

POLICY STATEMENT ON RECEIVERSHIP AND CONSERVATORSHIP COUNSEL

Applicability

This policy statement applies when the Farm Credit System Insurance Corporation (Corporation or FCSIC), acting in its role as receiver or conservator of a Farm Credit System institution, hires outside counsel to provide professional services or support for FCSIC conservatorship or receivership activities. This policy does not apply to services provided to FCSIC by outside counsel in other circumstances. This policy also does not apply when the Corporation, as receiver or conservator, chooses to continue to employ attorneys of the institution that has been placed in receivership or conservatorship on certain continuing matters, such as loan closings, loan restructuring, loan servicing, and loan collection.

Background

The Farm Credit Administration (FCA) has the exclusive power and jurisdiction to appoint a receiver or conservator for a System institution. FCA must appoint FCSIC as conservator or receiver for a System institution other than the Federal Agricultural Mortgage Corporation (Farmer Mac); FCA has the discretion to name FCSIC as receiver or conservator for Farmer Mac.¹

Definition of "outside counsel"

"Outside counsel" means attorneys and law firms who are engaged to represent the interests of the Corporation. Outside counsel may be retained to provide various services for the receivership or conservatorship, including, without limitation, assuming responsibility for specific cases or matters, acting as co-counsel² with the Corporation's attorneys, or providing legal advice to FCSIC on specific issues.

Decision to Retain

FCSIC's Chief Operating Officer (COO) will determine whether it is advisable to retain outside counsel to assist in the conduct of a receivership or conservatorship. FCSIC may retain outside counsel after FCSIC is named as receiver or conservator or when appointment appears imminent. The COO will consider all relevant factors in determining whether to retain outside counsel, including:

- the expertise required;
- the anticipated workload;

¹ See §§ 4.12(b) and 8.41(c) of the Farm Credit Act of 1971, as amended (12 U.S.C. § 2183(b); 2279cc(c)).

² The term "co-counsel" is a general term applied here to an outside attorney or law firm working together with a Corporation staff attorney on a matter. The relationship of the outside attorney or firm and the staff attorney could vary according to the needs of the situation. For example, a co-counsel could be a local attorney or firm working under the specific (day-to-day) direction or the general direction of the staff attorney; an attorney or firm with a special expertise that takes the lead on a case or matter, with the staff attorney also doing substantive work on the case; or an attorney or firm hired to provide support for staff attorneys.

- time constraints; and
- the effectiveness and efficiencies gained by using outside legal counsel.

Selection

The COO, with the advice and concurrence of the General Counsel, shall select and determine the terms of employment of outside counsel. The selection process will be governed by contracting procedures approved by the COO from time to time. Factors considered in selecting outside counsel include, without limitation:

- the capacity to perform the services required;
- relevant expertise and experience;
- location (including possible travel expenses);
- cost effectiveness (including cost containment measures and availability of discount, flat rate and other innovative fee arrangements);
- potential conflicts of interest; and
- outside counsel's reputation for competence, integrity and customer service.

The COO will provide timely reports to the FCSIC Board on the selection and performance of outside counsel.

Services

Outside counsel will be required to enter into a legal services agreement with the Corporation governing the terms and conditions of engagement prior to performing any work. The legal services to be performed by outside counsel will generally include the review of all legal files of the institution at the beginning of a receivership and preparation of a draft litigation plan and budget, including recommendations pertaining to the disposition of pending or potential suits.

Outside counsel will generally be expected to:

- advise FCSIC's COO and General Counsel of any pending or potential suits that are significant in terms of amounts to be recovered, litigation costs, or issues involved;
- investigate previous actions of the institution's directors, officers, and other related parties in order to determine whether to bring civil charges or recommend that criminal charges be brought;
- represent the receiver or conservator in civil actions;
- render legal advice to the receiver or conservator in general corporate matters;
- perform legal services on a discrete projects or matters; and
- provide other services as needed.

Basic Requirements

All outside counsel engaged by FCSIC must agree to comply with the following basic requirements:

1. Outside counsel shall take all measures necessary to ensure the absolute confidentiality of all information entrusted to it, and shall sign a confidentiality agreement acceptable to the COO and General Counsel.

