Agricultural Law Update

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Federal court rules ASCS Handbooks are not binding on farmers

In a March 17, 1993 decision of the U.S. District Court for the District of Columbia, *Jones v. Espy* (Civil No. 90-2831-LFO), the court ruled, in a landmark decision, that USDA cannot deny farmers subsidy payments based solely on ASCS Handbook violations. ASCS Handbooks, which supplement federal statutes and regulations, are distributed to all ASCS county and state officers but not to farmers.

The Handbook provision at issue in the *Jones* case prohibited loans between persons if the grantor of the loan had a direct or indirect interest in the farm or crop. ASCS cited the Handbook provision as its authority for denying plaintiffs their payments.

Plaintiffs were eighteen partners in a farming operation in Kern County, California. In March, 1988, they submitted an operating plan that accurately described the capital contributions of the partners. In addition, the partnership needed a $100,000 loan, which one of the partners agreed to loan the partnership. This loan was discussed with two county committee personnel, including the County Executive Director, and they both agreed the loan would be valid if evidenced by a note bearing market interest rate. However, the full county committee was not advised of the loan, and it was not disclosed on the operating plan.

The county committee approved the operating plan and approved plaintiffs as eighteen persons; plaintiffs went forward with the $100,000 loan from one of the partners, and farmed.

A year-end review (January, 1989) of plaintiffs found problems with plaintiffs' operation resulting in the county committee reversing itself, finding plaintiffs to be one person. Plaintiffs appealed to the county and state committees but were denied at both levels.

Plaintiffs appealed to the Deputy Administrator, State and County Operations [DASCO], who had a hearing on the issue in September, 1989 and in June, 1990, denied the appeal, citing three reasons: (1) like the county committee, the Deputy Administrator concluded that the Partnership had been undercapitalized, violating the thirty percent "capitalization" provisions of the Handbook; (2) the $100,000 loan from Mr. Jones violated the financing requirements of 7 C.F.R. section 795.7 and the agency Handbook; and (3) DASCO affirmed that the contributions of the two partners, Walter and Brett Tank, who contributed part or all in-kind managerial assistance and equipment, were not commensurate with their share of the Partnership proceeds. When presenting their defense of the appeal, defendants relied only on the latter two of these grounds — that the Jones Loan violated the regulatory "financing" requirements and that the Tank brothers failed to contribute commensurate shares.

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Partial summary judgment granted in challenge to termination of cooperative membership

In a lengthy opinion, a federal district court has granted partial summary judgment in favor of a marketing cooperative, its wholly owned subsidiary, and certain of its employees in an action brought by former members of the cooperative who contend that their membership in the cooperative was unlawfully terminated. *Ripplemeyer v. National Grape Cooperative Ass'n, Inc.*, No. CIV. 92-5034, 1992 WL 359780 (W.D. Ark. Dec. 3, 1992). The action arises out of the 1978 decision of the National Grape Cooperative Association (National), a New York agricultural marketing cooperative that wholly owns Welch Foods, Inc., to close a finished goods production facility in Springdale, Arkansas. Until it was closed, the facility processed grapes grown by

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Plaintiffs argued that (1) the county committee's original determination finding them to be eighteen persons was *final* and *unreviewable*; (2) the "financing" rules violate the Administrative Procedures Act (APA) rulemaking requirements; (3) the agency's ruling was arbitrary and capricious, in violation of the APA; and (4) plaintiffs were entitled to equitable estoppel.

Judge Oberdorfer, in a thorough review of the four arguments raised by plaintiffs, found:

(1) The county committee's determination was not final and was reviewable at year end;

(2) On the issue of the partners' contributions (of part or all in-kind managerial assistance and equipment), because the defendants did *not* make a specific finding that the partners did not make the requisite contributions in money, management, or equipment as noted in the plan, there was no factual basis to reverse the county committee's original determination;

(3) On the issue of the loan, the loan was consistent with the regulations regarding capital contributions; the sole issue was that of compliance with the agency's Handbook requirements. The Handbook stated that the grantor and recipient of financing shall be considered a single person where the grantor has a direct or indirect interest in the farm or crop; however, plaintiffs argued the Handbook provision was an unenforceable agency rule promulgated without notice and comment as required by the APA. Defendants countered that the Handbook provision was merely an interpretive rule and therefore not subject to rulemaking requirements. If the provision was invoked to reduce the subsidies, then it was a rule because it was determinative of issues or rights addressed. Thus, it could not be "enforced against plaintiffs without first being subject to notice and comment."

Accordingly, plaintiffs were granted summary judgment. [The fourth issue, estoppel, was not reached by the court.] In summary, for the first time, a federal court has rejected USDA/ASCS's use of a Handbook provision/rule to prevent a farmer from receiving or retaining a subsidy or deficiency payment.

