

**PROGRAM NECESSITY OR REGULATORY
INEQUITY: COLLECTION OF INDEMNITY
OVERPAYMENTS UNDER THE FEDERAL
CROP INSURANCE PROGRAM**

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“Agriculture is the most healthful, most useful and most noble employment of man.”

– George Washington

INTRODUCTION

Imagine you are a farmer who participates in the Federal Crop Insurance Program (“FCIP”). You sustain severe crop losses due to a devastating flood and submit a claim under your federal crop insurance policy. The claim is paid, but unbeknownst to you, the historic yields used in calculating your indemnity payment were incorrectly entered in your policy database by your agent resulting in you unknowingly receiving a \$75,000 overpayment. Six years later, you are contacted by the company which issued your crop insurance policy and notified of the overpayment. The company demands repayment of the \$75,000 and advises that failure to pay within thirty days will result in your ineligibility to participate in the FCIP. You do not have the funds available to repay the indemnity due to several unsuccessful crop years. The fact that the overpayment was not the result of any action or mistake on your part is inconsequential and of no consideration in the request for repayment. Further, the fact that six years have elapsed does not affect your obligation to make full reimbursement of the overpayment. In addition to all this, you do not have the funds to dispute the overpayment determination in a costly arbitration proceeding. Failure to make payment will result in your inability to continue farming as you will be unable to obtain financing without crop insurance. The scenario places your ability to make a living in great peril. In this situation, it is clear that the purpose of the crop insurance program to stabilize farming is frustrated by the FCIP’s regulatory requirements.

While it can be argued that this scenario presents an equitable consequence of a government program because a farmer participant in the FCIP should not receive payments or indemnities greater than allowed under the program’s rules and regulations, there is no question the present regulations present a difficult and unfair result to certain insureds.¹ The regulatory scheme addressing

¹ Federal Crop Insurance Act, 55 Fed. Reg. 23066, 23067-68 (June 6, 1990) (to be codified at 7 C.F.R. pt. 400) (Because the Multiple Peril Crop Insurance program is

recovery of erroneously paid indemnities under the FCIP does not include a fault-based analysis as a consideration for recovery. Additionally, a definitive time limit does not exist for recovering overpayments, leaving a policyholder vulnerable to an overpayment demand many years after the initial incorrect claim payment. The present regulations give no claim finality to farmer participants and give no consideration to a policyholder's role in an indemnity error. This lack of consideration of a participant's culpability and the unlimited time period for recovery of overpayments presents a gap in FCIP regulations that should be addressed to ensure more equitable delivery of the FCIP.

In the first portion of this Article, I will provide the background and purpose of the FCIP as well as outline the current regulations pertaining to indemnity overpayments. I will also address the previous interpretations by the Federal Crop Insurance Corporation ("FCIC") of regulations addressing overpayment issues and the case law that has discussed overpayment recovery in the context of the FCIP. The basic fairness and equities of the overpayment regulations as well as policy issues presented by the FCIP will also be outlined. Subsequently in this Article, I will propose regulatory modifications to provide more fair and reasonable treatment of program participants, including a specific time limitation for recovery of overpayments and consideration of a participant's role in the genesis of the overpayment.

I. BACKGROUND

A. History of the Federal Crop Insurance Program

The FCIP originated in 1938 with the passage of the Federal Crop Insurance Act ("FCIA").² The FCIA was enacted by Congress as a policy response to the Great Depression and Dust Bowl because

available to farmers and ranchers in all fifty states, it must be delivered consistently to all policyholders in all states with respect to all crops and plans of insurance. As emphasized by the Federal Crop Insurance Corporation, the terms and conditions of federal crop insurance "cannot be enforced in a patchwork pattern." Rather, federal law must control "not only the contractual relationship with its contractors," but also "the relationship such contractors have with insureds." Otherwise, the Federal Crop Insurance Corporation would not be able to "carry out its Congressional mandate to establish crop insurance uniformly throughout the United States.").

² 7 U.S.C. § 1501.

it was determined that “[p]rivate insurance companies apparently deemed all risk crop insurance too great a commercial hazard.”³ The FCIA sets forth that the purpose of the FCIP is “to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.”⁴ The FCIP serves as the preeminent risk management solution for the nation’s agricultural producers and is “a [major] component of the federal farm safety net.”⁵ Program participants can purchase insurance coverage for their crops or livestock to protect against a variety of perils, including losses due to adverse weather conditions and market fluctuations.⁶ Additionally, a large portion of the premiums for such coverage is paid by the federal government.⁷

As well as providing risk protection for the agriculture industry through a system of crop insurance, the FCIP supports conservation goals and is a factor in stabilizing the agricultural credit markets.⁸ The FCIA also provides the means for the research and tools necessary to create and sustain an insurance program.⁹

The FCIC is a government-owned corporation that operates, regulates, and administers the FCIP.¹⁰ The FCIC is both a governmental corporation and an agency of and within the United States Department of Agriculture (“USDA”).¹¹ The FCIC was granted regulatory and rule-making authority through the FCIA.¹² The FCIC is funded with mandatory appropriations of “such sums as are necessary.”¹³ The FCIA established a Board of Directors to

³ FCIC v. Merrill, 332 U.S. 380, 383 n.1 (1947).

⁴ Kansas *ex rel.* Todd v. United States, 995 F.2d 1505, 1507 (10th Cir. 1993) (quoting 7 U.S.C. § 1502).

⁵ STEPHANIE ROSCH, CONG. RSCH. SERV., R46686, FEDERAL CROP INSURANCE: A PRIMER 1 (2021).

⁶ *Id.* at 4.

⁷ *Id.* at 1.

⁸ *Id.* at 34.

⁹ 7 U.S.C. § 1502.

¹⁰ *Id.* at § 1503.

¹¹ *Id.*

¹² Kansas *ex rel.* Todd v. United States, 995 F.2d 1505, 1507-08 (10th Cir. 1993) (citing 7 U.S.C. § 1516(b)).

¹³ ROSCH, *supra* note 5, at 3; 7 U.S.C. § 1516(a)(2).

manage the FCIC subject to the general supervision of the Secretary of Agriculture.¹⁴

The FCIP has evolved tremendously since its inception in 1938. In its initial stages, the FCIP covered a limited number of crops and was restricted geographically.¹⁵ The FCIC served as the direct issuer of crop insurance policies.¹⁶ Throughout its first four decades, the FCIP was primarily an experiment, or pilot program, with limited farmer participation requiring the continuation of congressional disaster spending to assist farmers.¹⁷ To address low participation in the FCIP and the ongoing need for ad hoc disaster assistance and emergency loans, the Federal Crop Insurance Act of 1980 was enacted.¹⁸ This legislation sought to make crop insurance more accessible by expanding the number of commodities covered under the FCIP as well as the geographic scope of the program.¹⁹ The program was also modified to authorize the private sector delivery of federal crop policies, with the federal government providing regulatory and financial support.²⁰

In response to continued dissatisfaction with the disaster bills that competed with federal crop insurance, the FCIP was again dramatically restructured with the passage of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act in 1994.²¹ Modifications to the program included increased premium subsidies, creation of catastrophic coverage, authorization of prevented planting coverage, and the requirement that farmers purchase crop insurance to participate in commodity support payments through the USDA.²² In 1996, the mandatory participation requirement was eliminated, but a requirement for farmers who accept other government benefits to purchase crop insurance to remain eligible for disaster benefits authorized for that

¹⁴ 7 U.S.C. § 1505(a)(1).

¹⁵ ROSCH, *supra* note 5, at 42.

¹⁶ *Id.*

¹⁷ See *History of the Crop Insurance Program*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY, <https://www.rma.usda.gov/en/About-RMA/History-of-RMA> [https://perma.cc/2V8E-M8BS].

¹⁸ Federal Crop Insurance Act of 1980, 7 U.S.C. §§ 1501-1524.

¹⁹ ROSCH, *supra* note 5, at 42.

²⁰ *Id.*

²¹ See Federal Crop Insurance Reform and Department of Agriculture Reorganization Act, Pub. L. No. 103-354, 108 Stat. 3178 (1994).

²² ROSCH, *supra* note 5, at 42.

year was established and remains in effect.²³ That same year, Congress continued modifications to the FCIP with passage of the Federal Agriculture Improvement and Reform Act of 1996.²⁴ This act created the Risk Management Agency (“RMA”) in the USDA to administer FCIC programs and other non-insurance-related risk management and educational programs that support the nation’s agriculture.²⁵ With respect to the FCIP, the RMA determines “where policies are offered, what coverage is offered, and [the paperwork necessary for coverage].”²⁶ Increased participation in the FCIP followed with a threefold increase in participation by 1998 from the level seen in 1988.²⁷ Further expansion of the FCIP was seen following enactment of the Agriculture Risk Protection Act of 2000.²⁸ This act modified the program by authorizing the sale of crop revenue insurance and livestock insurance.²⁹ This act further increased premium subsidies and allowed a mechanism by which private sector companies could develop new types of crop insurance.³⁰ The expansion of private company insurance plans led to the introduction of revenue coverage which has been extremely popular and now accounts for the largest share of policies sold.³¹

The role of the FCIP as a major resource for the nation’s farmers and ranchers was further enhanced by the 2008, 2014, and 2018 Farm Bills.³² These bills expanded crop insurance coverage options and directed the RMA to strengthen crop insurance by providing more management options for producers and making crop insurance more affordable for beginning farmers.³³ At present, crop insurance serves as the primary tool for farmers in dealing with

²³ See *History of the Crop Insurance Program*, *supra* note 17.

²⁴ Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

²⁵ See *History of the Crop Insurance Program*, *supra* note 17.

