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Via email Michael.Hand@usda.gov

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Via email Cynthia.Simpson@rma.usda.gov

Cynthia Simpson
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Re: Proposed Amendments to 7 C.F.R. Part 400, Subpart R, Administrative Remedies for Non-Compliance

Dear Mr. Hand and Ms. Simpson:

Rain and Hail, L.L.C. appreciates the opportunity to comment on the proposed rule entitled Administrative Remedies for Non-Compliance published May 18, 2007, 72 Fed. Reg. 27981 *et seq*. The proposed rule would amend 7 C.F.R. Part 400, Subpart R, and would be issued under the Federal Crop Insurance Act, as amended, 7 U.S.C. § 1501 *et seq*. ("FCIA"). These comments are in addition to, and are intended to supplement, the comments submitted by National Crop Insurance Services, Inc., which we are hereby incorporating by reference as though fully set forth herein.

Our concerns with the structure of the rule fall into nine categories.

I. The Retroactive Application of the Rule Must Be Removed.

The proposed Rule purports to make the Rule retroactive with respect to sanctions for false or inaccurate statements. The law is clear that retroactivity is disfavored and generally violates the *ex post facto* clause of the U.S. Constitution. [1] U.S. Const. art. I, § 9, cl. 3; *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). The rule against retroactivity applies to compliance actions, and prohibits compliance actions when the affected party lacked advance fair notice of the prohibited conduct. *U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998). Further, the Due Process Clause's protection of fair notice and repose[2] are compromised by retroactive legislation. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

The proposed rule and FCIC's explanation of it are inconsistent as to its retroactivity. In the preamble, FCIC states, "The provisions of this rule will not have a retroactive effect." 72 Fed. Reg. at 27981. However, proposed rule § 400.451(d) actually states: "With respect to a false or inaccurate statement, this rule is applicable to any act or omission occurring after June 20, 2000 * * *." Because it is unclear as to its retroactivity, the proposed rule violates Executive Order 12988.

Retroactivity to June 20, 2000, is unlawful under Title 28, United States Code. Section 2462 precludes proceedings "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, * * * [beyond] five years from the date when the claim first accrued, * * *." 28 U.S.C. § 2462. This limitations period applies to both judicial and administrative proceedings. *See 3M Co. v. Browner*, 17 F.3d 1453, 1455-58 (D.C. Cir. 1994). Thus, as written, § 400.451(d) is unlawful since it seeks to attach liability to conduct occurring seven years ago.

Finally, an Approved Insurance Provider ("AIP") is entitled to notice "within 3 years after the end of the insurance period during which the error, omission, or failure is alleged to have occurred" under 7 U.S.C. § 1515(h)(b)(2), and the current SRA limits each AIP's record retention obligations to three years from the later of two events (the annual settlement date for a reinsurance year, or the end of the insurance period for an eligible crop insurance contract) except in instances where FCIC has given notice during the three-year period that "specified records [are to be retained] for a longer period" or a policyholder has an unsatisfied debt. *See* SRA §§ IV.G.4. through 6. Further, the Agricultural Risk Protection Act of 2000 ("ARPA") limited FCIC to one renegotiation of the SRA. Pub. L. 106 – 224, Title I, § 148, June 20, 2000,

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[1] While the Rule claims it is remedial in nature, the Rule also states fines and disqualifications are in addition to any other actions taken by FCIC or others under the terms of the crop insurance policies, other statutes and regulations. The U.S. Supreme Court has labeled the treble damage provision of the Federal False Claims Act as "punitive". *See, Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Mounding additional sanctions on top of those recoverable under the False Claims Act and other statutes is clearly punitive.

[2] The present Rule seeks to punish past conduct for which affected persons lacked adequate, advance notice of the prohibited conduct. This is because many of the amendments are substantive in nature, rather than procedural. For example, the Rule, for the first time, defines "willful and intentional" conduct. The definition deviates from the common law meaning of those terms, and specifically nullifies a showing of malicious intent, an element of common law fraud.

114 Stat. 394, which occurred in 2004. The proposed changes to the disqualification and civil fine rules, on a retroactive basis back to ARPA's enactment, specifically violate 7 U.S.C. § 1515(h)(b)(2) and constitutes an unauthorized renegotiation of the SRA.

