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Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Relief under Ag Credit Act of 1987 may have tax implications

The Agricultural Credit Act of 1987 includes two relief provisions for farmers about to suffer foreclosure, both of which may create discharge of indebtedness income. The first, 7 U.S.C. § 2001(c)(6), provides for termination of the mortgage debt upon payment by the debtor of "recovery value." As a condition to such termination, the Secretary may require a "recapture agreement" to recapture the difference between "recovery value" and fair market value if the real estate is sold within two years. The second, 7 U.S.C. § 2001(d), (e), provides for principal and interest write-down, subject to a "shared appreciation agreement," which would recapture the difference between the appraised value at the time of restructuring and at the time of recapture. The "shared appreciation agreement" may have a term of up to ten years. Recapture is triggered at the earlier of conveyance by the debtor, repayment of the loan, or cessation of farming operations. While these restructuring devices may seem to avoid discharge of indebtedness income because the "recapture agreement" or "shared appreciation agreement" is substituted for the original debt, an analysis of the case law leads to an opposite conclusion.

A discharge of indebtedness [DOI] is included in gross income under section 61(a)(12) of the Internal Revenue Code. DOI results when an obligation is discharged for less than the amount due. IRC § 108 provides for non-recognition of DOI income in bankruptcy cases when the taxpayer is insolvent and when the taxpayer is a solvent farmer. The price of such exclusion from income is the reduction of certain tax attributes, a Congressional attempt to ensure that the income will be realized, and taxed, at the time of some later sale. The "solvent farmer" exception is not an automatic relief from DOI income and many farmers may have some difficulty qualifying under this provision. See 4 N. Harl, Agricultural Law § 39.03[4] (Supp. 1988). If there is a reasonable prospect that the debt will be enforced, there is no DOI and so no reason to qualify for the IRC § 108 exclusions.

(Continued on next page)

FmHA's net recovery value

A primary focus under the Agricultural Credit Act of 1987 for the Farmers Home Administration are the loan servicing provisions. The interim regulations, published September 14, 1988, provide a structure for FmHA in handling loan servicing requests. 53 Fed. Reg. 35638. The new regulations set forth five phases for servicing borrower's accounts.

Phase I involves the accounts of borrowers who are current in their payments. Rescheduling and reamortization are available in this phase to meet the primary objectives of keeping the farmer in business and minimizing losses to the government.

If the farmer borrower is unable to meet or make regular payments, even with a rescheduled or reamortized loan, the borrower enters phase II of the loan servicing options, which includes lower interest rates and deferrals.

When these options do not assist the borrower in preventing delinquency and when the borrower is 180 days delinquent, the borrower enters phase III of the loan servicing process. At this point, the agency must determine which will provide the best net recovery value to the government: keeping the farmer in business or liquidating. The loan servicing options available at this stage are consolidation, rescheduling, reamortization, deferral, softwood timber loans, conservation easements, and write down of debt. Each of these loan servicing options will be measured against the net recovery value to the government.

If at the end of all calculations, FmHA determines that it cannot restructure the loan, a notice of intent to accelerate will be sent to the borrower, notifying the borrower of the right to a meeting with FmHA, the right to appeal, the right to request an independent appraisal, and the right to buy out the loan at net recovery

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The issue is whether a "recapture agreement" or a "shared appreciation agreement" is a sufficient continuation of the original debt to avoid DOI income upon a termination at the time the debtor pays "recovery value" or at the time of a principal and interest write-down. If not, there is clearly DOI income. Forms for both agreements are included in the Regulations promulgated September 14, 1988, certain Provisions of the Agricultural Credit Act of 1987, and Additional Amendments of Portions of Farmer Program Regulations, 53 Fed. Reg. 35746 (1988) (to be codified at 7 C.F.R. § 1951.950, Exhibits C and D).

The Tax Court has held that an obligation is not treated as a true debt for tax purposes

> "when it is highly unlikely, or impossible to estimate, whether or when the debt will be repaid. . . .
>
> . . .
>
> "When an obligation is highly contingent and has no presently ascertainable value, it cannot refinance or substitute for the discharge of a true debt. The very uncertainty of a highly contingent replacement obligation prevents it from re-encumbering assets freed by discharge of the true debt until some indeterminable date when the contingencies are removed. In a word, there is no real continuation of indebtedness when a highly contingent obligation is substituted for a true debt. Consequently, . . . the gain is realized to the extent the taxpayer is discharged from the initial indebtedness."

Angelo Zappo, 81 T.C. 77 (1983).

Under a "recapture agreement," no interest is called for and the decision to sell rests entirely with the debtor. In *Zappo*, even to the extent the guaranty agreement involved was a primary obligation of the debtor, it was subject to a number of contingencies, was not interest bearing, and so was not a "substitute for the discharge of a true debt." Likewise, although a "shared appreciation agreement" is certain of execution at the earlier of the times specified in the statute, the agreement is subject to the contingency that the real estate appreciate, which may not occur and even if its does occur is uncertain in amount. "'[I]n a true lending transaction, there exists the reasonable likelihood that the lender will be repaid in light of all foreseeable risks.'" *Zappo* at 88. Neither the recapture agreement nor the shared appreciation agreement appears to satisfy the *Zappo* criteria. The restructuring arrangements allowed by the Agricultural Credit Act of 1987, even if subject to the "recapture" or "shared appreciation" agreements, create DOI income.

