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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563-AB98

Common Crop Insurance Regulations, Tobacco Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes the Common Crop Insurance Regulations Tobacco Crop Provisions. The amended provisions removed the Quota Tobacco Crop Insurance Provisions, and revised the Guaranteed Tobacco Crop Insurance Provisions, and changed the title of the Guaranteed Tobacco Crop Insurance Provisions to Tobacco Crop Insurance Provisions. The intended effect of this action is to provide policy changes and clarify existing policy provisions to better meet the needs of insured producers. The changes will apply for the 2010 and succeeding crop years.

DATES: This rule is effective May 26, 2009.

FOR FURTHER INFORMATION CONTACT: Gary Johnson, Risk Management Specialist, Product Management, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, P.O. Box 419205, Stop 0812, Room 421, Kansas City, MO 64141-6205, telephone (816) 926-7730.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be non-significant for the purposes of Executive Order 12866 and, therefore, it has not been reviewed by the Office of Management and Budget (OMB).

Paperwork Reduction Act of 1995

Pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the collections of information in this rule have been approved by OMB under control number 0563-0053.

E-Government Act Compliance

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

Unfunded Mandates Reform Act of 1995

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

Executive Order 13132

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

Regulatory Flexibility Act

FCIC certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Program requirements for the Federal crop insurance program are the same for all producers regardless of the size of their farming operation. For instance, all producers are required to submit an application and acreage report to establish their insurance guarantees and compute premium amounts, and all producers are required to submit a notice of loss and

production information to determine the amount of an indemnity payment in the event of an insured cause of crop loss. Whether a producer has 10 acres or 1000 acres, there is no difference in the kind of information collected. To ensure crop insurance is available to small entities, the Federal Crop Insurance Act authorizes FCIC to waive collection of administrative fees from limited resource farmers. FCIC believes this waiver helps to ensure small entities are given the same opportunities as large entities to manage their risks through the use of crop insurance. A Regulatory Flexibility Analysis has not been prepared since this regulation does not have an impact on small entities, and, therefore, this regulation is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605).

Federal Assistance Program

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

Executive Order 12372

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

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. 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 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 economic impact on the quality of the human environment, health, or safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Background:

This rule finalizes changes to the Common Crop Insurance Regulations by removing the Quota Tobacco Crop Insurance Provisions and reserving § 457.156. FCIC also changes the Guaranteed Tobacco Crop Insurance Provisions by changing the title to Tobacco Crop Insurance Provisions. The American Jobs Creation Act of 2004 eliminated the tobacco quota support program and quota support price as administered by the Farm Service Agency (FSA). Prior to the American Jobs Creation Act of 2004, tobacco was sold in United States Department of Agriculture (USDA) auction warehouses. The prices paid by various auction warehouses by tobacco companies were based upon the quality and grade of the tobacco. Today the majority of tobacco is grown and sold under contract with a tobacco company. Therefore, a new environment exists for tobacco production and marketing and FCIC proposed to revise the tobacco policy to reflect this new environment. These changes were published by FCIC on Wednesday, May 23, 2007, as a notice of proposed rulemaking in the **Federal Register** at 72 FR 28895–28901. The public was afforded 60 days to submit written comments after the regulation was published in the **Federal Register**.

A total of 207 public comments were received from 131 commenters. The commenters were insurance providers, agents, an insurance service organization, attorneys, trade associations, producers, grower associations, agriculture credit associations, State agricultural associations, State departments of agriculture, and other interested parties.

Based on these public comments, FCIC will not require a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance, nor will an insured with a contract be allowed to insure tobacco using a contract price. FCIC recognized the proposed rule requiring a tobacco contract could deny insurance coverage to tobacco producers in regions where a tobacco contract is traditionally not offered, such as the New England States. Also, FCIC recognized the proposed rule requiring a tobacco contract could deny insurance coverage for small tobacco producers in other regions who cannot obtain a tobacco contract. Since contracts are no longer required, all provisions related to the contracting requirement are also removed. This would include the use of a base price to determine the price election, requirements to sign contracts prior to the acreage reporting date and quality

adjustment based on contractual standards.

Due to statutory language contained in the Food, Conservation, and Energy Act of 2008, FCIC removed the “basic unit” definition in section 1 of the proposed rule and will retain the current “basic unit” definition in the current Guaranteed Tobacco Crop Provisions and Quota Tobacco Crop Provisions in this final rule.