II. The Cumulative Penalty Provisions Must Be Removed.

The proposed rule's cumulative penalties violate the Excessive Fines provision of the Eighth Amendment to the United States Constitution. U.S. Const. amend. VIII. Moreover, cumulative penalties are not allowed under 7 U.S.C. § 1515(h). The sanctions for false information, added by ARPA, are "one or more of the sanctions described in paragraph (3)." 7 U.S.C. § 1515(h)(1). Willful and intentional failures "to comply with a requirement of" FCIC are "subject to one or more of the sanctions described in paragraph (3) * * *." 7 U.S.C. § 1515(h)(2). Therefore, while the sanctions in paragraph (3) potentially are cumulative, there is no statutory basis for punishing the same conduct under other regulations or agreements. Accordingly, any fair reading of the FCIA precludes cumulative penalties in addition to those found in 7 U.S.C. § 1515(h)(3).

Finally, the proposed rule should exclude penalties and suspensions for conduct that is already addressed in the SRA. The SRA is the result of negotiated rule making and its terms can not be amended retroactively nor changed prospectively without Congressional authorization. We believe the proposed rule should be clarified to clearly establish that the penalties and fines provided therein are not cumulative and that if the FCIC has existing contract-based or regulatory remedies, the proposed rule is expressly inapplicable.

III. Imputation of Conduct Should Be Removed or Restricted.

FCIC has no statutory basis for imputing liability. The FCIA does not authorize imputation. While FCIC proposes to impute liability under 7 U.S.C. § 1515(h), no portion of that subsection permits it. Thus, all provisions relating to the imputing of conduct should be stricken.

While we believe the imputation of conduct should be removed, if RMA proceeds with its inclusion, the scope of potentially imputable conduct must be narrowed.

These proposed provisions ignore the general rule that the liability of an independent contractor may not be imputed to a corporation, *see* 41 Am. Jur. 2d Independent Contractors § 2 (2007), and it imposes an impossible standard on large AIPs. As currently written, the fact that a corporation has implemented a system to ensure compliance with FCIC requirements does not limit its liability for the actions of its independent contractors, "affiliates" and employees. Moreover, under the proposed regulations a corporation with thousands of lower-level employees and independent contractors could be held liable and subject to disqualification for the rogue actions of a single independent contractor or any other individual "associated" with the company, even if that individual acts in violation of company policy unbeknownst to the company.

Absent evidence that Congress intended to impose such harsh strict liability standards on corporations, of which there is none, the proposed regulations cannot stand. *See R Ranch Market Corp. v. United States*, 861 F.2d 236, 239 (9th Cir. 1988) (striking down regulation which permits disqualification without requiring proof that employees acted on behalf of ownership; "we are reluctant to infer that Congress intended to impose such a sanction on an unknowing employer absent a clear indication that such was Congress' intent").

At a minimum, the scope of potentially imputable conduct must be narrowed to only impute conduct of 1) officers and directors and 2) conduct of employees that is specifically ratified or endorsed by the entity. Moreover, the entity must be given "credit" for having practices that attempt to prevent rule violations and encourage "whistleblower complaints" of suspected violations. Thus, if an entity addresses the allegedly "bad" conduct by its employee or independent contractor after its officers have been made aware of the situation, it should not be subject to any of the penalties set forth under this Rule.

IV. Definitions Must Be Added and Clarified.

An agency acts arbitrarily and capriciously if it fails to articulate a standard for a permitted or disallowed action, or refuses to define the criteria it applies. *Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Dir. 1999). Fundamental fairness also requires that regulations be clear so that a person of common intelligence need not guess at its meaning or application. *Boyce Motor Lines. V. United States*, 342 U.S. 337, 340 (1952). The current draft of the Rule does not adequately define certain key terms that will provide adequate notice of prohibited conduct in the future.

The Rule does not define such key words as "waste" and "abuse". If FCIC intends to impose sanctions for persons engaged in "waste" and "abuse," the terms must be adequately defined to provide notice of the prohibited conduct.

Intentional and willful acts should be defined to make clear that the actor knew the falsity of the statement when made and intended that FCIC act on the basis of the intentional and willful misstatements.

