consignment will not be allowed to enter the United States.

(d) *Commercial consignments.* Baby squash and baby courgettes from Zambia may be imported in commercial consignments only.

(e) *Phytosanitary certificate.* Each consignment of baby squash and baby courgettes must be accompanied by a phytosanitary certificate of inspection issued by the Zambian NPPO with an additional declaration reading as follows: ''These baby squash or baby courgettes were produced in accordance with 7 CFR 319.56–48.''

(Approved by the Office of Management and Budget under control number 0579–0347)

Done in Washington, DC, this 12th day of December 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–30080 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 400, 407, and 457

RIN 0563–AB73

General Administrative Regulations; Administrative Remedies for Non-Compliance

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes the General Administrative Regulations; Administrative Remedies for Non-Compliance to add additional administrative remedies that are available as a result of the enactment of section 515(h) of the Federal Crop Insurance Act (Act) (7 U.S.C. 1515(h)), make such other changes as are necessary to implement the provisions of section 515(h) of the Act, and to clarify existing administrative remedies.

DATES: *Effective Date:* This rule is effective January 20, 2009.

FOR FURTHER INFORMATION CONTACT: For further information, contact Cynthia Simpson, Director, Appeals, Litigation and Legal Liaison Staff, Risk Management Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., Room 4619, Stop 0806, Washington, DC 20250, telephone (202) 720–0642.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and budget (OMB) has determined that this rule is non-significant for the purposes of Executive Order 12866 and, therefore, it has not been reviewed by OMB.

Paperwork Reduction Act of 1995

This rule does not constitute a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

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) 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, 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. All similarly situated participants are required to comply with the same standard of conduct contained in the Act, the regulations published at 7 CFR chapter IV, the crop policies, and the applicable procedures. For example, any producer, whether growing 10 acres or 10,000 acres, submits the same documentation for insurance and for a claim. All agents, whether selling and servicing five policies or a hundred and five policies, are required to perform the same tasks for each. The consequences for failure to comply with the standards of conduct are also the same for all participants and other persons regardless of the size of their business. A Regulatory Flexibility Analysis has not been prepared since this regulation does not have a significant impact on a substantial number of 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 proposed 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.

Environmental Evaluation

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

Background

This rule finalizes changes made to 7 CFR part 400, subpart R, Administrative Remedies for Non-Compliance that was published by FCIC on May 18, 2007, as a notice of proposed rulemaking in the **Federal Register** at 72 FR 27981–27988. In the Administrative Remedies for Non-Compliance, FCIC proposed to include provisions in its regulation that were enacted with the passage of the Agricultural Rick Protection Act of 2000 (ARPA). Through the enactment of section 515(h) of the Act in ARPA, Congress significantly strengthened FCIC's ability to combat fraud, waste and abuse by establishing a strong system of administrative actions that are now applicable to all participants in the Federal crop insurance program.

Now, producers, agents, loss adjusters, insurance providers and their employees and contractors, and any

other persons who willfully and intentionally provide any false or inaccurate information to FCIC or to an approved insurance provider with respect to a policy or plan of insurance or willfully and intentionally failed to comply with a requirement of FCIC are subject to remedial administrative remedies. In addition to disqualification from participating in the Federal crop insurance program, producers will be disqualified from receiving benefits under other various United States Department of Agriculture programs. In addition, civil fines have been increased. Now a civil fine can be imposed for each violation and the civil fine is the greater of $10,000 or the amount of pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of FCIC.

The public was afforded 30 days to submit written comments after the regulation was published in the **Federal Register**. A total of 128 comments were received from 17 commenters. The commenters were seven insurance services organizations, one grower association, four insurance providers, two law firms, one public citizen, one agent, and one government employee. The comments received and FCIC's responses are as follows:

Comment: One commenter stated that FCIC has taken significant actions since the implementation of the Act in 2000 to reduce fraud, waste and abuse of the crop insurance program. The commenter strongly supports FCIC's efforts to combat waste, abuse and fraud in FCIC programs and believes that those who knowingly and willfully abuse the program must be punished.

Response: FCIC will continue to take such actions as are necessary to improve program integrity.

Length of Comment Period

Comment: Several commenters stated that the thirty-day comment period was inadequate. The commenters asked that the comment period be extended by sixty days because of the serious nature of the proposed rule and in order for other affected individuals to comment and to fully understand the legal exposure they could face under the proposed rule.

Response: FCIC usually gives 30 or 60 day comment period depending on the rule. Because this rule is implementing a law that has been in effect since June 2000, FCIC made the decision not to extend the comment period.

Section 400.451 General

Comment: A commenter stated that ''waste'' and ''abuse'' are neither offenses defined by statute or regulation and that FCIC never has defined in a regulation, contract, policy, or procedure, the conduct or actions that constitute ''waste'' and ''abuse.'' The commenter asked that FCIC define ''waste'' and ''abuse.''

Response: Combating fraud, waste and abuse are the obligation of all Government agencies. The imposition of these sanctions is one means to combat fraud, waste and abuse. However, there are numerous other actions taken by FCIC to combat fraud, waste and abuse. However, in the context of this rule, fraud, waste and abuse are not grounds for the imposition of sanctions. Sanctions are imposed for violations of section 515(h) of the Act and other relevant statutory provisions. The terms fraud, waste and abuse are not used except in the context of a policy statement. Therefore, inclusion of separate definitions may confuse persons into believing that sanctions can be imposed for allegations of fraud, waste and abuse. This is supported by many of the following comments which suggest that fraud must be proven before a sanction under section 515(h) of the Act can be imposed. No change has been made.

Comment: A commenter stated that a person may abuse the crop insurance program without providing false information or violating FCIC procedures.

Response: The crop insurance program may still be abused by a person without providing false information or violating FCIC procedures. Abuse can occur in any number of ways and FCIC continuously reviews the program to tighten program requirements to prevent other types of abuse. However, this rule is intended to preclude the specific abuses associated with the providing of false or inaccurate information and failure to comply with a requirement of FCIC.

Comment: A commenter stated § 400.451(b) is overbroad as it expands the rule to persons outside of the crop insurance program. For example, an accountant knowingly falsifies an insured's Schedule F and an insurance provider overpays on an Adjusted Gross Revenue claim based on that Schedule F, the commenter asked whether the accountant is subject to the sanctions of § 400.454. The commenter asked that FCIC precisely identify the persons to be covered by subpart R.

Response: Section 515(h) of the Act specifically refers to a producer, agent, loss adjuster, insurance provider or ''other person'' that intentionally provides false or inaccurate information to FCIC or to an approved insurance provider with respect to a policy. In the example given, an accountant who knowingly provides false information on a Schedule F may be subject to sanction under § 400.454. However, unless the accountant is otherwise participating in the crop insurance program, disqualification would not be applicable. However, the accountant could be subject to civil fines. Section 515(h) of the Act was intended to sanction anyone who willfully and intentionally provides false or inaccurate information, not just direct participants. Therefore, its scope could encompass any person. For example, an elevator operator who provides false weight receipts or the seed dealer who falsifies a sales receipt would also be subject to sanctions under section 515(h) of the Act.

Comment: A commenter stated that by making the proposed rule applicable to ''any other persons who may provide information to a program participant,'' the FCIC was improperly expanding the scope of persons subject to administrative sanctions beyond what is authorized in the Act. In addition, the phrase, ''any other persons who may provide information'' was imprecise and, therefore, subject to ambiguous construction.

Response: As stated above, section 515(h) of the Act authorizes the scope of the sanction to apply to other than just producers, agents, loss adjusters or insurance providers. Congress expressly refers to ''other persons.'' Therefore, the scope of this rule is authorized and can apply to virtually anyone who may provide information that is false or inaccurate. Therefore, there is no ambiguity. However, as stated above, persons who may not be participating in the crop insurance program or other United States Department of Agriculture (USDA) programs would likely be subject to civil fines instead of disqualification.

Comment: A commenter is concerned that the proposed rule exposes too many innocent persons to the threat of civil fines and sanctions without focusing on the real wrong-doers. The rule proposes to cover a vast number of ''participants in the federal crop insurance program'' as well as any other persons who may provide information to a program participant. In addition, the definitions of affiliate, participant, person, and principal are broad and far reaching and may subject innocent persons to the threat of civil fines and sanctions. The commenter recommends these

definitions exclude those not actively involved in the submission, purchase or receipt of benefits of crop insurance policies.

Response: In order to be subject to the sanctions under section 515(h) of the Act, FCIC must be able to prove that the person willfully and intentionally provided false or inaccurate information or willfully and intentionally failed to comply with a requirement of FCIC. Therefore, it is not possible for the sanctions to be imposed on innocent persons. Further, the standards for the imputing of improper conduct are the same as that applied in debarments and ensures that only those persons responsible for the violation are sanctioned. As an additional check and balance, persons have the right to contest any sanction before it is imposed before an Administrative Law Judge. This will ensure that the burden of proof has been met.

Comment: Several commenters stated that the proposed rule made the rule retroactive in effect. In the preamble, FCIC states, ''the provisions of this rule will not have a retroactive effect.'' However, the proposed rule at § 400.451(d) states that the ''failure to comply with a requirement'' is applicable as of the date the proposed rule become effective. But, the rule with respect to a false or inaccurate statement is applicable to any act or omission occurring after June 20, 2000. The rule and FCIC's explanation of it are inconsistent as to its retroactivity. Because Congress did not grant FCIC the authority to promulgate retroactive rules, they can only be applied prospectively. To impose penalties for past conduct is improper and unlawful. Because it is unclear as to its retroactivity, the rule violates Executive Order 12988. The proposed rule should be changed so that the regulation clearly has no retroactive effect. The commenters asked that the rule become effective on the date rule becomes final.

Response: FCIC has clarified when the provisions of this rule become effective. There is confusion because section 515(h) of the Act, which contains the sanction provisions applicable to false or inaccurate information that are the subject of this rule, have been in effect since June 2000. Further, since that date, those statutory provisions have been used to impose sanctions against persons that have provided false or inaccurate information after June 2000 because the statutory provisions were not in conflict with the regulation sanction provisions that existed during that time. Therefore, false or inaccurate information provided between June 20, 2000, and the date this rule becomes effective will continue to be processed under section 515(h) of the Act and the regulations in effect prior to the date this rule becomes effective. For false or inaccurate information provided after the date this rule is effective will be processed under this rule.

Section 400.452 Definitions

A. In General

Comment: A commenter stated that the proposed rule expanded the definition of ''person'' and added 17 more definitions which apply only to this subpart. FCIC does not describe the sources of many of the definitions.

Response: FCIC expanded § 400.452 to include terms used in the proposed rule. Most of the definitions will refer to terms and definitions contained in other regulations, such as the Common Crop Insurance Policy Basic Provisions to ensure consistency. With respect to the other definitions, FCIC has defined the terms in such a manner as to achieve the purpose of this rule. The rulemaking procedures do not require that administrative agencies document the source of all of its information.

Comment: Several commenters make statements regarding removing (1) vague and ambiguous language, and (2) defining terms FCIC normally or routinely uses but has failed to define, such as ''benefit,'' ''fraud,'' ''waste and abuse,'' ''wrongdoing,'' and ''knows or has reason to know.'' A commenter stated that the word ''benefit'' is used in the regulation but not defined. The proposed rule suggests benefit is not limited to monetary gains. The commenters also stated that 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. One commenter also stated that FCIC should add the definition of ''knows or has reason to know'' contained in 7 CFR 1.302(o) to the proposed rule and make conforming changes to the balance of the proposed rule consistent with the text of this added definition.

Response: FCIC has revised the rule to add definitions of ''benefit,'' and ''knows or has reason to know.'' ''Benefit'' is defined as any advantage, preference, privilege or favorable consideration a person receives from another person in exchange for certain acts or considerations. A benefit may be monetary or non-monetary. The definition of ''knows or should have known'' will be the same as that contained in 7 CFR 1.302(o). Further, this rule does not sanction persons for ''fraud, waste or abuse.'' This rule imposes sanctions for violations of section 515(h) of the Act and other statutory provisions. To the extent that such statutory provision includes some elements of fraud, waste and abuse, the prohibited conduct will be specified therein.

B. Revisions to Specific Definitions

1. Affiliate

Comment: A commenter stated that FCIC's definition of ''affiliate'' is inconsistent with the Standard Reinsurance Agreement's (SRA) definition of ''affiliate.'' The commenter stated that the definition should be amended to mirror the SRA's focus on the control of management of the book of business.

Response: While the narrower definition is appropriate for the SRA, such a narrow definition is not appropriate for this rule, which is intended to determine who a person is for the purposes of this rule. Under the definition of ''person'' affiliates are also considered as part of the person if the requirements are met. The main reason for defining the term ''affiliate'' in this rule is to put everyone on notice that the term may be used differently in this rule than it is in other rules or agreements. No change has been made.

Comment: A commenter stated that the definition of ''affiliate'' is broad and ambiguous because it uses the term ''same or similar management'' when describing a presumably affiliated business entity. The commenter suggested that the ambiguity can be cured by using either the accepted definition under federal banking and securities law or alternatively by substituting the term ''identical or substantially identical management'' for ''same or similar management.''

Response: The definition was obtained from the definition of ''affiliate'' in USDA's suspension and debarment regulations published at 7 CFR part 3017. Since a disqualification has a similar effect to a debarment, it was determined that the treatment of affiliates and the definition should be the same for both remedial sanctions. No change has been made.

2. Participant

Comment: A commenter stated that the definition of ''participant'' was unduly broad in that it contained no materiality or other threshold test for determining the extent of benefit that makes a person a participant. As written, someone who does not have a substantial beneficial interest for purposes of the crop insurance policy could be subject to a sanction.

Response: Any person, regardless of his interest for purposes of the crop

insurance policy, who willfully and intentionally makes a false statement or fails to comply with a requirement of FCIC, may be subject to sanction. As stated above, such person may have no connection to the crop insurance program other than to provide certain information that is then provided to FCIC or the insurance provider. If such person willfully and intentionally provides false or inaccurate information, such person can be subject to the sanctions provided in this rule even if they derive no benefit from the crop insurance program. Materiality does not require monetary damages. The false information can be material if it adversely affects program integrity, including damage to the program's reputation. Since the gravity must be considered in determining whether to impose a sanction, FCIC has revised the provision to include a materiality requirement and added a definition of ''material.''

Comment: A commenter suggested that a materiality test, percent interest or monetary level of benefit be used as a threshold for defining ''participant.''

Response: As stated above, materiality does not require monetary damages or benefits. The false information can be material if it adversely affects program integrity, including damage to its reputation. Further, FCIC has revised the provisions to include a materiality requirement when the gravity of the violation is taken into consideration and defined the term ''material.''

