



United States Department of Agriculture

Farm and Foreign Agricultural Services
Risk Management Agency

October 9, 2003

INFORMATIONAL MEMORANDUM

TO: All Reinsured Companies
All Risk Management Agency Offices
All Other Interested Parties

FROM: Ross J. Davidson, Jr. /s/ *Ross J. Davidson*
Administrator

SUBJECT: Witness Requests

BACKGROUND:

The Risk Management Agency (RMA) and Federal Crop Insurance Corporation (collectively "RMA/FCIC") receive numerous requests for witnesses to testify in arbitration or judicial proceedings. The regulations published at 7 C.F.R. part 1, subpart K provide the requirements for making witness requests in cases where RMA/FCIC or the United States Department of Agriculture (USDA) is not a party. RMA/FCIC employees must be authorized to testify when such appearance is in their official capacity or arises out of or is related to their employment with USDA.

Employees can be authorized to testify only if it is in the interest of USDA to do so. The following will be considered when determining if authorization will be provided: (1) what interest of USDA would be promoted by the employee's testimony; (2) whether an appearance would result in unnecessary interference with the duties of the employee; and (3) whether an employee's testimony would result in the appearance of improperly favoring one litigant over another.

When the above stated criteria are met, there have still been questions regarding the scope of the employee's testimony in the proceeding. Many of the requests are for employees to testify regarding investigations that were conducted on the insured's farming operation and, therefore, involve matters that are within the personal knowledge of the employee.



1400 Independence Ave., SW Stop 0806•Washington, DC 20250-0806

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All Programs Authorized Under the Federal Crop Insurance Corporation

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In addition, numerous requests have been made for employees to testify regarding interpretations of policy provisions. In the past, RMA has refused such requests because the basic tenets of insurance law stated that the policy was to be construed against the drafter. In the Agricultural Research, Extension and Education Reform Act of 1998, Congress required that RMA provide interpretations of the Act and any regulation promulgated thereunder. As a result, section 506(r) of the Federal Crop Insurance Act (Act) and 7 C.F.R. part 400, subpart X specifies the process for requests for interpretations of RMA/FCIC's statutory and regulatory provisions. Since many policies are published as regulations, they would be included in this requirement.

RMA realizes there may be occasions when the reinsured company may want testimony to bolster a final agency determination ("FAD"). Further, there are occasions when testimony is sought regarding RMA's approved procedures, handbooks or bulletins. Such matters are not covered under 506(r) of the Act and 7 C.F.R. part 400, subpart X. RMA agrees that under certain circumstances, providing such testimony regarding such matters could be in the interest of USDA.

This bulletin is intended to provide guidance with respect to requests for witnesses and the scope of their testimony and does not revise, amend or otherwise affect the requirements of the reinsured companies under section 506(r) of the Act or 7 C.F.R. part 1, subpart K and part 400, subpart X.

GUIDANCE:

1. All requests for witnesses must be submitted in accordance with 7 C.F.R. part 1, subpart K to the Director, Appeals, Litigation, and Legal Liaison Staff, Risk Management Agency, 1400 Independence Avenue, S.W., Room 4619, AG Stop 0806, Washington, DC 20250, fax number (202) 690-5890.
2. Since Congress has required that RMA issue procedures to determine the manner in which it will render an interpretation of the Act and regulations, RMA will not waive section 506(r) of the Act or 7 C.F.R. part 400, subpart X to permit an employee to testify in lieu of a FAD. To ensure the timely issuance of a FAD and allow time to process witness requests, requests for FAD's should be made when issues first arise, not when litigation is imminent.
3. Each request for witness testimony should identify the type of testimony sought. The types of testimony include matters regarding: (1) facts within the employee's personal knowledge; (2) FAD's; (3) provisions of approved procedures and handbooks; (4) bulletins; or (5) other specific actions taken by RMA. In cases

where the testimony is sought on more than one of these identified matters, the request should so state.

4. With respect to requests for witness testimony where an employee has personal knowledge of the facts of the case, such requests should identify the employee by name and state the knowledge that the requestor believes the employee to possess. If the employee has personal knowledge, the employee may be permitted to testify as to such knowledge if such testimony would meet the above stated criteria. However, the employee will be specifically instructed to refuse to answer any questions regarding interpretations of statute, regulations, policies, procedures or bulletins unless the request identified that testimony would include these issues.
5. With respect to requests for witness testimony regarding an explanation of RMA's actions with respect to a FAD, the request should state the FAD upon which such testimony is sought. If authorized, it will be RMA that will designate the employee to testify. The employee will only be authorized to testify regarding the matters raised in the FAD, including the basis for RMA's interpretation. The employee will be specifically instructed to refuse to answer any questions regarding any other interpretations of statute, regulations, policies, procedures or bulletins unless the request identified that testimony would include these issues.
6. With respect to requests for witness testimony regarding approved procedures, handbooks or bulletins, the request should state the specific provision of the procedures or handbooks or identify the bulletin. If authorized under the above stated criteria, RMA will designate the employee to testify. The employee will only be authorized to testify regarding the provision in the procedure, handbook or bulletin identified by the requestor, including RMA's interpretation of the provision and the basis for such interpretation. In accordance with 7 C.F.R. 400.768, employees will not be permitted to provide interpretations of factual situations, such as whether the conduct of an insured, agent, or loss adjuster was in accordance with the policy or procedures. Further, the employee will be specifically instructed to refuse to answer any questions regarding any other interpretations of statute, regulations, policies, procedures or bulletins not specifically raised in the request unless the request identified that testimony would include these issues.
7. The Appeals, Litigation and Legal Liaison Staff and all employees authorized to testify will consult with the Office of the General Counsel to ensure that the substance of such testimony is in accordance with the law.