The Rule also defines "requirement of FCIC" to include not only regulations and policy provisions, but also procedures and other written communications from FCIC. The Rule does not address the potential conflicting nature of these requirements. It also imposes the same sanctions for violating non-binding, informal procedures and communications as for violating binding rules and regulations. Neither the law nor the Administrative Procedures Act accords the same type of formality, equality or deference to these types of agency decisions.

While the phrase "other written communications from FCIC" should be removed as ambiguous and amorphous, it must at least be restricted to require that the FCIC Official sending the "other written communication" have express authority to send the communication and require that the communication be sent to the AIP's designee for the specifically stated type of communication.

V. The Rule Impermissibly "Waters Down" the Materiality Requirement.

The Rule substantially deviates from Congress' expressed intent of only sanctioning material violations. Specifically, 7 U.S.C. §1515(h)(3) only permits sanctions for persons who have committed a "material" violation of the Act. The Rule defines "violation" without any reference to the materiality of the conduct.

In fact, the Rule states a single "violation" can be the basis for disqualification and states violations that result in over $100,000.00 of overpayments may be the basis for imposition of the maximum penalty. In this regard, many AIPs pay several hundred million dollars in claims in a normal year. If an AIP ONLY pays $100 million in claims in a year, this $100,000.00 threshold is only 0.1% of the indemnities paid, which is immaterial and statistically insignificant by any measure. Thus, materiality must remain an individualized decision based upon all relevant facts and should have a threshold that is statistically significant based upon all of the program business the entity services.

VI. The Burden of Proof Should Be Based Upon "Clear and Convincing" Evidence.

Fraud requires "clear and convincing" proof to establish liability. This is a higher standard than the "preponderance of the evidence" standard required under the proposed rule. Since fraud connotes intentional misconduct, the party charging that conduct is required to prove it to a greater certainty than other facts. *See United States v. McInteer***,** 470 F.3d 1350, 1357 (11th Cir. 2006), *citing* Fed. R. Civ. P. 9(b) (applying fraud requirements to allegations under False Claims Act), and *United States v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002), *quoting United States v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562, 567-68 (11th Cir. 1994)("a plaintiff must plead facts as to time, place, and substance of the defendant's alleged fraud, specifically the details of the defendant's allegedly fraudulent acts, when they occurred, and who engaged in them.")

It is improper to reduce the burden of proof for the government when alleging fraud. Intent and willfulness also must be established by clear and convincing evidence.

VII. The Restriction on Participation After Disqualification Must Recognize Contractual and Statutory Rights that Precede the Date of Disqualification.

The Rule prohibits a person who is disqualified from receiving "any monetary or non-monetary benefit from a program administered under the [FCIA]." While this requirement seems consistent with the intent of the statute, contractual and statutory rights that precede disqualification should not be affected.

For example, many entities have deferred compensation and employee stock ownership plans (ESOPs) for the benefit of their employees. While these plans are part of the normal compensation paid to the individual employee, the terms of the plan may require deferral of payment for many years after termination and the values are sometimes based upon the

employer's stock price at a future date. Each employee has a right in these plans that cannot be taken away by the employer, even if the employee is terminated for cause, and most of these plans are subject to Federal ERISA requirements.

If an employee is disqualified, the employer is still obligated to honor these pre-existing obligations. The Rule should clarify that honoring contractual and statutory obligation that precede the date of disqualification does not subject an entity to potential disqualification for indirectly providing a "monetary or non-monetary benefit from a program administered under the [FCIA]."

VIII. Authorization to Seek Disqualification Should Be Required From the FCIC Board of Directors.

Disqualification is more than a "scarlet letter". From the standpoint of an insured, disqualification would pose a significant financial hardship that could be catastrophic if a significant uninsured crop loss occurred during the period of disqualification. Moreover, from the standpoint of an agent, who specializes in crop insurance, or an AIP, disqualification is tantamount to a death sentence. Once an agent or AIP is forced out of the program, whether for one year or five years, as a practical matter, they will not be able to reenter the market and successfully compete for business.