Jones v. Espy is an important precedent, some would say long overdue, that will force ASCS to more timely update its regulations rather than rely on its Handbook, which will, in the long run, better educate farmers and give them an opportunity to be informed of and comment upon changes in the law as the law develops.

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Horse soring case

The Fourth Circuit Court of Appeals recently interpreted the Horse Protection Act, affirming the decision of the Judicial Officer in *Elliott v. Administrator, Animal and Plant Health Inspection Service, USDA*, No. 92-1662, 1993 WL 89684 (4th Cir., Mar. 30, 1993). At issue in *Elliott* was the appeal of violations of the Act based on findings that three horses entered in horse shows were "sore." Elliott based his appeal on three arguments: 1) that the Secretary erred in interpreting the Act; 2) that the Act was unconstitutionally vague; and 3) that the Secretary improperly relied upon an evidentiary presumption.

The Act prohibits "entering for the purposes of showing ... any horse which is sore...." *Elliott*, 1993 WL 89684 at *2 (citing 15 U.S.C. section 1824(2)(B)). "In general terms, a horse is sore when it has received deliberate treatment that causes the horse to experience discomfort in its forelimbs when it walks." *Id.* at *6. Soring is generally associated with Tennessee Walking Horses (Walkers) as trainers have been known to sore the horses' forelimbs in order to simulate the quick, high step of a properly trained Walker. *Id.* at n. 3.

On three separate occasions, Mr. Elliott paid a show entrance fee and later presented the horse for inspection, whereupon the inspecting veterinarian found the horse to be sore. The Administrator of the Animal and Plant Health Inspection Service (APHIS) filed a complaint against Mr. Elliott. A hearing was held before an administrative law judge (ALJ), who found that the horses were sore, but found that the Act did not cover the time period after "entering" but before showing. APHIS appealed to the Judicial Officer, who reversed and imposed fines and a period of disqualification from showing. *Id.* at *1-2.

On appeal, Mr. Elliott alleged that "entering" as used in the Act constituted only registration for a show and the payment of the fee. The court rejected this argument and stated that the plain meaning of "entering" a horse in a show encompassed all the requirements for entrance — including inspection and the time necessary to complete it. *Id.* at *4. Moreover, the court noted that even if the Act's language on this issue was not clear, USDA's interpretation would be supported as reasonable and consistent with Congressional intent.

Mr. Elliott next argued that the Act was vague in defining the prohibited conduct and in failing to set standards for examination and diagnoses. Elliott alleged that this vagueness rendered the Act unconstitutional. The court rejected these arguments, finding that the prohibited conduct was clearly stated and that the testimony of the veterinarians was properly treated as expert evidence.

Mr. Elliott also challenged the ALJ finding that the horses were sore. He argued that the ALJ had impermissibly relied on the statutory presumption that if a horse is "abnormally sensitive," it is deemed to be "sore." He argued that the phrase "abnormally sensitive" was so vague that the presumption was unwarranted. The court declined to rule on the validity of the presumption, as it held that sufficient additional evidence that the horses were sore was presented.

The court upheld the fine of $2,000 per violation and Mr. Elliott's disqualification for five years per violation, running consecutively.

— Susan Schneider, Arent, Fox, Washington, DC

Grape coop/Continued from page 1

National's members in northwest Arkansas and southern Missouri.

According to National, the facility was closed because it was under-utilized as a result of a decline in grape production in the region. The plaintiffs, former members of the cooperative, allege that National misrepresented the reasons for closing the facility and breached certain understandings relating to the closing.

In their federal court action, plaintiffs asserted a host of claims, including breach of fiduciary duty, breach of contract, misrepresentation and/or constructive fraud, breach of duty to deal fairly and in good faith, the tort of outrage, negligence, and violations of the Securities and Exchange Act, the Agricultural Fair Practices Act, and the Sherman Antitrust Act. Defendants moved for summary judgment on all of the claims and prevailed on all except for the claims alleging breach of fiduciary duty, negligence, and violation of the Securities and Exchange and Agricultural Fair Practices Acts.

The plaintiffs alleged that the defendants breached their fiduciary duty to them by acting beyond their authority, unlawfully, and in bad faith. They premised the duty on New York's cooperative corporations statute and their long-standing relationship with National. Applying New York law, the district court denied the defendants' motion for summary judgment on the breach of fiduciary duty claim on the grounds that whether the duty was appropriately discharged was a question of fact. *Id.*, at *6. Because the plaintiffs apparently treated the breach of fiduciary duty claim and the negligence claim as one cause of action, the court treated the two claims as one in denying summary judgment. *Id.*, at *11.