²⁶ ROSCH, *supra* note 5, at 3 (footnote omitted).

²⁷ See *History of the Crop Insurance Program*, *supra* note 17.

²⁸ *Id.*

²⁹ Agriculture Risk Protection Act of 2000, Pub. L. No. 106-224, 114 Stat. 358 (2000).

³⁰ ROSCH, *supra* note 5, at 42; 7 U.S.C. § 1508(h)(1)(A); 7 U.S.C. § 1522(c)(1).

³¹ Joseph W. Glauber, *The Growth of the Federal Crop Insurance Program, 1990–2011*, 95 AM. J. AGRIC. ECON. 482, 482 (2013).

³² See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008); Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014); Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).

³³ See sources cited *supra* note 32.

production and price risks.³⁴ The expanse of the FCIP in its current format is seen in the fact that it insures over 120 crops throughout the United States, with the RMA managing more than \$100 billion worth of insurance liability in 2020.³⁵ The RMA's fiscal year 2021 operating budget was \$67.1 million.³⁶ In the 2019 crop year, over two million policies were sold in the United States, and almost 400 million acres of land were covered by crop insurance policies.³⁷

B. Mechanics of Coverage and Claims

As noted, federal crop insurance policies are issued, subsidized, and reinsured by the FCIC pursuant to the FCIA.³⁸ The authority of the FCIC to establish the terms and conditions of federal crop insurance contracts and to carry out the purpose of the FCIA is complete and unlimited.³⁹ The FCIC promulgates all policy documents, loss adjustment standards and procedures, and premium rates.⁴⁰ Federal crop insurance policies are issued on standardized forms that are drafted or approved by the FCIC.⁴¹ As a result of the FCIC's rule-making authority, the policy forms are published as federal regulations and have the full force and effect of a federal statute.⁴²

Federal crop insurance policies require that disputes arising between the companies that issue the policies and policyholders be resolved through arbitration but restrict an arbitrator from

³⁴ See *Who Shoulders Risk in Crop Insurance?*, NAT'L CROP INS. SERV., <https://cropinsuranceinamerica.org/who-shoulders-risk-in-crop-insurance/> [https://perma.cc/HW89-7XFV].

³⁵ RISK MGMT. AGENCY, U.S. DEPT OF AGRIC., RISK MANAGEMENT AGENCY FACT SHEET: ABOUT THE RISK MANAGEMENT AGENCY 1 (2021), <https://www.rma.usda.gov/-/media/RMA/Fact-Sheets/About-the-Risk-Management-Agency.ashx?la=en> [https://perma.cc/Q8JE-ATPP] [hereinafter RISK MANAGEMENT AGENCY FACT SHEET]; ROSCH, *supra* note 5, at 2.

³⁶ RISK MANAGEMENT AGENCY FACT SHEET, *supra* note 35, at 1.

³⁷ ROSCH, *supra* note 5, at 2 (“[M]ore than 90% of planted acres for corn, soybeans, and cotton and more than 85% of planted acres for wheat [were insured] through the FCIP.”).

³⁸ See 7 U.S.C. § 1508. See generally 7 U.S.C. § 1501.

³⁹ *Kansas ex rel. Todd v. United States*, 995 F.2d 1505, 1508 (10th Cir. 1993).

⁴⁰ See 7 U.S.C. § 1508.

⁴¹ See generally 7 C.F.R. § 457.8 (2022).

⁴² Private policies developed by the RMA and other privately developed but SRA-reinsured policies that are accepted by the FCIC Board are not published regulations. See 7 U.S.C. § 1508(h); 7 U.S.C. § 1522(c).

engaging in policy interpretation.⁴³ Rather, the FCIC is responsible for issuing any and all interpretations of the terms and conditions of federal crop insurance policies or the applicable procedures.⁴⁴ The FCIC issues these interpretations in the form of Final Agency Determinations (“FADs”) or interpretations of procedure.⁴⁵ All interpretations issued by the FCIC are “binding on all participants in the [f]ederal crop insurance program.”⁴⁶

Since 1998, the delivery of federal crop insurance to farmers has solely been through private sector companies which contract with the FCIC.⁴⁷ These private sector companies are referred to in the FCIA and regulations as Approved Insurance Providers (“AIPs”).⁴⁸ To qualify as an AIP, a company must demonstrate that it has the requisite financial and operational resources, organization, experience, internal controls, and technical skills to meet complex FCIP requirements.⁴⁹ For 2022, thirteen companies were approved as crop insurance providers.⁵⁰

AIPs sell federal crop insurance policies in all fifty states and Puerto Rico.⁵¹ Each AIP enters into a contract with the FCIC known as a Standard Reinsurance Agreement (“SRA”).⁵² This cooperative financial assistance agreement obligates AIPs to service the federal crop policies in strict accordance with the rules and regulations of the FCIC.⁵³ The AIPs do not have a right to waive or vary the terms

⁴³ 7 C.F.R. § 457.8.

⁴⁴ *Id.*

⁴⁵ *Id.* at § 400.766; *id.* at § 400.765 (A FAD is issued relating to matters of general applicability regarding FCIC’s interpretation of provisions of the FCIA or any regulation codified in the Code of Federal Regulations, including certain policy provisions. The FCIC issues interpretations for policies not codified in the Code of Federal Regulations (including pilot policies and Section 1508(h) policies), or any procedure used in the administration of the FCIP.).

⁴⁶ 7 C.F.R. § 400.766(b)(2).

⁴⁷ *See History of the Crop Insurance Program*, *supra* note 17.

⁴⁸ 7 U.S.C. § 1502(b)(2); 7 C.F.R. § 400.701 (2022).

⁴⁹ 7 C.F.R. § 400.164 (2022).

⁵⁰ *See Crop Insurance Provider List for 2022*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY, <https://public-rma.fpac.usda.gov/AipListing/> [<https://perma.cc/EE5Z-XBJ8>].

⁵¹ RISK MANAGEMENT AGENCY FACT SHEET, *supra* note 35, at 1.

⁵² *See Reinsurance Agreements Overview*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY, <https://legacy.rma.usda.gov/pubs/ra/> [<https://perma.cc/3FP3-USZ7>]; 7 C.F.R. §§ 400.161-177 (2022).

⁵³ *See sources cited supra* note 52.

of coverage.⁵⁴ The SRA also sets forth audit requirements for the companies.⁵⁵

A federal crop insurance contract is an obligation between the insured farmer and its AIP.⁵⁶ Both parties have the right to terminate or cancel the contract at the conclusion of a crop year, but unless the contract is canceled, it is typically automatically renewed the next crop year.⁵⁷ In general, federal crop insurance policies provide coverage for losses due to unavoidable natural events (e.g., adverse weather, failure of irrigation, fire, plant diseases, insect damage) and market price declines.⁵⁸ Participants can tailor their policies by selecting the crop insurance options that are most compatible with the farmer's management goals and production practices.⁵⁹ Policy types are available which allow a farmer to insure a farm's average crop yields, its crop revenue, the county's average crop yield, or the county's average crop revenue.⁶⁰ In 2021, AIPs offered nineteen types of insurance policies through the FCIP.⁶¹ The majority of federal crop insurance policies sold are for row crops, but policies are also available for specialty crops, forage crops, and livestock and animal products.⁶²

Federal crop policies represent an agreement to indemnify or protect the policyholder against losses that occur during a specific crop year.⁶³ Losses must be found to have been caused by "unavoidable natural events" beyond the insured's control, and the insured must be found to have complied with all policy terms.⁶⁴ For all insured crops, policyholders are required to adhere to good farming management practices so as to reduce operator-caused crop losses.⁶⁵

⁵⁴ 7 C.F.R. § 457.8 (2021) (The first paragraph of the FCIC policies section attached to the regulation.).

⁵⁵ See *Reinsurance Agreements Overview*, *supra* note 52; 7 C.F.R. §§ 400.161-177.

⁵⁶ See *History of the Crop Insurance Program*, *supra* note 17.

⁵⁷ ROSCH, *supra* note 5, at 6.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 6.

⁶⁰ *Id.*

⁶¹ *Id.* at 1.

⁶² *Id.* at 14.

⁶³ See *History of the Crop Insurance Program*, *supra* note 17.

⁶⁴ ROSCH, *supra* note 5, at 4.

⁶⁵ *Id.* at 7.

In the event of crop or revenue loss, an insured provides notice to the AIP in accordance with the policy's notice requirements.⁶⁶ Thereafter, a claim adjustment takes place in which the AIP obtains all necessary information to process the claim.⁶⁷ The insured is responsible for establishing the time, location, cause, and any amount of loss.⁶⁸ After the claim is processed by the AIP, an indemnity check will be issued.⁶⁹ All claims are submitted to the FCIC, and claim payments are paid by the AIPs with monies from the United States treasury.⁷⁰

C. Preemption of State and Local Laws

The United States Constitution states that the laws of the United States are supreme.⁷¹ Through federal statutes and regulations, Congress may preempt state laws.⁷² Congress may expressly preempt other laws, or it "may implicitly pre-empt a state law, rule, or other state action."⁷³ The preemption of conflicting state or local laws is part of the FCIP's regulatory scheme so as to ensure uniform delivery of the FCIP throughout the nation.⁷⁴ The

⁶⁶ See *Claims Process*, U.S. DEPT OF AGRIC. RISK MGMT. AGENCY, <https://www.rma.usda.gov/en/Topics/Insurance-Cycle/Claims-Process> [<https://perma.cc/55RE-B3XJ>].