In light of the serious nature of the issues to be prosecuted under the proposed rule and the magnitude of the remedies set forth in the proposed rule, initiation of disqualification proceedings should require more than the simple action of the Manager of the FCIC filing a complaint. Instead, the Manager should be required to obtain authorization from the FCIC Board of Directors before filing a complaint. Other regulatory schemes with similarly serious consequences for their sanctions require such a separate step in order to preserve due process and the overall fairness of the procedure. For example, the Federal Deposit Insurance Act, which provides authority for civil penalties imposed by all Federal banking agencies, established a three-tiered penalty system for violations of laws, rules, and conditions imposed in writing based on the severity of the violation. *See* 12 U.S.C. § 1818(i). Imposition of those penalties is by the FDIC Board of Directors. 12 C.F.R. § 308.132 *et seq.*

IX. Lack of Required Notice to Policyholders.

Since at least 1998, paragraph 27 of the common policy has contained the following language relative to false statements: "You may be subject to remedial sanctions in accordance with 7 C.F.R. part 400, subpart R."

Presently 7 C.F.R. § 454(a) provides as follows:

Any person who willfully and intentionally provides any materially false or inaccurate information to FCIC or to any approved insurance provider reinsured by FCIC with respect to an insurance plan or policy issued under the authority of the Federal Crop Insurance Act, as

amended, (7 U.S.C. § 1501 et seq.) may be subject to a civil fine of up to an amount specified in § 3.91(b)(7) of this title and disqualification from participation in:

> (1) The catastrophic risk protection plan of insurance and the noninsured crop disaster assistance program for a period not to exceed two (2) years; or
>
> (2) Any plan of insurance providing protection in excess of that provided under the catastrophic risk protection plan of insurance for a period not to exceed ten (10) years.

Since January 23, 2005, 7 C.F.R. § 3.91(b)(7) has provided as follows:

> (7) Federal Crop Insurance Corporation--
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> (i) Civil penalty for any person who willfully and intentionally provides any false or inaccurate information to the Federal Crop Insurance Corporation or to an approved insurance provider with respect to an insurance plan or policy that is offered under the authority of the Federal Crop Insurance Act, codified at 7 U.S.C. 1506(n)(1)(A), has a maximum of $11,000.
>
> (ii) Civil penalty for any person who willfully and intentionally provides any false or inaccurate information to the Federal Crop Insurance Corporation or to an approved insurance provider with respect to an insurance plan or policy that is offered under the authority of the Federal Crop Insurance Act, or who fails to comply with a requirement of the Federal Crop Insurance Corporation, codified at 7 U.S.C. 1515(h)(3)(A), has a maximum of the greater of: The amount of pecuniary gain obtained as a result of the false or inaccurate information or the noncompliance; or $11,000.

Prior to January 23, 2005, 7 C.F.R. § 3.91(b)(7) read as follows:

> Federal Crop Insurance Corporation. Civil penalty for any person who willfully and intentionally provides materially false or inaccurate information to the Federal Crop Insurance Corporation or an approved insurance provider reinsured by the Federal Crop Insurance Corporation, codified at 7 U.S.C. 1506(n)(1)(A), has a maximum civil penalty of $10,000.

Based upon the language of 7 C.F.R. § 454(a) and the timing of the amendments to 7 C.F.R. § 3.91, it does not appear that producers have been provided the required notice of the sanctions available under 7 U.S.C. § 1515(h)(3) as required by 7 U.S.C. § 1515(h)(5). First, as noted above 7 C.F.R. § 454(a), in its present form, does not notify producers that they can be disqualified for up to five years from the specific programs listed in 7 U.S.C. § 1515(h)(3)(B). Second, prior June 23, 2005, 7 C.F.R. § 3.91, as incorporated by reference in 7 C.F.R. § 454(a), did not provide producers notification that the potential fine for providing false information could be greater than $10,000 if the pecuniary gain obtained as a result of the false information was greater than $10,000. Thus, it appears the regulations published by FCIC prior to June 23,

2005, failed to satisfy the notice requirement contained 7 U.S.C. § 1515(h)(5) and only partially satisfied the notice requirement after this date. Therefore, it also appears that 7 U.S.C. § 1515(h)(5) would not be satisfied if the sanctions listed in the proposed amendments to 7 C.F.R. Part 400 were applied retroactively to June 20, 2000.

Should you have any questions regarding our view of these matters, please contact me at (515) 559-1510.

Sincerely,

Mike Davenport
Vice President and General Counsel

Md/LT Hand re Administrative Remedies