comment: A commenter stated section 2(e) provides that "any amount due'' the insurance provider "will be deducted from any indemnity due'' the

insured. They believe they also have the right to deduct amounts due the insured from replant payments and prevented planting payments, neither of which are indemnities. Moreover, they believe that such deductions should be discretionary not obligatory. They stated there may be situations in which such a deduction is unadvisable or contrary to other statutes. Thus, they recommended that the compulsory "will'' be replaced with the permissive "may'' and that the third sentence of section 2(e) be amended as follows: "Any amount due us for any crop insured by us under the authority of the Act may be deducted from any prevented planting payment, indemnity or other payment due you for this or any other crop insured with us.'' Further, they stated, redesignated section 2(f) suggests that an insurance provider is obligated to enter into a payment agreement with a delinquent insured. Because FCIC may not compel them to agree to a payment arrangement, they recommend that FCIC amend redesignated section 2(f) to include the following sentence: "Nothing in this provision shall be construed to require us to enter into a payment agreement with you.''

Response: FCIC agrees that premiums should be deducted from prevented planting payments, and has clarified section 2(e) provision accordingly. However, FCIC does not agree that premiums should be deducted from replanting payments because these payments are intended to provide funds to the policyholder to help defray the costs of replanting. Further, the premium billing date is generally quite some time after a replanting payment would generally be made. FCIC also does not agree the deductions should be discretionary. One major premise of the program is to ensure that all policyholders are treated the same, regardless of which insurance provider they select. To permit this change would introduce the potential for disparate treatment. In addition FCIC is not aware of any circumstance in which it would be contrary to another Federal statute to deduct the premium from an indemnity payment. To the extent that such a requirement would conflict with state law, the state law would be preempted. The suggested revision has not been made. Since the policy previously stated that payment plans were available to avoid ineligibility, such payment plans had to be offered by insurance providers. Nothing in this rule changes this requirement. Making this requirement discretionary could result in the disparate treatment of policyholders based on the insurance provider selected. This is contrary to the principles stated above. Further, the recommended change could have the effect of eliminating the availability of payment agreements. Since this was not proposed and the public was not afforded the opportunity to comment on this change, FCIC cannot adopt this recommendation.

Comment: A few commenters stated they recommend the word "paid'' in the first sentence of redesignated section 2(f) be replaced with "received by the insurance provider.'' One commenter stated "indemnities'' and "other administrative offsets'' should be defined for the purpose of clarity. One commenter asked if the offsets in section 2(e) apply only to administrative fees and related interests (*see* subsequent reference to "offset'' in sections 7(b) and 24(e)) and how will offsets be implemented.

Response: FCIC has revised the definition of "delinquent debt'' to replace the word "paid'' with "postmarked or received by us or our agent'' to provide a more easily administered time frame for establishing delinquent debts. The reference to postmarks is needed to prevent policyholders from being penalized for delays in mail service. In response to previous comments, throughout the Basic Provisions, FCIC has clarified that indemnities, prevented planting payments and replant payments are different and that offsets can only be used against the indemnities and prevented planting payments. Therefore, the term does not need to be defined. However, FCIC has defined "offset.'' The respective provisions state what will be offset. FCIC has removed the references to offset of administrative fees from this section and has included all such provisions in section 24 and clarified how they will be implemented.

Comment: A commenter asked what "termination'' means in the phrase "termination may affect your eligibility * * *'' They ask whether it means termination of the policy. If so, they ask under what circumstances is termination relevant in this context. If the policy is terminated because the insured chooses to do so, or simply does not plant for three years, they ask if the insured is barred from other programs. The intent of this section must be clarified. Perhaps the intent is "Termination under section 2(e) may affect * * *'' Identification of delinquent producers in the Ineligible Tracking System must be swift and certain if approved providers are to have any hope of collecting premium and other amounts, and the program is to be protected from people who simply do not pay their premium. In addition, FCIC should ensure that amounts due under the crop insurance program will be withheld from benefits payable under the "other USDA programs'' to which this portion of the proposal refers and remitted to the approved provider to whom the crop insurance-related debt is owed. In addition, the proposal should be revised to ensure that if a producer is delinquent as to any one crop insurance policy, that producer also will be considered delinquent under all other policies in which the producer has an interest.

Response: FCIC has revised redesignated section 2(f) to make it clear that ineligibility and termination of the policy will preclude the producer from receiving an indemnity, prevented planting payment or replanting payment and may affect eligibility for other USDA programs. This revision clarifies that the provision is only applicable when the policyholder fails to make a payment when it is due. FCIC agrees ineligible persons should be placed on the Ineligible Tracking System as quickly as possible and will continue to work with insurance providers in this regard. FCIC will ensure that all administrative offsets are conducted as expeditiously as possible in accordance with 31 U.S.C. chapter 37. However, administrative offset only applies to amounts owed to FCIC and the provision has been revised accordingly. FCIC does not have the authority to collect amounts owed to the insurance provider through administrative offset. Therefore, any amounts recovered by FCIC will be retained by FCIC. Redesignated section 2(f) has been revised to state that if there is a delinquent debt for one policy, the policyholder is ineligible for insurance and all other policies will terminate effective of the next termination date. However, having a delinquent debt on one policy does not create a delinquent debt on all other policies. Delinquent debts only apply to those policies for which applicable payments have not been paid by the due date.

Comment: A commenter asked whether the sentence "All administrative fees and related interest are owed to FCIC * * *'' needs to be in redesignated section 2(f). FCIC is not a party to this contract, and the language already says other benefits may be affected. Another commenter stated the language indicates that all administrative fees and related interest are owed FCIC. The commenter asked if all accrued interest is owed FCIC, or just accrued interest on the administrative fee. If all accrued interest is owed FCIC, the commenter asks if FCIC be

responsible for the collection process for unpaid interest. The commenter asks if FCIC is going to calculate accrued interest and require all insurance providers to access accrued interest on the date specified in the policy. It would seem practical to do so if the accrued interest is a condition of termination. Another commenter stated the provision "all administrative fees and related interest are owed to FCIC * * *'' seems to change the existing collection process. The commenter also stated the subsection would benefit from defining the term "due'' and also recommended defining "insured crop'' and/or "under the authority of the Act'' because these phrases are used here and elsewhere in the proposed Basic Provisions.

Response: The reference to administrative fees being owed to FCIC is not necessary in this section since it is more appropriate to include this in section 24 and FCIC has revised the policy accordingly. Section 24 has also been revised to clarify that only accrued interest on administrative fees is owed to FCIC. Interest on amounts owed to the insurance providers should be determined and collected by the insurance providers. FCIC has clarified that administrative fees are paid to the insurance providers but they are actually owed to FCIC and if the policyholder fails to pay the administrative fee, FCIC is responsible for collection. The term "insured crop'' is already defined. Further, FCIC believes the phrase "under the authority of the Act'' is not a term that can be easily defined without being overly restrictive. This term would encompass all policies reinsured by FCIC and since new policies are being developed and offered all the time, it is impossible to specifically identify all these policies. With respect to the term "due,'' terms only need to be defined if they have meaning different from the common meaning of the term or there are multiple common meanings. FCIC intended the common meaning of the term "due'' to apply, which refers to payable immediately or on demand. Therefore, it is not necessary to define this term.

Comments were received regarding proposed section 2(e)(3). The comments are as follows:

Comment: A commenter stated proposed section 2(e)(3) must be reconciled with proposed section 2(e)(5), or at least the two sections should be cross-referenced.

Response: Proposed section 2(e)(3) has been redesignated as section 2(f)(1)(i) and FCIC has revised redesignated section 2(f) to ensure there are no inconsistencies with the provisions in proposed section 2(e)(5).

Comment: A few commenters stated, if this proposed language is retained, the word "and'' should be replaced with "or'' following the word "fee'' in proposed section 2(e)(3)(i).

Response: FCIC agrees that interest is not always owed and has revised the provisions where necessary to refer to interest owed as applicable.

Comment: A commenter stated proposed section 2(e)(3)(ii) seems to contradict proposed section 2(e)(2).

Response: Proposed section 2(e)(2) specifies when the policy terminates, and proposed section 2(e)(3)(ii) specifies when ineligibility starts. Since these refer to different matters, there is no conflict between these two sections. Ineligibility specifies the period for which the policyholder can no longer obtain insurance. However, ineligibility does not terminate policies that were in effect before the person became ineligible. These policies must be terminated and the termination provisions provide the date on which these policies are no longer in effect. However, for the purposes of clarity, FCIC has revised the provisions regarding termination and ineligibility.

Comment: A few commenters stated proposed section 2(e)(3) seems to require an insurance provider to offer a payment plan. This was not previously in the policy. If so, a payment agreement needs to be made part of the policy as an insurance provider option with language to specify what constitutes an agreement. Another commenter asked if an insurance provider must do a payment plan or if it is optional. The commenter stated, if it is optional, the language should state this.

Response: Since the policy previously stated that payment plans were available to avoid ineligibility, such payment plans had to be offered by insurance providers. Nothing in this rule changes this requirement. However, FCIC has revised the definition of "delinquent debt'' to specify that the agreement to pay must be acceptable to the insurance provider. The insurance provider should determine what terms are acceptable because this is an agreement between the policyholder and the insurance provider and such agreements may vary based on individual circumstances. The agreement does not need to be made part of the policy because the policy expressly states the consequences of entering or violating such an agreement.

Comment: A commenter stated they have concern when an insured with a payment agreement transfers to Insurance provider B. Insurance provider B pays an indemnity and later the insured defaults on the payment agreement with Insurance provider A. Which insurance provider will be responsible for collecting money from the insured.

Response: Since insurance provider B paid the indemnity, it would be up to insurance provider B to collect the indemnity back from the policyholder. Insurance provider A would not have privity of contract with the policyholder. However, insurance provider A would still be responsible to collect the amount of premium due under the payment agreement.

Comment: A commenter stated proposed sections 2(e)(3)(ii) and (iii) seem to contradict proposed sections 2(e)(4) and (5) and asked if proposed sections 2(e)(4) and (5) are saying the same thing. The commenter further stated that the insured should only become eligible after the bankruptcy is discharged, not when it is filed. This would alleviate the problem addressed in the final sentence.

Response: The sections do not conflict. Proposed sections 2(e)(3)(ii) and (iii) specify when a producer becomes ineligible while proposed sections 2(e)(4) and (5) specify when policies will be terminated. As explained above, these are different matters. Proposed sections 2(e)(4) and (5) are not repetitive although a portion of proposed section 2(e)(5) does clarify that a policy in place at the time a person becomes ineligible does remain in place until the next termination date. Proposed section 2(e)(5) (redesignated section 2(f)(3)) also clarifies when an ineligible person can again purchase insurance. FCIC does not agree that a person should be ineligible for insurance during bankruptcy proceedings because such proceedings obviate the requirement that persons repay amounts owed. It would be contrary to the purposes of bankruptcy to make a person ineligible based on a debt they may no longer owe.

Comment: A commenter asked if the insurance provider must return any administrative and operating subsidy it has received when termination is retroactive.

Response: When ineligibility is retroactive, any administrative and operating subsidy associated with the policy must be returned for the applicable crop year. Any changes in this requirement should be addressed in the reinsurance agreement, not the crop insurance policy.

Comments were received regarding proposed section 2(e)(6). The comments are as follows:

Comment: A few commenters stated if an insured defaults on a payment agreement with his previous insurer after the insured's present insurance provider has paid a subsequent claim, an overpaid claim situation results which in all likelihood would be uncollectible. In situations such as this, the current policy language is preferable.

Response: FCIC understands that making the ineligibility retroactive may create overpayments. However, when eligibility for crop insurance for the year is based on an agreement to pay a debt, benefits should not be paid for that crop year if the payment agreement is breached. No change has been made in response to this comment.

Comment: A commenter has concern with the possible litigation this could create when insurance has attached on a policy and then the insurance provider will cancel current insurance because an agreement to pay was defaulted on by the insured. The commenter prefers to keep current language in the provisions. If proposed section 2(e)(6) is kept, an insured that has an agreement to pay that continues four or five months past the termination date, could intentionally default on the agreement. They would intentionally default because they feel they will not have a loss in the current year and therefore would not be required to pay premium. RMA could propose charging the current year premium on acres even though they will not qualify for a loss, in this situation. This proposal could be viewed as harsh because they are charging premium for a policy in which they have no hope of collecting an indemnity. Also agreements to pay with multiple installments have a higher likelihood to be late on a payment because insureds are not billed in advance of their next payment installment. A commenter suggested the current language be retained because the proposed language seems to imply that an insurance provider retroactively cancels all policies and establishes no other payment plans for any crops. It should also address situations where another insurance provider has a payment plan in place. The reference to "crop year'' is a departure from "reinsurance year.'' It is irrelevant which insurance provider holds the payment agreement. If such agreement is breached, the policy automatically terminates effective with the beginning of the crop year. Once a policyholder becomes ineligible, he or she will be placed on the Ineligible Tracking System with a date on which ineligibility began, which will provide notice to other insurance providers that the policyholder is no longer eligible. Since the policy is provided to producers on a crop year basis, the provisions must refer to crop years rather than reinsurance years. This is the only fair and equitable way to operate the program and prevent abuse.

Response: Eligibility for the current year is conditioned on the payment of the debt in accordance with a payment agreement. If that payment agreement is breached, the condition is no longer met and the policyholder has no longer met the conditions for eligibility. This principle should be recognized by the courts and terminating the policy retroactively is no different than voiding the policy. Although there is no direct monetary penalty when a policyholder defaults on a payment agreement, there is a consequence because benefits will not be in place for the crop year in which the payment agreement was breached and until the debt is paid. The current provision affords no protection because policyholders could still breach the agreement, which rendered them ineligible on the date such payment was missed, and allow them to become eligible later in the same crop year by paying the debt in full when a loss is likely to occur. This would result in the administrative difficulty of trying to determine when the policyholder was eligible and whether an indemnity could be paid. FCIC cannot charge a premium even though the policy was terminated retroactively because it was not proposed and the public was not afforded the opportunity to comment on it. Insurance providers are responsible to manage these payment agreements and determine whether there is a failure to make a scheduled payment. There is nothing in this provision that prohibits late payment provided the scheduled payment is made. No change has been made in response to this comment.

Comment: A commenter suggested adding the word "crop'' between "your'' and "policies'' in proposed section 2(e)(6). This paragraph seems consistent with proposed section 2(e)(3)(iii), but inconsistent with proposed section 2(e)(5). The added language will create many problems if coverage is terminated retroactively, as many lenders rely on coverage being in place, as do other holders of assignments of indemnity.

Response: FCIC has replaced the reference to "crop policy'' with "policy'' to make the provisions consistent and has revised the definition of "policy'' to specify that each crop is considered to be covered by a separate policy. FCIC has revised the provisions to eliminate any inconsistencies. FCIC understands lien holders depend on crop insurance payments being made, and that additional complexities arise when more than one insurance provider is involved. However, whether crop insurance exists is within the control of the policyholder and benefits should not be allowed when premiums or other amounts due are not paid in a timely manner.

Comment: A commenter stated they agree with the provision in proposed section 2(e)(6).

Response: Although FCIC has revised the provisions, the requirements in proposed section 2(e)(6) have been retained in redesignated section 2(f).

Comment: A commenter asked if failure of a payment plan is limited to just this debt. They stated this appears to be the case, since reference to "the debt'' is used.

Response: The phrase "the debt'' in this section has been replaced with "amounts owed'' to clarify that it covers any amounts covered under the payment agreement.

Comment: The proposed language changes the current application of ITS (Ineligible Tracking System) in that it implies a retroactive termination. Also, this language conflicts with proposed section 2(e)(4).

Response: FCIC understands the proposed language constitutes a change in the time a producer becomes ineligible and may require more frequent monitoring of the Ineligible Tracking System. However, as stated above, a producer should not receive benefits for a year in which a previously agreed upon payment is not made. FCIC has revised the provisions to reconcile when policies are terminated and policyholders become ineligible.

Comment: A commenter recommended revising proposed section 2(e)(7) because, by definition, there can only be one policy. They question whether this means "county crop contract,'' and ask why not define and use that term.

Response: FCIC has revised the definition of "policy'' to clarify that each agricultural commodity in each county constitutes a separate policy. Proposed section 2(e)(7) refers to each policy that is terminated, which could be multiple policies in a given crop year. No changes have been made as a result of this comment.

Comment: A commenter stated there must be a "lag time'' allowed between signing the claim for indemnity and termination (*i.e.* claim for indemnity signed today, termination date is tomorrow) in proposed section 2(e)(9).

Response: As stated above, the offset of premium from an indemnity is for the convenience of the policyholder and insurance provider and was never

intended to abrogate the requirement that premiums and other payments be made by the due date. To allow anything different will result in the disparate treatment of policyholders based solely on whether they file a claim. Further, it adds a significant administrative burden for insurance providers to have to track all open claims, determine whether the claim is legitimate, and whether it will cover the amount of premium owed. No change has been made in response to this comment.

Comment: A few commenters suggested adding replant payments to the next to the last sentence in proposed section 2(e)(10).

Response: FCIC agrees and has made the proposed change in redesignated section 2(f)(5).

Several comments were received regarding proposed section 2(e)(11). The comments received are as follows:

Comment: A commenter stated it was unclear how individuals (those with any interest in an entity with a substantial beneficial interest in the insured) would be placed on the Ineligible Tracking System if they are not involved in the crop insurance program.

Response: FCIC agrees the provision is too inclusive. However, there may be situations, such as certain partnerships, where the partners are liable for the debt of the partnership and such persons will also be ineligible if the partnership becomes ineligible. Further, there may be other entities where piercing the corporate veil is appropriate based on the common law standards. This provision has been revised to put everyone on notice that persons with a substantial beneficial interest may be ineligible but it does not abrogate the legal requirements of determining when such persons may be held liable for the entity's debt or vice versa. Tracking should be no different than any other ineligible person.

Comments: A few commenters stated proposed section 2(e)(11) would not appear to be legally permissible if the "person'' with a substantial beneficial interest in the insured happens to be a corporation. Some of the commenters stated this language also may make others with an interest in the corporation liable for unpaid premium and the proposed language attempts to illegally pierce the corporate veil and make shareholders personally liable above and beyond their investment in the corporation.

Response: See response to first comment under this subsection.

Comment: A commenter stated that in general terms, shareholders are insulated from the actions of a corporation and this section goes against this principle. Another commenter stated this section violates constitutional and legal provisions.

Response: See response to first comment under this subsection.

Comment: A commenter stated RMA should research the legality of this provision.

Response: See response to first comment under this subsection.

Comment: A commenter stated the proposed amendment is a good one, but will present major tracking and compliance problems.

Response: See response to first comment under this subsection.

Comment: A commenter stated in their opinion proposed section 2(e)(11) is too broad when determining ineligibility. If someone is involved in a corporation and also has an individual policy then becomes ineligible on the individual policy, the new language would make all other shareholders of the corporation ineligible on any other policies in which they had a substantial beneficial interest. The current procedure that would lower the corporations' insurable interest by the ownership amount of the person ineligible is fair and defendable. They suggested not adding this paragraph.

Response: See response to first comment under this subsection.

Comment: A commenter stated proposed section 2(g) should be "cancel,'' not "terminate.''

Response: FCIC agrees the term "cancel'' should be used because the use of the term "terminate'' is inconsistent with the definition of the term "termination date'' and has revised section 2(h), as redesignated, accordingly.

Comment: The following comments were received regarding section 2(i). A commenter questions whether section 2(i) is needed. They stated it should be deleted or at a minimum, the portion referencing FSA be deleted. A few commenters stated section 2(i) requires "* * *information regarding crop insurance coverage on any crop previously obtained at any other local FSA office or from an approved insurance provider, including the date such insurance was obtained and the amount of the administrative fee.'' This does not distinguish between federally subsidized crop insurance and other types, such as crop-hail. FCIC should consider if the reference to "any other local FSA office'' is still necessary; if so, at least the word "other'' should be deleted. FCIC also should clarify whether "the date such insurance was obtained'' means the effective crop year (question whether the specific day is necessary). The commenter questioned the necessity of learning "the amount of the administrative fee'' (if kept, add "if any'' since the fee is a fairly recent addition).

Response: Since no changes to this section were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Clarification of Insurance Guarantees, Coverage Levels, Verification of Records, Establishment and Adjustment of Approved Yields—Section 3

Comment: A few commenters suggested deleting "for Determining Indemnities'' from the heading of section 3 since guarantees, levels, and prices are used for other purposes as well.

Response: Since this is merely a technical change since headings do not affect the meaning of the provisions, FCIC has revised the heading accordingly.

Comment: A few commenters suggested rearranging the order of section 3 so redesignated paragraphs (g)–(j) are further redesignated as (c)–(f), and the APH-specific paragraphs, currently (c)–(f), are at the end of the section.

Response: FCIC has revised section 3 to put all like provisions together.

Comment: A commenter stated section 3(a) should be clarified as follows: "(a) Unless adjusted in accordance with this policy, the production guarantee or amount of insurance, coverage level, and price used to calculate and establish your coverage as shown on your summary of coverage for each crop year also will be used to determine any indemnity that may be due with respect to that crop year. The information necessary to determine those factors will be contained in your application, the Special Provisions, the actuarial documents or a combination of these documents.''

Response: FCIC agrees the provision should be revised to specify that reported information will be used for the summary of coverage unless the information is adjusted or limited by the policy. Further, FCIC has removed the reference to the location of the "factors'' to be consistent with other changes made as a result of comments and because it is duplicative.

Comment: A few commenters recommended FCIC consider whether the first sentence in proposed section

3(b) should refer to prices as well as to coverage levels since both are included in the rest of the paragraph. A commenter also asked if the limitation in proposed section 3(b) to one coverage level means one per county crop (for example, a grower could insure corn in County A at one level and corn in County B at a different level). (This is an issue of defining policy, contract, etc., and they suggested that the policy clarify that coverage choices are on a county-crop basis.).

Response: Not all crops have only one price election. Some crops have multiple price elections for different types, varieties, etc., and provisions regarding the number of applicable prices are contained in the Crop Provisions. FCIC has revised the definition of "policy'' to clarify that each crop in each county is considered a separate policy. Further, FCIC realizes the first sentence of redesignated section 3(b) conflicts with the first sentence of redesignated section 3(d). Therefore, the first sentence in redesignated section 3(d) has been removed and FCIC has revised the first sentence of redesignated section 3(b) to specify that only one coverage level for additional coverage may be selected unless one of the exceptions apply.

Many comments were received regarding the proposed language in proposed section 3(b) that would not allow increases in coverage levels when there was a cause that could or would result in a loss. The comments are as follows:

Comment: The new language added to section 3(b) is an admirable attempt to prevent adverse selection against FCIC. However, the phrase "could or would'' is overly broad and puts an unreasonable and excessive burden of proving the unknown on the insurance provider and should be deleted from the proposal. Proposed section 3(b) mirrors section 17(b)(4), which imposes similar restrictions with respect to prevented planting. The provision, whether in proposed section 3(b) or in section 17(b), is problematic, speculative, difficult to determine, and is impractical to administer. It creates an administrative burden because it compels the insurance provider to conduct an inquiry as to whether a cause of loss has occurred each time an insured requests an increase to the coverage level or price election. They assume the insurance provider has the authority to determine a loss occurred prior to the insured making the change in price election or coverage level and proposed section 3(b) should so state.

Response: FCIC agrees that the provision is unworkable with respect to coverage level selection and has removed it from redesignated section 3(d).

Comment: The policy covers natural, unavoidable causes of loss. People cannot control the weather and other insured perils. They ask who would decide if there is a potential loss situation. The weather can change daily. A completely dry winter can become a blizzard with 2 feet of snow the next day. The final sign-up deadline is March 15 for some crops in some areas. A producer requesting a policy change in February cannot be allowed to have an advantage over a producer requesting a policy change in March after a blizzard.

Response: See response to first comment under this subsection.

Comment: If a geographic area has suffered drought for the past year or two, this provision would not enable producers to increase their coverage level even though a known cause of loss is likely to adversely impact the producer. In the instance where an insured has a certain level of coverage when a drought begins, would that insured not be able to increase his or her coverage throughout the duration of the drought. It could be hard to police the increases of coverage if a cause of loss is present at the sales closing date. A prime example is the drought in the U.S. That means even with the rains that have occurred in areas, if you look on the drought maps, there are areas that are basically stuck with what they had this year because of the continuing drought.

Response: See response to first comment under this subsection.

Comment: They ask how do you prove in all cases if loss or potential loss may have occurred before election changes and what equitable standard should be used in making these determinations. It is difficult to determine or quantify situations in which a cause of loss could or would result in an insured cause of loss that has occurred before an insured's request for an increase of coverage. It is difficult to manage and monitor in dry areas. They ask whether in a drought situation if an insurance provider denies an increase in coverage because of ongoing drought and a month later, after a rainfall, can the insurance provider accept another request for an increase in coverage provided it is before the sales closing date. Insureds should be allowed to change coverage levels, price elections, plans of insurance, etc., anytime on or prior to the sales closing date specified in the Special Provisions. The proposed provision would be nearly impossible to determine/enforce.

Response: See response to first comment under this subsection.

Comment: FCIC should make the determination if a cause of loss that could or would result in an insured loss has occurred prior to the time the producer requests the increase. FCIC should issue Managers Bulletins defining counties and crops in which FCIC has determined that a cause of loss existed prior to the sales closing date and no increase of coverage from the prior year would be allowed. The burden should not be on the producer, agent or insurance provider to declare that such a condition exists, presuming that the sales closing dates are set properly. If FCIC believes a condition exists that should cause the offer of coverage to be withdrawn, it should advise all and withdraw the offer.

Response: See response to first comment under this subsection.

Comment: There are system issues to properly "block'' applications from areas/situations that would not be eligible under this language. The proposed language seems to be counter to an insured's ability to make risk management changes from year to year. Producers may find it more difficult to obtain loans from their lenders when coverage cannot be increased because the likelihood of losses is apparent. The provision seems contrary to the intent of ARPA, which encourages producers to take out higher levels of coverage. Producers, unable to utilize existing risk management tools, will appeal to Congress for disaster aid. Will the determination be by insured, county, region, state, etc., and who will make it.

Response: See response to first comment under this subsection.

Comment: A "knowledge qualifier'' should be added to proposed section 3(b) as well as a time element. Thus, the proposal should be revised to read "* * * you may not increase your coverage * * * if as of the sales closing date you knew or reasonably should have known a cause of loss had occurred that is reasonably likely to result in an insured loss * * *'' Suppose there is no rain for six months before the sales closing date; as written, the provision would prohibit coverage changes because "a cause of loss that could or would result in an insured loss has occurred. * * *.''

Response: See response to first comment under this subsection.

Comment: This section does not preclude insureds from changing to a different plan, such as Crop Revenue Coverage or Revenue Assurance, or changing approved insurance providers and then revising the coverage level or price election. How soon will the

insurance provider know what coverage the producer previously had when the producer comes to them and do they back off at a later date when they find that the producer increased coverage when a cause of loss was already there.

Response: See response to first comment under this subsection.

Comment: A commenter recommended FCIC amend proposed section 3(b) as follows: "However, you may not increase your coverage level or price election after the occurrence of an insurable cause of loss.

Response: See response to first comment under this subsection.

Comment: They ask why existing policyholders should be prevented from making coverage changes, when a new applicant can choose the highest coverage level available on the sales closing date even though a cause of loss exists. This appears to be unfair and discriminatory.

Response: See response to first comment under this subsection.

Comment: A commenter stated the word "since'' in the fourth sentence of proposed section 3(b) should be amended to read "because.''

Response: Since "since'' or "because'' are synonymous, either are correct in the fourth sentence. No change has been made.

Many comments were received regarding proposed section 3(d). The comments received are as follows:

Comment: A significant number of commenters complained of the excessive burdens on agents and loss adjusters to perform the work, on producers as a result of delayed claims, and the costs to the insurance providers as a result of this requirement. They claim the provisions conflict with other record requirements in the policy.

Response: FCIC agrees with the commenters who indicated the proposed provision would delay claims processing, significantly increase program costs, and would conflict with current record retention requirements. Therefore, FCIC has removed the proposal requiring the insured to provide written verifiable records for the loss unit for at least the three most recent crop years of the producer's production history from redesignated section 3(f). However, verification of yields is important to maintaining program integrity. The policy provisions already contain record retention requirements and FCIC has determined the same effect can be achieved through APH reviews by insurance providers.

Many comments were received regarding proposed sections 3(d)(2) and (3). The comments are as follows:

Comment: Many commenters stated the provisions are unworkable and do not solve or mitigate the problem they are attempting to fix. Several commenters stated the penalty of denying a claim yet still charging premium when over or under a 5 percent tolerance level from the APH is far too harsh, and could easily be legally challenged because a premium is charged, yet no coverage and service is provided. A commenter stated denying the indemnity even after recalculating the average yield and still requiring premium payment will likely result in legal action and claims of Bad Faith. Some of the commenters further stated this penalty is unacceptable, and pointed out there is no coinsurance law in the Act. Other commenters indicated the penalty is unreasonable and should be deleted. A commenter stated the current processes in place to address APH and acreage tolerances is working, and the proposed provisions will unduly penalize insureds and create unbearable exposure for agents. A commenter stated that if APH audits are to be required as stated in section 3(d), then APH and unit corrections should be made to the policy, and indemnities subsequently paid based on the corrected information.

Response: FCIC has revised redesignated section 3(f) to specify that the consequences of misreporting are now contained in section 6(g) to eliminate any inconsistencies with that section. FCIC has removed the provisions stating that insurance will be denied and a premium will still be owed. FCIC agrees that the consequences could be overly harsh because it provides the same consequences regardless of whether the error was large or small. Instead, FCIC will utilize the consequences currently stated in section 6(g) and a consequence has been added that is commensurate with the error when such error exceeds established tolerances. These changes will be much less harsh but still provide an incentive for policyholders to accurately provide information.

Comment: A few commenters stated the proposed language refers to tolerances applied to the "average yield.'' This does not seem to consider that the average yield is not always the same as the approved APH yield, due to yield substitutions and other yield adjustments. They questioned if the "sanctions'' should be applied if the "correct yield'' does not affect the (adjusted) approved APH yield by more than the tolerance. A commenter asked, if the statement "* * * results in a yield more than five percent different than the correct yield'' refers to the APH yield or an individual year's yield. The commenter stated five percent of an individual year's reported yield may be excessively stringent as there may be instances of a simple error such as gross yield being reported instead of net yield. This may not make much of a difference in the APH but could exceed five percent for an individual unit.

Response: Tolerances are now based on liability, not the components that make up the liability, such as yield or acreage.

Comment: A few commenters stated it is unclear how the language meets the stated purpose of better meeting the insured's needs. According to the **Federal Register** explanation, "* * * This change is necessary to protect the integrity of the crop insurance program because the operation of the program relies heavily on the accurate reporting by producers. A tolerance of 5 percent is included to be consistent with tolerances in other aspects of the program. However the receipt of complete and accurate information is crucial to the program * * *'' They agree with the motive, but disagree with the method proposed. The 5 percent tolerance provides some allowance for minor differences in what is reported at different times, but still may not be flexible enough. (In addition, this tolerance is not consistently applied in other provisions of the proposed revisions to the Basic Provisions.) The demand for accuracy needs to be tempered with the recognition that measurements of acreage and production can result in different (but not inaccurate) figures each time. FCIC may want to consider leaving the specific tolerance out of the policy language and letting it be handled in procedure instead. One set of tolerance percentages may be too restrictive for some crops and situations but too loose for others. (For example, the CIH provides a 5 percent tolerance for many Category B APH crops, but a 2 percent tolerance for other Category B and all Category C crops.) A commenter stated the 5 percent tolerance in proposed section 3(d)(3) is unrealistic. The commenter further stated that errors do happen, but corrections can be made. They noted that typically, if information is misreported to the FSA, corrections are allowed. The commenter added this provision could potentially not only deny an insured a payment due to an insurable loss but could also cost him a premium on acreage deemed uninsurable, because of an honest error.

Response: These changes meet the needs of insureds by preventing program abuse and keeping premiums down. The tolerance has been increased

to 10 percent to reduce the impact on those producers whose errors are more likely to be inadvertent and add greater flexibility. The tolerances in the procedures are not relevant because the purpose of the tolerances in the policy is to determine when a sanction will apply.

Comment: A commenter asked if one loss unit is out of tolerance, what happens to the remainder of the units. The commenter further stated there is a conflict between language in section 6 (the insurance provider "may elect'' whether to use reported information or the information determined to be correct) and proposed section 3(d)(3) which indicates "corrected liability'' will be used with penalties attached.

Response: Since liability is on a unit basis, the tolerances are also applied on a unit basis.

Comment: A commenter stated proposed section 3(d)(3) makes no sense, as there may not even be a claim. The commenter also provided the following example: An insured reports APH production based on the bin measurements (no loss), the next year he/she has a loss, and the APH must be verified, by that time the prior year's production is sold, and the actual production sold differs from his/her APH by 5.5 percent, which should not be unreasonable due to moisture, shrink, etc., differences. The commenter stated that under the proposed language, it appears that his/her indemnity could be denied.

Response: As revised, the monetary sanction only applies when there has been a claim. However, the information is still corrected so that future determinations of liability are correct. If the bin measurement, which is done by the insurance provider, differs from the sold production, the producer cannot be penalized because it was not the producer who reported the production. The producer relied on the insurance provider. In cases where the discrepancy cannot be explained under the current procedures, the information should be reconciled and appropriate corrections made.

Comment: A commenter stated that unless fraud is evident, producers should be allowed to correct any discrepancies or errors in production reporting, and be paid any indemnity due, in return for premium paid. The commenter further stated the proposed provision exposes lenders to unneeded risk. A few commenters stated RMA already has in place punitive measures to deal with fraudulent behavior, and, if the proposed provision is implemented, the producers who will be most affected by the proposed tolerances and attendant sanctions will be those who simply make inadvertent errors. The commenters further stated that if a tolerance is maintained, it should be more reasonable and allow for exceptions. In addition, they believe that if a producer's claim is denied because of inaccurate yield reports exceeding a tolerance, the insured should not be responsible for the full premium, and in such cases only a modest administrative fee is warranted. A commenter stated that determining the nature of misreported information could be difficult. Therefore, they suggest consideration of a graduated monetary penalty matrix for misreported information resulting in an average yield of greater than 105 percent of the correct yield. If a reporting discrepancy of greater than 105 percent can be credibly attributed to an error made in good faith or variable reporting information, perhaps a maximum monetary penalty could be imposed with denial of the claim waived. Progressive monetary penalties short of claim denial would still serve as a strong incentive to report accurate information. Annual verification of certified yields would eventually alleviate the potential for misreported information problems because the actual production history yields would have been verified prior to the loss claim. A commenter recommended penalties be tailored toward willful and intentional actions.

Response: It is almost impossible to distinguish intentional from unintentional errors and provisions requiring such determination would create a very difficult standard to administer. However, errors must be identified and corrected. FCIC has increased the tolerances to lessen the impact on growers who make small, inadvertent errors.

Comment: A commenter suggested changing the wording in the lead-in sentence in proposed section 3(e) to read, "We will revise your actual yield(s) which may change your approved APH yield when:''

Response: "Approved yields'' are the yields upon which production guarantees are based and are the yields that ultimately must be revised. However, as stated above, redesignated section 3(g)(1) has been revised to reference individual crop year yields.

Comment: Several commenters recommended amending the introductory phrase in proposed section 3(e) to read: "We *may* revise your approved yield when: * * *'' The commenters stated that proposed section 3(e), as written, compels them to revise an insured's yield if the conditions in proposed sections 3(e)(1) through (3) are satisfied. Because there are many circumstances now unforeseen that may impact the revision of an insured's yield, proposed section 3(e) should authorize, but not require, revision of the approved yield. The **Federal Register** explanation for the proposed change states the language was changed to "Clarify that yields may also be adjusted * * * '' however, the actual proposed language states "We will revise your approved yield.''

Response: The provisions in redesignated section 3(g) must apply the same for all producers. Therefore, if an insurance provider discovers producers who meet all the criteria for having the approved yield adjusted, such yield must be adjusted. The provisions themselves contain any exceptions, if applicable. If no exception is stated, FCIC did not intend for there to be any exception and none can be made. To require otherwise could result in disparate treatment.

Comment: A few commenters stated existing regulations may not allow an approved yield to be revised as suggested, and thought providing an insured an "approved yield'' and then revising it could raise legal questions.

Response: The final rule published on June 25, 2003 (68 FR 37697) revised the definition of "approved yield'' to include adjustments made under redesignated section 3(g). Therefore, adjustments of the approved yield are permitted.

Comment: Several commenters stated proposed section 3(e) is too general and random, and asked what the procedure will be, in what time-frame will the adjustments occur, and to what levels will the inconsistent yields be adjusted. One of the commenters stated the processes for revisions are subjective and leave the insurance providers open to dispute and litigation. An additional commenter stated they could not assess the impact of this subsection without knowing what the specific procedures will be.

Response: FCIC has revised the provisions in redesignated section 3(g) to be specific regarding when the adjustments apply and exactly how the adjustment will be made to reduce subjectivity and make the standards more certain. FCIC has added provisions stating that reductions in the approved yield will occur at any time the circumstances warranting such reduction are discovered. The procedures will only specify when the insurance providers must review the policies to determine whether redesignated section 3(g) is applicable and the standards that FCIC will use to

determine whether the yields are excessive.

Comment: A few commenters recommended removing proposed section 3(e) since computation of the APH yield is not otherwise addressed in the Basic Provisions, and stated the modified language could properly be included in the program materials governing APH determinations.

Response: The final rule published on June 25, 2003 (68 FR 37697) revised the definition of "approved yield'' to include all adjustments made, including those under redesignated section 3(g). Therefore, the Basic Provisions now address, in part, the computation of the approved yield. No change has been made in response to this comment.

Comment: A commenter stated yield edit procedures are already in place to contain and identify certain yields, and asked why it is necessary to add proposed section 3(e). The commenter stated a unit could contain more than one APH database, and asked how the determination in proposed section 3(e) would be made in this case.

Response: The producer must be notified that the approved yield may be adjusted, the reasons for such adjustment, and the manner of such adjustment. Since the yield edit procedures are not a part of the policy, they do not provide adequate notice. The provisions in redesignated section 3(g) have been revised to specify that determinations are made on a database basis.

Comment: Some commenters recommended defining or explaining what an "inconsistent yield'' is as used in proposed section 3(e)(1) because the phrase will be subject to multiple interpretations. One of these commenters thought using the term "materially inconsistent'' would be more appropriate because it would not be beneficial to make small changes. Commenters recommended defining or explaining what a "surrounding farm'' is. The commenters asked how big or small of an area make up the "surrounding farms'' and if the area is measured in distance. A commenter suggested replacing "approved yield'' with "actual yield per acre for each crop year reported.'' Another commenter thought "approved yield'' should be replaced with "average yield.''

Response: FCIC agrees that the proposed provisions may be too broad and difficult to administer. FCIC has eliminated references to "inconsistent yield,'' and "surrounding farm'' and has revised the provisions in redesignated section 3(g)(1) to state that approved yields will be adjusted by substituting assigned yields when individual crop year yields are excessive and the producer does not have verifiable records to support the yield. FCIC has also added provisions to handle situations where the producer provides verifiable records but the yield may be significantly different from other yields in the county or his other databases and there is no explanation for the difference.

Comment: A commenter stated the language proposed in proposed section 3(e)(1) infers those involved in crop insurance, particularly FCIC, can more accurately determine actual yields using averages in the area than the insured who personally harvested the crop. The commenter disagrees with that notion.

Response: FCIC does not presume to be able to determine actual yields more accurately than the producer. However, since yields are certified, some may not reflect the actual production. FCIC has revised redesignated section 3(g)(1) to use specific criteria to determine when differences in yields are sufficient to require adjustment. In addition, provisions have been added that allow the producer to avoid an adjustment of an approved yield by providing verifiable records of production and an explanation of yield differences.

Comment: A few commenters stated the **Federal Register** explanation of the changes in proposed section 3(e)(1) "* * * Given the ease in which production can be shifted to create losses or to increase approved yields, the policy must provide a mechanism to allow correction when the surrounding yields show the reported yields are not accurate * * *'' appears to contradict the proposed language in proposed section 3(d) which only requires hard copy records "for the loss unit.''

Response: Changes proposed in proposed section 3(d) have not been retained in this final rule. However, the proposed requirement to provide records was limited to the loss unit to decrease the administrative burden on the insurance provider and policyholder. Section 508(g)(2) of the Act requires that the producer have satisfactory evidence of the yields in the database or receive an assigned yield. Therefore, the producer must still maintain the records even if they are not requested or there is no loss. As revised in redesignated section 3(g)(1), in certain circumstances, such records can now be used to avoid the application of the adjustment to the approved yield. However, the producer must still explain any discrepancies from other yields. This should address situations where production may have been shifted.

Several additional comments were received regarding proposed section 3(e)(1). The comments are as follows:

Comment: A commenter stated proposed section 3(e)(1) is not clear as to where the responsibility lies to obtain yields from "surrounding farms,'' and that insurance providers are not generally authorized to compel this type of information from neighboring farmers. Some commenters stated it is unclear how policyholders will be able to provide "evidence'' from surrounding farms that are not part of their operations. A commenter stated it is unclear how anyone will know if surrounding farms have similar characteristics and farming practices.

Response: The provisions regarding surrounding farms have been removed and FCIC will now determine whether yields are excessive based on procedures.

Comment: Some commenters stated the provisions do not specify what acceptable explanations for inconsistency would be nor does it consider in which direction (higher or lower) the inconsistency exists. These commenters pointed out that soil type, rainfall, wind, heat, etc., can affect the yield of one farm, as compared to another just across the road. A few commenters asked if a unit with low yields in its history due to losses could have a yield increased due to surrounding yields, or if non-loss units would be revised to the same yield level as units with losses or just lower yielding units. Some commenters stated, as written, the parenthetical sentence "(The inconsistent yield will be revised * * *)'' indicates yields will be changed even if satisfactory evidence is provided to support the yield. A commenter asked if it was the intent to revise yields that are deemed inconsistent, even though production records are provided that substantiate the inconsistent yield.

Response: The provision has been revised to indicate that only verifiable records can be used to explain inconsistencies and where such records have been provided yield adjustments will not be applicable unless there is no reason for the discrepancy. The revised yield adjustment provisions are not dependent on whether the unit suffered a loss. If the criteria are met, the adjustment will apply.

Comment: A commenter stated the phrase "similar characteristics'' is subject to various interpretations and should be explained.

Response: The reference to "similar characteristics'' has been removed from this section.

Several additional comments were received regarding proposed section 3(e)(2). The comments are as follows:

Comment: Some commenters stated they understood the goal of preventing inflation of a producer's APH yield, but thought provisions in proposed section 3(e)(2) that do not allow yields to be based on acreage under 25 percent of the current acreage would create problems. The commenters stated changes in market prices, farm program acreage restrictions and production technology would result in many legitimate situations in which the 25 percent level would be reached. The commenters recommended making the threshold percentage less than 25 percent to limit harm to producers who have changed cropping patterns for the above reasons. Other commenters recommended reducing the 25 percent threshold to 10 percent.

Response: There may be cases where a 400 percent increase in size is legitimate. However, the purpose for using APH is to obtain a yield that is reflective of the actual production capability of the unit. FCIC has evidence that 400 percent or more increases in size have been used to create yields that do not represent the yield potential for the unit for the express purpose of creating losses. FCIC selected this threshold, and included the requirement that the yield would exceed 115 percent of the other similar units, to limit the application of the approved yield reduction to those instances where the evidence shows the yields are not reflective of the potential production for the unit. To increase the threshold to 1000 percent, as recommended, would defeat the purpose of this provision because it would allow instances where FCIC has established that such increases have been used for improper purposes. No change has been made to redesignated section 3(g)(2) in response to this comment.

Comment: Some commenters stated proposed section 3(e)(2) should reference average acres in the database or field rather than acres in the unit, and that the proposed language may not provide the desired results. The commenters recommended more direct language that would simply state that establishing high yields on small acreages that are then applied to large acreages is prohibited. Some commenters stated there is no indication of how yields would be revised, and, even though the details may belong in procedure rather than the policy, it is very difficult to comment when it is not known what effect the specific procedures will have on insurance providers and insured producers. A commenter stated proposed section 3(e)(2) places a burden on the insurance provider, after the APH is approved, to compare planted acres reported on the acreage report to the average acres in the APH. The commenter asked if they are comparing current acreage within the unit to the average acres within the APH for the unit, or if the comparison is done by APH database when multiple databases exist for a unit.

Response: There may be a small burden added to insurance providers. However, not all databases will have to be reviewed. FCIC's procedures will establish the criteria for reviewing such databases. FCIC has revised this provision to state that it applies on a database basis. However, since every circumstance cannot be included in the policy, FCIC approved procedure will provide direction for situations in which there is more than one database involved. Further, FCIC has added provisions stating how the approved yield will be adjusted. The recommended change cannot be adopted because it fails to specify what constitutes small and large acreages.

Comment: A commenter suggested replacing the phrase "25 percent of the current acreage in the unit'' with "25 percent of the current available cropland in the unit'' in proposed section 3(e)(2). The commenter stated this would prevent someone from building a yield database on a unit with substantially more available cropland that could use the yield established on the small amount of acreage on the entire unit, and that using cropland acres would be consistent with current added land procedure.

Response: Producers do not report cropland acres and to make the recommended change would require additional reporting that would be meaningless because cropland has never been reported in the past, nor is it used to calculate approved yields. Since yield differences are also a factor, the current acreage must be compared to the acreage on which the APH yield was established and the current acreage will be available on the acreage report and the acreage on which the APH was established should be readily available to insurance providers from their APH databases. No change has been made.

Comment: A commenter was concerned the 25 percent threshold in proposed section 3(e)(2) would be triggered too often when insureds who reported past production as basic units decide to break out into optional units. The commenter stated producers would have difficulty meeting the 25 percent requirement when breaking a basic unit into more than four optional units.

Response: Approved yield reductions only apply when producers increase their acreage. Since optional units are usually smaller than the basic units from which they are derived, it is unlikely the provisions regarding reduction in approved yields would apply. This comment suggests there may be confusion regarding whether the 25 percent refers to an increase or decrease in acreage. Therefore, FCIC has revised the provision in redesignated section 3(g)(2) to clarify that yield reductions only apply when current year's acreage is more than 400 percent of the average acreage in the database.

Comment: Some commenters stated language in proposed section 3(e)(2) requires yield revision, regardless of the reason for an acreage increase, and makes no distinction between the "average number of acres'' for a database with one or two years of actual history and a database with five to ten years of history. The commenters asked if this rule should apply to perennial crops where trees/vines must reach a certain age before they are considered insurable, and if this revision changes the current "added land'' procedures for category B crops.

Response: The yield reduction can apply any time the producer has actual yields in the database. FCIC has not made any distinction based on the number of years because the purpose of this provision is to prevent producers from using small amounts of acreage to create artificially high yields and applying them to large acreages where such yield would not reflect the yield potential. This practice can happen regardless of the number of years in the database. Actual yields are only necessary to determine whether any increase existed that would meet the stated criteria for reduction. This provision applies to all crops. However, based on how perennial crops are produced, it is unlikely that the situation will ever arise where these yield reduction provisions are applicable. All applicable procedures will be revised to be consistent with this rule.

Comment: A commenter stated reducing the threshold from 50 percent (the percentage currently used in added land procedures) to 25 percent as specified in proposed section 3(e)(2) will result in increased loss adjustment expenses.

Response: Revisions to approved yields for acreage exceeding the revised 400 percent limitation in redesignated section 3(g)(2) should be made by insurance provider underwriters, not by

adjusters when working claims. The information needed to determine whether an approved yield adjustment is necessary will be available by the acreage report date and any adjustment should be reflected on any summary of coverage. Therefore, this provision should not result in increased loss adjustment expenses. Further, the 50 percent threshold in the added land procedures has been removed effective for the 2004 crop year. However, applicable procedures will be revised to be consistent with this rule.

Comment: A commenter recommended considering acres in each individual year compared to the current years' acres in determining the use of such year in the calculation of the approved yield rather than looking at the average number of acres.

Response: The use of individual years would add an unnecessary complexity because of the variance between crop years and the determination of how each individual year would be evaluated. The average number of acres used to calculate the approved yield is easily understood and is a credible method to use for this purpose. No change has been made.

Comment: Some commenters stated the language in proposed section 3(e)(2) is very unclear, and there is no practical way for insurance providers to implement the provisions. Other commenters stated the proposed language is unworkable and unnecessary.

Response: FCIC has revised the provisions to improve clarity and the ease of implementation.

Comment: A commenter asked whether proposed section 3(e)(2) eliminated the need to perform silage appraisals on corn insured as grain but harvested as silage. Another commenter asked if they could or could not use a corn silage appraisal on 81 percent of the acres for APH purposes, if the appraisal and the yield on the remaining acres result in no loss.

Response: Proposed section 3(e)(2) does not eliminate the need to perform silage appraisals on corn insured as grain but harvested as silage. The purpose of this provision was to prevent producers who did not have a loss from leaving high yielding acreage in a field for appraisals and destroying or putting the lower yielding acreage to another use in order to artificially inflate their actual yields. FCIC has revised the provision to state that appraisals obtained from only a portion of the acreage in the field that remains unharvested after the remainder of the crop within a field has been destroyed or put to another use will not be used to establish the actual yield unless representative samples are required to be left in accordance with the Crop Provisions. The provision has also been moved to redesignated section 3(e)(4) because it is more related to the other provisions establishing yields, not adjusting them.