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ The USDA reinsures a portion of the losses from the sale and service of federal crop insurance. AIPs may choose the level at which they wish the USDA to reinsure. Generally, AIPs cede to the USDA the higher risk policies for reinsurance. AIPs can also purchase reinsurance from third parties for the portion of its book of business not reinsured by the USDA. RISK MGMT. AGENCY, U.S. DEPT OF AGRIC., 2022 STANDARD REINSURANCE AGREEMENT (2021); ROSCH, *supra* note 5, at 4.

⁷¹ U.S. CONST. art. VI, cl. 2. (The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

⁷² *City of New York v. F.C.C.*, 486 U.S. 57, 63-66 (1988).

⁷³ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002)).

⁷⁴ Cases have addressed the question of complete preemption in the context of the FCIP finding that the FCIA does not completely preempt state law. See *generally* *Meyer v. Conlon*, 162 F.3d 1264, 1269 (10th Cir. 1998); *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs., Inc.*, 121 F.3d 630, 634 (11th Cir. 1997); *Agre v. Rain & Hail LLC*, 196 F. Supp. 2d 905, 912 (D. Minn. 2002); *Rio Grande Underwriters, Inc. v. Pitts*

FCIA expressly provides for the preemption of conflicting state or local laws.⁷⁵ The preemption of state or local laws is set forth in the FCIA in Section 1506(l) stating:

State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.⁷⁶

In the federal regulations, the preemption of state law is set forth as having application “to all policies of insurance, insured or reinsured by the Corporation, contracts, agreements, or actions authorized by the Act and entered into or issued by [the] FCIC.”⁷⁷ The text for the Common Crop Insurance Policy used by insureds and included in the federal regulations notes preemption of state and local laws as follows: “[i]f the provisions of this policy conflict with statutes of the State or locality in which this policy is issued, the policy provisions will prevail. State and local laws and regulations in conflict with federal statutes, this policy, and the applicable regulations do not apply to this policy.”⁷⁸ Preemption of the type associated with the FCIP is known as “conflict preemption” meaning that when there is an actual conflict between the agreements, contracts, or actions authorized by 7 C.F.R. Part 400 or the FCIC and a state or local law, the state or local law is preempted.⁷⁹

Farms, Inc., 276 F.3d. 683, 687 (5th Cir. 2001); *Farmers Crop Ins. All. v. Laux*, 442 F. Supp. 2d 488, 498 (S.D. Ohio 2006) (finding no complete federal preemption in reliance on earlier regulations which are no longer in effect.).

⁷⁵ 7 U.S.C. §§ 1501, 1506(l) (2022); 7 C.F.R. § 400.352(a) (2022) (“No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part . . . or by the Corporation.”).

⁷⁶ 7 U.S.C. § 1506(l).

⁷⁷ 7 C.F.R. § 400.351 (2022).

⁷⁸ *Id.* at § 457.8.

⁷⁹ *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

II. REPAYMENT OF OVERPAID INDEMNITIES UNDER CURRENT REGULATORY SCHEME

The SRA requires AIPs to adhere to and implement quality control guidelines to ensure the integrity of the FCIP.⁸⁰ AIPs are required to conduct various reviews on a reinsurance-year basis as well as verify actual production history⁸¹ for eligible crop insurance contracts.⁸² The reviews to be conducted by AIPs include data mining reviews, individual policy reviews, operational reviews, conflict of interest reviews, consecutive loss adjuster reviews, and \$200,000 indemnity reviews.⁸³ Through these quality control activities, each AIP verifies that its delivery of federal crop insurance products comports with all FCIC rules, practices, and regulations.⁸⁴ These AIP investigations identify any errors in policy issuance and claim payments, and such are corrected.⁸⁵ The correction of errors may lead to a finding that indemnities have been overpaid and recovery of the improperly paid indemnities from the policyholder is necessary.⁸⁶

Additionally, through its compliance division, the RMA reviews policy and claim data to ensure that AIPs have fully complied with laws, policies, and procedures.⁸⁷ The assessments and investigations of RMA identify instances in which indemnity payments did not comply with contract or agreements and crop policy terms and approved procedures.⁸⁸ The findings of RMA often result in determinations of overpaid indemnity and the need for

⁸⁰ RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., 2022 STANDARD REINSURANCE AGREEMENT—APPENDIX IV (2021) [hereinafter APPENDIX IV].

⁸¹ ROSCH, *supra* note 5, at 20 (“The expected yield for an insured unit is referred to as the actual production history (APH). The APH is used in conjunction with the projected price to establish the insured value covered under the policy. Higher APH yields increase the value of the insured crop and therefore the crop insurance premium charged for the policy.”); 7 C.F.R. § 457.8.

⁸² See APPENDIX IV, *supra* note 80, at 11-14.

⁸³ *Id.* at 11-13.

⁸⁴ ROSCH, *supra* note 5, at 28-29.

⁸⁵ See APPENDIX IV, *supra* note 80, at 10.

⁸⁶ See, e.g., RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-106 (2010); RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-136 (2011); RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-281 (2018); RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-287 (2019).

⁸⁷ See RISK MANAGEMENT AGENCY FACT SHEET, *supra* note 35, at 1.

⁸⁸ See *id.*

AIPs to seek reimbursement of overpaid indemnities from policyholders.⁸⁹

To facilitate reviews and audits, the terms of the Common Crop Insurance Policy require a policyholder to maintain and make available to its AIP, or any USDA employee involved in an investigation or review, records reflecting the planting, replanting, inputs, production, harvesting, and disposition of insured crops for three years after the end of each crop year.⁹⁰ The policy further requires a policyholder to retain all records used to establish the amount of production the policyholder certified in establishing the policyholder's approved yields for its insured crops. The records relating to approved yields must be retained for three years after the calendar date for the end of the insurance period for the crop year in which the policyholder initially certified such records.⁹¹ The period for which policyholders must retain records may be extended beyond three years if the AIP or an employee of the USDA notifies the policyholder in writing.⁹² Additionally, policy terms provide that the signing of the policy application constitutes authorization by the policyholder for an AIP or the USDA to obtain records relating to the policyholder's farming operation from third parties such as Farm Service Agency offices, banks, warehouses, gins, cooperatives, marketing associations, and accountants.⁹³

A. Policy Provisions Relating to the Repayment of Indemnities

Although several provisions of the federal crop insurance policy address indemnity overpayments associated with a claim determined in a prior crop year, there is a void in the language of federal crop insurance policies pertaining to overpayments.⁹⁴ The Common Crop Insurance Policy does not contain general guidelines or standards for recovering indemnity overpayments.⁹⁵ The policy does not contain any language addressing whether a finding of fault

⁸⁹ See, e.g., *Occidental Fire & Cas. Co. of N.C. v. Bush*, No. 2:19 CV 67 CDP, 2020 WL 2733811 (E.D. Mo. May 26, 2020).

⁹⁰ 7 C.F.R. § 457.8 (2022).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

or improper conduct by a policyholder is required to mandate repayment of improperly paid indemnity nor does it set forth a specific time period by which an AIP may seek reimbursement of an indemnity overpayment. The provisions referencing overpayments are devoid of particulars other than a directive that overpayments must be reimbursed.⁹⁶

In the Common Crop Insurance Policy, the primary policy provision addressing payment of claims is Section 14.⁹⁷ Section 14 on its face promotes finality of claims.⁹⁸ Sections 14(f) and 14(g) of the Common Crop Insurance Policy describe the AIP's duties relating to processing and payment of claims and emphasize that claims will be paid promptly.⁹⁹ The language addressing a policyholder's duties in the claim process further advances expedient claim resolution.¹⁰⁰ Overall, Section 14 of the Common Crop Insurance Policy promotes a timely and orderly claim and settlement process and does not contemplate retroactive redeterminations.¹⁰¹

Section 21(b)(3) of the Common Crop Insurance Policy is one section of the policy that does address the requirement for a policyholder to repay overpaid indemnities, noting repayment must occur in situations in which the AIP or FCIC have evidence that the policyholder has made a knowing misrepresentation relating to a

⁹⁶ See *id.* (Section 3(g)(4)(iii), Section 6(h), Section 21(b)(3), and Section 27 of the Common Crop Insurance Policy all contain requirements regarding the overpayment of indemnities. Section 24 of the Common Crop Insurance Policy also states that “[i]nterest will accrue at the rate of 1.25 percent simple interest per calendar month on any unpaid premium amount or administrative fee due [to the FCIC].”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (Section 14: “(f) If you have complied with all the policy provisions, we will pay your loss within 30 days after the later of: (1) We reach agreement with you; (2) Completion of arbitration, reconsideration of determinations regarding good farming practices or any other appeal that results in an award in your favor, unless we exercise our right to appeal such decision; (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 (4) The entry of a final judgment by a court of competent jurisdiction. (g) In the event we are unable to pay your loss within 30 days, we will give you notice of our intentions within the 30-day period.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

certified yield.¹⁰² Section 21(b)(3) of the Common Crop Insurance Policy provides:

While you are not required to maintain records beyond the record retention period specified in section 21(b)(2), at any time, if we or FCIC have evidence that you, or anyone assisting you, knowingly misreported any information related to any yield you have certified, we or FCIC will replace all yields in your APH database determined to be incorrect with the lesser of an assigned yield determined in accordance with section 3 or the yield determined to be correct: (i) If an overpayment has been made to you, you will be required to repay the overpaid amount¹⁰³

The requirement for repayment of overpaid indemnities is also set forth in Section 3(g)(4)(iii) of the Common Crop Insurance Policy which provides for the repayment of any “overpaid or underpaid indemnity or premium” stemming from the correction of an approved yield.¹⁰⁴ Section 6(h) of the Common Crop Insurance Policy addresses overpayments arising from misreported information in an acreage report.¹⁰⁵ However, no singular policy provision addresses incorrectly paid indemnity claims and the consequences or requirements arising from erroneous indemnity claim payments or prevented planting payments.¹⁰⁶

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ The AIP’s duty to correct claims as it pertains to misreported production is addressed in the FCIC’s Loss Adjustment Manual Standards Handbook (“LAM”), which identifies standards and requirements for general loss adjustment for adjusting losses in a uniform and timely manner in states that a corrected claim must be prepared: (1) when the AIP discovers an error in the original claim based on the insured’s failure to report or account for all production (subpart A(1)(a)); and (2) the underpayment or overpayment resulting from the correction exceeds the FCIC–approved tolerance of \$250 (subpart B(2)). It further states “[t]here is no time limit for when a corrected claim can be prepared.” RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., LOSS ADJUSTMENT MANUAL STANDARDS HANDBOOK 313 (2021), <https://www.rma.usda.gov/-/media/RMA/Handbooks/Loss-Adjustment-Standards---25000/Loss-Adjustment-Manual/2021-25010-1H-Loss-Adjustment-Standards-Handbook.ashx> [https://perma.cc/RK29-VEW9].