The plaintiffs' breach of contract claim alleged that the membership and marketing agreement between the plaintiffs and National authorized a member's termination only when the member violates a rule or policy of the cooperative or ceases to meet the qualifications for membership. The court held, however, that the agreement fully authorized the termination in the manner undertaken by National. *Id.*, at *7-8. For the same reasons, the court granted summary judgment in favor of National on the plaintiffs' claim that National breached its duty to deal fairly and in good faith. *Id.*, at *10-11. The court also granted summary judgment in the defendants' favor on the misrepresentation, constructive fraud, and outrage claims, reasoning that the plaintiffs had failed to show with the requisite particularity under Arkansas law a basis for the claims. *Id.*, at *9-11.

As for the alleged statutory violations, the court declined to find that the marketing agreements between the plaintiffs and National were themselves investment contracts for purposes of section 10(b) of the Securities and Exchange Act. The court, however, declined to grant the defendants' motion for summary judgment on the plaintiffs' claim that the Securities and Exchange Act was violated because, notwithstanding the failure of the plaintiffs to allege any misrepresentation or omissions regarding the allocation certificates, capital equity credits, or notes encompassed in the compensation plan contemplated by the marketing agreements, the effect of that compensation plan had not been addressed in the defendants' brief. *d.*, at *13-14.

The court also declined to grant the defendants summary judgment on plaintiffs' claim that the Agricultural Fair Practices Act had been violated through various alleged acts of intimidation. The court held that "[t]he plaintiffs' allegation, if believed by the trier of fact, could support a finding that, even if National properly terminated memberships..., National engaged in coercive and/or intimidating actions to force the plaintiffs to breach, cancel or otherwise terminate their marketing agreements with National." *Id.*, at *15.

Finally, the court refused to exempt the activities of National and Welch Foods, Inc. from Sherman Antitrust Act liability under the Capper-Volstead exemption on the grounds that Welch Foods was not a farmer. *Id.*, at *16-17. The court, however, granted the defendants' motion for summary judgment on the plaintiffs' claims that National and Welch Foods, Inc. conspired to fix prices in violation of section 1 of the Sherman Antitrust Act because, as parent and wholly owned subsidiary, respectively, the two could not be guilty of a conspiracy as a matter of law. *Id.*, at *18-19. The court also found that the plaintiffs had failed to substantiate their additional claims of unlawful conspiracy, including a conspiracy allegedly involving a third party. *Id.*, at *20-21. Summary judgment in the defendants' favor was also granted on the plaintiffs' claims that defendants violated the prohibitions against monopolization found in section 2 of the Sherman Antitrust Act. *d.*, at *21-23.

— Christopher R. Kelley, Of Counsel, Arent Fox Kintner Plotkin & Kahn, Washington, DC

CONFERENCE CALENDAR

Annual APA National Conference "Agenda for America's Communities"
May 1-5, 1993, Chicago, IL
Topics include: protecting farmland in northeastern Illinois; small towns and rural planning.
Sponsored by APA.
For more information, call (312) 955-9100.

Water Organizations in a Changing West: Fourteenth Annual Summer Program
June 14-16, 1993, University of Colorado, Boulder, CO
Topics include: providing for fisheries, recreation, and other instream benefits; new legislative approaches.
Sponsored by Natural Resources Law Center.
For more information, call (303) 492-1288.

Drake University's Agricultural Law Summer Institute
June 14-17, Business planning for farm operations; June 21-24, The law of farmer cooperatives; June 28-July 1, Migrant and seasonal farmworker law; July 5-8, Water law and agriculture; July 12-15, Legal issues in industrialization of agriculture: contract production, biotechnology, intellectual property rights, and land tenure; July 19-22, Comparative agricultural law: a civil law perspective.
Sponsored by the Agricultural Law Center, The Law School, Drake University.
For more information, call 1-515-271-2947.

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* during the month of March, 1993.

1. CCC; Export programs; emerging democracies facilities guarantees; interim rule with request for comments, due 6/1/93. 58 Fed. Reg. 11786; Correction 58 Fed. Reg. 15901.

2. Farm Credit Administration; Employee responsibilities and conduct; effective date 3/3/93; 58 Fed. Reg. 12333.

3. FmHA; Revisions to the Insured and Guaranteed Soil and Water Loan instructions and related instructions to implement the requirements of section 1802 of the Food, Agriculture, Conservation, and Trade Act of 1990; final rule; effective date 3/19/93. 58 Fed. Reg. 15071.

4. FmHA; State Director exception for an extension of the 60-day deadline for requesting borrowers loan servicing. 58 Fed. Reg. 15417.