The public comments regarding the proposed rule and FCIC’s responses to the comments are listed below identifying issues and concerns, and the changes made, if any, to address the comments as follows:

Comment: A commenter requested a clarification on the definition of “average price received” in section 1. It appears the “average price received” is defined as the average price received for sold production. Also, this “average price received” is used in the calculation of quality adjustment in section 12(e)(4). Based on the definition, one would have to wait to quality adjust any tobacco until the production has actually been sold. In addition to waiting until the production is sold, it would not be possible to quality adjust mature appraised tobacco production. A change to the definition or an additional definition needs to be considered.

Response: FCIC has removed the definition of “average price received” and will retain the existing policy definition of “average value,” which includes the average value of any production for the applicable tobacco type divided by the appraised pounds and/or harvested pounds without regard to discounts or incentives. Retention of the “average value” definition allows quality adjustment to be performed without waiting for the producer to sell the insured tobacco.

Comment: A commenter questioned the phrase “without regard to discounts or incentives” in the definition of “average price received” whether this means “excluding” discounts or incentives.

Response: FCIC has removed the definition of “average price received” and will retain the existing policy definition of “average value”. Therefore, discounts or incentives are not applicable.

Comment: Comments were received opposing the definition of “basic unit” in section 1 and the provisions in section 2 that limits units by tobacco type. A few commenters agreed with the proposed rule “basic unit” definition to limit units by tobacco type, but stated FCIC should allow optional and enterprise units by the Special Provisions where appropriate. Other

commenters stated division by basic or optional units by farm serial number (FSN) should be retained because of the occurrences of drastic weather patterns on one farm and not the other. Other commenters stated tobacco growers should be treated the same as producers of other Category B crops, which allows optional units by FSN or by section.

Response: Due to statutory language in the Food, Conservation, and Energy Act of 2008, FCIC has removed the “basic unit” definition in section 1 of the proposed rule and will retain the “basic unit” definition in the current Guaranteed Tobacco Crop Provisions and Quota Tobacco Crop Provisions in this final rule. Section 2 of these Crop Provisions allows optional and enterprise units if authorized in the Special Provisions.

Comment: A commenter suggested that if the definition of “commercial tobacco producer” is necessary, it should be included in the definition of “tobacco contract” in reference to “producer or entity”.

Response: FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Therefore, FCIC has removed the definition of “commercial tobacco producer” and all references to this term in this final rule.

Comment: A commenter stated the definition of “contract price” needs to be clarified because tobacco contracts often contain multiple prices based on the type of tobacco grade and level of tobacco stalk position.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Therefore, FCIC removed the definition of “contract price” and all references to this term in this final rule.

Comment: A commenter stated the definition of “minimum acreage” needs clarification because the tobacco contract specifies the total pounds of tobacco to be delivered by the producer, plus the contract is not county specific.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Therefore, FCIC removed the definition of “minimum acreage” and all references to this term in this final rule.

Comment: A few comments were received regarding the definition of “price election.” The commenters asked how would the price election be determined if an insured had multiple contracts for the same type of tobacco

within the unit. Another comment stated the definition does not recognize that contract prices will vary by the type and grade of tobacco.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Since contracts are no longer required, contract prices will no longer be used. Therefore, FCIC removed the definition of "price election" in this final rule. The definition of "price election" contained in the Basic Provisions is applicable to these Tobacco Crop Insurance Provisions.

Comment: A commenter noted FCIC deleted the definition of "production guarantee" and recommends FCIC should retain the old "production guarantee" definition in the policy and add the term "acres" multiplied by the approved yield, multiplied by the coverage level percentage selected.

Response: Tobacco is an actual production history (APH) crop. Therefore, the definition of "production guarantee (per acre)" in the Basic Provisions is applicable to the Tobacco Crop Insurance Provisions and is consistent with other APH crops. No change has been made.

Comment: A commenter questioned whether the definition of "tobacco bed" is relevant to today's current tobacco farming operations.

Response: Tobacco beds are still used by tobacco producers in their farming operations. Therefore, the definition of "tobacco bed" is left in this final rule.

Comment: A commenter recommended revising the definition of "tobacco company" to include the terms "tobacco company," "commercial marketing association" and "tobacco handler" to reduce two other definitions into one.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Therefore, FCIC removed the definitions of "tobacco company," "commercial marketing association," and "tobacco handler" and all references to these terms in this final rule.