In light of this tax result, a farmer seeking restructuring relief under the Agricultural Credit Act of 1987 and his advisors should assess the farmer's qualifications under the provisions of IRC section 108 for relief from DOI income. If those requirements are not met, there may be tax liability but no funds available with which to pay the tax.

—James W. Narron

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 188 Morris Rd., Toney, AL 35773.

FmHA'S NET RECOVERY VALUE / CONTINUED FROM PAGE 1

value. If the borrower does not exercise any of these rights, the borrower is considered for preservation loan servicing programs, the lease-back/buy-back and homestead protection options.

If the loan cannot be restructured and it is determined that the borrower is ineligible for preservation loan servicing options or if the borrower does not request the preservation loan servicing options, liquidation is required. This is phase IV of the loan servicing procedure.

Phase V involves the property once it is in inventory as the borrower is once again considered for the preservation loan servicing options.

Throughout this process, net recovery value to the government becomes a key component of the calculations. Provisions for determining net recovery value are found at 7 C.F.R. § 1951.909(f). The county supervisor determines the net recovery value to the government based on information available locally with guidance provided by the State Director. The county supervisor initially determines the current market value of the property by using the instructions provided for valuing real estate found in Part 1809 of the regulations and the FmHA instructions for valuing chattel property. 7 C.F.R. § 1951.909(f)(1). Adjustments are then made to the current market value of the property.

The county supervisor must subtract from the current market value the amounts required to pay off prior liens, as well as amounts necessary to pay taxes and assessments, depreciation, management costs, and interest costs to the government. 7 C.F.R. § 1951.909(f)(1)(ii). If the state has statewide or district contracts for management of inventory farms, the State Director will specify the rates to be used in the management costs calculations Exhibit I, A.(1). If the state does not have this information available, the county supervisor will use local level contract rates. Depreciation costs are calculated by dividing the annual rate of depreciation by twelve and multiplying that number by the average holding period in months. Interest cost is the interest rate on 90-day T-Bills, multiplied by the current market value, divided by twelve, and then multiplied by the average holding period in months. Average inventory holding periods are to be established by each state by July 1 of each year. 7 C.F.R. § 1951.909(f)(1)(ii).

The county supervisor must then adjust the current market value for any changes in value during the average inventory holding period. 7 C.F.R. § 1951.909(f)(1)(iii). Increases or decreases in value are to be determined annually by a farm land market advisory committee. The committee's meetings and decisions, including the basis for those decisions, are to be documented and retained in the State Office and provided upon request. Exhibit I., A.(5).

The county supervisor must subtract resale expenses such as repairs, commissions, and advertising. 7 C.F.R. § 1951.909(f)(1)(iv). The county supervisor is to contact at least one local newspaper to obtain the cost for advertising inventory farms. Repair costs involve typical essential repairs related to the physical condition of the collateral. Commission costs are to be determined by a survey of auctioneers to determine the average commission rate for chattel sales. Real estate commissions will be determined

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by an annual state study to find out whether commissions should be included as an expense or whether FmHA disposes of inventory farms without the assistance of brokers or auctioneers. Exhibit I, A. (4)(a).

The county supervisor must subtract other administrative and attorney expenses. 7 C.F.R. § 1951.909(f)(1)(v). The State Director must consult with the regional counsel to determine the government attorney time involved in an involuntary liquidation. Administrative expenses are to be determined by the State Director utilizing FmHA Resource Management System work standards. These standards should be available in the local FmHA office.

Finally, the county supervisor adds any income that will be received after acquisition, such as rent. 7 C.F.R. § 1951.909(f)(1)(vi).

The borrower has forty-five days after notice of ineligibility for loan servicing to buy the property at the net recovery value. FmHA will not finance this buyout. 7 C.F.R. § 1951.909(h)(3)(iii). A borrower who does buy the property at net recovery value must enter into a Net Recovery Buyout Recapture Agreement. This agreement requires a borrower who sells the property within two years of the buyout and realizes a gain to agree to pay the difference in the sale price and the net recovery value buyout amount to FmHA. During the two-year period, FmHA will have a lien against the property which will be subordinate to any purchase money security interest. The borrower's account is credited with the amount paid and a receivable account is established in the amount equal to the difference between the net recovery value and the market value of the real estate. 7 C.F.R. § 1951.913. If the property is not sold within the two-year period, the lien and the borrower's personal liability on the receivable account is then extinguished. 7 C.F.R. § 1951.909(h)(3)(iv).

Borrowers and their advocates should try to determine the net recovery value of the farmer's property as they prepare their requests for loan servicing options. Net recovery value is the bottom line number against which loan servicing options are measured. If any of the loan servicing options will provide greater return to the government than the net recovery value, the borrower cannot buy out at the net recovery value.