B. Final Agency Determinations

Although policy language setting forth overpayment requirements is limited, recovery of overpayments from policyholders by an AIP has been addressed in several FADs issued by the FCIC. In these FADs, the FCIC has confirmed that AIPs must correct erroneous claims and capture any resulting overpayments.¹⁰⁷ These FADs further explain that the requirement for repayment extends to any instance of non-compliance irrespective of fault and is not limited to the specific circumstances in which overpayments are referenced in the policy.¹⁰⁸

In FAD-085, the FCIC clarified that the requirement for repayment of overpaid indemnity even extends to situations in which there is a correction of government data utilized in calculating an indemnity overpayment.¹⁰⁹ The question posed to the FCIC in FAD-085 was whether indemnity payments had to be recalculated if the National Agricultural Statistical Services (“NASS”) subsequently corrected yield data upon which a claim payment was initially determined.¹¹⁰ The requestor sought an interpretation from the FCIC to the effect that repayment by the insured of an indemnity (or any portion of the indemnity) that had been previously paid to the policyholder was not required if there was a correction or revision to the NASS data used in determining indemnity.¹¹¹ The FCIC disagreed with the requestor’s interpretation, finding that if NASS data is corrected (as opposed to simply revised) and such correction results in the policyholder having received an overpayment of indemnity that the policyholder is required to repay such overpaid indemnity.¹¹²

In FAD-106, the FCIC emphasized the breadth of the requirement to correct claims and recover incorrect claim payments stating: “[w]hen overpayments are discovered as a result of non-compliance with any policy provision, the policyholder may be

¹⁰⁷ See sources cited *supra* note 86.

¹⁰⁸ *Id.*

¹⁰⁹ RISK MGMT. AGENCY, U.S. DEPT OF AGRIC., FINAL AGENCY DETERMINATION: FAD-085 (2008).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (The FCIC differentiated revisions from corrections noting that “[c]orrections are the fixing of mistakes.”).

required to repay such overpaid amounts.”¹¹³ FAD-106 was issued in response to a proposed interpretation that Section 21 of the Common Crop Insurance Policy sets forth “the only instances in which an approved insurance provider (AIP) may go back and claim overpaid indemnities for crop years prior to the current or most recent crop year”¹¹⁴ In FAD-106, the FCIC rejected the submitted interpretation and made clear that Section 21 of the Common Crop Insurance Policy furnishes “only one instance where an AIP may go back and claim overpaid indemnities”¹¹⁵ The FCIC specifically noted that “there are numerous other provisions of the policy where non-compliance could affect the existence or amount of an indemnity paid.”¹¹⁶ The FCIC further confirmed that non-compliance with any policy provision could entitle an AIP to be reimbursed for any amounts overpaid to a policyholder as a result of such non-compliance.¹¹⁷ The FCIC delineated instances of possible non-compliance by a policyholder which could require reimbursement to an AIP stating: “[f]or example, incorrect yields, uninsurable acres reported on the acreage report, overstated acreage, incorrect share, etc., that are discovered must be corrected, and if such correction results in an overpaid indemnity or any other debt, it is subject to collection from the policyholder.”¹¹⁸

In FAD-136, the FCIC again confirmed the need for AIPs to correct claims and collect overpayments finding that an AIP “may go back and adjust data in previous crop years due to, for example,

¹¹³ FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86. FAD-106 states that a policyholder “may” be required to repay overpaid indemnities, and AIPs are required by the FCIP to recover overpayments from policyholders. The language of FAD-106 says that “[n]on-compliance with any . . . provisions could entitle the AIP to collect any amounts that may have been overpaid as a result of such non-compliance.” *Id.* The goal of the FCIP is consistent delivery to producers. If an AIP does not seek an overpayment from a policyholder, the program would be delivered in an unequal manner with certain a policyholder receiving a claim payment in excess of the amount properly payable under the program’s rules and regulations. Such inconsistent payment would be in direct contradiction to the program’s goal. Further, forgiveness of an overpayment debt could be considered a rebate to the policyholder in violation of the terms of the SRA between the FCIC and the AIP. 2022 STANDARD REINSURANCE AGREEMENT, *supra* note 70.

¹¹⁴ FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

misreporting or non-compliance, and recover overpayments.”¹¹⁹ The FCIC also clarified that, “unlike the one year deadline imposed on policyholders to request arbitration, there is no time limit specified in the policy in which the AIPs must make their correction.”¹²⁰

In FAD-140, the FCIC reiterated that strict compliance with all rules, regulations, and procedures of the FCIP is required in order for the program to be sustainable and delivery of this farm subsidy program to be uniform.¹²¹ The circumstance addressed in FAD-140 involved a policyholder having received an incorrect approved yield through no fault of its own.¹²² The FCIC determined that the approved yield should be corrected even if there existed no evidence that the policyholder had misreported material information noting “that an AIP cannot provide coverage beyond that which the policy terms allow, and that an AIP must correct any errors in policy documents which indicate that coverage exceeds that which RMA allows.”¹²³ The FCIC further emphasized the need for strict conformance with all policy provisions and procedures and the need for corrections, including revisions to previously made loss payments, without consideration for the source of the error.¹²⁴

¹¹⁹ FINAL AGENCY DETERMINATION: FAD-136, *supra* note 86.

¹²⁰ *Id.*

¹²¹ RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-140 (2011).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (“FCIC agrees with the second requestor that when it is discovered that the approved yield or production guarantee is not calculated in accordance with the approved policy and procedure, the yield and guarantee must be corrected to conform to the requirements. It does not matter who made the error. The crop insurance program can only operate and make payments in accordance with its applicable provisions, which may necessitate correction of erroneous information or application of provisions. This requirement for strict adherence to the policy provisions and the need for corrections was clearly established by the Supreme Court in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).”).

In FAD-281¹²⁵ and FAD-287¹²⁶, the FCIC found in clear and unambiguous terms that an AIP is required to correct errors in the payment of indemnity under federal crop insurance policies and recover any overpayments. These FADs confirmed that recoupment of incorrectly paid indemnities is required whenever overpayments result from non-compliance with any policy or procedure and may occur years after the initial indemnity payment.¹²⁷

C. Case Law

The recovery by the FCIC of monies overpaid to insureds by AIPs was addressed by the Seventh Circuit Court of Appeals in *Old Republic Insurance Company v. FCIC*.¹²⁸ The court found that the FCIC was entitled to recover overpayments made by private insurers under the FCIP.¹²⁹ Addressing claim overpayments in the context of the FCIP, the court stated that readjustment of private insurers' claims and recovery of overpayments was consistent with sound reinsurance principles as required by the FCIA and, therefore, the FCIC's recovery of overpayments was not barred by statute.¹³⁰ The *Old Republic* Court also reasoned that requiring

¹²⁵ FINAL AGENCY DETERMINATION: FAD-281, *supra* note 86 (“However, that does not mean that the AIP does not have a duty to correct claims. The [f]ederal crop insurance program uses taxpayer dollars and FCIC and AIPs have a duty to ensure those taxpayer dollars are paid in accordance with policy and procedures. As a result, FCIC agrees in part with the second requestor. If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim. This obligation has been confirmed by the courts in *Old Republic Insurance Company v. FCIC*, 947 F.2d 269 (7th Cir. 1991). However, regardless of when a claim was first paid or denied, if the AIP later revises the claim because it discovered that policy and procedures were not followed, then this becomes a new determination and the producer has one year to seek arbitration from the date of such determination if the producer does not agree with the changes.”).

¹²⁶ FINAL AGENCY DETERMINATION: FAD-287, *supra* note 86 (“FCIC does not agree with the second requestor that only non-compliance by an insured can result in an AIP being able to reclaim alleged overpayments. The AIP has a duty to correct claims. . . . FCIC agrees with the first requestor that if an error is recognized at any point it must be corrected. It is the AIP's responsibility to audit and correct any claim that was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim.”).

¹²⁷ FINAL AGENCY DETERMINATION: FAD-281, *supra* note 86; FINAL AGENCY DETERMINATION: FAD-287, *supra* note 86.

¹²⁸ 947 F.2d 269, 274 (7th Cir. 1991).