3. Preponderance of the Evidence

Comment: A commenter stated that intentional, willful conduct and fraud are subject to special rules regarding proof in civil litigation. Fraud requires ''clear and convincing proof to establish liability.'' This is a higher standard than that required under the proposed rule by a preponderance of the evidence. Because fraud connotes intentional misconduct the party charging that conduct is required to prove it to a greater certainty. The commenter stated further that it is improper to reduce the burden of proof by the government when alleging fraud. No justification has been given that alters longstanding rules applicable to civil litigation. Furthermore, intentional and willful acts should be defined to make clear that the person knew the falsity of the statement when made and intended that FCIC act on the basis of the intentional and willful misstatements. Intent and willfulness also must be established by clear and convincing evidence.

Response: Section 515(h) of the Act does not require a showing of fraud. The standard is whether a person willfully and intentionally provided false or inaccurate information. The standard of proof was derived from USDA's suspension and debarment regulations because of the similarity of the effects of disqualification and debarment. Further, debarment must also show evidence of willfulness and knowingly, which is similar to the standards contained in section 515(h) of the Act. The causes for debarment need only be established by a preponderance of the evidence. In addition, this is not a civil litigation. This is an administrative action taken to protect the integrity of the program and misuse of taxpayer dollars. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. Section 515(h) of the Act does not contain any requirement that the person who provides the false information intended for FCIC to rely on such information. FCIC does not have to prove fraud. FCIC only needs to prove that a person willfully and intentionally provided false or inaccurate information or failed to comply with a requirement of FCIC.

Comment: A commenter stated that the definition of ''preponderance of the evidence'' needs to be revised or clarified to clearly state that FCIC has the burden of proof to produce evidence to meet its preponderance of the evidence.

Response: FCIC has revised § 400.454(a) to clarify that FCIC bears the burden of proving that the person willfully and intentionally provided false or inaccurate information or failed to comply with a requirement of FCIC.

4. Principal

Comment: A commenter stated that the definition of ''principal'' was broad, and includes persons whom the law does not recognize as a principal. In addition, while the concept of ''control'' is defined by case law, the concept of ''critical influence'' is not. Theoretically, a data processor has ''critical influence'' because the incorrect entry of data may have a significant impact on liability. The commenter asked whether FCIC contends that such persons are ''principals'' under the rule. The commenter also questioned who is a ''key employee'' and what are the indicia of a ''key employee.'' The commenter asked who will determine whether an employee is a ''key employee''—the insurance provider or FCIC?

Response: The definition of principal has been broadened in this rule because insurance providers have routinely delegated many of their obligations and responsibilities to persons who would not normally have the ability to direct the activities of the business. The definition of ''principal'' is intended to encompass such persons who may not have the title, but who have functional influence or control over some activities of the insurance provider. This delegation is not unique to the insurance providers. Insureds may also delegate their obligations to other persons, such as farm managers. The use of the term ''key employee'' is intended to be a catch-all term for employees that have primary management or supervisory responsibilities or have the ability to direct activities or make decisions regarding the crop insurance program. FCIC would initially decide whether an employee is a key employee based upon the person's responsibilities in the entity when determining whether to file a complaint. However, it would be an Administrative Law Judge that will ultimately decide whether the employee is subject to sanction under this rule.

Comment: A commenter said that the definition of ''principal'' was broad and ambiguous. This problem is magnified by the use of ''key employee'' (an undefined term with no commonly accepted legal understanding) and ''critical influence on or substantive control over the activities of the entity'' (also undefined and not susceptible to common legal interpretations from other bodies of law). The commenter suggested that FCIC could cure the ambiguity to defining ''principal'' by citing position names commonly used in business and limiting the scope of the definition to only certain functions with the organization. The commenter suggested the following definition for ''principal'': ''A person who is an officer, director, owner or partner within an entity with primary management or supervisory responsibilities over the entity's Federal crop insurance activities.''

Response: FCIC is attempting to avoid being locked into titles because they do not fit all the business entities that can be involved directly or indirectly with the crop insurance program. This is why the term ''key employee'' has been added. This definition is trying to identify those persons who perform or exert some type of management or control or decision making over at least some activities related to the crop insurance program. Those are the persons who will be treated as principals. Given the practice of delegation that occurs in the insurance and farming industries, the definition would be too limiting to name the specific titles.

5. Requirement of FCIC

Comment: Several commenters stated that the definition of ''requirement of FCIC'' is overly board, ambiguous, and vague. As written, the rule could include informal communications, such as e-mails, from RMA personnel writing without actual approval by supervisory or managerial personnel with the agency. The definition does not define the form in which the written communication must take. Thus, a requirement of FCIC could take the form of any writing, including an e-mail. The commenter asked what types of communications are included in ''other written communications.''

Response: FCIC has revised the definition to specify that requirements will be contained in formal communications such as regulations, procedures, policy provisions, reinsurance agreements, memorandums, bulletins, handbooks, manuals, findings, directives or letters signed or issued by persons who have been provided the authority to issue such communications on behalf of FCIC. The definition is also revised to clarify that e-mails are not formal communications although they can be used to transmit formal communications.

Comment: Several commenters stated that the definition of ''Requirement of FCIC'' does not specify from whom within the FCIC the written communication may come. The written communication could come from any FCIC employee, regardless of status or level, to anyone associated with the insurance provider.

Response: As stated above, the provision as been revised to specify that written communications that will qualify as a ''requirement of FCIC'' will be originated by a FCIC employee that has been delegated the authority to issue such communications on behalf of FCIC. The current delegations are found at *http://www.rma.usda.gov/news/managers/2000/PDF/mgr-00–016–1.pdf, http://www.rma.usda.gov/news/managers/2000/PDF/mgr-00–016–2.pdf, http://www.rma.usda.gov/news/managers/2000/PDF/mgr-00–016–3.pdf*, and these delegations include documents that would qualify as ''requirements of FCIC.'' To the extent that other persons may also receive delegated authority, other bulletins containing such delegation will be issued.

Comment: A commenter stated that no ''other written communication from FCIC'' should qualify as a ''Requirement of FCIC'' unless FCIC has sent the communication to the insurance provider's designated recipients. The commenter pointed out that the SRA, in Appendix II, paragraph 6, requires each insurance provider to designate persons with authority to receive written communications from FCIC.

Response: To the extent that the ''requirement of FCIC'' is in the form of letters and other individual communications, such documents will be provided to the designated recipients of the insurance providers. However, documents such as regulations, procedures, bulletins, reinsurance agreements, etc. may also be considered requirements of FCIC under certain circumstances. Such documents will continue to be released in the customary manner.

Comment: A commenter suggested the phrase ''other written communications from FCIC'' be removed or at least 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 insurance provider's designee for the specifically stated type of communication.

Response: As stated above, FCIC has previously delegated persons to provide written communication on behalf of FCIC. FCIC will issue other bulletins if other persons will be delegated this authority. Further, as stated above, to the extent that such communication is a letter or other such individual communication, such communication will be sent to the insurance provider's designee. However, all other communications will be released in the customary manner.

Comment: One commenter questioned whether the Common Crop Insurance Policy falls within the definition of requirement of FCIC. The commenter asked if the Common Crop Insurance Policy is a requirement of FCIC only for agents, adjusters, and producers because the SRA's remedy applies only to insurance providers. This same conundrum exists for various handbooks and manuals.

Response: As stated in the rule, documents such as the Common Crop Insurance Policy are considered a requirement of FCIC unless such documents contain their own sanctions for violations. Further, even if such documents contain sanctions, they may still be considered a requirement of FCIC if there are multiple violations of the same provision or multiple violations of different provisions. FCIC has clarified that the remedial sanction is in addition to any other remedy contained in such document. The requirement of FCIC will only apply the persons to whom the document applies. For example, all regulations, including the Common Crop Insurance Policy, are applicable to insurance providers, agents, loss adjusters, and producers. However, the SRA is only applicable to insurance providers. The question will be whether the person is legally obligated to comply with the document through the force of law or contract.

Comment: One commenter asked: (1) Who is the arbiter of whether the ''breach rises to the level where remedial action is appropriate;'' (2) what standard is used to make a determination that a breach occurred under ''requirement of FCIC;'' and (3) whether materiality of the breach or injury to FCIC is a consideration for ''requirement of FCIC.''

Response: FCIC will initially determine whether a breach rises to the level where remedial action should be taken when it issues the complaint. However, persons have the ability to contest any proposed sanction before an Administrative Law Judge, who will be the ultimate arbiter. Further, as stated above, the rule states the standards applicable. For a document that has its own remedy for a violation, such document will only be considered a requirement of FCIC when there are multiple violations of the same or different provisions. If the document is directed to a specific person or group of persons, or does not contain a remedy for a violation, and requires such person or persons to take or cease from taking a specific action, the document is considered a requirement of FCIC. As stated above, FCIC has revised the provisions to include materiality, which applies to both false or inaccurate statements and failing to comply with a requirement of FCIC. However, as stated above materiality does not require monetary damages. The false information or the failure to comply can be material if it adversely affects program integrity, including damage to the crop insurance program's reputation.

Comment: One commenter stated that definition of ''requirement of FCIC'' states that a breach will not be considered a requirement of FCIC unless the breach rises to the level where remedial action is appropriate. The proposed rule imposes a subjective standard of reviewing conduct. The commenter asked at what level does conduct rise to ''the level where remedial action is appropriate.''

Response: The rule makes it clear that when the communication has its own remedy there must be multiple violations before the conduct arises to the level where remedial action, in addition to the remedy contained in the

communication, is necessary. With respect to other communications, there is a subjective element. However, as stated above, the gravity of the violation must be taken into consideration when determining whether to impose a sanction, which would include whether conduct arises to the level where remedial action is appropriate. In addition, the ultimate decision maker regarding whether the conduct arises to the level where remedial action is necessary will be the Administrative Law Judge. For the purpose of clarity, FCIC has used the term ''violation'' in place of ''breach'' because breach may mistakenly imply that the definition only applies to contracts or agreements when the definition clearly refers to other types of documents.

Comment: A few commenters stated that the definition of ''requirement of FCIC'' includes not only regulations and policy provision, but also procedures and other written communications from FCIC. The proposed 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 gives the same type of formality, equality or deference to these types of agency decisions.

Response: To the extent that there is a conflict between the regulations, policy provisions, and procedures, the regulations resolve such conflict in the order of priority. To the extent that other written communications may be in conflict, any provision that has the force of law, such as statutory or regulatory provisions, would take precedence. Further, neither the Act nor the Administrative Procedures Act precludes the use of any particular form of communication to impose requirements on a person. If FCIC has the authority to require that certain action be done or ceased, the Act provides the authority to provide sanctions for non-compliance. The nature of the crop insurance program makes it impractical to put all requirements in regulations or reinsurance agreements. Circumstances may arise during the year that requires immediate action and FCIC must have the means to ensure such action is taken. In determining whether to impose a sanction, FCIC must look at the nature of the violation. If the person fails to take a specific action required by FCIC or FCIC mandates that it cease a specific action, it does not matter the form of the communication. The person is required to comply and failure to comply can result in the imposition of sanctions.

Comment: One commenter is concerned that a person without access to FCIC's regulations, policies, procedures or other written communications and those who may have misinterpreted those regulations, policies and procedures, may be subject to sanctions. The commenter stated that the definition should include regulations, policies, procedures or other written communications the person knew or should have known or had received a specific notice of alleged violation.

Response: As stated above, sanctions can only be imposed for a violation of requirement of FCIC if such requirement is applicable to the person. If applicable, the person should have notice of the requirement. For example, bulletins are not applicable to producers unless such bulletin is provided to the producer or directs the agent or insurance provider to provide such bulletin to the producer. In addition, the gravity of the violation will be taken into consideration before imposing any sanction. No change has been made.

Comment: One commenter stated that, as proposed, the FCIC has virtually unlimited discretion in determining what constitutes a ''requirement.'' Insurance providers are often forced to make on the spot interpretations of ambiguous regulations without any guidance from FCIC, only to have FCIC later determine that the insurance provider's interpretation was incorrect. Allowing FCIC to go one step further and disqualify an insurance provider because it disagrees with the insurance provider's interpretation of an ambiguous ''requirement,'' is unreasonable, unworkable, and unfair.

Response: FCIC does not disqualify an insurance provider because it disagrees with the FCIC. If FCIC determines that an insurance provider has made an incorrect interpretation, it would notify the insurance provider of its misinterpretation and request that any actions taken based on the misinterpretation be corrected. Sanction would only be considered if the insurance provider does not comply with FCIC's request. Further, if the insurance provider believes that FCIC's interpretation is incorrect or that it does not have the authority to require the specific action, it can always appeal FCIC's action to the Civilian Board of Contract Appeals. No sanction could be imposed during this appeal process.

6. Violation

Comment: One commenter stated that the definition of ''violation'' leaves far too much room for interpretation as to what constitutes a single violation and what results in multiple violations. For example, assume that a farmer submits a single claim under his policy, but that the claim involves three separate units of insurance. The farmer submits three false production worksheets in connection with the one claim. The commenter asked whether the farmer committed one violation or three violations.

Response: To be subject to a sanction, the person must have willfully and intentionally provided false or inaccurate information. Each false or inaccurate piece of information would constitute a violation. Therefore, if in the acreage report the producer falsely reports the number of acres in the unit and the share, this would be two violations. In the example given, the farmer has committed four violations. The proposed rule defines violation as ''each act or omission'' made by a person that satisfies all required elements for a sanction is a violation. The farmer signed his name on three separate production worksheets and one claim, four times he ''certified'' the information provided, to the best of his knowledge to be true and complete; when in fact, he knew the information was false.

7. Willful and Intentional

Comment: One commenter stated that ''willful and intentional'' acts should be defined to make clear that the person knew the falsity of the statement when made and intended that FCIC act on that misstatement.

Response: A ''willful and intentional'' act is providing information by a person who had ''knowledge that the statement was false or inaccurate at the time.'' The requirement that the person ''intended that FCIC act on that misstatement'' is an element of fraud. However, under section 515(h) of the Act, to impose a sanction, the person only needs to have willfully and intentionally provided false or inaccurate information. The term ''fraud'' is not found in section 515(h) of the Act and if Congress wanted to require reliance by FCIC as an element, it could have so required. No change has been made.

Comment: One commenter stated that the definition ''Willful and intentional'' is incomplete and inaccurate as a standard of proof for the conduct under the proposed rule. Intent and willfulness must be established by clear and convincing evidence.

Response: The general standard of proof in administrative cases is preponderance of the evidence. This is consistent with USDA's suspension and

debarment regulations, which serve a similar purpose. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. No change has been made.

Comment: One commenter stated that FCIC should clearly require that scienter must be proven with respect to willful and intentional statements prosecuted under the rule to ensure that prosecutions are confined to fraudulent statements or acts or omissions, rather than non-malicious acts or omissions.

Response: In the definition of ''willful and intentional,'' FCIC has included the requirement that the person know that the statement was false or inaccurate at the time the statement was made or the person know that the act or omission was not in compliance with a requirement of FCIC at the time the act or omission occurred. Therefore, sanctions will not be imposed for innocent mistakes. However, maliciousness is not a standard required by the Act. FCIC has structured these provisions to fully comply with the requirements imposed in the Act. No change has been made.