–Joyce Lancaster

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Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks:

1. FCA; Agricultural Credit Act of 1987; implementation; proposed rule. 53 Fed. Reg. 44438.

2. FCA; Funding and fiscal affairs, loan policies and operations, and funding operations; borrower rights; announcement of effective date of final regulations. Effective date 10/14/88. 53 Fed. Reg. 45076.

3. FCA; Loan policies and operations; borrower rights; supplemental proposed rule; concerns "two portions of the disclosure regulations concerning the effective interest rate." 53 Fed. Reg. 45101.

4. ASCS; Appeal regulations; final rule; effective date 11/8/88. 53 Fed. Reg. 45073.

5. ASCS; Loans and purchase programs; grains; uniformity of price support and production adjustment programs; final rule; effective date 11/25/88. 53 Fed. Reg. 47658.

6. CCC; Loans and purchase programs; grains, uniformity of price support and production adjustment programs; final rule; effective date 11/25/88. 53 Fed. Reg. 47658.

7. CCC; Appeal regulations; final rule; effective date 11/8/88. 53 Fed. Reg. 45073.

8. CCC; Milk price support program; final rule; effective date 11/15/88. 53 Fed. Reg. 45887.

9. FmHA; Agricultural Credit Act of 1987; implementation; interim rule; correction; effective date 11/14/88. "Request for a meeting to consider action to cure non-monetary defaults and to request loan servicing to correct monetary defaults can be made at the same time, "i.e., . . . borrowers are not obliged to choose between one or the other form of relief." 53 Fed. Reg. 45755.

– Linda Grim McCormick

Correction

The correct address for AALA Director Walter J. Armbruster is:

Walter J. Armbruster
Farm Foundation
1211 West 22nd St., Suite 216
Oak Brook, Illinois 60521

AG LAW CONFERENCE CALENDAR

1989 Penn State area tax meetings.

Jan. 3, 1989, Bedford, PA;
Jan. 4, 1989, Uniontown, PA;
Jan. 5, 1989, Butler, PA;
Jan. 6, Indiana, PA;
Jan. 10, Warren, PA;
Jan. 11, Mercer, PA;
Jan. 12, DuBois, PA;
Jan. 13, Centre County, PA;
Jan. 17, Tamaqua, PA;
Jan. 18, Quakertown, PA;
Jan. 19, Lancaster, PA;
Jan. 20, Chambersburg, PA;
Jan. 24, Lewisburg, PA;
Jan. 25, Honesdale, PA;
Jan. 26, Tunkhannock, PA;
Jan. 27, Wellsboro, PA.

Topics include: preproductive costs, investment credit carryover, dealing with recaptures.

Sponsored by Penn State University College of Agriculture.

For more information, call 814-865-7656.

Conference for employers of farm labor.

Jan. 16-17, 1989. Thompson's Dairy Bar, Clarks Summit, PA.
Feb. 8-9, 1989. Ramada Inn, Kennett Square, PA.
Feb. 14-15, 1989. Holiday Inn, Gettysburg, PA.

Topics include: employment of migrant and seasonal agricultural workers; Penn. Seasonal Farm Labor Act; employee health and safety rules and regulations

Sponsored by Penn State University College of Agriculture.

For more information, call 814-865-9547 or 814-865-7656

Environmental law

Feb. 16-18, 1989, Hyatt Regency, Washington, D.C.

Topics include: Superfund Amendments and Reauthorization Act of 1986; land use regulation; Clean Water Act developments and underground water developments.

Sponsored by Environmental Law Institute and The Smithsonian Institution.

For more information, call 215-243-1630 or 1-800-CLE-NEWS.

AgBiotech'89

March 28-30, 1989, Hyatt Regency, Arlington, VA.

Topics include: patents and regulatory affairs; state and local public relations regarding environmental release.

Sponsored by Biotechnology Magazine

For more information, call 1-800-243-3238, ext 232.

Hazards of the workplace – an employer's obligation to disclose in[f]

by John C. Becker

In the November, 1988 issue of the *Agricultural Law Update,* part one of the two-part discussion on hazards of the workplace focussed on the provisions of the OSHA Hazard Communication Standard. In this second part, the issue under discussion is the employer's obligation to disclose information to the public. In addressing this issue, two sources should be consulted, state law that directs disclosure of information to the public and Title III of the 1986 Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 11001 *et seq.* to the Comprehensive Environmental Response, Cleanup and Liability Act of 1980, (CERCLA), 42 U.S.C. § 9601 *et seq.*

Under state law, any person who lives or works in the state and who is not a competitor of the employer may have the right to request copies of workplace hazardous substance surveys, environmental hazard surveys, and material safety data sheets [MSDS]. Under conditions set forth in the law or regulation, for example, see Pa. Stat. Ann. tit. 35, § 7305(g) (Purdon 1988 Supp.), local police, fire, or emergency response agencies that cover the area in which an employer is located may also be entitled to receive this information. Once received, the agencies may have to limit further disclosure of the information to those that involve the official business of the agency. For example, see 34 Pa. Code § 305.3(d)(3).