¹²⁹ *Id.*

¹³⁰ *Id.* at 275.

insurers to refund monies that had been paid based on errors would serve to discourage potentially wrongful or negligent adjustment practices by insurers participating in the federal program.¹³¹ The finding in *Old Republic* was referenced by the FCIC in FAD-281 as authority for the proposition that AIPs must correct any claim if it is discovered that the claim was not adjusted according to FCIC procedures.¹³²

The United States District Court for the Eastern District of Missouri addressed a dispute arising from an indemnity overpayment determination in *Occidental Fire & Casualty Company of North Carolina v. Bush*.¹³³ Based upon an audit initiated by RMA, Occidental Fire & Casualty Company (“Occidental”) determined that its former policyholder, Franklin Bush, had received indemnity overpayments and owed additional premium in connection with crop policies issued several years prior.¹³⁴ A federal court action was filed by Occidental seeking relief as to recovery of the overpayment with Bush presenting a counterclaim.¹³⁵ The federal court dismissed the complaint and counterclaim without prejudice finding that per the terms of the federal crop insurance policy, the dispute as to the overpayment was properly resolved in arbitration and not by judicial action in the first instance.¹³⁶ Noting that the arbitration provision of the Common Crop Insurance Policy is broad, the court held such provision applies to all determinations made by the AIP, regardless of who initiates the proceedings.¹³⁷ The court also held that in accordance with the arbitration provision, an arbitration proceeding must be initiated within one year of the disputed determination.¹³⁸ This suggests that overpaid claims should be arbitrated and that the policyholder and the AIP have one year after the AIP’s overpayment determination to file an arbitration.

¹³¹ *Id.*

¹³² FINAL AGENCY DETERMINATION: FAD-281, *supra* note 86.

¹³³ *Occidental Fire & Cas. Co. of N.C. v. Bush*, No. 2:19 CV 67 CDP, 2020 WL 2733811 (E.D. Mo. May 26, 2020).

¹³⁴ *Id.* at *1.

¹³⁵ *Id.*

¹³⁶ *Id.* at *6.

¹³⁷ *Id.* at *5.

¹³⁸ *Id.*

III. STATUTE OF LIMITATIONS ISSUES

The time period in which an AIP can assert a claim against a policyholder for the recovery of erroneously paid indemnity under a federal crop insurance policy is an uncertain area of the law. Under the terms of the federal crop insurance policy and applicable regulations, no deadline exists for an AIP to seek recovery of indemnities alleged to have been improperly paid.¹³⁹ Statutes of limitations applicable to insurance contracts or other written contracts for the state which has jurisdiction over the contract does not prescribe a time period in which AIP overpayment determinations can be rendered.¹⁴⁰ Rather, a statute of limitations is a procedural mechanism for the sole purpose of limiting the time period in which one has to bring an “action.”¹⁴¹ As such, these statutes do not affect the substantive rights under a contract, and in the context of the FCIP, a statute of limitations would not dictate the time during which an AIP is permitted to review prior claim decisions, correct claims, and issue overpayment determinations. These statutes in no way present time limitations for an AIP to review policies and claims and render overpayment determinations or attempt to recover overpayments utilizing the various means available to AIPs under the FCIP.¹⁴² Statutes of limitations only preclude an AIP from filing an “action” seeking the repayment of claim monies.¹⁴³ The fact that an AIP could be barred from pursuing

¹³⁹ See 7 C.F.R. § 457.8 (2022).

¹⁴⁰ *Great Am. Ins. Co. v. Wahl*, No. 117,176, 2017 WL 5014883 (Kan. Ct. App. Nov. 3, 2017) (The Kansas Court of Appeals held in a case arising from an overpayment indemnity claim, that the FCIA did not preempt the state’s statute of limitations. The insurer who brought the claim against the policyholder was unable to identify a federal statute of limitations in the FCIA or any other federal statute or regulation for an insurer to bring a court action against a policyholder. Thus, the state statute of limitations did not conflict with any federal law so as to trigger preemption.); *Lyerly v. Am. Nat’l Fire Ins. Co.*, 540 S.E.2d 469 (S.C. Ct. App. 2000) (holding that the FCIA does not preempt a state’s statute of limitations).

¹⁴¹ *Fed. Deposit Ins. Corp. v. Petersen*, 770 F.2d 141, 142 (10th Cir. 1985) (“Statutes of limitation are generally considered to be procedural rather than substantive law.”) (first citing *Kalmich v. Bruno*, 553 F.2d 549, 553 (7th Cir. 1977); and then citing *Bournias v. Atl. Mar. Co.*, 220 F.2d 152, 154-55 (2d Cir. 1955).

¹⁴² See 7 C.F.R. §§ 400.675-686 (2022).

¹⁴³ An issue that remains unclear is whether a state’s statute of limitation begins to run on the date of the original claim payment or at the time of the overpayment determination. The Kansas Court held the AIP’s claim for recovery of overpaid indemnities was barred by the running of the state’s five-year statute of limitations with

a court action when juxtaposed to the availability of other recovery options under the FCIP deems the AIP's inability to file a court action only limited protection to policyholders.¹⁴⁴

In addition to having no effect on any substantive rights under a crop insurance contract, statutes of limitations in many states are not applicable to the filing of an arbitration proceeding.¹⁴⁵ As noted above, statutes of limitations applicable to insurance contracts in many states apply only to the time period allowed for filing an action in court.¹⁴⁶ Where a statute of limitations is narrowly crafted to apply only to an "action" or "civil action," courts have consistently held that such a statute does not apply in arbitration.¹⁴⁷ Thus, in states in which the statute of limitations has been held inapplicable to arbitration proceedings, an AIP could not only demand

the statute beginning to run on the date of the original claim payment. *Great Am. Ins. Co.*, 2017 WL 5014883, at *4.

¹⁴⁴ Several options are available to an AIP under the FCIP for collection of policyholder overpayments. Pursuant to Section 24(e) of the Common Crop Insurance Policy, an AIP can recover overpaid indemnities through "administrative offset from payments [the policyholder] receive[s] 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." 7 C.F.R. § 457.8. If at the time of the overpayment demand, a policyholder is a participant in the FCIP, the AIP can utilize the potential of being listed in the Ineligible Tracking System and declared ineligible for participation as a means to facilitate payment from a policyholder. 7 C.F.R. § 400.679 (2022).

¹⁴⁵ See, e.g., *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.*, 197 A.2d 83, 87 (Conn. Super. Ct. 1963) (holding that arbitration proceedings are not civil actions within a statute of limitations); *Carpenter v. Pomerantz*, 634 N.E.2d 587, 590 (Mass. App. Ct. 1994) (holding that "action" has been interpreted to pertain to court proceedings); *Vaubel Farms, Inc. v. Shelby Farmers Mut.*, 679 N.W.2d 407, 412 (Minn. Ct. App. 2004) (holding that the term "suit" as used in statute of limitation does not include an arbitration proceeding); *Cameron v. Griffith*, 370 S.E.2d 704, 704 (N.C. Ct. App. 1988) (holding that arbitration is neither an "action" nor a "judicial proceeding" for purposes of statute of limitation); *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 172 (S.D. Ohio 1993) ("[T]he effect of a statute of limitations is to bar an action at law, not arbitration.").

¹⁴⁶ A few states have adopted broader statutes of limitations that apply to civil actions and arbitrations. See WASH. REV. CODE § 7.04A.090(3) (2023) ("A claim sought to be arbitrated is subject to the same limitations of time for the commencement of actions as if the claim had been asserted in a court."). See also GA. CODE ANN. § 9-9-5(a) (2023) (providing that an arbitration initiated in Georgia may, at the discretion of a court or arbitrator, be time-barred if it "would be barred by limitation of time had the claim . . . been asserted in court"); N.Y. C.P.L.R. § 7502(b) (McKinney 2023) (providing that an arbitration in New York may be time-barred if the claim "to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state").

¹⁴⁷ *Great Am. Ins. Co.*, 2017 WL 5014883, at *4.

reimbursement but could initiate an arbitration proceeding to collect the alleged overpayment as long as the arbitration was initiated within the time period prescribed in the federal crop insurance policy for instituting an arbitration proceeding.¹⁴⁸

The only limitation of action provision in the federal crop insurance policy applicable to disputes between a policyholder and an AIP is the one-year limitation period set forth in Section 20(b)(1) of the Common Crop Insurance Policy.¹⁴⁹ This provision states that an arbitration proceeding must be initiated within one year after the issuance of a determination for which a disagreement exists between an AIP and the policyholder.¹⁵⁰ The FCIC has issued multiple FADs addressing this time period for challenging determinations under a federal crop insurance policy.¹⁵¹ The FCIC in FAD-245 held that there is no ambiguity with Section 20(b)(1) and that the “insured has one year from the date of denial of the claim or receives any other determination with which the insured disagrees to file for arbitration.”¹⁵² In FAD-299, the FCIC reiterated this one year requirement stating that “the one-year limitation provision in section 20(a)(1) prevents a policyholder from bringing a claim based upon the policy more than one year after the claim payment or the determination which is being challenged.”¹⁵³ The FCIC in FAD-299 referenced its previous finding in FAD-280 and confirmed the one year limitation for initiation of arbitration action.¹⁵⁴ It has also been clarified by the FCIC, that the one year limitations period to bring a claim is not altered if the arbitration proceedings include claims involving extra-contractual damages or

¹⁴⁸ See 7 C.F.R. § 457.8.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (Section 20(b)(1): “(b) Regardless of whether mediation is elected: (1) You must initiate arbitration proceedings within 1 year of the date we denied your claim or rendered the determination with which you disagree, whichever is later.”).

¹⁵¹ See *e.g.*, RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-245 (2015); RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-299 (2020); RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-280 (2018).

¹⁵² FINAL AGENCY DETERMINATION: FAD-245, *supra* note 151.

¹⁵³ FINAL AGENCY DETERMINATION: FAD-299, *supra* note 151.