Comment: A few comments were received regarding the definition of "tobacco contract". A commenter recommended revising the definition of "tobacco contract" to state, "A written agreement between the insured producer or entity and a tobacco company." This will clarify the insured must be a party to the underlying contract. Further, FCIC should revise subsections (a) and (b) accordingly. This

revision is consistent with section 6(a), which requires the entity named on the tobacco contract to be the same as the entity named on the application for insurance. Another commenter stated tobacco companies will only give one contract name on their paperwork/checks, even if a share exists. The proposed policy language and elsewhere needs additional review to address the problem of a tobacco contact being in one entity name but other entities (not named on the tobacco contract) also having a share they wish to insure. A commenter stated subsection (b) of the definition of "tobacco contract" includes the phrase, "(an option to purchase is not a commitment)" [to purchase the tobacco pounds specified]. This language was a problem before for another contract crop and suggested revising the language to comply with other contract crops.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for insurance. Therefore, FCIC removed the definition of "tobacco contract" and all references to this term in this final rule.

Comment: A commenter stated, although tobacco types are defined in the Special Provisions, the definition of "Tobacco types" should identify the various types of tobacco insured under the policy and include the caveat, not all types are insurable in all States.

Response: It would be more confusing to add the insurable types to the policy because, as the commenter states, not all types are produced in all states. Further, new types may be developed that would require a revision to the policy to be effective. By including only the insurable tobacco types in a county in the Special Provisions, which are provided annually to the producer, there should be no confusion in any county what types are insurable. Therefore no change has been made.

Comment: Comments were received opposing the proposed rule in section 2 to limit units by type. A few commenters agreed with the unit division to limit basic units by type; but stated, if FCIC intends on limiting units by type, the inclusion of a Special Provision of Insurance statement will provide FCIC the flexibility if it later decides in certain instances, optional units or enterprise units are appropriate. Other commenters stated the unit division for basic and optional units by FSN contained in the current Guaranteed and Quota Tobacco Crop Provisions should be retained. Other commenters stated tobacco growers should be treated the same as producers

of other Category B crops, which allows for optional units by FSN or by section.

Response: Due to statutory language contained in the Food, Conservation, and Energy Act of 2008, FCIC removed the "basic unit" definition in section 1 of the proposed rule and will retain the current "basic unit" definition in the current Guaranteed Tobacco Crop Provisions and Quota Tobacco Crop Provisions in this final rule. Section 2 of these Crop Provisions allows optional and enterprise units by the Special Provisions. However, the program integrity problems that revising the definition of "basic unit" was intended to address still exist. The loss ratio remains high in many areas and there have been issues with producers shifting production between units and between policies. FCIC is examining other changes to the policy that will prevent such program vulnerabilities.

Comment: A few commenters stated the term "sufficient acreage" as referenced in section 3(b) is a defined term and should be included in section 1. A commenter asked why FCIC is imposing a set number of "sufficient acres" on an insured deemed to have acreage for producing their contract poundage and then reduce the production guarantee if the insured did not plant enough acreage to fill their contract. This language penalizes the insured for planting fewer acres than the required number of acres which would be expected to produce the contracted amount of production. This would be an issue between the insured and the tobacco company if the insured was not able to produce the number of pounds required to fulfill the contract. The commenter also states this provision is internally inconsistent and does not provide the basis upon which one can determine whether the acreage is sufficient. Another commenter suggested FCIC to reconsider section 3 and recommend using language in the Loss Adjustment Manual (LAM) to address how the total production guarantee is computed for all other contracted crops.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for insurance. Therefore, there is no longer a "sufficient acreage" requirement and FCIC has removed all references to this term in this final rule.

Comment: In reference to section 3(a), a commenter asked if Cigar Binder and Cigar Wrapper are tobacco types insured under the Tobacco Crop Insurance Provisions, and whether each insured tobacco type is insured as a separate crop, which is designated by a "crop

code” on the actuarial documents. Also, if a producer intends on insuring three types of tobacco, the commenter asks if the tobacco producer should be required to list all types separately on the application, will the tobacco producer be allowed to add a tobacco type at the acreage reporting date so long as the tobacco type is reported on their application, or with reference to the provision in subsection 7(a), are tobacco producers only allowed coverage if the specific tobacco type is timely applied for by sales closing date.