— Linda Grim McCormick, Toney, AL

Lobbying Congress

By Chuck Culver

"Contrary to tradition, against the public morale, and hostile to good government, the lobby has reached such a position of power that it threatens government itself — its size, its power, its capacity for evil; its greed, trickery, deception and fraud condemn it to the death it deserves."

Bill Clinton in the 1992 Presidential campaign? No, how about Senator Hugo Black on radio in 1935. These are powerful words directed against a constitutionally protected exercise, especially when spoken by a future Justice of the U.S. Supreme Court. Yet, it is an expression of contempt that is as current as today and as old as President Andrew Jackson's struggle with the National Bank lobby.

Of course, there is a flip side to the issue. W.M. Kiplinger in his 1942 book, *Washington Is Like That*, wrote "you yourself are doubtless a member of a lobby group and are represented in Washington by a lobbyist, or two, or three. If you are not, then it shows you are not a very active citizen." Involvement of groups and individuals in the process of government is a cornerstone of our democracy. The absolute refusal by King George III to hear grievances from the American colonists led to the adoption of the First Amendment protection of the right of petition. The modern right of petition to influence government action, coupled with the right of free speech, has evolved into the right to lobby by propaganda and indirect pressure as well as by personal contact.

Most people, when lobbying is mentioned, envision late night private meetings, hand shakes with money, or influence peddling on unsavory issues destined to be buried deep in the bowels of esoteric legislation. Few see lobbying in its broadest context — citizen involvement including the sharing of information and the opening of additional levels of communication between legislator and constituent. Yet, in this very context, all of us may have "lobbied" at some time or another. The question becomes, what level of lobbying is regulated lobbying?

Therefore, this *Update* piece is for individuals wishing to lobby Congress and perhaps those who are already doing so but may not realize there are laws governing their activities. This piece does not cover campaign finance regulations or lobbying for foreign governments. Also, those wishing to influence action by the Executive branch will be subject to other regulations not covered here.

What are the relevant statutes or House and Senate rules that cover lobbying activities?

Since the 1920's, Congress, through the early pioneering efforts of Senator Thad Caraway of Arkansas, has attempted to protect itself, or perhaps insulate itself, from outside influence. In 1946 it succeeded in passing the Federal Regulation of Lobbying Act, 2 U.S.C. sections 261-270 [the FRLA]. The Act, which is more a disclosure than a regulating law, is still the controlling legislation. Congress also passed the Foreign Agents Registration Act, 22 U.S.C. section 611 et seq., which provides for registration with the Attorney General of lobbyists working on behalf of foreign governments. Laws restricting the use of federal funds in lobbying Congress can be found at 18 U.S.C. section 1913, and in the newly adopted "Byrd Amendment," 31 U.S.C. § 1352. In 1989, Congress passed the Ethics Reform Act (as amended in 1991), which changed rules regarding honoraria, travel, gifts, meals, lodging, and post employment lobbying for Members and staff. Finally, those representing charitable institutions which are exempt from taxation as 501(c)(3) corporations have lobbying restrictions codified at 26 U.S.C. section 501(h).

What is lobbying?

Congress defines lobbying in the FRLA as the act of attempting to influence the passage or defeat of legislation, either directly or indirectly. Under 26 U.S.C. section 501(h), Congress defines lobbying as "carrying on propaganda, or otherwise attempting, to influence legislation...."

Who are lobbyists and who must register?

As defined by FRLA, a lobbyist is any person "who by himself, or through any agent or employee or other persons *in any manner whatsoever*, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment" of the passage or defeat of legislation either indirectly or indirectly. As one can readily see, lobbying is defined very broadly, but to be a lobbyist covered by the Act, one must collect, solicit or receive funds/things of value with the intent to use these to help influence the passage or defeat of legislation. Those falling under these provisions, and who do not fall under a specific statutory exception or an exception established by the Supreme Court, as listed below, must register as lobbyists.

This provision is honored more in the breach than compliance. It is ironic to note that the 6,000 currently registered federal lobbyists in the U.S. account for only one-third of those listed in the lobbying reference manual, *Washington Representatives*. The Government Accounting Office (GAO) estimates that there are four times as many paid lobbyists as there are registered lobbyists.

What is required under registration?

Those registering under the FRLA must file in writing and under oath with the Secretary of the Senate and the Clerk of the House. The form shall include the lobbyist's name, business address, name and address of employer, duration of employment, amount of compensation, and amounts paid for specific expenses.

Besides registering, there is a reporting requirement. Additional quarterly filings shall be made detailing: (1) all monies received and expended, to whom paid, and for what purpose; (2) articles that have been published seeking to influence passage or defeat of legislation; and (3) what legislation one was attempting to affect. All such filings are open to the public.