¹⁵⁴ *Id.* (“This is supported by FAD-280, published on RMA’s website on September 18, 2018, which states that the one-year limitation provision prevents a policyholder from bringing an arbitration action or seeking judicial review under the terms of the policy more than one year after the claim payment or the determination which is being challenged.”).

equitable estoppel.¹⁵⁵ The FCIC has also clarified that election of mediation does not create an exception to the one year limitation.¹⁵⁶

The open-ended period for an AIP to correct claims and seek resulting overpayments from a policyholder was referenced by the FCIC in FAD-106 and FAD-136.¹⁵⁷ In FAD-106, the FCIC addressed the question of “how many years may the AIP claim overpayments and demand repayments under the provisions of Section 21 of the Basic Provisions.”¹⁵⁸ The requestor argued that as Section 21 provides for a standard three-year retention period for policyholders’ farming records, demands for overpayments can only be made only during this three-year period.¹⁵⁹ The FCIC rejected this interpretation, noting the language of Section 21 requires policyholders to “maintain records for three years after the end of the crop year for which the policyholder initially certified such records.”¹⁶⁰ The FCIC explained that this language places policyholders under an obligation in many circumstances to retain records longer than three years. The FCIC referenced the example in the policy language which addressed records used to establish a yield and explained that if for crop year 2003 a policyholder’s yield was based upon records certified for years 1997 to 2002, all such records relied upon would have to be maintained through the 2006 crop year (three years after the year at issue), meaning that the 1997 records would have to be retained for a total of nine years.¹⁶¹ The FCIC further noted that the time period to correct claims and seek overpayments should not correspond to the three-year record retention period because AIPs and the FCIC are not limited to using policyholders’ records to discover misreported information and

¹⁵⁵ *Id.*

¹⁵⁶ FINAL AGENCY DETERMINATION: FAD-258, *supra* note 86 (“Section 20(b)(1) makes it clear that even if mediation is elected, the initiation of arbitration proceedings must occur within one year of the date the approved insurance provider denies the claim or renders the determination with which the policyholder disagrees. FCIC also agrees that failure to initiate arbitration within the period prescribed by section 20(b)(1) precludes the policyholder from seeking judicial review.”).

¹⁵⁷ FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86; FINAL AGENCY DETERMINATION: FAD-136, *supra* note 86.

¹⁵⁸ FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; 7 C.F.R. § 457.8 (2022).

claim errors.¹⁶² In completing audits and reviews, AIPs and the FCIC can utilize records from third parties.¹⁶³ The FCIC plainly acknowledged that no time limitation exists for correcting claims and recovering overpayments.¹⁶⁴

The lack of any time limit for policy and claim corrections by an AIP was also noted in FAD-136. The requestor referenced FAD-106 and sought agreement with its policy interpretation that an “AIP is not restricted by the policy to dispute and then correct within one year of its determination, unlike the policyholder.”¹⁶⁵ The FCIC agreed that the one-year deadline for a policyholder to dispute a determination was inapplicable to AIPs and made clear that “there is no time limit specified in the policy” in which AIPs must make corrections to claims.¹⁶⁶

Accordingly, a policyholder cannot look to the current policy or regulations for a defined time period during which an AIP may seek reimbursement of a claim payment found to have been made outside of policy terms or applicable regulations. Additionally, state statutes of limitations applicable to such contracts of insurance do not prescribe a deadline by which a company must review a policy to verify the accuracy of the claim payment. Thus, neither federal nor state law restricts the time during which the AIP may review a previously paid claim or present a demand for collection of incorrectly paid indemnities, leaving policyholders in the FCIP without any meaningful claim finality.

IV. POLICYHOLDER OPTIONS

The determination of a debt in connection with an indemnity overpayment often results in a financial struggle for farmers. In many circumstances, a finding that a farmer has received an indemnity overpayment undermines the stability of the farmer’s entire operation and places the future of the farming enterprise in jeopardy. The options available to a farmer faced with an overpayment demand are limited and costly.

¹⁶² FINAL AGENCY DETERMINATION: FAD-10, *supra* note 86.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (“When overpayments are discovered as a result of non-compliance with any policy provision, the policyholder may be required to repay such overpaid amounts.”).

¹⁶⁵ FINAL AGENCY DETERMINATION: FAD-136, *supra* note 86.

¹⁶⁶ *Id.*

Policyholders can repay the overpayment and eliminate further action on the part of the AIP, but in many instances, repayment is not an option available to farmers due to financial considerations.¹⁶⁷ Monies received for previous years' claims often have been expended for farming obligations, and without knowledge that claim monies would be required to be repaid, the farmer has taken no steps to ensure funds are available for repayment.

If the debt is not paid, the policyholder has the option of entering into a written payment plan pursuant to FCIC guidelines to repay the AIP in installment payments.¹⁶⁸ The farmer also can dispute the debt through an arbitration proceeding against the AIP.¹⁶⁹ Ultimately, if the policyholder fails to repay the debt in whole or in installments, the AIP will submit the policyholder to the FCIC to be placed on the Ineligible Tracking System ("ITS") and declared ineligible to participate in the FCIP.¹⁷⁰

A. *Payment Plan*

Under FCIC regulations, a policyholder who is determined to owe a debt arising from a federal crop insurance policy has the option of entering into a written payment plan by which the debt can be repaid through installments.¹⁷¹ Such payment agreements require strict adherence to the plan's provisions and have limited repayment periods.¹⁷² A payment plan under Section 400.681 must be written and signed and dated by both parties.¹⁷³ By signing the plan, the policyholder agrees to satisfy all financial obligations to

¹⁶⁷ 7 C.F.R. § 457.8 (2022) (Section 24: "(c) For the purpose of any other amounts due us, such as repayment of indemnities found not to have been earned: . . . (3) The amount will be considered delinquent if not paid within 30 days of the date the notice is issued by us.").

¹⁶⁸ *Id.* at § 400.681.

¹⁶⁹ *Id.* at § 457.8.

¹⁷⁰ *Id.* at § 400.679(a).

¹⁷¹ *Id.* at § 400.677 ("Written payment agreement means a written document between a debtor and the insurance provider, or FCIC, that is signed and dated by all applicable parties to satisfy financial obligations of the debtor with scheduled installment payments under conditions that modify the terms of the original debt in accordance with § 400.681.").

¹⁷² *Id.* at § 400.681(a)(2)-(3).

¹⁷³ *Id.* at § 400.681(b)(2).

the AIP through scheduled payments.¹⁷⁴ A single written payment agreement may cover multiple crop years as is often needed in the case of an overpaid indemnity.¹⁷⁵ The regulations governing these agreements provide that the period for repayment cannot exceed more than two years and the agreement cannot be modified once it is executed by either party.¹⁷⁶ If a policyholder fails to make any installment payment, the policyholder is deemed ineligible to participate in the FCIP.¹⁷⁷ Due to the limited time period allowed for payment under a payment plan, policyholders in precarious financial conditions find these installment plans of limited or no value.

B. Arbitration

A policyholder can initiate an arbitration proceeding to dispute an AIP's determination that it improperly received indemnities and that such monies must be reimbursed.¹⁷⁸ It has been found that an AIP's claim to recover overpaid indemnities from a farmer falls within the arbitration provision of the federal crop insurance policy.¹⁷⁹ Any arbitration is subject to the requirements of Section 20(b) of the Common Crop Insurance Policy or similar provisions in other plans of insurance which provide that an arbitration must be initiated within one year of the determination with which the policyholder disagrees.¹⁸⁰ The policy further provides that the arbitration must be conducted in accordance with the rules of the American Arbitration Association ("AAA").¹⁸¹ The arbitration can

¹⁷⁴ *Id.* at § 400.681(b)(1)(ii).

¹⁷⁵ *Id.* at § 400.681(b)(1)(i) ("Only one written payment agreement is permitted per termination date. A written payment agreement may cover multiple crops provided they all have the same termination date . . .").

¹⁷⁶ *Id.* at § 400.681(a)(2)-(3) ("(a) Written payment agreements shall: . . . (2) Not exceed two years in duration; and (3) Not be modified, replaced, or consolidated after it has been executed in accordance with paragraph (b) of this section.").

¹⁷⁷ *Id.* at § 400.683(b)(1) ("(b) The duration of the period of ineligibility will be: (1) For ineligibility as a result of a delinquent debt, until the debt has been paid in full discharged in bankruptcy, or the person has executed a written payment agreement.").

¹⁷⁸ *Id.* at § 457.8.

¹⁷⁹ *Occidental Fire & Cas. Co. of N.C. v. Bush*, No. 2:19 CV 67 CDP, 2020 WL 2733811, at *5 (E.D. Mo. May 26, 2020).

¹⁸⁰ 7 C.F.R. § 457.8.

¹⁸¹ *Id.*; RISK MGMT. AGENCY, U.S. DEPT OF AGRIC., FINAL AGENCY DETERMINATION: FAD-007 (2001) ("[I]t is the agency's final determination that the provisions contained in

be administered though the AAA or conducted as a private arbitration pursuant to guidelines issued by the FCIC.¹⁸² Whether conducted through the AAA or privately administered, arbitrations can be costly and time consuming for a farmer. The costs connected to an arbitration proceeding include arbitrator's fees and expenses and administrative fees for proceedings administered by the AAA.¹⁸³ Although farmers can appear in an arbitration pro se, the complex issues surrounding indemnity overpayments often require farmers to retain counsel to assist with the arbitration. The cost of counsel can be an additional expense for the farmer who is already facing the possibility of paying an overpayment debt.

C. Ineligible Tracking System

The FCIP regulations pertaining to debts of policyholders provide a number of means for a farmer to contest overpayment determinations.¹⁸⁴ However, if a farmer eventually fails to make payment of the debt, the AIP submits the policyholder to FCIC for placement on the ITS. The ITS is a database of the FCIC that is designed to track individuals who are ineligible to participate in any program administered by the RMA, including private insurance programs reinsured by FCIC and authorized under the FCIA.¹⁸⁵ An individual is placed on ITS for failure to pay any

section 20 allow arbitration before any Alternative Dispute Resolution organization, provided the organization applies the rules of the AAA to the proceedings.”).