Many comments were received regarding the sanctions provisions in proposed section 3(e)(3). The comments received are as follows:

Comment: Some commenters stated the example in proposed section 3(e)(3) is confusing and asked if it is intended to address what may or may not be considered "good farming practices.'' The commenters suggested revision to avoid confusion with insurable practices listed in the actuarial documents. Another commenter stated the example is confusing because there is no "partial irrigated practice,'' and an insured crop is either irrigated or non-irrigated. An additional commenter asked what practice this would be called, irrigated or non-irrigated, and if the yield would be raised. The commenter stated that during a season and between crop years are different issues (a new database could be developed for the next year to reflect the different practice).

Response: FCIC agrees with the comments and has clarified the provisions in redesignated section 3(g) to indicate adjustments will be made when the approved yield is based upon cultural practices that are different than the cultural practice that will be carried out for the crop year. This provision is intended to address any change in practice that may affect the yield, even if both practices are considered good farming practices. The revised provisions require the producer to notify the insurance provider prior to the acreage reporting date if a cultural practice will be performed that will reduce the insured crop's production from previous levels. The example has been revised to clarify that the practice remains non-irrigated but the actions of the producer are different under that practice, which could affect the yield. Databases are established by practice, not the specific actions that comprise that practice. Therefore, it may not be possible to develop a new database for subsequent years.

Comment: A commenter stated proposed section 3(e)(3) suggests that an insured's ability to change farming practices during the growing season is unrestricted. Because changing the farming practice may require a revision to the acreage report, this section should, at a minimum, advise the insured that other policy provisions or procedures may affect the insured's ability to change practices. Another commenter asked in the event of a claim and acreage reported as irrigated that has not been watered, if the practice would be changed or if it would remain as irrigated with an appraisal for an uninsured cause of loss.

Response: FCIC has clarified the example to those situations where the cultural practices within a farming practice have changed, not the farming practice itself. If the farming practice has changed, different databases should be established or if the producer fails to carry out the good farming practice, appraisals for uninsured causes of loss must be made. Therefore, the ability to change farming practices is not unrestricted.

Comment: A few commenters recommended revising proposed section 3(h) to allow producers to elect two different levels of additional coverage for non-high risk and high risk acreage. The commenters claimed producers want to buy additional coverage on their high-risk ground, but it is not affordable at the level of coverage they have for their non-high risk ground. They also stated if high-risk rates are accurate, there is no reason a producer should not have a higher level than CAT or a different insurance plan. Current provisions discriminate against the farmer who farms both non-high risk and high risk ground versus the farmer who farms only high risk ground or only non-high risk ground. Current provisions force producers with high risk acreage to accept insurance insufficient to protect the income at adequate levels or pay astronomically high premiums. They state that current restrictive provisions prevent producers from using subsidy levels and other benefits provided by the legislature to the maximum extent possible. They also claim that current provisions force the producer to make the difficult choice between excluding the high risk ground from insurance or having coverage too low (CAT), reducing coverage on all acres to make the premium affordable, or paying an extremely high premium to maintain a high coverage level/plan of insurance on all acres. The commenters provided the following data for Hamilton County, Illinois, to show the prices being paid for the various levels of CRC coverage in 2002 based on a 120–bushel corn APH and a 45–bushel soybean APH. "Farmer 1'' has all non-high risk land and elects 75 percent coverage with the following coverage and costs per acre:

Crop	Coverage	Cost
Corn	$208.80	$13.30
Soybeans	152.10	8.20

"Farmer 2'' has only high-risk ground, lowers coverage to 60 percent to keep insurance affordable and has the following coverage/costs.

Crop	Coverage Rating/Cost Rating/Cost
Corn	$167.00 AAA/$8.70 BBB/$16.40
Soybeans	$121.50 AAA/$5.90 BBB/$11.60

"Farmer 3'' has both high risk ground and non-high-risk ground, insures at 75 percent and has the following coverage/costs:

Crop	Coverage Rating/Cost Rating/Cost
Corn	$208.80 AAA/$23.80 BBB/$44.50
Soybeans	$152.10 AAA/$16.20 BBB/$31.50

The commenters further stated, if "farmer 3'' who has both non-high risk and high risk land chooses to exclude the high risk ground and carry only CAT on it, the high risk CAT coverage is only $66/an acre on corn and only $61.87/an acre on soybeans, and furthermore, he/she would lose replant coverage, choice of optional units, and the ability to collect both crop insurance indemnity payments and disaster program payments in the event of a disaster bill. The commenters recommended using the following language to make this revision:

"(h) You must obtain the same level of coverage (catastrophic risk protection or additional) for all acreage of the crop in the county unless one of the following applies:

* * *

(2) If you have additional coverage for the crop in the county and the acreage has been designated as "high-risk'' by FCIC, you would be able to obtain a High-Risk Land Exclusion Option for the high-risk land under the additional coverage policy and insure the high-risk acreage under a separate policy at a level of coverage and/or plan of insurance less than that obtained on the other acreage, provided that the high-risk policy is obtained from the same insurance provider from which the additional coverage on the other acreage was obtained.''

Response: Since no changes to this paragraph were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made as a result of this comment.

Comment: A commenter suggested changing the word "comparable'' to "equivalent'' and deleting the phrase "as established by FCIC.'' A few commenters stated it will be beneficial to add the clarification in proposed section 3(i) that at least 65/100 coverage is required to exclude hail/fire. Some of the commenters recommended adding language indicating that equivalent hail/fire liability can be obtained with a hail/fire policy (as in the Crop Insurance Handbook, section 4E(3) & (3)(c)). A commenter stated the phrase "A comparable coverage as established by FCIC'' is ambiguous because it provides neither the producer nor the insurance provider a definitive standard for determining when this ostensible contract alternative may be utilized. The commenter asked if the phrase "comparable coverage'' refers to alternative plans of insurance or whether FCIC intends to review each hail and fire exclusion. The commenter recommended the phrase either be clarified or omitted.

Response: Since section 508(c)(7) of the Act refers to "equivalent,'' redesignated section 3(i) has been revised accordingly. However, the reference to "as established by FCIC'' was added to be in compliance with the Act and only refers to the determination of whether the producer selected a coverage level that is equivalent to 65/100 for its multiple peril crop insurance policy. FCIC has also added a provision to redesignated section 3(i) to specify that to be eligible for the exclusion, the producer needs to have purchased the same or a higher dollar amount of coverage for hail and fire from another source in conformance with the Act. The insurance provider must determine whether the producer has met this requirement based on the amount of coverage privately purchased.

Comment: Commenters stated RMA might consider if proposed section 3(j) belongs in section 3 since it deals with who may sign crop insurance documents for the insured entity, which affects more than just level/price and APH documents. The commenters thought it might be better located in the definition of "Person'' or possibly in a separate section of its own. One commenter suggested revising the provision to read, "* * * on behalf of you, provided that the person has a properly executed power of attorney or such other legally sufficient document authorizing the person to sign and act on behalf of you. We may request a copy of the power of attorney or legally sufficient document.''

Response: In response to this and other comments, FCIC has moved proposed section 3(j) to section 2 since this section contains provisions relating to the manner in which application is made.

Contract Changes—Section 4

Comment: A few commenters stated the phrase "local insurance provider'' should be defined if it is used in section 4. Another commenter does not believe the word "local'' is necessary and pointed out the agent may be in another state.

Response: FCIC agrees the term "local crop insurance provider'' should not be used and has revised the provisions to indicate all changes will be available upon request from the producer's crop insurance agent.

Comment: A few comments were received regarding language in section 4(b) that indicates changes will be posted on RMA's Web site or filed with the Office of the Federal Register. A commenter stated that the language proposed infers that FCIC considers the posting of a change on RMA's Web site or the filing of a change with the Office of the Federal Register to be sufficient to effectuate a change to the Basic Provisions, which is incorrect. The commenter added that because the Basic Provisions is a substantive rule promulgated in accordance with the Administrative Procedure Act (APA), changes to the Basic Provisions also must be effected in accordance with the APA. The commenter believes posting a contract change on RMA's Web site, even if prior to the contract change date, is legally inadequate and will not change the Basic Provisions. The commenter stated that similarly, filing a change with "the Office of the Federal Register not later than the contract change date'' also is legally insufficient to change the policy. At a minimum, any change to the Basic Provisions must be published in the **Federal Register** not later than the contract change date. The commenter recommended that FCIC amend the rule accordingly. A commenter stated they did not object to the posting on RMA's Web site of changes not later than the contract change date contained in the Crop Provisions. They do believe, however, that it is inappropriate to suggest that a change is sufficient and timely made if simply filed with the Office of the Federal Register on the contract change date. The commenter stated the Office of the Federal Register has specific rules determining when filings are available

for public inspection, and to avoid any legal controversy, either this portion of the first sentence of subsection (b) should be eliminated or should be revised to read "or available for public inspection at the Office of the Federal Register'' (then continuing with the sentence as written).

Response: Nothing in section 4(b) is intended to supplant the APA or change the legal requirements for when a rule is effective. Those provisions stating that policy changes will be posted on the RMA Web site or from agents are simply intended to provide alternative methods for producers to access the changes on the contract change date so the producer can select one that best meets the needs of the particular producer. To avoid confusion regarding the effective date of the changes, the reference to the **Federal Register** has been removed. It is the responsibility of FCIC to ensure that policy changes are made in accordance with the APA.

Comment: A commenter states that section 4(b) strongly suggests the contract of insurance is between FCIC and the producer, which it is not. They believe the existing provision is preferable, although the following could be inserted without harm: "Policy provisions may also be viewed on the RMA Web site at http://www.rma.usda.gov or a successor Web site. * * *'' They recommended the first sentence begin with "All policy provisions, amounts of insurance and other information referred to in this section also will be available * * *'' They stated that alternatively, the insurance provider apparently can fulfill its obligations with respect to publication of contract changes by making available to producers computer equipment with internet access, and asked if that is the proposal's intent. Another commenter asked if the reference to the Web site in section 4(b) is intended to relieve the insurance provider from having to provide notification of changes. They stated if it is not, it should be deleted. The commenter also questioned the purpose for posting on the Web site.

Response: The "agreement to insure'' provision contained in the policy clearly specifies the contract of insurance is between the insurance provider and the producer. FCIC has revised the provision to specify that the changes are available for viewing on the RMA Web site. Section 4(b) specifies the information that must be available by the contract change date and the location of such information. This section does not relieve the insurance provider of the responsibility to provide written notice to policyholders of contract changes. Such notification is still required by section 4(c). The purpose of providing the Web site to producers is to provide an alternative way for policyholders to obtain information.

A few comments were received regarding the last sentence in section 4(b). The comments are as follows:

Comment: A few commenters stated it is unclear what exactly needs to be available at the agent's office. A commenter prefers retaining the current policy language in section 4(b) regarding making the information available from the agent instead of the insurance provider. The commenter believes most insureds have easier access to their agent's office than their crop insurance provider.

Response: As stated above, changes are made to the policy through the rulemaking process, not through the agent. To eliminate the confusion regarding when the contract changes must be made available, FCIC has deleted the reference to agents in section 4(b) and added it to section 4(c). This separation was needed to clarify that the contract changes must be on the Web site by the contract change date but agents do not need to make the information available until after the contract change date. This provides a location for producers to get a hard copy of the changes if they want them prior to 30 days before the cancellation date and they do not have access to the Internet. Further, FCIC agrees that use of the term "local insurance provider'' is not correct since most producers will get the information from their agent and has changed the provision accordingly. The new provision in section 4(c) has also been revised to indicate that agents must make available all of the changes referenced in section 4(b).

Comment: A commenter stated that FCIC, not the insurance providers nor their agents, has the duty of notifying the public of changes to the insurance policy. For this reason, FCIC should revise the final sentence of the section 4(b) to read as follows: "This information may be available to you from your local crop insurance agent.''

Response: The purpose of the requirement that agents make policy changes available is not to provide notice to the public of such changes. The purpose is to provide an alternative source of information for such changes for those producers who do not have access to the RMA Web site or the **Federal Register**. Therefore, agents must have the changes in their offices. However, as stated above, the provision has been moved to section 4(c) and clarified that the changes will be available from the agent after the contract change date.

Comment: A commenter stated the added last sentence implies that crop insurance agents will make their computers available to insureds for searching the RMA Web site.

Response: The reference to the RMA Web site only provides a site where the changes can be found. FCIC has revised section 4(b) to remove the reference to the agent to avoid any perception that the agents' computers are to be made available to access the Web site.

Comment: A few commenters suggested the last sentence be deleted. One of the commenters wanted it deleted in view of the requirements in section 4(c). Some of the commenters stated if the sentence is not deleted they suggested changing "will be available to you'' to "may be requested.'' Some of the commenters stated the phrase "insurance provider'' is used whereas "insurance company'' is used in other places in the policy. A commenter asked what the purpose of the last sentence is, and if it is contradictory with the earlier information regarding Web site posting.

Response: As stated above, FCIC has moved this sentence to section 4(c). The requirement is not contradictory because it only provides an alternative location for the information. FCIC has also revised the provision to specify the information will be available upon request.

Comment: A commenter believes the language in section 4(b) that no longer requires policy changes to be available in the agent's office does not appear to meet the needs of limited resource farmers who may not have access to the internet.

Response: FCIC agrees that policy changes should be available in the agent's office and has revised the provisions accordingly.

A few comments were received regarding section 4(c). The comments received are as follows:

Comment: A few commenters stated it is unclear what constitutes notification. A commenter stated that since RMA does not provide insurance providers with a summary of changes to the Special Provisions, how does RMA expect insurance providers to provide a summary of changes to policyholders. The commenter further stated this subsection seems inconsistent with (b) above. They asked what RMA's overall intent is for this issue. They asked whether it is the insurance provider's burden to notify of changes, or the policyholder's burden to check the Web site. The commenter stated that in the past, RMA has taken the position for its direct policies that once it was

published in the **Federal Register**, the burden was on the policyholder. They asked if that is still the position of RMA.

Response: The provision has been revised to clarify that notification means the insurance provider must provide the insured with a copy of the changes to the Basic Provisions and Crop Provisions and a copy of the Special Provisions because this document may change every year and FCIC agrees that insurance providers should not be required to have to compare the previous and current year's Special Provisions to determine what, if any, changes were made. Therefore, a summary of changes is provided to insurance providers and others at the time actuarial documents are released. Section 4(c) is not inconsistent with the provisions of section 4(b). Section 4(b) is intended to provide a location where changes can be found by the contract change date. However, many producers do not have access to this information so section 4(c) requires insurance providers to provide actual notice of the policy changes. Section 4(c) imposes the burden on the insurance provider to provide the required information. However, nothing in this provision changes the legal principle that once the policy is published in the **Federal Register**, producers are presumed to know what is in the policy and can be held responsible for such knowledge regardless of whether they actually received a copy of the policy from the insurance provider.

Comment: A few commenters stated it may help to clarify the reference is to "* * * the cancellation date preceding the effective crop year for the insured crop * * *'' in section 4(c).

Response: The definition of "cancellation date'' refers to the date by which the policy renews for the next crop year. Further, by its very nature, the policy changes must be made before insurance attaches (except for prevented planting). Therefore, the producer knows that the cancellation date must precede the next year's insurance. No changes have been made.

Eliminating the Liberalization Provisions—Section 5

A few comments were received regarding deletion of the current liberalization provision. The comments are as follows:

Comment: A commenter stated that FCIC proposed to delete the provisions contained in section 5, but did not explain its reasons for doing so. The commenter stated that because the removal of the provisions contained in section 5 is a material change to the Basic Provisions, FCIC's failure to provide an explanation precludes them and the public from commenting on said deletion and therefore constitutes a violation of the APA. Accordingly, they request that FCIC explain the basis for deleting this provision and they reserve the right to file comments at a later date.

Response: The Background section of the proposed rule did state why section 5 was being deleted. The **Federal Register** 67 FR 58917 under section 5 states, "Delete the liberalization provisions because they conflict with the preamble to the Basic Provisions.'' Therefore, the public was provided the opportunity to comment on the proposed change and the reason for it and comments were received. No additional comments will be entertained on this issue prior to the finalization of this provision.

Comment: A few commenters recommended the liberalization provision in the current provisions be retained. One of the commenters suggested a legal opinion on the issue. They stated that according to the **Federal Register** explanation, this was deleted because it conflicted with the preamble (opening paragraph) of the Basic Provisions, and they question if this is really a conflict as long as the policy provisions include such a liberalization clause. Another commenter stated this provides policyholder protection in the event liberalization occurs. One of the commenters stated that the preamble is errant since the policy can be revised by written agreement, and added that liberalization allows for some authorized flexibility.

Response: The preamble stated that the policy could not be waived or varied in any way by any person. Section 5 stated that coverage could be broadened, which constitutes a variation of policy terms. Therefore, a conflict existed. FCIC agrees that the policy can be modified by written agreement and has revised the policy preamble accordingly. However, the liberalization provisions cannot be retained because they are difficult to administer, add a level of uncertainty, and could result in disparate treatment of producers. Further, many requests were received after losses had occurred and it was very difficult to determine the affect such change would have on premium. Changes made after losses had occurred also subjected FCIC to significant litigative risk.

Comment: A commenter agreed with deletion of the current liberalization provision. They believe the presence of the language which FCIC proposes to delete is simply an invitation to litigation. The commenter stated that such a provision, moreover, can be misinterpreted as providing a rationale for introducing actuarially unsound changes in coverage.

Response: FCIC agrees with the comment and no change has been made.

Revisions to Acreage Reports and Misreporting of Information—Section 6:

A few comments were received regarding section 6(d). The comments received are as follows:

Comment: A commenter believes the current language in section 6(d) appears to adequately cover both planted and prevented planting acreage revisions. Therefore, they question whether the added language regarding prevented planting acreage is necessary. A few commenters stated there already is a final acreage reporting date in each county actuarial, and recommended that the provisions continue to allow revisions up until that date, rather than as proposed in section 6(d).

Response: The proposed revision is necessary to prevent situations in which producers revise their acreage report to try to claim a different planting intention in order to receive a higher benefit. This change is necessary to protect program integrity by preventing abuse.

Comment: A commenter stated the rule should give examples of the types of circumstances under which consent, as specified in proposed section 6(d), may be given. They believe one such circumstance might well be when government errors are discovered.

Response: FCIC has revised the provision to add criteria upon which consent can be given to revise an acreage report and to restructure it for readability.

Comment: A commenter stated the provisions in section 6(d) address reporting of planted acreage and revising prevented planting acres but leave out what happens if prevented planting acres fail to be reported. They believe the proposed language could give the impression that if the insured failed to report prevented planting acres, they could be added after the acreage report deadline. They suggested the words "or fail to report any prevented planting acreage'' be added in the first sentence after the words "for any planted acreage * * *''

Response: The recommended change could not be made because it would suggest the prevented planting acreage could be added after the acreage reporting date with the insurance providers consent. FCIC has added a provision to clarify that if a producer fails to report any prevented planting acreage on the acreage report, it cannot

be added later. Producers should know all prevented planting acreage by the final planting date or after the late planting period, as applicable. Acreage acquired after such dates would not be insurable as prevented planting because a cause of loss would already have occurred before the acreage was acquired.

Comment: The commenter stated that acreage can be revised with an insurance provider's consent provided it meets certain appraisal requirements and that policyholders who under-report acreage can request to add these acres to their policy with no additional expense to them. They added that the insurance provider then incurs the expense of inspection and if the acres do not make the appraisal guarantee, acres are not increased. The commenter stated that insureds are not charged for failure to report acres correctly and the insurance provider incurs expense for the errors of the insured. They propose charging insureds a fee when insureds fail to report acres and request inspection by the insurance provider. They believe the fee could be based on a flat charge per unit, number of acres, actual expense to inspect or a combination thereof.

Response: There is no authority in the Act to impose other fees in addition to the administrative fee. Further, the SRA precludes insurance providers from imposing fees unless such fees are authorized by the Act and approved by FCIC. No changes have been made.

Many comments were received regarding changes proposed in section 6(f). The comments received are as follows:

Comment: Most of the commenters stated the proposed penalties are much too harsh, will cause undue hardship for those making reasonable or inadvertent errors, and that the current, time tested, provisions should be retained. A commenter stated the proposed revisions to section 6, like those to section 3, reflect FCIC's belief that every error is malum in se. They stated given FCIC's world view, it is not surprising that its proposals, particularly the penalties for the misreporting of acreage, are Draconian. Other commenters requested consideration of an approach other than the proposed "all or nothing.'' Several of the commenters stated the current provisions are more consistent with other forms of insurance in the way they deal with unintentional errors. Another commenter stated the current provisions were too harsh in some circumstances. Some of the commenters stated penalties should be targeted toward willful and intentional misstatements, not inadvertent mistakes. A commenter stated discretion must be given to the circumstances of misreported information and suggested a graduated penalty matrix and claim denial waiver ability for misreported acreage resulting in a liability exceeding the established tolerances. A commenter was hopeful there is still a human side to our society today where a mistake is still possible. The commenter stated FSA corrects mistakes made, but the proposed rule allows no tolerance for crop insurance mistakes.

Response: The purpose of the provision is not to punish but to provide an incentive for producers to take such actions as are necessary to ensure that information is properly reported. FCIC has an obligation to taxpayers to ensure that program funds are properly spent. FCIC has also added provisions that allow the correction of information in certain circumstances and the incorrect information will not be considered as misreported in such cases. The new provisions now take into consideration the severity of the misreporting and should not impact those making small, inadvertent errors. Further, FCIC has revised the provision to clarify that producers will be required to repay any overpaid amounts that result from the correction of misreported information to be consistent with other provisions in the policy that require the repayment of such amounts.

Comment: Most commenters stated the 5 percent tolerance is unrealistic, intolerable and there is no reason to deny claims when information provided on the acreage report exceeds the proposed 5 percent tolerance. They stated the current provisions should be used because they prohibit liability increases after the reporting date (without insurance provider approval) and, in nearly all cases, if an insured misreports acreage, it almost always results in a disadvantage for the insured, because if over-reported, premium is paid on unplanted acreage, and if under-reported, the guarantee is reduced and the claim is paid on the lesser of acres reported or acres determined. Some of the commenters stated that if tolerances remained, the insured should be responsible for only a modest administrative fee and not the full premium.

Response: FCIC has revised the provisions to increase the tolerance to 10 percent, removed the provisions disallowing the payment of a claim while still requiring payment of the premium, and added provisions that require claims be reduced by an amount commensurate with the misreporting in excess of the 10 percent tolerance. For example, if a producer reports 100 acres in the unit and there was actually 150 acres, any payable claim would be reduced by 23.3 percent (100/150 acres = 0.667 and 0.90–0.667 = 23.3 percent reduction). Further, the current provisions regarding over-reporting or under-reporting liability will be retained. Tolerances are a set number. However, to determine whether something exceeds the tolerance there must be a comparison between the reported and actual information, which is what is required in the provisions.

Comment: A commenter stated the changes in section 6(f) create a policy that is strewn with fine print which makes a payable claim nearly impossible if not at least unreliable. Several commenters pointed out most of the measurements used in agriculture are not precise and there is no gold standard. They stated acreage measurements, even by Geographic Information System (GIS), do not generally measure actual surface area, but assume a flat earth. Several commenters stated it is not reasonable to hold farmers accountable for measurement errors made by third parties. Some commenters believe FSA measurements are poorly constructed with uncorrected photos, worn planimeters, or bouncing wheels. They stated in areas of significant slope or in case of errant FSA measurements, the proposed rule would deny claims. Other commenters asked whose acreage determination will be determined to be the "correct'' one, for example, the insurance provider's or FSA's, or others. The commenter recommended this section include a discussion of how the "correct'' acreage is to be determined and by whom, for instance Global Positioning System (GPS), FSA, etc. The commenters stated producers often report acreage that is recorded by "FSA,'' and FSA acres are many times determined to be inaccurate (except that they are used for other farm programs). Other commenters stated that under 4–CP, the FSA compliance manual, farmers whose acreage or production records exceed the five percent tolerance of error are notified of the discrepancy on their acreage or production records and an adjustment is made to their records and payments. They stated producers who have production records with innocent discrepancies are not declared ineligible to receive FSA benefits. Some commenters thought it very confusing to farmers if they are allowed to correct their records without penalty at the FSA office, but their crop insurance information must be error free or they

will be denied coverage. Some commenters asked if the individual will be able to seek recourse against that government agency or if the producer will be prohibited from collecting any payments when the error was beyond his/her control (*i.e.* processing error). A commenter stated the proposal does not take several issues into consideration such as: (a) The degree of the violation; (b) Did the producer measure or employ others to measure the acreage; (c) Did the producer rely on photocopies or past acreage determinations; and (d) Did the producer control the acts contributing to the violation. The commenter believes these types of issues are important to consider because they indicate the violation or error was not a result of fraud.

Response: FCIC agrees the policy must provide a reliable means to cover losses for producers and the proposed provisions regarding "no insurance'' has been removed. FCIC also understands acreage measurements may not be entirely accurate and has added provisions to allow for exceptions for those who exceed the new tolerance because they relied on FSA measurements. In such cases, the information can now be corrected and the reduction in claim for misreporting shall not apply. FCIC understands acreage measurements vary depending on the method used. FCIC has revised section 6(d) to specify that if there is an irreconcilable discrepancy in acreage, the acreage that is determined by the insurance provider through an on farm measurement will be used. If no on farm measurement by the insurance provider is done, the measurement obtained from FSA will be used. FCIC understands FSA may have different methods of adjusting errors. However, because the various programs have different goals and associated issues, it sometimes is necessary to have different consequences for non-compliance. If the government or the insurance company commits the error, the error will be corrected. If a third party commits the error, the producer always has legal recourse against such person. However, it would add substantial program vulnerability to allow corrections for the errors committed by third parties.

Comment: Other commenters stated the proposed provisions would make the product less appealing to producers who do not abuse the program, go way overboard, and will drive many producers out of the program. Other commenters stated the proposal undermines ARPA and places unnecessary burdens on producers that could discourage them from using the program. The commenters added agricultural bankers rely on farmers obtaining crop insurance to cover a major portion of their production risk when approving an operating loan. They stated crop insurance is used as a form of collateral and helps ensure community bank's farm customers will have the ability to repay their operating loans. They believe this is especially true given the current adverse economic conditions caused by severe drought impacting roughly 50 percent of the nation and increased reliance on crop insurance indemnity payments by farmers and their lenders. They stated making the policy so unreliable and uncertain will threaten the ability of many producers to obtain loans from bankers who would be concerned the collateral they thought they had to back up the crop loan may be canceled due to no fault of the producer. Some of the commenters asked who pays if the loss was supposed to repay a bank loan when the claim is denied due to a tolerance issue. They also asked who the banking industry goes after and who gets sued. Some of the commenters stated there is no need to over-react to prevent fraud and abuse, and that from the information available to them, it appears the crop insurance industry is taking significant steps to prevent fraud and abuse and cited preventative measures being worked on such as data mining and spot checking. Some of the commenters also thought the proposal would create a paper work nightmare and stated it will not work.

Response: FCIC agrees the proposed provisions would make the program less appealing to those who do not abuse the program and make it less reliable for lending institutions. However, the above stated revisions should remove the uncertainty and help maintain the reliability of the program.

Comment: A commenter questioned if it is legal to charge premium when denying a claim and stated it is likely the provision will be challenged. Some commenters stated the provision requiring premium for no coverage is illegal and in violation of insurance principles.

Response: FCIC has removed the consequence of no insurance while still requiring the payment of the premium and replaced it with a payment reduction commensurate with the misreporting. Since producers will still receive coverage, charging the full premium is appropriate.

Comment: Several commenters recommended FCIC simply adjust the acreage and/or yields to reflect the actual conditions when an error is made, since the error could be made through no fault of the producer and with no intent to defraud. A commenter stated this type of allowance would be consistent with other provisions of the proposed rule, such as those allowing cancellation of multiple contracts when the extra contracts are not the fault of the producer. The commenter stated the proposed provision is more restrictive than other types of insurance policies such as property or commercial insurance where errors are taken into consideration and the amount of the indemnity payment is adjusted accordingly, but not completely denied.

Response: FCIC does not agree that errors should simply be fixed. Fraud is not the only issue. Any misreporting can result in increased outlays and cause premiums to increase. If no consequences are in place for misreporting, there would be no incentive to accurately report information and program abuse and costs would increase. However, the consequences of misreporting have been revised to take into consideration the extent of the error. While other lines of insurance may be willing to accept the risk of misreported information, the crop insurance program uses taxpayer dollars so there is a heightened duty to ensure such dollars are properly paid.

Comment: A commenter stated the proposed penalties imposed for under or over reporting acreage will cause an explosion of lawsuits, all of which will be lost. The commenter also stated the proposed provision would create unbearable exposure for agents, and the new language requires revision of all errors, no matter how small, and will create tremendous administrative expense. The commenter stated the provision should refer to "reported liability'' instead of "corrected liability'' to have true tolerance—otherwise there is no tolerance.

Response: The new provisions now take into consideration the severity of the misreporting and should not impact those making small, inadvertent errors. In addition, this should significantly reduce the litigative risks.

Comment: A commenter thought some producers seeking to defraud the government would deliberately seek to keep their misstatements within the 5 percent margin of error, while some unintentional errors may deviate from the correct report by more than 5 percent. Some commenters stated the proposed language would encourage under-reporting of liability within the 5 percent tolerance if it will be corrected at loss time. They also stated the proposed rule already includes a potentially costly consequence for innocent errors, in that the proposal says if the Corporation or insurance

provider discovers a producer has misreported any information (including, presumably, within the 5 percent margin of error) the producer may be required to document the producer's acreage in future years, including an acreage measurement service at the producer's own expense.

Response: FCIC agrees that producers may try to misreport within the tolerances, but this is true for whatever tolerance is set. There must be a balancing test between meeting the needs of those producers who have inadvertent errors and those who may seek to defraud the program. However, even information misreported within tolerance will be subject to the under and over-reporting provisions.

Comment: A commenter asked how claims can be paid at the corrected liability (105%) without correcting policy coverage and the associated premium.

Response: The tolerance only determines when an additional consequence will apply. Any time there is incorrect information reported, the policy coverage should be corrected or limited as necessary, and any adjustments necessary must be made.

Comment: Some commenters stated that in fraudulent situations there already exist other punitive measures at RMA's disposal. The commenters believe if the proposed provisions are implemented, the producers who will be most affected by the proposed tolerances and attendant sanctions will be those who simply make inadvertent errors. They stated if a tolerance is maintained, they believe it should be more reasonable and consider exceptions. They also stated many growers have noted that it is often logistically impossible for an acreage measuring service to complete its survey of a parcel of land by the specified acreage reporting date. Therefore, they believe when an insured producer has contracted for the services of an acreage measuring service, the insured should only be required to file a preliminary acreage report by the acreage reporting date, which should be followed by a reasonable time period (*e.g.*, 30-days) for the insured to file a final acreage report and have his production guarantee adjusted accordingly without penalty. A commenter stated acreage reports for wheat covered under the winter coverage endorsement are required before acreage is measured by FSA and an allowance needs to be made for this.

Response: FCIC agrees there are measures in place to deal with fraudulent situations. However, as stated above, the measures in this rule are intended to cover all errors, not just fraud. FCIC agrees that in some cases, final determination of acreage must be delayed until acreage measurement services are performed and has revised section 6(d) accordingly.

Comment: Some commenters stated the proposed provisions would not meet the following purpose stated in the preamble "* * * stronger sanctions are imposed to ensure that producers completely and accurately report material information'' and the statement that the provisions "will better meet the needs of the insured.'' They did believe the proposal would reduce participation by honest producers who are hit with tough penalties for accidental errors. A commenter stated the proposed provisions might discriminate against the small producer who may report 21 acres and have 19 acres at loss time and not be paid the loss and still owe the premium. They suggested FCIC consider using a minimum number of acres, such as 5 acres.

Response: The needs of producers are met because incorrect payments can be reduced, which can result in reduced premiums. It is impossible to set a *de minimis* amount of acreage that would be fair to both large and small producers. As stated above, FCIC has revised the provision to make the consequences commensurate with the offense and increased tolerance levels to mitigate the consequences for inadvertent errors. This should avoid any discrimination.

Comment: A commenter stated the proposed provisions would allow unit liability to increase or decrease at loss time, and did not believe this should be allowed after damage to the crop.

Response: FCIC generally agrees unit liability should not increase after damage to the insured crop. The provisions retained in this final rule do not allow such increases in liability.

Comment: A commenter suggested revising provisions to allow the acreage found to be misreported in excess of 5 percent to be revised to what is correct if it results in a lower liability yet the insured pay the original premium amount, including prevented planting acres reported. They further recommended allowing a claim to be paid based on the liability of the reported amount but charge premium on the correct amount of acreage, if the acreage is under reported by more than 5 percent. A few commenters recommended retaining the current misreporting provisions but to add a penalty equal to what the premium would have been on an unreported unit.

Response: As stated above, the 5.0 percent tolerance has been removed. However, the consequences of misreporting recommended would not affect any catastrophic risk protection policies since no premium is owed. FCIC has revised the provision to reduce any claim paid so it will affect all producers, regardless of the coverage level selected.

Comment: Some commenters thought the provisions could conflict with section 6(d), which allows late revisions with the insurance provider's consent, and (e), which states the insurance provider "may elect'' to use reported information or the information determined to be correct (while (f) indicates "corrected liability'' will be used with penalties attached). Another commenter stated the proposed language has the appearance of taking away the ability to revise submitted acreage reports even prior to the acreage reporting date which is allowed by another paragraph in section 6.

Response: FCIC has revised both section 6(d) and 6(f) to remove any inconsistencies. FCIC intended to restrict revisions to the acreage report when the acreage has been prevented from being planted even if the acreage report was submitted prior to the acreage reporting date. The acreage report can still be revised prior to the acreage reporting date for planted acreage under certain circumstances.

Comment: A commenter questioned how this provision affects the rest of the policy when only one loss unit is out of tolerance.

Response: The reductions in the claim for misreporting apply on a unit basis. Other units insured under the policy that are within tolerance would not be affected by the claim reduction.

Comment: A few commenters stated the provision proposed in section 6(f)(2) totally disregards tolerances that may already be in place, such as tolerances recently implemented in the Pacific Northwest.

Response: In most situations, the tolerances will no longer be applicable. Under certain circumstances, revisions to the acreage report will be made and the originally reported information will not be considered as misreported.

Comment: A commenter suggested section 6(f) be revised to read as follows: "You are responsible for the accuracy of all information reported by you, or by someone else on your behalf, on the acreage report and you should verify the information prior to submitting to us.''

Response: FCIC has revised the provision to specify that the producer is responsible for the accuracy of all information contained in any reports. However, current section 3(i) has been moved to section 2(k) and revised to specify that the producer is responsible

for the accuracy of all information submitted on their behalf.

Several comments were received regarding section 6(g). The comments are as follows:

Comment: Some commenters asked if the language proposed in section 6(g) would allow insurance providers to charge insureds for acreage measurement services. Some of the commenters thought this would be similar to charging for appraisals in traditional property and casualty policies. One of the commenters thought this issue should be addressed in the SRA, but stated the presence of this language in the policy raises the issue and that it should be addressed for consistency.

Response: There is no basis for the insurance provider to charge a fee. Under FCIC's procedures, the insurance providers are required to verify acreage and are compensated for this obligation under the administrative and operating subsidy. If the insurance provider elects to provide acreage measurements under section 6(h), they still cannot charge for it because such service will be considered as part of their responsibilities under the procedures.

Comment: A commenter asked whether insurance providers could provide the acreage measurement service or use FSA measurements, and on what basis the insurance provider elects to require third-party measurement services in subsequent years. The commenter also pointed out that a policyholder can easily switch insurance providers to avoid the requirement and associated expense.

Response: The insurance providers are in the best position to determine the possible reason for the misreporting and whether there is a risk that information will continue to be misreported in subsequent crop years. If the insurance provider feels that a risk of misreporting still exists, it can require documentation to support the reported information. It would be very difficult to set standards for when the information is required.

Comment: A commenter stated the proposed provision is confusing because acreage measurement cannot be performed or documented after the fact.

Response: This section contains a requirement to substantiate information reported in subsequent crop years. It is not intended for the purpose of making corrections in the crop year that information was misreported. No changes have been made.

Clarification of Premium and Administrative Fees—Section 7

Comment: A few commenters wanted clarification of provisions in section 7(a) regarding the time premium is due. One of the commenters stated they should be able to bill the policyholder anytime after premium is determined.

Response: The annual premium is earned and payable at the time coverage begins. However, many producers may have used their available capital to produce the crop and there has always been concern that billing producers up front would discourage or prevent participation. This problem still exists today and it would be detrimental to producers to change this provision. Producers must generally be able to use the proceeds of the crop or their insurance, as applicable, to pay the premium to mitigate the financial barrier to participation in the program. No change has been made.

The following comments were received regarding the provisions in section 7(b) that specify premium or administrative fees owed may be offset from an indemnity.

Comment: Several commenters agreed with the change.

Response: The proposed changes have been retained in the final rule.

Comment: Some commenters wanted to add "replant payment'' with indemnity and prevented planting.

Response: FCIC has clarified throughout this final rule that a replant payment is different from an indemnity or prevented planting payment. FCIC makes the distinction based on the fact that a replant payment is to reimburse for the costs of having to replant the crop, not indemnify for any crop losses. No change has been made.

Comment: A few commenters recommended changing "may'' to "will.'' A few commenters recommended keeping "may'' so the insurance provider has the option, but not the obligation to offset premium due from indemnities. One of these commenters recommended changing it to "We may deduct from any replant payment, prevented planting payment or indemnity due you under any policy issued by us under the authority of the Act, any amount you owe us related to any insurance policy issued by us.'' A commenter asked why the reference to "crop insured with us under the authority of the Act'' was removed.

Response: FCIC has revised the provision to use "will'' instead of "may'' to be consistent with section 2(e). Offsets cannot be discretionary without making producers subject to disparate treatment based on their insurance provider. FCIC has revised section 2(e) to add that the amounts must be due for policies authorized under the Act and section 7(b) cross-references section 2(e). Therefore, it is not necessary to add the language to section 7(b).

Comment: A few commenters asked to have the ability to offset outstanding premium due under a negotiated payment agreement with the producer.

Response: There is nothing in the policy that precludes the insurance provider from including in their payment agreement a provision that would allow offset. However, if the payment agreement does not contain such a provision, no offset can be permitted unless such offset is mutually agreed to by the producer and insurance provider.

Comment: A few commenters recommended section 7(b) clarify that premium due for fall crops could be withheld from fall payments and premium due from spring crops could be withheld from spring payments (but not both unless there is a past due situation).

Response: FCIC does not agree with the recommended change. If a premium is due for a fall crop it should be withheld from the next indemnity or prevented planting payment due, regardless of whether the indemnity due is for a spring or fall crop. The insurance provider should not have to pay indemnities when there is an outstanding amount owed.

Comment: A commenter stated further clarification is needed to determine if the word "offset'' means the same as "administrative offset'' in section 2(e). If so, there appears to be a conflict between the two.

Response: FCIC has defined the term "offset'' and the term "administrative offset'' is only used in conjunction with the governments ability to offset amounts owed to it. Therefore, there should no longer be confusion between the two sections.

Comment: A commenter is concerned about the "zero tolerance'' provision of the program, where non-payment of premium by termination date results in ineligibility to participate in the program—without recourse.

Response: FCIC believes it is necessary to enforce premium payment provisions, including the consequence of ineligibility for failure to make required payments. Failure to do so could result in significant administrative difficulties involving collections, increased accounting, etc. Further, the program accommodates producers as much as possible by generally delaying the payment of premium until after the growing period to allow the premium to be paid from the crop proceeds or offset from the indemnity or prevented planting payment. To allow producers to

continue to participate when they have not paid their premiums could cause program abuse. However, producers do have recourse. They have the ability to challenge the amount owed with the insurance provider through the arbitration process. They can further appeal their inclusion on the Ineligible Tracking System to the National Appeals Division. No changes have been made.

Clarification of Insured Crop—Section 8

The following comments were received regarding section 8(b):

Comment: A few commenters recommended section (b) be left as currently written.

Response: The current provisions can not be retained because there have been questions regarding insurability of specific practices and the use of the Special Provisions for exclusions in the last few years that demonstrate they need clarification.

Comment: A commenter asked for clarification of the section.

Response: This proposed section has been revised to specify that if the acreage does not qualify as planted acreage the crop is not insurable or if a crop type, class or variety or the conditions under which the crop is planted are not generally recognized in the area, the crop is not insurable. This was done to set an objective standard and make the provision easier to administer. This standard is similar to standards used elsewhere in the policy so there is more consistency among policy provisions. FCIC has retained the provisions regarding when information necessary for insurance is not included in the actuarial documents but has moved it to a new provision for readability. FCIC has removed the reference to "adapted to the area'' because such determinations are now included in determinations of "generally recognized.'' The provision regarding whether a practice, type, class or variety has been excluded from the actuarial documents has been moved to a newly created section 8(c) and clarified to indicate that specific exclusions do not mean everything else is insurable. FCIC also revised the definition of "insured crop'' to remove the references to the Basic and Crop Provisions and refer to the policy to be consistent with section 8, which also refers to the actuarial documents.

Comment: A few commenters recommended the definition in parentheses at the end of the sentence in (b)(1) be removed. A commenter recommended the last sentence in section 8(b)(1) that references written agreements be removed from that section and be included in either the definition of written agreement or in section 18, which covers written agreements.

Response: FCIC agrees that the parenthetical is not appropriate in this section and has moved it to section 3 and clarified that it is only for high risk land that transitional yields and premium rates can be changed.

Comment: A few commenters stated section (8)(b)(2) states "if any farming practice, type, class, or variety is not established or widely used in the area, it may not be considered a good farming practice.'' This sentence fails to reflect section 123 of ARPA and must be modified in the final rule. A few commenters stated the "good farming practice'' is not objective and makes it difficult for producers and insurance providers to know if a crop is insured or not, and it should be changed.

Response: FCIC has removed all references to "good farming practices'' because this determination is separate and distinct from a determination of insurability. FCIC also revised the definition in the June 25, 2003, final rule to make the standard more objective. Further, FCIC agrees that "widely used'' should not be used to determine insurability and has revised the provision to use the standard of "generally recognized'' for the area to determine insurability.

Comment: A commenter requested the provisions state when a crop is not covered. A commenter stated that better wording for section 8(a)(2) would be: "A farming practice, type, class or variety that is not excluded by the policy may not be insurable.'' But this provision still requires FCIC to develop an exhaustive list of "good farming practices'' that are established, general to the area, and widely used.

Response: As stated above, all references to "good farming practices'' have been removed. However, there are so many factors that could render a crop uninsurable, it is impossible to list them all. FCIC has set an objective standard for making such determinations to add stability and consistency to the program.

Comment: A few commenters believed the use of "expressly'' is misleading and "just because'' is un-professional language to use in an insurance contract.

Response: FCIC agrees with the comment and has revised the provision accordingly.

Comment: A few commenters asked if section 8(b) covers substitute crops.

Response: Section 8(b) is applicable to all crops.

Comment: A commenter recommended the entire section 8(b) be altered to read as follows:

"(b) A crop which will NOT be insured will include, but will not be limited to, any crop:

(1) For which the information necessary * * *;

(2) Grown using a practice or a type, class or variety that is not adapted to the area or is expressly excluded by the policy or the actuarial documents; and

The policy's failure to expressly exclude a specific farming practice, type, class, or variety does not mean that the practice, type, class, or variety is insurable. If any farming practice, type, class or variety is not established or widely used in the area, as determined by FCIC or us, it may not be considered a good farming practice. It is your responsibility to determine prior to planting whether the practice, type, class, or variety is insurable under this section.''

Response: The recommended revision has not been used because the provision has been revised as indicated above. Additionally the recommended language would require FCIC to determine whether or not certain types, classes, or varieties are adapted in an area. FCIC believes these determinations should be made by agricultural experts for the area.

Comment: Two commenters asked if section 8(b)(4) should be revised since there is a new definition of "second crop.''

Response: FCIC agrees section 8(b)(4) should not use the term "second crop'' and has amended the provision accordingly.

Clarification of Insurable Acreage—Section 9

Comment: A commenter recommended section 9(a) be revised to add the words "in the county'' between the words "insurable'' and "except.''

Response: Since no changes to this provision were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter stated that "three'' versus "3'' should be consistent in sections 9(a)(1) and 9(a)(1)(i)(A) and also in item B with "4''. The commenter stated this language creates a burden on the grower, and asked how the agent knows to ask. The commenter believes this creates errors and omission exposure to the agent that is not reasonable. The commenter also asked

for the purposes of "harvested'' as used herein, if they are to use the applicable "harvest'' definition found in the crop provisions.

Response: FCIC agrees these terms should be consistent and the numbers contained in paragraphs 9(a)(1)(i)(A), 9(a)(1)(i)(B), and 9(a)(1)(iii) have been spelled out. FCIC does not agree that section 9(a) created a burden on the producer or unreasonable exposure to agents. The purpose of this provision is to ensure that only acreage that has the capability of producing a crop is insured. Agents are only required to explain the operations of the crop insurance program to producers, including conditions required for acreage to be insurable. Therefore, the agent only commits an error if the agent fails to inform the producer of the policy requirements. It is the obligation of the insured to provide the information. The definition of the term "harvested'' contained in the Crop Provisions should be used. However, if there are no Crop Provisions covering the crop, the common meaning of the term should be used.

Comment: Several commenters believe it is unclear who is responsible for the burden of proof regarding the requirements found in section 9(a)(1). They believe it is unclear whether the agent is required to ask or the insured is required to volunteer the information.

Response: It is the agent's responsibility to make sure the producer is aware of and understands insurability requirements so that he or she can properly report insurable and uninsurable acreage. It is the producer's responsibility to provide the information when acreage would not meet the insurability requirements of section 9(a)(1).

Comment: One commenter believes the provisions in section 9(a)(1) imply the agent needs to be involved in the loss process, which they stated is not acceptable in the eyes of compliance.

Response: Determinations of insurability should be made at the beginning of the crop year, not after a loss has occurred. Loss adjusters are required to verify that the acreage on the acreage report is insurable. No change has been made.

Comment: A few commenters stated the provisions in section 9(a)(1) need further clarification because the language as written could be interpreted to mean that it only takes one year in the past three that a crop was not planted and harvested to make the acreage uninsurable. Therefore, any acreage with a loss in one of the past three years that was not harvested would be uninsurable. They believe the language could also be interpreted to mean that two out of the past three years where the acreage was planted and harvested is good enough. A commenter recommended using the following: "(1) That has not been planted with the intention of harvesting within one * * *.''

Response: FCIC agrees the provision requires clarification and has revised the language to indicate acreage is insurable unless it has not been planted and harvested in at least one of the three previous crop years. FCIC also revised the provision to add that the acreage is insurable if the acreage was insured in any of the past three years. This was done to clarify that prevented planting acreage had to be insured because it would be extremely difficult to establish when acreage was actually prevented from being planted in past years unless there is an insurance record and to address the situation where the acreage was insured but not harvested during the last three crop years. The recommendation to use language based on the intention of the producer has not been used because of administrative difficulties in determining intent.

Comment: Several commenters stated that the provisions in section 9(a)(1) make it very difficult to verify on an acreage basis. A commenter asked that the current provisions contained in section 9(a) be retained.

Response: The current provisions have been subject to multiple interpretations and must be clarified. This new provision is intended to identify acreage where it may not be appropriate to insure a crop because of the production capacity of the acreage. There are means to determine the previous use of the acreage through FSA records, satellite imaging, or even previous insurance records. This provision is necessary to protect program integrity. No change has been made.

Comment: One commenter stated the provisions in section 9(a)(1)(i)(A) and (B) that require harvest may be a problem if the crop is destroyed by an insured cause of loss.

Response: The concern is addressed in this final rule by revising section 9(a)(1) to allow insurance for acreage that has been insured in any of the three previous crop years. The requirement in section 9(a)(1)(ii) has been deleted because of the revision in section 9(a)(1).

Comment: Several commenters asked that section 9(a)(1)(i)(C) not be deleted as proposed. The commenters stated that in areas with poor drainage and wet cycles there are areas of cropland that do dry up after the final planting date. They believe deleting the current provisions contained in section 9(a)(1)(i)(C) would be very discriminating to the prairie pothole region of the country. The commenters added that not all excessive rainfall disappears in several weeks like river flooding. Commenters questioned what the issue is if a producer has not planted a crop on the ground in the past three years. They noted there are justifiable reasons, too dry, too wet, etc. The commenter believes the proposed provisions potentially penalize a grower for making prudent planting decisions.

Response: FCIC agrees provisions allowing insurance for acreage that has been prevented from being planted for the three previous years should be retained. However, rather than retaining section 9(a)(1)(i)(C), section 9(a)(1) has been revised to allow insurance for such acreage if it has been insured in any of the previous three crop years.

Comment: A few commenters were concerned if the proposal was intended to make acreage that has had a prevented planting payment for three consecutive years uninsurable. A commenter stated that such acreage should be insurable.

Response: FCIC agrees acreage referenced in the comment should be insurable provided the acreage was insured, and has revised section 9(a)(1) to accomplish this as stated above.