Comment: One commenter stated that the definition of ''willful and intentional'' deviates from the common law meaning of those terms, and specifically nullifies a showing of malicious intent, an element of common law fraud. The commenter further states that fraud is the very target of 7 U.S.C. 1515(h) and that FCIC may lack the authority to expand the definition of willful and intentional to include conduct outside the common understanding of fraud and to impute knowledge from one individual to another.

Response: Section 515(h) only requires that the person willfully and intentionally provide a false or inaccurate statement or fail to comply with a requirement of FCIC before a sanction can be imposed. Section 515(h) does not use the term ''fraud'' and that term's other connotations. FCIC has studiously attempted to stay within the requirements of the Act. To that end, FCIC has used the common definitions and common law to determine the meaning of ''willful and intentional.'' This rule contained the same meaning as has been given the term since FCIC began doing disqualifications after the enactment of the Federal Crop Insurance Reform Act of 1994. With respect to the imputation of knowledge, FCIC has used the Department's debarment regulations as guidance because the burdens and consequences are similar.

Comment: One commenter stated that for the definition of ''willful and intentional'' FCIC does not specifically define the words separately, and FCIC does not state the source of this definition. FCIC also excludes the showing of malicious intent as unnecessary. FCIC includes ''the failure to correct the false or inaccurate statement when its nature becomes known to the person who made it'' and includes acts of omission. These additions force agents and agencies to review information for past years, or they may be subject to sanctions.

Response: Defining the words separately would not change the meaning or bring more clarity. The terms will be given their common meaning. The dictionary defines ''willful'' as ''intentional, or knowing, or voluntary.'' ''Intentional'' is defined as ''done purposely.'' FCIC has also looked to the body of established law regarding the meaning of the terms for the purposes of this rule. There is no requirement in the Act for maliciousness intent. The Act only requires that a person willfully or intentionally provide false or inaccurate information. Therefore, requiring a person to know the information was false or misleading and electing to provide it anyways satisfies the common meaning of the terms. Further, agents are not required to review information for past years. Agents will only be subject to sanctions if they knew the information was false or inaccurate at the time it was provided or if they discover it later and they fail to do anything about it. No change has been made.

Comment: One commenter stated that the definition of ''Willful and intentional'' 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 misstatements.

Response: As stated above, there is no requirement that the person intended FCIC to act on the false information in section 515(h) of the Act. To be subject to sanctions, the person only needs to have willfully and intentionally provided false or inaccurate information to FCIC or an approved insurance provider. Reliance of the misstatement is an element of fraud, which as stated above, is a term that is not found in section 515(h) of the Act.

Comment: One commenter stated that FCIC must establish a clear indication of how intent will be established with respect to demonstrating whether a statement, act or omission is willful and intentional. A false or inaccurate statement or a noncompliant act or omission alone does not rise to willful and intentional and additional evidence that clearly establishes that a person had sufficient knowledge is necessary before imposing sanctions.

Response: The definition of ''willful and intentional'' makes it clear that the person must have knowledge of the falseness or inaccuracy of the information. Unless FCIC can establish the person has such knowledge no sanction under section 515(h) of the Act can be imposed. Further, FCIC is not alone in making these decisions. Any person subject to a proposed sanction has a right to contest the sanction before an Administrative Law Judge. The Administrative Law Judge will determine whether FCIC has met its burden before any sanction is imposed.

Comment: One commenter stated that with no showing of intent coupled with the provision that sanctions may be imposed regardless of whether FCIC or the insurance provider sustained monetary losses places all parties in jeopardy of severe punishment for seemingly innocuous mistakes that may have caused little to no harm.

Response: Sanctions cannot be imposed for innocuous mistakes. There must be evidence of willfulness and intent. Further, the fact that no monetary losses may occur does not excuse the improper conduct. All false or inaccurate statements have the capacity to adversely affect program integrity.

Comment: One commenter stated that while the definition may be clear in regards to willful, it is not clear from the definition that there is actually a requirement of intention at all. The commenter suggested that the definition should include knowledge of the inaccuracy and that an intent, malicious or otherwise be associated with the inaccuracy. The definition should be confined to ''material'' misrepresentations or omissions.

Response: ''Intentional'' is defined as ''done purposely.'' FCIC's definition of ''willful and intentional'' is consistent with that definition in that it requires the person to have provided the information to FCIC or an approved insurance provider even though the person had knowledge that the information was false or inaccurate at the time that the statement was made and still elected to provide the information to FCIC or the approved insurance provider. However, as stated above materiality has been added to the rule but it does not require monetary damages.

Section 400.454 Disqualification and Civil Fines

A. In General

Comment: One commenter stated that ARPA required that each policy or plan of insurance to provide notice of the sanctions that could be imposed under ARPA for willfully and intentionally providing false or inaccurate information to FCIC or failing to comply with a requirement of FCIC. FCIC has failed to comply with 1515(h)(5).

Response: Section 27 of the Common Crop Insurance Policy Basic Provisions (Basic Provisions) (7 CFR 457.8) states that if the producer, or someone assisting the producer, has intentionally concealed or misrepresented a material fact, the producer could be subject to the remedial sanctions in 7 CFR part 400, subpart R, which includes disqualification and civil fines. However, FCIC has revised this rule to include more specific language in section 27 of the Basic Provisions and added a new section 22 to the Group Risk Plan Common Policy (7 CFR 407.9) (GRP policy).

B. Section 400.454(a)

Comment: One commenter has concerns that FCIC is not providing producers with the appropriate notice of sanctions as stated under section 515(h)(5). The commenter stated that section 454(a) lacks the required notice to policyholders. Specifically, the commenter stated that the proposed language in section 454(a) does not appear to provide producers 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). That in its present form section 454(a) does not notify producers that they can be disqualified for up to five years from specific programs or that the potential fine could be greater than $10,000.

Response: It is not the specific intent of § 400.454(a) to provide producers notice of sanctions available under section 515(h)(3) of the Act. It is intended to provide all persons of the possible consequences of willfully and intentionally provided false or inaccurate information or willfully and intentionally failing to comply with a requirement of FCIC. As stated above, FCIC has revised the Basic Provisions and the GRP policy to ensure that producers receive the required notice.

Comment: Several commenters stated that the decision to initiate administrative sanctions should not rest solely with the FCIC Manager, but that it should require a determination by the FCIC Board of Directors.

Response: Section 515(h) of the Act confers the authority to impose sanctions on the Secretary, who has subsequently authorized the Manager of FCIC to initiate the process when the rule was originally promulgated in 1993 (58 FR 53110). Since this process has been in place since 1993 and there have not been any allegations that the Manager has abused this authority, the Secretary has elected to allow the authority to initiate sanctions to remain with the Manager of FCIC. In addition, although the Manager initiates the process, it is the Administrative Law Judge that ultimately decides whether there is sufficient evidence to impose a sanction under section 515(h) of the Act.

Comment: Several commenters stated that FCIC uses an inappropriate standard of proof, preponderance of the evidence, for the imposition of any penalty. One commenter stated that the standard of guilt should rest with the party alleging such violation. Instead of requiring a mere 'preponderance of evidence' the standard of proof should be clear and convincing evidence. There is no justification for holding the crop insurance industry to a lower standard of guilt.

Response: As stated above, this is the same standard applied by the Department for debarments. Because the effects are similar and both can require willful and intentional conduct, it is appropriate to apply that standard to sanctions under this rule. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. No change has been made.

Comment: Several commenters stated that the proposed rule imposes a low evidentiary threshold for the imposition of sanctions. The burden of proof should be clear and convincing evidence as opposed to a preponderance of the evidence. The rule only authorizes sanctions for willful and intentional conduct. Such a standard connotes the elements of fraud. In almost every instance, liability for fraud cannot be predicated on a mere preponderance of the evidence; rather, a finding based on at least clear and convincing evidence is required. Therefore, the draft regulations should be amended to reflect a burden of proof of clear and convincing evidence. Commenters stated that FCIC may lack the authority to adopt a burden of proof lower than the clear and convincing standard of proof in fraud cases. One commenter stated that to establish a prima facie claim of fraud, the party alleging it must prove by clear and convincing evidence that there was a false representation or concealment of a material fact, calculated with the intent to deceive. One commenter stated that the rule potentially expands the liability of actions to a degree not enforceable in civil litigation.

Response: Section 515(h) of the Act does not require a finding of fraud. Sanctions can be imposed for willfully and intentionally providing false or inaccurate information. Further, as stated above, this is the same standard applied by the Department for debarments. Because the effects are similar and both can require willful and intentional conduct, it is appropriate to apply that standard to sanctions under this rule. Further, this has been the standard of proof that has been applied since the application of these sanctions in 1993. No change has been made.

C. Section 400.454(b)

Comment: One commenter stated FCIC needs to provide a clear indication of how intent will be established as to whether a statement, act or omission is willful and intentional. Further, scienter must also be established to a statement, act or omission that is willful and intentional.

Response: As stated above, FCIC has defined ''willful and intentional'' to be consistent with the common definition of these terms and case law. Scienter is not a specific requirement. No change has been made.

Comment: Several commenters stated that the proposed rule must be confined to material misrepresentation or omissions that cause financial loss. One commenter stated that it was the intent of Congress. A commenter stated that FCIC should confine the proposed rule to statements, acts or omissions that cause injury or damages, consistent with general principles of law relative to fraud.

Response: FCIC has revised the provisions to require consideration of materiality when considering whether to impose a sanction and defined the term ''material.'' However, as stated above materiality does not require monetary damages. The false information can be material if it adversely affects program integrity, including damage to the crop insurance program's reputation or providing or potentially providing benefits that would otherwise not be available. Further, as stated above, fraud is not required to be proven before a sanction can be imposed. There only needs to be a finding that a person willfully and intentionally provided false or inaccurate information or failed to comply with a requirement of FCIC.

D. Section 400.454(c)

Comment: One commenter stated that ''gravity'' is subjective and vague. It did not tell the public the standard to be applied by FCIC when measuring the severity of a violation. The commenter suggested that FCIC adopt the list of factors under 7 CFR 1.335(b) or develop its own list of mitigating factors to be applied when considering the gravity of a violation.

Response: FCIC has reviewed the list of factors used in the assessment of sanctions in 7 CFR 1.335(b), and has modified the list to be more applicable to the crop insurance program and included it in § 400.454(c).

Comment: One commenter has concerns that cumulative penalties could exceed the gravity of the violation. The commenter urged FCIC to establish appropriate penalties to violations that are always commensurate to the gravity of such violations.

Response: As stated above, FCIC has adopted factors, with modification, used by Department in assessing sanctions. However, Congress specifically revised section 515(h) of the Act to allow the imposition of a separate sanction for each violation. The gravity of each violation will be taken into consideration when imposing a sanction.

Comment: A commenter stated that increased penalties demand an equally elevated system of judgment process and identification of degree. The rule's definition of degree of offense and penalty extends to others who may be oblivious to the error of intention to submit false information. For example, the agent who forwards an actual production history (APH) which was completed and signed by an insured can be totally unaware of erroneous information provided by that insured, unless the submission is blatantly different from other producers in the area. Cumulative penalties could result in disproportionate fines in relation to the offense. Therefore, a minor infraction could have a major impact.

Response: An agent that transmits an APH that is false can only be sanctioned if the agent knew or should have known the information was false and transmitted it anyway. If the agent had no way to know the information was false, no sanction can be applied. However, the producer that provided the false APH may be sanctioned for providing the false information to the agent. In such case, the gravity of the violation will be considered based on the factors FCIC has added to the rule to ensure the sanction is commensurate with the violation. Further, FCIC will consider each person's conduct as it pertains to the provision of false or inaccurate information. Therefore, there should not be the possibility of disproportionate sanctions.

Comment: A few commenters stated that the rule should exclude penalties and suspensions for conduct that is already addressed in the SRA.

Response: There is nothing in the SRA or other contracts that specifically involves willfully and intentionally providing false or inaccurate information or failing to comply with a requirement of FCIC. Further, there may be circumstances where the improper conduct under the SRA is so egregious that the imposition of sanctions may be appropriate. The rule explains those situations. In such cases, the liquidated damage provisions may be inadequate given the gravity of the violation. Further, suspension or termination may not be viable options and the imposition of a civil fine may be more appropriate. However, with respect to any breach of the SRA, FCIC first will look to the remedies in the SRA. Because remedies are available under the SRA, sanctions can only be imposed if there are multiple violations of the same or different provisions.

Comment: Several commenters state that the proposed rule's cumulative penalties violate the excessive fines provision of the Eighth Amendment of the U.S. Constitution. Since its penalties would be cumulative, the proposed rule could result in disproportionate fines. Cumulative penalties are not allowed under the Act, in addition to those found in 7 U.S.C. 1515(h)(3). The commenters stated that the rule should also be clarified to make it clear that the penalties and fines are not cumulative and that if the FCIC chooses to enforce any existing contract-based or regulatory remedies, the rule should be expressly inapplicable. A commenter stated that while the sanctions in 7 U.S.C. 1515(h)(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 at 7 U.S.C. 1515(h)(3). A commenter stated that FCIC should not treat the sanctions as cumulative relative to other sanctions, as this is not anywhere provided for in the plain language or legislative history of the statute.

Response: Section 515(h) of the Act expressly authorizes a separate civil fine for each violation. Therefore, this rule does not contain cumulative civil fines for the same conduct. It would not make sense to impose the same civil fine on a person who committed one violation compared to one who committed two or more violations. When determining the civil fine to apply for each violation, FCIC is to take into consideration the gravity of that violation. Therefore, this allows the sanctions to be proportional to the conduct. However, there is nothing in the Act that would preclude FCIC from enforcing section 515(h) of the Act along with any contractual remedies. When section 515(h) of the Act was enacted, Congress was aware that many contracts and agreements had remedies for a breach. If it wanted the sanctions under section 515(h) of the Act to be the sole remedy for the conduct it could have so required, but it did not do so. The application of any other remedy will be taken into consideration when assessing the sanction to be imposed under this rule so that the result is not disproportionate. Further, this is most likely to arise with respect to the willful and intentional failure to follow a requirement of FCIC, because there is no mention of willfully and intentionally providing false or inaccurate information in the contract or agreement. As stated above, there are situations when the conduct is so egregious, such as with multiple violations, that the imposition of sanctions is appropriate under this rule in addition to the remedies available in the contract or agreement. No change has been made in response to this comment.

Comment: One commenter states that the rule states that it is remedial in nature. However, the rule also states that 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. Recently the U.S. Supreme Court disregarded its own long-standing position on the remedial nature of the federal False Claims Act and labeled its treble damage provision as ''punitive.'' Adding additional sanctions on top of those recoverable under the False Claims Act, and other statutes will undoubtedly be punitive, and subject the rule to interpretation and construction consistent with its punitive aims.

Response: The provisions stating that the imposition of sanctions under this rule is in addition to any other sanctions provided in the agreement or contract is not new. It was included in § 400.451(c). Further, it is not FCIC's decision regarding whether other sanctions are imposed. FCIC can only enforce the sanctions available under the contract or agreement and section 515(h) of the Act.