What are the exceptions?

The FRLA establishes three statutory exemptions to the registration requirement: (1) those merely appearing to testify before a Congressional committee; (2) public officials acting in their official capacity; and (3) owners, publishers, and employers of newspapers and periodicals carrying out normal business. No amendment, it should be noted, has been made for radio and television.

In *United States v. Harriss*, 347 U.S. 612 (1954), the Supreme Court limited the scope of the FRLA to cover only direct lobbying of Members, and not staff. The Court tightened the Act by excluding incidental influence and indirect lobbying from coverage. Therefore, the two-part registration test established in the FRLA has been supplemented by the court to include a requirement of direct communications with a Member.

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In *Bradley v. Saxbe*, 388 F. Supp. 53 (1974), the D.C. District Court held that the term "organizations" under the "person" definition in the FRLA was meant to apply to business, philanthropic, and professional organizations, and not to organizations of public officials and their agents. The Court held further that agents of public officials whose lobbying activities were financed from public (non-federal) sources, and who lobbied solely on behalf of public officials for governmental purposes were exempt from registering under the FRLA.

What are the penalties for failing to register?

Any person violating either the registration or reporting requirements under the FRLA is guilty, upon conviction, of a misdemeanor with possible penalties of a fine not to exceed $5,000.00 and imprisonment not to exceed twelve months, or both. A second conviction will result in felony penalties of up to $10,000 in fines and up to five years imprisonment, or both. Any person convicted under the Act shall be barred for three years from lobbying Congress or appearing before any Congressional committee. No one has been convicted under this statute since the 1950's.

Are these restrictions an infringement on the rights of speech and petition?

Perhaps, but they are not impermissible infringement. The intent behind the FLRA was that disclosure would eliminate the seamier aspects of lobbying by warning an unwary Congress and alerting an ever vigilant public. As early as 1853, the Supreme Court, in *Marshall v. Baltimore and Ohio Railroad*, 57 U.S. 314, stated that a non-disclosed contingency contract for lobbying was unenforceable as a matter of public policy. The Court recognized that all persons who may be affected by the acts of a legislature had a right to "urge claims and arguments, either in person or by counsel professing to act for them," but ruled against the enforceability of the lobbying contract in this case because it had not been disclosed to those being lobbied. The Court held further that "legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors."

The Supreme Court, in the case of *United States v. Harriss*, denied claims that the FRLA was unconstitutionally vague or a violation of First Amendment guaranteed freedoms to speak, publish, and petition the government. While limiting the scope of the FRLA, the Court found that the disclosure requirements were minimal and were within the Congressional right of "self protection." The Court refused to rule on whether the three-year disbarment from lobbying penalty was a constitutional violation of the rights of speech and to petition.

Can lobbyists be paid with federal funds?

No. Long-standing federal laws and regulations have barred federal employees from using federal funds to lobby Congress (18 U.S.C. § 1913). Under the recently adopted "Byrd Amendment," 31 U.S.C. § 1352, recipients of federal loans, cooperative agreements, and grants, as well as those hired to secure such awards, must certify to the agency in question that no federal funds were used to influence a federal agency, Member of Congress, or committee or personal staffer in the making of the grant, cooperative agreement, or loan. Also, the use of non-federal lobbying funds to secure such loan, cooperative agreement, or grant must be disclosed at time of submission (Standard Form LLL). Disclosure must be made by all subcontractors and subgrantees as well. Those lobbyists securing grants and cooperative agreements not exceeding $100,000, or loans not exceeding $150,000, are exempt. The penalty for failing to certify is a civil fine of not less than $10,000.00 nor more than $100,000.

In-house lobbyists (those employed at least 130 working days within one year) are probably exempt from the disclosure requirement since the law is targeted to those who hire outside lobbyists, but all recipients must certify that no federal funds were utilized in lobbying. Those who have been successful at securing what is commonly called Congressional "pork" (and Executive "pork" as well) must be cognizant that they are not "home free" by simply registering and reporting under FRLA; they must comply with the Byrd Amendment certification process also.

Are there additional restrictions on the Members?

There are restrictions on both Members and staff. The restrictions come in the form of ethical rules while serving or working in Congress and post-employment rules upon retirement. Lobbyists must familiarize themselves with the ethical rules that members and staff are obliged to follow so as to avoid embarrassment or worse.