Response: Cigar Binder and Cigar Wrapper and other insurable tobacco types listed on the Special Provisions are insured as separate crops under these Tobacco Crop Insurance Provisions. The tobacco producer must elect each tobacco type being insured by the sales closing date. The tobacco producer cannot add a tobacco type to the acreage report if the tobacco producer did not elect to insure the tobacco type by the sales closing date.

Comment: A few comments were received regarding the requirement in section 6(a), which states the insured is to provide a copy of all tobacco contracts to the approved insurance provider on or before the acreage reporting date and the name on the tobacco contract match the insured entity name. The commenters ask whether it is FCIC’s intention the approved insurance provider, rather than the agent as designee/affiliate, must review each contract for this requirement.

Response: As stated above, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Therefore, no tobacco contracts have to be submitted by the insured producer.

Comment: A few commenters questioned why section 6(b) is requiring a copy of a written lease agreement, if applicable, between the insured and any landlord or tenant identifying all persons sharing in the crop and must be provided on or before the acreage reporting date.

Response: There have been issues in the past with the proper identification of persons with a share in the crop when leases have been involved and the amount of such shares. FCIC added this provision to assist insurance providers in properly determining and verifying who has an insurable interest and that the reported shares in the insured crop are accurate.

Comment: A commenter stated the following: (1) The use of the phrase, “elect to insure” in section 7(a) means an insured is not required to insure each

tobacco type the insured grows in the county; (2) It is unclear when the insured must report all tobacco (insured or insurable) types produced in a county; and (3) Further, if the tobacco producer grows tobacco that is not insurable, i.e., not grown under a tobacco contract, the commenter asked whether the insured must report this tobacco too.

Response: (1) FCIC agrees the use of the phrase, “elect to insure” in section 7(a) means a tobacco producer is not required to insure all insurable tobacco types the tobacco producer grows in the county. (2) and (3) Section 6 of the Basic Provisions requires producers to report all acreage of the crop in the county, including insurable and uninsurable on or before the acreage reporting date. Since each type is considered a separate crop, all insurable and uninsurable acreage of each type the producer elects to insure must be reported. However, as stated above, the provisions regarding the requirement to have a contract with a tobacco company have been removed. Therefore, failure to have a contract no longer makes the tobacco uninsurable.

Comment: A commenter stated the provision in section 7(a) provides insureds the option to elect which types of tobacco to insure by treating each tobacco type as a separate crop, and presumably a separate administrative fee would apply to each type insured. The commenter recommended the provisions in section 7(a) be revised to require all insurable tobacco types grown by the insured to be the crop insured. This would be similar to the Dry Beans Crop Provisions which requires all dry bean types to be the crop insured.

Response: FCIC has always allowed tobacco types to be insured as separate crops with separate administrative fees. This provision simply provides a clarification of the existing requirement. This proposed change would be a substantive change for which the public was not provided the opportunity to comment. Therefore, no change can be made.

Comment: Comments were received opposing the proposed rule that only tobacco grown under a tobacco contract is eligible for insurance. Commenters stated FCIC’s contention that the majority of tobacco is grown under contract with a tobacco company is not accurate as to all types of tobacco in all regions. Also, the commenter stated this requirement will adversely impact tobacco producers in the New England States, substantially all of whom grow the tobacco types for which tobacco contracts are not traditionally offered.

A commenter disagreed with FCIC’s certification in the Regulatory Flexibility Act that the proposed rule regulation will not have significant impact on a substantial number of small entities. The requirement of a tobacco contract will effectively disqualify a significant number of Cigar Binder, Filler and Wrapper tobacco producers. For this reason the commenter believes FCIC is not in compliance with the Regulatory Flexibility Act. Some commenters agreed with the proposed rule requirement to insure only tobacco grown under contract for the majority of tobacco acreage, but FCIC should allow insurance for certain tobacco types grown without a tobacco contract via the Special Provisions.

Response: As stated above, for many of the reasons cited by these commenters, FCIC is no longer requiring a tobacco producer to have a tobacco contract with a tobacco company for their tobacco to be eligible for crop insurance. Therefore, FCIC removed all references to this term “tobacco contract” in this final rule.

Comment: A comment recommended adding language to section 8(b) to read, “Failure to obtain plants for replanting is not an insurable reason not to replant”.