FCIC will take into consideration any other sanctions that may have been previously imposed for the conduct to ensure that the sanctions are not disproportionate to the conduct. To the extent that FCIC imposes sanctions under section 515(h) of the Act, in addition to the remedies available under the contract or agreement, the person is able to challenge such imposition before the Administrative Law Judge.

Comment: One commenter stated that because the definition of willful and intentional is broad and sanctions can be applied without resulting monetary damages, it appears that cumulative penalties could easily result from simple mistakes that resulted in little to no damages. Thus, cumulative penalties could be unconstitutional as it may constitute excessive fines under the Eighth Amendment.

Response: Cumulative penalties cannot be applied for simple mistakes. Sanctions under section 515(h) of the Act can only be applied for willfully and intentionally providing false or inaccurate information or failing to comply with a requirement of FCIC. Further, materiality will be considered when determining whether to impose a sanction and a consideration of the gravity will also be done to determine the amount of sanction to apply. This should preclude the imposition of sanctions that is disproportionate to the conduct.

Comment: Two commenters stated that the $100,000 threshold in § 400.454(c)(2) may be appropriate for producers, agents, adjusters, or other program participants, but it is too low to impose on insurance providers. A $100,000 indemnity could represent only a few hundred thousandths of the total indemnities paid by insurance provider. A commenter stated that the proposed penalty is too harsh. Absent any intention on the part of Congress to impose such draconian penalties, the proposed regulations cannot stand. A commenter suggested that $500,000 may be a more appropriate benchmark for insurance providers.

Response: The $100,000 threshold in the aggregate may be low given the amount of indemnities each insurance provider pays out each year. However, on an individual basis, a $100,000 indemnity is a significant amount and the consequences are appropriate, especially given that insurance providers are required to review all claims in excess of $100,000 and annually report the results. The commenter is correct that in the case of multiple violations, a $500,000 threshold is more appropriate.

Comment: One commenter stated that the threshold amount for the imposition of maximum penalties is low and has no rational basis, especially when applied to an insurance provider. Without raising the threshold for imposing the maximum disqualification term or fine, the FCIC could run two serious risks. First, it easily could be imposing civil fines in amounts disproportionate to actual losses and will thus be excessive under the Eighth Amendment of the Constitution. Second, program disqualification for an insurance provider which overpays losses based on such a low threshold is disproportionate that this remedy, too, would violate the Eighth Amendment.

Response: The civil fine is no more than the amount of any pecuniary gain resulting from the improper conduct for which such sanction is sought or $10,000. The $10,000 civil fine is reasonably related to the amount of time and resources required to investigate whether false or inaccurate information was provided to FCIC or the insurance provider and whether such information was provided willfully and intentionally. The Supreme Court has held that civil fines reasonably related to the cost of investigation do not violate the Eighth Amendment. FCIC is unsure of the argument that ''program disqualification for an insurance provider which overpays losses based on such a low threshold is disproportionate that this remedy, too, would violate the Eighth Amendment.'' The Supreme Court has held that occupational debarments, even permanent ones, are traditionally not viewed as punishments. Therefore, it is difficult to see how an occupational disqualification for a limited term would be ''cruel and usual.'' Further, while FCIC has added a materiality requirement, it is not dependent on monetary damages. Further, these thresholds are related to the maximum sanctions that can be imposed. Based on the gravity of the violation, amounts smaller than the maximum may be appropriate. No change is made in response to this comment.

Comment: One commenter stated the monetary threshold in § 400.454(c)(2)(ii) (redesignated as 400.454(c)(3)(ii)) is less defensible when one recognizes that it is not tied to a single crop year's overpayments. Hypothetically, disqualification could occur based on more than $100,000 in errors over multiple crop years. An insurance provider could be barred from the program for errors amounting to less than 0.009 percent of indemnities paid. FCIC's approach violates the Eighth Amendment as applied to insurance providers.

Response: As stated above, FCIC has left the single violation at $100,000 but increased the threshold for multiple violations to $500,000 for the imposition of the maximum sanction against insurance providers. The commenter is correct that since insurance providers deal with much larger amounts of claims, the threshold should be higher for the imposition of the maximum sanction. However, as stated above, monetary damages are not required as a condition of imposing a sanction under this rule. Sanctions can be imposed for any willful and intentional providing of false or inaccurate information or willful and intentional failure to comply with a requirement of FCIC. This means that under the Act, a single willful and intentional providing of false or inaccurate information by an insurance provider can subject it to disqualification of a period up to one year. Although not required, FCIC has added a materiality requirement but it is still not conditioned on whether there is a monetary loss.

Comment: One commenter stated that the proposed rule states a single 'violation' can be the basis for the imposition of the maximum penalty if the violation results in an overpayment of more than $100,000. This $100,000 threshold is immaterial and statistically insignificant with regard to insurance providers.

Response: A single violation of $100,000 is not statistically insignificant. The average claim paid over the last three crop years is less than $5,300. Further, approved insurance providers have an obligation to verify all claims in excess of $100,000. Therefore, there is a heightened duty with respect to these policies. As a result, FCIC has not increased the single violation threshold. However, as stated above, FCIC has increased the multiple violation threshold for insurance providers to $500,000.

Comment: Several commenters stated that the parameters proposed for the maximum penalties under § 400.454(c)(2) (redesignated as 400.454(c)(3)) were too broadly worded. The commenter asked what constitutes ''multiple'' violations. If a single claim involves the submission of five fraudulent claims for indemnity, a commenter asked whether the participant has committed multiple violations.

Response: Multiple violations are the number of each willful and intentional false or inaccurate statement and each incident of failing to comply with a

requirement of FCIC. One false or inaccurate statement or one incidence of failing to comply with a requirement of FCIC is a single violation. More than one false or inaccurate statement, even if there is only one claim involved, or more than one incidence of failing to comply with a requirement of FCIC constitutes multiple violations. In the example given, each fraudulent claim for indemnity counts as a separate violation so that five fraudulent claims would constitute multiple violations.

Comment: One commenter asked if the multiple violations all have to be of the same nature, or whether they can be completely unrelated violations.

Response: Multiple violations do not all have to be of the same nature. Multiple violations may be completely unrelated. An example of multiple violations of the same nature may be an insured who falsely certified three separate production worksheets that the production was less than the guarantee. An example of multiple unrelated violations may be when a producer falsely reports acreage on an acreage report and then later falsely reports production for the unit and claims a loss.

Comment: One commenter asked how many years does ''several crop years'' entail.

Response: ''Several crop years'' is commonly defined as a number of more than two or three, but not many. ''Many'' is commonly defined as a large number to infinity. Use of the term ''several'' means that if the improper conduct occurred in more than three crop years, the maximum sanction can be imposed.

Comment: One commenter asked under § 400.454(c)(2) (redesignated as 400.454(c)(3)), how many years back can FCIC look to violations ''over several crop years.''

Response: The Act does not limit the number of years RMA can look at to discover fraud, waste or abuse.

Comment: One commenter stated that under the proposed rule one error, immaterial or not, which does not arise to negligence much less fraud, can be mistakenly repeated numerous times. The maximum penalty would appear to apply in the case of multiple violations without materiality or damages.

Response: Sanctions can only be imposed for proven willful and intentional acts that monetarily or non-monetarily harm the program. If the person knows that he or she is committing an error and continues to do so, then this would be willful and intentional conduct that could lead to the imposition of sanctions. In addition, as stated above, FCIC has added a provision regarding materiality although it does not require monetary damages.

Comment: One commenter asked whether there must have been an actual adjudication by FCIC or some other authority of a previous violation.

Response: There is no requirement for an adjudication of a previous violation. However, to be a factor in determining the appropriate length of disqualification or amount of civil fine there must be sufficient evidence to prove that there was a violation and that it was willful and intentional. The Administrative Law Judge will consider whether there is sufficient evidence to support that a previous violation occurred.

Comment: One commenter asked for examples of multiple acts of wrongdoing.

Response: FCIC has reconsidered this provision in light of the other provisions and comments received and realized that only conduct that is willful and intentional can be subject to sanctions and such improper conduct constitutes a violation. Since redesignated § 400.454(c)(3) already covers multiple violations, FCIC has removed the provisions relating to multiple acts of wrongdoing to avoid any ambiguity.

Comment: One commenter asked what is a wrongdoing. Wrongdoing is not a defined term in the proposed regulations. The commenter asked if wrongdoings equate to a violation.

Response: As stated above, this provision has been removed because multiple violations are already covered under redesignated § 400.454(c)(3)(i).

Comment: One commenter asked if multiple acts of wrongdoing span more than one crop year, and if so, how many crop years.

Response: As stated above, the provisions regarding wrongdoings have been removed. Redesignated § 400.454(c)(3) already covers multiple violations.

Comment: One commenter asked what would constitute ''multiple'' acts of wrongdoing. The commenter stated that ''wrongdoing'' should be a defined term. The commenter states that a similar problem of ''individual'' or ''multiple'' violations arises under § 400.454(f)(1).

Response: As stated above, the provisions regarding wrongdoings have been removed. The term ''individual'' and ''multiple'' are given their common usage meaning and, therefore, a definition is not necessary. Individual means one and multiple means more than one.

Comment: Several commenters stated that the phrase ''of so serious a nature'' provides no objective guidance as to what conduct rises to this level. The commenters suggested that FCIC clearly define precisely what conduct will result in the maximum penalties.

Response: Conduct ''of so serious a nature'' is one of the standards used in suspension and debarment proceedings and FCIC intends to use the history of the imposition of suspensions and debarments under this standard as guidance under this rule. Further, this standard still requires that the conditions of willful and intentional be met. However, it is not possible to define the actual conduct meeting this standard because each case is based on its own factual situation. No change has been made in response to this comment.

E. Section 400.454(d)

Comment: Several commenters objected to imputation of conduct between individuals and corporations. They claim that section 515(h) does not authorize the imputation of conduct between individuals and corporations. In addition, FCIC's proposed rule provides no evidence that its board of directors has authorized the Manager to impute liability as part of conducting the 'business' of FCIC. One commenter stated that the provisions for imputations of conduct of one person to another are unauthorized by the FCIA, inappropriate, legally improper, and both overly broad and vague. One commenter stated that the most troubling is the potential to impute conduct from an individual to an organization. This provision puts insurance providers at risk for unjustified sanctions. However, if RMA proceeds with its inclusion, the scope of potentially imputable conduct must be narrowed.

Response: The Act does not preclude the imputation of improper conduct. The purpose of section 515(h) is to protect the Government from doing business with persons who have willfully and intentionally made misrepresentations. Persons can include entities or individuals. However, all entities are operated by individuals who are responsible for the actions of the entity. Therefore, those individuals should be held responsible for those actions just as much as the entity itself. Conversely, entities that benefit from the improper conduct by its associates should similarly be held responsible. Without the ability to impute improper conduct too many people could find means to shield themselves from their conduct. Further, the factors that must be satisfied before the imputation of conduct should ensure that the truly innocent are not sanctioned. There must be knowledge, approval or acquiescence

before knowledge can be imputed. Further, as stated more fully below, FCIC has added provisions to clarify when improper conduct may be imputed and that the factors applicable to determining the gravity of the violation must also be considered with respect to the person upon whom improper conduct is imputed. No change has been made in response to this comment.

Comment: One commenter stated that FCIC cannot rely on 7 CFR part 3017 for the imputation of liability. FCIC cannot rely on 3017 because 3017 provides for imputation of liability by FCIC only for 'fraudulent, criminal, or other improper conduct.' The first problem with this concept is that part 3017 was not issued under the authority of FCIA. The second problem with relying on part 3017 is that FCIC has not cited the statutory authority for that set of regulations as authority for the proposed rule. Finally, the rule calls for the imputation of liability for any violation of § 400.454(b), which includes providing false or inaccurate statements and failing to adhere to a 'Requirement of FCIC.' A false statement would not be fraudulent unless made with the requisite intent. An inaccurate statement or failure to adhere to a requirement of FCIC could result simply from negligence. Thus, the severity of the conduct embraced by 3017.630 is significantly greater than the conduct covered by proposed § 400.454(b).

Response: Section 515(h) of the Act describes the conduct that is subject to sanctions under this rule, not 7 CFR 3017. The purpose of the imputation of conduct provisions is to preclude individuals from escaping responsibility for their actions by hiding behind entity structures. It is not intended to enlarge the scope of the sanctions or to apply to conduct that is otherwise not sanctionable under section 515(h). However, FCIC must employ all reasonable measures to protect the program from any person who has committed a violation subject to the sanctions in section 515(h). No change has been made in response to this comment.

Comment: One commenter stated that the proposed rule improperly expands, without providing a basis for doing so, the scope of the allowed imputation under 7 CFR 3017.630 to include omissions and failures to act as well as culpable acts performed with intent.

Response: Section 515(h) of the Act describes the conduct that is subject to sanctions under this rule. Section 400.454(d) only seeks to ensure that those persons involved in the conduct described in section 515(h) are held accountable. One way to do this is to preclude individuals from shielding themselves through the use of entities or from entities shielding themselves by claiming the conduct was caused by an individual associated with the entity even though the entity benefited from the conduct. No change has been made in response to this comment.

Comment: One commenter stated imputing conduct would be improved by two fundamental changes. First, conduct only should be imputed when the person to whom the conduct is imputed 'knows or has reason to know' of the conduct under the definition contained in 7 CFR 1.302(o). The standards contained in that definition should work for the Federal crop insurance program. Second, the imputation scheme could be improved by revising 400.454(f) to conform to 7 CFR 1.335(b). Providing a non-exhaustive list of aggravating and mitigating factors would create appropriate flexibility for dealing with situations where conduct is imputed.

Response: As stated above, FCIC has already included the definition of ''knows or has reason to know'' and used that term with respect to the imputation of conduct. Further, FCIC has added a provision that will require the review of the factors added to § 400.454(c)(2) when imposing a sanction on a person to whom conduct was imputed.

Comment: One commenter stated that to impute the improper conduct of a person to another person, such person must know or should have known of the improper conduct. This statement indicates that the government will assess what the knowledge level of an individual should be and prosecute them according to their supposed knowledge. There are many factors that can influence the knowledge level of an agent or insurance provider representative. Not every insured and agent has the same level of knowledge or access to every element of information.

Response: As stated above, imputation of improper conduct provides a means to ensure that those responsible for the improper conduct are held accountable. It is to prevent persons from using entities or other persons as shields against responsibility. Persons should not be permitted to turn a blind eye to what is occurring, while at the same time they are benefiting from the conduct. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. No change has been made in response to this comment.

Comment: One commenter stated that holding an organization responsible for the acts of an individual is only reasonable if that individual is a principal of that organization, and even then there are perimeters to be established.

Response: The commenter's view is too restrictive. There may be cases where an entity will allow a subordinate to commit violations or turn a blind eye to such conduct in order to obtain the benefits. For example, an agency may knowingly allow agents to falsify records in order to increase premiums and their commissions. The agents may not be a principal of the agency, but the agency by allowing the improper conduct, would be complicit and should be held accountable. There are sufficient parameters in the rule to ensure that persons who have no way of knowing of the improper conduct and have no involvement are not held accountable for the actions of others. No change has been made in response to this comment.