As part of the Ethics Reform Act of 1989, 2 U.S.C. § 31-2, new ethics rules governing gifts, travel, meals, and lodging were adopted. No Member or employee of Congress may accept gifts from a single source, except from relatives, that exceed in the aggregate $250 in any calendar year. However, single gifts of $100 or less need not be aggregated towards the $250 limit. Gifts of meals and beverages are exempt from the gift rule if consumed on the spot and not coupled with a gift of overnight lodging.

Necessary expenses (reasonable expenses for food, lodging, and travel) may still be provided to Members and staffers who are "substantially participating" in an event, fact-finding tour, or other function related to their official duties. These expenses are exempt from the gifts rule and are limited to a duration of four consecutive days for domestic travel for House Members and employees and three consecutive days (seventy-two hours) of domestic travel for Senators and Senate employees. Both the House and Senate limit the paying of expenses on international travel to seven consecutive days. The day limits are exclusive of travel time. Necessary expenses can also be provided for spouses and children. These limits apply to necessary expenses paid by a single sponsor. A loophole exists for longer trips if more than one sponsor is involved.

It cannot be overemphasized that lobbyists must protect the Members and Congressional employees to help ensure compliance with ethics rules. A lobbyist can call or write for guidance from the Senate Select Committee on Ethics at (202) 224-2981, 220 Hart Building, Washington, D.C. 20510, or the House Committee on Standards of Official Conduct at (202) 225-7103, HT-2 Capitol, Washington, D.C. 20515.

As of this writing, no Member of Congress or staffer may accept an honorarium for speaking. However, loopholes do exist because speaking fees can be donated by the sponsor to the favorite charity of the Member and campaign contributions are generally allowable (with restrictions).

The post-employment or "revolving door" restrictions on federal employees

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have gained much attention since the 1992 elections. Under 18 U.S.C. section 207(e)(1), a former Member of Congress is prohibited for one year following his leaving office from making any contact with the intent to influence any Member, officer, or employee of Congress (the so-called "cooling-off" period). Key staff members (those making at least three-quarters the salary of a Member for at least sixty days within the last year) leaving Congressional employment may not lobby the Member he worked for or members of the staff he left for one year (18 U.S.C. § 207(e)(2)). Key committee staff members may not lobby Members of the Committee, former Members if they were members during the employee's last year, or committee staffers for one year after leaving employment (18 U.S.C. § 207(e)(3)).

The Senate has traditionally maintained tougher revolving door rules applicable to former staff than has the House. All former Senate staffers are barred by Senate rules for one year upon leaving Senate employment from lobbying the Senator and his current staff. Former committee staffers are prohibited from lobbying committee Members and current committee staff over the same period. These rules do not have criminal penalties. Those whose new lobbying job is for other government entities are exempt from the prohibition. An obvious loophole allows former personal staff to lobby current committee staff, and vice versa.

Are these special ethical considerations for attorneys?

Yes. Under the ABA Model Code of Professional Responsibility (EC 7-16 and 8-4), a lawyer-lobbyist seeking to influence legislation should identify the capacity in which he appears and follow all applicable laws and rules. Although a lawyer may represent client interests without believing in them, a lawyer-lobbyist must not seek action on behalf of the public unless he conscientiously believes it to be in the public interest.

According to EC 8-5, a lawyer-lobbyist shall refrain from deceptive, fraudulent, and illegal practices, and shall disclose such improper actions unless bound by attorney-client confidentiality requirements. EC 903 (also DR 9-101) on revolving door employment states that an attorney should not take private employment in an area in which he had substantial responsibility when he was in public employment. And finally, DR 9-101(c) — Avoiding Even the Appearance of Professional Impropriety — holds that "a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."

Are there changes on the horizon?

Yes. The most visible plan for change is the bill pursued by Senator Levin of Michigan, S. Res. 349 (the House version was introduced by Rep. Bryant, D-Tx). Senator Levin pursued this bill unsuccessfully last Congress, but reintroduced it this Congress because of the greater likelihood of passage. The Levin bill would shift registering and regulating responsibilities to the Justice Department and would create a single method of disclosure reporting (twice yearly) for domestic lobbyists and those representing foreign countries. The bill establishes an elaborate procedure for correcting noncompliance with the registration and disclosure requirements. Other bills on the subject are S. Res. 79 introduced by Senator DeConcini of Arizona and a measure introduced by Senator Boren of Oklahoma that mirrors ethics requirements imposed by the Clinton Administration on the members of the Executive branch.

Agriculture and lobbying

As members of the AALA, we should preceive lobbying for agriculture-related issues as a primary concern. The history of agriculture lobbying is long. In his book *Democracy Under Pressure*, part of the Twentieth Century Fund's "When the War Ends" series written during World War II, the author, Stuart Chase, labeled "Big Agriculture" as one of the four most effective, and threatening, lobbying blocs. In relating "Big Agriculture's" lobbying successes, Stuart Chase pinpoints the beginning of this power as 1920 with the advent of tractors, but foretold its eventual inability to "save itself alone."