Comment: A commenter stated a compromise to restricting insurability for acreage that has been prevented from being planted for the previous three crop years should be considered. The commenter suggested reinstating the provisions of section 9(a)(1)(i)(C) with additional language similar to the following:

"Due to an insurable cause of loss that prevented planting. However, prevented planting will not be an insurable cause of loss until planting viability has been re-established. Should the acreage again be prevented from planting, no indemnity will be paid nor premium due on the acreage for the current crop year, or * * *'' Another commenter recommended the prevented planting issue be left as it is currently. Another commenter stated insurance for acreage that is prevented from being planted is a crucial part of the safety net for farmers who have been repeatedly hit by drought or flood in recent years. The commenter stated it is farmers who have been struck by disaster several years in a row who have the greatest need for continued insurance coverage, for example, they may need to show proof of insurance in order to obtain operating credit. They believe it would be unfair

to pull the coverage away from the farmers because they have had to use it.

Response: As stated above, prevented planting is now covered under section 9(a)(1) provided the acreage was insured. The current prevented planting provisions impose some restrictions because there is a limited time period in which the cause of loss must occur. If the cause of loss occurs outside of that period and no crop was planted and harvested on the acreage, the acreage would not insured for the crop year. If this occurs for three subsequent crop years, the acreage is not insurable. If in any one of the last three crop years, the acreage was insured and qualified for prevented planting, the acreage would be insurable for the subsequent year. No change has been made.

Comment: One commenter stated they do not understand why changes were proposed in section 9(a)(1)(i). They believe the proposed language appears to be more confusing than the current provision, therefore, they recommended retaining the current language, but deleting subsections 9(a)(1)(i)(B) & (C).

Response: Past inquiries have indicated a need for clarification of this provision. Changes were proposed to clarify the number of years that acreage cannot be planted to comply with another USDA program, to avoid uninsurability when a de minimis amount of acreage is uninsurable, and to remove provisions that allowed insurance for acreage that was prevented from being planted for the three previous years. The provisions have been further revised as stated above to provide additional clarification. FCIC does not agree that section 9(a)(1)(i)(B) should be deleted because rotational practices sometimes require the same crop to remain on the acreage for three or more years. This acreage may not have been planted during those years, such as alfalfa, and such acreage may not be insurable. Therefore, if section 9(a)(1)(i)(B) were deleted, the acreage would not be insurable. Section 9(a)(1)(i)(C) has been incorporated into section 9(a)(1) as stated above.

Comment: A few commenters suggested the 5 percent tolerance proposed in section 9(a)(1)(iii) is too restrictive because it would require over 30 acres in a section. The commenters recommended the 5 percent be reduced to 1 to 2 percent.

Response: The suggested change would be more restrictive than the proposal. The purpose of this provision is to identify a de minimis amount of acreage that if added to the unit would not significantly impact a loss on the unit. This is intended to apply in situations such as when fence rows or structures are removed and the acreage is converted to crop land. The provision does not require a full five percent of the acreage in the unit to be added. Any amount of acreage up to five percent of the acreage in the unit can be added without requiring a written agreement. No change has been made.

Comment: Regarding section 9(a)(3), a few commenters stated, based on their past experience, only FCIC knows when actuarial documents do not provide the necessary information. The commenters further stated that in reality, the option is unavailable.

Response: The reference to the information on the actuarial document was used because there are instances where the actual premium rate is not on the actuarial document. The actuarial document contains a premium rate or a formula to determine the premium rate for each insurable situation. If a rate can be determined for the acreage in question based on such formulas, it is insurable. If a premium rate cannot be determined from the actuarial documents, the acreage still may be insurable if a written agreement provides a rate. No changes have been made.

Comment: A few commenters stated the provision proposed in section 9(a)(4) which is currently (a)(3) should not be changed. They believe the phrase "as soon as it is practical'' creates ambiguity and leaves it open to interpretation as to whose decision this is. An additional commenter stated the phrase "as soon as it was practical to do so'' establishes a requirement that cannot reasonably be implemented or enforced. They stated as they previously noted, and certainly as universally recognized among producers and insurance providers, simply determining whether it is "practical to replant'' is a very difficult task. They believe requiring the additional determination of the earliest date upon which it was "practical to replant'' assures conflict and inconsistency for the sake of insignificant benefit to the program. Another commenter stated the proposed change is too subjective and impossible to defend or prove.

Response: FCIC agrees the phrase "as soon as it is practical'' should be removed and has deleted this proposed change from the final rule.

Comment: Several commenters commented on the provision in section 9(b). Some of the commenters stated that RMA should be responsible to help make definitive determinations regarding the amount of irrigation water available at the beginning of the insurance period rather than after the fact. They stated the phrase "knew or had reason to know'' is difficult to substantiate, especially since water district authorities are reluctant to predict the amount of water that will be available at a later time. A commenter asked what "adequate water'' is if the crop is not under full irrigation and some rainfall is needed in addition to irrigation water to produce a crop. One commenter recommended clarifying provisions regarding irrigation practice requirements. A few of the commenters stated the provisions remain ambiguous as they relate to coverage in adverse weather conditions such as drought. One of the commenters stated that the absence of a more precise description of a "good irrigation practice'' in section 12(e) is a serious concern for many producers and recommended language be added to acknowledge that conditions may arise when continued irrigation is no longer beneficial to the crop. One commenter asked who is to determine what acres should be reported as irrigated versus non-irrigated in drought or dry situations, and how this should be administered. The commenter stated policy language that does not have a clear way of being administered should not be issued.

Response: Since no changes to sections 9(b) or 12(e) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended changes, the recommendations cannot be incorporated in the final rule. No change has been made.

Clarification of Share Insured—Section 10

Comments received regarding section 10(b) are as follows:

Comment: A commenter supported the proposed new requirement that a single policy be required where the same people are involved in multiple farming operations. The commenter believes this change would help prevent abuse.

Response: Based on other comments received, FCIC agrees that the proposed provisions could affect legitimate entities in ways that were not intended, would add complexity to the program, and could be circumvented. However, there are significant problems within the program that are caused by the use of multiple entities that can be used to circumvent program requirements. An examination of the program has revealed that there may be procedures that provide incentives for the creation of such entities and abuse of the system. Instead of precluding the insurance of individual entities, FCIC has revised its

procedures to reduce incentives to abuse the program through the creation of multiple entities. The procedures have been amended to require that previous production records be used to establish the insurance guarantees any time a producer has been involved with a particular farming operation. This requirement will reduce instances in which producers create separate entities to avoid using records of production established by other entities in which they have been involved. The proposed revisions to section 10 have been removed in their entirety.

Comment: Many commenters recommended deleting the language added to section 10(b). Some stated the existing language is far more clear than the proposed language. A commenter believes that all parties on one policy will not work. They stated that farm partnerships or corporations operate land over hundreds of miles and that one partner may live in a community 100 miles away from another producer. They stated that producer A may want his policy in his home town while producer B wants his coverage with his agent in his home town with his existing insurance provider. The commenter believes requiring all of these issues be handled as "one'' does nothing for the benefit of the insured, insurance provider, or RMA. The commenter finds that when there is more than one insurance provider involved in a loss situation, each insurance provider "patrols'' the other to make sure the submitted data is correct. They believe this is far too cumbersome and serves no benefit and, therefore, urged this provision be dropped.

Response: See response to first comment under this subsection.

Comment: An additional commenter stated no person should be permitted to receive an indemnity payment unless they have an insurable interest in the property lost or damaged. The commenter added that the proposal perpetuates this error by permitting landlords and tenants to insure each other's interest, even though they have no economic or legal ownership of the other's interest. An additional commenter stated the provisions do not appear to address insuring the persons share of a corporation, partnership, etc., when the corporation and/or partnership does not have a policy. The commenter stated that current procedure contained in the Crop Insurance Handbook (CIH) requires this acreage to be reported on the person's policy. A few additional commenters stated that the proposed changes in section 10(b) launch a very wide net that encompasses everyone who is even remotely related to the insured to be disclosed and included on the policy. The commenters stated that, aside from the fact that it can be very difficult to determine if all necessary persons are included under the policy, it also appears to be a rather blatant violation of the freedom of contract between the producer and the insurance provider, as this provision would dictate who would be incorporated as a contracting party. The commenters stated that if this language were included in the Basic Provisions of the policy, it would probably not be an enforceable contract, as all parties did not voluntarily enter into the contract. They stated that a corporation is a recognized legal entity that is separate from its shareholders, and added that the proposed language would also require "piercing the veil'' of the corporation to expose all persons with whom the insured might have remote affiliations. The commenters stated that the corporate veil may only be pierced through a judicial process if it is found that the officers of a corporation committed intentional or illegal acts outside the scope of their duties. The commenters believe it is unreasonable for there to be a presumption of wrong doing by every policyholder to warrant a court proceeding to "pierce the veil'' of every corporation affiliated with the insured. Another commenter believes the proposal would eliminate two aspects of the program they feel are today working well for farmers. The commenter stated that first, under the proposal, producers would no longer be able to separately insure separate shares in the same crop, which is a common practice today and works well for both landlords and tenants.

Response: See response to first comment under this section.

Comment: A commenter suggested separate policies be issued for each insured person to help mitigate the potential for fraudulent activities.

Response: See response to first comment under this section.

Comment: A few commenters stated that if section 10(b)(2) is retained, the last sentence should be revised. They stated for example, Bureau of Indian Affairs trusts often do not have an SSN/EIN, but instead use the allotment number to create an identification number as referenced in Exhibit 32 of the Crop Insurance Handbook (CIH).

Response: See response to first comment under this section. FCIC agrees that BIA trusts may not have an SSN or EIN and has revised section 2 to provide an alternative means of reporting.

Comment: One of the commenters added that insurance providers have some concerns with this clause, which allows the additional entity's share to be given the policyholder's APH and guarantee for the unit. The commenter stated that this allows abuse of the program because those with lower APHs will want to insure their share on the person's policy with the higher APH. They stated that this can create a serious problem in high loss ratio counties and that each entity should be required to use his/her individual APH records.

Response: See response to first comment under this section.

Comment: A commenter stated that landlords who wish their tenants to handle their insurance affairs can provide a power of attorney allowing them to do so. The commenter added that while this would require a separate policy, it will be easier to administer. Another commenter recommended the tenant and landlord each insure their individual interests through individual policies, and separately provide the identifying information the proposal requires.

Response: See response to first comment under this section.

Comment: A commenter stated that trying to gather the information about all of the husbands, wives, and children who are involved would be virtually impossible. They stated that the proposed provision would change the fundamental role of an insurance agent from being someone knowledgeable in the policy, its provisions, and how they apply to a growers situation to that of a private investigator. The commenter feels this provision implies there is a great deal of fraud within the system that must be prevented. They believe if that is true, every legitimate legal means to prevent the fraud should be used, but it should be done by trained fraud investigators and not the insurance agents. The commenter stated that agents' backgrounds and training do not prepare them for duties such as this. The commenter added that because agents are not trained in gathering this information and verifying its legitimacy, they now have a significant liability exposure. The commenter added that currently, many agents have trouble obtaining this coverage at all. The commenter feels that implementing this change would result in eliminating the agency force that has done a very commendable job of delivering this product to this point. A few other commenters suggested that "child, or any member of your household'' be removed, because identification of such individuals and subsequent enforcement will be very difficult. An

additional commenter asked if agents or insurance providers will be held accountable for enforcement, and if so, if they will be held liable for incorrect information given to them by other parties, including FSA. They do not believe an agent can be expected to validate the share arrangements of every insured farmer.

Response: See response to first comment under this section.

Comment: A few commenters stated the language contained in section 10(b)(1) indicates that the insured share includes that of "* * * your spouse, child, or any member of your household * * *'' which they believe conflicts with the definition of "substantial beneficial interest,'' which only includes spouses and children who reside in the household (if the children are not removed), not non-resident children or other household members.

Response: See response to first comment under this section.

Comment: A few commenters stated that if the language in section 10(b)(1) remains, procedural questions need to be addressed (though perhaps not in the policy) regarding proof of separate farming operations. The commenter noted that currently, each spouse may prove that he or she has totally separate farming operations in certain limited situations, however, with the addition of children and other household members who may derive their income from something other than farming, it may be difficult to prove that they have "separate'' operations; A few additional commenters stated that they understood the intent (as indicated in the **Federal Register** explanation) of the provisions proposed in section 10(b), but stated it will be very difficult to administer and enforce.

Response: See response to first comment under this section.

Comment: A commenter stated they understand the revised provisions contained in section 10(b) are trying to stop the insuring of high risk land under separate policies, however, they believe that if an entity is recognized as independent by the FSA and IRS it would seem that to be consistent it should be considered a separate entity for crop insurance purposes as well.

Response: See response to first comment under this section.

Comment: A few commenters doubt that data reconciliation ramifications have been considered sufficiently to make the change in section 10(b).

Response: See response to first comment under this section.

Comment: A few commenters do not believe the new wording in section 10(b), "* * * or under your policy for any insured crop * * *'' is as clear as the current sentence. An additional commenter stated FCIC's determination of the entities would not coincide with FSA's or other government programs. A few additional commenters feel the change from "may'' to "will,'' in section 10(b) could be understood to include uninsurable acreage. A few additional commenters stated that the first sentence is lengthy and unclear, and in fact, the **Federal Register** explanation is superior. The commenters doubt this is intended to mean that an insured individual may no longer insure his/her share of an uninsured partnership that is not composed entirely of other family members, but they feel the new language may be interpreted that way. The commenters stated they do not have any serious objection to what FCIC is trying to accomplish, but they are not sure that the objective can be accomplished with any degree of certainty. They stated they trust that feasibility studies have been performed to see if this is even possible to administer and that procedures will be made readily available by RMA in order to implement the provisions of section 10(b)(2) effectively.

Response: See response to first comment under this section.

Comment: A commenter asked if the provisions proposed in section 10(b)(2) are finalized as proposed, what happens with currently insured policies that would no longer be permissible under this language. A few commenters were concerned about the effect on unit structure. One of the commenters asked if these provisions survive to final rule, how basic and optional units will be determined under these provisions. A few commenters stated the provisions are unclear as to who would receive the 1099 if losses were paid. A few of the commenters presumed the named insured would receive the 1099, but believe this becomes more complicated when other parties are involved.

Response: See response to first comment under this section.

Comment: A commenter stated that the proposed provisions would jeopardize lending institutions. Several commenters urged FCIC to modify the language of the proposed rule to clarify that the intent is no broader than the current requirement that common owners/operators within a county have all of their farming operations under one policy.

Response: See response to first comment under this section.

Comment: A commenter stated that the proposed provisions contained in section 10(b) relate to the requirement that common owners and operators within a county have all of their farming operations under one policy and further require producers to "prove that the acreage farmed by your spouse, child, or any member of your household is a totally separate farming operation in accordance with FCIC approved procedures.'' The commenter suggested that FCIC clarify that the purpose of this rule is for the original intent of common owners and operators being covered by one policy.

Response: See response to first comment under this section.

Comment: A commenter stated that the American farmer has the same rights as other business professionals and individuals to operate under various legal entities. A commenter stated the proposal would require a partnership to insure all of its various crops within a single county under the same policy, which they believe removes flexibility from the program and further discourages participation. They stated the proposal seems to shift the focus of the program away from insuring a particular crop in a particular location and toward insuring particular people. The commenter believes this is inappropriate in an insurance program where it is a particular risk to a particular crop that is being insured. The commenter recognizes that FCIC is attempting to eradicate past instance of so-called "over-insuring'' the same crop, however, they believe this proposal goes too far in the other direction. The commenter added that by trying to eliminate a very small problem, the proposal creates a disincentive for using the program.

Response: See response to first comment under this section.

Comment: A commenter stated that while they agreed with the intent to keep insureds from creating new entities and either shifting production between entities or taking the highest coverage available on one piece of ground and CAT coverage on the other, they believe the people FCIC is trying to keep from abusing the program will just find a way to work around this, and only the people with legitimate business reasons will be affected. The commenter stated that three individuals working together would be able to create seven different entities without falling under the proposed language, and that adding a fourth individual increases the ability to establish 13 different entities.

Response: See response to first comment under this section.

Comment: A commenter asked what effect these provisions would have when one shareholder has less than a 10 percent interest for SBI purposes but the same individuals in another entity all

have over 10 percent interest in the entity. The commenter also asked how this can be checked and enforced through the duplicate policy listing. A few commenters stated they are concerned how this is to be administered when more than one policy with different insurance providers are involved.

Response: FCIC agrees that the proposed provisions could affect legitimate entities in ways that were not intended, would add complexity to the program, and could be circumvented. However, there are significant problems within the program that are caused by the use of multiple entities that can be used to circumvent program requirements. An examination of the program has revealed that there may be procedures that provide incentives for the creation of such entities and abuse of the system. Instead of precluding the insurance of individual entities, FCIC has revised its procedures to reduce incentives to abuse the program through the creation of multiple entities. The procedures have been amended to require that previous production records be used to establish the insurance guarantees any time a producer has been involved with a particular farming operation. This requirement will reduce instances in which producers create separate entities to avoid using records of production established by other entities in which they have been involved. The proposed revisions to section 10 have been removed in their entirety.

Comment: A commenter stated it is unclear why sections 10(c) and 10(d) are necessary or where these definitions have any effect under the policy. They stated that these two sections should be included in the definitions sections if anywhere.

Response: Since no changes to these subsections were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Clarification of Causes of Loss—Section 12

Comment: A few commenters questioned the use of the words "natural disaster'' in section 12. Some of the commenters recommended "act or acts of nature'' should be used instead.

Response: FCIC agrees that "natural disaster'' can be interpreted in a number of ways. However, the term "act of nature'' has the same problems. The purpose of the provision is to ensure conformity with the Act, which precludes losses caused by things that are not naturally occurring. FCIC has revised the provision to specify a "naturally occurring event.''

Comment: A commenter stated FCIC should change section 12(b) to "approved by us.'' Another commenter believed removal of "farming practices'' from section 8(b)(1) would be detrimental to the provisions in section 12(b).

Response: The recommended change is not appropriate because in the Final Rule published on June 25, 2003, agricultural experts make the determination of whether a production method constitutes a good farming practice. Further, the reference to "farming practices'' in section 8(b)(1) created an ambiguity because that section deals with whether the crop is insurable and it could be confused with the failure to follow good farming practices, which deals with uninsurable causes of loss after insurability has been established. Therefore, the reference had to be removed from section 8(b)(1) and that provision has been revised as stated above.

The following comments were received regarding the provisions proposed in section 12(c):

Comment: A commenter supported the proposed change.

Response: Although there was general agreement with the proposed changes, additional information has indicated that it may not be possible to implement the change regarding released water on acreage where there is a water easement in an actuarially sound manner. Water flowage easements are extremely variable in location. For example, in some cases, easements have been purchased outside of older levee systems, while inside the older levee systems easements were not purchased. In this case, disparate treatment of insureds would result because the proposed provisions would provide coverage for the acreage most often flooded and no coverage would be provided for acreage less frequently flooded. In addition, because of variability in location of the water easements, it would be very difficult to provide separate premium rates for land with and without water easements. Further, the proposed provision would create additional loss adjustment difficulties because it can be very difficult to separate damage caused by released water and generally wet conditions that often occur at the same time. Therefore, FCIC has not retained the proposed provision regarding released water in this final rule.

Comment: A commenter requested this type of acreage be uninsurable.

Response: There may be years when no water is released or the timing of the release still allows a crop to be produced. Therefore, there is no basis to determine the acreage uninsurable. No change has been made in response to this comment.

Comment: A commenter wanted clarification of "contained,'' "contained by'' and "flood water.'' A few commenters wanted clarification of "water easement'' and "seepage.''

Response: FCIC agrees that this provision may have needed clarification and has revised it to clarify what constitutes water contained behind the structure and water released from the structure and has added an example for further clarification. As stated above, the term "water easement'' has been removed from this rule. Since the proposed provisions regarding released water have been removed, it is not necessary to clarify how released "flood water'' and "seepage'' will be considered.

Comment: Several comments were received regarding provisions proposed in section 12(d). A few commenters agreed with changing 12(d) as written in the proposed rule. Some commenters stated "reasonable effort'' should be clarified and that guidelines should be added in the policy stating who is responsible to determine what is practical and what is not a reasonable effort. A few commenters stated the phrase "unless we determine it is not practical to do so'' should be removed.

Response: Since situations may vary greatly, it would be impossible to set a single standard that would encompass all situations. "Reasonable efforts'' means the producer must attempt to repair the damage unless the insurance provider determines it is not possible to make repairs or it would not be practical to replace the equipment because the need for irrigation no longer exists because of the insured peril. It is the insurance provider's responsibility to determine whether the producer made reasonable efforts and whether it is practical to require that such efforts be made based on the individual circumstances, such as the extent of the damage to the equipment and the extent of damage to the crop. FCIC does not agree the phrase "unless we determine it is not practical to do so'' should be removed because there may be times that reasonable efforts to restore the equipment in a timely manner may not be possible or practical, such as when the crop is destroyed. To be consistent with other provisions, FCIC has clarified that cost will not be a factor in

determining whether it is practical to restore the equipment or facilities.

Comment: A few commenters stated section 12(e) needs clarification as to "good irrigation practice'' because there are times when continued irrigation is no longer beneficial because of agronomic factors.

Response: Since no changes to this subsection were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

A few comments were received regarding the provision proposed in section 12(f). The comments are as follows:

Comment: A commenter agreed with the proposed provision.

Response: FCIC agrees that some provision is needed.

Comment: A few commenters requested clarification of what is "discoverable'' and "placed in storage.''

Response: FCIC has modified the provision to replace the word "discoverable'' with "that is not evident or would not have been evident'' to avoid any perception that the insurance provider is required to conduct tests on the crop before the end of the insurance period or to determine whether it has been damaged when no notice of damage has been filed. However, the insurance provider is still required to conduct proper loss adjustment if a notice of damage has been filed. Producers are still required to ascertain whether damage occurred after a cause of loss for the purposes of timely filing their notice of damage. FCIC has removed the reference to "placed in storage'' and referred to "the end of the insurance period'' to increase clarity.

Comment: A commenter did not agree a producer should have reduced coverage for losses suffered during the insurance period, just because the damage could not be discovered until the crop was placed in storage.

Response: Many crops will not be affected by this change because most of the time that a crop is damaged by an insurable cause of loss, the damage is evident before the crop has been removed from the field. However, FCIC agrees there may be some situations where a crop may be affected by an insurable cause of loss and the damage is not apparent until after it is placed in storage. In many of these cases, it is extremely difficult, if not impossible, to determine whether the damage was due to an insured cause of loss that occurred within the insurance period or due to a cause of loss that occurred during transport, was due to intermingling with other producer's damaged or diseased crop while in storage or was first damaged while in storage, making accurate loss determinations impossible. In situations where it is possible to determine that the cause of loss occurred during the insurance period and it is possible to determine the extent of the insurable damage, the Crop Provisions may permit such coverage. No change has been made in response to this comment.

Comment: Several commenters recommended coverage be excluded for the following causes of loss: (1) War, invasion, any act of terrorism (including biological and chemical), and warlike operations whether or not war is declared; (2) genetically modified organism (GMO) contamination (production or price loss); (3) Fire if artificial or man-made origin; and (4) Early harvest of a crop that reduces yield, but receives a premium from the processor.

Response: Since these changes were not proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended changes, the recommendations cannot be incorporated in the final rule. No change has been made. However, in the proposed rule, FCIC revised the first paragraph of section 12 to clarify that all causes of loss, except where the Crop Provisions specifically cover loss of revenue due to a reduced price in the marketplace, must be due to a naturally occurring event. Since the causes referenced in the comments are not due to naturally occurring events, they are already excluded under the policy.

Clarification of Replanting Payments—Section 13

Several comments were received regarding replanting payment provisions contained in section 13. The comments are as follows:

Comment: A commenter stated the replant provision is a loss mitigation provision for the benefit of the insurance provider because it reduces losses, instead of an added benefit.

Response: Since no changes to this section were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended changes the recommendations cannot be incorporated in the final rule. No change has been made.

Comment: Several commenters requested an additional subsection (4) be added to section 13(b) stating, "On which you did not incur costs to replant.''

Response: See response to first comment under this section.

Comment: Several commenters recommended deleting the "actual cost'' item stating the administrative cost to determine the actual cost is counterproductive and results in more cost than is saved by just paying the amount specified and referring directly to what is stated in the Crop Provisions.

Response: See response to first comment under this section.

Clarification of the Insured's and Insurance Provider's Duties—Section 14

Comment: A commenter stated there are two distinct areas under section 14, "Your Duties'' and "Our Duties'' and each of these areas are then lettered or numbered consecutively from (a)(1), creating confusion and inability to clearly reference the correct provision. The commenter recommended that section 14(a) should be "Your Duties,'' and everything below that should be relettered and renumbered accordingly; and section 14(b) should be "Our Duties'' and treated similarly.

Response: To make this change, FCIC would be required to identify all references to section 14 found throughout the Basic Provisions, the specific Crop Provisions and Special Provisions to also make the corresponding changes. New documents would have to be provided to all insureds. As has been done by FCIC, references can be made to section 14(a)(2) (Our Duties) or section 14(a)(2) (Your Duties) to distinguish between these provisions. The burden of making the change would outweigh the benefit that would result from making this change. No change has been made.

Comment: A commenter stated if providing 3 years of records when a claim is filed is an insured's responsibility, it should also be included in section 14 of "Your Duties.''

Response: Based on the comments received regarding the changes proposed in section 3(d) that required the insured to provide records for at least the three most recent crop years that were certified in the producer's APH database for any unit for which the insured files a claim, FCIC removed the requirement in section 3(d) and, therefore, there is no need to incorporate it here.

Comment: A commenter recommended that the phrase "In case there has been a cause of loss'' be changed to "When there is a cause of loss'' in section 14(a) (Your Duties).

Response: In response to other comments, FCIC has elected not to adopt this proposed change. Therefore, the recommended revision is no longer applicable.

Comment: A commenter stated the word or should be added to the end of section 14(a)(1) (Your Duties).

Response: FCIC does not agree with the recommended change. The producer must comply with all the requirements listed in section 14(a) (Your Duties). The recommended change would only require them to comply with any one of the requirements, not all. No change has been made.

Numerous comments were received regarding the provisions proposed in section 14(a)(2) (Your Duties). The comments are as follows:

Comment: A commenter stated it is unclear why "occurrence'' was added. The commenter believes the term should be defined.

Response: Based on the comments received, FCIC will not incorporate the provisions proposed in sections 14(a) and (a)(2) (Your Duties) in the final rule.

Comment: Several commenters stated the proposed revision that requires notice "within 72 hours after the occurrence * * *'' (instead of " * * * your initial discovery * * *'') places an undue burden on absentee landlords. A commenter stated the proposed change removes the ability to accept late notice of loss from absentee landlords, insured's whose companion policyholder notice was turned in timely and other situations where insurance providers are able to accurately adjust the loss.

Response: See response to first comment under this subsection.

Comment: Another commenter believes the proposed language would result in agents submitting claims for a large number of insureds anytime a peril occurred in the area just to be certain the 72-hour after occurrence requirement was met.

Response: See response to first comment under this subsection.

Comment: Several commenters stated the current provision should be retained and that it is more simple and direct. The commenter stated the proposed change would result in a producer failing to report events that they knew caused damage, but which the producer alleges he or she did not recognize was from a "cause of loss'' or that "may affect the amount of production or quality.''

Response: See response to first comment under this subsection.

Comment: A commenter was opposed to eliminating the requirement to provide notice when a producer "initially discovers'' damage to an insured crop as they believe adoption of this proposal will prevent insurance providers from learning about potential losses and inspecting the insured crop before deterioration from uninsured causes occurs. The commenter believes adoption of the proposal would erode program integrity and significantly increase the opportunity for program abuse and fraud.

Response: See response to first comment under this subsection.

Comment: A commenter stated the provisions need reference to a calendar date. The commenter recommended using "by the end of the insurance period'' versus "15 days after * * *''

Response: See response to first comment under this subsection. With respect to the current 15 day notice requirement and parentheses in section 14(a)(2), since no changes to this provision were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation to require notice by the end of the insurance period cannot be incorporated in the final rule. No change has been made.

Comment: A commenter suggested retaining the current provision but delete the parentheses. The commenter believes the parenthetical portion is necessary and does not put the program at risk. The commenter stated if the revision is incorporated, it will be directly in conflict with state law in several jurisdictions and will limit an insurer's ability to deny claims due to late notice in situations where the insurer cannot accurately adjust the claim. The commenter added that if this provision is inserted, it must specifically preempt contrary state laws.

Response: See response to first comment under this subsection. With respect to the current 15 day notice requirement and parentheses in section 14(a)(2), since no changes to this provision were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation to require notice by the end of the insurance period cannot be incorporated in the final rule. No change has been made.

Comment: A commenter recommended the section be revised to establish an absolute obligation to give notice, when there is a continuing cause of loss, no later than the end of the insurance period.

Response: See response to first comment under this subsection.

Comment: Another commenter stated the proposed changes are too extreme. The commenter believes there are valid reasons for filing a late notice of loss and the provisions do not need to be so restrictive. They also stated the current language is sufficient.

Response: See response to first comment under this subsection.

Comment: A commenter stated that section 14 should allow some lee-way for delayed reporting in exceptional circumstances and that the extension request option should also be available for the initial reporting deadlines in section 14(a) (Your Duties).

Response: See response to first comment under this subsection.

Comment: A few commenters stated it is not clear how the proposed language will affect the "delayed notice'' language in the Loss Adjustment Manual (LAM).

Response: See response to first comment under this subsection.

Comment: A commenter recommended the words "specified in the Crop Provisions'' be inserted following "cause of loss'' in section 14(a)(2) (Your Duties). The commenter stated that this approach adds clarity and is consistent with the revisions proposed in section 2.

Response: See response to first comment under this subsection.

Numerous comments were received regarding the provisions proposed in section 14(a)(3) (Your Duties). The comments are as follows:

Comment: A commenter stated it is unclear why representative samples of the unharvested crop must be left only if the insured reports damage within 15 days of the time they begin harvest of the damaged unit. The commenter believes that representative samples should be left in any case, at any time, whenever the insurance provider determines it cannot accurately determine the loss at the time a claim is made, because that is the purpose of representative samples. Another commenter similarly stated that representative samples should be required in all cases.

Response: The purpose of this provision is to ensure that insurance providers have the ability to adjust the loss. If notice of loss is provided more than 15 days before harvest begins, the assumption is that the insurance provider will have time to inspect the crop prior to its harvest to verify the cause of loss. If notice is provided within 15 days of harvest, it is possible that insurance providers will not have time to inspect the crop while it is still in the field and representative samples must be left. If the insurance provider determines it cannot accurately

determine the loss, representative samples may be required under the claims section in the Crop Provisions. Therefore, it is unnecessary to add the provision to the Basic Provisions. No change has been made in response to this comment.

Comment: Several commenters recommended the current provisions be retained and rely on the Crop Provisions for additional requirements regarding representative samples. They believe the proposed provision would create undue hardship for growers of higher value crops. A few of the commenters stated if the proposed provision is adopted, FCIC should rewrite it to avoid confusion, such as "Leave representative samples (if authorized in the Crop Provisions) of the unharvested crop intact if you report * * *'' while one of the commenters stated if the proposed provision is adopted, FCIC should rewrite it to avoid confusion, such as "Leave representative samples (if not authorized in the Crop Provisions) of the unharvested crop intact if you report * * *''. A few commenters recommended that section 14(a)(3) (Your Duties) be deleted from the Basic Provisions and included in specific Crop Provisions to allow for crop differences. They believe the proposed description of a sample may not be realistic for all crops, with one commenter adding this is probably the reason such has not been included before. The commenters stated if the proposed language is retained, the number and frequency of samples should be addressed. The commenter believes the Crop Provisions should define the particular types of samples appropriate to the particular crop and various potential circumstances. They recommend the proposal therefore should not be adopted. One commenter stated the current language is sufficient and should be retained while another commenter stated the current language should be retained and refer the insured to the Crop Provisions. A commenter suggested adding the word "not'' after the word "If.'' The commenter stated this requirement should apply if not already provided for in the crop provisions, and suggested keeping the current wording because the crop provisions address this requirement better. The commenter stated this would allow a producer to give notice on the 14th day after harvest and still be in compliance.

Response: The proposed rule moves the representative sample provisions from the Crop Provisions to the Basic Provisions to be consistent with FCIC's ongoing efforts to consolidate common requirements. When Crop Provisions, which currently require representative samples, are next revised, only the requirements that differ from those listed in the Basic Provisions will be contained in the specific Crop Provisions (for example, different sample sizes, *etc.*). To leave the provisions in the Crop Provisions instead of the Basic Provisions, would lead to unnecessary duplication and the difficulty of revising every Crop Provision when the common requirements change. The number and frequency of samples should not be included in the Basic Provisions because the requirements may change by crop. FCIC does not agree that moving the current provisions from the Crop Provisions to the Basic Provisions would create an undue hardship for growers of higher value crops because the proposed provisions will not apply if the Crop Provisions do not require the representative samples. Most Crop Provisions for higher value crops do not require representative samples. FCIC agrees the proposed provisions should be clarified. FCIC does not agree the phrase "if not authorized in the Crop Provisions'' should be added because the issue is whether the samples are required by the Crop Provisions and the provision has been revised accordingly. FCIC agrees this was not the intent of the provision and has revised it to require representative samples if notice is provided less than 15 days before harvest or during harvest.

Comment: A commenter stated it is unclear why the proposed provisions added statements that the 15-day time limit to retain the representative samples may be extended if it is necessary to accurately determine the loss and provided that the insured will be notified in writing of any such extension. The commenter believes it would be simpler to require that the samples be left intact until such time as the insurance provider is able to determine the loss or permission is granted in writing to destroy or harvest the samples. They feel this would be simpler and better because otherwise, if the time period expires and was not extended in writing by the insurance provider, and no accurate determination of loss was made, how would the loss be determined. A commenter stated the provision proposed contains language stating, "You will be notified in writing * * *'' which the commenter believes is an additional Insurance provider expense addressing something the insured already has in writing—the policy and crop provisions.

Response: The requirement to leave the sample for 15 days after harvest is to ensure that there is adequate time to inspect the crop. However, insurance providers are required to adjust all losses in a timely manner. Further, the producer is required to expend resources to care for the sample and should not be required to maintain the sample indefinitely. The added language is only intended to allow the insurance provider to extend the time period to provide additional time when unusual circumstances exist that preclude the insurance provider from inspecting the crop within the 15 day time period. Since this is an exception to a policy term, *i.e.,* the requirement that the sample only needs to be maintained for 15 days after harvest, the producer must be notified that the insurance provider is exercising its right to extend the time.

Comment: A commenter stated the phrase "length of the field'' is not defined in section 14(a)(3) (Your Duties) and may be interpreted differently with different dimensions, shapes, and planting patterns of the field. A few commenters suggested further consideration of the following: (a) Usage of the term field with respect to leaving representative samples may require clarification because, per the revised definition of "field,'' a field could include multiple crops; and (b) The length of the field could be interpreted to be row direction or longest point from one end to another, and leaving strips perpendicular to row direction could be impractical.

Response: "Field'' is defined and the provision is clarified to indicate that the samples must be the length of the rows, if the crop is planted in rows, or, if the crop is not planted in rows, the longest dimension of the field. The provision has been further clarified to specify the crop within each field because units may have multiple fields. FCIC also agrees it would not be practical to leave strips perpendicular to row direction. Therefore, FCIC has revised the provisions as stated above.

Comment: A commenter recommended the word "investigation'' be replaced with the word "adjustment'' in section 14(a)(4) (Your Duties). A few commenters recommended the word "written'' be inserted following the word "obtain'' in section 14(b) (Your Duties). Another commenter stated written consent for and written notification of the actions listed in section 14(b) (Your Duties) should be required.

Response: Since no changes to section 14(a)(4) (Your Duties) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be

incorporated in the final rule. No change has been made.

Comment: A commenter supports the provision proposed in section 14(c) (Your Duties) that allows written requests for extensions. The commenter also recommended the standard under which such requests will be reviewed should be set forth. A commenter stated the extension period proposed in section 14(c) (Your Duties) should not be adopted. The commenter stated that sixty days is more than sufficient time for producers who disagree with the insurance provider's adjustment of their loss to assemble and submit all data and analysis available to support the producer's determination of an appropriate adjustment. They believe the requirement that providers consent to extensions will be abused and manipulated as a result of normal market forces, and will be ignored by finders of fact, with the result that producers who claim "a good reason'' for submitting data and documentation of their claim a year after the insurance period will be permitted to do so and insurance providers will have no meaningful way to address that data and documentation regarding a crop long since rendered inaccessible and conditions that no longer exist.

Response: There may be circumstances beyond the producer's control that could prevent the determination of the amount of the loss within the 60 day time period after the end of the insurance period, such as the unavailability of crop settlement records. Further, notice of damage must be provided within 72 hours of the discovery of such damage and not later than 15 days after the end of the insurance period. Therefore, the insurance provider has the opportunity to inspect the acreage or access the other documentation prior to the claim being filed. The provision has been revised to clarify that extensions can only be granted if the amount of the loss cannot be determined within the time period because the information needed to determine the amount of the loss is not available. This should eliminate any potential abuse.

Comment: A commenter suggested the word "other'' should be deleted following the words "complying with the'' in section 14(c) (Your Duties). The commenter views the requirements of subsections (a) and (c) to establish separate obligations of insureds, and they believe applicable judicial precedents dictate this view. They added that FCIC's proposed addition of the word "the'' makes the use of "other'' superfluous.

Response: FCIC agrees and has revised the provision accordingly.

Comment: A commenter suggested adding the words "we will assist you in preparing a claim for indemnity'' in section 14(c) (Your Duties).

Response: Certain information required to complete a claim is provided by the insured while the insurance provider provides other needed information. The suggested language does not help clarify the necessary steps or the claims process in general. Therefore, no change has been made.

Comment: A commenter stated the provisions in section 14(c) (Your Duties) are not practical for some crops, for example information needed to complete an avocado insurance claim is not known or available until after 60 days.

Response: FCIC is aware there may be circumstances in which determinations necessary to finalize a claim cannot be made within 60 days. This is the justification for adding the extension in writing language to section 14(c) (Your Duties) in the proposed rule that allows for additional time to submit a claim for indemnity with the insurance provider's approval. If individual crops require a longer time period, the crop provisions may provide for this. No change has been made.

Comment: A commenter stated that a claim for indemnity referenced in section 14(c) (Your Duties) is more commonly referred to as a production worksheet. The commenter also asked if this part was even necessary.

Response: Although some insurance providers may use a specific form to record and transmit claim information, the claim for indemnity is a common generic term used throughout the insurance industry and the policy provisions. This is the document that contains all the information necessary to pay the claim. The information in section 14(c) (Your Duties) is necessary as it provides a deadline for insureds to submit a claim for indemnity to ensure that claims are not submitted years after the fact when it is impossible to verify the cause of loss or the records. However, an exception does need to be made for those situations where the producer was genuinely prevented from submitting the claim timely. No change has been made.

Comment: Several commenters suggested adding "s'' after "examination'' in section 14(d)(2) (Your Duties) to allow for the possibility that more than one sworn statement may be necessary in some instances.

Response: The second paragraph in the heading of the Basic Provisions states that unless the context indicates otherwise, use of the singular form of the word includes the plural. No change has been made.

Comment: Several comments were received regarding the provision proposed in section 14(d)(2) (Your Duties). A commenter stated that USDA is not a party to the contract and it has no right to directly require the producer to do anything, nor should insurance providers suffer the exposure to liability resulting from use of a contract to which they are a party as a means through which a USDA employee abused a producer or violated the producer's civil rights. They stated that if an examination under oath is needed, FCIC should direct the insurance provider to conduct such an examination. The commenter does not believe a producer should be required to submit to multiple examinations by FCIC, FSA, the Office of Inspector General (OIG), whoever else in USDA may be interested, and also by the producer's insurance provider, who alone has the direct obligation to deliver the program in accordance with its requirements. Other commenters stated reference to "any USDA employee'' is too broad and should be more limited.

Response: Although the contract is between the producer and the insurance provider, the Act specifies that FCIC and FSA have oversight responsibilities since taxpayer money is involved in the crop insurance program, which includes conducting investigations and other fact-findings. Further, the Office of Inspector General Act authorizes OIG to conduct investigations. In addition, insurance providers would not be held accountable for the actions of any USDA employee. Any adverse decision rendered by an USDA employee is appealable to the National Appeals Division. Further, USDA employees who are authorized to conduct investigations cannot abdicate their responsibility by allowing the insurance provider to conduct the examinations under oath. To the maximum extent practicable, USDA employees will coordinate their efforts so that multiple examinations are not required. The provisions have been revised to limit the reference to any USDA employee authorized to conduct investigations.

Comment: A commenter suggested the words "by you or your agent'' be inserted after "confirmed'' and "to us'' after "writing'' in section 14(g) (Your Duties).

Response: Since no changes to section 14(g) (Your Duties) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be

incorporated in the final rule. No change has been made.

Comment: A commenter suggested that the words "and such failure affects our ability to accurately adjust the loss'' be added after the word "section;'' in 14(h) (Your Duties). A commenter believes the penalty seems out of proportion, particularly when the producer may be in an extremely difficult situation due to the aftermath (or ongoing nature) of a natural disaster. The commenter recommended graduated penalties based on the length of the delay, with provisions for waivers for good cause shown. Another commenter stated the proposed provisions are very restrictive and should not be a part of this rule. Many commenters stated they do not believe an insured should be held responsible for the full premium when coverage is denied because of an inadvertent failure to meet the much reduced notification deadlines. Most of those commenters believe that in such cases, only a modest administrative fee is warranted. A commenter recommended the provisions be revised to read as follows: "If you fail to comply with the notice requirements and we believe that such failure prejudiced our ability to make all determinations required to verify your loss, no indemnity will be due.'' A commenter stated that the sanction in section 14(h) (Your Duties) of claim denial for not meeting the 72-hour notification requirement of a prevented planting claim is troubling because of potential extenuating circumstances that could be considered good cause for missing the 72-hour requirement. The commenter suggested a monetary penalty such as reduced indemnity percentage(s) and/or sanction waiver ability for reasonable and justifiable late claim notifications. Another commenter objected to the proposed change because they do not believe it is legal to charge premium and not offer coverage. A commenter questioned how an insured can be charged a premium for acreage that was never planted. A commenter recommended that language be added to section 14 to expressly state that the insured's duties are conditions precedent to the payment of any claim for loss or damage under the policy. The commenter added this is important because it shifts the burden of proof of compliance with "Your Duties'' to the insured in a disputed situation.

Response: FCIC agrees that there are circumstances where an indemnity, replanting or prevented planting payment should be allowed if the insured's failure to comply in a timely manner with the notice requirements of section 14 did not preclude the insurance provider from accurately determining the loss. FCIC has revised the provision accordingly. If failure to comply with the requirements of section 14 results in the insurance provider's inability to accurately determine the loss, a claim cannot be paid since the amount of the insurable loss cannot be determined. It is not illegal to charge the full premium for planted or prevented planting acreage because the insured still received the full benefit of insurance coverage for the crop. However, FCIC agrees that there is a discrepancy between the notice of damage and the notice of prevented planting. FCIC intended that the exception for when a claim can still be adjusted to apply to both. To ensure that this exception is consistently applied, it has been added to section 14(h) and removed from section 14(a)(2). Further, there is no authority to impose a modest administrative fee and there is no basis to establish a graduated penalty. FCIC agrees that it should be the insured's duty to prove compliance with all policy provisions because the policy imposes the burden on the insured to comply with the requirements and the provisions have been revised accordingly. FCIC has also clarified the consequences for such failure.

Comment: Several commenters recommended deleting the words "in a timely manner'' in section 14(h) (Your Duties), because they feel the 72-hour requirement covers this.

Response: FCIC agrees that the provisions contain the requirements for providing notice and this section simply states the consequences for failing to meet those requirements. The provision has been revised accordingly.

Comment: A commenter believes that section 14 (Our Duties) should require the insurance provider to notify the producer if the information submitted is incomplete, which the commenter believes generally happens in practice.

Response: Since nothing relating to this recommended change was proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter recommended that the provisions proposed in section 14(a)(3) (Our Duties) be deleted because if there is no basis for investigation, this becomes meaningless. They added that it implies the insurance provider would have to check with USDA before paying any claim to see if there was a USDA investigation under way. The commenter further stated that no time limit is set for completion of USDA's investigation, which could result in unreasonable delays in policyholders receiving valid indemnity payments. Another commenter stated the proposed provisions will require RMA to notify insurance providers when an insured is under investigation regarding a policy with a previous insurance provider.

Response: FCIC agrees that this provision only applies if there is an investigation and has revised the provision to add ",if applicable,''. FCIC agrees that if payment of a claim is to be delayed, the insurance provider must be notified. Insurance providers are not required to determine whether there is an investigation before paying a claim. Investigations are completed as expeditiously as possible. However, many investigations are very complex and it would be impossible to set specific time limits. Therefore, no time limit can be included.

Comment: Numerous commenters suggested retaining the current language in section 14(d) (Our Duties) that was proposed to be deleted. One commenter stated the language is extremely valuable for insurance providers in court cases, while others added that the Standard Reinsurance Agreement allows for approved documents. Another commenter stated that removing the reference to the application of FCIC loss adjustment procedures in this section will hinder insurance providers' ability to defend their conduct in litigation or arbitration. One other commenter expanded to say they feel this contract needs to be very clear in establishing that both the insurance provider and the producer are bound by loss adjustment procedures approved by the Agency. The commenter believes that deletion of this section will result in producers challenging as inaccurate, unscientific or otherwise insufficient the Agency's often very technical and specific requirements for determining production, quality and many other issues that routinely arise. Another commenter objected to the proposed deletion, stating that although there may be a reason to modify somewhat the language, as done with the preamble, the concept embodied in the existing subsection (d) should remain specifically as a provision of section 14. While the commenter believes the preamble is a part of the policy and binding contractual language, they are concerned, however, that a court may view the matter differently, for instance, treating the preamble as merely introductory or explanatory language as opposed to a binding contractual

provision. The commenter added that since the Standard Reinsurance Agreement obligates insurance providers to follow FCIC's prescribed "or approved'' procedures, there is no reason to delete this obligation from the description of insurance providers' loss adjustment duties as described in section 14.

Response: To avoid any confusion regarding the legal affect of putting the language in the preamble, FCIC agrees to retain the current language in section 14(d) (Our Duties). FCIC disagrees that producers are bound by the procedures. While the procedures will be used to establish the loss, if the loss adjustment procedures impose any burden on the producer not contained in the policy, the producer is not bound by such procedures.

Clarification of Production Included in Determining an Indemnity Provision—Section 15

Several comments were received regarding section 15(b). The comments are as follows:

Comment: A commenter suggested the policy should be amended to give insurance providers the option of paying indemnities based on appraised production when a farmer's harvested production is substantially lower than the appraised production for the same unit (as determined by a growing season inspection).

Response: FCIC does not agree the insurance provider should have the "option'' of paying indemnities based on appraised production when the harvested production is substantially lower than the appraised production. The purpose of this provision is to establish that harvested production is presumptively more accurate than appraised production and should be used to establish indemnities except in those situations where the crop is harvested after the end of the insurance period. After the end of the insurance period, it is extremely difficult to determine whether an additional cause of loss occurred or whether the crop simply deteriorated so the appraised production is presumptively more accurate. FCIC has revised the provisions to make it clearer when appraised production is used and when harvested production is used. Further, if it is an issue of the appraisal, the procedures allow producers to dispute the appraised amounts through the controversial claims process. However, if there has been a growing season inspection and the appraised production was significantly higher than the harvested production, there may be a need for further investigation but the harvested production should not be automatically rejected.

Comment: A few commenters recommended retaining the current language in section 15(b) and adding "If your claim is based on appraised production and you later decide to harvest the acreage, you must provide us with the amount of harvested production. Claims will be adjusted if the harvested production exceeds the appraised production and you will be required to repay any overpaid indemnity.'' A commenter would like to change the language from "only if you are not going to harvest'' and replace with "if the crop is not harvested by the end of the insurance period.''

Response: FCIC does not agree the current provisions in section 15(b) should be retained because the current provisions state the amount of production of any unharvested insured crop "may'' be determined based on appraisals, instead of "will'' be determined based on appraisals. This led to confusion in situations where the crop was later harvested after the crop was appraised and indemnities may have been paid. However, FCIC has revised the proposed provision to remove the term "only'' in the first sentence because it created an inconsistency. Appraised production will be used to calculate the claim if the insured does not harvest the acreage, or if the insured later decides to harvest the acreage after the end of the insurance period and the harvested production is less than the appraised production. FCIC has also revised the fourth sentence of the proposed provision, to clarify that claims will be adjusted using the harvested production, if the harvested production exceeds the appraised production.

Comment: A few commenters believe the new language will leave policies open-ended since there is no closure date.

Response: FCIC agrees there is no closure date or time frame in which a producer must harvest the acreage. However, there should be few instances in which harvest is delayed for any significant period because if the crop is economically viable, the incentive will be to remove it as quickly as possible. Further, since the appraised production is used if the crop is harvested after the end of the insurance period and the harvested production is lower than the appraised production, insurance providers are not harmed by the delay and producers have the freedom to choose the management practices that best suits their operations.

Comment: A few commenters asked if the insurance provider pays a higher indemnity if harvested production is lower than appraised production. They also asked if the producer is required to repay overpaid indemnities when the harvested production is higher than the appraised production.

Response: When the appraisal occurs at the end of the insurance period and the crop is harvested after the end of the insurance period, if the appraised production is greater than the harvested production, the claim will be paid based on the higher appraised production. However, FCIC has clarified that the harvested production may still be used if the producer can prove that no additional causes of loss or deterioration of the crop occurred after the end of the insurance period. Producers will be required to repay overpaid indemnities if the harvested production was greater than the appraised production.