Comment: Two commenters stated it would appear that the rule would hold a person responsible for the acts of another even where such statements, acts or omissions are not fraudulent. The commenter feels that other persons could be held to a higher standard than the person making the statement or committing the act or omission. If there is to be any imputation of liability, it must pertain strictly to fraudulent statements, acts or omissions and require actual knowledge or a reason to know.

Response: Persons to whom conduct may be imputed are not held to a higher standard. The rule requires knowledge, approval or acquiescence before the conduct can be imputed from an individual to the organization. Further, knowledge of or a reason to know is required before conduct can be imputed from an entity to an individual. As stated above, FCIC has added a definition of ''knows or has reason to know'' obtained from 7 CFR 1.302. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the improper conduct, there may be no basis to impute the improper conduct. However, as stated above, fraudulent conduct is not required before a sanction may be imposed. Section

515(h) refers to willfully and intentionally providing false or inaccurate information or willfully and intentionally failing to comply with a requirement of FCIC. If such conduct occurs and the requirements for the imputation of such conduct have been met, these persons will be subject to the sanctions contained in the rule. No change has been made in response to this comment.

Comment: One commenter stated that FCIC is proposing to revise § 400.454(d) to allow FCIC to impute the improper conduct of a person to another person if the other person has the power to direct, manage, control or influence the activities of the person that is being cited for improper conduct. Since an insurance provider employs agents to sell policies, it follows the entire organization could potentially be cited for improper conduct of an agent. Both could be disqualified from selling crop insurance.

Response: An insurance provider could only be at risk of sanction if it is proven that the insurance provider had knowledge, approved of or acquiesced to the conduct of the agent that is the subject of the sanction. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. However, there have been instances in the past where insurance providers have allowed false information, such as backdated documents, to be provided by agents. In such cases, the insurance provider should be held accountable. No change has been made in response to this comment.

Comment: One commenter stated that the proposed rule seems to indicate that suspension and/or debarment may happen without the parties being fully aware of the reasoning behind the penalty. The commenter recommends that this provision be eliminated for 'participants' and FCIC fully explain the process.

Response: FCIC is unsure of the basis for the comment. FCIC must prove that a person willfully and intentionally provided false or inaccurate information or willfully and intentionally failed to comply with a requirement of FCIC. Such conduct cannot be imputed to another unless there was knowledge, approval or acquiescence. Further, the process of imposing disqualifications and civil fines has been in place since 1993 and, before any sanction is imposed, the person will have an opportunity to hear the evidence against them and provide evidence in their defense. An Administrative Law Judge will determine whether a sanction under this rule can be imposed. Therefore, there should never be a situation where a person would not be aware of the basis for the sanction. In addition, by statute, sanctions apply to participants. Therefore, there is no basis to remove them from this rule. No change has been made in response to this comment.

Comment: One commenter stated that at a minimum, the scope of potentially imputable conduct must be narrowed to only impute conduct of officers, directors and 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 under the rule.

Response: The rule requires the knowledge, approval or acquiescence of the entity before improper conduct can be imputed. Unless these standards are met, no conduct can be imputed to the entity. However, it is not practical to limit the imputation of conduct to when such conduct is ''ratified'' or ''endorsed'' by the entity. Such actions suggest the need for an affirmative action on the part of the entity. However, in most cases, there is a failure of the entity to act when it knew or should have known of the improper conduct. If the safeguards put in place by the entity are working there should be no risk of the imputation of conduct to it. Further, one of the factors to be considered in determining the gravity is the internal controls in place. However, FCIC does not know what the commenter meant by ''addressing'' the alleged bad improper conduct. Once the entity becomes aware of the improper conduct that is subject to sanction, it must be reported to FCIC so it can take the appropriate action against the wrongdoer. Failure to report such improper conduct can make the entity at least appear complicit in the conduct. If the person rejects the improper conduct and any benefit derived therefrom, such as refusal to accept documents that are backdated, etc., then there may not be a basis for the imputation of conduct.

Comment: One commenter stated that clarification concerning imputation of liability to other persons is needed. It must be proven that the third party had actual knowledge or at least a reason to know of the fraudulent statement, act or omission of another.

Response: As stated above, this rule does require knowledge or at least a reason to know before conduct can be imputed. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. However, fraudulent is not the standard. If a person willfully and intentionally provides a false or inaccurate statement, the person is subject to the sanctions contained in this rule.

Comment: One commenter stated that FCIC has the authority to sanction, even debar an insurance provider as a result of the violation of a low level employee.

Response: An insurance provider cannot be disqualified or assessed a civil fine unless it is proven that it had knowledge of or reason to know of the willful and intentional violation by the low level employee. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. However, there have been instances in the past where the insurance provider has turned a blind eye to misconduct it knew about, such as backdated documents, and in such cases the insurance provider should be held accountable.

Comment: One commenter objects to imputing the conduct of an 'individual associated with an organization,' as FCIC has not defined what it means to be 'associated with an organization.' The commenter asks whether a contractor is 'associated with' an insurance provider or whether that contractor's subcontractor is associated with an insurance provider.

Response: Any person that performs work on behalf of the organization can be found to be associated with the organization. However, that does not necessarily mean that conduct will be imputed to the organization. The organization must know or have reason to know of the improper conduct. While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be

no basis to impute the conduct. No change has been made in response to this comment.

Comment: One commenter stated that a corporation's receipt of a benefit from an individual's violation does not 'evidence knowledge, approval or acquiescence' unless the corporation knows or should know of either the violation or that the benefit resulted from the violation.

Response: While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct.

Comment: One commenter stated (1) the imputation appears to be automatic if the 'conduct occurred in connection with the individual's performance of duties for or on behalf of that organization.' The commenter stated a reasonable approach would be to make conduct by a 'principal,' no presumed imputation should exist with respect to any person who is not a principal. (2) While receipt of a benefit can be 'evidence of knowledge, approval or acquiescence,' it only should be rebuttable evidence. (3) The proposed rule gives no recognition of the extent to which the organization's practices attempted to preclude such conduct. USDA elsewhere has recognized the relevance of this factor. See for example, 7 CFR 1.335(b)(11). (4) Imputing knowledge in the severe fashion proposed could chill internal investigative efforts by insurance providers and ultimately cooperation with FCIC in identifying and punishing misconduct. FCIC should not adopt a rule that might chill such efforts.

Response: (1) The commenter's view is too restrictive. There may be cases where an entity will allow a subordinate to commit violations or turn a blind eye to such conduct in order to obtain the benefits. For example, an agency may knowingly allow agents to falsify records in order to increase premiums and their commissions. The agents would not be a principal of the agency, but the agency by allowing the improper conduct would be complicit and should be held accountable. (2) While acceptance of benefits of the improper conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the person can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. (3) As stated above, having internal controls in place is one of the factors to be considered when determining the gravity of the violation. (4) This rule should not chill the investigative efforts of the entity. If the entity discovers improper conduct subject to sanction under this rule, the entity can shield itself from any imputation of such conduct by not accepting the benefits from the conduct and promptly reporting the improper conduct to FCIC. No change has been made as a result of the comment.

Comment: One commenter stated that an insurance provider can be sanctioned based simply upon the fact that the conduct occurred in connection with the individual's performance of duties for or on behalf of that organization. If an insurance provider did not actively participate in the agent's or adjuster's violation, the agent's or adjuster's conduct should not be imputed to the insurance provider and the insurance provider should not be sanctioned under this rule.

Response: An insurance provider that did not actively participate in an agent's or adjuster's violation and it is proven that the insurance provider did not know or have reason to know of the violation, the insurance provider should not be sanctioned. As stated above, the entity can shield itself from any imputation of such conduct by not accepting the benefits from the improper conduct and promptly reporting the conduct to FCIC. No change has been made as a result of this comment.

Comment: One commenter stated that whether a person had reason to know of a particular course of conduct is a very subjective analysis. The commenter asked how FCIC plans to determine whether one person had a reason to know of the conduct of another.

Response: Acceptance of the benefits of the conduct subject to the sanction is evidence of knowledge. However, as stated above, that evidence is rebuttable. There are other ways to establish a reason to know, such as an obligation to review documents that contain the false statements, etc. In all cases, the person will have the opportunity to provide evidence in defense and the issue will be decided by an independent Administrative Law Judge.

Comment: Two commenters, citing 41 AM JUR 2d, Independent Contractors section 2 (2007), stated that liability of an independent contractor may not be imputed to a corporation, but it imposes a virtually impossible standard on large insurance providers. Under the proposed regulations, a corporation with thousands of lower-level employees and independent contractors can be held liable and subject to disqualification for the rogue actions of a single independent contractor [or any other individual 'associated' with the insurance provider], even if that individual acts in violation of insurance provider policy unbeknownst to the insurance provider.

Response: As stated above, the corporation can only be subject to sanctions under this rule if it knew of or could reasonably have known of the improper conduct. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the improper conduct, a person can still rebut such evidence. If the corporation can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. Therefore, the corporation is not liable for the rogue acts of a single independent contractor that is unknown or could not have been known by the corporation. No change has been made in response to this comment.

Comment: One commenter citing Federal law stated that absent evidence that Congress intended to impose such harsh strict liability standards on corporations, of which there is none, the proposed rule cannot stand.

Response: This rule is not imposing strict liability on corporations. Conduct can only be imputed if the corporation knew or reasonably should have known of the improper conduct. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the corporation can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. No change is made in response to this comment.

Comment: One commenter stated that whether an individual had 'reason to know' a specific fact is not equivalent to whether an individual 'should have known' of the fact and FCIC should amend the rule to clarify the applicable standard. USDA's civil fraud regulations, under 7 CFR 1.302(o), already define the phrase 'knows or has reason to know' in the context of fraud and false statements. Another commenter stated that the language 'reason to know' should be defined to make clear that this does not create a 'should have known' standard. The commenter stated that the 'reason to know' requires that a person draw reasonable inferences from information already 'known to him' and does not give rise to the duty of inquiry that is

created by a 'should have known' standard.

Response: As stated above, FCIC has added a definition ''knows or has reason to know'' for clarity and used the definition contained in 7 CFR 1.302(o). However, also as stated above, fraud is not a prerequisite to the imposition of sanctions under this rule. Section 515(h) of the Act only requires that a person willfully and intentionally provide a false or inaccurate statement or willfully or intentionally fail to follow a requirement of FCIC.

Comment: The commenter, citing federal law, stated that imputation from an organization to another organization is contrary to existing law. The mere existence of a partnership, joint venture, joint application, association, or similar arrangement does not automatically give rise to shared liability. The commenter stated that the proposed rule must be clarified to include additional prerequisites for imputed liability such as actual knowledge or reason to know of the culpable acts.

Response: The issue is not shared liability. The question is whether a person can be held accountable for the actions on another. As stated above, the rule requires that there be knowledge or reason to know of the improper conduct. While acceptance of benefits of the conduct can be considered evidence of knowledge, approval or acquiescence of the conduct, a person can still rebut such evidence. If the corporation can prove they were uninvolved and had no way of knowing of the conduct, there may be no basis to impute the conduct. No change has been made in response to this comment.

F. Section 400.454(e)

Comment: One commenter stated that the Agricultural Market Transition Act cited in § 400.454(e)(1)(i)(B) was replaced by the Farm Security and Rural Investment Act of 2002.

Response: The reference to the Agricultural Market Transition Act in § 400.454(e)(1)(i)(B) will be deleted and replaced with the Farm Security and Rural Investment Act of 2002 or a successor statute.

Comment: One commenter stated that the prohibition contained in § 400.454(e)(1)(ii) is neither discussed in nor implied by section 515(h), therefore it is an impermissible expansion of the penalties authorized by ARPA.

Response: FCIC does not understand this comment. Section 515(h)(1) of the Act refers to ''producer, agent, loss adjuster, approved insurance provider, or any other person.'' This means that the sanctions in section 515(h) can apply to any person who willfully and intentionally provides false or inaccurate information or willfully and intentionally fails to comply with a requirement of FCIC. However, section 515(h) provides for different consequences depending on whether the person is a producer or other person. This distinction is carried over into § 400.454(e)(1)(ii). That fact that § 400.454(e)(1)(ii) refers to participant is not an expansion of the available sanction since a participant, as defined in the rule, just delineates a group of persons already included under section 515(h). No change is made in response to this comment.

Comment: One commenter asked if § 400.454(e)(1)(i)(I) (redesignated § 400.454(e)(1)(i)(H)) applied only to federal assistance laws and if so, the rule should be worded to reflect that fact.

Response: Section 515(h) of the Act refers to ''any law that provides assistance to the producer of an agricultural commodity affected by a crop loss or decline in the prices of agricultural commodities.'' It does not make any distinction between federal or any other laws but as a practical matter, disqualification can only apply to programs under the auspices of the Federal Government. Therefore, redesignated § 400.454(e)(1)(i)(H) will be revised to read: ''Any federal law that provides assistance to the producer of an agricultural commodity affected by a crop loss or decline in the prices of agricultural commodities.''

Comment: One commenter stated that the requirements were far too broad and overreaching to be fair and enforceable and that an insurance provider could be subject to sanctions even if it strictly complied with the rule to periodically check the Ineligible Tracking System (ITS) and Excluded Parties List System (EPLS). An insurance provider could be required to check the ITS and EPLS daily for not only prospective business partners, but also for its current employees, adjusters, and agents. In an example given, insurance provider A contracts with an adjuster. Insurance provider A checks ITS and EPLS and the adjuster is cleared. The same adjuster later contracts with insurance provider B. The adjuster is then disqualified for conduct associated with his work for insurance provider B. However, prior to insurance provider A's next periodic check of ITS and EPLS, the adjuster works several claims for insurance provider A.

Response: The burden imposed by this rule is no different than the burden that exists with respect to suspended or debarred persons. The Government wants to preclude such persons from circumventing their disqualification by hiding under the auspices of another person. Participants in the program have the responsibility to periodically review EPLS and ITS to determine whether the persons it does business with are included on such lists. FCIC will examine the reasonableness of the reviews to determine whether it is appropriate to disqualify the participant who does business with a disqualified person. Such disqualification is not automatic. No change is made in response to this comment.

Comment: One commenter stated that the rule's requirement to periodically review the ITS and EPLS to determine persons who are disqualified from participation in the Federal crop insurance program directly contravenes the statutory requirement that the relevant sanctions under the proposed rule be confined to 'willful and intentional' acts.

Response: There is no contravention of the statute by imposing disqualification on persons who elect to do business with a person that has been disqualified. Without this requirement, disqualified persons will be able to hide their participation by hiding under another person. FCIC has the authority to prevent such circumvention and has elected to adopt the same remedies as is applicable to persons who do business with suspended and debarred persons. Disqualification is not automatic and FCIC will consider the circumstances on a case-by-case basis. No change is made in response to this comment.