¹⁸² The FCIC established rules to provide an alternative process for filing a demand for arbitration solely for the purposes of allowing for arbitration other than the AAA. RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., MANAGER'S BULLETIN 12-003.1 (2012); RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., FINAL AGENCY DETERMINATION: FAD-282 (2018) (“FAD-007 expressly states that that arbitration is allowed before any alternative disputes resolution organization provided that the rules of the AAA are applied to the proceeding. In 2012, FCIC issued Manager's Bulletin MGR-12-003.1 for the purposes of establishing rules to provide an alternative process for filing a demand for arbitration solely for the purposes of allowing for arbitration with other than the AAA.”).

¹⁸³ MANAGER'S BULLETIN 12-003.1, *supra* note 182.

¹⁸⁴ See 7 C.F.R. § 400.679(a)(2) (2022); *id.* at § 400.677 (“Meaningful opportunity to contest means the opportunity for the insured to resolve disagreements with a decision by the insurance provider through requesting a review of the decision by the insurance provider, mediation, arbitration, or judicial review, as applicable.”).

¹⁸⁵ See *id.* at §§ 400.675-686.

delinquent debt as of the termination date,¹⁸⁶ or any other applicable due date.¹⁸⁷ The RMA considers a delinquent debt to be “a debt that is not satisfied on or before the date of delinquency,” such as the termination date, due date contained in a written payment agreement, or “due date specified in the notice to the person of the amount due.”¹⁸⁸ Amounts due as delinquent debts include claim indemnities, prevented planting payments, as well as replant payments that have been “found not to have been earned or that were overpaid.”¹⁸⁹

Placement on ITS renders a person unable to participate in the FCIP as well as other farm programs. Thus, if a policyholder does not reimburse an AIP for an overpaid claim following notification of such debt as required by ITS guidelines, the ultimate result is the policyholder being placed on ITS and precluded from participating in federal farm programs. Inability to participate in the FCIP often leads producers to cease farming as the producer has no risk safety net and financing for the farming operation cannot be obtained without assurances of such safety net.

V. FAIRNESS AND PUBLIC POLICY CONCERNS

The FCIP’s current regulatory scheme as it relates to claim correction and overpayment recovery presents serious concerns for policyholders. The lack of a time limitation for recovering indemnity overpayments and fault-based criteria renders the program stringent and inequitable.

As seen in the policy language and recognized in numerous FADs, there exists no specified time period in which an AIP may seek recovery of an indemnity overpayment from a policyholder. It is conceivable under the present regulations that a demand for repayment of indemnity could be presented even ten or more years

¹⁸⁶ *Id.* at § 457.8 (Termination date is defined as “[t]he calendar date contained in the Crop Provisions upon which your insurance ceases to be in effect because of nonpayment of any amount due us under the policy, including premium.”).

¹⁸⁷ *Id.* at § 400.679.

¹⁸⁸ *Id.* at § 400.677.

¹⁸⁹ *Id.* (“Other amounts due include, but are not limited to, indemnities, prevented planting payments, or replant payments found not to have been earned or that were overpaid, premium billed with a due date after the termination date for the crop year in which premium is earned, and any interest, administrative fees, and penalties on such amounts, if applicable.”).

after a claim was initially paid. The lack of a conclusion to a claim leaves an insured indefinitely susceptible to repayment requests and creates a sense of financial uncertainty for policyholders. Farmers cannot conclusively know that any amount paid by an AIP as indemnities for crop or revenue losses is a final determination. Rather, at any point in the future, monies represented to the farmer as properly payable under the terms and conditions of a crop policy may be required to be returned with interest. Individuals or entities no longer engaged in farming may be faced with repayment requests and possibly litigation or arbitration to collect the same years after leaving farming. In situations in which a policyholder is no longer actively farming, the monies received for claims many years prior have most commonly been spent and now no viable farming operation exists to generate monies for repayment.

The possibility of repayment requests years after initial claim payments also hampers a farmer's ability to contest an overpayment determination through arbitration. With the passage of time, the facts and circumstances surrounding the condition of a crop and the circumstances of a claim fade from a farmer's memory. The particulars as to a crop or claim years prior may be difficult to recall as there have been numerous intervening crops and possibly crop claims. Additionally, those involved in the issuance of the policy or the farming operation may no longer be available to recount details and provide pertinent information. As the records retention requirement is generally only three years following each crop year, documents relative to the crop and claim may not be available, leaving a farmer at a disadvantage in disputing the overpayment demand.¹⁹⁰

The second shortfall in FCIP regulations is the absence of any consideration of the cause or reason for a claim error in determining whether and to what extent a policyholder should be required to reimburse the incorrectly paid indemnity. The absence of any type of fault-based finding before seeking return of monies is not a reasonable approach. Section 21 of the Common Crop Insurance Policy makes clear that a knowing misrepresentation by a policyholder in submitting a certified yield requires the

¹⁹⁰ FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86 (According to the terms of the policy, a policyholder is required to maintain records for three years.).

policyholder to repay any indemnity paid pursuant to said yield.¹⁹¹ However, despite the inclusion of this specific policy language addressing a policyholder's wrongful conduct in the context of certified yields, the FCIC has clarified in numerous FADs that actual fault or wrongful conduct by a policyholder is not a prerequisite to recovering indemnity paid in error.¹⁹² The FCIC has specifically held that repayment is required in any instance of non-compliance with policy provisions and procedures no matter how innocent, inconsequential, or inadvertent the policyholder's conduct.¹⁹³ In FAD-140, the FCIC stated that correction of claims and repayment of indemnities is necessary without consideration of "who made the error."¹⁹⁴ Repayment is required by the policyholder no matter the individual or entity responsible for the error in calculation or payment of the original claim.¹⁹⁵ This means that a policyholder can comply with all policy terms and applicable procedures and diligently and competently report all data to its AIP to ensure its claim is processed appropriately and still be required at some unknown future time to repay monies received for its yield or revenue shortfall. The repayment mandate extends to situations in which a policyholder is completely unaware that the claim payment was not in complete compliance with the policy terms and governing procedures such that the policyholder has no reason to expect a subsequent repayment demand.

The goal of uniform delivery of the FCIP is to ensure that no policyholder receives more than allowed by the applicable policy and procedures.¹⁹⁶ This goal is necessary and appropriate as the payment of claims involves taxpayer funds.¹⁹⁷ However, consistent delivery must be weighed against the possible disastrous scenario faced by a policyholder when an AIP seeks repayment of claim

¹⁹¹ 7 C.F.R. § 457.8.

¹⁹² See, e.g., FINAL AGENCY DETERMINATION: FAD-085, *supra* note 109; FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86; FINAL AGENCY DETERMINATION: FAD-136, *supra* note 86; FINAL AGENCY DETERMINATION: FAD-140, *supra* note 121; FINAL AGENCY DETERMINATION: FAD-281, *supra* note 86; FINAL AGENCY DETERMINATION: FAD-287, *supra* note 86.

¹⁹³ See, e.g., sources cited *supra* note 192.

¹⁹⁴ FINAL AGENCY DETERMINATION: FAD-140, *supra* note 121.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; FINAL AGENCY DETERMINATION: FAD-281, *supra* note 86 (Payments must be made in accordance with applicable policy provisions.).

¹⁹⁷ ROSCH, *supra* note 5, at 4.

monies received years prior and believed to have been paid appropriately. The disruptive effect of overpayment recovery is especially apparent in situations in which an AIP offsets an overpayment debt from current year indemnities.¹⁹⁸ Such a situation places a farmer in financial chaos as the money to be paid for the current year's losses and required for the farmer to continue in business are diverted to pay an overpayment debt arising from a claim processed years earlier. The farmer is left without monies to pay current debts and without the safety net promised by the FCIP and needed for the survival of the farming operation. The objective of the FCIC is to deliver the FCIP to all insureds in a "fair and consistent manner."¹⁹⁹ However, the regulations and application of the same by the FCIC as it pertains to recoupment of overpayments in their present form fall far short of this goal.

VI. PROPOSAL AS TO REGULATORY MODIFICATIONS

To advance more equitable delivery of the FCIP, the FCIC should acknowledge the current faults in the overpayment processes and regulations and take appropriate action to remedy the inequities in the overpayment mechanisms. Revision of the current regulations would require publication by the FCIC of proposed changes in the Federal Register for comment from interested parties.²⁰⁰ This public participation in the rule-making process presents an opportunity for the FCIC to obtain additional information and data to craft a process that meets the challenges corrected claims and overpayment recovery pose to policyholders, AIPs, and the FCIC. Public input would be invaluable to the FCIC in assisting with balancing the interests of the various parties participating in the FCIP. Although a thorough review of the overpayment recovery process may reveal numerous areas for which revision is warranted, at a minimum, revisions are needed to define the time period in which overpayments can be sought from

¹⁹⁸ See 7 C.F.R. § 457.8 (2022).

¹⁹⁹ See *Federal Crop Insurance Corporation*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY, <https://www.rma.usda.gov/Federal-Crop-Insurance-Corporation> [https://perma.cc/P9AT-FFGD].