Under SARA, an employer's initial obligation is to report the presence of an extremely hazardous substance on the employer's property. 42 U.S.C. § 11002(c). To meet this obligation, an employer needs to obtain the list of extremely hazardous substances prepared by EPA. 40 C.F.R. § 355, Appendix A. When a hazardous substance is identified from this list, the employer or owner of the facility where the substance is located must determine the amount on site and compare that amount to the threshold planning quantity for the substance. If the amount of the hazardous substance exceeds that quantity, the employer or facility owner must notify the state Emergency Response Commission that it is subject to the emergency planning requirements of SARA. *Id.* § 355.30(b).

For example: the threshold planning quantity for aldicarb is listed as 100/10,000 pounds. This refers to the total amount of active ingredient, not total weight of formulated material. The higher number refers to nonpowder, nonmolten, nonsolution formulations, such as granules greater than 100 microns in size. Wetable powders and liquid formulations are covered by the smaller threshold planning quantity number.

The employer or facility operator will designate a representative as facility emergency response coordinator and notify the local emergency planning district of the selection. 42 U.S.C. § 1100d(d)(1). This coordinator will participate in the local emergency response planning process of developing a local response plan.

A third employer obligation deals with the release of extremely hazardous substances. In this situation, reportable quantity amounts are again used to determine if a release must be reported. If the release does not exceed the reportable quantity amount, there is no need to report its release. *Id.* § 11004(a)(2). For example, the reportable quantity amount for aldicarb is one pound. If less than one pound is released, there is no need to report its release.

A release that remains confined to the facility is also not subject to the notification requirement. *Id.* § 11004(a)(4). Relying on this exception to the reporting obligation requires the ability to prove the release did not escape off the property. Routine releases of fertilizers and pesticides as part of agricultural operations are generally not subject to reporting.

Under SARA and CERCLA, the normal application of fertilizer and the application of a Federal Insecticide, Fungicide, and Rodenticide Act registered pesticide are exempt from release reporting. 42 U.S.C. § 9603(e) (West 1983).

If notification is required, it is to be given to the local emergency planning committee and the state emergency response commission of any area likely to be affected by the release. 42 U.S.C. § 11004(b)(1). Notice should also be given to the EPA National Response Center. This notice must be given immediately after the release and will include the following information:

* the chemical name or identity of the released substance
* whether the substance is an extremely hazardous substance
* an estimate of the quantity released
* the time and duration of the release
* the medium (air, water, soil, etc.) into which the substance was released
* precautions to take as a result of the release
* name and telephone number of a contact person
* any known or anticipated immediate or delayed health risks associated with the emergency release and advice concerning medical attention that may be necessary for exposed individuals.

Id. § 11004(b)(2).

As soon as practical after a release that requires this notice, a follow-up notice is to be given to the state and local emergency planning commissions or committees. This follow-up notice updates information in the original notice and includes the following additional information:

* action taken to respond to and contain the release
* known or anticipated immediate or delayed health risks associated with the release
* if appropriate, advice concerning medical attention necessary for exposed individuals.

Id. § 11004(c).

Owners or operators of facilities involved with emergency releases occurring during transportation of the substances can meet the requirement of notification by calling the 911 emergency number, if available, or the telephone operator. *Id.* § 11004(a)(1), 40 C.F.R. § 355.40(b)(4)(ii).

For employers who are subject to OSHA's Hazard Communication Standard, SARA contains additional requirements. The first of these additional obligations requires an employer, or facility operator, to submit a copy of each MSDS to the state commission, the local committee, and the fire department that has jurisdiction over the facility. 42 U.S.C. § 1121(a)(1). At present, this obligation applies to hazardous chemicals that are present in amounts equal to or greater than 10,000 pounds, or extremely hazardous substances greater than or equal to 500 pounds, 55 gallons, or the threshold planning quantity, whichever is less. Effective October 17, 1989, MSDS's for all remaining hazardous chemicals will be submitted, regardless of the amount maintained at the facility. Prior to October 17, 1989, if an employer or facility operator obtains a hazardous or extremely hazardous substance in an amount that would require the MSDS to be submitted, the MSDS must be submitted within three months after it meets the quantity amount that requires the MSDS to be submitted. *Id.* § 11021(d); 40 C.F.R. § 370.20(b)(1)(i), see generally 52 Fed. Reg. 38344-38377.

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ction to the public

As an alternative to providing an MSDS for each of the hazardous or extremely hazardous substances, an employer or facility operator has the option of submitting a list of the chemicals grouped by hazard category such as immediate health hazard, delayed health hazard, fire hazard, sudden release of pressure hazard, and reactive hazard. 42 U.S.C. § 11021(2), 40 C.F.R. § 370.21(b). Each list must also include the chemical or common name of each hazardous chemical as provided on the MSDS. If the substance is a mixture, the list can contain the required information on each component of the mixture or for the mixture itself. When listing components of a mixture those substances that make up at least 1% of the mixture will be listed, unless the substance is carcinogenic in which case substances that make up at least 0.1% of the mixture will be listed, 40 C.F.R. § 370.28(b).