Response: The definition of “practical to replant” in the Basic Provisions states it will be considered “practical to replant” regardless of the availability of plants or seed. Thus, if the tobacco producer fails to obtain tobacco plants for any reason and does not replant the damaged acreage when it is practical to replant such acreage is not insured. Therefore, no change has been made.

Comment: A few comments were received regarding changing the end of insurance period date in section 9(f) for Flue-Cured tobacco in the States of Alabama, Florida, Georgia, North Carolina, and Virginia, and moving dates for all other tobacco types to 15 days earlier than currently indicated.

Response: FCIC based the end of the insurance periods on agronomic conditions in those States. However, if the commenter has information to support changes to the end of insurance periods; such information can be submitted to the appropriate Risk Management Agency (RMA) Regional Office for consideration. The current policy provisions allow for exceptions to the end of insurance period dates by the Special Provisions. No change has been made.

Comment: A commenter questioned in reference to section 10, who can, or is going to be required to prove or disprove a fire was caused by lightning. Voltage surges and short circuits can

leave the same physical evidence as lightning in mechanical devices. Lightning striking in the middle of a tobacco field or tobacco barn will leave no physical evidence of its cause.

Response: In accordance with section 14(e) of the Basic Provision, the burden of proof is on the insured to show that the loss was due to an insurable cause. This means to not only establish that a fire occurred, the insured must also establish that the fire was due to a naturally occurring event (*i.e.*, lightning). Since fire can be caused by other naturally occurring events other than lightning, FCIC removed the terms "if caused by lightning." As long as the fire can be proven to be from any naturally occurring event, it is an insurable cause of loss.

Comment: One commenter asked when representative samples are required in reference to section 11. Both the Basic Provisions and the Tobacco Crop Insurance Provisions indicate representative samples are required, but neither one says when.

Response: Section 11(b) states that if a notice of damage is filed the stalks and stubble must be left intact. However, it does not state when samples must be left for unharvested acreage. Section 11(a) is revised to require representative samples be left for any field that will not be harvested.

Comment: A commenter stated section 12(a) refers to the commingling of production. The proposed rule permits insurance for basic units by type only. So, when there is commingled production by type, the commenter asks whether the commingled production is allocated on a pro rata basis. In the absence of optional units, FCIC must clarify the concept of commingled production.

Response: Section 12(a) references the loss will be determined on a unit basis. Due to statutory language contained in the Food, Conservation, and Energy Act of 2008, FCIC removed the "basic unit" definition of section 1 of the proposed rule and will retain the current "basic unit" definition in the current Guaranteed Tobacco Crop Provisions and Quota Tobacco Crop Provisions in this final rule. Optional and enterprise units may be allowed by the Special Provisions. FCIC will also retain the current language in the section 12(a)(1)(2) of the Guaranteed Tobacco Crop Provisions that addressed how commingled production is handled for basic and optional units in this final rule and makes these Tobacco Crop Provisions consistent with other crop policies. If production is commingled, the production will be allocated to the liability on the harvested acreage for

each unit and in accordance with procedures approved by FCIC.

Comment: A commenter stated if section 12(c) does not define "production guarantee (per acre)," an approved insurance provider cannot enforce section 12(c)(1)(i).

Response: The definition of "production guarantee (per acre)" in the Basic Provisions is applicable to these Tobacco Crop Insurance Provisions. Therefore, there should be no difficulty in applying section 12(c)(1)(i).

Comment: A commenter recommended adding a provision in section 12(c) stating production to count will be at least 35 percent of all unharvested acreage. This provision is warranted due to the costs for harvesting tobacco which would not be incurred for an unharvested crop.

Response: FCIC did not propose changes regarding production to count on unharvested acreage so the public was not afforded an opportunity to provide comments. Therefore, no change can be made as a result of this comment.

Comment: A commenter stated section 12(c)(1)(i)(E) is inconsistent with section 11. Accordingly, this provision should be amended to read, "Of any type of tobacco when the stalks and stubble have been destroyed in violation of section 11(b)".

Response: FCIC has made the change for clarification.

Comment: A few commenters stated they were not in favor of the addition of prevented planting coverage for tobacco and recommend that it be removed.