²⁰⁰ See 5 U.S.C. § 553(c).

policyholders and consideration of fault must be factored into overpayment recovery.²⁰¹

A. Definitive Statute of Limitations

The lack of any deadline or decisive time period by which an AIP is allowed to correct a claim and seek reimbursement of an overpaid claim is a void in the FCIP. Under the program's present structure, the only time limitation which provides any protection to a policyholder is the application of a state's statute of limitation to restrict the time period in which a court action can be filed by an AIP to recover overpaid monies. In some instances, a state's contractual statute of limitation could also preclude an AIP from filing an arbitration proceeding seeking monies due from a policyholder after the running of such statute.²⁰² However, such protection is of minimal value considering the various recovery methods AIPs have at their disposal through the FCIP. AIPs have the ability to recover sums owed by policyholder by offsetting such debt from monies owed from currently owed claims payments or other sums due to the policyholder. Reporting a policyholder to the FCIC for listing on the ITS is also a potent option available to AIPs to facilitate payments on the part of policyholders. Additionally, in many states an AIP can file an arbitration proceeding seeking to recover overpaid sums if such proceeding is filed within one year following the overpayment determination no matter how much time has expired since the payment of the original claim.²⁰³

Accordingly, modification to the regulations and policy terms is necessary to provide a policyholder with a specific time period during which an AIP can demand payment of an overpayment. Time limitations for recovering overpayments would render the FCIP more reasonable and provide much needed finality to the claim process.

²⁰¹ For consistency in program, the time limitation addressing recovery of overpayments from policyholders would have to be carried through to the regulations applicable to the time during which the FCIC could seek overpayments from AIPs.

²⁰² See *supra* note 146.

²⁰³ FINAL AGENCY DETERMINATION: FAD-280, *supra* note 151; Occidental Fire & Cas. Co. of N.C. v. Bush, No. 2:19 CV 67 CDP, 2020 WL 2733811, at *2-3 (E.D. Mo. May 26, 2020).

To accomplish this goal of equity and conclusiveness, a logical modification to the FCIP is to revise the policy language to include a set period in which recovery of overpayments may be sought from policyholders which corresponds with the record retention timetable set forth in Section 21 of the Common Crop Insurance Policy.²⁰⁴ Under the Common Crop Insurance Policy, a policyholder is required to retain its farming records for a period of three years following the year in which such records were applicable. The logical progression is to limit overpayment requests to the same three-year time period.

As the period for which a policyholder must retain records can be expanded, the language added to the regulations to address a time period in which an AIP can seek to recover overpayments could include a similar provision for enlargement. The language of Section 21(c) of the Common Crop Policy provides that an AIP or representative of the FCIC “may extend the record retention period beyond three years by notifying [the policyholder] of such extension in writing.”²⁰⁵ This same procedure could be applied to the three-year period for overpayment recovery for situations in which an AIP or the FCIC is conducting a review or audit of the policy in question and such investigation will extend beyond three years following the crop year in question. This notice would allow sufficient time for the AIP or the FCIC to complete any policy or claim review while providing the policyholder with knowledge that the claim in question is not final and the potential exists for a future reimbursement demand.

This proposal for a set three-year period to seek overpayments would not undermine the integrity of the FCIP. Review, audit, and revision of claims would remain an integral part of the FCIP. The only change afforded by such revision is to ensure such quality control measures are completed in a reasonable and definite time period. As this proposed revision includes a mechanism for extending the three-year period for seeking overpayments upon

²⁰⁴ This approach was rejected by the FCIC in FAD-106 as the interpretation submitted sought to tie the period for claim correct and indemnity only to instances in which the imposition of an assigned yield under Section 21(f)(1) of the Common Crop Insurance Policy would affect an indemnity, prevented planting payment, or replant payment. FINAL AGENCY DETERMINATION: FAD-106, *supra* note 86.

²⁰⁵ 7 C.F.R. § 457.8 (2022).

written notice to the policyholder, it accommodates situations in which additional time is required beyond three years for the AIP or FCIC to complete investigative work and make any necessary corrections to a policy or claim. The suggested modification tasks the AIPs and FCIC with responsibility to monitor the progress of claim reviews and ensure that reviews are completed timely and to properly notify policyholders if extensions are warranted. Any hardship or added expense incurred by AIPs or the FCIC as a result of modifying the regulations to require timely overpayment requests and monitoring investigations and reviews to appropriately notify policyholders of needed extensions is far outweighed by the enhancement to the program's equity and reasonableness.

B. Fault-Based Considerations

The question of whether fault considerations should be factored into the requirement for policyholders to reimburse AIPs for overpaid indemnities is a complex and complicated issue. Because the program is to be delivered consistently, it is necessary that all policyholders be held to the same requirements and receive the same benefits. If an error is made in a claim payment as the result of conduct of an AIP or the FCIC and the policyholder is not required to repay the amount received in error, then such policyholder has received claims monies to which it was not entitled and a benefit not afforded other policyholders. The integrity of the FCIP is undermined by such disparate treatment. However, to completely disregard a policyholder's role in a claim error also threatens the underpinnings of the FCIP which is to assist farmers and provide stability for their farming operations. Requiring a policyholder to reimburse improperly paid monies in situations in which the policyholder acted in complete good faith and in accordance with all requisite policy terms and procedures can be viewed punitive in nature. The policyholder received the claim funds from the AIP with the expectation that the payment was proper and, in most cases, expended the monies in the operation of its farming business. With no knowledge that the claim payment was incorrect and subject to repayment, the policyholder takes no steps to prepare for a repayment request. When an overpayment demand is presented years after the initial payment, it often places

the farmer in an untenable financial position. The reality that an unexpected repayment request causes many farmers to fall into dire financial circumstances warrants program revision to address circumstances in which a farmer has no responsibility for the claim error and resulting overpayment.

One option that the FCIC could explore would be to raise the tolerance for correction of overpayments to a higher amount in situations in which the policyholder has no culpability. The FCIC has built into its systems tolerances or amounts for which payments or calculations can be incorrect without requiring correction. The concept of forgiveness of errors could be applied to situations in which a policyholder had no responsibility for the claim being overpaid. The revised regulations could provide that a policyholder is not required to repay overpayments up to the sum of \$10,000 if the policyholder's conduct did not in any way cause or contribute to the overpayment. Although financial soundness concerns may require AIPs or the FCIC to account for overpayment sums, such accounting by the party responsible for the claim error would be a more equitable result considering the possible financial consequences to policyholders. The possibility that AIPs may share the repayment obligation up to the sum of \$10,000 where its conduct caused the overpayment could, as recognized by the Court in *Old Republic*, serve as an incentive for AIPs to more diligently process claim and avoid inputting and data collection errors.²⁰⁶

These contemplated revisions of the overpayment regulations would not apply to those circumstances in which a claim error is due to the submission of incorrect data or other wrongful conduct on the part of a policyholder. In any situation in which the policyholder possesses culpability for a claim overpayment, the entire amount of the overpayment should be properly recovered from the policyholder. Clearly, a policyholder should not benefit from its failure to provide accurate and correct information or to knowingly misrepresent information in connection with a claim.

CONCLUSION

The FCIP is crucial to the economic stability of the nation's farmers and ranchers. To ensure stability for all participants,

²⁰⁶ *Old Republic Ins. Co. v. FCIC*, 947 F.2d 269, 274 (7th Cir. 1991).

delivery of this federally-reinsured risk management program requires equitable and reasonable treatment of all participants. The present configuration of the FCIP's claim correction mechanism falls short of the program's goals. Under the current design, farmer participants are at risk of receiving demands for repayment of overpaid indemnities resulting from the correction of prior claims years after receiving such indemnities for yield and revenue losses. Further, reimbursement requests are made by AIPs without consideration of the policyholder's role in the claim error. The potential adverse consequences faced by policyholders under this current scheme requires revision of the regulations addressing claim errors. Changes should be implemented by the government administrator to make the regulations pertaining to claim correction and recovery of overpaid indemnities more equitable such that the goals of the FCIP are met and not thwarted by application of its own policies and procedures.

Although a review of all aspects of the overpayment process is warranted in light of the potential difficulty policyholders may face under present regulations, a shortfall which must be addressed is the lack of a definite time period during which an AIP can seek reimbursement of claim monies. Presently, there is no deadline or limitation for an AIP to seek recovery of incorrect claim payments. The opened-ended period for such debt recovery leaves participants with the potential of repayment requests years after claim monies have been expended. A reasonable approach is to revise the regulations so that the time in which overpayments can be requested corresponds with the record retention requirement under the current policy. Policyholders are required to maintain records pertaining to their farming operation for three years after the crop year. A three-year period to pursue overpayments from policyholders more equitably accommodates the needs of all program participants. This timetable provides sufficient time for the FCIC and AIPs to audit and review claims and complete necessary quality control processes. This timeframe gives farmers claim finality and the knowledge that at a time certain the potential for an overpayment demand terminates.

The second issue which requires scrutiny by the FCIC is what consideration should be given in the FCIP's regulations to a policyholder's lack of culpability in a claim mistake or error. If a

policyholder's conduct was of no consequence in the mistaken calculation or processing of a claim, it is appropriate that some level of forgiveness for such overpayment be incorporated into the program. Revisions to the regulations could accomplish this forgiveness by providing that a policyholder who had no role in a claim error and resulting overpayment would not be required to repay overpaid monies up to a designated level, such as \$10,000. Such debt forgiveness may cause some financial concerns for AIPs and the FCIC. However, this more holistic and less stringent approach to error correction has tremendous potential for improving the program from the farmer participant standpoint while more appropriately addressing claim processing errors.

The suggestions for change directed to the FCIC present unique challenges as balancing fair delivery of crop insurance products with the program's financial soundness must be achieved for the benefit of all participants. It would be in the best interest of all involved for the FCIC to study these program shortcomings and reach out to all interested parties, policyholders, AIPs, agents, and FCIC personnel, to formulate procedures and processes to strengthen delivery of the FCIP.