Comment: Several comments were received regarding the meaning of the term "commensurate'' in sections 15(e)(2)(ii) and 15(f)(2)(ii).

Response: FCIC originally responded in the June 25, 2003, final rule that the term was clear. However, subsequent queries have demonstrated that although the term may be clear, its application is not. FCIC has revised the provision to clarify that the 65 percent reduction in the amount of the indemnity will also result in a 65 percent reduction in the amount of premium owed by the producer.

Comment: Several comments were received regarding the provisions proposed in section 15(j) that require producers to certify production has been destroyed before a claim can be paid, when a Federal or State agency requires such destruction. One of the commenters stated producers that are no-till farming need flexibility to leave appraised crops standing. Several other commenters asked if there was a conflict between the Federal and State agency's decisions, whose decision rules.

Response: The provision is only applicable if there is an injurious disease present. If any State or Federal agency requires the crop to be destroyed, then the producer is required to destroy the crop, regardless of whether the producer used no-till or any other production methodology. However, if the State or Federal agency only requires destruction of the production, then the producer could leave the plants standing. FCIC has revised the provisions to allow for this distinction. If either a State or Federal agency requires destruction, destruction must occur before a claim can be paid.

Clarifications of the Prevented Planting Provisions—Section 17

Many general comments were received regarding proposed prevented planting changes. The comments are as follows:

Comment: A few commenters stated that while improvements and simplification in prevented planting provisions are long overdue, they believe that producers and the insurance industry would be better served if RMA deferred action on this section until the agency has an opportunity to fully evaluate the input and recommendations from the Prevented Planting Forums.

Response: Based on the comments received regarding proposed changes to the prevented planting provisions, FCIC has decided to defer action on most of the proposed prevented planting proposed changes until it has an opportunity to fully evaluate other possible solutions. Any other recommended changes would be proposed in the **Federal Register** and the public would be provided an opportunity to comment. FCIC was required to make certain prevented planting changes that were mandated by ARPA. Those changes were included in the Final Rule FCIC published in the **Federal Register** on June 25, 2003. Additionally, while FCIC has agreed to defer most of the proposed prevented planting changes, as stated more fully below, it has decided to incorporate proposed changes to prevented planting provisions that are necessary to protect program integrity.

Comment: Several commenters stated it is now widely acknowledged that current rules are impractical for many prevented planting situations, particularly those related to extended drought and that RMA has established Prevented Planting Work Groups to provide the agency with guidance on the development of new prevented planting provisions. The commenters believe RMA should refrain from promulgating any prevented planting changes until the Prevented Planting Work Groups have completed their work, except for those necessary to implement other provisions (*e.g.*, the "double insurance'' provisions mandated by ARPA).

Response: See response to first comment under this section.

Comment: A commenter stated they would like to see an entirely fresh approach taken with regard to prevented planting. They understand that work groups have been, or are being, formed to discuss alternative approaches or changes to the current language, and stated that if it has not been considered, there should be a representative from each Standard Reinsurance Agreement holder included in these workgroups. They offer the following as several alternatives to the current and proposed language: (a) Abandon the idea of eligible acres by crop; (b) abandon the idea of rolling prevented planting acres to another crop; and (c) establish the idea of a "window of opportunity'' something on the order of "According to NASS Crop Reporting District, you must have been unable to do fieldwork on a minimum of 70 percent of the days from the earliest planting date on the policy to the end of the late planting period on the policy.'' The commenter stated that an idea like this would establish a defined area that is either eligible or ineligible for prevented planting payments and that it would also promote planting, such as a subsequent crop after the final planting date for some earlier crop.

Response: See response to first comment under this section.

Comment: A commenter noted there were numerous proposed changes in the prevented planting provisions. They are also aware that an RMA-backed prevented planting work group is being formed to address possible solutions to current prevented planting issues. The commenter suggested that it may be best to minimize the prevented planting changes being made in the new policy until the work group has a chance to complete its work, then make one, rather than two, changes to prevented planting provisions and the associated procedures. They stated that while the current prevented planting provisions and procedures have their problems, there will be a tremendous amount of cost, training and learning curve associated with changes, and they believe going through that process one time rather than two times may be the most prudent approach. The commenter generally believes that RMA should wait for the prevented planting work group to finish its work and provide recommendations before any prevented planting provisions are changed. They believe the current provisions are nearly impossible to administer but they do not believe the proposed provisions are any better. They believe there may be benefit to only going through the pain of one change rather than two changes.

Response: See response to first comment under this section.

Comment: A commenter stated that prevented planting provisions need simplification and a concise determination of what qualifies. They stated the provisions continue to show vagueness and subjectivity as to what is supposed to be eligible. They believe now is the time to improve this part of the provisions that have been a burden on all parties. The commenter feels the use of seven pages of a forty-page document should be a good indication of the complexity of prevented planting coverage. The commenter believes serious consideration should be given to delaying these proposed provisions if for no more reason than to rectify the issues with prevented planting. The commenter stated producers want to plant a crop. However if they cannot, they want to know what they can collect. They stated it is difficult to provide an answer without going through a major process. The commenter also believes consideration should be given to the following: (a) The prevented planted acreage; (b) the insured peril; (c) acreage left as black dirt should be paid an amount low enough to encourage producers to plant if at all possible; and (d) the crop to be paid on would be the largest planted acreage crop in the producer's database for any such acreage prevented from being planted. The commenter stated there does not appear to be any valid reason to determine if a loss caused by perils covered under the policy for one insured should be based on what other producers did or did not do. The commenter asked if insureds get paid a fire loss on their homes based upon if the neighbors did or did not have a loss on their homes. They also asked if hail losses are paid to an insured based upon the hail his neighbor received. They further asked why FCIC thinks they have to determine an insured's claim based on others and asked if this was the intent of Congress when prevented planting was requested to be covered.

Response: See response to first comment under this section.

Comment: A few commenters do not agree with the new prevented planting provisions. They believe the current prevented planting provisions are already an administrative nightmare and are difficult to understand without introducing additional options. The commenters recommended retaining the current provisions as they are until the prevented planting provisions can be simplified.

Response: See response to first comment under this section.

Comment: A commenter stated they support the long discussed idea of a flat payment per acre. The commenter stated this approach could also use NASS data based on average land rental rates by Crop Reporting District.

Response: See response to first comment under this section.

Comment: A commenter noted that provisions contained in section 17(a)(1) require that the insured was prevented from planting the insured crop, "due to an insured cause of loss that is general in the surrounding area and generally prevents other producers from planting acreage with similar characteristics. Failure to plant at any time on or before the final planting date when other producers in the area with acreage with similar characteristics are planting will result in the denial of the prevented planting claim provided that such planting constitutes a good farming practice.'' The commenter stated this requirement presumes there is one sound and correct practice that constitutes "good planting practices.'' They believe this requirement pits one producer against another as the resultant successful practice is not known until well after a crop is planted or is considered prevented from being planting. In this regard, the commenter suggested that in light of the fact that RMA is organizing a "Prevented Planting Forum,'' that resolution of this issue be postponed until RMA further reviews the issue.

Response: See response to first comment under this section.

Many comments were received regarding provisions proposed in section 17(a)(1). The comments are as follows:

Comment: A few commenters believe the term "general in the surrounding area'' is vague, ambiguous, and cannot be administered without specific guidelines. A commenter stated the proposal's use of "general in the surrounding area'' is unworkable. They believe a reasonableness standard coupled with an objective definition of "good farming practice'' as previously proposed should be substituted. They suggested the following language, "(1) In view of the geography, topography, soil types, weather conditions and exposure, it was not reasonable and would not have been a good farming practice, for you to plant the insured crop on the insured acreage due to an insured cause of loss. (Failure to plant at any time on or before the final planting date when it would have been reasonable and a good farming practice to plant will result in denial of a prevented planting claim).''

Response: FCIC has deferred most of the changes proposed in section 17(a)(1) until it has an opportunity to fully evaluate other possible solutions. Any alternatives will be proposed in the **Federal Register** and the public will be provided an opportunity to comment. However, there is a program integrity issue that arises when producers are able to plant the crop on some or all of the days early in the planting period but elect not to do so until the end of the planting period, where adverse weather may prevent them from planting. Producers should not receive a prevented planting payment if the producer elected not to plant on those days other producers in the area were planting. If a producer has been planting crops throughout the planting period when it was possible, but weather conditions prevented further planting, the producer would still be eligible for a prevented planting payment. In response to comments applicable to the June 25, 2003, final rule, the term "area'' is now defined. FCIC has revised section 17(a)(1) accordingly.

Comment: A commenter stated the proposed changes will be unenforceable in litigation or in arbitration. They stated the Special Provisions establish a planting period, the conclusion of which is marked by the final planting date, and that accordingly, an insured who plants by the final planting date is eligible for insurance (provided that the insured satisfies all other conditions of the policy). The commenter noted however, that subsection (a)(1) suggests that, for the purposes of prevented planting, the final planting date may be irrelevant and that an insured, to maintain eligibility for prevented planting, must have planted by some arbitrary date that may be a day, a week, or a month before the final planting date. They believe that unless a latter-day Nostradamus participates in the Federal crop insurance program, neither FCIC, the insurance providers, nor insureds have the ability to anticipate the possibility of future conditions that may prevent planting.

Response: See response to first comment under this subsection.

Comment: A commenter suggested deleting everything after the word "loss'' in the second line, because they believe everything else is subjective and not defensible. They stated that if the proposed language stays, RMA should issue its up front timely determination on a by area basis of what will be considered acceptable prevented planting locations and situations. They feel insureds and agents must be able to know what the rules and expectations are at the time possible prevented planting conditions exist and cannot be subjected to after the fact second guessing, particularly in situations where some are planting and some are not in the same conditions. The commenter recommended that a subsection (iii) be added to specify that an insured should only get paid prevented planting one time, not consecutive years for the same cause of loss (for example, the same potholes that are filled with water every year).

Response: See response to first comment under this subsection.

Comment: A commenter stated that the proposed change is a good improvement regarding initial planting period.

Response: See response to first comment under this subsection.

Comment: A few commenters stated language should be added that an insured must be prevented from planting during the regular planting period prior to the final planting date to be eligible for payment in the late planting period.

Response: See response to first comment under this subsection.

Comment: A few commenters recommended a requirement be included that a producer must show that an effort was made to plant when conditions were favorable. A few commenters believe the phrase "generally prevents other producers from planting * * *'' suggests there could be situations where some producers are eligible for prevented planting payments even though other producers in the area were able to plant. A few commenters stated the parenthetical statement following is absolute and that this needs clarification.

Response: See response to first comment under this subsection.

Comment: A commenter stated that allowances should be made for eligible prevented planting payments and planted acres. A few commenters stated the policy should be absolutely clear as to whether insurable and planted acreage can exist in the same area. A commenter stated they realize the language for prevented planting was written in the farm bill, however they suggested to address abuse, the provisions should require that to qualify for prevented planting, a producer must be prevented from planting during the initial planting period. The commenter also believes that prevented planting claims should not be allowed until the midpoint in the late planting period has passed.

Response: See response to first comment under this subsection.

Comment: A commenter stated the language does not clarify whether or not the farmer must initially be prevented from planting during the original planting period. A few commenters recommended a specific date should be established to remove the guesswork. One of the commenters stated that prevented planting, as a general matter, requires continuing analysis with a view to maintaining program integrity, being

able to offer a sound insurance product, and having a clearly understood program.

Response: See response to first comment under this subsection.

Comment: A commenter stated it is their general position that prevented planting claims should be allowed if a producer is prevented from planting by the end of the documented planting window. They believe that to expand the requirement further puts RMA in the position of dictating management practices and other decisions that are solely the responsibility of the producer. However, they do not believe RMA should simply look away from situations where there is an indication that committing fraud was the main objective, especially those situations where an individual is clearly pushing the edge of the envelope in regard to planting activities in the surrounding area.

Response: See response to first comment under this subsection.

Comment: A commenter stated the provisions specify that "Failure to plant at any time * * * will result in the denial of the prevented planting claim. The surrounding area includes * * *'' They asked who determines that everyone else should have been planting when a drought may be in effect. They stated that perhaps the other producers should not have been planting to collect their full guarantees. The commenter stated that some people will virtually always plant, because that it is what they have always done even though it may not be a "good farming practice.'' They believe the Colorado statement on prevented planting is very good.

Response: See response to first comment under this subsection.

Comment: A commenter stated that the proposed language requires a producer to have been prevented from planting the entire planting season which could penalize the producer who in the early part of the planting season, waits on better planting conditions, and finds later in the season planting is impossible.

Response: See response to first comment under this subsection.

Comment: A few commenters were concerned about inequitable treatment between replant requirements and prevented planting requirements. A few of the commenters believe both situations should be treated similarly while one of the commenters stated that consistent requirements would help simplify the program.

Response: There are different planting requirements between prevented planting and replanting. However, the purpose for the payment and the circumstances are significantly different and warrant different treatment. When acreage that is prevented from being planted is planted during the late planting period, the guarantee is reduced for every day that the crop is late planted. Such reductions do not apply to crops replanted during the late planting period. Further, prevented planting payments are based on the expected costs incurred in the preparation of planting and are usually limited to 60, 65 or 70 percent of the production guarantee for planted acreage. In contrast, once the crop is planted during the initial planting period, policyholders are eligible for payment based on 100 percent of the production guarantee. In addition, when it is practical to replant the crop, the policyholder does not have a loss other than the cost of replanting. The purpose of a replant payment is to cover such costs. Therefore, it is reasonable to require policyholders to replant in the late planting period because they will still receive the full benefit of insurance for which they paid the full premium. However, policyholders who are prevented from planting would receive reduced benefits even if they were required to plant during the late planting period and they paid a full premium. No change has been made.

Comment: A commenter stated that under the notice of loss section, the insured must give notice of prevented planting and in section 17(a)(2) it appears he must give a prevented planting acreage report. The commenter asked if there is a deadline for the prevented planting acreage report.

Response: Current provisions contained in section 17(a)(2) require prevented planting acreage to be included on the insured's acreage report. Therefore, the deadline would be the acreage reporting date specified in section 6(a).

Comment: A commenter stated the burden of the provisions contained in section 17(a)(4) should be on FCIC to withdraw the offer of insurance if these conditions exist in a specific area or for a specific crop. They believe if that happens, FCIC should provide timely notice to insurance providers and the public that its offer of insurance or increases in coverage is withdrawn.

Response: FCIC believes the commenter is referring to current provisions contained in section 17(b)(4). Since no changes to section 17(b)(4) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A few commenters believe coverage at the 60 percent level should be reduced to 50 percent. A few commenters stated that buy-up coverage for prevented planting should be eliminated. One of the commenters believes this change would address the current abuse created by the moral hazard of too great an incentive not to plant. A commenter recommended that the option to increase prevented planting coverage by an additional five or ten percent be eliminated in section 17(h)(1). They believe the base coverage provided is already too much incentive to not plant. A few commenters believe the incentive to not plant is too great. A commenter stated prevented planting, as a general matter, requires continuing analysis with a view to maintaining program integrity, being able to offer a sound insurance product, and having a clearly understood program. The commenter believes that in certain situations, the highest available coverage level is such that it may serve as an incentive not to plant which leads to vulnerability to program abuse when a producer perceives it more profitable not to plant rather than to incur the additional costs of planting and tending a crop through harvest. Another commenter stated that reducing the incentive to not plant (reducing the amount of prevented planting payments) would likely reduce the tendency of growers to "stop'' trying to get a crop planted when conditions are less than ideal.

Response: Since no changes to the prevented planting coverage levels were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter suggested RMA consider declaring areas or counties eligible for prevented planting due to drought which would allow producers within the area who choose not to plant to receive a prevented planting payment. They stated this would be similar to the Palmer Drought Index that was previously used, except it would be more precise and could be based on information from FSA, Natural Resources Conservation Service (NRCS), and the Extension agents reported to the RMA/Regional Office.

Response: Since no such changes to the prevented planting provisions related to drought were proposed, no changes were required as a result of

conforming amendments, the public was not provided an opportunity to comment on the recommended change, and only technical amendments were proposed, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter stated that FCIC should prohibit insureds from filing prevented planting claims based on drought in successive years.

Response: Since no such changes to the prevented planting provisions related to drought were proposed, no changes were required as a result of conforming amendments, the public was not provided an opportunity to comment on the recommended change, and only technical amendments were proposed, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter asked how the possibility of inadequate irrigation water from reservoirs or other water facilities will be addressed in terms of prevented planting.

Response: Inadequate water from reservoirs or other water facilities is already addressed in the current provisions of section 17(d), which discusses failure of the irrigation water supply. Since only technical corrections were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on any changes, no additional changes can be incorporated in the final rule. No change has been made.

Comment: A few commenters stated the provisions in section 17(d) need to be consistent with other sections that require qualification for the entire planting period rather than the final planting date. A commenter recommended that the words "or within'' be changed to the words "or throughout.'' A commenter stated that as they expressed previously regarding the definition of "prevented planting,'' section 17(d) does not clarify whether or not the farmer must initially be prevented from planting during the original planting period. They believe it appears the farmer must be prevented from planting throughout the entire planting period to be eligible for prevented planting coverage during the late planting period. Commenters also believe that "drought'' and "normal precipitation'' for prevented planting purposes need to be defined.

Response: There is no need for a conforming amendment to require the inability to plant throughout the planting period. To qualify for coverage under section 17(d), the cause of loss of drought must continue over a prolonged period and there must be insufficient soil moisture. Therefore, by its very terms, those conditions must exist throughout the planting period. The reference to the final planting date is simply to provide the date on which the conditions stated in section 17(d) must exist. Since no changes to the terms "drought'' and "normal precipitation'' were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A few comments were received regarding section 17(d). A commenter suggested striking "if you elect to try to plant the crop'' from the last sentence. A commenter suggested changing the words "final planting date'' to "late planting date.''

Response: Since only technical corrections were proposed to section 17(d), no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

A few comments were received regarding section 17(d)(1). The comments are as follows:

Comment: A few commenters stated the term "toward crop maturity'' is an undeterminable and ambiguous term.

Response: Since only a technical correction was proposed to section 17(d)(1), no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommended changes cannot be incorporated in the final rule. No change has been made.

Comment: A commenter suggested deleting the words "or progress toward crop maturity.'' They believe this change would make the determination of prevented planting due to drought easier.

Response: See response to first comment under this subsection.

Comment: A commenter believes the provisions are totally subjective. They believe RMA should issue these determinations up front to providers and policyholders for the locales where the determination applies. The commenter does not believe agents should be subjected to the error and omission exposures this language creates, and that insureds should know up front how the policy will react when these conditions exist.

Response: See response to first comment under this subsection.

Comment: A few commenters stated the term "germination of seed'' is an ambiguous term and leaves much guesswork. They stated that insurance providers are not able to determine "good farming practices,'' and that the provisions seem to require that FCIC provide a determination in time for the grower to make an accurate decision. One of the commenters stated recent FCIC interpretation through FAD–012 has attempted to incorporate a sense of "good farming practice'' as a criteria for prevented planting eligibility due to drought, *i.e.*, if it is a "good farming practice'' to plant, then one should not be prevented, and vice versa. They stated the difficulty is that the policy also provides coverage for planted acreage that fails due to drought. The commenters added that the policy does not define drought, nor does it adequately describe the severity of dryness needed in order to qualify for prevented planting coverage and therefore, drought needs to be defined. They believe eligibility for prevented planting due to drought should be viewed as a significantly harsh weather-related condition and that eligibility needs to be based on NRCS or other governmental agency declaration that soil should not be disturbed due to dry conditions or the insured is physically unable to properly prepare the seed bed (as verified by an adjuster) due to dry conditions.

Response: See response to first comment under this subsection.

Several comments were received regarding section 17(d)(2). The comments are as follows:

Comment: A few commenters stated that FCIC should determine whether "reasonable expectation'' exists prior to the time the decision must be made. They stated the policy states that there must not be a "reasonable expectation'' of having adequate water to carry out an irrigated practice. They believe with the myriad of informational sources available with respect to irrigation water and agriculture, the provision leaves both the policyholder and insurance provider open to subjectivity and second-guessing. They believe that in situations where water availability is controlled by water districts (*e.g.*, reservoirs, canals, etc.), RMA should be required to facilitate the distribution of available water resource data, which would provide for consistent information being provided to all insurance providers. The commenters believe that existing policy language

was adequate with respect to individuals who relied on their own water sources (*e.g.*, wells) as these situations need to be handled on a case-by-case basis. A few of the commenters believe if access to the water supply is adversely affected and the cost of modifying equipment to obtain the irrigation water equals or exceeds the indemnity, such modification should not be required, even though actual failure of the water supply may not have occurred. Another commenter stated the policy language is vague relative to insurability for prevented planting. A commenter believes the provisions proposed are totally subjective and that RMA should issue these determinations up front to providers and policyholders for the locales where the determination applies. They do not believe agents should be subjected to the error and omission exposures this language creates. The commenter stated that insureds should know up front how the policy will react when these conditions exist. A commenter stated they would expect FCIC to determine whether the expectation exists prior to the time when the decision must be made.

Response: With respect to the recommendations that FCIC make the determinations of whether the producer had a reasonable expectation, many of these decisions are made on a case by case basis because individual circumstances can vary significantly. FCIC does not have the information (local weather data, available water or other information from irrigation districts, etc.) or personnel to make decisions on an individual producer basis. The insurance provider would have a much greater access to local conditions and the availability of water. No change has been made.

Comment: A few commenters believe the change from "reasonable probability'' to "reasonable expectation'' simply is a bad idea. They believe the former is objective and the latter is subjective. They stated that while weather bureau records can establish whether there is a "reasonable probability'' of adequate water, only the producer's psychiatrist can state whether that producer had a "reasonable expectation.'' The commenter suggested section 17(d)(2) be revised to read as follows: "(2) For irrigated acreage, you have not been notified by the supplier(s) upon whom you intend to rely for irrigation water that the supplier(s) does(do) not expect sufficient water will be available to you at appropriate times throughout the growing season to constitute a good farming practice for the insured crop on the insured acres.''

Response: FCIC proposed to amend section 17(d)(2) to only replace the word "probability'' with the word "expectation'' to conform to other policy provisions, such as section 9(b). It was not intended to change the meaning of the provision. FCIC agrees that there is a degree of subjectivity in both terms. It is impossible to totally remove the subjectivity because there is no way to know for certain at the final planting date whether the producer will have adequate water to irrigate the crop for the remainder of the crop year. Too many factors are unknown. However, FCIC will clarify when there is no reasonable expectation. The information used to determine whether or not there is a reasonable expectation must be from objective sources such as weather stations, reservoir levels, snow pack measurements, etc. Subjective information, such as letters from water districts that are not supported by the other evidence, will not be sufficient to establish a reasonable expectation.

Comment: A commenter stated that the provisions proposed in section 17(e) are entirely too complex for the average agent or insured to understand.

Response: Since the commenter did not reference any specific provisions contained in section 17(e) that they believe are complex or difficult to understand, FCIC cannot respond or make any specific changes as a result of this comment. As stated above, FCIC has elected not to make the proposed changes unless they are necessary to protect program integrity. FCIC elected to incorporate the proposed changes to section 17(e)(1)(i)(A) into the final rule to clarify that prevented planting payments cannot be collected on uninsurable acreage. If the acreage is not insurable, it cannot be used to determine eligible acreage for the purposes of prevented planting. The proposed changes to section 17(e)(1)(ii)(A) have been incorporated into the final rule because some prevented planting payments may have been allowed on the maximum number of acres specified in the processor contract even though the processor contract only guaranteed to accept production from a minimum number of acres and acceptance of any production from acreage above the minimum was optional or conditional. Further, there were instances where processors canceled contracts because the acreage was prevented from being planted, which, under the existing language, could render the acreage ineligible for prevented planting. This outcome would render the prevented planting coverage useless for such producers.

Comment: A commenter recommended the provisions proposed in section 17(e) be revised as follows: (1) Near the end of the statement in the first column, insert a comma after "available'', delete "or'' and insert "or elect to use another growers APH records'' after the word "guarantee'; and (2) At the end of the statement in the second column, insert a comma after "available'', delete "or'' and insert '', unless you elect to use another growers APH records'' after the word "guarantee.''

Response: Since no changes to these provisions were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

A few commenters suggested that section 17(e)(1)(i)(A) be revised as follows:

Comment: Near the beginning of the first sentence, insert the words "in any one of the 4 most recent crop years'' after the word "purposes.''

Response: FCIC has revised the provision to clarify that the phrase "in any one of the 4 most recent crop years'' applies to both the acres certified for APH purposes and the insured acreage reported.

Comment: In the last sentence, insert the words "during the normal planting period'' between the words "planting'' and "may.''

Response: The issue involves whether the crop has been prevented from planting and such determinations can only apply to the period in which the crop is normally planted. No change has been made.

Several comments were received regarding section 17(f)(1). The comments are as follows:

Comment: A few commenters recommended removing the entire parenthetical statement and adding language specifying payment or per-acre liability would not exceed that of the crop that is planted or reported for prevented planting. One of the commenters further stated the provision's "20/20'' rules attempt to prevent a producer from claiming small acreages within a unit for prevented planting or from claiming small acreages within a "field'' to a crop, type and practice different from any crop already planted in a "field.'' They believe the provision contains qualifiers that are burdensome and complicated to administer, when in reality, the provision can be easily circumvented by the producer. Therefore, they feel the

provision is of little benefit. A commenter recommended the section be removed because they believe it is confusing and impossible to administer. They believe the objective of the removed language could be simply accomplished by revising this section of the proposal to provide that any per-acre liability for prevented planting would not exceed the per-acre liability of the planted portion of the field.

Response: The proposed change is incorporated into the final rule because it is necessary to protect program integrity. There has to be means to determine the crop considered prevented from being planted when acreage in the field has been planted without penalizing producers for their normal planting practice, which may include planting separate crops within the field. Further, without this change, it is possible for prevented planting payments to be made for crops on acreage that would otherwise not be insurable because of rotation requirements or processor contract requirements. However, FCIC will look for ways to reduce the complexity while still maintaining program integrity. FCIC will consider the recommended change to add language to limit liability to that of the planted crop or the crop reported from being prevented planting. To be consistent with ARPA, FCIC also added provisions to handle those situations where the producer was prevented from planting a first insured crop and plants a second crop on the acreage. FCIC realizes there may be ways to circumvent the requirements and is working diligently to resolve this problem.

Comment: A commenter stated that as written, section 17(f)(1) is confusing and contains ambiguities that render the subsection amenable to different, reasonable interpretations. They believe this confusion is exacerbated by the parenthetical, which they suggest be subdivided into additional subsections.

Response: FCIC has subdivided the parenthetical into different sections to make it more easily read and understood.

Comment: A commenter suggested putting a period after the word "unit'' which would thereby eliminate rolling acreage from one crop to another. The commenter believes this recommendation would greatly simplify the provisions.

Response: Ending the provision at "unit'' would not solve the problem of rolling acreage from one crop to another because eligible acreage for a crop is still limited in section 17(e) and there must be a determination of the basis on which the remaining prevented planting acreage would be paid. FCIC is looking at other ways to simplify these provisions. No change has been made in response to this comment.

Comment: One commenter suggested the word "is'' be changed to the word "acreage'' in section 17(f)(3).

Response: FCIC agrees the word "is'' is not necessary in the provision and has revised the provision accordingly. However, FCIC does not believe the word should be replaced with the word "acreage'' because the term "acreage'' is already stated in the lead-in sentence in section 17(f) and would apply to this provision.

Comment: Regarding provisions proposed in section 17(f)(4), a commenter questioned how they will know if another person has received a prevented planting payment, because one grower could get a fall prevented planting payment while another grower may have the land for spring. The commenter suggested that the word "insured'' be added in the third line in front of "crop.''

Response: FCIC incorporated the proposed change into the final rule published on June 25, 2003. However, it inadvertently omitted this comment. ARPA only permits multiple prevented planting payments on the same acreage if the double cropping requirements are met. Therefore, this determination must be made and it is the producer that would be in the best position to have access to the information since the producer will either be the landowner or lessee. In either case, the producer would know who to contact to determine whether the acreage was previously prevented from planting. FCIC has revised the provision to clarify that it is the insured's responsibility to determine whether a prevented planting payment had previously been made for the acreage before receiving a payment. It is not necessary to add the word "insured'' before the word "crop'' in the third line because it would not be possible to receive a prevented planting payment for the crop if the crop was not insured. No change has been made.

Comment: Some comments were received indicating the provisions in section 17(f)(5) were unclear.

Response: FCIC originally responded in the June 25, 2003, final rule that the section was revised to improve clarity and remove any conflict with other provisions. However, FCIC subsequently discovered that it failed to incorporate provisions that would allow a crop from which no benefit was derived to be planted without consequence to the prevented planting payment, just as is allowed for a cover crop. The provision has been revised to allow a crop to be planted prior to first insured crop that is prevented from being planted, provided no insurance or other benefit is derived from the crop.

Comment: A few commenters believe the language proposed in redesignated section 17(f)(6) would seem to be helpful.

Response: FCIC has incorporated the proposed change into the final rule to protect program integrity. Without this change, it would be possible for producers to claim they were prevented from planting even though they never intended to destroy the forage crop and plant another crop.

Comment: A few commenters recommended that a comma be inserted after the word "practices'' in the parenthetical sentence in section 17(f)(9), and that the word "or'' be deleted and the words "or FSA farm plan'' be inserted after the word "requirements.''

Response: Since no changes to section 17(f)(9) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A commenter suggested the provision contained in section 17(f)(9), which requires producers to have inputs available to plant, needs to be clarified. They stated that while prevented planting was addressed in the proposed rule, this one important subsection is in need of clarification and was not addressed. The commenter stated that as modes of farming and farm financing change, many limited resource producers in particular, buy inputs at the moment they are needed. They stated that often times, this purchasing pattern is made necessary by lack of dry storage for the inputs. The commenter recommended this subsection be revised to clarify that producers must have inputs available to plant, which may include having sufficient financing, including lines of credit, available to purchase inputs when needed.

Response: Since no changes to section 17(f)(9) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

A few comments were received regarding provisions proposed in section 17(f)(12). The comments are as follows:

Comment: A few commenters believe the term "could'' is vague. They believe the provision will be difficult to enforce. A commenter believes the word "could'' is far too broad in the context of the provision and should be revised to state " * * * a cause of loss has occurred that should reasonably be expected to prevent planting.''

Response: FCIC has incorporated the proposed change into the final rule to protect program integrity. Without this change, it would be possible for producers to lease or buy acreage on which a cause of loss has already occurred in order to obtain a prevented planting payment. This would violate the basic tenets of insurance. FCIC has revised the provision to specify a cause of loss that has occurred that would prevent planting. This change should make the provision more enforceable.

Comment: Commenters also believe the phrase "or you request insurance for the acreage'' is confusing. They stated that prevented planting is reported via the acreage report and it is unclear if the application and the sales closing date were intended to serve as the time by which insurance providers are to be notified. A commenter suggested the words "request insurance'' be changed to "apply for insurance'' because "request'' could be construed to mean when the prevented planting acres are listed on the acreage report, the insured is in the process of requesting coverage from the insurance provider. The commenter noted that at acreage reporting, a loss has already occurred.

Response: FCIC has revised the provision to clarify that the request for insurance only applies to requests for written agreements to provide insurance. The date the request for written agreement is submitted would be the date to determine whether a cause of loss that would prevent planting had occurred, not the acreage reporting date or the sales closing date.

Comment: A commenter believes the provision is subjective and questioned how the provider or agent is supposed to know that a cause of loss has occurred that will or could prevent planting. The commenter stated that if RMA believes conditions exist in an area that warrant withdrawal of the insurance offer, it should publicize and make known that the offer is withdrawn.

Response: Section 17(f)(12) is necessary to allow insurance providers to deny coverage in those situations where it is clear the acreage could never have been planted. Most agents and loss adjusters are located far closer to their insureds than FCIC and would be in the best position to know the local weather conditions and whether significant events had occurred that would preclude the ability to plant the acreage. The provision has been revised to make the standard less subjective and only require denial when there is a cause of loss that would prevent planting.

Comment: A commenter suggested that the language be replaced entirely with wording similar to that used at the end of section 17(e)(1)(i)(A). The commenter believes the reference to "otherwise acquire'' should surely be removed to prevent the situation of a grower operating land a year ago, leasing it last year, getting it back this year and calling it added land.

Response: FCIC has revised section 17(f)(12) and section 17(e)(1)(i)(A) to make them consistent to the maximum extent practical and has restructured section 17(f)(12) to make it easier to read and understand. However, there must be language to cover those situations such as inheritance or gifts of land. FCIC has revised the language to clarify that it is referring to other means of acquiring acreage beside lease or purchase. FCIC has also clarified the language to make it clear that producers who have leased the acreage in successive years will be eligible for prevented planting coverage. It is unnecessary to make other changes to address the commenter's hypothetical situation. If the producer owned the acreage, leased it to another person and the lease expired and the producer regains the acreage, the producer is not "acquiring'' the acreage. The producer had already acquired it when the acreage was first purchased and it is simply being returned. In this situation, the acreage would be eligible for prevented planting coverage. In those situations where the producer leased the acreage from a landlord, the landlord subsequently leases the acreage to another person, and the producer was able to lease the acreage again from the landlord, the provisions regarding leased acreage would apply, not the "otherwise acquired'' provisions.

Comment: A commenter suggested the phrase "during the normal planting period'' be inserted at the end of the sentence.

Response: The recommended language does not need to be added because the prevented planting coverage begins on the current or previous sales closing date, which falls outside the time the crop is normally planted, and the cause of loss that prevented planting could occur at any time during this period. No change has been made in response to this comment.

Comment: A few commenters recommended that language be added in section 17(f)(13) to specifically state that for acreage to be eligible for prevented planting, it must have been insurable if it had been planted.

Response: Since the suggested language was not proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Several comments were received regarding provisions contained in section 17(h). The comments are as follows:

Comment: A commenter suggested that sections 17(h), 17(h)(1) and 17(h)(2) be deleted. A commenter recommended that when switching acres, only allow those crops of equal or lesser value and only if both crops are insured with the same insurance provider. A commenter believes the practice of "rolling'' of crops creates an unacceptable moral hazard in connection with prevented planting and that serious consideration should be given to its elimination. They stated that if however, the practice of "rolling'' is retained, an insured should not be permitted to roll up to a higher paying crop. They do not believe any prevented planting payment should exceed that which would have been paid on the crop originally reported as prevented planting. The commenter also believes that "rolling'' should only be allowed when both crops are insured by the same insurance provider. A commenter suggested the total elimination of subsection 17(h) because they believe it is complex, burdensome and hard for insureds to understand. They believe the added language will be very difficult to track, both for insurance providers and RMA. The commenter stated that changing insurance providers is possible, therefore the "rolling'' of acres should somehow be limited to "rolling'' of acres to another crop to the same insurance provider, otherwise it becomes impossible to track. A few commenters believe the language that introduces the "rolling'' concept should be removed. They believe these provisions that attempt to restrict the number of payable prevented planting acres by crop are complicated and difficult to understand by the insured, the insured's agent, and insurance provider personnel. They added that once understood, the procedural process required to determine, by crop, the maximum eligible acres and subsequent payable crop acres, once the maximum has been reached, is excessively arduous and expensive to administer. A commenter recommended that section 17(h) be revised to read as follows: "If

we determine you are eligible for a prevented planting payment for a crop for which you do not have an adequate base of eligible prevented planting acreage, as determined in accordance with section 17(e)(1), your prevented planting guarantee or amount of insurance, premium and prevented planting will be paid as reported if you have other insured crops with eligible prevented planting acres up to the amount of liability originally reported for the crop you were prevented from planting. The prevented planting liability established for the other insured crops in the county will be applied on a dollar amount of liability per acre basis until you no longer have other crops with eligible prevented planting acres or you have been paid for the full amount of the prevented planting liability for the crop you reported as prevented planting.''

Response: FCIC understands there may be concerns regarding section 17(h). However, FCIC has been unable to determine whether the recommendations regarding "rolling'' acreages, limiting "rolling'' acreages to a lesser value crop or original liability, limiting "rolling'' acreages to when both crops are insured by the same insurance provider, and total elimination of the "rolling'' acreage provisions would fully address the concerns or add other program vulnerabilities. Until FCIC can make such a determination, it would be premature to include such changes in this final rule. FCIC will review alternatives, including those recommended, to find one that will simplify these provisions and still protect program integrity. Since FCIC is considering alternatives, it has elected to defer the changes proposed in section 17(h);

Comment: A commenter suggested the word "insured'' be added between the words "a'' and "crop.''

Response: FCIC agrees with the commenters that it may improve clarity to add the word "insured'' before the word "crop.'' However, it has elected to defer the proposed change until a more thorough review of prevented planting provisions is completed.

Comment: A commenter believes the issue of switching to a crop that results in the most similar prevented planting payment creates considerable uncertainty as to the ultimate monetary impact to the insurance provider. They stated this provision provides switching of crops that use different plans of insurance that have different Basic, Crop, and Special Provisions. They also added it impacts the premium, amount of administrative and operating reimbursement caused by switching of plans and crops, and fund designations (for example, by switching from the Assigned Risk Fund for Crop A to the Commercial Fund for Crop B). They also noted that if crops are insured with different insurance providers, insurance provider B can be responsible for payment of prevented planting acres reported to insurance provider A. They believe this provision is confusing for auditors since you are switching crops to different databases that are in different legal descriptions from where the prevented planting loss occurred. The commenter stated this provision does not address how to handle situations in revenue plans of insurance when the harvest price is higher than the base price and the liability per acre increases, and asked if they should roll to the approved yield database using the base or harvest price.

Response: FCIC also does not believe it is necessary to incorporate language in the provisions that address how to handle situations in revenue plans of insurance when the harvest price is higher than the base price. This would be an issue for any prevented planting payment made under such plans of insurance. Therefore, nothing in this provision increases or decreases the delay that may arise while waiting for the harvest price to be established. However, as stated above, FCIC is looking at alternatives to the "rolling'' acreage provisions.

Comment: With respect to section 17(h)(2), a commenter recommended the words "no prevented planting payment will be made for the acreage'' be deleted and replaced with the words "a prevented planting payment will be made based on a guarantee equal to or less than the guarantee for the originally reported non-irrigated crop.'' Another commenter stated this language could lead to the conclusion that eligible prevented planting acres are tied to practice and asked if that is the intent of the language.

Response: FCIC has incorporated the change in the proposed rule into the final rule to protect program integrity. Without this change, it would be possible for producers to receive prevented planting payments based on irrigated crops even though the acreage that was prevented from being planted was not irrigated and there was no equipment to irrigate such acreage. FCIC is unable to adopt the recommended change because FCIC has been unable to determine whether the recommendation would fully address the concerns or add other program vulnerabilities. Until FCIC can make such a determination, it would be premature to include such changes in this final rule. FCIC will review alternatives, including those recommended, to find one that will simplify these provisions and still protect program integrity. Eligible acreage may be tied to a practice only with respect to irrigated practice. Current provisions contained in section 17(f)(10) prohibit prevented planting coverage based on an irrigated practice unless adequate irrigation facilities were in place to carry out an irrigated practice on the acreage. Since the provisions only reference irrigated and non-irrigated, eligible acreage is not tied to other practices, such as summerfallow or continuous cropping.

Comment: A commenter stated the proposed revisions in section 17 do little to clarify what they believe is the most baffling portion of the Basic Provisions. They question whether or not an insured is actually prevented from planting if the insured is able to plant a substitute crop. They stated that an insured either plants or does not, and that in the former instance the insured insures the crop, and in the latter instance the insured files a claim for prevented planting.

Response: ARPA specifically provides for a prevented planting payment to be made if the insured is prevented from planting a first crop even though a second crop is planted on the same acreage in the same crop year. No change can be made.

Clarifications to the Written Agreement Provisions—Section 18

Comment: Several commenters recommended clarifying the situations in which price elections can be included in a written agreement, and asked if the new language was intended to allow RMA Regional Offices to offer higher price elections for organic crops.

Response: The reason the definition of "price election'' references written agreements is because written agreements are often requested when the actuarial documents do not contain the provisions necessary to insure the crop. In such cases, the price election used is generally the price election established by FCIC for the crop where it is insured and it is just transferred from an existing Special Provisions or addendum thereto. This is to prevent over-insurance of the crop. FCIC did not intend to provide authority to increase the price election by written agreement from those that have been announced by FCIC. The reference to written agreement in the definition of "price election'' may be misleading and FCIC has removed the reference. FCIC has also revised section 18 to clarify that price elections cannot be revised by written agreement. If price elections are

established by FCIC for organic crops, they will be included with all the other price elections on the Special Provisions or addendum thereto.

Comment: Several commenters recommended deleting the language contained in section 18(d) that allows a written agreement to be in effect for a maximum of 4 years. Another commenter agreed with the four-year period. Several commenters stated the RMA-Regional Office should approve agreements for the length they want to, if they want less than 4 years.

Response: The maximum number of years a written agreement should remain in effect is dependent on the type of agreement, the propensity for terms defined within the agreement to change, and pending changes to actuarial documents in effect for the crop and county. Some agreements may be reasonable and prudent for only one year. Others may have terms that should apply for many years. To provide flexibility and reduce unnecessary paperwork, FCIC agrees with the comments recommending deletion of the four-year maximum duration for a written agreement. The duration of a written agreement will be stated in the written agreement. FCIC has revised section 18(d) accordingly. Because written agreements can now be extended for many years, FCIC has also revised and clarified the provisions to specify that even though the written agreement may be for multiple years, it will only be in effect for a particular crop year if the conditions under which it was requested exist for that year. If conditions change, the written agreement is not cancelled, it is just not considered in effect for that crop year. FCIC has also removed the consequences of a denial of liability for failure to report a changed condition to be consistent with the removal of such consequences elsewhere in the policy in response to other comments.

Comment: A few commenters recommended deleting the word "printed'' in the last sentence in section 18(d). A commenter stated "policy'' is already defined and asked for clarification if the definition for it is the same as in the rest of the provisions. Another commenter asked that "immediately'' be defined, and suggested "promptly'' may be more appropriate.

Response: FCIC agrees the word "printed'' should be deleted and the provisions have been revised to specify the policy without regard to the written agreement. Since the notice provisions have been removed, the term "immediately'' is no longer applicable.

Comment: Several comments were received regarding the provision proposed in section 18(e) that states certain written agreements may be accepted after the sales closing date. The commenters asked that this issue be handled in the Crop Insurance Handbook as it is now. A commenter asked for clarification of placing a Web site address in the regulation regarding if this would lock down the procedures and make them unchangeable without republication in the **Federal Register** as a proposed rule. Another commenter asked that "physical inability'' be defined while another commenter asked who "may'' approve the policy.

Response: Producers do not receive copies of the handbook and must be provided the date by which written agreements must be requested. Therefore, FCIC has revised the provisions in section 18(e) to specifically state the exceptions to the sales closing date deadline and removed the reference to the procedures and Web site. FCIC also agrees the term "physical inability'' is unclear and has revised the provision to add an example. Only FCIC can offer written agreements and section 18 has been revised accordingly. Once offered, the producer and the insurance provider can elect whether to accept the written agreement as offered. Neither the insurance provider nor producer can elect to accept some terms of the written agreement and reject others.

Many commenters commented on the provisions proposed in section 18(f). The comments are as follows:

Comment: Commenter disagreed with the proposed language that requires producers to have a four year history of the same crop in order to qualify for a written agreement. They noted that peas, lentils and chickpeas are expanding in the Midwest because producers are finding the value in pulse crops through rotation and market value. The commenter stated that depending on demand and profitability, producers will plant and rotate peas, lentils and chickpeas in a 3 to 5-year rotation. They added that pulse crops break cereal disease cycles, improve soil organic matter, fix nitrogen and improve farm profitability. Commenters believe this requirement would also have a detrimental effect on specialty and alternative crop producers who quite often would have less than 4 years of production history for the crop. They stated that producers often rotate crambe and canola in a 2 to 4 year rotation, which would take 8 to 16 years to establish the history to qualify for the proposed crop insurance requirement. They believe this is an unrealistic and unreasonable expectation that would close the door for risk management protection for numerous producers. A commenter stated by the time an insured has four years of history with a new crop, considering recent weather patterns, he could easily experience a couple of bad years. Thus, he is out of business before he is even eligible for crop insurance. A commenter stated the current rule of a three year crop history requirement for insurability is onerous already and that extending this to four years is simply unrealistic and will have a muffling affect on innovative agriculture. Many commenters stated the federal requirement for organic certification is 3 years, and requiring 4 years costs organic producers another year without coverage. A few commenters asked why two years would not suffice. Several commenters asked that records for similar crops, types, varieties, and practices, as well as agronomic research done at regionally relevant land grant research stations, be accepted for consideration when approving a written agreement.

Response: The Act provides the authority for the FCIC to enter into a written agreement with an individual producer if the producer in the area has actuarially sound data relating to the production by the producer of the commodity that is acceptable to FCIC. This means that there has to be sufficient data to be able to make an insurance offer and such data must be specific to the crop in the area. It would be a violation of the Act to rely on similar crops or to rely on data on a crop that was not produced in the area. Based on comments received, FCIC agrees that requiring four or more years of data related to the production of a commodity by a producer may be too restrictive. However, the suggestion to use two years of data cannot be accepted because the ability to determine actuarially sound coverage on zero to two years of production experience of a single producer is questionable when insurance has not been available in the county. Therefore, FCIC will retain the current three year requirement for a crop for which there are no actuarial documents because there may not be any other data upon which to base insurance.

Comment: The commenter added that the proposal would create an artificial impediment to the expansion of minor oilseed crop acres in the United States (for example, in South Dakota and Montana where there are some canola written agreements, because there is no standard coverage available in many of the counties) since producers would have to grow canola 4 years before RMA could provide the insurance offer. The

commenter stated that because the proposed language is practice, type, and variety specific, a grower in North Dakota who wanted insurance on high erucic rapeseed would need to provide four years of production evidence for high erucic rapeseed (regardless of the number of years they grew canola) before RMA could provide an insurance offer. The commenter believes since canola and rapeseed are very similar, this requirement would be unduly restrictive to growers. They added that any growers wishing to rotate into canola in other states that show promising growth, such as Wisconsin, Michigan and the Pacific Northwest, would face the same overly restrictive requirements.

Response: In those cases where the crop has previously been insured and the producer is only changing the type, variety or practice, there is data in the county that can be used to establish insurance and, therefore, only one year of records is required. FCIC has revised the provisions accordingly.

Comment: A commenter stated that the provision seems to run contrary to Congressional intent in the farm bill to encourage planting flexibility. The commenter added that producers in some states are growing program crops (*i.e.*, cotton in Kansas) that may not have been grown traditionally. The commenter stated the intent of planting flexibility is to allow producers to respond to market signals and promote conservation practices. The commenter believes the proposed provisions would discourage producers from pursuing planting flexibility and may discourage planting based on new technologies and possible value added opportunities.

Response: Notwithstanding the added flexibility in the Farm Bill, FCIC is bound by the language in the Act. Therefore, even though it may impose a hardship to those producers who rotate crops and new producers, to comply with the Act, FCIC must set a minimum standard of how much production evidence is acceptable for determining an appropriate premium rate and coverage in these circumstances.

Comment: A commenter recommended the provisions be revised to allow a minimum of 65 percent coverage if sound farming practices are adhered to when producers do not have 4 years of production records.

Response: The Act's requirement for actuarially sound data applies to all coverage levels. Therefore, simply setting a maximum coverage level for producers without actuarially sufficient data would not be sufficient to meet this requirement. FCIC has also revised the provisions to inform the producer of the other requirements for requesting a written agreement. Such requirements were previously located in the procedures, which the producer did not receive.

Comment: Several comments were received regarding the provision proposed in section 18(g) that states any written agreement will be denied if FCIC determines the risk is excessive. They stated that clarification is needed regarding the roles of the RMA Regional Offices and the insurance providers as to who decides. The commenters asked if the proposed provision would affect written agreements already in effect and asked what the definition of "excessive risk'' is.

Response: This provision has now been incorporated into sections 18(d) and 18(h), which includes the basis for which written agreement requests can be denied. FCIC also added standards for which requests could be rejected and written agreements denied. Such standards were previously included in the procedures and FCIC determined that producers should know these standards. The Act provides FCIC with the authority to limit insurance on the basis of risk. Consistent with the Act, the provision clearly states FCIC will determine when the risk is excessive. The insurance providers have no role in making these determinations of excessive risk. Such determinations can affect requests for written agreements or written agreements already in effect but if the determination is made during the crop year, the written agreement will not be canceled until the subsequent crop year. Currently the excessive risk is determined by loss ratio and loss frequency. However, FCIC is exploring other possible methodologies to determine whether other methodologies may more accurately assess the risk.

Elimination of the Arbitration Provisions—Section 20

There were a large number of comments regarding the proposed elimination of the current arbitration provisions. For the purpose of addressing these comments, FCIC has grouped them into the following 3 categories: (a) Comments agreeing with the proposed elimination; (b) comments disagreeing with the proposed elimination; and (c) comments recommending alternative methods of dispute resolution.