The next additional requirement deals with reporting to the state commission, local planning committee, and local fire department. Those employers or facility operators who file an MSDS must also file a chemical inventory form known as either a "Tier 1" or "Tier 2" form. 42 U.S.C. § 11022(a)(1). The initial filing date of the inventory form was March 1, 1988, and the obligation continues annually thereafter. With the expansion of the MSDS filing requirement in October, 1989, filing of the chemical inventory form will also apply to those employers and facility operators covered by the expanded requirement. Enforcement of the expanded OSHA hazard communication standard on August 1, 1988 will create the obligation for additional employers to file chemical inventory forms on March 1, 1989, the annual renewal date for the filings.

After filing an inventory report form with the local fire department, the owners or facility operator may receive a request for an on-site inspection. Under SARA, the local fire company is authorized to make this inspection and request that the owner provide specific location information on hazardous chemicals at the facility. *Id.* § 11022(f).

When selecting the report form to use, a "Tier 2" form can be used in place of a "Tier 1" form. Check with the state Emergency Response Commission to determine which form is being used in your state.

In order to complete the "Tier 2" form, an employer or facility operator must have the following information readily available.

* The facility name, complete address, primary standard industrial classification code and Dun and Bradstreet number. The standard industrial classification code can be obtained from the unemployment compensation tax return filed by the employer or by referencing the code in the classification manual that is available from the U.S. Government Printing Office in Washington, D.C.
* Name, title, and telephone number (to include a 24 hour phone number) for an emergency contact person.
* The chemical name and chemical abstract service number of each hazardous or extremely hazardous substance being reported. Identification of the substance as a solid, liquid, or gas, pure form or mixture is also required.
* Information about the substance and its hazards, such as physical or health hazards, pressure release hazard, fire hazard, reactivity hazard, and its immediate or delayed effect hazards.
* Inventory information that can be used to calculate maximum daily amount, average daily amount, and number of days when the substance was present at the reported location.
* The type of storage which the substance is under, to include the temperature and pressure conditions.
* A brief description of the location of the substance that will enable it to be located in time of emergency.
* The reporting owner or facility operator has an option to file a site plan or list of coordinated abbreviations to assist in locating the substance on the workplace or facility.

40 C.F.R. § 370.41.

Access to MSDS's and chemical inventory report forms are governed by the statute. Under these rules, any person may obtain an MSDS from a specific facility by submitting a written request to the local planning committee. 42 U.S.C. §§ 11021(c)(2), 11022(e)(3). If an employer or facility operator has used the "Tier 1" inventory report form, a "Tier 2" report may be requested by a state commission or local planning committee member acting in his or her official capacity or if the request is limited to hazardous chemicals stored in amounts in excess of 10,000 pounds. *Id.* § 11022(e)(3)(A),(B),(C). In other situations, a request for a "Tier 2" inventory form may be made if the request includes a general statement of need. *Id.* Such a situation might be that of a request by a private citizen for "Tier 2" report forms. When the request is received by a state commission or local planning committee, the recipient will evaluate the statement of need and forward a request to the employer or facility operator if need is established.

A final SARA requirement deals with reporting requirements for release of toxic chemicals. A release of a toxic chemical is any spilling, leaking, pumping, pouring, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including abandoning or discarding of barrels, containers, and other closed receptacles. 40 C.F.R. § 372.3, see generally, 53 Fed. Reg. 4500-4554.

This obligation is limited to certain employers and facility operators, and therefore may have less than a broad application. To be subject to this requirement, an owner or facility operator must meet all of these guidelines:

* The facility must have ten or more full time employees.
* The facility must be classed in one of the standard industrial classification codes from 20 through 39, as in effect on January 1, 1987.
* The facility manufactures, processes, or otherwise uses a toxic chemical in excess of a threshold quantity of that chemical as set by regulations.

42 U.S.C. § 11023(b)(1).

Major divisions that are outside the standard industrial classification codes are agriculture, forestry, fishing, construction, transportation, communication, electric, gas, sanitary services, wholesale and retail trade, finance, insurance, real estate, and service entities.

Threshold quantities of toxic chemicals to be reported vary according to activity that involves the product and the year in which the activity takes place. For example, facilities that manufactured or processed a toxic chemical during 1987 were obligated to file a report if more than 75,000 pounds of the chemical was manufactured or processed. In 1988, this figure is reduced to 50,000 pounds and further reduced in 1989 and thereafter to 25,000 pounds. If a chemical is "otherwise used" at a facility the threshold amount is 10,000 pounds for any year. *Id.*

In the context of this regulation, "manufacture" means to produce, prepare, import or compound a toxic chemical, whether it be the primary or secondary product of the activity. *Id.* § 11023(b)(1)(c). "Process" is a term used

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to describe the preparation of a toxic chemical, after its manufacture, for distribution in commerce. *Id.* In this context, preparation may involve the physical form or state of the chemical or making part of an article that contains the toxic chemical. "Otherwise used" refers to use that does not meet the definition of "manufacture" or "process." *Id.*

The list of toxic chemicals to which this requirement applies was published in 53 Fed. Reg. 4530-4540, 40 C.F.R. § 372.65. This is a separate list from that which triggers the planning notice and emergency release.