2. Outside counsel must provide proof of, and must maintain, adequate malpractice insurance.
3. Outside counsel shall maintain the highest ethical standards and comply with all applicable laws, rules and regulations governing ethical conduct.
4. Outside counsel are to be generally familiar with and are to comply with all applicable Federal statutes, including the Farm Credit Act, and well as regulations, policies, procedures and directives promulgated pursuant thereto.
5. Outside counsel may list FCSIC as a client in published materials, but may not represent that it has been "approved" as outside counsel for FCSIC.
6. Outside counsel must include in its fees or hourly rates for legal services its costs of doing business, including all "overhead," general and administrative costs, fringe benefits, and profit. Outside counsel shall not charge the Corporation "markups" above any costs actually incurred by outside counsel for any supplies or services obtained by it for the Corporation; any discounts outside counsel receives are to be passed on to the Corporation.

Cost-effective case management

Working with FCSIC staff, outside counsel will be expected to apply a cost/benefit analysis to legal matters where there is discretion, such as decisions whether to investigate, pursue, settle, or drop claims. With respect to actions the receiver is required to take, such as loan collection, we expect outside counsel to take steps to perform such actions through the most cost-effective means.

Coordination and oversight

The General Counsel, or his/her designee, is responsible for managing all legal assignments and litigation, including matters referred to outside counsel. Outside counsel must consult with the General Counsel on all strategic and major tactical decisions associated with a matter as well as on issues that may set a legal precedent. The General Counsel, or his/her designee will, together with a liaison designated by the COO from the Corporation's receivership staff (Receivership Liaison), coordinate the activities of the outside counsel with other receivership activities. Significant activities to be coordinated include preparation of a draft litigation plan and budget, including whether to bring litigation likely to raise significant legal issues, involve significant expenditures of resources, or generate publicity. The type of coordination will be determined on a case-by-case basis.

Outside counsel will submit periodic reports requested by the General Counsel and the Receivership Liaison containing, at a minimum, a list of all significant activities that have been undertaken or are likely to be undertaken in the near future, and all significant costs recently incurred or likely to be incurred in the near future.

Evaluation

In order to assure effective management and retention of outside counsel, FCSIC will evaluate all outside counsel for Corporation receiverships from time to time to assess quality of work, cost consciousness, responsiveness, and effective case management. After considering input

from the Receivership Liaison, the General Counsel (or his/her designee) will review the performance of outside counsel. The evaluations will be submitted to the Chief Operating Officer for approval. These evaluation procedures do not in any way affect the Corporation's process for terminating its use of an attorney or create any right for an attorney to be evaluated prior to a termination.

Termination

The Corporation reserves the right to discontinue its relationship with outside counsel for any reason, at any time. If terminated, outside counsel will be provided instructions concerning disposition of receivership files and other Corporation property. Outside counsel's cooperation during transition is an ethical obligation and necessary for an orderly transfer of legal matters. Upon demand, outside counsel must forward to FCSIC all files and documents concerning the receivership or the Corporation, including all work product.

Post-Representation Responsibilities

While the Corporation's relationship with outside counsel generally begins with execution of a legal services agreement, the relationship imposes responsibilities on outside counsel that continue after the termination of the representation. For example, all information maintained in legal matter files, whether supplied by the Corporation or third parties or created by outside counsel, including attorney work product, is the property of the Corporation. Under no circumstances may outside counsel withhold files for any reason, including a dispute over payment. Upon completion or termination of the matter, outside counsel is responsible for the preservation of the files until the Corporation authorizes their destruction or orders their transfer to the Corporation or another organization. Separate records retention requirements may apply to underlying support documentation related to outside counsel's Corporation invoices.

Audits and Reviews

Outside counsel will be required to allow FCSIC or its representatives or designees to conduct audits or reviews of its billings, including previously paid invoices. All paid invoices are subject to audit regardless of disallowances taken during the fee bill review and approval process. For purposes of subsequent audits, outside counsel will be required to retain copies of all invoice packages and original underlying support documentation, including time sheets and time and expense adjustment records, for at least three years after final payment. The Corporation will reserve the right to obtain additional information upon review of any itemized fee bill or support documentation.