Response: Prevented planting is a legitimate peril faced by tobacco producers. These provisions provide coverage for tobacco producers whose acreage is prevented from being planted due to an insured cause of loss. These provisions make the tobacco crop insurance program consistent with other crop programs. Therefore, FCIC will retain the prevented planting coverage provisions.

In addition to the changes made above, FCIC will remove the paragraph immediately preceding section 1 which refers to the order of priority of provisions in the event of conflict. This information is contained in the Basic Provisions; therefore, it is duplicative and should be removed in the Tobacco Crop Insurance Provisions.

FCIC has also added a new section 12(e) that allows claims to be settled based on appraised production even if the acreage has been harvested unless we determine that the harvested production is inconsistent with appraised production and the producer

cannot prove that an insurable cause of loss occurred between the appraisal and the end of the insurance period that could account for the reduction in production. Once tobacco has been harvested and removed from the field it is placed in a curing barn and loses its identity. This makes it difficult to determine the total production to count at the unit level. FCIC realizes this is a program vulnerability. This language allows approved insurance providers to settle tobacco claims based on appraised tobacco production in the field and helps ensure accuracy in determining production to count for claims purposes. The appraised production will be determined in accordance with loss adjustment procedures approved by FCIC. If the claim is settled on the appraised production, redesignated section 12(f) regarding quality adjustment is not applicable, since quality adjustment on tobacco can only be determined after the tobacco is cured.

List of Subjects in 7 CFR Part 457

Crop insurance, Tobacco, Reporting, and recordkeeping requirements.

Final Rule

■ Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR part 457 as follows:

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 1. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

■ 2. Revise § 457.136 to read as follows:

§ 457.136 Tobacco crop insurance provisions

The Tobacco Crop Insurance Provisions for the 2010 and succeeding crop years are as follows:

FCIC policies:

UNITED STATES DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies: Tobacco Crop Insurance Provisions

1. Definitions.

Average value. For appraised production, the value of such production divided by the appraised pounds for the tobacco types. For harvested production, the value of such production divided by the harvested pounds for the tobacco type.

Basic unit. In lieu of the definition in the Basic Provisions, a basic unit is all

insurable acreage of an insurable type of tobacco in the county in which you have a share on the date of planting for the crop year and that is identified by a single FSA farm serial number at the time insurance first attaches under these provisions for the crop year.

Harvest. Cutting or priming and removing all insured tobacco from the unit.

Hydroponic plants. Seedlings grown in liquid nutrient solutions.

Late planting period. In lieu of the definition in section 1 of the Basic Provisions, the period that begins the day after the final planting date for the insured crop and ends 15 days after the final planting date, unless otherwise specified in the Special Provisions.

Planted acreage. In addition to the definition contained in the Basic provisions, land in which tobacco seedlings, including hydroponic plants, have been transplanted by hand or machine from the tobacco bed to the field.

Pound. Sixteen ounces avoirdupois.

Priming. A method of harvesting tobacco by which one or more leaves are removed from the stalk as they mature.

Tobacco bed. An area protected from adverse weather in which tobacco seeds are sown and seedlings are grown until transplanted into the tobacco field by hand or machine.

Tobacco types. Insurable tobacco as shown on the Special Provisions of Insurance.

2. Unit Division.

A basic unit will be determined in accordance with the definition of basic unit contained in section 1 of these Crop Provisions. Optional and enterprise units may be allowed by the Special Provisions of Insurance.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities.

In addition to the requirements of section 3 of the Basic Provisions, you must select only one price election percentage and coverage level for each tobacco type designated in the Special Provisions of Insurance that you elect to insure.

4. Contract Changes.

In accordance with section 4 of the Basic Provisions, the contract change date is November 30 preceding the cancellation date.

5. Cancellation and Termination Dates.

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are March 15.

6. Report of Acreage.

In addition to the requirements of section 6 of the Basic Provisions, you must provide a copy of any written lease

agreement, if applicable, between you and any landlord or tenant. The written lease agreement must:

(1) Identify all other persons sharing in the crop; and

(2) Be submitted to us on or before the acreage reporting date.

7. Insured Crop.

(a) In accordance with section 8 of the Basic Provisions, the insured crop will be each tobacco type you elect to insure and for which a premium rate is provided by the actuarial documents:

(1) In which you have a share;

(2) That meets all rotation requirements on the Special Provisions of Insurance.