If these requirements have been met, an owner or facility operator must submit to EPA and the State Emergency Response Commission a completed EPA form "R" for each toxic chemical. 40 C.F.R. § 372.15. This report will cover releases of a toxic chemical that occurred during that calendar year and must be filed on or before July 1 of the next year. The first report for calendar year 1987 must be submitted on or before July 1, 1988. Once completed, the facility owner or operator must retain a copy of the report, plus all supporting documents and materials, for a period of five years. 40 C.F.R. § 372.16.

Since the term "release" is broadly defined in this section, the facility owner or operator must know the location where the substance was released and the type of treatment or disposal used at the release point. If the release is emitted to the air, discharged to water, or released to land, form "R" asks the facility owner or operator to determine the total release of the substance in a calculation of pounds per year. If the chemical is treated on the facility before being released, a treatment efficiency calculation is made to determine the effectiveness of the method used.

Unlike the Occupational Safety and Health Act, 29 U.S.C. § 667(a), SARA Title III does not generally pre-empt any other state or local law. 42 U.S.C. § 11041(a). Therefore, individuals subject to a state law disclosure requirement may find themselves subject to disclosure under SARA Title III as well. In some cases disclosure may be to the same agencies, such as police, fire, or other emergency response agencies, but in other cases the list of eligible recipients of this information may be broader. Each method may also result in different procedures to obtain eligible information, thereby creating the need to determine if the applicant is complying with the statute that authorizes its release. If the request must go through a state agency or local commission, inconvenience to and interference with an employer's work routine should be lessened.

This area of the law continues to grow dramatically. Each of these rules serves a useful purpose – to inform workers and the general public about hazards in employment and living arrangements. To achieve the maximum effect on worker and public safety, compliance levels must be high. For employers and their advisors, a useful approach to discussing compliance questions is to emphasize the benefit gained from compliance rather than the obligation imposed by statute or regulation. By raising compliance levels, employers and employees will reap a benefit.

Disaster Assistance Act materials

Various regulations have been issued pursuant to the Disaster Assistance Act of 1988. Pub. L. No. 100-387, 102 Stat. 924 (1988) (to be codified at 7 U.S.C. § 1421 et seq. and at various other sections of Title 7 of the United States Code). To date, these regulations include the following: Commodity Credit Corporation, Loan and Purchase Program, Grains and Similarly Handled Commodities (Final Rule), 53 Fed. Reg. 37700 (9/27/88); Commodity Credit Corporation, Tree Assistance Program (Final Rule), 53 Fed. Reg. 40015 (10/13/88); Commodity Credit Corporation, Emergency Livestock Assistance (Interim Rule), 53 Fed. Reg. 40206 (10/14/88); Agricultural Stabilization and Conservation Service, Poundage Quota and Marketing Regulations for the 1986 Through 1990 Crops of Peanuts (Final Rule), 53 Fed. Reg. 40203 (10/14/88); Commodity Credit Corporation, Forage Assistance Program (Interim Rule), 53 Fed. Reg. 41309 (10/21/88); Agricultural Stabilization and Conservation Service, Burley Tobacco: Marketing Quotas and Acreage Allotments (Interim Rule), 53 Fed. Reg. 43845 (10/31/88); Federal Crop Insurance Corporation, General Crop Insurance Regulations (Notice of Extension of Sales Closing Dates), 53 Fed. Reg. 38707 (10/3/88).

The Agricultural Stabilization and Conservation Service [ASCS] has issued the 1988 ASCS Disaster Assistance Handbook for State and County Offices. The handbook pertains almost exclusively to the Emergency Crop Loss Assistance provisions of the Disaster Assistance Act (Title II of the Act), and was issued in four amendments: 9/19/88, 9/20/88, 10/3/88, and 10/17/88.

Amendment One is actually the foundation document of this handbook. It amends disaster regulations issued under statutes in earlier years. Amendment One includes, but is not limited to, the following areas:

1. The responsibilities of state and county committees;
2. Eligibility requirements;
3. Crop, acreage and yield information, including tobacco and peanuts;
4. Assigned, appraised, and actual production provisions, including acceptable evidence of production;
5. Basic payment rates;
6. Guidelines establishing different payments yields and basic payment rates for the same nonprogram crop;
7. Advance deficiency forgiveness;
8. Disaster credit;
9. Provisions for current and future FCIC insurance;
10. Coordination with Emergency Livestock Assistance provisions;
11. Provisions requiring compliance with highly erodible lands and wetlands regulations;
12. Payment limitations provisions;
13. Fraudulent representation provisions (criminal and civil); and
14. Appeal provisions.