Comment: Two commenters stated that insurance providers have greater access than individual agencies to monitor ITS and that agencies don't have the system to do an effective job. Although the insurance providers monitor ITS, the agency may not receive notification of ineligibility until several months have passed or until after an initial application was accepted and was detected only when a loss was submitted.

Response: Persons who are disqualified are also reported to the General Services Administration for inclusion on the EPLS. EPLS is available to everyone. Therefore, all participants have the ability to timely determine whether the persons with whom they are doing business have been disqualified. No change is made in response to this comment.

Comment: One commenter asked if entity ABC is ineligible, and new entity DEF is set up, how will agents discover the new entity, without some elaborate system. It would appear that FCIC could have a system which would automatically detect, in a timely manner

before insurance attaches, by cross referencing social security number.

Response: There is no foolproof method to prevent disqualified persons from trying to hide their involvement. The participants' responsibility is to review ITS and EPLS to determine whether it is doing business with a person listed. If a person is not listed because it has changed its name, participants cannot be held accountable for the knowledge. However, if the person is required to provide its social security number or other identification number in connection with its participation in the program or affiliation with the participant, such persons should be identifiable on ITS or EPLS. No change is made in response to this comment.

Comment: One commenter stated that spousal tracking would be tedious to track as there may be multiple entries for a given last name. The commenter asked whether this means that it will have to go through all insureds with that last name. What if a person retains their maiden name and their spouse is ineligible? The commenter asks how this will be tracked.

Response: If the spouse is disqualified under this rule, the spouse should be separately listed in ITS and EPLS. Therefore, there should be no difficulty in tracking such persons.

Comment: One commenter was concerned that an agency could become a victim if an insured were to testify that he knowingly took a false report when, in fact he didn't; it would be the agent's word against the insured's word. The commenter asks where the burden of proof lies.

Response: The burden of proof lies with FCIC, who must establish that the agent willfully and intentionally provided a false or inaccurate statement. Testimony can provide evidence, but the agent will have the opportunity to provide a defense, which will all be considered by a neutral Administrative Law Judge.

Comment: One commenter stated that agents should not be involved in any aspect of production fact finding as it could be interpreted as a conflict of interest. The commenter suggested that this could be remedied by FCIC making production fact finding by agents a conflict of interest.

Response: Agents are precluded from participating in any aspect of the loss adjustment process under the conflict of interest provisions in the SRA. It is the loss adjuster that would be determining production. Further, it is the loss adjuster that should be providing the production information to the insurance provider, not the agent. However, if the agent knows that false information has been provided and does nothing, the agent can be held responsible. No change is made in response to this comment.

Comment: One commenter is concerned that a mistake could be turned into a ''willful and intentional'' act due to a person's misinterpretation.

Response: It is difficult to see how this could happen. FCIC bears the burden of proving willful and intentional conduct and the person will be provided an opportunity to provide a defense. The evidence will be considered by a neutral Administrative Law Judge, who will determine whether FCIC has met its burden. This due process should protect against misinterpretations. No change is made in response to this comment.

Comment: One commenter is concerned about the imposition of multiple penalties of $100,000 per occurrence for multiple events. The commenter recommends that participants should not be punished for simple errors or misinterpretation of a rule, but participants should be punished for willful and intentional abuses.

Response: Simple errors or misinterpretation of a rule are not the basis for sanctions. There must be willful and intentional conduct, which is defined in the rule. Further, the civil fine is $10,000 per violation, not $100,000. No change is made in response to this comment.

Comment: One commenter suggests if an agent submits an acreage report with false information it appears to be shifting the responsibility of acreage reporting from the insured to the agent. The agent should not be expected to act as a law enforcement official. Agents are not authorized to require hard copy records from the insured unless the records are specifically requested by the insurance provider.

Response: The proposed rule is not shifting the responsibility of acreage reporting from the insured to the agent. The insured is responsible for the accuracy of the provided information. However, agents should not provide any documentation with information it knows or has reason to know is false. At a minimum the agent should ask the insured if the information provided is correct. If an agent does not know nor has no reason to know that the information is false, there is no basis to sanction the agent. No change is made in response to this comment.

Comment: One commenter is concerned about the rule's reference to proving willful and intentional error versus unintentional error. Unintentional errors can occur; the most experienced operator, agent or adjuster with years of training or coverage, can make a mistake on a report. Months or years after the unintentional error, these mistakes may be construed as intentional omissions. Specific and defined consideration of the values and variables used to determine guilt or innocence is needed.

Response: Unintentional errors are not the basis for sanctions. FCIC bears the burden of proving that the error was willful and intentional at the time it was made and the person will have the opportunity to provide evidence in the defense. An independent Administrative Law Judge will decide whether FCIC has met its burden. No change is made in response to this comment.

Comment: One commenter stated that the prohibition contained in § 400.454(e)(3)(ii) is neither discussed in nor implied by section 515(h) and therefore, is an impermissible expansion of the penalties authorized by ARPA.

Response: Section 400.454(e)(3)(ii) precludes participants from conducting business directly related to crop insurance with disqualified persons or conducting any other business if such business would permit the disqualified person from receiving a benefit under a program administered under the Act. Under section 515(h) of the Act, FCIC is expressly authorized to exclude persons from participating in the crop insurance program. Ancillary to this express authority is the authority to take such actions as are necessary to ensure that disqualified persons do not continue to participate in, or receive benefits from, the crop insurance program. FCIC exercised this authority in § 400.454(e)(3)(ii). Without this provision, persons could avoid their disqualification by affiliating with other persons. Further, as learned in the suspension and debarment process, the only meaningful way to prevent persons from doing business with disqualified persons is to make them also subject to disqualification. No change is made in response to this comment.

Comment: One commenter stated that the penalty imposed under § 400.454(e)(3)(iii) is inequitable and overly broad. For example, if a disqualified agent also is a chemical supplier, it is unreasonable for FCIC to prohibit insureds from purchasing chemicals from that individual.

Response: Doing business with a disqualified person does not automatically subject the participant to disqualification. The purpose of § 400.454(e)(3)(iii) is to preclude persons from circumventing their

disqualification. FCIC will have to evaluate whether the business is related to the crop insurance program, the disqualified person will be able to receive benefits under the crop insurance program as a result of the business relationship, or the disqualified person is using the business relationship to obtain benefits not otherwise entitled to because of the disqualification. No change is made in response to this comment.

Comment: One commenter asked what occurs in a situation in which a participant is unaware that the person with whom he or she is doing business was disqualified. The commenter asks whether a participant has an obligation to inquire of a prospective business partner as to its status in the crop insurance program.

Response: A participant has an obligation to review ITS and EPLS to discover whether a person with whom they are doing business is disqualified. Therefore, unless there is some subterfuge on the part of the disqualified person, such as using different names, social security numbers, etc., there should not be any situation where the participant is unaware they are doing business with a disqualified person.

Comment: One commenter stated that the phrase in § 400.454(e)(3)(iii), 'may be subject to disqualification' seems selective. The commenter asks what criteria FCIC will apply in determining whether to disqualify a participant for doing business with a disqualified person.

Response: The purpose of the provision is to prevent disqualified persons from circumventing their disqualification. There may be situations where the participant does not know and has no reason to know that a person has been disqualified, such as using a slightly different name or social security number. Under these circumstances, it is unlikely disqualification could be imposed on the participant. There may also be situations where the business conducted is in no way related to the crop insurance program. However, there may also be situations where the participant knows the person is disqualified and elects to do business with them anyway. Under such circumstances, disqualification of the participant may be appropriate. Each case will have to be considered on its own merits. This may seem selective, but all cases will ultimately be determined by a neutral Administrative Law Judge who will determine whether FCIC has met its burden.

Comment: One commenter stated that § 400.454 refers to a person as an insurance provider and the disqualification of an insurance provider is also broad and ambiguous. The commenter asks if the entire insurance provider, the individual, or both are penalized if a qualifying error occurs. Clarification is needed to explain the process used when an insurance provider is disqualified because of an error.

Response: Insurance providers cannot be disqualified because of an error unless such error was committed willfully and intentionally. If the person named in the disqualification is the insurance provider, then the insurance provider as a business entity is disqualified. If an individual affiliated with the insurance provider is disqualified, the disqualification applies to the individual, not the insurance provider unless specifically named. The process used for disqualification is the same for all persons, including individuals and insurance providers. A complaint is filed seeking disqualification and the person can mount a defense before a neutral Administrative Law Judge.

Comment: One commenter stated that § 400.454(e)(3)(ii) states that 'no participant may conduct business with a disqualified participant or other person * * * if, through the business relationship, the disqualified participant or other person will derive any monetary or non-monetary benefit from a program administered under the Act.' It is not clear what 'program administered under the Act' means.

Response: ''Program administered under the Act'' means any program authorized under the Federal Crop Insurance Act. This would include all crop insurance programs, education programs, research and development programs, expert reviews, etc. It would not include any program not authorized under the Act, such as private hail insurance or other lines of business.

Comment: One commenter stated that the rule is overbroad in that it could be interpreted to apply to contractual, statutory, or other pre-existing legal rights and obligations that an insurance provider might have with 'other persons,' i.e., its employees subject to future disqualification. For example, if an employee is disqualified for violating 'FCIC requirements' and is terminated for cause, under federal law the insurance provider must continue to honor its existing ERISA obligations to its former employee. As the rule is written, allowing the disqualified participant to continue to derive these monetary benefits, as mandated by ERISA, could subject the insurance provider to disqualification. Another commenter stated that contractual and statutory rights that precede disqualification should not be affected. 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 obligations that precede the date of disqualification does not subject an entity to potential disqualification because of indirectly providing a 'monetary or non-monetary benefit from a program administered under the FCIA.'

Response: As stated above, the purpose of this provision is to prevent disqualified persons from circumventing their disqualification by affiliating with other participants. In the scenario presented, once the participant severs the relationship with the disqualified person, FCIC recognizes that there may be legal obligations that the participant must continue to fulfill, such as ERISA. However, such arrangements may be subject to scrutiny to ensure that they are not a subterfuge to continue to channel benefits to a disqualified person. FCIC has added provisions to clarify that simply fulfilling a previous contractual or statutory obligation after termination of the relationship with a disqualified person is not doing business with such person unless the arrangement is determined to provide a means of circumventing the disqualification, for example, a severance agreement executed at the time of termination that provides payments or benefits similar to what the person was previously receiving.

Comment: One commenter stated that the rule has no limitation with respect to the type of business relationship that a participant or other person has with a 'disqualified participant or other person.' Thus, the business activity could be completely unrelated to any business transaction subject to the FCIA or to the receipt of any benefit from the USDA under another Federal program. Second, such a proposed provision creates a serious risk of blacklisting individuals.

Response: There is no limitation with respect to the type of business because FCIC does not want to create loopholes for disqualified persons to be able to create business opportunities to circumvent their disqualification. However, § 400.454(e)(3) expressly states that the business must directly relate to the Federal crop insurance program or allow the person to receive a benefit from a program administered under the Act. As stated above, such

programs would include the contracts, cooperative agreements and partnerships for research and development, educations, etc. Therefore, there is no possibility of ''blacklisting'' individuals. FCIC has the right to elect not to permit disqualified persons to circumvent their disqualification by preventing their ability to obtain benefits related to crop insurance or another program administered under the Act. No change is made in response to this comment.

Comment: One commenter stated that the proposed rule proposes routine review of the ITS and EPLS to ensure FCIC is not doing business with a disqualified person. Each insurance provider handles the flow of information from RMA systems in a different manner. This commenter does not use ITS or EPLS. Agents are notified if an insured is ineligible, however the manner and timing of the notification varies with each insurance provider. The proposed rule would hold agents accountable for review of systems of which they have little or no knowledge. The commenter recommends that RMA systems not accept data for ineligible producers.

Response: The commenter's suggestion presupposes that the disqualified person is an agent or a producer and this may not be the case. Therefore, FCIC would have no means to identify when participants are doing business with disqualified persons. Further, all participants are already under an obligation to check the ITS and ELPS with respect to persons who may be suspended or debarred. That would include agents, loss adjusters, producers, and any other persons. Therefore, this rule does not add a new obligation; it simply reaffirms the existing obligation and places participants on notice to also check for disqualified persons. No change is made in response to this comment.

Comment: One commenter stated that, as the rule is written, an agent and agency could be disqualified from selling crop insurance for an error that was not willful or intentional on their part.

Response: It is difficult to see how continuing to do business with a disqualified person is not willful or intentional unless there is some deceit on the part of the disqualified person. The participant has a duty to check the ITS and ELPS to identify disqualified persons. The participant knows that it is precluded from doing business with such persons. Therefore, the participant's continuance of business with a disqualified person under the circumstances can be considered willful and intentional.

G. Section 400.454(f)

Comment: One commenter stated that the civil fines were too miniscule and suggested that the minimum fine should be $50,000, civil fines should be imposed against all individuals who participated in the entire scheme, and jail time of five years minimum for all offenders involved in the loan process.

Response: FCIC cannot impose a civil fine in any amount greater than that authorized in section 515(h) of the Act. Further, nothing in the Act authorizes the imposition of incarceration. However, to the extent that the conduct that subjects a person to disqualification may violate any criminal statutes, there is no impediment to the prosecution of such persons. Further, any individual who participated in the conduct that is subject to disqualification is also subject to disqualification provided their conduct meets the standards contained in this rule.

Comment: One commenter stated that although § 400.454(c) requires FCIC to consider the ''gravity'' of an offense when imposing a civil fine, FCIC should amend subsection (f) to recognize the concept of materiality.

Response: As stated above, FCIC has amended the provisions in § 400.454(c) regarding whether to impose a civil fine and the amount to include materiality.

Comment: One commenter stated that the rule improperly fails to recognize any concept of materiality. The absence of a materiality test is contrary to FCIA, which only authorizes sanctions for material violations. Because the proposed rule applies to reinsurance agreements, it clearly sets up a situation where immaterial conduct is punished beyond the levels contemplated in the SRA. The commenter suggested that this section could be improved by including the non-exhaustive list of aggravating and mitigating factors found under 7 CFR 1.335(b).

Response: As stated above, FCIC has amended the provisions in § 400.454(c) regarding whether to impose a civil fine and the amount to include materiality. Further, FCIC has also added the list of aggravating and mitigating factors found in 7 CFR 1.335(b) to § 400.454(c).

Comment: Two commenters stated that § 400.454(f)(1) imposes a separate civil fine for each individual action. It was suggested that FCIC should fully explain what constitutes an 'individual action'.

Response: FCIC has revised the provision to refer to ''each violation.'' FCIC has also revised the definition of ''violation'' in § 400.452 to specifically refer to the elements for disqualification or civil fines contained in § 400.454.

Comment: One commenter asked what would constitute an individual or multiple violations.

Response: As stated above, each willful and intentional false or inaccurate statement or each act that would be considered a willful and intentional failure to comply with a requirement of FCIC would be considered an individual violation. For example, each document that contains a back-dated date would be an individual violation. If there is more than one such document or there are different false statements on more than one document, there would be multiple violations.