Many commenters stated they support the proposal to eliminate the arbitration provisions. Their additional comments are as follows:

Comment: Many of the commenters believe that mandatory arbitration can be quite costly to the producer and that it eliminates access to any other form of dispute resolution. Some of the commenters agree with the rationale provided in the abstract to the rule and believe mandatory arbitration has proven to be ineffective in many instances and has overreached its original objectives. A commenter agreed with the rationale for the change provided in the preamble of the proposed rule. They applaud the elimination of the arbitration requirement, and the retention of the reconsideration, mediation, and appeal procedures for disputes with the government. The commenter added if arbitration is ultimately removed, references to arbitration in other areas of the policy should be removed, and they believe it should be replaced with alternative dispute resolution. One commenter believes the proposal to delete the provisions regarding arbitration and to permit producers to resolve disputes through the judicial process is a good one. The commenter believes that by deleting the provision, it is clear that the only avenue is through the judicial process.

Response: As a result of all the comments, FCIC has determined it would not be in the best interest of the producer or insurance provider to eliminate the arbitration provisions. However, it is clear that the current arbitration provisions need to be revised to address the issues identified with arbitration. As explained more fully below, FCIC has revised the arbitration provisions to address these issues.

Comment: A commenter recommends that FCIC should require insurance providers, as a condition of the reinsurance contract, to offer and participate in alternative dispute resolution similar to that offered in contracts with the government, *i.e.*, reconsideration, mediation, and appeal to the National Appeals Division insofar as disputes involve interpretation of FCIC regulations. They do not believe this requirement would be unduly burdensome for insurance providers. A commenter stated their experience with mandatory farmer-lender mediation has been positive on the whole for both debtors and creditors. A commenter also believes FCIC should consider adding provisions which will simplify and quicken the dispute resolution process. They recommended the policy specifically provide that the parties may mediate any dispute, provided there is a clear requirement that whoever attends the mediation conference has the authority to settle the claim and that insurance providers be given some assurance their decision to settle will not be later questioned by FCIC, which

they believe is a crucial requirement. The commenter believes insurance providers are reluctant to settle any claims because it is easier for them to fight the insured and lose, than to settle with the insured and fight FCIC if FCIC later disagrees with the settlement. They do not believe mediation will work or that settlements will occur even in the judicial process, if there is a disincentive for the insurance providers to settle. The commenter recommended the rule be clarified to state that any settlement entered into between a producer and insurance provider related directly or indirectly to the payment of premium will constitute full payment of the premium so the producer will not be considered ineligible for benefits for non-payment of premium. They believe if the purpose of these new regulations is to "better meet the needs of the insured,'' then it seems obvious to them such needs will be better served if the dispute resolution process is simplified and settlements are encouraged.

Response: The commenters also suggested that FCIC require the insurance providers to offer alternative dispute mechanisms similar to the governmental dispute resolution mechanisms such as mediation, reconsideration or appeal to the National Appeals Division (NAD). Mediation is always an option available to resolve disputes between producers and insurance providers and FCIC will revise the provisions to clarify that this option is available and how mediation will operate within the policy provisions. Further, a revised arbitration process will still be available to resolve disputes. But there is no basis to impose additional burdens on the insurance providers to create formal reconsideration or appeals processes because it would impose a significant monetary burden to set up such formal processes. The insurance providers are always free to adopt informal reconsideration or appeals processes. Further, such informal processes must be in addition to, not instead of, the arbitration process stated in the policy. FCIC does not believe it should establish formal rules for mediation. Mediation works best when both parties are in agreement as to the process. However, FCIC agrees that producer and insurance provider representatives who participate in the mediation must have authority to settle the case or the process is rendered meaningless and will incorporate this requirement into the provisions. While insurance providers are free to mediate and settle disputes, FCIC cannot abdicate its responsibilities to ensure that taxpayer dollars are properly spent. However, FCIC agrees that it should take into consideration litigative risk and the reasonableness of settlement. If the insurance provider and producer settle a dispute regarding premium, the producer no longer owes a debt to the insurance provider once the agreed to amount has been paid and should no longer be ineligible. However, as stated above, if such settlement occurred after the termination date, the producer would still be ineligible for the following crop year. Notwithstanding any such settlement, the insurance provider would still be required to pay FCIC all premium owed under the policy unless the insurance provider can demonstrate that the amount of premium billed was in error.

Comment: Commenters stated it appears that determinations made by FCIC will be subject to appeal provisions under 7 CFR part 11, but it is not clear as to whether the policyholder will be offered these same appeal rights for determinations made by insurance providers. One of the commenters commended FCIC for having already established the offering of appeal rights through the provisions of 7 CFR part 11. However, they believe it is imperative for policyholders to also be provided a system of dispute resolution with insurance providers. The commenter stated many of the potential disputes between insurance providers and policyholders involve sums of money that make legal action on the part of the policyholders cost prohibitive, thereby leaving them with no grievance procedure or recourse. The commenter urged that insurance providers be included in appeal procedures under 7 CFR part 11 or a similar dispute resolution/appeals system and suggested the following language for section 20(a), "Except as provided in section 20(d), you may appeal any determination made by FCIC or insurance providers in accordance with appeal provisions published at 7 CFR part 11.'' The commenter believes that in addition to providing low cost dispute resolution for both the insurance providers and policyholders, informal appeals and mediation serve to foster good will and communications between disputing parties.

Response: FCIC agrees that it would be in the best interests of all parties if there were a low cost dispute resolution mechanism available to the insurance provider and producer. However, disputes between the producer and the insurance provider can never be appealed to NAD under 7 CFR part 11. Under 7 U.S.C. 6994, only "adverse decisions'' are appealable to NAD and under 7 U.S.C. 6991(1), "adverse decisions'' can only be rendered by a USDA agency, such as FCIC. FCIC has clarified the provisions to specify when disputes may be brought to NAD. As stated above, FCIC has also revised the provisions to allow mediation as a low cost means to resolve disputes. However, disputes not resolved through mediation must be resolved through arbitration.

Comment: One of the commenters questioned whether determinations made by insurance providers would leave the policyholder with no dispute resolution options other than legal action, or if it is intended that policyholders disputing insurance provider determinations will be able to appeal adverse insurance provider determinations to FCIC.

Response: FCIC does not have the resources to hear disputes between producers and insurance providers at this time.

Comment: A commenter added that many states have USDA certified agricultural mediation programs that are quite capable of participating in a dispute resolution/appeals system for insurance providers. Nationwide, the number of USDA certified state agricultural mediation programs has increased to 29 due to the ongoing success of the program and most USDA agencies that deal with agricultural producers have implemented dispute resolution/appeals of adverse determinations under 7 CFR part 11. The commenter stated that as part of the appeals process, mediation is offered through USDA certified mediation programs, if available in the state and that if elected by producers in states without USDA certified programs, mediation is provided through other non-USDA certified mediation providers. The commenter added if mediation is unsuccessful in resolving the dispute, the producer can file a request to have the dispute heard by the National Appeals Division. The commenter stated in fiscal year 2002, the dispute resolution rate for one state's Agricultural Mediation Service cases was 89 percent, including those where adverse determinations are reversed or modified. Also included are those where the producer, through mediation, gains understanding, accepts the determination, and foregoes further administrative appeals even though the adverse determination remains unchanged. The commenter believes disputes resolved through mediation save the participants further time, effort, and money spent on formal appeals or litigation. In the commenter's state, average mediation costs for insurance

providers would typically range from around twenty-five to seventy-five dollars per case.

Response: There is nothing in the policy that would preclude producers and insurance providers from utilizing the USDA certified state mediation programs, if such programs are amenable to hearing such disputes.

Comment: A commenter stated it appears FCIC has decided that the American Arbitration Association (AAA) arbitration was not an effective or desirable dispute resolution method, and has therefore decided to use the administrative appeals process exclusively, which they agree with. The commenter stated the current language in section 20 caused considerable confusion over the meaning and the exact requirements of arbitration. They stated that the apparent requirement for the AAA oversight and administration was disregarded by a federal district court when the parties could not reach agreement on an arbitrator or initiation of arbitration.

Response: FCIC has not decided to use the administrative appeals process exclusively. Under the proposed rule, the only dispute resolution mechanism available was litigation. Further, FCIC determined that elimination of arbitration was not in the best interests of the producer or the insurance provider and has elected to revise the arbitration provisions to reduce the problems identified by the commenters and FCIC in its preamble to the proposed rule. FCIC has not determined that the American Arbitration Association (AAA) arbitration was not an effective or desirable dispute resolution method. FCIC is simply unable to endorse or require a producer or insurance provider to use a specific organization to settle disputes. Such action would be a violation of the competitive process.

Many commenters opposed elimination of arbitration from the policy. Their additional comments are as follows:

Comment: Many commenters stated arbitration is effective and resolves disputes quicker and cheaper than litigating in court. A commenter stated lengthy court battles cause substantial delays of crop insurance indemnity payments which many producers cannot afford. If producers go to court, they may incur more expenses and delays than they would through arbitration. The commenter stated crop insurance involves complex evidence, testimony and documents and that experienced arbitrators' quick understanding of the issues saves time and money. They stated incorporation of an arbitration clause in the crop insurance policy enables producers, at the time they sign the contract, to know what their potential costs will be in terms of time and money if a dispute arises. A few commenters stated that while the arbitration process may have its flaws, it provides an interim process through which the insurance provider, agents and insured may make their case to an arbitrator whose expertise lends itself to quick resolution of the issue. A commenter states the case statistics from all Federal district courts for the year ending 2001 compiled by the Department of Justice indicate the median time to bring a civil case to trial in the Federal district courts is 21.6 months. An additional 10.9 months from the filing of a notice of appeal is required to dispose of any appeal. The number of cases pending in the Federal district courts for more than three years is at an all-time high of 35,303 cases, more than doubling since 1999. By comparison, the International Centre for Dispute Resolution, a division of the AAA, and the largest international commercial arbitral institution in the world, had an average resolution time for claims of less than ten months from filing to award.

Response: FCIC is unable to dispute the statistics provided and has elected to retain the arbitration provisions.

Comment: Commenters stated although the AAA, which administers the majority of arbitration cases, assesses filing fees, the fees vary according to the size of the case. They stated only a case in excess of $1 million would incur the filing fee described in the proposed rule, while by contrast, cases valued at $75,000.00 and at $150,000.00, which are more indicative of the average dispute, result in filing fees of only $750 and $1,250 respectively. The commenter stated that in analyzing costs, FCIC has examined only the infrequent high value cases, and from those made erroneous conclusion as to the cost of arbitration. The commenter questioned whether FCIC has, in fact, analyzed crop insurance arbitration cases to determine both the median and mean claim amounts demanded by insureds. They stated if FCIC has made such a determination, they request FCIC publish the number of cases reviewed and the median and mean claim amounts. The commenter stated that in an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes and the commenter provided a listing of the fee schedule. The commenter stated a nonrefundable initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed and a case service fee will be incurred for all cases that proceed to their first hearing, which is payable in advance at the time the first hearing is scheduled. They noted this fee is refunded at the conclusion of the case if no hearings have occurred, however, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.

Response: FCIC had previously received significant anecdotal evidence that the cost of arbitration was rivaling that of litigation and based on the requests for litigation expenses incurred in arbitration, FCIC had to agree. However, FCIC accepts that these cases may have been the exception and not the rule and has elected to retain the arbitration provisions as amended as stated below.

Comment: The commenter believes that in assessing the cost of arbitration, FCIC apparently ignored the costs associated with retaining counsel, an option in arbitration but a necessity in litigation. The commenter stated that more specifically, in disputes involving nominal amounts of money, insurance providers and, to a greater degree, insureds chose to proceed without counsel. They stated however, if litigation is required, both insurance providers and insureds will be compelled to retain counsel to navigate through the specialized waters of litigation, which they believe will be more of a burden on insureds than on insurance providers. Therefore, they believe any cost-savings associated with the elimination of the filing fee will be more than offset by the imposition of legal fees. The commenter stated that moreover, for claims under $75,000, the AAA offers expedited procedures that streamline arbitration, thereby reducing the time and expenses incurred by insurance providers and insureds. They added that similarly, for claims under $10,000, the AAA permits cases to be decided based on documents only. The commenter stated that by eliminating the oral hearing, insurance providers and insureds are not compelled to spend more money than the amount in dispute. They added that unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Response: See response to first comment under this subsection.

Comment: The commenters recognize that some arbitrators have exceeded the scope of their authority and, therefore, they urged FCIC to incorporate an

explicit list of issues subject to arbitration into the Common Crop Insurance Regulations. That some arbitrators or arbitration panels may have rendered interpretations of the policy should not be a basis for rejecting arbitration as an approach. Any deviation by an arbitrator from the scope of authority conferred by contract is a ground for vacating the arbitrator's decisions. Thus, to the extent an arbitrator goes beyond resolving factual disputes, the arbitrator's determination is subject to being vacated and reversed. This is the appropriate method for dealing with an errant arbitrator rather than the one chosen of proposing total elimination of the process. The commenter stated the proposed rule laments the instances in which arbitrators have interpreted the crop insurance policy and, in doing so, applied state law even though preempted. They stated contrary to FCIC's understanding or expectation, even purely factual disputes between insurance providers and insureds often necessitate the interpretation of an insurance policy that neither party wrote. They stated whether these disputes are resolved through arbitration or litigation, an arbitrator or a jury or a judge ultimately will decide the meaning and effect of the insurance policy and the various handbooks issued by FCIC. The commenter believes unless FCIC establishes a framework in which it alone has the authority to settle disputes involving policy interpretations, FCIC must accept the reality that a third party will fulfill that function. The commenter stated it is their overwhelming experience that most arbitrators apply the applicable policy provisions and the law, and do not engage in policy interpretation. They believe this is the direct result of briefing arbitrators on the history and role of the federal crop insurance program, the Act, the relationship between the FCIC and the insurance provider, the pertinent legal authority regarding preemption, and cases involving the specific policy terms and conditions at issue in the arbitration.

Response: FCIC accepts that arbitration may be a valuable tool and has elected to retain it. However, there appears to be little dispute that arbitrators have exceeded the scope of their authority in the past and made policy or procedure interpretations. Since many arbitrators failed to state the reasons for their decision, it would be impossible to get such decisions vacated. Therefore, another means had to be developed to ensure that arbitrators were not interpreting the policies or procedures. FCIC agrees that factual disputes and policy and procedure interpretations can be intertwined and that this should not preclude arbitrators from hearing the dispute. FCIC also agrees that the only way to avoid the possibility of having third parties interpret the policy or procedure is to develop a framework in which FCIC is the only one who can render interpretations. There have been instances in the past where arbitrators' decisions have resulted in disparate treatment, whereby one producer could win an award and a neighbor with the same crop and conditions may not based on who the arbitrator was. This is contrary to the goals of the crop insurance program. Federal crop insurance is a national program with all producers receiving the same policy for the same crop and insurance providers are required to use procedures issued by FCIC in the service and adjustment of such policies to ensure that all producers are treated alike and none receive special benefits or treatment because of the crop they produce, the insurance provider that insures them, or who hears their disputes. Therefore, consistent with section 506(r) of the Act and 7 CFR part 400, subpart X, FCIC has revised the policy to create this framework and specify that such interpretations must be sought from FCIC in mediations, arbitrations or litigations, such interpretations will be binding, and failure to obtain an interpretation will result in nullification of any settlement or award. This will ensure that all producers and insurance providers are treated alike.

Comment: Commenters also stated they believe that local court decisions may cause more variance in policy decisions than through arbitration and thus, FCIC's goals for proposing to eliminate arbitration would not be met and would be even further undermined.

Response: FCIC is not sure that local court decisions will have more variance than arbitrators' decisions. However, FCIC sees the other benefits of arbitration and has elected to retain the arbitration process.

Comment: One of the commenters believes if there are problems with the arbitration system, the arbitration process should be improved rather than abandoned. They believe the arbitration process as enacted in 1925 provides such contracts be arbitrated and this provision is irrevocable.

Response: FCIC does not agree that it is required to include arbitration in its policies. However, FCIC has elected to improve, rather than abandon the system.

Comment: Commenters also stated they believe arbitration alleviates unnecessary parties from being named in litigation.

Response: Regardless of whether arbitration or litigation is offered, unnecessary parties may be named. Further, there are instances where the necessary parties have not been joined in the arbitration, such as when the producer is alleging agent error. However, as stated above, FCIC has agreed to retain the arbitration provisions as revised.

Comment: Commenters stated FCIC has historically been hesitant to provide financial and testimonial assistance to insurance providers defending FCIC policy and procedures. Commenters stated that while RMA may believe its direct participation in the arbitration of individual disputes would enhance the program, in their experience, RMA employees typically have declined requests to testify as either fact or expert witnesses, or have elected not to provide any information material to the dispute. They believe nevertheless, a system could be devised through which the approved providers would notify RMA of pending arbitrations and scheduled hearing dates, and upon RMA's request, would call an employee designated by RMA as a witness. The commenter believes the essential standard for any such system would be that RMA participation did not delay resolution of the dispute between producer and approved provider. They believe centralizing the notice receipt and RMA participation decision in a single RMA office should easily allow this standard to be met.

Response: As stated above, FCIC agrees that it needs to provide interpretations to ensure that the provisions are administered in a uniform manner for all insureds. Therefore, it has revised the provisions to require policy and procedure interpretations be obtained from FCIC and such interpretations will be binding in any mediation, arbitration or litigation. FCIC has procedures in place to seek policy interpretations through 7 CFR part 400, subpart X. Further, the department has procedures to request witnesses or documents and FCIC will permit witness testimony or provide documents if the standards in such procedures have been met. Further, the administrative and operating expense subsidy paid to insurance providers includes an amount for litigation expenses. Such subsidy is paid for all policies, regardless of whether the policy is ever litigated, and is intended to cover the costs associated with those policies where litigation occurs.

Comment: A commenter recommended the section heading be changed to read "Arbitration, Appeals and Administrative Review.''

Response: FCIC agrees that the heading should be changed and has revised it to read "Mediation, Arbitration, Appeals, Reconsideration and Administrative and Judicial Review'' to encompass all the provisions contained in that section.

Comment: Commenters suggested that all issues should be arbitrated. Another commenter recommended the current provisions be retained with a definition of "factual determination'' added or explain in another subsection what can and cannot be arbitrated. A commenter recommended FCIC establish guidelines regarding how arbitration cases are to be handled, how various types of issues are to be addressed and provide producers with information when they sign contracts as to what their options are under arbitration clauses. A commenter stated their experience with the arbitration process has been the arbitrators' lack of knowledge or understanding of the policy and procedures and specifically the insurance providers' lack of authority to negotiate settlements without doing so outside of FCIC procedure and jeopardizing FCIC reinsurance on the policy. The commenter believes most of the problems cited in the proposed rule relating to the use of arbitration may arise from insufficient guidance from the Department of Agriculture. They stated if a contract arbitration clause is intended to only direct certain types of disputes to arbitration, the clause should explicitly set out the appropriate parameters (*i.e.* "Any disputes involving acreage determinations, approved yield calculations, determinations of production to count, or other similar factual determinations shall be resolved in accordance with the rules of the American Arbitration Association. Arbitration shall not be used to resolve other policy disputes or disputes regarding the interpretation of policy.''). They added that specific provisions of an arbitration clause in effect modify the standard framework embodied in the Commercial Arbitration Rules.

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. Since producers should receive the policy upon application, which contains the rights and responsibilities of the parties regarding arbitration, there is no need to provide additional information regarding their options. Insurance providers have the authority to negotiate any settlement. However, FCIC must have the ability to determine whether its policies and procedures have been adhered to. If an insurance provider and its agent and loss adjuster have followed FCIC's policy and procedures in handling the policy, there is no basis to deny reinsurance, which includes the defense of cases where there is little or no litigative risk. It is only where the insurance provider, agent or loss adjuster committed an error or omission that reinsurance is at risk. Insurance providers always have the option to discuss settlement of a case with FCIC to determine whether the settlement would be reinsured. FCIC is unsure what the commenter is referring to when it states that the arbitration clause in effect modifies the standard framework of the Commercial Arbitration Rules and, therefore, cannot respond to this comment.

Comment: A few commenters recommended retaining the first sentence of current subsection (a) to address arbitration between policyholder and insurance provider, and that the appeal details be incorporated in a separate subsection (b). The commenter views the process of arbitration and the process of appeals and administrative review as two distinct processes, and both may be appropriate for inclusion in the policy. The commenter believes arbitration should apply to disputes between the insurance provider and the insured, and appeals and administrative review should apply to decisions made by FCIC. A commenter added that the proposed language (only a "determination made by FCIC'') severely limits the situations that would be subject to the process identified in the proposal.

Response: FCIC has restructured the entire section and has attempted to distinguish between resolution of disputes with insurance providers and those with FCIC. However, since some processes and provisions are applicable to both, it would be impossible to totally separate these provisions. FCIC agrees that the appeals process available in 7 CFR part 11 is extremely limited. However, there is no statutory authority to permit disputes between insurance providers and producers to be resolved through this process. Arbitration and mediation are now available for determinations not made by FCIC.

Comment: Commenters stated the AAA should administer all arbitrations. The commenter stated based on their experience, alternative dispute resolution organizations other than the AAA are either unable or unwilling to administer arbitration in accordance with the AAA's rules. Other commenters felt it would work if reputable arbitrators were used that both parties agreed to. A commenter states the existing provisions of section 20 only require use of the AAA rules, not the AAA itself. It states that this approach is appropriate because there are various reputable and less expensive arbitration providers available. Because of the increasing acceptance of arbitration as a preferred alternative to the judicial process, competition amongst the providers of arbitration services enables parties to the process to negotiate cost savings arrangements. A commenter believes the AAA should still be an option for any appeals process. Other commenters expressed concern that local influences need to be discouraged. They suggested that perhaps this should go to the Federal system to resolve the lawsuit and, as with any other Federal program, lawsuits should pre-empt State laws. The commenter suggested the Law Committee's input be sought. A commenter referred to the RMA's FAD–007 (issued in 2001), stating RMA interpreted the arbitration requirement of section 20(a) of the Basic Provisions to allow for any alternative dispute resolution organization to administer these proceedings. The commenter also referenced their previous letter in which they brought to RMA's attention that Rule R–2 of the specific rules required by the Basic Provisions states "When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they hereby authorize the AAA to administer the arbitration.'' They stated that the American Arbitration Association cannot vouch for the integrity, quality, or fairness of any proceedings carried out by other organizations. A commenter stated creating federal jurisdiction over federally-reinsured crop policies will assist insurance providers in those few instances when arbitrators intend to

exceed the role as fact finder and that declaratory relief could be sought. The commenter does not believe creating federal jurisdiction will require any statutory change. They believe rather, by completely preempting the field of crop insurance with improved regulatory language (in conjunction with the existing statutory language set forth in the Act at 7 U.S.C. 1506(1)), Federal courts will have jurisdiction over all federal crop insurance claims as a matter of law and complete preemption will also promote uniformity in the payment of claims.

Response: FCIC cannot require all arbitrations be filed with AAA. This would violate the government requirement to compete for contracts or services if it were to limit arbitrations to AAA. However, FCIC needs a uniform standard for administering arbitrations and the AAA rules provide a standard that is widely accepted. FCIC is not precluding the use of AAA. However, if any other organization offering arbitration services wants to participate, it must use the AAA rules except that to the extent the AAA rules may conflict with the laws regarding competition, such rules cannot apply. FCIC has attempted to obtain legislative authority to limit litigations to the Federal courts several times in the past and such authority has not been provided. Therefore, even if, as the commenter states, FCIC has the authority to limit litigations to the Federal courts through the regulatory process, it is unlikely that Congress would permit the exercising of such authority. FCIC does not have the resources to completely preempt state law. Further, Congress did not intend for complete preemption or it would have preempted all state laws, not just those in conflict with contracts, agreements or regulations of FCIC. FCIC has revised the provisions to clarify its preemptive effects by making the policy provisions binding and limiting the imposition of certain costs and damages. FCIC is unsure of what the commenter is suggesting regarding the Law Committee. Arbitration is an issue that involves all program participants and they all should have an opportunity to comment on any proposals.

Comment: A commenter stated that the proposed language does not address insurance provider determinations at all, and specifically, it does not provide any protection to the insurance provider from punitive or extra contractual damages because it only applies to appeal or administrative reconsiderations, not "legal actions'' against insurance providers.

Response: FCIC agrees that insurance providers may have been at risk for punitive or extra contractual damages in litigations even though they may not have violated FCIC's policies or procedures. This risk poses a considerable program integrity issue since it can affect the manner in which insurance providers manage their litigations and could result in increased costs to taxpayers. Therefore, FCIC has revised section 20, and made conforming amendments to 7 CFR 400.176(b) and 400.352(b)(4), to limit the imposition of punitive and other extra contractual damages, attorneys fees and other costs to those situations where FCIC has determined the insurance provider violated its policies and procedures and such violation had a monetary impact on the payment of the claim. FCIC will be making the determinations because, as authors of the policy or procedure, FCIC is in the best position to know whether an action constitutes a violation and to ensure the uniform application of the policies and procedures.

Comment: Commenters suggested FCIC first consider alternative appeals systems, including an internal dispute settlement division within the RMA. A commenter suggested that perhaps requiring approved providers to institute some form of internal process for independent review of provider actions challenged by producers, and requiring producers to utilize that process as a prerequisite to arbitration, also would be helpful. They stated that certainly has proved to be the case in their insurance provider, even though the original insurance provider decision is affirmed far more often than the producer's request for relief is granted.

Response: FCIC does not currently have the resources to implement an internal dispute resolution division within FCIC. Insurance providers are free to implement their own internal review mechanisms. However, there is no basis to require them to provide such a mechanism. It would impose a considerable administrative burden on the insurance providers and FCIC does not have the authority to compensate them for this burden.

Comment: A commenter believes removing arbitration will add to the uncertainty of dispute resolution and, ultimately, discourage farmer participation in crop insurance.

Response: As stated above, FCIC has elected to retain the arbitration process.

Comment: A commenter stated arbitration is one of the longstanding, accepted forms of alternative dispute resolution, and the Federal Arbitration Act encourages its utilization as a mechanism for resolving disputes. The commenter believes the proposed regulation appears to directly violate this Act. They stated all 50 states and the Federal Government have adopted contract arbitration statutes that provide for dispute settlement by arbitration, and that most contracts with the Federal Government include a provision that all disputes be settled by arbitration. They do not see any justification for removing this option from the crop insurance program.

Response: FCIC agrees that arbitration may be a longstanding form of alternative dispute resolution. However, this does not mean it is appropriate in every situation. In the existing rule, the arbitration provisions were subject to abuse and disparate treatment of program participants. This is not acceptable of a national program that relies significantly on taxpayer dollars. However, instead of eliminating arbitration, FCIC has elected to directly address the situation through the revisions stated above and below.

Comment: A commenter stated arbitration should be retained as a binding obligation of the parties to the crop insurance policy. To do otherwise is totally inconsistent with this salutary change previously made to and embodied in the current Basic Provisions. A commenter stated arbitration can also bring finality to the dispute because the arbitration award can only be appealed or overturned upon a showing of extraordinary circumstances (for example, fraud, bias or other inappropriate actions on the part of the arbitrator), once the decision is rendered the controversy is resolved. A commenter also states that FCIC's complaint that binding arbitration is inconsistent with the producer's right to file judicial appeals within one year of the denial of the claim ignores the probable benefit to the producer of achieving through arbitration a final resolution of any disputed claim within the first year following its denial. A commenter stated FCIC's reliance on section 508(j) of the Federal Crop Insurance Act, 7 U.S.C. 1508(j), to state that "[b]inding arbitration is inconsistent with * * * the Act'' is not supported by the text of the Act. They stated section 508(j)(2)(A), the only subsection that mentions litigation or the courts, vests the federal district courts with exclusive jurisdiction over the actions against FCIC or the Secretary of Agriculture. They added that the statute does not address an action by an insured against an insurance provider. They also believe the legislative history of the Act also is devoid of language supporting FCIC's interpretation of section 508(j). They stated, moreover and more significantly, none of the

federal courts that have discussed the crop insurance policy's arbitration clause have intimated the Act precludes or limits FCIC's authority to require disputes to be submitted to binding arbitration. They believe FCIC's contention directly contradicts its present interpretation of this exact issue as referenced in FAD–013. The commenter also believes FCIC's position also contradicts numerous arguments made by RMA to the federal district courts and the Agriculture Board of Contract Appeals, namely, that the right of judicial appeal is not inconsistent with the exhaustion of contractual remedies. They believe if FCIC intends for arbitration to be non-binding, it may insert into the crop insurance policy an arbitration clause that mirrors the arbitration clause contained in both the Livestock Gross Margin Insurance Policy and the Livestock Risk Protection Insurance policy. The commenter stated that a decision by a trial or an appellate court has precedential effect, albeit in varying degrees, on other courts, both federal and state. They believe a verdict in litigation that is adverse to an insurance provider may be more detrimental to the crop insurance program than a multitude of adverse decisions rendered in arbitration. The commenter stated that under the AAA's Commercial Rules, arbitration provisions are binding, and that generally, arbitration is by nature a binding process. They stated the issue of the appealability of an arbitration decision should not be confused with the binding nature of that decision. They believe inclusion of a statement in an arbitration clause that the decision is appealable within one year of the denial of claim would override the standard rules and allow the decision to be appealed in a manner consistent with section 508(j).

Response: There apparently has been confusion regarding the binding effect of arbitration decisions. FCIC agrees that arbitration must be binding on the parties. However, the producer has a statutory right to appeal a denial of a claim. Arbitration cannot take away that right even if there may be some benefits to finality. FCIC had been informed that the AAA rules precluded appeal of the arbitrator's decision. Because of this inconsistency, FCIC proposed to eliminate arbitration. As stated above, instead of eliminating arbitration, FCIC has elected to revise the provisions to make arbitration binding unless it is appealed. Any AAA rules restricting such an appeal are not applicable. The commenter is incorrect that section 508(j)(2)(A) of the Act is the only subsection that mentions litigations or the courts. Section 508(j)(2)(B) of the Act states that a suit on the claim must be appealed within one year of denial of the claim. Suit refers to litigations. Further, the courts have held that section 508(j)(2)(A) of the Act does not limit all actions for denial of claims to suits against FCIC. The courts have held that producers can still sue the insurance providers in state or federal court. In such cases, the one year statute of limitation applies. No court has discussed whether FCIC has the authority to require binding arbitration because FCIC has never asserted such authority. The intent of arbitration was to provide a more informal appeals process as a prelude to litigation similar to the administrative process that was available to producers who insured with FCIC. There was never any intent to take away the producers right to litigate disputes. Further, the commenters misunderstand FAD–013. FAD–013 does not make arbitration binding. It specifically states that the producer must complete the arbitration process before bringing any suit to court. Therefore, FCIC is unsure of how the FAD–013 is inconsistent with the proposed rule because, in the proposed rule, FCIC was expressing concern that arbitration under the AAA rules precluded appeal to the courts. Under the final rule, the producer will still be required to complete the arbitration process before any appeal to the courts may be brought. Even though court decisions may have precedential effects, the Act specifically gives the right to appeal to the courts within one year of denial of a claim and FCIC does not have the authority to take away that right.

Comment: A commenter stated that arbitration that provides producers flexibility in the timing and location of the hearing itself may be of utmost importance. Further, unlike litigation, when many matters become a matter of public record, disputes decided by arbitration can remain private and confidential if agreed to by the parties.

Response: FCIC agrees that the flexibility offered by the arbitration process is beneficial and has retained arbitration. While arbitration disputes may not be public, FCIC, as the regulator of the program, has the right to examine all records relating to the policy, which includes documents relating to any mediations, arbitrations, or litigations. FCIC has revised section 21 to specify that FCIC has the right to obtain documents relating to mediations, arbitrations or litigations at any time.

Comment: A commenter stated that because the parties have input into the selection of the arbitrators, persons of particularized knowledge to the subject matter of the dispute can be utilized. The arbitrator's experience in the subject matter of the dispute allows for a quick understanding of the issues which in turn may save time and expense. The parties are less vulnerable to unexpected rulings by less knowledgeable jurists or juries.

Response: FCIC agrees that arbitrators with particularized knowledge can be useful and has retained the arbitration process. However, to alleviate any problems associated with disparate policy or procedure interpretations, only FCIC will now be able to make such interpretations. Arbitrators roles will be limited to factual determinations.

Comment: A commenter stated that section 20 as now written is clear and comprehensive. It consistently has been upheld and enforced by all courts presented with the issue, most recently a decision of the United States District Court for the District of Minnesota entered September 26, 2002, in the Minnesota sugar beet litigation (in re. 2000 Sugar Beet Crop Insurance Litigation, 01–CV–1629–1637—D. MN September 26, 2002).

Response: FCIC disagrees that the current section 20 is clear and comprehensive. FCIC intended arbitration to be limited to factual disputes. However, even the commenters admit that arbitrators have made policy interpretations. Therefore, it is not clear what matters are subject to arbitration and there has been no consistency as to the interpretations made. As stated above, FCIC has revised the provisions to allow arbitration of all matters. However, all policy and procedure interpretations will be done by FCIC. FCIC also disagrees that all courts have upheld arbitration. There have been courts that have failed to require producers to arbitrate disputes prior to filing suit. FCIC has clarified that completion of arbitration is a prerequisite to filing suit.

Comment: Some commenters state because of the ability to structure the procedures associated with arbitration, parties enjoy increased opportunity to shape resolution of their disputes based on their own business circumstances and objectives. Parties that actively participate directly in creating agreements by which their disputes will be resolved are generally more satisfied with the outcome than those who become subject to the terms of a jury verdict.

Response: FCIC has elected to retain the arbitration process and the flexibility of the AAA rules, as revised.

Comment: A commenter states that although the preamble to the proposed rule portrays existing section 20 as a source of problems, no empirical, verifiable bases have been provided for the statements made at pages 58918–19 of volume 67 at the **Federal Register**. The commenter stated that its members are unanimous in desiring to retain arbitration. The commenter stated that while there certainly may be anecdotal reports of isolated complaints, there is no sentiment to abandon use of arbitration. In this context, it certainly is remarkable that data supposedly evidencing a reason for changing section 20 was provided in introductory material when RMA explicitly had terminated efforts last spring to gather objective data. They refer to inquiries by RMA initially soliciting the experience of insurance providers with respect to section 20 and then terminating its inquiries to them. In short, the commenter states RMA never has made any concerted effort to determine the actual experiences of members and their satisfaction level with arbitration. A commenter stated RMA has never communicated any concerns about the arbitration process, and no empirical data indicates the process is failing to meet the needs of the federal crop insurance program. Commenters stated that in support of elimination of arbitration, FCIC proffers several justifications, none of which they believe are credible.

Response: While FCIC had received numerous complaints regarding the arbitration process, FCIC agrees that there is a lot of support for arbitration and has retained the arbitration process, as revised.

Comment: A commenter states that subsection (c), as proposed, should be eliminated and its subject matter is more appropriately addressed under section 31.

Response: FCIC has revised the provision to cross reference section 31. However, the provisions stating that the Act, regulations and policy provisions are binding are still needed in section 20 to provide notice to mediators, arbitrators and the courts that the policy provisions must be followed.

Comment: Commenters believe the proposed prohibition on the ability to arbitrate is an overreaching act by the federal government that interferes with the contracting process between the producer and the crop insurance provider.

Response: Since FCIC drafted the contract, FCIC has the right to determine its terms. However, as a result of the many comments received, FCIC has elected to retain the arbitration process, as revised.

Comment: Commenters stated they believe that arbitration has increased confidence and participation in the federal crop insurance program and has contributed materially to achievement of the program's objectives. They stated while they would not catalog the advantages of arbitration that have fueled the migration of disputes away from traditional courts, they felt however, it is important to note why this mechanism is so particularly appropriate for resolving factual disputes between producers and approved providers arising in the context of the federal crop insurance program. They provided the following five reasons: (a) First, the program is highly technical, involving a wide variety of farming practices and unique crops. In addition, and unlike virtually all other forms of insurance, actions taken under a federally reinsured crop policy with respect to one crop year directly affect the rights and obligations of the parties with respect to the following crop year. These program characteristics demand a dispute resolution forum that allows parties to educate the fact finder about the program and the unique relationship between the insured, the approved provider, the Agency, and the myriad of documents and requirements incorporated into the policy by law and the Basic Provisions. The fact finder also must learn details of the insured crop and good farming practices with respect to that crop. Moreover, this education must be completed, and a resolution obtained, quickly enough for producer and approved provider alike to apply the dispute's result to the following year's crop and insurance coverage. Universal experience with civil litigation demonstrates beyond reasonable dispute that America's courts are incapable of regularly meeting these challenges. Approved providers and producers likely would be nearly unanimous, however, in their view that arbitration under the existing section 20, in fact, does exactly that in virtually all cases; (b) Second, crop insurance is a federal program that must be administered consistently throughout the country. The proposal would empower every court in every state to interpret and apply the policy, including the countless Agency documents and materials incorporated into this contract of insurance. Adopting the proposal therefore is certain to prevent any semblance of uniform, national administration and delivery of the program. Approved insurance providers necessarily would be required to choose whether to follow Agency directives and procedures in states whose courts have severely penalized approved providers for doing exactly that. The resulting and inevitable differentiation in program delivery among states would constitute discrimination intolerable for a federal program. The Act preempted state law in the first instance for just these reasons. They continue to make program survival dependent upon that preemption not being eviscerated as the proposal seeks; (c) Third, in contrast to court decisions, arbitration decisions are confidential and have no value whatsoever as precedent. Each decision affects only the specific parties to that decision and their very specific facts. While if single misinterpretation or erroneous judgment by an arbitrator can defeat program intentions in one dispute, an identical misinterpretation or erroneous judgment by a court will defeat program intentions in an infinite number of disputes. The private nature of arbitration, therefore, fosters and enhances consistent, nondiscriminatory administration of the program; (d) Fourth, the federal crop insurance program is very technical and many aspects of the policy and required Agency procedures are wholly inflexible. As a result, in certain situations rigid application of the policy's technical requirements leads to outcomes for producers that are grossly inequitable by many common standards. Elected judges and juries of the producer's friends and neighbors are extraordinarily ill-suited to perform even the most clear duty to enforce such provisions and it is absurd to expect them to bring about the harsh outcomes adherence sometimes requires. A disinterested arbitrator, often an attorney, is far less likely to ignore the policy and its technical requirements simply to achieve a more favorable result for a needy insured; and (e) Fifth, notwithstanding the filing fee, arbitration is materially less expensive for both producers and approved providers than litigation. Even though the direct cost approved providers pay to defend program integrity is very substantial, to mount that defense in courts rather than in arbitration would be more expensive by several multiples. Moreover, arbitrators virtually always enforce the policy's limitations on recovery, thereby minimizing losses and costs while still providing the insured with the benefits of their bargain. From the insureds perspective, arbitration

virtually never exacts the typical civil litigation toll of one-third of whatever the insured might be awarded.

Response: While FCIC disagrees that arbitration provides more consistent results than litigation or that courts are incapable of developing the knowledge base necessary to handle these disputes, FCIC agrees that arbitration can provide a valuable dispute resolution tool and has elected to retain the arbitration process.

Comment: Commenters stated whatever concerns prompted section 20 of the proposal can be addressed through dialogue and consultation. They believe the only certain result is a better alternative than section 20 of the proposal easily will be found. A commenter stated if FCIC believes specific aspects of the arbitration process can be improved to better effectuate program intent, it should initiate a dialogue with approved providers, producers and other interested parties to consider possible enhancements of the arbitration process.

Response: FCIC agrees that arbitration can provide a valuable dispute resolution tool and has elected to retain the arbitration process. However, FCIC has revised the provisions to address the concerns expressed in the proposed rule. If interested parties have additional suggestions, they should provide them to FCIC.

Comment: Commenters stated that the regulation providing for the issuance of a Final Agency Determination ("FAD") is not the solution. They stated first, the parties often are not aware of the need for an interpretation until after a loss occurs or arbitration or litigation commences. They believe accordingly, any FAD issued by FCIC post-dates the insurance period, if not the crop year. They stated based on their experience, arbitrators and juries take a dim view of *ex post facto* policy interpretations. They stated secondly, FCIC may take up to three months to issue a FAD. They believe while 90 days may be expeditious in Government time, it is an eternity in the world of agriculture.

Response: FCIC agrees that the FAD process does not work in all situations. There will be instances where witness testimony will be more appropriate. However, whether the policy interpretation is provided prior to the start of the crop year, at the time of loss or after a dispute has arisen, the policy interpretation will be the same. Policy interpretations will be rendered by unbiased persons within RMA. The benefits of the FAD process is that such interpretations provide consistent interpretations and are available to all interested parties on RMA's Web site.

Comment: Commenters asked on what basis FCIC expects that a state court jury or judge will be less likely to apply state law than an arbitrator. They believe a county judge that faces an election every two years will apply a pro-farmer meaning to disputed policy terms or facts or will be removed from the bench. In their view, a state court jury, consisting of the insured's neighbors, is more likely to disregard the legal principle of preemption than a neutral arbitrator. They added that even the regulation preempting state taxation of federal crop insurance premium has not stopped the various state departments of insurance from attempting to impose premium taxes on their insurance provider. A commenter stated changing arbitration to appeals and administrative review does not solve any issue that may be perceived with arbitration without total state preemption and any final appeal being limited to the federal court for this federal program.

Response: FCIC agrees that state preemption has been an issue and has clarified that the terms of the policy are binding and that state law is preempted to the extent it is in conflict with the policy. There has been a presumption that the ability to appeal a decision allowed courts to correct errors that may have been made by lower courts. FCIC had been informed that arbitrations were not appealable and, therefore, there was no further opportunity to review the decision to determine whether it complied with the preemption provisions. Now that arbitration can be appealed, the presumption again exists that any error of the arbitrator can be corrected by the court. However, FCIC cannot restrict appeals to the federal courts for the reasons stated above.

Comment: A commenter stated because FCIC is not a party to the Basic Provisions or the current arbitration clause, FCIC may not be joined as a party to the arbitration. They believe FCIC's misconceptions concerning arbitration result from the fact that it sits on the sidelines and passes judgment but does not play. The commenter stated by contrast, FCIC is amenable to joinder in litigation, regardless of whether filed in state or federal court. They added the joinder of FCIC in state court action will necessitate the removal of the matter to federal court. They stated if FCIC mandates insurance providers and insureds litigate their disputes, FCIC should anticipate being involved in litigation. A commenter believes, at a minimum, FCIC should authorize the insurance providers to, at their discretion, enter into arbitration agreements with their respective insureds. They believe under these agreements, which FCIC would have the opportunity to review to ensure compliance with the applicable law, the parties would arbitrate cases in which the amount in controversy does not exceed a certain level. The commenter provided three reasons for their suggested $150,000 threshold amount: first, the filing fee for such a case is de minimus, only $1,250; second, the majority of disputes involve lesser amounts; and, third, assuming that insureds will commence litigation in state court, which is likely to be more hostile to the insurance providers and FCIC, the $150,000 benchmark will enable them to remove the litigation to federal court under the principle of diversity jurisdiction.

Response: FCIC agrees that arbitration can provide a valuable dispute resolution tool and has elected to retain the arbitration process, as revised. FCIC cannot determine whether issues are subject to arbitration based on the dollar amount in dispute because it would result in disparate treatment. Two farmers could be disputing the same issue and one would be able to arbitrate the dispute while the other may not, solely based on the size of their loss. Such standards would be arbitrary and capricious. Further, the dollar limitation would not enable insurance providers to remove cases to federal court because producers frequently defeat diversity by filing suit against the local agent.

Comment: A commenter recommended section 25 be incorporated into a more comprehensive section 20 to read as follows:

"20. Arbitration, Damages and Limitation of Actions.

(a) If you disagree with any determination that we reach, the disagreement will be resolved before the American Arbitration Association and in accordance with its Commercial Dispute Resolution Procedures. Your failure to agree with any determination made by FCIC must be resolved through the FCIC appeal provisions published at 7 CFR part 11.

(b) You may not bring legal action against us unless you have complied with all terms and conditions of the policy.

(c) You must commence arbitration against us, as provided in subsection (a), within twelve (12) months of the date on which we denied your claim or rendered the determination with which you disagree.

(d) No award determined by arbitration or appeal shall exceed the amount of liability established or which

should have been established under the policy.

(e) You may not recover and we will not be liable for any attorney's fees, charges or costs, or any punitive, compensatory or any other damages other than contractual damages except as authorized by 7 CFR 400.351 and 400.352.''

Response: FCIC agrees that the provisions in section 25 should be incorporated into section 20 and made such other changes as necessary in response to these comments and due to the need to restructure the provisions for clarity.

Comment: A commenter believes that instead of deleting policy provisions requiring arbitration, the federal crop insurance industry would be better served by RMA submitting standard amicus briefs to arbitrators on the issues outlined above. They believe amicus briefing will likely assist and assure the arbitrator's role to one of fact finder.

Response: FCIC does not have the authority to submit amicus briefs. Such briefs are done by the Department of Justice and submitted on behalf of the Federal government. Obtaining such briefs is a time consuming process and often cannot be provided in the time frame needed by the insurance provider or producer. To assist the arbitrator, FCIC has revised the provisions to require that all policy and procedure interpretations be provided by FCIC. This should assist the parties to the dispute by providing an objective interpretation.

Comment: A commenter noted that several states currently require arbitration or mediation to be done before going to court. They stated that mediation, however, is not restricted to the policy liability limits as the current arbitration is in the policy now.

Response: FCIC has revised the provisions to limit liability under arbitration, mediation and litigation to the policy liability.

Comment: A commenter believes a reasonable requirement could be made as to the knowledge an arbitrator hearing a dispute would have and that the arbitrator must withdraw himself or herself if there is any conflict of interest.

Response: FCIC does not have the resources to check the knowledge and skills of all arbitrators. Arbitrators are mutually agreed to by the insurance provider and producer and they have the ability to determine whether the arbitrator has the requisite knowledge to resolve the dispute. However, FCIC has added a provision stating that arbitrators or mediators with a familial, financial or other business relationship to the producer or insurance provider are disqualified.

Comment: A commenter believes since most disputes, if not all, involve denying coverage not intended to be provided under the policy or a claim payment not entitled to under the policy, FCIC should be supportive to settle these disputes in the fastest, and least expensive manner for all parties concerned. They stated this would be beneficial for the policyholder, insurance provider, FCIC and the American taxpayer.

Response: The goal of the program is to ensure that producers receive those benefits to which they are entitled. FCIC has agreed to retain arbitration because commenters have claimed this is the fastest and least expensive manner to accomplish this goal. However, as stated above, FCIC has revised the provision to ensure that any payments are made in accordance with the policy terms.

A few commenters recommended a mediation process or appeal rights to settle disputes. Their additional comments are as follows:

Comment: One commenter stated section 20(a) implies adverse determinations made by insurance providers could leave the policyholder with no means of dispute resolution other than legal action. They stated that while the offering of appeal rights to insurance providers is certainly commendable, it provides no provision for potential disputes between the policyholder and the insurance provider. They strongly recommended the policyholder be offered appeal rights under the provisions of 7 CFR part 11. A commenter recommended using the existing USDA–National Appeals Division (NAD) system of hearing officers located around the country, which may require an expansion of NAD's authority and resources, therefore a legal opinion may be required. The commenter stated NAD hearing officers already hear some RMA cases and have basic program knowledge and that some of the present NAD hearing officers spent many years as FCIC hearing officers. The commenter stated that for RMA to move in this direction, support from NAD and any statutory changes as would be necessary to hear and decide RMA producer-insurance provider dispute cases would be required. They believe this alternative takes advantage of existing infrastructure and a seasoned appeals operation. The commenter believes the potential for disputes between insurance providers and policyholder is high and could involve sums of money that make legal action on the part of policyholders cost prohibitive. They stated that without appeal rights, the policyholders only grievance process would be the court system. The commenter added that most USDA agencies that deal with agricultural producers have implemented dispute resolution/appeals of adverse determinations rules under 7 CFR part 11 and carry out the mediation process with USDA certified programs in states where available. They added that if elected in states without USDA certified programs, mediation is provided through other non-USDA certified mediation providers. The commenter stated if mediation is unsuccessful in resolving the dispute, the producer maintains the right to file a request to have the dispute heard by the National Appeals Division. The commenter stated their programs consistently have agreement rates in the 90 percent range. They believe mediation provides a fast and efficient alternative to the formal appeals process and litigation, and therefore, they strongly urged that insurance providers be included in appeal procedures under 7 CFR part 11 or a similar dispute resolution/appeals system. The commenter believes without question, and by definition of adverse decision (7 CFR 11.1), the proposed rule could very easily generate a multitude of determinations and decisions that could be interpreted as adverse, individually to the producer, to the insurance provider, and among government agency representatives, or in any combination.

Response: As stated above, FCIC has elected to retain the arbitration process. Therefore, the producer's recourse will not be limited to the courts. However, FCIC cannot permit producers to appeal their disputes with insurance providers to NAD. As stated above, statutorily, only disputes between producers and agencies within USDA can be appealed to NAD. Further, since FCIC has elected to retain the arbitration process, it is not necessary to seek legislative authority for NAD to hear disputes between producers and insurance providers. However, as stated above, FCIC agrees that mediation could be a valuable dispute resolution tool and has revised the provisions to permit its use when both parties agree. There is nothing in the provisions that would preclude the use of the USDA certified mediation programs if they are willing to hear such disputes.

Comment: A commenter stated as proposed, the changes in the Basic Provisions would seem to allow using the litigation route in a jurisdiction that encourages or requires alternate dispute resolution (ADR) and might open up that opportunity for quick, relatively

low cost correction. The commenter believes that would be a good thing, but it leaves the disposition methods applied to cases to happenstance. They believe both producers and insurance providers deserve a better approach. The commenter stated that leaving the producers and the insurance providers adrift without a structured, low cost, high settlement rate oriented dispute resolution system is not necessary.