Over the years this bloc has grown with the addition of supporters looking to protect the food and nutrition programs that fall under the auspices of the USDA, and has fractured as with the famous breaking of the farm bloc by David Stockman early in the first Reagan term. Today, the clout of the agriculture lobby is suspect. Farm and commodity groups have not coalesced on a broad plan of action. Omnibus farm groups have lost Congressional clout to commodity-specific organizations; livestock groups have advanced programs contrary to the interests of row-crop groups, and vice versa; dairy and livestock interests have been at each others' throats; and groups representing nontraditional frontiers such as sustainable agriculture have been at loggerheads with groups representing more traditional methods, to name just a few. This internal struggle is most likely the result of: (1) federal "zero-sum-game" budget pressures; (2) the rise of effective environmental, consumer, and union advocate groups that have targeted a weak agriculture; (3) the further strengthening of major agribusiness; and (4) the decline of the farm population in the U.S.

David Hardy, former solicitor for the U.S. Fish and Wildlife Service, laments the lack of effectiveness of the agriculture lobby in an article that appeared in the April 12, 1993 issue of *Feedstuffs*. He reasons that agriculture should unite under broad common objectives, creating a single organization dedicated to being a one-stop shop for lobbying action. In the February 22, 1992, issue of the *National Journal*, Graeme Browning reported on a Washington think-tank study declaring there was no farm vote. If the lobbyists cannot rally votes back home, and if the Congressman does not have farm roots of his own, then agriculture has no clout.

Welcome to the world of agriculture lobbying.

Position announcement

The Natural Resources Law Center of the University of Colorado School of Law invites applications for the position of El Paso Natural Gas Law Fellow for the Spring semester, 1994. Candidates may be from business, government, legal practice, or universities. A stipend of $20,000 is available for the semester along with additional support for secretarial and research assistance.

Candidates should apply by letter, outlining the nature of their research interest, their ability to come to the School of Law during the Spring 1994 semester, and a brief statement of their qualifications, including three references. Address letters to Professor David H. Getches, RE: El Paso Fellowship, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

In addition, the Center invites applications for unpaid fellowships in all areas of natural resources law and policy. For all positions, please apply by July 1, 1993.

Final agency action needed for judicial review

Following the Fourth and Seventh Circuits, the U.S. District Court for the District of North Dakota recently held that judicial review of pre-enforcement actions taken under the Clean Water Act (CWA) is not available. *Board of Managers v. Bornhoft*, No. A4-91-218, 1993 WL 33117, (D.N.D. Jan. 20, 1993). At issue was an action for declaratory relief against the Army Corps of Engineers (Corps) and involving the White Spur Drain in Bottineau County, North Dakota. *Id.* at *1.

In 1988, the Board of Managers of the Bottineau County Water Resource District (the Board) applied to the Corps for a § 404 permit under the CWA because of plans to discharge dredged or fill material in a wetland area. The desired work was a continuation of drainage and flood control work begun in the 1970's. *Id.*

In 1989, the Corps learned that a construction company working for the Board had deposited spoil material in the wetland area and issued a "cease and desist" letter to the Board. This letter ordered that the unauthorized work on the project be discontinued and announced that consideration of the § 404 permit would be suspended until the dispute was resolved. *Id.* Two years later, when the dispute had not yet been resolved, the Board brought the present action.

After the filing of the Board's complaint as well as motions to dismiss and for summary judgment, the Corps acted on the § 404 permit, granting permission for completion of at least some of the work requested by the Board. The parties stipulated that the Board's initial request to order the Corps to render a decision on the permit was moot. *Id.* at *2.

The question remaining before the court was whether it could act on the cease and desist letter issued by the Corps. The Board argued that it was not responsible for the dredged material and that any enforcement action taken should be against the contractor and not the Board. The Board asserted that the Corps should not be allowed to shut down an ongoing project of the Board because the contractor failed to comply with contract specifications. *Id.*

The Corps responded by arguing that because it had not assessed civil penalties or brought any enforcement action, the court did not have proper jurisdiction. In a related argument, the Corps asserted that the cease and desist letter did not constitute a final agency action, therefore the case was not ripe for judicial review. *Id.*

The court adopted the Corps' arguments, following the Fourth and Seventh Circuits. *Id.* at *3 (citing *Southern Pines Associates by Goldmeier v. U.S.*, 912 F.2d 713, 717 (4th Cir. 1990); *Hoffman Group, Inc. v. E.P.A.*, 902 F.2d 567, 569 (7th Cir. 1990); *See also McGowan v. U.S.*, 747 Fed. Supp. 539, 542 (E.D. Mo. 1990) (pre-enforcement judicial review not available under the CWA for cease and desist letters)). The court held that the cease and desist letter from the Corps did not constitute a final agency action reviewable by the court. As the Corps had not brought an enforcement action or assessed any penalties, the court did not have jurisdiction.