(b) You will be considered to have a share in the insured crop if you retain control of the acreage on which the tobacco is grown and you are at risk of loss.

8. Insurable Acreage.

In addition to the provisions of section 9 of the Basic Provisions, we will not insure any acreage that is:

(a) Planted in any manner other than as provided in the definition of "planted acreage" in section 1 of these Crop Provisions, unless otherwise provided by the Special Provisions of Insurance or by written agreement; or

(b) Damaged before the final planting date to the extent that the majority of producers in the area would normally not further care for the tobacco crop, unless such crop is replanted or we agree that replanting is not practical.

9. Insurance Period.

In lieu of the provisions of section 11 of the Basic Provisions, coverage ends at the earlier of:

(a) Total destruction of the tobacco on the unit;

(b) Removal of the tobacco from the unit where grown, except for curing, grading, and packing;

(c) Abandonment of the crop on the unit;

(d) Final adjustment of the loss on the unit; or

(e) The calendar date for the end of the insurance period, which is the date immediately following planting and designated by tobacco types and states (or as otherwise stated on the Special Provisions of Insurance) as follows:

(i) Flue cured—November 30 in North Carolina and Virginia;

(ii) Flue cured—October 31 in Alabama, Florida, Georgia, and South Carolina;

(iii) Burley—February 28 in all states;

(iv) Dark air cured—March 15 in

Kentucky, Tennessee, and Virginia;

(v) Fire cured—April 15 in Kentucky, Tennessee, and Virginia;

(vi) Cigar Binder, Cigar Filler, and Cigar Wrapper—April 30 in

Connecticut, Massachusetts, Pennsylvania, and Wisconsin; and

(vii) Maryland type—May 15 in Maryland and Pennsylvania.

10. Causes of Loss.

In accordance with the provisions of section 12 of the Basic Provisions, insurance is provided only against the following causes of loss that occur during the insurance period:

(a) Adverse weather conditions;

(b) Fire;

(c) Insects, but not damage due to insufficient or improper application of pest control measures;

(d) Plant disease, but not damage due to insufficient or improper application of disease control measures;

(e) Wildlife;

(f) Earthquake;

(g) Volcanic eruption; or

(h) Failure of the irrigation water supply due to a cause of loss specified in sections 10(a) through (g) that also occurs during the insurance period.

11. Duties In The Event of Damage or Loss.

(a) In accordance with section 14 of the Basic Provisions, you must maintain representative samples of each unharvested tobacco crop (type) for our inspection. The representative samples must be at least 5 feet wide (at least two rows), and extend the entire length of each field in the unit. The samples must not be harvested or destroyed until after our inspection.

(b) If you have filed a notice of damage, you must leave all tobacco stalks and stubble in the unit intact for our inspection. The stalks and stubble must not be destroyed until we give you written consent to do so or until 30 days after the end of the insurance period, whichever is earlier.

12. Settlement of Claim.

(a) We will determine your loss on a unit basis. In the event you are unable to provide separate acceptable production records:

(1) For any optional unit, we will combine all optional units for which such production records were not provided; or

(2) For any basic units, we will allocate any commingled production to such units in proportion to our liability on the harvested acreage for the units.

(b) In the event of loss or damage covered by this policy, we will settle your claim by:

(1) Multiplying the number of insured acres by your applicable production guarantee (per acre);

(2) Multiplying the result of section 12(b)(1) by your price election;

(3) Multiplying the total production to count determined in section 12(c) by your price election;

(4) Subtracting the result of section 12(b)(3) from the result of section 12(b)(2); and

(5) Multiplying the result of section 12(b)(4) by your share.

For example:

You have 100 percent share in a unit to produce 3,000 pounds of Burley tobacco, a production guarantee of 1,950 pounds (APH yield of 3,000 pounds \times .65 coverage level), you plant 1.0 acre, your price election is \$1.50 per pound, and your production to count is 500 pounds. Your indemnity would be calculated as follows:

(1) 1.0 acre \times 1,950 pounds production guarantee = 1,950 pounds;

(2) 1,950 pounds \times \$1.50 price election = \$2,925.00 value of the production guarantee;

(3) 500 pounds production to count \times \$1.50 price election = \$750.00 value of the production to count;

(4) \$2,925.00 value of the production guarantee—\$750.00 value of the production to count = \$2,175.00; and

(5) \$2,175.00 \times 1.000 share = \$2,175.00 indemnity.