Amendment One also contains various exhibits, including form Letters to Producers Requiring 1989 FCIC Insurance and Waiving 1989 FCIC Insurance, respectively; FmHA 1945-29, ASCS Verification of Farm Acreages, Production and Benefits; CCC-441, Application for 1988 Disaster Benefits; CCC-440, Certification of Crop Insurance; Special Disaster Crop Table (with information on target prices, loan rates and advance deficiency payments); Maintaining and Listing the Crop Table; ASCS-574, Application for Disaster Credit; ASCS-658, Record of Production and Yield; Disaster Computations; and CCC-441A, the 1988 Disaster Program Worksheet.

Amendment Two of the Handbook contains directions for automated processing of data and payment calculations, including information to be used by ASCS office personnel in programming payment calculation software. Amendments Three and Four, respectively, amend and supplement certain basic provisions contained in Amendment One.

One noteworthy aspect of the contents of the above-listed regulations and handbook is the fact that they do not contain any loss provisions relating to reduced crop quality. Under section 205 of the Disaster Assistance Act, the Secretary of Agriculture has the discretion to recognize reduced crop quality as a form of disaster loss for target price commodities and for peanuts, sugar, tobacco, and soybeans. The Secretary has not implemented this section of the Act, although his decision not to do so is reportedly under reconsideration. Certain farm groups and Congressional repre-

(Continued on next page)

DISASTER ASSISTANCE ACT MATERIALS / CONTINUED FROM PAGE 6

sentatives are urging that section 205 be implemented because of well-documented aflatoxin contamination of corn crops in several states and because of the occurrence of crops of small and shriveled soybeans. – *Julia R. Wilder*

This material is based upon work supported by the USDA, Agricultural Research Service, under Agreement No. 59-32U4-8-13. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the USDA.

Editor's note: The National Center for Agricultural Law Research and Information has prepared a working paper on the Disaster Relief Act of 1988. It covers the statute, applicable USDA regulations, and provisions of the ASCS Disaster Assistance Handbook. The publication is free of charge. Contact: NCALRI, University of Arkansas School of Law, Fayetteville, AR 72701; 501-575-7646.

Manufacturer's liability for hazardous wastes deposited on a farm

Property owners were unsuccessful in recovering compensatory and punitive damages for emotional distress that arose from the deposit of hazardous chemicals on their farm in *State of Minnesota by Woyke v. Tonka Corp.*, 420 N.W.2d 624 (Minn. Ct. App. 1988).

Tonka Corporation had allowed an employee to take home unneeded materials that included barrels of still-bottom and obsolete paint. The employee used the materials around the farm. An investigation by the Minnesota Pollution Control Agency led Tonka to remove the barrels from the farm and incur cleanup costs of $260,000.

Because there was no guarantee that the soil was free from contamination after the cleanup, testimony showed a reduction in value of the farm. The property owners sued Tonka for these damages and for emotional distress from the contamination.

The jury awarded $110,000 in property damages for diminished value of the farm, $550,000 in compensatory damages for emotional distress, and $1,960,000 in punitive damages. The trial court granted Tonka's motion for judgment notwithstanding the verdict on the compensatory and punitive damages for emotional distress claims. On appeal, the trial court's judgment n.o.v. was affirmed. There was no objective showing of physical manifestations of emotional distress, no evidence of extreme and outrageous conduct, and no evidence of willful indifference to the safety of others. Thus, the evidence did not support recovery for emotional distress or punitive damages. – *Terence J. Centner*

STATE ROUNDUP

ILLINOIS. *Installment contracts and Chapter 13. In re Kessler,* 86 Bankr. 134 (C.D. Ill. 1988), involved a farming couple whose off-farm income was used to offset the losses of their cow-calf operation. In June, 1987, debtors had entered into a real estate installment contract for the purchase of eighty acres located about twelve miles from the debtors' home. The terms of the contract included a purchase price of $40,000, a down payment of $2,000, and a term of seventeen years with interest at ten percent per year.

In September, 1987, the debtors filed a Chapter 13 proceeding, asserting that the land was worth $12,000 and that they be permitted to pay the sellers over a thirty-year period. The debtors and the sellers stipulated that the eighty-acre tract had a value of $16,000. The stipulation further provided that the sellers were not waiving their objection to feasibility and were not agreeing that the tract was necessary for an effective reorganization. The court agreed with the sellers, thereby enabling the sellers to pursue their remedies in state court.

One issue concerned whether the sellers were entitled to adequate protection. The court noted that a claim of lack of adequate protection can not form the basis of an objection to confirmation of a Chapter 13 plan. Even if it were a suitable objection, the court cited *United States Association of Texas v. Timbers of Inwood Forest Association, Ltd.*, 108 S. Ct. 626, in holding that the sellers were not entitled to adequate protection since there was no showing the land was depreciating in value.