— Susan A. Schneider, Associate, Arent Fox Kintner Plotkin & Kahn, Washington, DC

ASCS's denial of equitable relief held not reviewable

A challenge to the ASCS's failure to grant equitable relief under 7 U.S.C. section 1441-2(g)(1) and 7 C.F.R. section 791.2 has been dismissed as unreviewable under the Administrative Procedure Act (APA). *Otterson v. Madigan*, No. C-92-3327-DLJ, 1993 U.S. Dist. LEXIS 2157 (N.D. Calif. Feb. 22, 1993). Invoking section 701(a)(2) of the APA, the court held that judicial review was precluded because the agency's determination was "committed to agency discretion by law." *Id.* at *11-12.

The plaintiffs were husband and wife and co-trustees of a family trust. The husband and his father produced rice under a crop-share lease on land owned by the trust. They also entered into a marketing agreement with a cooperative which, in turn, pledged the rice to the CCC for a price support loan. Subsequently, the ASCS required the cooperative to repay the loan because the father was not a member of the cooperative.

The plaintiffs sought, but were denied, administrative equitable relief under 7 U.S.C. section 1441-2(g)(1) and 7 C.F.R. section 791.2. 7 U.S.C. section 1441-2(g)(1) provides that "[i]f the failure of a producer to comply fully with the terms and conditions of the program conducted under this section precludes the making of loans, purchases, and payments, the Secretary may, nevertheless, make such amounts as the Secretary determines are equitable in relation to the seriousness of the failure. The Secretary may consider whether the producer made a good faith effort to comply fully with the terms and conditions of the program in determining whether equitable relief is warranted...."

When the plaintiffs sought judicial review of the ASCS's denial of equitable relief, the government moved to dismiss the complaint on the grounds that section 701(a)(2) of the APA precluded review. Review is precluded under section 701(a)(2) when "agency action is committed to agency discretion by law."

In granting the motion, the court first observed that "[a] statute may commit action to agency discretion under section 701(a)(2) in two ways. First, a statute may be drawn so broadly that it does not provide a court with judicially manageable standards by which it may measure an agency's actions.... Second, there are statutes that leave agency action to 'the exercise of informed discretion,' in cases where experts might disagree about the action to be taken under the statute." *Id.* at *7-8 (citations omitted).

In reviewing the provisions of the statutory authority for the equitable relief sought by the plaintiffs, 7 U.S.C. § 1441-2(g)(1), the court concluded that it was "unable to discern from the language of the statute any meaningful standard against which this Court could judge the Secretary's exercise of his discretion to determine what is equitable.... [T]he Court is convinced that the terms 'good faith effort'... and 'seriousness of the failure to comply' ... do not provide a meaningful standard." *Id.* at *11-12. Accordingly, the court held that judicial review was precluded. The court also ruled that, even if review was not precluded, "there appears to be no available evidence that there was an abuse of discretion." *Id.* at *12.

—Christopher R. Kelley, Arent Fox Washington, DC

Ag law firm criticized

In a sharply critical opinion, the Bankruptcy Court for the northern district of Oklahoma ordered a "general write down of fees" charged by an Arkansas law firm representing a farmer in a Chapter 12 bankruptcy. *In re Burke*, 147 B.R. 787 (Bankr. N.D. Okla. 1992). The court based its action on its finding of "defective disclosure of compensation, the sheer size of the bill, the terrible results obtained, and the absence of a sufficient explanation and excuse therefor." *Id.* at 800. The court called the results of the case "hideous" and stated that the firm's "own activities contributed to the ruination of debtors' farm and the mistreatment of debtors' animals." *Id.* at 799.

— Susan Schneider, Arent, Fox, Washington, DC

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Membership directory update

The Association plans to reprint the membership directory this summer. Please submit any name, phone, or address changes to Bill Babione, AALA Director, University of Arkansas, Fayetteville, AR, by June 1, 1993. In particular, we would like to include members' e-mail addresses. Further, if you have not paid your 1993 dues, please so do immediately so that your name can be included in the directory.

EARLY REMINDER: Remember that the 1993 Annual Conference is being held at the Hotel Nikko in San Francisco, November 11-13, 1993. This year the Conference will begin on Thursday afternoon at 1:00 PM and end Saturday at noon.