(c) The total production to count (in pounds) from all insurable acreage on the unit will include:

(1) All appraised production as follows:

(i) Not less than the production guarantee for acreage:

(A) That is abandoned;

(B) Put to another use without our consent;

(C) That is damaged solely by uninsured causes;

(D) For which you fail to provide records of production, that are acceptable to us; or

(E) For any type of tobacco when the stalks and stubble have been destroyed without our consent under section 11(b);

(ii) Production lost due to uninsured causes.

(iii) Potential production on insured acreage you intend to put to another use or abandon, if you and we agree on the appraised amount of production. Upon such agreement, the insurance period for that acreage will end when you put the acreage to another use or abandon the crop. If agreement on the appraised amount of production is not reached:

(A) If you do not elect to continue to care for the crop, we may give you consent to put the acreage to another use if you agree to leave intact, and provide sufficient care for, representative samples of the crop in locations acceptable to us (The amount of production to count for such acreage will be based on the harvested production or appraisals from the samples at the time harvest should have

occurred. If you do not leave the required samples intact, or fail to provide sufficient care for the samples, our appraisal made prior to giving you consent to put the acreage to another use will be used to determine the amount of production to count.); or

(B) If you elect to continue to care for the crop, the amount of production to count for the acreage will be the harvested production, or our reappraisal if additional damage occurs and the crop is not harvested; and

(2) All harvested production from insurable acreage.

(d) Once we agree the current year's tobacco has no average value due to an insured cause of loss, you must destroy it, and it will not be considered production to count. If you refuse to destroy such tobacco, we will include it as production to count and value it at the applicable price election.

(e) In lieu of section 15(b) of the Basic Provisions, if we have conducted an appraisal of your insured crop and we determine that the harvested production you report is inconsistent with the appraised production and you cannot prove that an insurable cause of loss occurred between the appraisal and the end of the insurance period that can account for the reduction in production, your claim will be settled based on the appraised production on insured acreage, even if you have harvested the acreage. If we settle your claim based on your appraised production, section 12(f) regarding quality adjustment is not applicable.

(f) Mature tobacco may be adjusted for quality deficiencies when production has been damaged by insurable causes.

(1) You must contact us before any tobacco is disposed of so we can inspect the tobacco to determine the extent of the damage.

(2) Our inspection will be used to determine whether the average value is reasonable. Based on amount of damage determined during the inspection, if the average value is:

(i) Reasonable, such average value will be used to determine the quality adjustment in section 12(f)(5);

(ii) Unreasonable, we may adjust the average value used to calculate the quality adjustment in section 12(f)(5).

(3) If you dispose of any production without giving us the opportunity to have the tobacco inspected, you will not receive a quality adjustment for such tobacco, regardless of the average value of the production.

(4) Production to count will only be reduced if the average value for damaged tobacco is less than 75 percent of your tobacco price election. You must provide us with records that are

acceptable to us which clearly shows the number of pounds, price per pound, and the quality of such tobacco.

(5) Any reduction in the production to count will be determined by:

(i) Dividing the average value per pound as determined by us in accordance with section 12(f)(2) of these Crop Provisions by your applicable price election; and

(ii) Multiplying this result by the number of pounds of damaged production.

13. Late Planting.

In lieu of late planting provisions in the Basic Provisions regarding acreage initially planted after the final planting date, insurance will be provided for acreage planted to the insured crop after the final planting date as follows:

(a) The production guarantee (per acre) for acreage planted during the late planting period will be reduced by:

(1) One percent per day for the 1st through the 10th day; and

(2) Two percent per day for the 11th through the 15th day;

(b) The premium amount for insurable acreage planted to the insured crop after the final planting date will be the same as that for timely planted acreage. If the amount of premium you are required to pay (gross premium less our subsidy) for acreage planted after the final planting date exceeds the liability on such acreage, coverage for those acres will not be provided (no premium will be due and no indemnity will be paid for such acreage).

14. Prevented Planting.

Your prevented planting coverage will be 35 percent of your production guarantee for timely planted acreage. Additional prevented planting coverage levels are not available for tobacco.

§ 457.156 [Removed and Reserved]

■ 3. Remove and reserve § 457.156.

Signed in Washington, DC, on March 19, 2009.

William J. Murphy,

Acting Manager, Federal Crop Insurance Corporation.

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