Another issue was whether the stay could be lifted under Section 362(d)(2) even though the debtors' plan appeared to be feasible. To determine this the court had to decide whether the eighty-acre tract was "necessary to an effective reorganization." The court rejected the "rehabilitation test" in favor of a test "which requires a showing that the property will generate income or increase the value of the business and thereby benefit the estate." The court found that their estate would be better served by using the employment funds to pay current creditors rather than paying for additional losses from the cow-calf operation. The land was deemed not necessary for an effective reorganization.

In what appears to be dicta, the court stated that the debtors' right to have a plan confirmed through cramdown and reamortization based on the fair market value is not applicable to all property, only to that property which is necessary to an effective reorganization.

– *Paul A. Meints*

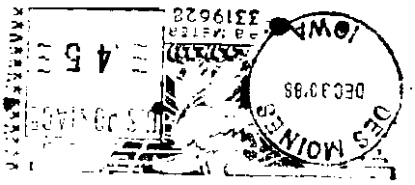
FLORIDA. *Cotton ginners and classifiers lien created.* Chapter 88-228, Florida Laws, enacted Fla. Stat. § 713.595, which created a lien in favor of any person who gins or classifies cotton for any cotton producer. The act, which took effect on July 2, 1988, authorizes a ginner or classifier to withhold the producer's warehouse receipts until the ginner or classifier has been paid in full. It also allows a purchaser or lender to withhold sales or loan proceeds until the ginner or classifier has been paid in full and further authorizes the purchaser to pay jointly the producer and ginner or classifier. The ginner or classifier, however, may withhold only the amount so owed from the joint payment.

– *Sid Ansbacher*

MONTANA. *PCAs, the FTCA, and the Montana Constitution.* Tookes alleged that the PCA's action on the Tooke's loan application amounted to breach of fiduciary duty and constituted constructive and actual fraud. The PCA moved to dismiss the suit, contending that under the Federal Tort Claims Act (FTCA) subject matter jurisdiction for torts alleged against PCA's rested exclusively in federal court. The district court found in favor of the PCA and dismissed the suit. The Montana Supreme Court, in 45 St. Rep. 641, affirmed the district Court. The PCA requested a rehearing. The Montana Supreme Court withdrew its first opinion and on rehearing reversed the district court in *Tooke v. Miles City Production Credit Association*, 763 P.2d 1111 (1988).

In reversing the district court, the Montana Supreme Court noted that Tookes argued that PCA's are exempted from FTCA coverage and that the court's first decision effectively denies tort claimants access to court for prosecution of claims against PCA's because the Montana Federal District courts continue to deny federal jurisdiction of such causes of action. Tookes asserted that the denial of a forum for their claim violates their rights under the Montana Constitution. The PCA responded that sovereign immunity protections fall outside the constitutional guarantees. The Montana Supreme Court wrote that the authority provided by *South Central Iowa PCA v. Scanlon*, 380 N.W.2d 699 (Iowa 1986) and *In re Hoag Ranches*, 846 F.2d 1225 (9th Cir. 1988) leads to the conclusion that PCA's are not FTCA agencies, and therefore the Tookes may pursue their tort claims against the PCA in state court as guaranteed by the Montana Constitution.

Donald D. MacIntyre



AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

ANNOUNCEMENT OF EXECUTIVE DIRECTOR. Effective January 1, 1989, the American Agricultural Law Association will enjoy the services of an Executive Director. The national office will be located in the Robert A. Leflar Law Center at the University of Arkansas. The mailing address will be:

Office of the Executive Director
Robert A. Leflar Law Center
University of Arkansas
Fayetteville, Arkansas 72701

The Association telephone number will be (501) 575-7389. FAX (501) 575-2053. Office hours are 8:00-4:30 central time.

William P. Babione will serve as the Association's first Executive Director. Bill received his B.A. in Business Administration from George Washington University in 1960, his M.A. in Education from Pepperdine University in 1976, and his J.D. from the University of Arkansas School of Law in 1988. He is a candidate for the LL.M. in Agricultural Law at the same law school. Bill brings a wealth of administrative experience, including conference planning, from his 22-year career as an officer in the U.S. Air Force.

In his role as Executive Director, Bill will perform the duties formerly carried out by the Association's Secretary-Treasurer and will supervise the Annual Job Fair. Other duties include coordinating the Annual Meeting and the work of the Association's various committees.

1988 AALA WRITING COMPETITION WINNERS. First Place: David C. Bugg, Spradling, Alpern, Friot and Gum, Oklahoma City, OK, for a paper entitled: "Crop Destruction and Forward Grain Contracts: Why Don't Sections 2-613 and 2-615 of the U.C.C. Provide More Relief?" Second Place: Patrick M. Anderson, Laramie, Wyoming, for a paper entitled: "The Agricultural Employee Exemption From the Fair Labor Standards Act of 1938."

1989 AALA WRITING COMPETITION. Thomas A. Lawler, Attorney at Law, P.O. Box 280, Parkersburg, IA 50665, (319) 346-2650, is in charge of the 1989 Writing Competition. Inquiries about the competition should be directed to him.