Response: FCIC agrees that producers and insurance providers need an alternative dispute resolution tool. As stated above, FCIC has elected to retain the arbitration process, as revised, and has added provisions that permit mediation. It is hoped that these will provide the low cost, high settlement rate alternatives as suggested by the commenters.

Comment: A commenter recommended designing and bringing into existence an RMA based appeals division made up of one or more hearing officers employed by the agency for the purpose of hearing and deciding disagreements between producers and insurance providers. The commenter believes such a system could be ordered after the appeals process existing prior to NAD (1994). They stated a legal opinion will likely be required to determine the jurisdiction. The commenter stated that authorizing regulations and procedures would have to be developed to determine the areas to be covered by an RMA producer-insurance provider disputes appeals system. They stated there are former FCIC hearing officers with the requisite experience and training available in RMA who could be pressed into service full or part time as required by the case workload. They stated that impacts on the USDA National Appeals Division should be sorted out in a legal opinion before a final decision is made on this alternative. The commenter stated that since an RMA hearing officer is the decision maker, the agency is assured a direct say in the case disposition with reasonable assurance that government rules and regulations are followed. They added that in the former FCIC Appeals process, hearings were generally held by phone and supported by mailed or faxed documents, keeping cost low and accessibility high, which is a major advantage over more costly alternatives.

Response: As stated above, FCIC has determined that it does not have the resources to implement an internal appeals division. However, FCIC agrees it should be involved to ensure that government rules and regulations are followed and FCIC has revised the provisions to require that all policy and procedure interpretations be obtained from FCIC.

Comment: A commenter recommended using the existing USDA–FSA certified mediation system located in some 29 key agricultural states. The commenter stated this would rest on a proven infrastructure and cover the most important agriculture states for RMA purposes. They believe this approach is consistent with USDA Departmental Regulation Number 4710–001, July 20, 2001, which already allows for the use of FSA certified mediators in crop insurance cases. Commenters believe alleviation of this expense issue can only be reached by requiring departments to utilize the state programs certified by USDA, and without such a designation as to which mediation service to use, the proposed rule has the potential of being self-defeating. A commenter stated that costs vary from state to state but would always be a fraction of either litigation or arbitration costs. They stated cases would be settled quickly and close to home for both parties. The commenter stated settlement rates in the states are uniformly high. They believe since the parties, insurance provider and producer, decide the issues and reach voluntary agreement, long term working relationships can be enhanced. The commenter noted one significant draw back to this alternative, that is, what to do in the states without certified programs. The commenter stated one of the important advantages of mediation is that it helps to clarify and focus issues keeping the parties on track with their discussions. The commenter added that in FSA farm program mediation cases, a representative from FSA is always a part of the mediation. They stated this mediation model avoids the possibility of the parties going beyond their authority because the FSA representative is there to give guidance and clarify rules. They stated that for example, whenever they do mediation where the FSA county committee is the decision maker, the FSA CED or a representative from the State FSA office is present to advise on the rules and options available to resolve the dispute. They stated this would eliminate the problem of the parties going beyond the limits of what the agency feels is appropriate.

Response: FCIC agrees that mediation is a valuable alternative dispute resolution tool and has revised the provision to allow for mediation if both parties agree. FCIC has elected not to direct who can provide such services because it recognizes that not all states have USDA certified mediation programs and there are other valuable organizations that can provide such services. This choice of mediator is best left to the participants. There is nothing in the provision that precludes the use of a USDA certified mediator if such person is willing to mediate the dispute. FCIC cannot direct such mediators to handle these disputes. FCIC's only participation in the mediation process would be to provide policy or procedure interpretations for matters in dispute and it will be able to review all settlements. This should provide sufficient restraints to ensure that settlements are made in accordance with FCIC approved policy and procedure.

Comment: A commenter recommended making a hybrid of mediation and an RMA appeals division. They stated that in the 29 states where the USDA–FSA certified mediation system operates, use it as the first level of dispute resolution, and in those cases that could not be resolved could be appealed to an RMA hearing officer. The commenter recommended states without the USDA–FSA certified mediation system would use the RMA hearing officer as the primary appeal. They believe this solves the problem of what to do in the non-mediation states and puts RMA in control of the appeal process. They recommended that after the pilot, RMA should review the results and develop a permanent system. One commenter stated it hopes FCIC will consider applying ADR methods as alternatives to litigation and they are available to assist in that regard.

Response: As stated above, FCIC does not have the resources to create an internal appeals division even if such appeals were limited to those cases where mediation failed. Instead, FCIC has elected to retain the arbitration process and if the mediation fails, the parties can have the dispute heard by an arbitrator.

Comment: A commenter stated that in terms of public-sector ADR, dispute resolution activities involving USDA caseload began in 1989 within "credit'' issues arising from Farmers Home Administration (FmHA) activities. The commenter stated the Agricultural Credit Act of 1987 created a mediation component offered through the public sector to provide an alternative for both FmHA customers and the agency in order to save time and money, and somehow mend lender and borrower relationships during a time of harsh transition in production agriculture. They stated resultant mediation activities were generated by agency actions associated with loan servicing, loan delinquency, and "distressed

borrower'' scenarios. The commenter noted that today, those same kinds of cases continue to be serviced, in addition to other caseload activities associated with issues arising from the USDA Reorganization Act of 1994, the Grain Standards Improvement Act of 2000, and a host of other federal dispute resolution regulations, orders, guidelines, and interpretations. The commenter added that the use of ADR processes (mediation) in their state in USDA-related crop insurance issues involving USDA agency administrators and staff (FSA, NRCS, *etc.*) insurance providers and their agents, producers and their attorneys, Native American Indian landowners, and others, is part of that service experience. In their view, the proposed rule for crop insurance issues moves considerably from what must have been a generally negative experience with binding arbitration, toward something that is identified in several parts as "the judicial process.'' The commenter stated although no definition of this process is offered in the proposed rule, but again similar to the intent of the Agricultural Credit Act of 1987, it appears that USDA is once again seeking to improve, streamline, and simplify its methods of addressing the kinds of conflicts found within federal crop insurance matters. The commenter believes the agency is seeking a less-costly method of resolving disputes, settling claims, and building good working relationships within very complex scenarios of federal regulation, business, and production agriculture. The commenter stated for public-sector mediation and facilitation practitioners, it is easy to understand USDA's move away from the relatively expensive, legalistic, non-problem-solving process of binding arbitration. The commenter believes however, the "the judicial process'' referenced in the proposed rule seems unlikely to improve the situation. They believe in fact, a judicial process provided by federal or state court activities involving such triangulated issues would be more expensive, more time consuming, and less of a model to build relationships among stakeholders than binding arbitration. They stated that clearly, the trend in conflict management and dispute resolution is moving the other direction, toward mediation, facilitation, collaboration, consensus building, and neutrally negotiated dialogue. The commenter stated that the new USDA Departmental Regulation on ADR substantiates this trend, as do many other federal documents, orders, and initiatives that have been researched and reviewed over the last decade. They stated that collectively, these clearly suggest that "the judicial process'' should be the method of last resort, after administrative remedies of ADR (mediation, facilitation, *etc.*) have been exhausted. The commenter believes from a practical perspective, moving decision making away from binding arbitration and toward "the judicial process'' may help deter certain arbitration costs in the short term, but seems most likely to only add time delays, administrative costs, and peripheral complexity to cases, and shift issue management further away from the very stakeholders and participants who need to understand, interact, and take ownership in the facts and issues involved in crop insurance. They stated those are precisely the stakeholders and participants that should resolve complaints and conflicts in these matters, and the very people who should take ownership in, and be accountable for, the decisions or outcome. They believe as such, agency personnel, insurance representatives, and producers would not only more directly manage their issues, they would be responsible and accountable for remedies. They believe arbitration and judicial processes have no way of offering these kinds of issue management incentives, and therefore are falling out of favor. They suggested tapping into the resources of those programs, providing additional support and revenues for services, providing the necessary training and administration from stakeholders' perspectives, and putting the theory of conflict resolution into practice via mediation and facilitation. Their experience with mediating crop insurance issues has been that cases seem to arise because such matters are not managed with a collective approach among these stakeholder populations. They believe that now, with both new federal crop insurance initiatives and a new Farm Bill to manage, it would seem that a more user-friendly method (like mediation or facilitated dialogue) would make sense in these triangulated, complex situations. The commenter believes whether or not mediation (or facilitated dialogue) would be mandatory, accessed on a voluntary basis, performed for a fee or sliding scale for participants, *etc.*, would require consideration over and above the content of the proposed rule. They stated however, in terms of providing better outcomes for participants, reaching appropriate outcomes for less money, saving time, and generally building viable business and regulatory relationships among stakeholders, the processes of mediation and facilitation are far superior to either arbitration or "the judicial process.'' They suggested that new applications of mediation and facilitation among stakeholder groups in federal crop insurance issues be convened on a pilot study basis, beginning in one state.

Response: FCIC agrees the historical trend is to provide for alternative dispute resolution. FCIC accepts the commenters statements that mediation is less expensive, less time consuming, and more of a model to build relationships between producers and insurance providers. Therefore, FCIC has retained arbitration, as revised, as a form of alternative dispute resolution and added mediation. Judicial review is the last resort if a party receives an unsatisfactory result in mediation or arbitration. FCIC agrees that better outcomes may be reached when both parties agree to the dispute resolution method.

Comment: A commenter cited a third reason given by FCIC for eliminating arbitration was that "* * * Binding arbitration is inconsistent with section 508(j) of the Act, which gives producers the right to file judicial appeals within one year of the denial of the claim.'' The commenter stated the USDA model of agricultural mediation provides mediation as an alternative to the formal appeal process. They stated whether an agreement is reached to resolve the dispute is totally up to the parties. The commenter added if an agreement is not reached at mediation, then the producer has further rights of appeal through the system. They believe that even if an agreement is not reached, mediation often helps the parties to better define the issues to be presented on appeal. The commenter stated the "binding'' nature of arbitration is totally avoided. The commenter believes another advantage to mediation is that it would lend itself to crop loss claim disputes where there is some subjectivity involved in the adjustment of the claim. They stated it has been their experience that even in cases where the regulations do not allow the local USDA FSA decision makers the flexibility or discretion to negotiate their decision, mediation has still been valuable in explaining the decision and establishing better lines of communication. The commenter stated another advantage to mediation is that it gives parties an informal opportunity to resolve disputes on their own without having a judge or arbitrator take that power out of their hands. They stated that over the years, the USDA agencies have recognized the importance of being able to resolve a

dispute in a non-adversarial setting that nurtures and restores the business relationship they have with the producer. The commenter believes crop insurance providers may have a similar concern that they be able to keep a satisfied customer. They believe handling a loss claim can be a difficult time emotionally, especially when so much is at stake with the current drought conditions, along with the struggling agricultural economy. The commenter stated mediation helps deal with those difficult emotional issues and personality conflicts that can otherwise impede a good business decision and an ongoing business relationship.

Response: FCIC agrees that mediation would avoid the problems associated with binding arbitration and has added provisions to allow for mediation. However, FCIC has also elected to retain the arbitration process although it has revised it to make arbitration decisions appealable. FCIC agrees that mediation can help to define issues even when no resolution is reached. FCIC also agrees mediation may provide a less stressful means of resolving disputes.

Comment: A few commenters thought if the insured prevailed in court, the insured should not be responsible for attorney fees, court costs, etc., and the award in section 20(b) should include those costs. A commenter believes this appears to be a deterrent to producers from challenging FCIC or the insurance provider for any wrong treatment related to their claim. A commenter stated that to do otherwise would eliminate the possibility of appeal for all but the biggest claims and most financially stable producers.

Response: FCIC disagrees that the provisions contained in section 20 should specify that the insured should not be responsible for attorney fees, court costs, etc., if the insured prevails in court, because to do so would conflict with the provisions contained in 7 CFR 400.352 regarding preemption of state laws and regulations. Further, FCIC does not want to punish insurance providers when there is a genuine dispute regarding policy coverage. In addition, it would be arbitrary and capricious to require insurance providers to pay the producer's expenses when the producer prevails and not require the producer to pay the insurance provider's expenses when the insurance provider prevails. However, as stated above, FCIC has clarified the provisions to specify the circumstances under which attorney fees, court costs, etc., can be awarded to the insured.

Clarification of Access to Insured Crop and Records, and Record Retention—Section 21

Comment: Several commenters opposed the provisions proposed in section 21(a), which would allow any USDA employee access to an insured crop and related records. They state that only those USDA employees involved with the insurance program should have access to the farm or records. They also claim producers have a right to privacy and right of notice if anyone is to enter their property or obtain related records. The commenters state that the insurance contract is between the insurance provider and the producer, not between FCIC and the producer. They state that access to crops and records should be only that necessary to investigate reasonable suspicions of fraud. The commenters also claim that employees having such access should be required to provide identification and notice before visiting, and provide notice of ARPA, section 122, which protects producers from disclosure of the information to the public. This would help alleviate problems related to unknown persons seeking entrance on a farmer's land. One commenter agreed with the change stating this is consistent with the effort envisioned by Congress and contained in ARPA legislation.

Response: FCIC agrees only those employees of USDA authorized to conduct reviews or investigations of crop insurance matters should have access to the farm or records. FCIC has revised section 21(a) accordingly. FCIC agrees the insurance contract is between the insurance provider and the insured. However, FCIC is also a Federal regulator of a government program and must have the ability to determine whether the program is being carried out in a proper manner. Therefore, FCIC must have access to the farm and records to make this determination. Further, the Act specifically provides for appropriate oversight and compliance functions to be carried out, through agencies besides FCIC, such as FSA. The Office of Inspector General also has oversight responsibilities over the program. In order to perform their functions, these persons may need to access the farm or farm records. FCIC disagrees that access should be limited to fraud cases because it is necessary to review a certain number of cases to ensure policy provisions and procedures are properly applied. To the extent possible, USDA employees will provide notice to the insurance provider or producer when entering the farm or obtaining records. However, there are cases, such as fraud investigations or other instances, where it is not practical to provide notice. Further, such employees may be asked to provide identification upon request. There is no violation of section 502(c) of the Act when an employee of USDA requests records. USDA employees are not considered the public for the purposes of section 502(c) of the Act. In addition, it is not the practice of USDA to tell farmers of the use of their documents. However, all such employees will be required to comply with the requirements of section 502(c) of the Act.

Comment: Several commenters were against the change in section 21(b), where producers who are now required to keep their records for 3½ years would now be required to retain their production records for approximately 8½ years. They stated it is retroactive and may deny coverage to a producer who has had coverage with three years of records and now needs previous years. A few of the commenters asked that the provision be clarified (including an example) to require records be kept for three years after the end of the crop year for which they were initially certified (as in the Crop Insurance Handbook).

Response: The record keeping requirements in section 21 have not changed. Producers were required to keep records for three years and the proposed rule simply clarified that this requirement also applied to the records used to establish the APH. However, FCIC realized there was perceived a difference in the procedures and policy and revised the provision to clarify that production records must be retained for 3 crop years following the crop year in which the record was certified, which is the current requirement in the procedures. Further, as stated above, FCIC removed the requirement that producers must provide all records for all years in the APH database when they file a claim. Therefore, there is no retroactive effect that would cause the denial of coverage. This means that if the producer certified five years of records for the 2003 crop year, the producer will be required to maintain those records for the 2004 through 2006 crop years and at the end of the 2006 crop year, the records are no longer required to be retained unless the producer has been otherwise notified by the insurance provider or USDA. The provision has been revised to be consistent with section 21(a), which permits USDA employees to obtain records from the farmer. An example is added to improve clarity.

Many commenters stated the penalty proposed in section 21(e) was too harsh for the following reasons:

Comment: A few commenters believe it is harsh to deny a claim because an insured fails to provide previous years' production records. A commenter added that the current procedure penalizes the insured by assigning 75 percent of the producer's prior approved yield and the producer loses any optional units. Another commenter believes only a modest administrative fee is warranted. Several commenters stated lack of previous years' records does not affect the ability to appraise the crop in the field. They added the proposed language overlooks whether or not the loss could be accurately determined. A commenter stated the proposed penalty is grossly excessive and should not be adopted. A commenter stated the penalty is extreme with no apparent alternatives available for corrective action. A commenter stated the penalty will result in many insured's being added to the ineligible list because the full premium would be due even though no claim is paid.

Response: While failure to provide a previous year's production records does not affect the ability to adjust a current loss, the omission may affect the amount of the claim because the guarantee must not have been correctly calculated. However, as stated in FCIC's response to comments received regarding the provisions proposed in section 3(d), the proposed requirement that failure to provide APH records will result in denial of a claim will not be incorporated in the final rule. FCIC has revised the provisions to specify that if a producer fails to provide the previous years' production records, the producer will receive an assigned yield for all such years that required records were not provided. Further, FCIC has revised the provisions to clarify all possible consequences for failure to provide reports or provide access to the insured crop or third party records and added that the consequences also apply for failure to provide access to the farm to be consistent with section 21(a), which required the producer provide access to the farm, not just the insured crop.

Comment: Several commenters stated the penalty raises a legal question of charging premium and not offering coverage or service. They stated they were not clear why the full premium is due in some cases and only 20 percent is due in others.

Response: FCIC has elected not to retain the provisions regarding the denial of coverage and the payment of premium.

Comment: A few commenters questioned if this was unit by unit or for the whole policy.

Response: The consequences have been revised to specify whether they are on a unit or policy basis.

Comment: Several commenters asked that the current provisions contained in section 21(b) that state, "Your failure to keep and maintain such records will, *at our option*, result in: [(1)–(4)]'' be retained.

Response: FCIC determined that the current language needed clarification and has revised the provisions to specify more precisely when each consequence applies. However, the imposition of such consequences is not optional. If the circumstance exists, the consequence will apply.

Clarification Regarding Other Insurance—Section 22

Several comments were received regarding the provisions proposed in section 22(a). The comments are as follows:

Comment: A few commenters stated that intent is considered here (as it should be) while it is not in other proposed sections dealing with what is reported versus what is correct.

Response: Obtaining duplicate policies is a much more obvious error than misreporting. Because of this, the presumption is that the producer intended to obtain two policies unless the producer can prove otherwise. FCIC did not want to create such a presumption with respect to misreporting, where it could be very difficult to establish no intent existed and would adversely affect program integrity.

Comment: Several commenters stated the provisions should be clarified as to what is necessary to demonstrate that the insured did not intend to have other like insurance, because one could interpret the language to mean that a transfer may not be a sufficient explanation. The commenters also asked to whom must the demonstration be made and to whose satisfaction. They asked what standards would be applied and who would make the decision. The commenters stated demonstration of intention is a subjective issue, and thus will be difficult to administer on an equitable basis.

Response: A transfer would be sufficient evidence that the producer did not intend to have duplicate policies. Written notification to an insurance provider that states the producer wants to purchase or transfer insurance and eliminate the other policy could also be acceptable. These have been added to section 22 as an example. However, it would be impossible to identify all the situations and including some situations and omitting others may cause confusion. It is up to the judgment of the insurance provider to evaluate the evidence presented by the producer that the duplication was inadvertent. If no such evidence is provided, the duplication is assumed to be intentional. FCIC agrees that an evaluation of the evidence may be subjective. However, the circumstances may be so different that an objective standard cannot be determined that would encompass all the possibilities.

Comment: A commenter stated the proposal assumes the existence of "other crop insurance issued under the authority of the Act'' is known or can be ascertained accurately at all times. The commenter believes that assumption is not correct with respect to duplicate policies or transferred policies. The commenter stated the proposal should be revised to reflect insurance provider's inability to determine at a certain time whether other insurance under the program is in effect.

Response: Since SSNs must be provided for all individuals, FCIC can compare the SSNs in the database and duplicate policies can be identified. If duplicate policies are identified, FCIC will notify the insurance providers. There is nothing in the policy that states when such determination must be made and FCIC agrees that it may be difficult for the insurance providers to discover all instances without FCIC's assistance. No change has been made.

Comment: A few commenters suggested the provisions contained in section 22(b) be clarified regarding how the provisions may apply to tobacco. The commenters stated the provisions contained in section 22(b) regarding other insurance against fire may now be inconsistent with the provisions proposed in section 12 that clarify all causes of loss must be due to the occurrence of a "natural disaster.'' The commenters stated that other fire coverage may be for reasons other than natural disasters.

Response: FCIC has incorporated the change proposed in section 12 in the final rule that clarifies all insurable causes of loss must be due to a naturally occurring event, except when the policy specifically covers loss of revenue due to reduced prices in the marketplace. This means that fire damage can only be paid if the fire is caused by a naturally occurring event. FCIC has clarified that section 22(b) only applies for fires due to naturally occurring events.

Clarification of the Amounts Due Us Provisions—Section 24

Comment: A commenter said it was unclear in section 24(a) when interest would be applied on administrative fees and if insurance providers would be responsible for collecting this amount prior to the termination date. A few commenters questioned FCIC collecting the amount due for fees and interest. A commenter suggested adding "due to us'' after "amounts'', after "fees due'' adding "to FCIC'', deleting "us'', and adding after the word "and'' the words "after the termination date.''

Response: The second sentence of section 24(a) [Reinsured Policies] makes it clear that interest on administrative fees accrues on the first day of the month following the premium billing date. Insurance providers will initially bill the producer for both premium and administrative fees and be responsible for collecting both. However, since administrative fees are ultimately due to FCIC, it will be FCIC's responsibility to collect the fees and related interest after the termination date for the applicable crop. FCIC agrees that clarification is needed regarding when amounts were owed to insurance providers and when amounts were owed to FCIC and has revised the provisions accordingly.

Comment: A few commenters recommended deleting "in part'' in section 24(e) because it could mean different things.

Response: FCIC can only collect through administrative offset that part of any overpaid indemnity FCIC paid or the premium owed to FCIC through its reinsurance agreement. FCIC cannot collect on that share of the indemnity or premium retained by the insurance provider. FCIC will be able to collect all administrative fees and interest owed to it through administrative offset. FCIC has revised the provision to clarify that the portion of the amount owed by the producer under the policy that is owed to FCIC can be administratively offset and to specify what such amounts may include.

Limitation of the Right to Collect Extra Contractual Damages—Section 25

A few comments were received regarding section 25(c). The comments are as follows:

Comment: A commenter suggested section 25 be combined in its entirety with section 20. Thus preventing confusion and clarifying FCIC's intent.

Response: Section 25 has been incorporated into section 20 to eliminate duplication and ambiguity.

Comment: A few of the commenters suggested that "may'' be changed to "will'' for clarification. A commenter requested clarification of "denial of a claim'' and "legal action.'' This was stated as important because of the disallowance of arbitration in section 20 of the proposed rule. A commenter suggested "legal action'' be changed to "litigation or arbitration'' since these terms are un-ambiguous. A commenter suggested section 25(c) be revised as follows "You are not entitled to recover any attorneys'' fees and expenses (or other similar charges) or any punitive, exemplary, compensatory, incidental, or consequential damages, unless you are able to establish that an action or inaction by the insurance provider, an employee of the insurance provider, or an agent was not authorized, required, or permitted under the Act, the regulations issued thereunder, or your insurance policy. This limitation means, therefore, that you will not recover any damages other than contractual damages unless you can establish the existence of one of the exceptions indicated herein.''

Response: FCIC has revised the applicable provisions in section 20 to specify that producers cannot recover attorneys fees or other expenses, or any punitive, compensatory or any other damages from insurance providers unless the producer obtains a determination from FCIC that the insurance provider, its agent or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC and such failure resulted in the producer receiving an indemnity, prevented planting payment or replant payment in an amount that is less than the amount to which the producer was entitled. FCIC has revised the provisions to clarify how the one year statute of limitations applies to arbitrations and litigations. FCIC has also clarified that the statute of limitations applies to denial of a claim and any other determination with which the producer disagrees.

Comment: A few commenters stated section 25 should further be amended to make clear that the Act and the attendant regulations likewise have a binding and preemptive effect in litigation. Some of the commenters stated the proposal should be amended to provide that no award rendered in litigation may exceed the amount of liability established or which should have been established under the policy. Some commenters stated the proposed amendment should not be implemented, as it will increase costs to insurance providers.

Response: Section 20 was revised to clarify that the Act, regulations and the policy have binding and preemptive effect. In addition, as stated above, section 20 now states no award in litigation can exceed contractual damages unless FCIC determines the insurance provider, agent, or loss adjusters failed to follow FCIC approved policy or procedure. FCIC is unsure of how the limitation on punitive damages will increase costs to insurance providers. If the commenter is referring to the removal of the arbitration process from the policy, FCIC has elected to retain the arbitration process, with revisions as stated above.

Comment: A commenter stated the rule states that language proposed in section 25(c) is intended to clarify that a producer may not recover attorney fees, punitive damages, compensatory damages or other extra-contractual damages except as authorized by 7 CFR § 400.352(b)(4). The commenter stated the policy language should be clear that these types of damages are "preempted.'' They stated that preemption should be complete. A commenter agreed section 25(c) should be revised, but asked the reference to 7 CFR 400.352(b)(4) be amended to 7 CFR 400.351 and 400.352, thereby incorporating the entire preemption regulation.

Response: FCIC has clarified that such damages, fees and costs are preempted unless FCIC determines the insurance provider, agent, or loss adjusters failed to follow FCIC approved policy or procedure. As stated above, FCIC elected not to completely preempt the imposition of punitive or compensatory damages. There may be instances where the circumstances are so egregious that such damages are warranted and FCIC does not want to take the authority away from the states to regulate conduct through the imposition of such damages. However, FCIC has eliminated the possibility that such damages may be imposed when the insurance provider follows FCIC's policy and procedures. FCIC has also revised section 20 to specifically reference 7 CFR part 400, subpart P as binding.

Comment: Some commenters stated suits should only be brought in federal court. A commenter stated the legal authority FCIC has in these matters and cited several cases. The commenter stated they understand there may be a belief among some employees of the United States Department of Agriculture that FCIC lacks the legal authority to require adjudication of disputes arising under the MPCI program to take place in Federal District Courts to the exclusion of state courts. They find any such belief to be erroneous. They also stated that any such understanding is not supported even by the analysis offered by those courts that have ruled against jurisdictional arguments

advanced by their members in their litigated disputes with agricultural producers. A commenter stated that complete preemption of state laws and remedies will have the effect of vesting federal courts with jurisdiction to hear claims involving federal crop insurance policies, which in turn, will ensure that a body of uniform federal, and not disparate state, law will develop regarding the application, construction and interpretation of federally-reinsured crop policies. The commenter added it will also prevent insureds from avoiding the terms and conditions of their federal crop insurance policies by filing claims in state courts and relying upon state remedies inconsistent with the federal crop insurance program. The commenter stated their position, of course, is supported by decisions of courts ruling in favor of their members' jurisdictional arguments, including *Owen* v. *Crop Hail Management*, 841 F.Supp. 297 (W.D. Mo. 1994), and *Brown* v. *Crop Hail Management*, 813 F.Supp. 519 (S.D. Tex. 1993). The commenter added that The Tenth Circuit in *Meyer* held: State law applies to FCIC contracts, with two exceptions: (a) When FCIC contracts provides that state law does not apply; and (b) when state law is inconsistent with FCIC contracts. 162 F.3d. at 1268. The commenter stated that relying on this explicit judicial authority, FCIC can revise sections 25 and 31 of the Basic Provisions to meet this test. Section 25 can and should be revised to state that legal actions against crop insurers, when producers are seeking to adjudicate claims of liability under any federally reinsured crop insurance contract, must be brought in the Federal District Courts of the United States. This approach would not preempt the bringing of state law claims for relief. Such claims easily could be alleged by producers' counsel as alternative or additional claims for relief to those which are brought under the MPCI policy in question.

Response: There is a difference between preempting state law and removing jurisdiction to hear cases from the state courts. The cases cited operate on the premise that FCIC can completely preempt state law. FCIC agrees it has the authority to completely preempt state law but as stated above, complete state preemption is not an option at this time. Further, the courts, including the Eleventh Circuit, have affirmed that state courts have jurisdiction to hear disputes between producers and insurance providers. FCIC has attempted to obtain legislative authority to limit litigations to the Federal courts several times in the past and such authority has not been provided. Therefore, even if, as the commenters state, FCIC has the authority to limit litigations to the Federal courts through the regulatory process, it is unlikely that Congress would permit the exercise of such authority. However, to mitigate the problems in the state courts, FCIC has revised section 20 to significantly limit the ability of the state courts to impose extra-contractual damages.

Clarification of the Interest Provisions—Section 26

Comment: A few commenters suggested combining section 26 with section 24(a) since (a) was deleted from section 26. A commenter stated the proposed amendment will increase the exposure to insurance providers and should not be implemented.

Response: Section 24 refers to amounts the insured owes, while the provisions contained in section 26 refer to interest payments the insured may receive. Combining the sections could cause confusion as to which interest provisions apply. Additionally, FCIC fails to see why the proposed change would increase exposure to insurance providers. The interest provisions have not been changed and removing the damages section was to remove the conflict with other existing policy provisions. The limitation on extra contractual damages has been moved to section 20. No additional change has been made.

Policy Voidance Provisions—Section 27

Comment: A commenter suggested section 27 should state whether the standard of proof required to void the policy in a disputed situation under this paragraph is a preponderance of the evidence or, clear and convincing evidence.

Response: Since no changes to section 27 were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Transfer of Coverage and Right to an Indemnity Provisions—Section 28

Comment: A few commenters requested that "Coverage and'' in section 28 be deleted to match the title with the form which is called "Transfer of Right to an Indemnity.''

Response: Although headings do not affect the meaning of the terms, this change would be misleading because the provisions refer to the producer transferring his or her share during the crop year, then being allowed to transfer the coverage rights, and subsequently the transferee being eligible to receive any indemnity payment. FCIC believes the current title is more descriptive of the section. No change has been made.

Clarification of the Subrogation Provisions—Section 30

Several comments were received regarding changes proposed in section 30. The comments are as follows:

Comment: Some commenters asked the second sentence be revised to replace the word "receive any funds'' with the words "recover any compensation for your loss * * * '' Response: FCIC agrees and has revised the provision accordingly.

Comment: A few commenters asked if compensation included hail insurance. A few commenters suggested hail insurance be excluded.

Response: FCIC has revised the provision to specify that compensation does not include private hail insurance payments.

Comment: A commenter suggested changing "If you recover any funds as compensation for your loss * * * '' by adding "except as provided in section 35 of this policy,'' otherwise subrogation could apply to other USDA payments (such as disaster payments).

Response: FCIC agrees that funds the producer receives as payment for the loss under other USDA payments allowed in section 35 should not be covered by subrogation. Additionally, if a producer receives a payment under a private insurance policy that indemnifies the producer for the amount of the crop insurance deductible, that payment also should be excluded. FCIC has revised the provision to limit its use to situations when the crop insurance indemnity plus the other payment exceed the amount of the insured's actual loss, without regard to any payment made under a private hail policy. Since any indemnity and other USDA farm program benefit cannot exceed the total amount of the loss, subrogation will never occur against the USDA farm program benefit. This would only be an issue if the producer also received a benefit for the same loss from another person. Once paid to the producer, the funds lose their identity and the producer would be required to repay to the insurance provider any money received in excess of the total loss.

Comment: A few commenters asked for examples of a situation to help with clarification.

Response: Since the provision has been revised for clarification, examples are no longer necessary.

Comment: A commenter stated if the producer returns the money their premium should be refunded.

Response: FCIC does not agree that if the producer repays any amount of the indemnity paid by the insurance provider the premium should be refunded. The premium is earned and payable because the coverage under the policy was provided. The policy is only intended to cover the producer's loss and if the producer receives compensation from another party, the amount of loss is reduced. Therefore, the producer is still receiving the benefit for which the premium was paid. No further change has been made.

Applicability of State and Local Statutes—Section 31

Comment: A few commenters suggested strengthening the language and clarifications in section 31 even though it was not proposed. They suggested clarifying that no state or local statutes are applicable to the interpretation of any federal crop insurance policy. A commenter asked if any of the Federal crop insurance definitions supercede state regulations such as California's. The following revision was suggested by one commenter, "If the provisions of this policy conflict with or cover the same subjects or matters as the statutes of the State or locality in which this policy is issued, the policy provisions will prevail. State and local laws and regulations either in conflict with federal statutes, this policy, and the applicable regulations, or covering the same subjects or matters as federal statutes, this policy, and the applicable federal regulations, do not apply to this policy, and they are preempted.''

Response: Since no changes to section 31 were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Notice Provisions—Section 33

A few comments were received regarding section 33. The comments are as follows:

Comment: A few commenters stated this section now conflicts with the proposed section regarding prevented planting.

Response: FCIC fails to see how the provisions contained in section 33 conflict with the provisions in section 14. Section 33 requires written notice within the time frame specified unless the notice provisions state otherwise. Section 14(g) allows a telephone notice for all notices required to be made within 72 hours, which would include the prevented planting notice. No change has been made.

Comment: A few commenters recommended changing "crop insurance agent'' to "us.'' A commenter suggested changing the current language regarding the insureds address to "your last known address.''

Response: Since no changes to this section was proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Clarification of the Unit Division Provisions

Comment: A commenter recommended using one spelling of the term "discernible'', either "discernable'' or "discernible.''

Response: FCIC agrees the word "discernible'' should be spelled the same way throughout the provisions. The term was used in provisions proposed in section 34(b)(1) and (c)(2) but the terms were spelled differently in each subsection. Since, in its response to the comments received regarding the proposed definition of the term "border,'' FCIC has decided not to adopt the proposed changes in section 34 that allowed a "border'' to qualify as a separation of optional units. Therefore, there are no longer multiple spellings of "discernible.''

Comment: A commenter stated growers in the Southeast are penalized by the fact that optional units are by farm serial number (FSN). The commenter stated a grower can farm in multiple locations in a county, growing thousands of acres, and only have one FSN, and recommended offering optional units by section, tracts, or section equivalents, and by non-contiguous land. The commenter further stated rules and administration are ambiguous because the Texas region allows growers further division, while the Southeast region does not.

Response: FCIC understands that unit division requirements vary between regions and crops. This variance is generally because there are many areas where there are not discernible section lines. Without a clear delineation between units, it would be very difficult to accurately track production, which creates the possibility of program abuse. Therefore, it would adversely affect program integrity to adopt this change. No policy allows optional units by tract. Before any other optional unit structures could be adopted, actuarial studies would have to be completed to determine the impact of such changes and any such changes must be adopted through the rulemaking process. No change has been made.

Comment: A few commenters suggested section 34(a)(1) add "For example, the enterprise unit selection may NOT remain in effect from year to year if there is only one underlying basic or optional unit with planted acreage one year.''

Response: Since no changes to section 34(a)(1) were proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A few commenters suggested section 34(a)(2) be revised to read: "For an enterprise unit'' since there is only one crop per county.

Response: FCIC agrees there can only be one enterprise unit per policy. However, there could be several different insured crops per county with an enterprise unit. The provision has been revised to state that the provisions apply to any individual enterprise unit.

Comment: A few commenters suggested section 34(a)(2)(ii) probably requires revision because of the revised definition of "enterprise unit'' referring to "planted insurable acreage.''

Response: FCIC agrees and has revised the provision accordingly.

Comment: A few commenters stated section 34(a)(2)(iii) overlooks the possibility of discovery happening after reporting.

Response: FCIC agrees and has revised section 34(a)(2)(vi) to clarify that if at any time the discovery is made that the producer does not qualify for an enterprise unit, the basic unit structure will be assigned. The same change has been made to section 34(a)(3)(iii).

Comment: A few commenters stated section 34(a)(2)(v) refers to "production reporting provisions.* * *'' and should be clarified.

Response: FCIC agrees that the provision should specifically reference the production reporting provisions and has revised the provision accordingly.

Comment: A few commenters suggested FCIC should consider if any changes are needed in section 34(a)(3) to match the revised whole-farm unit definition, or at least to refer to that definition.

Response: FCIC does not believe any changes are necessary because the use of the term "whole farm'' would require reference to the definition to determine the meaning of the term. No change has been made.

Comment: A few commenters suggested section 34(a)(3)(iii) may be improved by deleting the proposed language following the comma and inserting "we will assign the most similar eligible unit structure.'' A few commenters asked if FCIC should consider the possibility of assigning an enterprise unit if the plan allows for it instead of basic units in section 34(a)(3)(iii).

Response: FCIC is not sure what is the "most similar eligible unit structure.'' Therefore, it would be very difficult to determine such structure. Further, the producer must select enterprise units. If such a selection is not made, FCIC cannot require the producer to receive enterprise units. Basic units are the default if no other unit structure is selected and, therefore, the most appropriate unit structure when reverting back. No change has been made.

Comment: A few commenters disagreed with the changes in section 34(b) regarding having discernible borders. A few commenters agreed with the changes. A commenter requested clarification. A commenter asked the break be unplanted and not plowed or tilled. A few commenters found it too subjective. A couple of commenters were concerned regarding optional units for non-irrigated corners of a field in which a center-pivot irrigation system is used. A few commenters felt the proposed change would be a workable solution to the long standing problem of same row direction planting in irrigation systems.

Response: As stated in FCIC's response to the comments regarding the definition of "border,'' FCIC is withdrawing its proposal to allow a border created by different plant densities to qualify for unit division.

Clarification of the Multiple Benefits Provisions—Section 35

Comment: One commenter stated section 35 should specify that other USDA programs are not subject to being subrogated.

Response: FCIC agrees that funds the producer receives as payment for the loss under other USDA payments allowed in section 35 should not be covered by subrogation and has revised section 30 accordingly.

Clarification of the Substitution of Yields Provisions—Section 36

Comment: Some comments were received regarding section 36(b). Most were addressed in the final rule published prior to this rule (Vol. 68, No. 122/Wednesday, June 25, 2003) but one in particular suggested that yield substitutions should be allowed on a database basis at the production reporting time.

Response: FCIC failed to discover the suggestion to allow the election to be made at the time of production reporting and subsequently received inquiries suggesting it was not possible for producers to make appropriate elections by the sales closing date. Therefore, FCIC issued a bulletin allowing the election to be made by the production reporting date and has revised section 36(b) accordingly.

New Provisions for Beginning and New Producers

Comment: One commenter stated that a new section 38 should be added to address beginning farmers and new producers. They stated the proposed revisions to the Basic Provisions fail to address the special needs of beginning farmers with respect to insurance. The commenter believes the wide variety of regulations related to production history and records make it difficult for new producers to choose appropriate risk management tools. They believe to be consistent with widespread public support for addressing the crisis of an aging farm population, declining economic opportunity in agriculture, and depopulation of farming communities, the agency should not only make insurance more accessible to beginning farmers through clearer rules related to history and records, but should also offer special incentives to new producers of limited means. The commenter recommended the agency immediately develop a new section of the Basic Provisions to deal specifically with the unique needs of beginning farmers. They also urged the agency to develop proposals for special incentives for beginning farmers, and to utilize the USDA Advisory Committee on Beginning Farmers and Ranchers in developing this initiative.

Response: Since the recommended changes were not proposed, no changes were required as a result of conforming amendments, and the public was not provided an opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. No change has been made.

In addition to the changes described above, FCIC has made the following changes:

1. Revise the definition of "acreage report'' to change the word "paragraph'' to "section'' and the definition of "price election'' to change "to be used for computing'' to "that is'' to clarify that the price election is the value of the crop;

2. The "Contract change'' section has been changed to allow correction of clear errors in policy and actuarial materials such as when dates have been transposed or there are typographical errors such as transitional yields reported as 1000 pounds when it should have been 100 pounds;

3. Revise the provisions in section 9(a)(8) regarding the election to not insure second crop acreage to clarify the election can be made when it is uncertain whether or not the first insured crop will have an indemnity (Such cases may occur when only a portion of the acreage in the first insured crop unit is released to be planted to a second crop) and that the election is made for all acreage in the first insured crop unit, and to add provisions indicating when the election can be made when there is no release of first insured crop acreage;

4. Revise the written agreement provisions proposed to clarify the reference to "guarantee'' because it may not always be possible to know the guarantee (for example, in cases where the agreement authorizes coverage to be established according to standard actual production history rules or for adjustments in the premium rate only). In addition, the guarantee cannot be quoted for multi-year written agreements, because additional years of production cause the guarantee to change from year to year. Accordingly, the provisions have been revised to clarify that guarantees may not be required for written agreements in effect for more than one year. The provisions are also revised to clarify that if a written agreement is requested after the sales closing date, an inspection must be made only when the written agreement is needed to establish insurability and determine the condition of the acreage or crop, for example for an unrated practice, type or variety, or for a crop in a county where insurance is not currently offered for the crop. Add provisions to section 18 that were previously contained in procedures that imposed some requirement or burden on the producer so that the producer would know the process for filing a request for a written agreement, the contents of such request, the applicable deadlines, and the grounds for not

accepting or rejecting requests for written agreements. This change is intended to ensure that all program participants are aware of the requirements regarding written agreements. The provisions were also revised to clarify that any request for a written agreement will be denied if FCIC determines the risk is excessive. The proposed provisions specify the "written agreement'' would be denied; however, the written agreement will not be denied since the request for a written agreement will not be accepted;

5. In the Group Risk Plan, FCIC has moved the provisions previously contained in section 14 to section 16 to eliminate redundancies;

6. In the Group Risk Plan, FCIC has added a provision to section 15 to clarify when interest starts to accrue for amounts that may be due to the producer; and

7. FCIC has made technical revisions to other provisions in this rule for the purpose of clarity and such revisions are not intended to, and do not, make substantive changes to the provisions. FCIC has also revised the Group Risk Plan provisions to be consistent with the Basic Provisions.

Good cause is shown to make this rule effective less than 30 days after publication in the **Federal Register**. Good cause to make the rule effective less than 30 days after publication exists when the 30-day delay in the effective date is impracticable, unnecessary, or contrary to the public interest.

It is in the public interest to implement changes in this rule because they will improve the integrity and reduce costs of the crop insurance program. These changes include: (1) The requirement to collect additional identification numbers (social security numbers or employer identification numbers) to prevent ineligible persons from receiving program benefits; (2) New provisions providing authority to reduce excessively high insurance guarantees, thereby eliminating over-insurance; (3) New penalties for producers who misreport information necessary to establish insurance protection, which should increase the incentive to provide accurate information which will reduce costs associated with misreporting; (4) A requirement to destroy grain containing substances injurious to human or animal health before an insurance claim is paid to ensure that such grain does not enter the food stream; (5) New provisions to prohibit prevented planting payments where pasture or other forage crop is in place at the time planting should occur to prevent payments for acreage where it is possible that planting was never intended; (6) New provisions that require that policy and procedure interpretations be provided by FCIC in the settlement of any dispute, which should reduce instances in which policies and procedures are misinterpreted during arbitration or litigation resulting in improper payments; and (7) Clarification of several policy provisions that should result in more consistent administration of the crop insurance program.

Due to the larger number of comments and the scope and complexity of this rule, it was not possible for FCIC to complete this rule before now. Additional time was needed to ensure that all comments were considered and properly addressed. If FCIC is required to delay the implementation of this rule 30 days after the date it is published, the provisions of this rule could not be implemented until the next crop year for those crops having a contract change date of August 31, 2004. This would mean the benefits described above would not be available for an additional year.

For the reasons stated above, good cause exists to make these policy changes effective less than 30 days after publication in the **Federal Register**.

The amendments in this rule are applicable for the 2005 and succeeding crop years for all crops with a contract change date on or after the effective date of this rule, and for the 2006 and succeeding crop years for all crops with a contract change date prior to the effective date of this rule.

List of Subjects in 7 CFR Parts 400, 402, 407 and 457

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

Final Rule

■ Accordingly, as set forth in the preamble, the interim rule amending 7 CFR parts 402, 407, and 457, published in the **Federal Register** on June 30, 2000, at 65 FR 40483–40486 is adopted as final. In addition, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR parts 400, 402, 407 and 457 as follows:

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

■ 1. The authority citation for 7 CFR part 400 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

Subpart L—Reinsurance Agreement—Standards for Approval; Regulations for the 1997 and Subsequent Reinsurance Years

■ 2. In § 400.176, revise paragraph (b) to read as follows:

§ 400.176 State action preemptions.

* * * * *

(b) No policy of insurance reinsured by the Corporation and no claim, settlement, or adjustment action with respect to any such policy shall provide a basis for a claim of punitive or compensatory damages or an award of attorney fees or other costs against the Company issuing such policy, unless a determination is obtained from the Corporation that the Company, its employee, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by the Corporation and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled.

Subpart P—Preemption of State Laws and Regulations

■ 3. Amend § 400.352, paragraph (b)(4) by revising the parenthetical text to read as follows:

§ 400.352 State and local laws and regulations preempted.

* * * * *

(b) * * *

(4) * * * (Nothing herein precludes such damages being imposed against the company if a determination is obtained from FCIC that the company, its employee, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled) * * *

* * * * *

PART 402—CATASTROPHIC RISK PROTECTION ENDORSEMENT

■ 4. The authority citation for 7 CFR part 402 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

§ 402.3 [Amended]

■ 5. Amend § 402.3 by revising the OMB control number to read "0563–0053'';

■ 6. Amend § 402.4, as follows:

■ a. Revise the introductory text of the section to read as follows;

■ b. Amend section 1 by adding in alphabetical order the definitions of "Household'' and "Limited resource farmer''; and

■ c. Revise section 6(c).

The revised and added text reads as follows:

§ 402.4 Catastrophic Risk Protection Endorsement Provisions.

The Catastrophic Risk Protection Endorsement Provisions for the 2005 and succeeding crop years are as follows:

* * * * *

1. Definitions.

* * * * *

Household. A domestic establishment including the members of a family (parents, brothers, sisters, children, spouse, grandchildren, aunts, uncles, nieces, nephews, first cousins, or grandparents, related by blood, adoption or marriage, are considered to be family members) and others who live under the same roof.

* * * * *

Limited resource farmer. A person with:

(1) Direct or indirect gross farm sales not more than $100,000.00 in each of the previous two years (to be increased starting in fiscal year 2004 to adjust for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service (NASS)); and

(2) A total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department Data).

* * * * *

■ 6. Annual Premium and Administrative Fees.

* * * * *

(c) The administrative fee provisions of paragraph (b) of this section do not apply if you meet the definition of a limited resource farmer (see section 1). The administrative fee will be waived if you request it and:

(1) You qualify as a limited resource farmer; or

(2) You were insured prior to the 2005 crop year or for the 2005 crop year and your administrative fee was waived for one or more of those crop years because you qualified as a limited resource farmer under a policy definition previously in effect, and you remain qualified as a limited resource farmer under the definition that was in effect at the time the administrative fee was waived.

* * * * *

PART 407—GROUP RISK PLAN OF INSURANCE REGULATIONS FOR THE 2005 AND SUCCEEDING CROP YEARS

■ 7. The authority citation for 7 CFR part 407 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

PART 407—[AMENDED]

■ 8. In part 407 revise the part heading to read as set forth above.

■ 9. Amend § 407.2 by:
■ a. Revising paragraph (d), removing paragraph (e) and redesignating paragraphs (f) through (h) as paragraphs (e) through (g) respectively; and
■ b. Amending newly designated paragraph (e) by removing the phrase "§ 407.8, paragraph 21'' and adding the phrase "§ 407.9, section 15'' in its place.

The revision reads as follows:

§ 407.2 Availability of Federal crop insurance.

* * * * *

(d) Except as specified in paragraph (c) of this section, if a person has more than one contract authorized under the Act that provides coverage for the same loss on the same crop for the same crop year in the same county, all such contracts shall be voided for that crop year and the person will be liable for the premium on all contracts, unless the person can show to the satisfaction of the Corporation that the multiple contracts of insurance were without the fault of the person.

(1) If the multiple contracts of insurance are shown to be without the fault of the person and:

(i) One contract is an additional coverage policy and the other contract is a Catastrophic Risk Protection policy, the additional coverage policy will apply if both policies are with the same insurance provider, or if not, both insurance providers agree, and the Catastrophic Risk Protection policy will be canceled (If the insurance providers do not agree, the policy with the earliest date of application will be in force and the other contract will be canceled); or

(ii) Both contracts are additional coverage policies or both are Catastrophic Risk Protection policies, the contract with the earliest signature date on the application will be valid and the other contract on that crop in the county for that crop year will be canceled, unless both policies are with the same insurance provider and the insurance provider agrees otherwise or both policies are with different insurance providers and both insurance providers agree otherwise.

(2) No liability for indemnity or premium will attach to the contracts canceled as specified in paragraphs (d)(1)(i) and (ii) of this section.