Comment: One commenter stated that FCIC proposes to eliminate current § 400.454(f), which requires the hearings to be governed by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary. Without this section, it is unclear what rules apply to the hearings. The commenter suggested that FCIC state what rules of practice apply to these proceedings.

Response: The provisions from current § 400.454(f) that provide for the rules of practice have not been eliminated. They were moved to § 400.454(a).

Comment: One commenter suggested that the last sentence of 400.454(f)(3)(i) should end with the period inside the end parenthesis and the preceding sentence should end with a period of its own; '* * * the specified due date. (If * * * signed by FCIC.)' instead of '* * * the specified due date (if * * * signed by FCIC).'

Response: Given that these are independent sentences, FCIC has removed the parenthesis and added periods at the end of each sentence.

H. Section 400.454(g)

Comment: Two commenters stated that the language about insurance providers' assumption of the book of business introduces ambiguity and is absolutely unnecessary. As a matter of both fact and law, policies written by an agent or an agency on behalf of an insurance provider are already the direct liability of the insurance provider, so no assumption would be required. Adding this provision simply introduces confusion to an otherwise clear situation. On the other hand, it is appropriate for this provision to require the insurance provider to assign policies written by a disqualified agent or agency to a different agent or agency.

Response: The commenter is correct that when an agent writes a policy for a particular insurance provider, that

insurance provider has already assumed the liability for such policy. Therefore, this provision is removed. The requirement that the insurance provider assign the policies to a different agent or agency will be retained. However, ultimately it is the producer that has the right of selection of which agent will service their business and may move their policy to any agent of their choice that is not disqualified. Therefore, the provision is revised to allow for this election.

Comment: One commenter stated that the proposed rule appears to suggest that an agent rightfully found in violation can have his entire business confiscated, in addition to disqualification and other pecuniary fines. This could lead to constitutional problems.

Response: The agent is precluded from selling or servicing any policies or receiving any benefits from the sale or service of such policies during the period of disqualification. However, as the insurer, the insurance provider has an obligation to ensure that the policies are sold and serviced in accordance with the approved policies and procedures of FCIC. As stated above, it is the producer that has the right to elect which agent will sell and service his or her policy. If the producer fails to make this election, under the rule, the insurance provider must assign the policy to another agent but the assignment of any policy will only last for as long as the period of disqualification. After the disqualification period, subject to the election of the producer, the agent is entitled to get the book of business back. The provision has been revised to clarify that after the period of disqualification, policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

Comment: One commenter stated that it appears if an agent is disqualified, the agency employing the agent would be subject to disqualification as well. The rule also states that the insurance provider would be required to assign the book to another agent or agency. The commenter suggests the inclusion of language that, in the case of one agent in an agency being sanctioned, would leave the book of business within the same agency if that is the agency's choice or if one agency within an organization is sanctioned, would leave the business within the same organization if that is the organization's choice, unless the agency also committed a willful and intentional violation of FCIC requirement.

Response: If an agent is disqualified, the agency employing the agent may only be disqualified if the agency has been named in a disqualification, it continues to do business with the agent or provides any benefits to the agent under the crop insurance program or any other program authorized under the Act during the period of disqualification. As stated above, it is the producer that has the first right to determine who will sell and service his or her policy. If no such election is made, it is the responsibility of the insurance provider to ensure that the policies are properly serviced. There is nothing in this rule that would preclude the insurance provider from electing to keep the policies in the same agency. However, there is nothing in the Act that provides an agency with the right to take over policies sold and serviced by one of its agents. The transfer of policies under such circumstances should be a contractual matter between the agent, agency and insurance provider. No change is made in response to this comment.

Comment: One commenter had great concern that an insurance provider could somehow assign a violating agent's book of business to someone else. The commenter suggested that it may be legally impossible for an insurance provider to seize an agent's book of business.

Response: Once the agent is disqualified, that agent can no longer sell or service the policies in its book of business or receive any benefits from the same or service of such policies. As stated above, the provision has been revised to provide the producer with the right to elect a different agent. However, if no such election is made, as the insurer of these policies, the insurance provider has an obligation to sell and service the policies under the SRA. FCIC is leaving it to the insurance provider and agent to determine how the book of business will be serviced during the period of disqualification. However, FCIC has added a provision clarifying that after the period of disqualification, the policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

Comment: One commenter stated the requirement that the insurance provider assign them to a different agent or agency to service during the period of ineligibility is unfair and is a threat to the rights of the agent and agency. Agents and agencies own their books of business; it is an asset of the agent and the agency just like any other asset. The reassignment of that book of business would be the transferring of an agent's physical assets to another party.

Response: While agents and agencies may consider the book of business to be an asset, it is the producer that controls who sells and services the policy. Therefore, as stated above, the provision was revised to give the producer the election to cancel and rewrite the policy with another agent or agency. If the producer does not transfer the policy, it is the insurance provider that has a contractual obligation to ensure that the policies are serviced. As stated above, FCIC is leaving it to the agent, agency and insurance provider to determine to whom policies are moved once the agent is disqualified. This rule simply reiterates that such an assignment of the policies must occur. Further, as stated above, FCIC has added provisions clarifying that after the period of disqualification, the policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

Comment: One commenter stated that if a disqualification for an insurance provider results in a 'time out of new sales and renewals, but the ability for continued service of existing policies,' they believe that the same standard should be held to agents and agencies, and not simply a confiscation of an agent's or agency's book of business.

Response: Given the large number of policies in an insurance provider's book of business, it may not be feasible for them to be disqualified in the middle of a crop year without great disruption to the crop insurance program. All of the policies must be cancelled and rewritten with another insurance provider and for some insurance providers it could amount to hundreds of thousands of policies. At the end of the crop year, policies must be cancelled and rewritten with another insurance provider. Therefore, this rule does not allow the insurance provider to continue doing business, it simply provides for the orderly transition of the business. There is not such a large disruption to the program when an agent's or an agency's book of business must be moved. Policies do not have to be cancelled and rewritten because they will remain insured with the same insurance provider. However, as stated above, the agent's or agent's book of business is not confiscated. During the period of disqualification, the producer can elect to move to another agent and only if such election is not made will the insurance providers assign policies to fulfill its contractual obligation under the SRA. The contract between the agent and insurance provider can determine

how the business is sold and serviced if the agent is disqualified and such arrangements will not be disturbed by FCIC unless they violate the provisions of this rule by permitting the agent to continue to benefit from the crop insurance program during the period of disqualification. The provisions have also been revised to clarify that after the period of disqualification, the policies that were assigned by the insurance provider revert back to the previously disqualified agent unless the producer elects another agent.

I. Section 400.454(h)

Comment: One commenter stated that 400.454(h) contains the risk of improperly cumulative and excessive penalties.

Response: There is nothing in section 515(h) of the Act that states that the administrative remedies contained therein are the only remedies for the proscribed conduct. There are other civil, criminal and possibly administrative remedies available. If multiple remedies are applied to a person, that person has the right to challenge the application of those remedies as unconstitutional.

Section 400.457 Program Fraud Civil Remedies Act

Comment: One commenter stated that although the rule does not revise § 400.457(a), the proposed rule renders this section inaccurate. This section is not in accordance with the Program Fraud Civil Remedies Act of 1986, because the standards set forth in 400.454 differ from those set forth in 7 CFR 1.302 and 1.335.

Response: As stated above, FCIC has revised this rule to make it consistent with 7 CFR 1.302 and 1.335 to the maximum extent practicable. In any case, before sanctions can be imposed under both sections 515(h) of the Act and the Program Fraud Civil Remedies Act, all the requirements for the imposition of sanctions under each must be met.

Comment: Several commenters stated that the rule must be clear so that ordinary people can understand what conduct is prohibited and provides sufficient guidance to those who may be subject to the penalties. Several commenters expressed concern with the broad and ambiguous language of the rule. Unintentional errors can occur. Specific and defined consideration of the factors used to determine guilt or innocence is needed to be fair to alleged offenders. One commenter stated that FCIC must clear up any and all ambiguities under the proposed rule so all covered persons receive proper notice of their legal responsibilities. One commenter stated that the rule does not adequately define certain key terms that will provide adequate notice of prohibited conduct in the future. For example, the rule provides sanctions against persons who 'submit' or 'provide' false information related to the Federal crop insurance program. These terms do not provide adequate notice of prohibited conduct to agents or others who merely forward information or forms supplied or completed by others, but who submit the information and forms to insurance provider.

Response: In response to these and other comments, FCIC has added definitions and revised provisions to increase the clarity of the rule. Responses to these comments will also provide guidance. With respect to the terms ''submit'' and ''provide,'' the term submit is not used in the rule. The rule only refers to willfully and intentionally providing false or inaccurate information, consistent with section 515(h) of the Act, which uses the term ''provides.'' However, FCIC has revised the rule to add a definition of ''provides'' but without other specific examples, FCIC is unsure of what ambiguities the commenters are referring to.

List of Subjects in 7 CFR Parts 400, 407, and 457

Administrative practice and procedures; Administrative remedies for non-compliance.

Final Rule

■ Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR parts 400, 407 and 457, as follows:

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

■ 1. The authority citation for 7 CFR 400, subpart R is revised to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o), and 7 U.S.C. 1515(h)

Subpart R—Administrative Remedies for Non-Compliance

■ 2. Revise the heading for subpart R to read as set forth above.

■ 3. Revise § 400.451 to read as follows:

§ 400.451 General.

(a) FCIC has implemented a system of administrative remedies in its efforts to ensure program compliance and prevent fraud, waste, and abuse within the Federal crop insurance program. Such remedies include civil fines and disqualifications under the authority of section 515(h) of the Act (7 U.S.C. 1515(h)); government-wide suspension and debarment under the authority of 48 CFR part 9, 48 CFR part 409, and 7 CFR part 3017; and civil fines and assessments under the authority of the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812).

(b) The provisions of this subpart apply to all participants in the Federal crop insurance program, including but not limited to producers, agents, loss adjusters, approved insurance providers and their employees or contractors, as well as any other persons who may provide information to a program participant and meet the elements for imposition of one or more administrative remedies contained in this subpart.

(c) Any remedial action taken pursuant to this subpart is in addition to any other actions specifically provided in applicable crop insurance policies, contracts, reinsurance agreements, or other applicable statutes and regulations.

(d) This rule is applicable to any violation occurring on and after January 20, 2009.

(e) The purpose of the remedial actions authorized in this subpart are for the protection of the public interest from potential harm from persons who have abused the Federal crop insurance program, maintaining program integrity, and fostering public confidence in the program.

■ 4. Revise § 400.452 to read as follows:

§ 400.452 Definitions.

For purposes of this subpart:

Act. Has the same meaning as the term in section 1 of the Common Crop Insurance Policy Basic Provisions (7 CFR 457.8).

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the disqualification, suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the disqualified, suspended, debarred, ineligible, or voluntarily excluded person.

Agency. The person authorized by an approved insurance provider, or its designee, to sell and service a crop

insurance policy under the Federal crop insurance program.

Agent. Has the same meaning as the term in 7 CFR 400.701.

Agricultural commodity. Has the same meaning as the term in section 1 of the Common Crop Insurance Policy Basic Provisions (7 CFR 457.8).

Approved insurance provider. Has the same meaning as the term in 7 CFR 400.701.

Benefit. Any advantage, preference, privilege, or favorable consideration a person receives from another person in exchange for certain acts or considerations. A benefit may be monetary or non-monetary.

FCIC. Has the same meaning as the term in 7 CFR 400.701.

Key employee. Any person with primary management or supervisory responsibilities or who has the ability to direct activities or make decisions regarding the crop insurance program.

Knows or has reason to know. When a person, with respect to a claim or statement:

(1)(i) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(ii) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(iii) Acts in reckless disregard of the truth or falsity of the claim or statement; and

(2) No proof of specific intent is required.

Managing General Agent. Has the same meaning as the term in 7 CFR 400.701.

Material. A violation that causes or has the potential to cause a monetary loss to the crop insurance program or it adversely affects program integrity, including but not limited to potential harm to the program's reputation or allowing persons to be eligible for benefits they would not otherwise be entitled.

Participant. Any person who obtains any benefit that is derived in whole or in part from funds paid by FCIC to the approved insurance provider or premium paid by the producer. Participants include but are not limited to producers, agents, loss adjusters, agencies, managing general agencies, approved insurance providers, and any person associated with the approved insurance provider through employment, contract, or agreement.

Person. An individual, partnership, association, corporation, estate, trust or other legal entity, any affiliate or principal thereof, and whenever applicable, a State or political subdivision or agency of a State. ''Person'' does not include the United States Government or any of its agencies.

Policy. Has the same meaning as the term in section 1 of the Common Crop Insurance Policy Basic Provisions (7 CFR 457.8).

Preponderance of the evidence. Proof by information that, when compared with the opposing evidence, leads to the conclusion that the fact at issue is probably more true than not.

Principal. A person who is an officer, director, owner, partner, key employee, or other person within an entity with primary management or supervisory responsibilities over the entity's federal crop insurance activities; or a person who has a critical influence on or substantive control over the federal crop insurance activities of the entity.

Producer. A person engaged in producing an agricultural commodity for a share of the insured crop, or the proceeds thereof.

Provides. Means to make available, supply or furnish with. The term includes any transmission of the information from one person to another person. For example, a producer writes information on forms and gives it to the agent and the agent transmits that information to the insurance provider. In both instances, the information is ''provided'' for the purpose of this rule.

Reinsurance agreement. Has the same meaning as the term in 7 CFR 400.161, except that such agreement is only between FCIC and the approved insurance provider.

Requirement of FCIC. Includes, but is not limited to, formal communications, such as a regulation, procedure, policy provision, reinsurance agreement, memorandum, bulletin, handbook, manual, finding, directive, or letter, signed or issued by a person authorized by FCIC to provide such communication on behalf of FCIC, that requires a particular participant or group of participants to take a specific action or to cease and desist from a taking a specific action (e-mails will not be considered formal communications although they may be used to transmit a formal communication). Formal communications that contain a remedy in such communication in the event of a violation of its terms and conditions will not be considered a requirement of FCIC unless such violation arises to the level where remedial action is appropriate. (For example, multiple violations of the same provision in separate policies or procedures or multiple violations of different provisions in the same policy or procedure.)

Violation. Each act or omission by a person that satisfies all required elements for the imposition of a disqualification or a civil fine contained in § 400.454.

Willful and intentional. To provide false or inaccurate information with the knowledge that the information is false or inaccurate at the time the information is provided; the failure to correct the false or inaccurate information when its nature becomes known to the person who made it; or to commit an act or omission with the knowledge that the act or omission is not in compliance with a ''requirement of FCIC'' at the time the act or omission occurred. No showing of malicious intent is necessary.

■ 5. Revise § 400.454 to read as follows:

§ 400.454 Disqualification and civil fines.

(a) Before any disqualification or civil fine is imposed, FCIC will provide the affected participants and other persons with notice and an opportunity for a hearing on the record in accordance with 7 CFR part 1, subpart H.