* * * * *

§ 407.6 [Removed and reserved]

■ 10. Remove and reserve § 407.6;

§ 407.7 [Amended]

■ 11. Amend § 407.7 in the fourth sentence by removing the words "Except as may be allowed under § 407.6, and at the sole discretion of the Corporation,'' and capitalizing the first letter in the word "no'';

■ 12. Amend § 407.9, as follows:
■ a. Revise the introductory text;
■ b1. Following the second appearance of the heading "FCIC policies'', revise the first paragraph and add a new third paragraph "Agreement to Insure'';
■ b2. Following the second appearance of the heading "Reinsured Policies'', revise the first and second paragraphs and add a new fourth paragraph "Agreement to Insure'';
■ c. Amend the third paragraph under the heading "Both policies'' by removing the number "55'' and adding the number "45'' in its place;
■ d. Revise the last sentence of the seventh paragraph under the heading "Both policies'' and remove the paragraph "Agreement to Insure'' preceding the "Terms and Conditions'';
■ e. Amend section 1 by adding definitions for "Agricultural commodity,'' "Code of Federal Regulations (CFR),'' "Contract change date,'' "Delinquent debt,'' "Household,'' "Insurable loss,'' "Limited resource farmer,'' "Offset,'' and "Substantial beneficial interest'';
■ f. Amend section 1 by revising the definition of "Actuarial documents'';
■ g. Amend the definition of "Catastrophic risk protection'' by removing the number "55'' and adding the number "45'' in its place;
■ h. Amend the definition of "Second crop'' by revising the third sentence;
■ i. Revise section 3(c)(2);
■ j. Revise the introductory text in section 3(c)(3) and section 3(c)(3)(i);
■ k. Amend section 4(a) by removing the number "55'' and adding the number "45'' in its place;
■ l. Amend section 7 by revising sections 7(c), (d) and (e), redesignating section 7(f) as section 7(i), and adding new sections 7(f), (g) and (h);
■ m. Revise section 8(c);
■ n. Amend section 8(f) by removing the word "by'' in the second sentence and adding the words "not earlier than'' in its place;
■ o. Amend section 8 by revising section 8(g) and removing section 8(h);
■ p. Revise sections 9(a), (c) and (d) and add new sections (e) through (l);

■ q. Revise section 10;
■ r. Revise section 13;
■ s. Remove and reserve section 14;
■ t. Amend section 15(c) in both the FCIC and the Reinsured policy versions by removing the second sentences;
■ u. Amend section 15 in the Reinsured Policy version by adding a new section 15(i);
■ v. Revise section 16 in both the FCIC and the Reinsured policy versions;
■ w. Amend section 18 by redesignating sections 18(f) through (h) as sections 18(g) through (i), respectively, revising sections 18(b) and (e), and adding a new section 18(f);
■ x. Revise newly redesignated section 18(h) by replacing "terminate'' with "cancel'';
■ y. Revise sections 19(b) and (c); and
■ z. Revise section 21(a)(2)(ii).

The revised and added sections read as follows:

§ 407.9 Group risk plan common policy.

The provisions of the Group Risk Plan Common Policy for the 2005 and succeeding crop years are as follows:

* * * * *

This insurance policy establishes a risk management program developed by the Federal Crop Insurance Corporation (FCIC), an agency of the United States Government, under the authority of the Federal Crop Insurance Act (Act), as amended (7 U.S.C. 1501 *et seq.*). All terms of the policy and rights and responsibilities of the parties thereto are subject to the Act and all regulations under the Act published in 7 CFR chapter IV. The provisions of this policy may not be waived or modified in any way by us, your insurance agent or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. Procedures (handbooks, manuals, memoranda, and bulletins), issued by us and published on the RMA Web site at *http://www.rma.usda.gov/* or a successor Web site will be used in the administration of this policy. All provisions of state and local laws in conflict with the provisions of this policy as published at 7 CFR part 407 are preempted and the provisions of this policy control.

* * * * *

AGREEMENT TO INSURE: In return for the payment of the premium, and subject to all of the provisions of this policy, we agree with you to provide the insurance as stated in this policy. If there is a conflict between the Act, the regulations published at 7 CFR chapter IV, and the procedures issued by us, the order of priority is as follows: (1) The Act; (2) the regulations; and (3) the procedures issued by us, with (1) controlling (2), etc. If there is a conflict between the policy provisions published at 7 CFR part 407 and the administrative regulations published at 7 CFR part 400, the policy provisions published at 7 CFR part 407 control. If a conflict exists among the policy provisions, the order of priority is: (1) The Catastrophic Risk Protection Endorsement, as applicable; (2) the Special Provisions; (3) the Crop Provisions; and (4) these Basic Provisions, with (1) controlling (2), *etc.*

[Reinsured policies]

This insurance policy establishes a risk management program developed by the Federal Crop Insurance Corporation (FCIC), an agency of the United States Government, under the authority of the Federal Crop Insurance Act (Act), as amended (7 U.S.C. 1501 *et seq.*).

This insurance policy is reinsured by FCIC under the provisions of the Act. All terms of the policy and rights and responsibilities of the parties are subject to the Act and all regulations under the Act published in 7 CFR chapter IV. The provisions of this policy may not be waived or modified 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 the procedures (handbooks, manuals, memoranda, and bulletins), as issued by FCIC and published on the RMA Web site at *http://www.rma.usda.gov/* or a successor Web site, in the administration of this policy. All provisions of state and local laws in conflict with the provisions of this policy as published at 7 CFR part 407 are preempted and the provisions of this policy will control. 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.

* * * * *

AGREEMENT TO INSURE: In return for the payment of premium and subject to all of the provisions of this policy, we agree with you to provide risk protection as stated in this policy. If there is a conflict between the Act, the regulations published at 7 CFR chapter IV, and the procedures as issued by FCIC, the order of priority is as follows: (1) The Act; (2) the regulations; and (3) the procedures as issued by FCIC, with (1) controlling (2), etc. If there is a conflict between the policy provisions published at 7 CFR part 407 and the administrative regulations published at 7 CFR part 400, the policy provisions published at 7 CFR part 407 control. If a conflict exists among the policy provisions, the order of priority is: (1) the Catastrophic Risk Protection Endorsement, as applicable; (2) the Special Provisions; (3) the Crop Provisions; and (4) these Basic Provisions, with (1) controlling (2), *etc.*

[Both policies]

* * * * *

* * * The policy will consist of the accepted application, these Basic Provisions, the Crop Provisions, the Special Provisions, other applicable amendments, endorsements or options, the actuarial documents for the insured agricultural commodity, the Catastrophic Risk Protection Endorsement, if applicable, and the applicable regulations published in 7 CFR chapter IV. Insurance for each agricultural commodity in each county will constitute a separate policy.

* * * * *

1. Definitions.

* * * * *

Actuarial documents. The material for the crop year which is available for public inspection in your agent's office and published on RMA's Web site at *http://www.rma.usda.gov/* or a successor Web site, and which shows the maximum protection per acre, expected county yield, coverage levels, information needed to determine the premium rates, practices, program dates, and other related information regarding crop insurance in the county.

* * * * *

Agricultural commodity. Any crop or other commodity produced, regardless of whether or not it is insurable.

* * * * *

Code of Federal Regulations (CFR). The codification of general and permanent rules published in the **Federal Register** by the Executive departments and agencies of the Federal Government. Rules published in the **Federal Register** by FCIC are contained in 7 CFR chapter IV. The full text of the CFR is available in electronic format at *http://www.access.gpo.gov/* or a successor Web site.

Contract change date. The calendar date by which changes to the policy, if any, will be made available in accordance with section 19 of these Basic Provisions.

* * * * *

Delinquent debt. Any administrative fees or premiums for insurance issued under the authority of the Act, and the

interest on those amounts, if applicable, that are not postmarked or received by us or our agent on or before the termination date unless you have entered into an agreement acceptable to us to pay such amounts or have filed for bankruptcy on or before the termination date; any other amounts due us for insurance issued under the authority of the Act (including, but not limited to, indemnities found not to have been earned or that were overpaid), and the interest on such amounts, if applicable, which are not postmarked or received by us or our agent by the due date specified in the notice to you of the amount due; or any amounts due under an agreement with you to pay the debt, which are not postmarked or received by us or our agent by the due dates specified in such agreement.

* * * * *

Household. A domestic establishment including the members of a family (parents, brothers, sisters, children, spouse, grandchildren, aunts, uncles, nieces, nephews, first cousins, or grandparents, related by blood, adoption or marriage, are considered to be family members) and others who live under the same roof.

Insurable loss. Damage for which coverage is provided under the terms of your policy, and for which you accept an indemnity payment.

* * * * *

Limited resource farmer. A person with:

(1) Direct or indirect gross farm sales not more than $100,000.00 in each of the previous two years (to be increased starting in fiscal year 2004 to adjust for inflation using Prices Paid by Farmer Index as compiled by NASS); and

(2) A total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department Data).

* * * * *

Offset. The act of deducting one amount from another amount.

* * * * *

Second crop. * * * A cover crop, planted after a first insured crop and planted for the purpose of haying, grazing or otherwise harvesting in any manner or that is hayed or grazed during the crop year, or that is otherwise harvested is considered to be a second crop. * * *

* * * * *

Substantial beneficial interest. An interest held by any person of at least 10 percent in you. The spouse of any individual applicant or individual insured will be considered to have a substantial beneficial interest in the applicant or insured unless the spouses can prove they are legally separated or otherwise legally separate under state law. Any child of an individual applicant or individual insured will not be considered to have a substantial beneficial interest in the applicant or insured unless the child has a separate legal interest in such person. For example, there are two partnerships that each have a 50 percent interest in you and each partnership is made up of two individuals, each with a 50 percent share in the partnership. In this case, each individual would be considered to have a 25 percent interest in you, and both the partnerships and the individuals would have a substantial beneficial interest in you (The spouses of the individuals would not be considered to have a substantial beneficial interest unless the spouse was one of the individuals that made up the partnership). However, if each partnership is made up of six individuals with equal interests, then each would only have an 8.33 percent interest in you and although the partnership would still have a substantial beneficial interest in you, the individuals would not for the purposes of reporting in section 18.

* * * * *

3. Insured and Insurable Acreage.

* * * * *

(c) * * *

(1) * * *

(2) Where you have failed to follow good farming practices for the insured crop; or

(i) Planted to a type, class or variety not generally recognized for the area; or

(ii) Where the conditions under which the crop is planted are not generally recognized for the area (For example, where agricultural experts determine that planting a non-irrigated corn crop after a failed small grain crop on the same acreage in the same crop year is not appropriate for the area);

(3) 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 21 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 for all first insured crop acreage that may be subject to an indemnity reduction if the first insured crop is insured under this policy, or on a first insured crop unit basis if the first insured crop is not insured under this policy. For example, if the first insured crop under this policy consists of 40 acres, or the first insured crop unit insured under another policy contains 40 planted acres, then no second crop can be insured on any of the 40 acres. In this case:

(i) 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 by the acreage reporting date for the second crop if it is insured under this policy, or before planting the second crop if it is insured under any other policy, or, if the first insured crop is not insured under this policy, 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 the first insured crop), and if you fail to provide such notice, the second crop acreage will be insured in accordance with applicable policy provisions and you must repay any overpaid indemnity for the first insured crop;

* * * * *

7. Report of Acreage and Share.

* * * * *

(c) The premium amount and payment of an indemnity will be based on your insurable acreage on the acreage reporting date subject to section 7(d).

(d) You must provide all required reports and you are responsible for the accuracy of all information contained in those reports. You should verify the information on all such reports prior to submitting them to us.

(1) If you submit information on any report that is different than what is determined to be correct and such information results in:

(i) A lower amount of policy protection than the correct amount, the amount of policy protection will be reduced to an amount consistent with the reported information; or

(ii) A higher amount of policy protection than the correct amount, the information contained in the acreage report will be revised to be consistent with the correct information.

(2) In addition to the other adjustments specified in section 7(d)(1), if you misreport any information that results in an amount of policy protection greater than 110.0 percent or lower than 90.0 percent of the correct amount of policy protection, any indemnity will be based on the amount of policy protection determined in accordance with section 7(d)(1)(i) or (ii) and will be reduced in an amount proportionate with the amount of policy protection that is misreported in excess

of the tolerances stated in this paragraph (For example, if the correct amount of policy protection is determined to be $100.00, but you reported a policy protection amount of $120.00, any indemnity will be reduced by 10.0 percent ($120.00 / $100.00 = 1.20, and 1.20 − 1.10 = 0.10)).

(e) If you request an acreage measurement prior to the acreage reporting date and submit documentation of such request and an acreage report with estimated acreage by the acreage reporting date, you must provide the measurement to us, we will revise your acreage report if there is a discrepancy, and no indemnity will be paid until the acreage measurement has been received by us (Failure to provide the measurement to us will result in the application of section 7(d) if the estimated acreage is not correct, and estimated acreage under this paragraph will no longer be accepted for any subsequent acreage report).

(f) If there is an irreconcilable difference between:

(1) The acreage measured by FSA or a measuring service and our on-farm measurement, our on-farm measurement will be used; or

(2) The acreage measured by a measuring service, other than our on-farm measurement, and FSA, the FSA measurement will be used.

(g) Information on the initial acreage report will not be considered misreported for the purposes of section 7(d) if the acreage report is revised:

(1) In accordance with section 7(e) or (f);

(2) Because information is clearly transposed;

(3) When you provide adequate evidence that we or someone from USDA have committed an error regarding the information; or

(4) As expressly permitted by the policy.

(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 that was paid in a prior crop year, such claim will be adjusted and you will be required to repay any overpaid amounts.

* * * * *

8. Administrative Fees and Annual Premium.

* * * * *

(c) The administrative fee will be waived if you request it and:

(1) You qualify as a limited resource farmer; or

(2) You were insured prior to the 2005 crop year or for the 2005 crop year and your administrative fee was waived for one or more of those crop years because you qualified as a limited resource farmer under a policy definition previously in effect, and you remain qualified as a limited resource farmer under the definition that was in effect at the time the administrative fee was waived.

* * * * *

(g) If the amount of premium (gross premium less premium subsidy paid on your behalf by FCIC) and administrative fee you are required to pay for any acreage exceeds the amount of protection for the acreage, coverage for those acres will not be provided (no premium or administrative fee will be due and no indemnity will be paid for such acreage).

9. Written Agreements.

* * * * *

(a) You must apply in writing for each written agreement or for renewal of any written agreement no later than the sales closing date, unless you demonstrate your physical inability to submit the request prior to the sales closing date (For example, you have been hospitalized or a blizzard has made it impossible to submit the written agreement request in person or by mail);

* * * * *

(c) If approved by FCIC, the written agreement will include all variable terms of the contract, including, but not limited to, crop practice, and type or variety;

(d) Each written agreement will only be valid for the number of crop years specified in the written agreement and a multi-year written agreement:

(1) Will only apply for any particular crop year designated in the written agreement if all terms and conditions in the written agreement are still applicable for the crop year and the conditions under which the written agreement has been provided have not changed prior to the beginning of the crop year (If conditions change during or prior to a crop year, the written agreement will not be effective for that crop year but may still be effective for a subsequent crop year if conditions under which the written agreement has been provided exist for such year);

(2) May be canceled in writing by:

(i) FCIC not less than 30 days before the cancellation date if it discovers that any term or condition of the written agreement, including the premium rate, is not appropriate for the crop; or

(ii) You or us on or before the cancellation date;

(3) That is not renewed in writing after it expires, is not applicable for a crop year, or is canceled, then insurance coverage will be in accordance with the terms and conditions stated in this policy, without regard to the written agreement; and

(4) Will be automatically cancelled if you transfer your policy to another insurance provider (No notice will be provided to you and for any subsequent crop year, for a written agreement to be effective, you must timely request renewal of the written agreement in accordance with this section);

(e) A request for any written agreement must contain:

(1) A completed "Request for Actuarial Change'' form;

(2) Evidence from agricultural experts or the organic agricultural industry, as applicable, that the crop can be produced in the area if the request is to provide insurance for practices, types, or varieties that are not insurable, unless we are notified in writing by FCIC that such evidence is not required;

(3) The legal description of the land (in areas where legal descriptions are available), FSA Farm Serial Number including tract number, and a FSA aerial photograph, acceptable Geographic Information System or Global Positioning System maps, or other legible maps delineating field boundaries where you intend to plant the crop for which insurance is requested; and

(4) Such other information as specified in the Special Provisions or required by FCIC;

(f) A request for written agreement will not be accepted if:

(1) The request is submitted to us after the deadline contained in section 9(a);

(2) All the information required in section 9(e) is not submitted to us with the request for a written agreement (The request for a written agreement may be accepted if any missing information is available from other acceptable sources); or

(3) The request is to add land or crops to an existing written agreement or to add land or crops to a request for a written agreement and the request is not submitted by the deadlines specified in section 9(a);

(g) A request for a written agreement will be denied if:

(1) FCIC determines the risk is excessive;

(2) There is not adequate information available to establish an actuarially sound premium rate and insurance coverage for the crop and acreage; or

(3) Agricultural experts or the organic agricultural industry determines the

crop practices, types, or varieties are not generally recognized for the county;

(h) A written agreement will be denied unless FCIC approves the written agreement and the original written agreement is signed by you and sent to us not later than the expiration date;

(i) With respect to your and our ability to reject an offer for a written agreement:

(1) When a single Request for Actuarial Change form is submitted, regardless of how many requests for changes are contained on the form, you and we can only accept or reject the written agreement in its entirety (you cannot reject specific terms of the written agreement and accept others);

(2) When multiple Request for Actuarial Change forms are submitted, regardless of when the forms are submitted, for the same condition, all these forms may be treated as one request and you and we will only have the option of accepting or rejecting the written agreement in its entirety (you cannot reject specific terms of the written agreement and accept others);

(3) When multiple Request for Actuarial Change forms are submitted, regardless of when the forms are submitted, for the different conditions or for different crops, separate agreements may be issued and you and we will have the option to accept or reject each written agreement; and

(4) If we reject an offer for a written agreement approved by FCIC, you may seek arbitration or mediation of our decision to reject the offer in accordance with section 16;

(j) Any information that is submitted by you after the applicable deadlines in section 9(a) will not be considered, unless such information is specifically requested in accordance with section 9(e)(4);

(k) If the written agreement or the policy is canceled for any reason, or the period for which an existing written agreement is in effect ends, a request for renewal of the written agreement must contain all the information required by this section and be submitted in accordance with section 9(a), unless otherwise specified by FCIC; and

(l) If a request for a written agreement is not approved by FCIC, a request for a written agreement for any subsequent crop year that fails to address the stated basis for the denial will not be accepted (If the request for a written agreement contains the same information that was previously rejected or denied, you will not have any right to arbitrate, mediate or appeal the non-acceptance of your request).

10. Access to Insured Crop and Record Retention.

(a) We, and any employee of USDA authorized to investigate or review any matter relating to crop insurance, have the right to examine the insured crop, any records relating to the crop and this insurance, and any records regarding mediation, arbitration or litigation involving the insured crop, at any location where such crop or records may be found or maintained, as often as reasonably required during the record retention period.

(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, complete records pertaining to the planting of the insured crop and your net acres for a period of three years after the end of the crop year or three years after the date of final payment of the indemnity, whichever is later. This requirement also applies to all such records for acreage that is not insured.

(c) We, or any employee of USDA authorized to investigate or review any matter relating to crop insurance, may extend the record retention period beyond three years by notifying you of such extension in writing.

(d) By signing the application for insurance authorized under the Act or by continuing insurance for which you have previously applied, you authorize us or USDA, or any person acting for us or USDA authorized to investigate or review any matter relating to crop insurance, to obtain records relating to the planting, replanting, inputs, production, harvesting, and disposition of the insured crop from any person who may have custody of such records, including but not limited to, FSA offices, banks, warehouses, gins, cooperatives, marketing associations, and accountants. You must assist in obtaining all records we or any employee of USDA authorized to investigate or review any matter relating to crop insurance request from third parties.

(e) Failure to provide access to the insured crop or the farm, maintain or provide any required records, authorize access to the records maintained by third parties, or assist in obtaining all such records will result in a determination that no indemnity is due for the crop year in which such failure occurred.

* * * * *

13. Other Insurance.

Nothing in this section prevents you from obtaining other insurance not authorized under the Act. However, unless specifically required by policy provisions, you must not obtain any other crop insurance authorized under the Act on your share of the insured crop. If you cannot demonstrate that you did not intend to have more than one policy in effect, you may be subject to the consequences authorized under this policy, the Act, or any other applicable statute. If you can demonstrate that you did not intend to have more than one policy in effect (For example, an application to transfer your policy or written notification to an insurance provider that states you want to purchase, or transfer, insurance and you want any other policies for the crop canceled would demonstrate you did not intend to have duplicate policies), and:

(a) One is an additional coverage policy and the other is a Catastrophic Risk Protection policy:

(1) The additional coverage policy will apply if both policies are with the same insurance provider or, if not, both insurance providers agree; or

(2) The policy with the earliest date of application will be in force if both insurance providers do not agree; or

(b) Both are additional coverage policies or both are Catastrophic Risk Protection policies, the policy with the earliest date of application will be in force and the other policy will be void, unless both policies are with:

(1) The same insurance provider and the insurance provider agrees otherwise; or

(2) Different insurance providers and both insurance providers agree otherwise.

* * * * *

[Reinsured policy]

15. Restrictions, Limitations, and Amounts Due Us.

* * * * *

(i) We will pay simple interest computed on the net indemnity ultimately found to be due by us or determined by a final judgment of a court of competent jurisdiction or a final administrative determination from, and including, the 61st day after the date we receive the NASS county yield estimates for the insured crop year. Interest will be paid only if the reason for our failure to timely pay is not due to your failure to provide information or other material necessary for the computation or payment of the indemnity. The interest rate will be that established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611 *et seq.*), and published in the **Federal Register**.

[FCIC policy]

16. Appeals, Administrative and Judicial Review.

(a) All determinations required by the policy will be made by us.

(b) If you disagree with our determinations, you may:

(1) Except for determinations specified in section 16(b)(2), obtain an administrative review in accordance with 7 CFR part 400, subpart J or appeal in accordance with 7 CFR part 11; or

(2) For determinations regarding whether you have used good farming practices, request reconsideration in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J.

(c) If you fail to exhaust your administrative remedies under 7 CFR part 11 or the reconsideration process for determinations of good farming practices described in section 16(b)(2), as applicable, you will not be able to resolve the dispute through judicial review.

(d) If reconsideration for good farming practices under 7 CFR part 400, subpart J or appeal under 7 CFR part 11 has been initiated within the time frames specified in those sections and judicial review is sought, any suit against us must be:

(1) Filed not later than one year after the date of the decision rendered in the reconsideration process for good farming practices or administrative review process under 7 CFR part 11; and

(2) Brought in the United States district court for the district in which the insured farm involved in the decision is located.

(e) You may only recover contractual damages from us. Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from us in administrative review, appeal or litigation.

[Reinsured policy]

16. Mediation, Arbitration, Appeals, and Administrative and Judicial Review.

(a) If you and we fail to agree on any determination made by us except those specified in section 16(d), the disagreement may be resolved through mediation in accordance with section 16(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 16(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 16(d), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a rule of general applicability and is not appealable. If you disagree with an interpretation of a policy provision by FCIC, you must obtain a Director's review from the National Appeals Division in accordance with 7 CFR 11.6 before obtaining judicial review in accordance with subsection (e).

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

(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) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 16(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with section 16(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and

(4) In any suit, 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, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 16(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

(d) If you do not agree with any determination made by us or FCIC regarding whether you have used a good farming practice, you may request reconsideration by FCIC of this determination in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J (reconsideration).

(1) You must complete reconsideration before filing suit against FCIC and any such suit must be brought in the United States district court for the district in which the insured farm is located.

(2) Suit must be filed not later than one year after the date of the decision rendered in the reconsideration.

(3) You cannot sue us for determinations of whether good farming practices were used by you.

(e) Except as provided in section 16(d), if you disagree with any other determination made by FCIC, you may obtain an administrative review in accordance with 7 CFR part 400, subpart J (administrative review) or appeal in accordance with 7 CFR part 11 (appeal). If you elect to bring suit after completion of any appeal, such suit must be filed against FCIC not later than one year after the date of the decision rendered in such appeal. Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from FCIC.

(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.

(g) To resolve any dispute through mediation, you and we must both:

(1) Agree to mediate the dispute;

(2) Agree on a mediator; and

(3) Be present, or have a designated representative who has authority to settle the case present, at the mediation.

(h) Except as provided in section 16(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 15(i).

(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.

(j) If FCIC elects to participate in the adjustment of your claim, or modifies, revises or corrects your claim, prior to payment, you may not bring an arbitration, mediation or litigation action against us. You must request administrative review or appeal in accordance with section 16(e).

* * * * *

18. Life of Policy, Cancellation, and Termination.

* * * * *

(b) Your application for insurance must contain your social security number (SSN) if you are an individual or employer identification number (EIN) if you are a person other than an individual, and all SSNs and EINs, as applicable, of all persons with a substantial beneficial interest in you, the coverage level, price election, crop, type, variety, or class, plan of insurance, and any other material information required on the application to insure the crop. If you or someone with a substantial beneficial interest is not legally required to have a SSN or EIN, you must request and receive an identification number for the purposes of this policy from us or the Internal Revenue Service (IRS) if such identification number is available from the IRS. If any of the information regarding persons with a substantial beneficial interest changes during the crop year, you must revise your application by the next sales closing date applicable under your policy to reflect the correct information.

(1) Applications that do not contain your SSN, EIN or identification number, or any of the other information required in section 18(b) are not acceptable and insurance will not be provided (Except if you fail to report the SSNs, EINs or identification numbers of persons with a substantial beneficial interest in you, the provisions in section 18(b)(2) will apply);

(2) If the application does not contain the SSNs, EINs or identification numbers of all persons with a substantial beneficial interest in you, you fail to revise your application in accordance with section 18(b), or the reported SSNs, EINs or identification numbers are incorrect and the incorrect SSN, EIN or identification number has not been corrected by the acreage reporting date, and:

(i) Such persons are eligible for insurance, the amount of coverage for all crops included on this application will be reduced proportionately by the percentage interest in you of such persons, you must repay the amount of indemnity that is proportionate to the interest of the persons whose SSN, EIN or identification number was unreported or incorrect for such crops, and your premium will be reduced commensurately; or

(ii) Such persons are not eligible for insurance, except as provided in section 18(b)(3), the policy is void and no indemnity will be owed for any crop included on this application, and you must repay any indemnity that may have been paid for such crops. If previously paid, the balance of any premium and any administrative fees will be returned to you, less twenty percent of the premium that would otherwise be due from you for such crops. If not previously paid, no premium or administrative fees will be due for such crops.

(3) The consequences described in section 18(b)(2)(ii) will not apply if you have included an ineligible person's SSN, EIN or identification number on your application and do not include the ineligible person's share on the acreage report.

* * * * *

(e) Any amount due to us for any policy authorized under the Act will be offset from any indemnity due you for this or any other crop insured with us.

(1) Even if your claim has not yet been paid, you must still pay the premium and administrative fee on or before the termination date for you to remain eligible for insurance.

(2) If we offset any amount due us from an indemnity owed to you, the date of payment for the purpose of determining whether you have a delinquent debt will be the date FCIC publishes the payment yield for the applicable crop year.

(f) A delinquent debt for any policy will make you ineligible to obtain crop insurance authorized under the Act for any subsequent crop year and result in termination of all policies in accordance with section 18(f)(2).

(1) With respect to ineligibility:

(i) Ineligibility for crop insurance will be effective on:

(A) The date that a policy was terminated in accordance with section 18(f)(2) for the crop for which you failed to pay premium, an administrative fee, or any related interest owed, as applicable;

(B) The payment due date contained in any notification of indebtedness for any overpaid indemnity, if you fail to pay the amount owed, including any related interest owed, as applicable, by such due date;

(C) The termination date for the crop year prior to the crop year in which a scheduled payment is due under a payment agreement if you fail to pay the amount owed by any payment date in any agreement to pay the debt; or

(D) The termination date the policy was or would have been terminated under sections 18(f)(2)(i)(A), (B) or (C) if your bankruptcy petition is dismissed before discharge.

(ii) If you are ineligible and a policy has been terminated in accordance with section 18(f)(2), you will not receive any indemnity, and such ineligibility and termination of the policy may affect your eligibility for benefits under other USDA programs. Any indemnity that may be owed for the policy before it has been terminated will remain owed to you, but may be offset in accordance with section 18(e), unless your policy was terminated in accordance with sections 18(f)(2)(i)(D) or (E).

(2) With respect to termination:

(i) Termination will be effective on:

(A) For a policy with unpaid administrative fees or premiums, the termination date immediately subsequent to the billing date for the crop year;

(B) For a policy with other amounts due, the termination date immediately following the date you have a delinquent debt;

(C) For each policy for which the termination date has passed before you become ineligible, the termination date immediately following the date you become ineligible;

(D) For execution of an agreement to pay any amounts owed and failure to make any scheduled payment, the termination date for the crop year prior to the crop year in which you failed to make the scheduled payment; or

(E) For dismissal of a bankruptcy petition before discharge, the termination date the policy was or would have been terminated under sections 18(f)(2)(i)(A), (B) or (C).

(ii) For all policies terminated under sections 18(f)(2)(i)(D) and (E), any indemnities paid subsequent to the termination date must be repaid.

(iii) Once the policy is terminated, it cannot be reinstated for the current crop year unless the termination was in error. Failure to timely pay because of illness, bad weather, or other such extenuating circumstances is not grounds for reinstatement in the current crop year.

(3) To regain eligibility, you must:

(i) Repay the delinquent debt in full;

(ii) Execute an agreement to pay any amounts owed and make payments in accordance with the agreement (We will not enter into an agreement with you to pay the amounts owed if you have previously failed to make a scheduled payment under the terms of any other agreement to pay with us or any other insurance provider); or

(iii) File a petition to have your debts discharged in bankruptcy (Dismissal of the bankruptcy petition before discharge will terminate all policies in effect retroactive to the date your policy would have been terminated in accordance with section 18(f)(2)(i));

(4) After you become eligible for crop insurance, if you want to obtain coverage for your crops, you must submit a new application on or before the sales closing date for the crop (Since applications for crop insurance cannot be accepted after the sales closing date, if you make any payment after the sales closing date, you cannot apply for insurance until the next crop year);

(5) For example, for the 2003 crop year, if crop A, with a termination date of October 31, 2003, and crop B, with a termination date of March 15, 2004, are insured and you do not pay the premium for crop A by the termination date, you are ineligible for crop insurance as of October 31, 2003, and crop A's policy is terminated as of that date. Crop B's policy does not terminate until March 15, 2004, and an indemnity for the 2003 crop year may still be owed. If you enter an agreement to repay amounts owed on September 25, 2004, the earliest date by which you can obtain crop insurance for crop A is to apply for crop insurance by the October 31, 2004, sales closing date and for crop B is to apply for crop insurance by the March 15, 2005, sales closing date. If you fail to make a payment that was scheduled to be made on April 1, 2005, your policy will terminate as of October 31, 2004, for crop A, and March 15, 2005, for crop B, and no indemnity will be due for that crop year for either crop. You will not be eligible to apply for crop insurance for any crop until after the amounts owed are paid in full or you file a petition to discharge the debt in bankruptcy.

(6) If you are determined to be ineligible under section 18(f), persons with a substantial beneficial interest in you may also be ineligible until you become eligible again.

* * * * *

19. Contract Changes.

* * * * *

(b) Any changes in policy provisions, expected county yields, maximum amounts of protection, premium rates, and program dates (except as allowed herein) can be viewed on the RMA Web site at *http://www.rma.usda.gov/* or a successor Web site not later than the contract change date contained in the Crop Provisions. We may only revise this information after the contract change date to correct clear errors (For example, the maximum amount of protection was announced at $2500.00 per acre instead of $250.00 per acre).

(c) After the contract change date, all changes specified in section 19(b) will also be available upon request from your crop insurance agent. You will be provided, in writing, a copy of the changes to the Basic Provisions and Crop Provisions and a copy of the Special Provisions not later than 30 days prior to the cancellation date for the insured crop. Acceptance of the changes will be conclusively presumed in the absence of notice from you to change or cancel your insurance coverage.

* * * * *

21. Indemnity and Premium Limitations.

(a) * * *

(1) * * *

(2) * * *

(i) * * *

(ii) Be responsible for a premium that is 35 percent of the premium that you would otherwise owe for the first insured crop; and

* * * * *

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 13. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

■ 14. Revise § 457.2(d) to read as follows:

§ 457.2 Availability of Federal crop insurance.

* * * * *

(d) Except as specified in paragraph (c) of this section, if a person has more than one contract authorized under the Act that provides coverage for the same loss on the same crop for the same crop year in the same county, all such contracts shall be voided for that crop year and the person will be liable for the premium on all contracts, unless the person can show to the satisfaction of the Corporation that the multiple contracts of insurance were without the fault of the person.

(1) If the multiple contracts of insurance are shown to be without the fault of the person and:

(i) One contract is an additional coverage policy and the other contract is a Catastrophic Risk Protection policy, the additional coverage policy will apply if both policies are with the same insurance provider, or if not, both insurance providers agree, and the Catastrophic Risk Protection policy will be canceled (If the insurance providers do not agree, the policy with the earliest date of application will be in force and the other contract will be canceled); or

(ii) Both contracts are additional coverage policies or both are Catastrophic Risk Protection policies, the contract with the earliest signature date on the application will be valid and the other contract on that crop in the county for that crop year will be canceled, unless both policies are with the same insurance provider and the insurance provider agrees otherwise or both policies are with different insurance providers and both insurance providers agree otherwise.

(2) No liability for any indemnity, prevented planting payment, replanting payment or premium will attach to the contracts canceled as specified in paragraphs (d)(1)(i) and (ii) of this section.

* * * * *

§ 457.6 [Removed and reserved]

■ 15. Remove and reserve § 457.6.

§ 457.7 [Amended]

■ 16. Amend § 457.7 by removing the second sentence and adding ", except as

provided in the policy'' at the end of the new third sentence.

■ 17. Amend § 457.8, Common Crop Insurance Policy Basic Provisions, as follows:

■ a. Throughout § 457.8, where it appears, remove the words "crop policy'' and add the word "policy'' in its place;

■ b. Revise the first paragraph of the "FCIC Policies'' section that precedes the Basic Provisions Terms and Conditions;

■ c. Add an "Agreement to insure'' section after the second paragraph of the "FCIC Policies'' section that precedes the Basic Provisions Terms and Conditions;

■ d. Revise the first paragraph of the "Reinsured Policies'' section that precedes the Basic Provisions Terms and Conditions;

■ e. Revise the "Agreement To Insure'' section after the second paragraph of the "Reinsured Policies'' section that precedes the Basic Provisions Terms and Conditions;

■ f. Amend section 1 by adding definitions for "annual crop,'' "Code of Federal Regulations,'' "delinquent debt,'' "disinterested third party,'' "household,'' "insurable loss,'' "liability,'' "offset,'' "perennial crop,'' revising the definitions of "actuarial documents,'' "agricultural commodity,'' "contract change date,'' "crop year,'' "earliest planting date,'' "enterprise unit,'' "field,'' "insured crop,'' "limited resource farmer,'' "non-contiguous,'' "policy,'' "practical to replant,'' "price election,'' "replanting,'' "substantial beneficial interest,'' "whole farm unit,'' and removing the definitions of "another use, notice of,'' "damage, notice of,'' "delinquent account'' and "loss, notice of'';

■ g. Amend the definition of "acreage report'' by removing the words "paragraph 6'' and adding "section 6'' in their place;

■ h. Amend the definitions of "Approved yield'' and "Average yield'' by removing the phrase "section 3(d) or (e)'' and adding "section 3'' in its place;

■ i. Amend the definition of "Second crop'' by revising the third sentence;

■ j. Amend section 2 by revising sections 2(b) and (e), redesignating sections 2(f), (g), (h), and (i) as sections 2(g), (h), (i), and (j) respectively, and adding a new section 2(f);

■ k. Amend newly redesignated section 2(h) by removing "terminate'' and adding "cancel'' in its place;

■ l. Redesignate section 3(i) as section 2(k) and add a new sentence at the end;

■ m. Revise section 3;

■ n. Revise sections 4(b) and (c);

■ o. Remove and reserve section 5;

■ p. Revise section 6(d);

■ q. Revise section 6(g);

■ r. Redesignate section 6(h) as section 6(i) and add a new section 6(h);

■ s. Amend section 7 by revising sections 7(a), (b), (d) and (e)(4), and adding a new section (f);

■ t. Amend section 8 by revising sections (b)(1), (2) and (4), and adding a new (c);

■ u. Revise section 9(a)(1);

■ v. Amend section 9(a) by redesignating sections 9(a)(3) through 9(a)(8) as sections 9(a)(4) through 9(a)(9), respectively, and adding a new section 9(a)(3);

■ w. Revise the introductory text of newly redesignated section 9(a)(8) and revise newly redesignated section 9(a)(8)(i);

■ x. Amend redesignated section 9(a)(9)(ii) by removing "(8)'' and adding "(9)'' in its place;

■ y. Amend section 9(c) by removing "(1)'' and adding "(2)'' in its place;

■ z. Amend section 10(a)(2) by adding two new sentences at the end;

■ aa. Amend section 12 by revising the introductory text and sections 12(c) and (d) and adding a new section 12(f);

■ bb. Amend section 12(e) by removing the period at the end and adding "; or'' in its place;

■ cc. In section 14 revise the heading;

■ dd. Amend section 14 (Your Duties) in (a)(2) by removing the phrase "(we may accept a notice of loss provided later than 72 hours after your initial discovery if we still have the ability to accurately adjust the loss)'', revising sections 14(a)(3), 14(c), and 14(d)(2) and adding section14(h);

■ ee. Amend section 14(d)(1) (Your Duties) by removing the following phrase from the end of the section "or, if you fail to provide the records necessary to allow allocation, the reduction specified in section 15 will apply'';

■ ff. Amend section 14 (Our Duties) by removing the word "or'' at the end of section 14(a)(2), redesignating section 14(a)(3) as 14(a)(4), and adding a new section 14(a)(3);

■ gg. Revise sections 15(b), (e)(2)(ii), (f)(2)(ii) and (g)(3)(i);

■ hh. Revise section 15(j);

■ ii. Amend section 16(b)(3) by adding the word "insured'' between the words "from'' and "acreage'';

■ jj. Revise the introductory text in section 17(a)(1);

■ kk. Amend section 17(d)(1) by removing the word "and'' in the first sentence and adding the word "or'' in its place;

■ ll. Revise section 17(d)(2);

■ mm. Amend section 17(e)(1)(i)(A) by revising the first and second sentences;

■ nn. Revise section 17(e)(1)(ii)(A);

■ oo. Revise sections 17(f)(1) through (4);

■ pp. Revise section 17(f)(5)(i) and 17(f)(6);

■ qq. Amend section 17(f)(10) by removing the word "or'' at the end of that section;

■ rr. Amend section 17(f)(11) by removing the period at the end of that section and adding "; or'' in its place;

■ ss. Amend section 17(f) by adding a new section 17(f)(12);

■ tt. Amend section 17(h)(2) by adding a sentence at the end of the text;

■ uu. Amend section 18 by revising sections18(c) through (e) and adding sections 18(f) through (n);

■ vv. Revise section 20 (For FCIC policies);

■ ww. Revise section 20 (For reinsured policies);

■ xx. Revise section 21;

■ yy. Revise section 22(a);

■ zz. Amend section 22(b) introductory text by adding the phrase "caused by a naturally occurring event'' between "due to fire'' and "only'';

■ aaa. Revise section 24(b) (For FCIC policies);

■ bbb. Revise sections 24(a) and (e) (For reinsured policies);

■ ccc. Remove and reserve section 25;

■ ddd. Amend section 26 by removing the words "Payment and'' in the section heading, removing section 26(a) and removing the section (b) designation;

■ eee. Revise section 30;

■ fff. Revise section 34(a)(2);

■ ggg. Amend section 34(a)(2)(ii) by inserting the term "planted'' between the words "insurable'' and "acreage'';

■ hhh. Revise section 34(a)(2)(iii);

■ iii. Amend section 34(a)(2)(v) by adding the term "production'' between the words "the'' and "reporting'', removing "(c)'' and adding "(e)'' in its place, and removing the word "and'' at the end of the section;

■ jjj. Amend section 34(a)(2)(vi) by removing "If'' and adding "At any time we discover'' in its place, removing the phrase "when the acreage is reported'', and removing the period at the end of the section and adding "; and'' in its place;

■ kkk. Add a new section 34(a)(2)(vii);

■ lll. Amend section 34(a)(3)(i) by removing " and'' at the end of the text;

■ mmm. Amend section 34(a)(3)(ii) by removing the period at the end of the text and adding "; and'' in its place;

■ nnn. Add section 34(a)(3)(iii);

■ ooo. Revise section 34(b)(3);

■ ppp. Amend section 36(b) by removing the phrases "sales closing date'' and "applicable cancellation date'' and adding the phrase "production reporting date'' in their place; and

■ qqq. Amend section 37(a) by removing "(1)'' and adding "(2)'' in its place.

The revised and added text reads as follows:

§ 457.8 The application and policy.

* * * * *

[FCIC Policies]

This is an insurance policy issued by the Federal Crop Insurance Corporation (FCIC), a United States government agency. The provisions of the policy may not be waived or modified in any way by us, your insurance agent or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. Procedures (handbooks, manuals, memoranda, and bulletins), issued by us and published on the RMA Web site at *http://www.rma.usda.gov/* or a successor Web site will be used in the administration of this policy, including the adjustment of any loss or claim submitted hereunder.

* * * * *

AGREEMENT TO INSURE: In return for the payment of the premium, and subject to all of the provisions of this policy, we agree with you to provide the insurance as stated in this policy. If there is a conflict between the Act, the regulations published at 7 CFR chapter IV, and the procedures issued by us, the order of priority is as follows: (1) The Act; (2) the regulations; and (3) the procedures issued by us, with (1) controlling (2), etc. If there is a conflict between the policy provisions published at 7 CFR part 457 and the administrative regulations published at 7 CFR part 400, the policy provisions published at 7 CFR part 457 control. If a conflict exists among the policy provisions, the order of priority is: (1) The Catastrophic Risk Protection Endorsement, as applicable; (2) the Special Provisions; (3) the Crop Provisions; and (4) these Basic Provisions, with (1) controlling (2), *etc.*

[Reinsured Policies]

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

* * * * *

AGREEMENT TO INSURE: In return for the payment of the premium, and subject to all of the provisions of this policy, we agree with you to provide the insurance as stated in this policy. If there is a conflict between the Act, the regulations published at 7 CFR chapter IV, and the procedures as issued by FCIC, the order of priority is as follows: (1) The Act; (2) the regulations; and (3) the procedures as issued by FCIC, with (1) controlling (2), *etc.* If there is a conflict between the policy provisions published at 7 CFR part 457 and the administrative regulations published at 7 CFR part 400, the policy provisions published at 7 CFR part 457 control. If a conflict exists among the policy provisions, the order of priority is: (1) The Catastrophic Risk Protection Endorsement, as applicable; (2) the Special Provisions; (3) the Crop Provisions; and (4) these Basic Provisions, with (1) controlling (2), etc.

Terms and Conditions

Basic Provisions

1. Definitions.

* * * * *

Actuarial documents. The material for the crop year which is available for public inspection in your agent's office and published on RMA's Web site at *http://www.rma.usda.gov/* or a successor Web site, and which shows available coverage levels, information needed to determine amounts of insurance, premium rates, premium adjustment percentages, practices, particular types or varieties of the insurable crop, insurable acreage, and other related information regarding crop insurance in the county.

* * * * *

Agricultural commodity. Any crop or other commodity produced, regardless of whether or not it is insurable.

* * * * *

Annual crop. An agricultural commodity that normally must be planted each year.

* * * * *

Code of Federal Regulations (CFR). The codification of general and permanent rules published in the **Federal Register** by the Executive departments and agencies of the Federal Government. Rules published in the **Federal Register** by FCIC are contained in 7 CFR chapter IV. The full text of the CFR is available in electronic format at *http://www.access.gpo.gov/* or a successor Web site.

* * * * *

Contract change date. The calendar date by which changes to the policy, if any, will be made available in accordance with section 4 of these Basic Provisions.

* * * * *

Crop year. The period within which the insured crop is normally grown, regardless of whether or not it is actually grown, and designated by the calendar year in which the insured crop is normally harvested, unless otherwise specified in the Crop Provisions.

* * * * *

Delinquent debt. Any administrative fees or premiums for insurance issued under the authority of the Act, and the interest on those amounts, if applicable, that are not postmarked or received by us or our agent on or before the termination date unless you have entered into an agreement acceptable to us to pay such amounts or have filed for bankruptcy on or before the termination date; any other amounts due us for insurance issued under the authority of the Act (including, but not limited to, indemnities, prevented planting payments or replanting payments found not to have been earned or that were overpaid), and the interest on such amounts, if applicable, which are not postmarked or received by us or our agent by the due date specified in the notice to you of the amount due; or any amounts due under an agreement with you to pay the debt, which are not postmarked or received by us or our agent by the due dates specified in such agreement.

Disinterested third party. A person that does not have any familial relationship (parents, brothers, sisters, children, spouse, grandchildren, aunts, uncles, nieces, nephews, first cousins, or grandparents, related by blood, adoption or marriage, are considered to have a familial relationship) with you or who will not benefit financially from the sale of the insured crop. Persons who are authorized to conduct quality analysis in accordance with the Crop Provisions are considered disinterested third parties unless there is a familial relationship.

* * * * *

Earliest planting date. The initial planting date contained in the Special Provisions, which is the earliest date you may plant an insured agricultural commodity and qualify for a replanting payment if such payments are authorized by the Crop Provisions.

* * * * *

Enterprise unit. All insurable acreage of the insured crop in the county in which you have a share on the date coverage begins for the crop year. To qualify, an enterprise unit must contain all of the insurable acreage of the same insured crop in:

(1) One or more basic units that are located in two or more separate sections, section equivalents, FSA farm serial numbers, or units established by written agreement, with at least some planted acreage in two or more separate sections, section equivalents, FSA farm serial numbers, or two or more separate units as established by written agreement; or

(2) Two or more optional units established by separate sections, section equivalents, FSA farm serial numbers, or as established by written agreement, with at least two optional units containing some planted acreage.

Field. All acreage of tillable land within a natural or artificial boundary (*e.g.*, roads, waterways, fences, *etc.*). Different planting patterns or planting different crops do not create separate fields.

* * * * *

Household. A domestic establishment including the members of a family (parents, brothers, sisters, children, spouse, grandchildren, aunts, uncles, nieces, nephews, first cousins, or grandparents, related by blood, adoption or marriage, are considered to be family members) and others who live under the same roof.

Insurable loss. Damage for which coverage is provided under the terms of your policy, and for which you accept an indemnity payment.

* * * * *

Insured crop. The crop in the county for which coverage is available under your policy as shown on the application accepted by us.

* * * * *

Liability. The dollar amount of insurance coverage used in the premium computation for the insured agricultural commodity.

Limited resource farmer. A person with:

(1) Direct or indirect gross farm sales not more than $100,000.00 in each of the previous two years (to be increased starting in fiscal year 2004 to adjust for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service (NASS)); and

(2) A total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department Data).

* * * * *

Non-contiguous. Acreage of an insured crop that is separated from other acreage of the same insured crop by land that is neither owned by you nor rented by you for cash or a crop share. However, acreage separated by only a public or private right-of-way, waterway, or an irrigation canal will be considered as contiguous.

Offset. The act of deducting one amount from another amount.

* * * * *

Perennial crop. A plant, bush, tree or vine crop that has a life span of more than one year.

* * * * *

Policy. The agreement between you and us to insure an agricultural commodity and consisting of the accepted application, these Basic Provisions, the Crop Provisions, the Special Provisions, other applicable endorsements or options, the actuarial documents for the insured agricultural commodity, the Catastrophic Risk Protection Endorsement, if applicable, and the applicable regulations published in 7 CFR chapter IV. Insurance for each agricultural commodity in each county will constitute a separate policy.

Practical to replant. Our determination, after loss or damage to the insured crop, based on all factors, including, but not limited to moisture availability, marketing window, condition of the field, and time to crop maturity, that replanting the insured crop will allow the crop to attain maturity prior to the calendar date for the end of the insurance period. It will be considered to be practical to replant regardless of availability of seed or plants, or the input costs necessary to produce the insured crop such as those that would be incurred for seed or plants, irrigation water, etc.

* * * * *

Price election. The amounts contained in the Special Provisions, or an addendum thereto, that is the value per pound, bushel, ton, carton, or other applicable unit of measure for the purposes of determining premium and indemnity under the policy.

* * * * *

Replanting. Performing the cultural practices necessary to prepare the land to replace the seed or plants of the damaged or destroyed insured crop and then replacing the seed or plants of the same crop in the same insured acreage. The same crop does not necessarily mean the same type or variety of the crop unless different types or varieties constitute separate crops or it is otherwise specified in the policy.

* * * * *

Second crop. * * * A cover crop, planted after a first insured crop and planted for the purpose of haying, grazing or otherwise harvesting in any manner or that is hayed or grazed during the crop year, or that is otherwise harvested is considered to be a second crop. * * *

* * * * *

Substantial beneficial interest. An interest held by any person of at least 10 percent in you. The spouse of any individual applicant or individual insured will be considered to have a substantial beneficial interest in the applicant or insured unless the spouses can prove they are legally separated or otherwise legally separate under state law. Any child of an individual applicant or individual insured will not be considered to have a substantial beneficial interest in the applicant or insured unless the child has a separate legal interest in such person. For example, there are two partnerships that each have a 50 percent interest in you and each partnership is made up of two individuals, each with a 50 percent share in the partnership. In this case, each individual would be considered to have a 25 percent interest in you, and both the partnerships and the individuals would have a substantial beneficial interest in you (The spouses of the individuals would not be considered to have a substantial beneficial interest unless the spouse was one of the individuals that made up the partnership). However, if each partnership is made up of six individuals with equal interests, then each would only have an 8.33 percent interest in you and although the partnership would still have a substantial beneficial interest in you, the individuals would not for the purposes of reporting in section 2.

* * * * *

Whole farm unit. All insurable acreage of two or more insured crops planted in the county in which you have a share on the date coverage begins for each crop for the crop year. All crops for which the whole farm unit structure is available must be included in the whole farm unit. At least two of the

insured crops must each constitute at least 10 percent of the total liability of all insured crops in the whole farm unit, and all crops in the unit must be insured under the same plan of insurance and with the same insurance provider.