(1) Proceedings will be initiated when the Manager of FCIC files a complaint with the Hearing Clerk, United States Department of Agriculture.

(2) Disqualifications become effective:

(i) On the date specified in the order issued by the Administrative Law Judge or Judicial Officer, as applicable, or if no date is specified in the order, the date that the order was issued.

(ii) With respect to a settlement agreement with FCIC, the date contained in the settlement agreement or, if no date is specified, the date that such agreement is executed by FCIC.

(3) Disqualification and civil fines may only be imposed if a preponderance of the evidence shows that the participant or other person has met the standards contained in § 400.454(b). FCIC has the burden of proving that the standards in § 400.454(b) have been met.

(4) Disqualification and civil fines may be imposed regardless of whether FCIC or the approved insurance provider has suffered any monetary losses. However, if there is no monetary loss, disqualification will only be imposed if the violation is material in accordance with § 400.454(c).

(b) Disqualification and civil fines may be imposed on any participant or person who willfully and intentionally:

(1) Provides any false or inaccurate information to FCIC or to any approved insurance provider with respect to a policy or plan of insurance authorized under the Act either through action or omission to act when there is knowledge that false or inaccurate information is or will be provided; or

(2) Fails to comply with a requirement of FCIC.

(c) When imposing any disqualification or civil fine:

(1) The gravity of the violation must be considered when determining:

(i) Whether to disqualify a participant or other person;

(ii) The amount of time that a participant or other person should be disqualified;

(iii) Whether to impose a civil fine; and

(iv) The amount of a civil fine that should be imposed.

(2) The gravity of the violation includes consideration of whether the violation was material and if it was material:

(i) The number or frequency of incidents or duration of the violation;

(ii) Whether there is a pattern or prior history of violation;

(iii) Whether and to what extent the person planned, initiated, or carried out the violation;

(iv) Whether the person has accepted responsibility for the violation and recognizes the seriousness of the misconduct that led to the cause for disqualification or civil fine;

(v) Whether the person has paid all civil and administrative liabilities for the violation;

(vi) Whether the person has cooperated fully with FCIC (In determining the extent of cooperation, FCIC may consider when the cooperation began and whether the person disclosed all pertinent information known to that person at the time);

(vii) Whether the violation was pervasive within the organization;

(viii) The kind of positions held by the persons involved in the violation;

(ix) Whether the organization took prompt, appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence;

(x) Whether the principals of the organization tolerated the offense;

(xi) Whether the person brought the violation to the attention of FCIC in a timely manner;

(xii) Whether the organization had effective standards of conduct and internal control systems in place at the time the violation occurred;

(xiii) Whether the organization has taken appropriate disciplinary action against the persons responsible for the violation;

(xiv) Whether the organization had adequate time to eliminate the violation that led to the cause for disqualification or civil fine;

(xv) Other factors that are appropriate to the circumstances of a particular case.

(3) The maximum term of disqualification and civil fines will be imposed against:

(i) Participants and other persons, except insurance providers who:

(A) Commit multiple violations in the same crop year or over several crop years; or

(B) Commit a single violation but such violation results in an overpayment of more than $100,000;

(ii) Approved insurance providers who:

(A) Commit a single violation resulting in an overpayment in excess of $100,000; and

(B) Commit multiple acts of violations resulting in an overpayment in excess of $500,000; and

(iii) Any participant or person who commits such other action or omission of so serious a nature that imposition of the maximum is appropriate.

(d) With respect to the imputing of conduct:

(1) The conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, in violation of § 400.454(b) may be imputed to that organization when such conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the violation is evidence of knowledge, approval or acquiescence.

(2) The conduct of any organization in violation of § 400.454(b) may be imputed to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, knows, or had reason to know of such conduct.

(3) The conduct of one organization in violation of § 400.454(b) may be imputed to another organization when such conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(4) If such conduct is imputed, the person to whom the conduct is imputed to may be subject to the same disqualification and civil fines as the person from whom the conduct is imputed. The factors contained in § 400.454(c)(2) will be taken into consideration with respect to the person to whom the conduct is being imputed.

(e) With respect to disqualifications:

(1) If a person is disqualified and that person is a:

(i) Producer, the producer will be precluded from receiving any monetary or non-monetary benefit provided under all of the following authorities, or their successors:

(A) The Act;

(B) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*) or any successor statute;

(C) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*) or any successor statute;

(D) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*) or any successor statute;

(E) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*) or any successor statute;

(F) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*) or any successor statute;

(G) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921, *et seq.*) or any successor statute; and

(H) Any federal law that provides assistance to the producer of an agricultural commodity affected by a crop loss or decline in the prices of agricultural commodities.

(ii) Participant or other person, other than a producer, such participant or person will be precluded from participating in any way in the Federal crop insurance program and receiving any monetary or non-monetary benefit under the Act.

(2) With respect to the term of disqualification:

(i) The minimum term will be not less than one year from the effective date determined in § 400.454(a)(2);

(ii) The maximum term will be not more than five years from the effective date determined in § 400.454(a)(2); and

(iii) Disqualification is to be imposed only in one-year increments, up to the maximum five years.

(3) Once a disqualification becomes final, the name, address, and other identifying information of the participant or other person shall be entered into the Ineligible Tracking System (ITS) maintained by FCIC in accordance with 7 CFR part 400, subpart U, and this information along with a list of the programs that the person is disqualified from shall be promptly reported to the General Services Administration for listing in the Excluded Parties List System (EPLS) in accordance with 7 CFR part 3017, subpart E.

(i) It is a participant's responsibility to periodically review the ITS and EPLS to

determine those participants and other persons who have been disqualified.

(ii) No participant may conduct business with a disqualified participant or other person if such business directly relates to the Federal crop insurance program, or if, through the business relationship, the disqualified participant or other person will derive any monetary or non-monetary benefit from a program administered under the Act.

(iii) If a participant or other person does business with a disqualified participant or other person, such participant may be subject to disqualification under this section.

(iv) Continuing to make payments to a disqualified person to fulfill pre-existing contractual or statutory obligations after the business relationship is terminated will not be considered as doing business with a disqualified person unless such payment is used as a means to circumvent the disqualification process.

(f) With respect to civil fines:

(1) A civil fine may be imposed for each violation.

(2) The amount of such civil fine shall not exceed the greater of:

(i) The amount of monetary gain, or value of the benefit, obtained as a result of the false or inaccurate information provided, or the amount obtained as a result of noncompliance with a requirement of FCIC; or

(ii) $10,000.

(3) Civil fines are debts owed to FCIC.

(i) A civil fine that is either imposed under with this subpart, or agreed to through an executed settlement agreement with FCIC, must be paid by the specified due date. If the due date is not specified in the order issued by the Administrative Law Judge or Judicial Officer, as applicable, or the settlement agreement, it shall be 30 days after the date the order was issued or the settlement agreement signed by FCIC.

(ii) Any civil fine imposed under this section is in addition to any debt that may be owed to FCIC or to any approved insurance provider, such an overpaid indemnity, underpaid premium, or other amounts owed.

(iii) FCIC, in its sole discretion, may reduce or otherwise settle any civil fine imposed under this section whenever it considers it appropriate or in the best interest of the USDA.

(4) The ineligibility procedures established in 7 CFR part 400, subpart U are not applicable to ineligibility determinations made under this section for nonpayment of civil fines.

(5) If a civil fine has been imposed and the person has not made timely payment for the total amount due, the person is ineligible to participate in the Federal crop insurance program until the amount due is paid in full.

(g) With respect to any person that has been disqualified or is otherwise ineligible due to non-payment of civil fines in accordance with § 400.454(f):

(1) With respect to producers:

(i) All existing insurance policies will automatically terminate as of the next termination date that occurs during the period of disqualification and while the civil fine remains unpaid;

(ii) No new policies can be purchased, and no current policies can be renewed, between the date that the producer is disqualified and the date that the disqualification ends; and

(iii) New application for insurance cannot be made for any agricultural commodity until the next sales closing date after the period of disqualification has ended and the civil fine is paid in full.

(2) With respect to all other persons:

(i) Such person may not be involved in any function related to the Federal crop insurance program during the disqualification or ineligibility period (including the sale, service, adjustment, data transmission or storage, reinsurance, etc. of any crop insurance policy) or receive any monetary or non-monetary benefit from a program administered under the Act.

(ii) If the person is an agent or insurance agency, the producers may cancel their policies sold and serviced by the disqualified agent and rewrite the policy with another agent. If the producer does not cancel and rewrite the policy with another agent, the approved insurance provider must assign the policies to a different agent or agency to service during the period of disqualification or ineligibility. Policies that have been assigned to another agent or agency by the insurance provider will revert back to the disqualified agent or agency after the period of disqualification has ended provided all civil fines are paid in full and the producer does not cancel and rewrite the policy with a different agent or agency;

(iii) If the person is an approved insurance provider, the approved insurance provider shall not sell, or authorize to be sold, any new policies or may not renew, or authorize the renewal of, existing policies, as determined by FCIC, during the period of disqualification or ineligibility. Nothing in this provision affects the approved insurance provider's responsibilities with respect to the service of existing policies.

(h) Imposition of disqualification or a civil fine under this section is in addition to any other administrative or legal remedies available under this section or other applicable law including, but not limited to, debarment and suspension.

■ 6. Revise § 400.455 to read as follows:

§ 400.455 Governmentwide debarment and suspension (procurement).

(a) For all transactions undertaken pursuant to the Federal Acquisition Regulations, FCIC will proceed under 48 CFR part 9, subpart 9.4 or 48 CFR part 409 when taking action to suspend or debar persons involved in such transactions, except that the authority to suspend or debar under these provisions will be reserved to the Manager of FCIC, or the Manager's designee.

(b) Any person suspended or debarred under the provisions of 48 CFR part 9, subpart 9.4 or 48 CFR part 409 will not be eligible to contract with FCIC or the Risk Management Agency and will not be eligible to participate in or receive any benefit from any program under the Act during the period of ineligibility. This includes, but is not limited to, being employed by or contracting with any approved insurance provider that sells, services, or adjusts policies offered under the authority of the Act. FCIC may waive this provision if it is satisfied that the person who employs the suspended or debarred person has taken sufficient action to ensure that the suspended or debarred person will not be involved, in any way, with FCIC or receive any benefit from any program under the Act.

■ 7. Revise § 400.456 to read as follows:

§ 400.456 Governmentwide debarment and suspension (nonprocurement).

(a) FCIC will proceed under 7 CFR part 3017 when taking action to suspend or debar persons involved in non-procurement transactions.

(b) Any person suspended or debarred under the provisions of 7 CFR part 3017, will not be eligible to contract with FCIC or the Risk Management Agency and will not be eligible to participate in or receive any benefit from any program under the Act during the period of ineligibility. This includes, but is not limited to, being employed by or contracting with any approved insurance provider, or its contractors, that sell, service, or adjust policies either insured or reinsured by FCIC. FCIC may waive this provision if it is satisfied that the approved insurance provider or contractors have taken sufficient action to ensure that the suspended or debarred person will not be involved in any way with the Federal crop insurance program or receive any benefit from any program under the Act.

(c) The Manager, FCIC, shall be the debarring and suspending official for all debarment or suspension proceedings undertaken by FCIC under the provisions of 7 CFR part 3017.

■ 8. Amend § 400.457 by adding a new paragraph (d) to read as follows:

§ 400.457 Program Fraud Civil Remedies Act.

* * * * *

(d) Civil penalties and assessments imposed pursuant to this section are in addition to any other remedies that may be prescribed by law or imposed under this subpart.

§ 400.458 [Amended]

■ 9. Amend § 400.458 by removing paragraph (b)(2), adding an ''or'' at the end of paragraph (b)(1) and redesignating paragraph (b)(3) as paragraph (b)(2).

§ 400.459 [Removed]

■ 10. Remove § 400.459.

PART 407—GROUP RISK PLAN OF INSURANCE REGULATIONS

■ 11. The authority citation for 7 CFR part 407 continues to read as follows:

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

■ 12. Amend § 407.9, Group Risk Plan Common Policy, by adding a new section 22 at the end to read as follows:

§ 407.9 Group risk plan common policy.

* * * * *

22. Remedial Sanctions

If you willfully and intentionally provide false or inaccurate information to us or FCIC or you fail to comply with a requirement of FCIC, in accordance with 7 CFR part 400, subpart R, FCIC may impose on you:

(a) A civil fine for each violation in an amount not to exceed the greater of:

(1) The amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this title; or

(2) $10,000; and

(b) A disqualification for a period of up to 5 years from receiving any monetary or non-monetary benefit provided under each of the following:

(1) Any crop insurance policy offered under the Act;

(2) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*);

(3) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*);

(4) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*);

(5) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*);

(6) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*);

(7) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*); and

(8) Any federal law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 13. The authority citation for 7 CFR part 457 is revised to read as follows:

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

■ 14. Amend § 457.8, Common Crop Insurance Policy Basic Provisions, by adding a new paragraph (e) at the end of section 27 to read as follows:

§ 457.8 The application and policy.

* * * * *

27. Concealment, Misrepresentation or Fraud.

* * * * *

(e) If you willfully and intentionally provide false or inaccurate information to us or FCIC or you fail to comply with a requirement of FCIC, in accordance with 7 CFR part 400, subpart R, FCIC may impose on you:

(1) A civil fine for each violation in an amount not to exceed the greater of:

(i) The amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this title; or

(ii) $10,000; and

(2) A disqualification for a period of up to 5 years from receiving any monetary or non-monetary benefit provided under each of the following:

(i) Any crop insurance policy offered under the Act;

(ii) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*);

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*);

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*);

(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*);

(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*);

(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*); and

(viii) Any federal law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

* * * * *

Signed in Washington, DC on December 12, 2008.

Eldon Gould,

Manager, Federal Crop Insurance Corporation.

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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214, 215 and 274a

[Docket No. USCIS–2007–0055; CIS No. 2428–07]

RIN 1615–AB65

Changes to Requirements Affecting H–2A Nonimmigrants

AGENCY: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This final rule amends Department of Homeland Security regulations regarding temporary and seasonal agricultural workers, and their U.S. employers, within the H–2A nonimmigrant classification. The final rule removes certain limitations on H–2A employers and adopts streamlining measures in order to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. The final rule also addresses concerns regarding the integrity of the H–2A program and sets forth several conditions to prevent fraud and to protect laborers' rights. The purpose of the final rule is to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers, while protecting the rights of laborers.

The rule revises the current limitations on agricultural workers' length of stay including lengthening the amount of time an agricultural worker may remain in the United States after his or her employment has ended and shortening the time period that an agricultural worker whose H–2A nonimmigrant status has expired must wait before he or she is eligible to obtain H–2A nonimmigrant status again. This rule also provides for temporary employment authorization to agricultural workers seeking an extension of their H–2A nonimmigrant status through a different U.S. employer, provided that the employer is a registered user in good standing with the E-Verify employment eligibility verification program. In addition, DHS modifies the current notification and