* * * * *

2. Life of Policy, Cancellation, and Termination.

* * * * *

(b) Your application for insurance must contain your social security number (SSN) if you are an individual or employer identification number (EIN) if you are a person other than an individual, and all SSNs and EINs, as applicable, of all persons with a substantial beneficial interest in you, the coverage level, price election, crop, type, variety, or class, plan of insurance, and any other material information required on the application to insure the crop. If you or someone with a substantial beneficial interest is not legally required to have a SSN or EIN, you must request and receive an identification number for the purposes of this policy from us or the Internal Revenue Service (IRS) if such identification number is available from the IRS. If any of the information regarding persons with a substantial beneficial interest changes during the crop year, you must revise your application by the next sales closing date applicable under your policy to reflect the correct information.

(1) Applications that do not contain your SSN, EIN or identification number, or any of the other information required in section 2(b) are not acceptable and insurance will not be provided (Except if you fail to report the SSNs, EINs or identification numbers of persons with a substantial beneficial interest in you, the provisions in section 2(b)(2) will apply);

(2) If the application does not contain the SSNs, EINs or identification numbers of all persons with a substantial beneficial interest in you, you fail to revise your application in accordance with section 2(b), or the reported SSNs, EINs or identification numbers are incorrect and the incorrect SSN, EIN or identification number has not been corrected by the acreage reporting date, and:

(i) Such persons are eligible for insurance, the amount of coverage for all crops included on this application will be reduced proportionately by the percentage interest in you of such persons, you must repay the amount of indemnity, prevented planting payment or replanting payment that is proportionate to the interest of the persons whose SSN, EIN or identification number was unreported or incorrect for such crops, and your premium will be reduced commensurately; or

(ii) Such persons are not eligible for insurance, except as provided in section 2(b)(3), the policy is void and no indemnity, prevented planting payment or replanting payment will be owed for any crop included on this application, and you must repay any indemnity, prevented planting payment or replanting payment that may have been paid for such crops. If previously paid, the balance of any premium and any administrative fees will be returned to you, less twenty percent of the premium that would otherwise be due from you for such crops. If not previously paid, no premium or administrative fees will be due for such crops.

(3) The consequences described in section 2(b)(2)(ii) will not apply if you have included an ineligible person's SSN, EIN or identification number on your application and do not include the ineligible person's share on the acreage report.

* * * * *

(e) Any amount due to us for any policy authorized under the Act will be offset from any indemnity or prevented planting payment due you for this or any other crop insured with us under the authority of the Act.

(1) Even if your claim has not yet been paid, you must still pay the premium and administrative fee on or before the termination date for you to remain eligible for insurance.

(2) If we offset any amount due us from an indemnity or prevented planting payment owed to you, the date of payment for the purpose of determining whether you have a delinquent debt will be the date that you submit the claim for indemnity in accordance with section 14(c) (Your Duties).

(f) A delinquent debt for any policy will make you ineligible to obtain crop insurance authorized under the Act for any subsequent crop year and result in termination of all policies in accordance with section 2(f)(2).

(1) With respect to ineligibility:

(i) Ineligibility for crop insurance will be effective on:

(A) The date that a policy was terminated in accordance with section 2(f)(2) for the crop for which you failed to pay premium, an administrative fee, or any related interest owed, as applicable;

(B) The payment due date contained in any notification of indebtedness for any overpaid indemnity, prevented planting payment or replanting payment, if you fail to pay the amount owed, including any related interest owed, as applicable, by such due date;

(C) The termination date for the crop year prior to the crop year in which a scheduled payment is due under a payment agreement if you fail to pay the amount owed by any payment date in any agreement to pay the debt; or

(D) The termination date the policy was or would have been terminated under sections 2(f)(2)(i)(A), (B) or (C) if your bankruptcy petition is dismissed before discharge.

(ii) If you are ineligible and a policy has been terminated in accordance with section 2(f)(2), you will not receive any indemnity, prevented planting payment or replanting payment, if applicable, and such ineligibility and termination of the policy may affect your eligibility for benefits under other USDA programs. Any indemnity, prevented planting payment or replanting payment that may be owed for the policy before it has been terminated will remain owed to you, but may be offset in accordance with section 2(e), unless your policy was terminated in accordance with sections 2(f)(2)(i)(D) or (E).

(2) With respect to termination:

(i) Termination will be effective on:

(A) For a policy with unpaid administrative fees or premiums, the termination date immediately subsequent to the billing date for the crop year;

(B) For a policy with other amounts due, the termination date immediately following the date you have a delinquent debt;

(C) For each policy for which insurance has attached before you become ineligible, the termination date immediately following the date you become ineligible;

(D) For execution of an agreement to pay any amounts owed and failure to make any scheduled payment, the termination date for the crop year prior to the crop year in which you failed to make the scheduled payment; or

(E) For dismissal of a bankruptcy petition before discharge, the termination date the policy was or would have been terminated under sections 2(f)(2)(i)(A), (B) or (C).

(ii) For all policies terminated under sections 2(f)(2)(i)(D) and (E), any indemnities, prevented planting payments or replanting payments paid subsequent to the termination date must be repaid.

(iii) Once the policy is terminated, it cannot be reinstated for the current crop year unless the termination was in error. Failure to timely pay because of illness, bad weather, or other such extenuating

circumstances is not grounds for reinstatement in the current year.

(3) To regain eligibility, you must:

(i) Repay the delinquent debt in full;

(ii) Execute an agreement to pay any amounts owed and make payments in accordance with the agreement (We will not enter into an agreement with you to pay the amounts owed if you have previously failed to make a scheduled payment under the terms of any other agreement to pay with us or any other insurance provider); or

(iii) File a petition to have your debts discharged in bankruptcy (Dismissal of the bankruptcy petition before discharge will terminate all policies in effect retroactive to the date your policy would have been terminated in accordance with section 2(f)(2)(i));

(4) After you become eligible for crop insurance, if you want to obtain coverage for your crops, you must submit a new application on or before the sales closing date for the crop (Since applications for crop insurance cannot be accepted after the sales closing date, if you make any payment after the sales closing date, you cannot apply for insurance until the next crop year);

(5) For example, for the 2003 crop year, if crop A, with a termination date of October 31, 2003, and crop B, with a termination date of March 15, 2004, are insured and you do not pay the premium for crop A by the termination date, you are ineligible for crop insurance as of October 31, 2003, and crop A's policy is terminated as of that date. Crop B's policy does not terminate until March 15, 2004, and an indemnity for the 2003 crop year may still be owed. If you enter an agreement to repay amounts owed on September 25, 2004, the earliest date by which you can obtain crop insurance for crop A is to apply for crop insurance by the October 31, 2004, sales closing date and for crop B is to apply for crop insurance by the March 15, 2005, sales closing date. If you fail to make a payment that was scheduled to be made on April 1, 2005, your policy will terminate as of October 31, 2004, for crop A, and March 15, 2005, for crop B, and no indemnity, prevented planting payment or replanting payment will be due for that crop year for either crop. You will not be eligible to apply for crop insurance for any crop until after the amounts owed are paid in full or you file a petition to discharge the debt in bankruptcy.

(6) If you are determined to be ineligible under section 2(f), persons with a substantial beneficial interest in you may also be ineligible until you become eligible again.

* * * * *

(k) * * * You are still responsible for the accuracy of all information provided on your behalf and may be subject to the consequences in section 6(g), and any applicable consequences, if any information has been misreported.

3. Insurance Guarantees, Coverage Levels, and Prices.

(a) Unless adjusted or limited in accordance with your policy, the production guarantee or amount of insurance, coverage level, and price at which an indemnity will be determined for each unit will be those used to calculate your summary of coverage for each crop year.

(b) You must select the same coverage, catastrophic risk protection or additional coverage, and select one level of additional coverage for all acreage of the crop in the county unless one of the following applies:

(1) The applicable Crop Provisions allow you the option to separately insure individual crop types or varieties. In this case, each individual type or variety insured by you will be subject to separate administrative fees. For example, if two grape varieties in California are insured under the Catastrophic Risk Protection Endorsement and two varieties are insured under an additional coverage policy, a separate administrative fee will be charged for each of the four varieties. Although insurance may be elected by type or variety in these instances, failure to insure a type or variety that is of economic significance may result in the denial of other farm program benefits unless you execute a waiver of any eligibility for emergency crop loss assistance in connection with the crop.

(2) If you have additional coverage for the crop in the county and the acreage has been designated as "high risk" by FCIC, you will be able to obtain a High Risk Land Exclusion Option for the high risk land under the additional coverage policy and insure the high risk acreage under a separate Catastrophic Risk Protection Endorsement, provided that the Catastrophic Risk Protection Endorsement is obtained from the same insurance provider from which the additional coverage was obtained.

(c) In addition to the price election or amount of insurance available on the contract change date, we may provide an additional price election or amount of insurance no later than 15 days prior to the sales closing date. You must select the additional price election or amount of insurance on or before the sales closing date for the insured crop. These additional price elections or amounts of insurance will not be less than those available on the contract change date. If you elect the additional price election or amount of insurance, any claim settlement and amount of premium will be based on this amount.

(d) You may change the coverage level, price election, or amount of insurance for the following crop year by giving written notice to us not later than the sales closing date for the insured crop. Since the price election or amount of insurance may change each year, if you do not select a new price election or amount of insurance on or before the sales closing date, we will assign a price election or amount of insurance which bears the same relationship to the price election schedule as the price election or amount of insurance that was in effect for the preceding year. (For example: If you selected 100 percent of the market price for the previous crop year and you do not select a new price election for the current crop year, we will assign 100 percent of the market price for the current crop year.)

(e) You must report production to us for the previous crop year by the earlier of the acreage reporting date or 45 days after the cancellation date unless otherwise stated in the Special Provisions:

(1) If you do not provide the required production report, we will assign a yield for the previous crop year. The yield assigned by us will not be more than 75 percent of the yield used by us to determine your coverage for the previous crop year. The production report or assigned yield will be used to compute your approved yield for the purpose of determining your coverage for the current crop year.

(2) If you have filed a claim for any crop year, the documents signed by you which state the amount of production used to complete the claim for indemnity will be the production report for that year unless otherwise specified by FCIC.

(3) Production and acreage for the prior crop year must be reported for each proposed optional unit by the production reporting date. If you do not provide the information stated above, the optional units will be combined into the basic unit.

(4) Appraisals obtained from only a portion of the acreage in a field that remains unharvested after the remainder of the crop within the field has been destroyed or put to another use will not be used to establish your actual yield unless representative samples are required to be left by you in accordance with the Crop Provisions.

(f) It is your responsibility to accurately report all information that is used to determine your approved yield. You must certify to the accuracy of this information on your production report.

(1) If you do not have written verifiable records to support the information on your production report, you will receive an assigned yield in accordance with section 3(e)(1) and 7 CFR part 400, subpart G for those crop years for which you do not have such records.

(2) If you misreport any material information used to determine your approved yield:

(i) We will correct the unit structure, if necessary; and

(ii) You will be subject to the provisions regarding misreporting contained in section 6(g), unless we correct the information because the incorrect information was the result of our error or the error of someone from USDA.

(g) In addition to any consequences in section 3(f), at any time the circumstances described below are discovered, your approved yield will be adjusted:

(1) By including an assigned yield determined in accordance with section 3(e)(1) and 7 CFR part 400, subpart G, if the actual yield reported in the database is excessive for any crop year, as determined by FCIC under its procedures, and you do not provide verifiable records to support the yield in the database (If there are verifiable records for the yield in your database, the yield is significantly different from the other yields in the county or your other yields for the crop and you cannot prove there is a valid basis to support the differences in the yields, the yield will be the average of the yields for the crop or the applicable county transitional yield if you have no other yields for the crop, and you may be subject to the provisions of section 27);

(2) By reducing it to an amount consistent with the average of the approved yields for other databases for your farming operation with the same crop, type, and practice or the county transitional yield, as applicable, if:

(i) The approved APH yield is greater than 115 percent of the average of the approved yields of all applicable databases for your farming operation that have actual yields in them or it is greater than 115 percent of the county transitional yield if no applicable databases exist for comparison; and

(ii) The current year's insured acreage (including applicable prevented planting acreage) is greater than 400 percent of the average number of acres in the database or the acres contained in two or more individual years in the database are each less than 10 percent of the current year's insurable acreage in the unit (including applicable prevented planting acreage); or

(3) To an amount consistent with the production methods actually carried out for the crop year if you use a different production method than was previously used and the production method actually carried out is likely to result in a yield lower than the average of your previous actual yields. The yield will be adjusted based on your other units where such production methods were carried out or to the applicable county transitional yield for the production methods if other such units do not exist. You must notify us of changes in your production methods by the acreage reporting date. If you fail to notify us, in addition to the reduction of your approved yield described herein, you will be considered to have misreported information and you will be subject to the consequences in section 6(g). For example, for a non-irrigated unit, your yield is based upon acreage of the crop that is watered once prior to planting, and the crop is not watered prior to planting for the current crop year. Your approved APH yield will be reduced to an amount consistent with the actual production history of your other non-irrigated units where the crop has not been watered prior to planting or limited to the non-irrigated transitional yield for the unit if other such units do not exist.

(h) Unless you meet the double cropping requirements contained in section 17(f)(4), if you elect to plant a second crop on acreage where the first insured crop was prevented from being planted, you will receive a yield equal to 60 percent of the approved yield for the first insured crop to calculate your average yield for subsequent crop years (Not applicable to crops if the APH is not the basis for the insurance guarantee). If the unit contains both prevented planting and planted acreage of the same crop, the yield for such acreage will be determined by:

(1) Multiplying the number of insured prevented planting acres by 60 percent of the approved yield for the first insured crop;

(2) Adding the totals from section 3(h)(1) to the amount of appraised or harvested production for all of the insured planted acreage; and

(3) Dividing the total in section 3(h)(2) by the total number of acres in the unit.

(i) Hail and fire coverage may be excluded from the covered causes of loss for an insured crop only if you select additional coverage of not less than 65 percent of the approved yield indemnified at the 100 percent price election, or an equivalent coverage as established by FCIC, and you have purchased the same or a higher dollar amount of coverage for hail and fire from us or any other source.

(j) The applicable premium rate, or formula to calculate the premium rate, and transitional yield will be those contained in the actuarial documents except, in the case of high risk land, a written agreement may be requested to change such transitional yield or premium rate.

4. Contract Changes.

* * * * *

(b) Any changes in policy provisions, amounts of insurance, premium rates, program dates, and price elections (except as allowed herein or as specified in section 3) can be viewed on the RMA Web site at *http://www.rma.usda.gov/* or a successor Web site not later than the contract change date contained in the Crop Provisions. We may only revise this information after the contract change date to correct clear errors (For example, the price election for corn was announced at $25.00 per bushel instead of $2.50 per bushel or the final planting date should be May 10 but the final planting date in the Special Provisions states August 10).

(c) After the contract change date, all changes specified in section 4(b) will also be available upon request from your crop insurance agent. You will be provided, in writing, a copy of the changes to the Basic Provisions and Crop Provisions and a copy of the Special Provisions not later than 30 days prior to the cancellation date for the insured crop. Acceptance of the changes will be conclusively presumed in the absence of notice from you to change or cancel your insurance coverage.

* * * * *

5. [Reserved]

6. Report of Acreage.

* * * * *

(d) Regarding the ability to revise an acreage report you have submitted to us:

(1) For planted acreage, you cannot revise any information pertaining to the planted acreage after the acreage reporting date without our consent (Consent may only be provided when no cause of loss has occurred; our appraisal has determined that the insured crop will produce at least 90 percent of the yield used to determine your guarantee or the amount of insurance for the unit (including reported and unreported acreage), except when there are unreported units (see section 6(f)); the information on the acreage report is clearly transposed; you provide adequate evidence that we or someone from USDA have committed an error regarding the information on your

acreage report; or if expressly permitted by the policy);

(2) For prevented planting acreage reported on the acreage report, you cannot revise any information pertaining to the prevented planting acreage after the report is initially submitted to us without our consent (Consent may only be provided when information on the acreage report is clearly transposed or you provide adequate evidence that we or someone from USDA have committed an error regarding the information on your acreage report);

(3) For prevented planting acreage not reported on the acreage report, you cannot revise your acreage report to add prevented planting acreage;

(4) If you request an acreage measurement prior to the acreage reporting date and submit documentation of such request and an acreage report with estimated acreage by the acreage reporting date, you must provide the measurement to us, we will revise your acreage report if there is a discrepancy, and no indemnity, prevented planting payment or replant payment will be paid until the acreage measurement has been received by us (Failure to provide the measurement to us will result in the application of section 6(g) if the estimated acreage is not correct and estimated acreage under this section will no longer be accepted for any subsequent acreage report);

(5) If there is an irreconcilable difference between:

(i) The acreage measured by FSA or a measuring service and our on-farm measurement, our on-farm measurement will be used; or

(ii) The acreage measured by a measuring service, other than our on-farm measurement, and FSA, the FSA measurement will be used; and

(6) If the acreage report has been revised in accordance with section 6(d)(1), (2), (4), or (5), the information on the initial acreage report will not be considered misreported for the purposes of section 6(g).

* * * * *

(g) You must provide all required reports and you are responsible for the accuracy of all information contained in those reports. You should verify the information on all such reports prior to submitting them to us.

(1) If you submit information on any report that is different than what is determined to be correct and such information results in:

(i) A lower liability than the actual liability determined, the production guarantee or amount of insurance on the unit will be reduced to an amount consistent with the reported information (In the event the insurable acreage is under-reported for any unit, all production or value from insurable acreage in that unit will be considered production or value to count in determining the indemnity); or

(ii) A higher liability than the actual liability determined, the information contained in the acreage report will be revised to be consistent with the correct information.

(2) In addition to the other adjustments specified in section 6(g)(1), if you misreport any information that results in liability greater than 110.0 percent or lower than 90.0 percent of the actual liability determined for the unit, any indemnity, prevented planting payment, or replanting payment will be based on the amount of liability determined in accordance with section 6(g)(1)(i) or (ii) and will be reduced in an amount proportionate with the amount of liability that is misreported in excess of the tolerances stated in this section (For example, if the actual liability is determined to be $100.00, but you reported liability of $120.00, any indemnity, prevented planting payment or replanting payment will be reduced by 10.0 percent ($120.00 / $100.00 = 1.20, and 1.20 − 1.10 = 0.10)).

(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 replant payment that was paid in a prior crop year, such claim will be adjusted and you will be required to repay any overpaid amounts.

* * * * *

7. Annual Premium and Administrative Fees.

(a) The annual premium is earned and payable at the time coverage begins. You will be billed for the premium and administrative fee not earlier than the premium billing date specified in the Special Provisions.

(b) Premium or administrative fees owed by you will be offset from an indemnity or prevented planting payment due you in accordance with section 2(e).

* * * * *

(d) The premium will be computed using the price election or amount of insurance you elect or that we assign in accordance with section 3(d). The information needed to determine the premium rate and any premium adjustment percentages that may apply are contained in the actuarial documents or an approved written agreement.

(e) * * *

(1) * * *

(2) * * *

(3) * * *

(4) The administrative fee will be waived if you request it and:

(i) You qualify as a limited resource farmer; or

(ii) You were insured prior to the 2005 crop year or for the 2005 crop year and your administrative fee was waived for one or more of those crop years because you qualified as a limited resource farmer under a policy definition previously in effect, and you remain qualified as a limited resource farmer under the definition that was in effect at the time the administrative fee was waived.

* * * * *

(f) If the amount of premium (gross premium less premium subsidy paid on your behalf by FCIC) and administrative fee you are required to pay for any acreage exceeds the liability for the acreage, coverage for those acres will not be provided (no premium or administrative fee will be due and no indemnity will be paid for such acreage).

8. Insured Crop.

* * * * *

(b) * * *

(1) That is not grown on planted acreage (except for the purposes of prevented planting coverage), or that is a type, class or variety or where the conditions under which the crop is planted are not generally recognized for the area (For example, where agricultural experts determine that planting a non-irrigated corn crop after a failed small grain crop on the same acreage in the same crop year is not appropriate for the area);

(2) For which the information necessary for insurance (price election, premium rate, *etc.*) is not included in the actuarial documents, unless such information is provided by a written agreement;

(3) * * *

(4) Planted following the same crop on the same acreage and the first planting of the crop has been harvested in the same crop year unless specifically permitted by the Crop Provisions or the Special Provisions (For example, the second planting of grain sorghum would not be insurable if grain sorghum had already been planted and harvested on the same acreage during the crop year);

* * * * *

(c) Although certain policy documents may state that a crop type, class, variety or practice is not insurable, it does not mean all other crop types, classes, varieties or practices are insurable. To be insurable the crop type, class, variety or practice must meet all the conditions in this section.

9. Insurable Acreage.

(a) * * *

(1) That has not been planted and harvested or insured (including insured acreage that was prevented from being planted) in at least one of the three previous crop years unless you can show that:

(i) Such acreage was not planted:

(A) In at least two of the previous three crop years to comply with any other USDA program;

(B) Because of crop rotation, (*e.g.*, corn, soybeans, alfalfa; and the alfalfa remained for four years before the acreage was planted to corn again); or

(C) Because a perennial tree, vine, or bush crop was grown on the acreage;

(ii) The Crop Provisions or a written agreement specifically allow insurance for such acreage; or

(iii) Such acreage constitutes five percent or less of the insured planted acreage in the unit;

* * * * *

(3) For which the actuarial documents do not provide the information necessary to determine the premium rate, unless insurance is allowed by a written agreement;

* * * * *

(8) 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. For example, 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:

(i) 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 the Group Risk Protection Plan of 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;

* * * * *

10. Share Insured.

(a) * * *

(1) * * *

(2) * * * For each landlord or tenant that is an individual, you must report the landlord's or tenant's social security number. For each landlord or tenant that is a person other than an individual or for a trust administered by the Bureau of Indian Affairs, you must report each landlord's or tenant's social security number, employer identification number, or other identification number assigned for the purposes of this policy.

* * * * *

12. Causes of Loss.

The insurance provided is against only unavoidable loss directly caused by specific causes of loss contained in the Crop Provisions. All specified causes of loss, except where the Crop Provisions specifically cover loss of revenue due to a reduced price in the marketplace, must be due to a naturally occurring event. All other causes of loss, including but not limited to the following, are NOT covered:

* * * * *

(c) Water that is contained by or within structures that are designed to contain a specific amount of water, such as dams, locks or reservoir projects, etc., on any acreage when such water stays within the designed limits (For example, a dam is designed to contain water to an elevation of 1,200 feet but you plant a crop on acreage at an elevation of 1,100 feet. A storm causes the water behind the dam to rise to an elevation of 1,200 feet. Under such circumstances, the resulting damage would not be caused by an insurable cause of loss. However, if you planted on acreage that was above 1,200 feet elevation, any damage caused by water that exceeded that elevation would be caused by an insurable cause of loss);

(d) Failure or breakdown of the irrigation equipment or facilities unless the failure or breakdown is due to a cause of loss specified in the Crop Provisions (If damage is due to an insured cause, you must make all reasonable efforts to restore the equipment or facilities to proper working order within a reasonable amount of time unless we determine it is not practical to do so. Cost will not be considered when determining whether it is practical to restore the equipment or facilities);

* * * * *

(f) Any cause of loss that results in damage that is not evident or would not have been evident during the insurance period, including, but not limited to, damage that only becomes evident after the end of the insurance period unless expressly authorized in the Crop Provisions. Even though we may not inspect the damaged crop until after the end of the insurance period, damage due to insured causes that would have been evident during the insurance period will be covered.

* * * * *

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

Your Duties—

(a) * * *

(3) If representative samples are required by the Crop Provisions, leave representative samples intact of the unharvested crop if you report damage less than 15 days before the time you begin harvest or during harvest of the damaged unit (The samples must be left intact until we inspect them or until 15 days after completion of harvest on the unit, whichever is earlier. Unless otherwise specified in the Crop Provisions or Special Provisions, the samples of the crop in each field in the unit must be 10 feet wide and extend the entire length of the row, if the crop is planted in rows, or if the crop is not planted in rows, the longest dimension of the field. The period to retain representative samples may be extended if it is necessary to accurately determine the loss. You will be notified in writing of any such extension); and

* * * * *

(c) In addition to complying with the notice requirements, you must submit a claim for indemnity declaring the amount of your loss not later than 60 days after the end of the insurance period unless you request an extension in writing and we agree to such extension. Extensions will only be granted if the amount of the loss cannot be determined within such time period because the information needed to determine the amount of the loss is not available. The claim for indemnity must include all information we require to settle the claim. Failure to submit a claim or provide the required information will result in no indemnity, prevented planting payment or replant payment (Even though no indemnity or other payment is due, you will still be required to pay the premium due under the policy for the unit).

(d) * * *

(2) Upon our request, or that of any USDA employee authorized to conduct investigations of the crop insurance program, submit to an examination under oath.

* * * * *

(h) It is your duty to prove you have complied with all provisions of this policy.

(1) Failure to comply with the requirements of section 14(c) (Your Duties) will result in denial of your claim for indemnity or prevented planting or replant payment for the acreage for which the failure occurred. Failure to comply with all other requirements of this section will result in denial of your claim for indemnity or prevented planting or replant payment for the acreage for which the failure occurred, unless we still have the ability to accurately adjust the loss (Even though no indemnity or other payment is due, you will still be required to pay the premium due under the policy for the unit); and

(2) Failure to comply with other sections of the policy will subject you to the consequences specified in those sections.

Our Duties—

(a) * * *

* * * * *

(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

* * * * *

15. Production Included in Determining an Indemnity and Payment Reductions.

* * * * *

(b) Appraised production will be used to calculate your claim if you are not going to harvest your acreage. Such appraisals may be conducted after the end of the insurance period. If you harvest the crop after the crop has been appraised:

(1) You must provide us with the amount of harvested production; and

(2) If the harvested production exceeds the appraised production, claims will be adjusted using the harvested production, and you will be required to repay any overpaid indemnity; or

(3) If the harvested production is less than the appraised production, and:

(i) You harvest after the end of the insurance period, your appraised production will be used to adjust the loss unless you can prove that no additional causes of loss or deterioration of the crop occurred after the end of the insurance period; or

(ii) You harvest before the end of the insurance period, your harvested production will be used to adjust the loss.

* * * * *

(e) * * *

(1) * * *

(2) * * *

(i) * * *

(ii) Be responsible for premium that is 35 percent of the premium that you would otherwise owe for the first insured crop; and

* * * * *

(f) * * *

(1) * * *

(2) * * *

(i) * * *

(ii) Be responsible for premium that is 35 percent of the premium that you would otherwise owe for the first insured crop.

(g) * * *

(1) * * *

(2) * * *

(3) * * *

(i) If a volunteer crop or cover crop is hayed or grazed from the same acreage, after the late planting period (or after the final planting date if a late planting period is not applicable) for the first insured crop in the same crop year, or is otherwise harvested anytime after the late planting period (or after the final planting date if a late planting period is not applicable); or

* * * * *

(j) If any Federal or State agency requires destruction of any insured crop or crop production, as applicable, because it contains levels of a substance, or has a condition, that is injurious to human or animal health in excess of the maximum amounts allowed by the Food and Drug Administration, other public health organizations of the United States or an agency of the applicable State, you must destroy the insured crop or crop production, as applicable, and certify that such insured crop or crop production has been destroyed prior to receiving an indemnity payment. Failure to destroy the insured crop or crop production, as applicable, will result in you having to repay any indemnity paid and you may be subject to administrative sanctions in accordance with section 515(h) of the Act and 7 CFR part 400, subpart R, and any applicable civil or criminal sanctions.

* * * * *

17. Prevented Planting.

(a) * * *

(1) You were prevented from planting the insured crop (Failure to plant when other producers in the area were planting will result in the denial of the prevented planting claim) by an insured cause that occurs:

* * * * *

(d) * * *

(1) * * *

(2) For irrigated acreage, there is not a reasonable expectation of having adequate water to carry out an irrigated practice. If you knew or had reason to know that your water is reduced before the final planting date, no reasonable expectation existed.

(e) * * *

(1) * * *

(i) * * *

(A) The maximum number of acres certified for APH purposes, or insured acres reported, for the crop in any one of the 4 most recent crop years (not including reported prevented planting acreage that was planted to a second crop unless you meet the double cropping requirements in section 17(f)(4)). * * * No cause of loss that would prevent planting may be evident at the time you lease the acreage (except acreage you leased the previous year and continue to lease in the current crop year); you buy the acreage; the acreage is released from a USDA program which prohibits harvest of a crop; you request a written agreement to insure the acreage; or you otherwise acquire the acreage (such as inherited or gifted acreage).

* * * * *

(ii) * * *

(A) The number of acres of the crop specified in the processor contract, if the contract specifies a number of acres contracted for the crop year; or the result of dividing the quantity of production stated in the processor contract by your approved yield, if the processor contract specifies a quantity of production that will be accepted. If a minimum number of acres or amount of production is specified in the processor contract, this amount will be used to determine the eligible acres. If a processor cancels or does not provide contracts, or reduces the contracted acreage or production from what would have otherwise been allowed, solely because the acreage was prevented from being planted due to an insured cause of loss, we may elect to determine the number of acres eligible based on the number of acres or amount of production you had contracted in the county in the previous crop year. If you did not have a processor contract in place for the previous crop year, you

will not have any eligible prevented planting acreage for the applicable processor crop. The total eligible prevented planting acres in all counties cannot exceed the total number of acres or amount of production contracted in all counties in the previous crop year. If the applicable crop provisions require that the price election be based on a contract price, and a contract is not in force for the current year, the price election may be based on the contract price in place for the previous crop year.

* * * * *

(f) * * *

(1) That does not constitute at least 20 acres or 20 percent of the insurable crop acreage in the unit, whichever is less, and any prevented planting acreage within a field that contains planted acreage will be considered to be acreage of the same crop, type, and practice that is planted in the field except that the prevented planting acreage may be considered to be acreage of a crop, type, and practice other than that which is planted in the field if:

(i) The acreage that was prevented from being planted constitutes at least 20 acres or 20 percent of the total insurable acreage in the field and you produced both crops, crop types, or followed both practices in the same field in the same crop year within any one of the four most recent crop years;

(ii) You were prevented from planting a first insured crop and you planted a second crop in the field (There can only be one first insured crop in a field unless the requirements in section 17(f)(1)(i) or (iii) are met); or

(iii) The insured crop planted in the field would not have been planted on the remaining prevented planting acreage (For example, where rotation requirements would not be met or you already planted the total number of acres specified in the processor contract);

(2) For which the actuarial documents do not provide the information needed to determine a premium rate unless a written agreement designates such premium rate;

(3) Used for conservation purposes, intended to be left unplanted under any program administered by the USDA or other government agency, or required to be left unharvested under the terms of the lease or any other agreement (The number of acres eligible for prevented planting will be limited to the number of acres specified in the lease for which you are required to pay either cash or share rent);

(4) On which the insured crop is prevented from being planted, if you or any other person receives a prevented planting payment for any crop for the same acreage in the same crop year (It is your responsibility to determine whether a prevented planting payment had previously been made for the crop year on the acreage for which you are now claiming a prevented planting payment and report such information to us before any prevented planting payment can be made), excluding share arrangements, unless:

* * * * *

(5) * * *

(i) Any crop is planted within or prior to the late planting period or on or prior to the final planting date if no late planting period is applicable, unless:

(A) You meet the double cropping requirements in section 17(f)(4);

(B) The crop planted was a cover crop; or

(C) No benefit, including any benefit under any USDA program, was derived from the crop; or

* * * * *

(6) For which planting history or conservation plans indicate that the acreage would remain fallow for crop rotation purposes or on which any pasture or other forage crop is in place on the acreage during the time that planting of the insured crop generally occurs in the area;

* * * * *

(12) If a cause of loss has occurred that would prevent planting at the time:

(i) You lease the acreage (except acreage you leased the previous crop year and continue to lease in the current crop year);

(ii) You buy the acreage;

(iii) The acreage is released from a USDA program which prohibits harvest of a crop;

(iv) You request a written agreement to insure the acreage; or

(v) You acquire the acreage through means other than lease or purchase (such as inherited or gifted acreage).

* * * * *

(h) * * *

(1) * * *

(2) * * * However, if you were prevented from planting any non-irrigated crop acreage and you do not have any remaining eligible acreage for that crop and you do not have any other crop remaining with eligible acres under a non-irrigated practice, no prevented planting payment will be made for the acreage.

* * * * *

18. Written Agreements.

* * * * *

(c) If approved by FCIC, the written agreement will include all variable terms of the contract, including, but not limited to, crop practice, type or variety, the guarantee (except for a written agreement in effect for more than one year) and premium rate or information needed to determine the guarantee and premium rate, and price election (Price elections will not exceed the price election contained in the Special Provisions, or an addendum thereto, for the county that is used to establish the other terms of the written agreement. If no price election can be provided, the written agreement will not be approved by FCIC);

(d) Each written agreement will only be valid for the number of crop years specified in the written agreement, and a multi-year written agreement:

(1) Will only apply for any particular crop year designated in the written agreement if all terms and conditions in the written agreement are still applicable for the crop year and the conditions under which the written agreement has been provided have not changed prior to the beginning of the insurance period (If conditions change during or prior to the crop year, the written agreement will not be effective for that crop year but may still be effective for a subsequent crop year if conditions under which the written agreement has been provided exist for such year);

(2) May be canceled in writing by:

(i) FCIC not less than 30 days before the cancellation date if it discovers that any term or condition of the written agreement, including the premium rate, is not appropriate for the crop; or

(ii) You or us on or before the cancellation date;

(3) That is not renewed in writing after it expires, is not applicable for a crop year, or is canceled, then insurance coverage will be in accordance with the terms and conditions stated in this policy, without regard to the written agreement; and

(4) Will be automatically cancelled if you transfer your policy to another insurance provider (No notice will be provided to you and for any subsequent crop year, for a written agreement to be effective, you must timely request renewal of the written agreement in accordance with this section);

(e) A request for a written agreement may be submitted:

(1) After the sales closing date, but on or before the acreage reporting date, if you demonstrate your physical inability to submit the request prior to the sales closing date (For example, you have been hospitalized or a blizzard has made it impossible to submit the written agreement request in person or by mail);

(2) For the first year the written agreement will be in effect only:

(i) On or before the acreage reporting date, to:

(A) Insure unrated land, or an unrated practice, type or variety of a crop (Such written agreements may be approved only after inspection of the acreage by us and the written agreement may only be approved by FCIC if the crop's potential is equal to or exceeds 90 percent of the yield used to determine the production guarantee or the amount of insurance and you sign the agreement on the same day the appraisal is made); or

(B) Establish optional units in accordance with FCIC procedures that otherwise would not be allowed, change the premium rate or transitional yield for designated high risk land, change a tobacco classification, or insure acreage that is greater than five percent of the planted acreage in the unit where the acreage has not been planted and harvested or insured in any of the three previous crop years; or

(ii) On or before the cancellation date, to insure a crop in a county that does not have actuarial documents for the crop (If the Crop Provisions do not provide a cancellation date for the county, the cancellation date for other insurable crops in the same state that have similar final planting and harvesting dates will be applicable); or

(iii) On or before the date specified in the Crop Provisions or Special Provisions;

(3) On or before the sales closing date, for all requests for renewal of written agreements, except as provided in section 18(e)(1);

(4) To add land or a crop to an existing written agreement or to add land or a crop to a request for a written agreement provided the request is submitted by the deadlines specified in this subsection;

(f) A request for a written agreement must contain:

(1) For all written agreement requests:

(i) A completed "Request for Actuarial Change'' form;

(ii) An APH form (except for policies that do not require APH) containing all the information needed to determine the approved yield for the current crop year (completed APH form), signed by you, or an unsigned, completed APH form with the applicable production reports signed and dated by you that are based on verifiable records of actual yields for the crop and county for which the written agreement is being requested (the actual yields do not necessarily have to be from the same physical acreage for which you are requesting a written agreement) for at least the most recent crop year during the base period and verifiable records of actual yields if required by FCIC;

(iii) Evidence from agricultural experts or the organic agricultural industry, as applicable, that the crop can be produced in the area if the request is to provide insurance for practices, types, or varieties that are not insurable, unless we are notified in writing by FCIC that such evidence is not required by FCIC;

(iv) The legal description of the land (in areas where legal descriptions are available), FSA Farm Serial Number including tract number, and a FSA aerial photograph, acceptable Geographic Information System or Global Positioning System maps, or other legible maps delineating field boundaries where you intend to plant the crop for which insurance is requested;

(v) For any perennial crop, an inspection report completed by us; and

(vi) All other information that supports your request for a written agreement (including but not limited to records pertaining to levees, drainage systems, flood frequency data, soil types, elevation, *etc.*);

(2) For written agreement requests for counties without actuarial documents for the crop, the requirements in section 18(f)(1) (except section 18(f)(1)(ii)) and:

(i) A completed APH form (except for policies that do not require APH) based on verifiable records of actual yields for the crop and county for which the written agreement is being requested (the actual yields do not necessarily have to be from the same physical acreage for which you are requesting a written agreement) for at least the most recent three consecutive crop years during the base period;

(ii) Acceptable production records for at least the most recent three consecutive crop years;

(iii) The dates you and other growers in the area normally plant and harvest the crop, if applicable;

(iv) The name, location of, and approximate distance to the place the crop will be sold or used by you;

(v) For any irrigated practice, the water source, method of irrigation, and the amount of water needed for an irrigated practice for the crop; and

(vi) All other information that supports your request for a written agreement (such as publications regarding yields, practices, risks, climatic data, *etc.*); and

(3) Such other information as specified in the Special Provisions or required by FCIC;

(g) A request for a written agreement will not be accepted if:

(1) The request is submitted to us after the deadline contained in sections 18(a) or (e);

(2) All the information required in section 18(f) is not submitted to us with the request for a written agreement (The request for a written agreement may be accepted if any missing information is available from other acceptable sources); or

(3) The request is to add land to an existing written agreement or to add land to a request for a written agreement and the request to add the land is not submitted by the deadlines specified in sections (a) or (e);

(h) A request for a written agreement will be denied if:

(1) FCIC determines the risk is excessive;

(2) Your APH history demonstrates you have not produced at least 50 percent of the transitional yield for the crop, type, and practice obtained from a county with similar agronomic conditions and risk exposure;

(3) There is not adequate information available to establish an actuarially sound premium rate and insurance coverage for the crop and acreage;

(4) The crop was not previously grown in the county or there is no evidence of a market for the crop based on sales receipts, contemporaneous feeding records or a contract for the crop (applicable only for counties without actuarial documents); or

(5) Agricultural experts or the organic agricultural industry determines the crop is not adapted to the county;

(i) A written agreement will be denied unless:

(1) FCIC approves the written agreement;

(2) The original written agreement is signed by you and sent to us not later than the expiration date; and

(3) The crop meets the minimum appraisal amount specified in section 18(e)(2)(i)(A), if applicable;

(j) Multiyear written agreements may be canceled and requests for renewal may be rejected if the severity or frequency of your loss experience under the written agreement is significantly worse than expected based on the information provided by you or used to establish your premium rate and the loss experience of other crops with similar risks in the area;

(k) With respect to your and our ability to reject an offer for a written agreement:

(1) When a single Request for Actuarial Change form is submitted, regardless of how many requests for changes are contained on the form, you and we can only accept or reject the written agreement in its entirety (you

cannot reject specific terms of the written agreement and accept others);

(2) When multiple Request for Actuarial Change forms are submitted, regardless of when the forms are submitted, for the same condition or for the same crop (*i.e.*, to insure corn on ten legal descriptions where there are no actuarial documents in the county or the request is to change the premium rates from the high risk rates) all these forms may be treated as one request and you and we will only have the option of accepting or rejecting the written agreement in its entirety (you cannot reject specific terms of the written agreement and accept others);

(3) When multiple Request for Actuarial Change forms are submitted, regardless of when the forms are submitted, for the different conditions or for different crops, separate agreements may be issued and you and we will have the option to accept or reject each written agreement; and

(4) If we reject an offer for a written agreement approved by FCIC, you may seek arbitration or mediation of our decision to reject the offer in accordance with section 20;

(l) Any information that is submitted by you after the applicable deadlines in sections 18(a) and (e) will not be considered, unless such information is specifically requested in accordance with section 18(f)(3);

(m) If the written agreement or the policy is canceled for any reason, or the period for which an existing written agreement is in effect ends, a request for renewal of the written agreement must contain all the information required by this section and be submitted in accordance with section 18(e), unless otherwise specified by FCIC; and

(n) If a request for a written agreement is not approved by FCIC, a request for a written agreement for any subsequent crop year that fails to address the stated basis for the denial will not be accepted (If the request for a written agreement contains the same information that was previously rejected or denied, you will not have any right to arbitrate, mediate or appeal the non-acceptance of your request).

* * * * *

[For FCIC Policies]

20. Appeal, Reconsideration, Administrative and Judicial Review.

(a) All determinations required by the policy will be made by us.

(b) If you disagree with our determinations, you may:

(1) Except for determinations specified in section 20(b)(2), obtain an administrative review in accordance with 7 CFR part 400, subpart J (administrative review) or appeal in accordance with 7 CFR part 11 (appeal); or

(2) For determinations regarding whether you have used good farming practices (excluding determinations of the amount of assigned production for uninsured causes for your failure to use good farming practices), request reconsideration in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J (reconsideration). To appeal or request administrative review of determinations of the amount of assigned production, you must use the appeal or administrative review process.

(c) If you fail to exhaust your right to appeal or for reconsideration, as applicable, you will not be able to resolve the dispute through judicial review.

(d) If reconsideration or appeal has been initiated within the time frames specified in those sections and judicial review is sought, any suit against us must be:

(1) Filed not later than one year after the date of the decision rendered in the reconsideration or appeal; and

(2) Brought in the United States district court for the district in which the insured farm involved in the decision is located.

(e) You may only recover contractual damages from us. Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from us in administrative review, appeal, reconsideration or litigation.

[For Reinsured Policies]

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

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a rule of general applicability and is not appealable. If you disagree with an interpretation of a policy provision by FCIC, you must obtain a Director's review from the National Appeals Division in accordance with 7 CFR 11.6 before obtaining judicial review in accordance with subsection (e).

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

(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) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

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

(4) In any suit, 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, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

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

(d) If you do not agree with any determination made by us or FCIC regarding whether you have used a good farming practice (excluding determinations by us of the amount of assigned production for uninsured causes for your failure to use good farming practices), you may request reconsideration by FCIC of this determination in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J (reconsideration). To resolve disputes regarding determinations of the amount of assigned production, you must use the arbitration or mediation process contained in this section.

(1) You must complete reconsideration before filing suit against FCIC and any such suit must be brought in the United States district court for the district in which the insured farm is located.

(2) Suit must be filed not later than one year after the date of the decision rendered in the reconsideration.

(3) You cannot sue us for determinations of whether good farming practices were used by you.

(e) Except as provided in section 20(d), if you disagree with any other determination made by FCIC, you may obtain an administrative review in accordance with 7 CFR part 400, subpart J (administrative review) or appeal in accordance with 7 CFR part 11 (appeal). If you elect to bring suit after completion of any appeal, such suit must be filed against FCIC not later than one year after the date of the decision rendered in such appeal. Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from FCIC.

(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.

(g) To resolve any dispute through mediation, you and we must both:

(1) Agree to mediate the dispute;

(2) Agree on a mediator; and

(3) Be present, or have a designated representative who has authority to settle the case present, at the mediation.

(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.

(j) If FCIC elects to participate in the adjustment of your claim, or modifies, revises or corrects your claim, prior to payment, you may not bring an arbitration, mediation or litigation action against us. You must request administrative review or appeal in accordance with section 20(e).

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

(a) We, and any employee of USDA authorized to investigate or review any matter relating to crop insurance, have the right to examine the insured crop and all records related to the insured crop and any mediation, arbitration or litigation involving the insured crop as often as reasonably required during the record retention period.

(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:

(1) Complete records of the planting, replanting, inputs, production, harvesting, and disposition of the insured crop on each unit for three years after the end of the crop year (This requirement also applies to all such records for acreage that is not insured); and

(2) All records used to establish the amount of production you certified on your production reports used to compute your approved yield for three years after the end of the crop year for which you initially certified such records, unless such records have already been provided to us (For example, if your approved yield for the 2003 crop year was based on production records you certified for the 1997 through 2002 crop years, you must retain all such records through the 2006 crop year, unless such records have already been provided to us).

(c) We, or any employee of USDA authorized to investigate or review any matter relating to crop insurance, may extend the record retention period beyond three years by notifying you of such extension in writing.

(d) By signing the application for insurance authorized under the Act or by continuing insurance for which you have previously applied, you authorize us or USDA, or any person acting for us or USDA authorized to investigate or review any matter relating to crop insurance, to obtain records relating to the planting, replanting, inputs, production, harvesting, and disposition of the insured crop from any person who may have custody of such records, including but not limited to, FSA offices, banks, warehouses, gins, cooperatives, marketing associations, and accountants. You must assist in obtaining all records we or any employee of USDA authorized to investigate or review any matter relating to crop insurance request from third parties.

(e) Failure to provide access to the insured crop or the farm, authorize access to the records maintained by third parties or assist in obtaining such records will result in a determination that no indemnity is due for the crop year in which such failure occurred.

(f) Failure to maintain or provide records will result in:

(1) The imposition of an assigned yield in accordance with section 3(e)(1) and 7 CFR part 400, subpart G for those crop years for which you do not have the required production records to support a certified yield;

(2) A determination that no indemnity is due if you fail to provide records necessary to determine your loss;

(3) Combination of the optional units into the applicable basic unit;

(4) Assignment of production to the units by us if you fail to maintain separate records:

(i) For your basic units; or

(ii) For any uninsurable acreage; and

(5) The imposition of consequences specified in section 6(g), as applicable.

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

22. Other Insurance.

(a) Other Like Insurance—Nothing in this section prevents you from obtaining other insurance not authorized under the Act. However, unless specifically required by policy provisions, you must not obtain any other crop insurance authorized under the Act on your share of the insured crop. If you cannot demonstrate that you did not intend to have more than one policy in effect, you may be subject to the consequences authorized under this policy, the Act, or any other applicable statute. If you can demonstrate that you did not intend to have more than one policy in effect (For example, an application to transfer your policy or written notification to an insurance provider that states you want to purchase, or transfer, insurance and you want any other policies for the crop canceled would demonstrate you did not intend to have duplicate policies), and:

(1) One is an additional coverage policy and the other is a Catastrophic Risk Protection policy:

(i) The additional coverage policy will apply if both policies are with the same insurance provider or, if not, both insurance providers agree; or

(ii) The policy with the earliest date of application will be in force if both insurance providers do not agree; or

(2) Both are additional coverage policies or both are Catastrophic Risk Protection policies, the policy with the earliest date of application will be in force and the other policy will be void, unless both policies are with:

(i) The same insurance provider and the insurance provider agrees otherwise; or

(ii) Different insurance providers and both insurance providers agree otherwise.

* * * * *

[For FCIC policies]

24. Amounts Due Us.

* * * * *

(b) Interest will accrue at the rate of 1.25 percent simple interest per calendar month, or any part thereof, on any unpaid premium amount or administrative fee due us. With respect to any premiums or administrative fees owed, interest will start to accrue on the first day of the month following the premium billing date specified in the Special Provisions.

* * * * *

[For reinsured policies]

24. Amounts Due Us.

(a) Interest will accrue at the rate of 1.25 percent simple interest per calendar month, or any portion thereof, on any unpaid amount owed to us or on any unpaid administrative fees owed to FCIC. For the purpose of premium amounts owed to us or administrative fees owed to FCIC, interest will start to accrue on the first day of the month following the premium billing date specified in the Special Provisions. We will collect any unpaid amounts owed to us and any interest owed thereon and, prior to the termination date, we will collect any administrative fees and interest owed thereon to FCIC. After the termination date, FCIC will collect any unpaid administrative fees and any interest owed thereon.

* * * * *

(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 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.

* * * * *

25. [Reserved.]

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30. Subrogation (Recovery of Loss From a Third Party)

Since you may be able to recover all or a part of your loss from someone other than us, you must do all you can to preserve this right. If you receive any compensation for your loss, excluding private hail insurance payments and payments covered by section 35, and the indemnity due under this policy plus the amount you receive from the person exceeds the amount of your actual loss, the indemnity will be reduced by the excess amount, or if the indemnity has already been paid, you will be required to repay the excess amount, not to exceed the amount of the indemnity. The total amount of the actual loss is the difference between the value of the insured crop before and after the loss, based on your production records and the highest price election or amount of insurance available for the crop. If we pay you for your loss, your right to recovery will, at our option, belong to us. If we recover more than we paid you plus or expenses, the excess will be paid to you.

* * * * *

34. Unit Division.

(a) * * *

(1) * * *

(2) For an enterprise unit:

(i) * * *

(ii) * * *

(iii) You must comply with all reporting requirements for the enterprise unit (While separate records of acreage and production for basic or optional units must be maintained, if you want to change your unit structure in subsequent crop years, it is not required to qualify for an enterprise unit);

* * * * *

(vii) The discount contained in the actuarial documents will only apply to acreage in the enterprise unit that has been planted.

(3) * * *

(i) * * *

(ii) * * *

(iii) At any time we discover you do not qualify for a whole farm unit, we will assign the basic unit structure.

* * * * *

(b) * * *

* * * * *

(3) You have records, that are acceptable to us, for at least the previous crop year for all optional units that you will report in the current crop year (You may be required to produce the records for all optional units for the previous crop year);

* * * * *

Signed in Washington, DC, on August 3, 2004.

Ross J. Davidson, Jr.,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 04–18056 Filed 8–4–04; 4:24 pm]

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