Agricultural Law Update

VOLUME 24, NUMBER 3, WHOLE NUMBER 280 MARCH 2007

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IRS rules that some credit union activities are taxable

The IRS has issued three Technical Advice Memoranda (TAM) that will certainly shake up the way credit unions do business. A TAM is issued in response to an IRS agent request for guidance concerning an audit that the agent is processing.

Credit unions began in the U.S. in the early 1900s. They basically are non-profit institutions operated as a cooperative that offer financial services such as better interest rates on accounts and loans to its members. The credit union idea is fairly simple – people should be able to pool their money and make loans to each other. In 1934, the Congress passed legislation that permitted credit unions to be organized anywhere in the United States. Up until then, only a handful of states had passed legislation authorizing credit unions, with some of the statutes being unworkable. The 1934 federal legislation allowed credit unions to incorporate under either state or federal law, a system of dual chartering that still exists. Presently, about 85 million Americans are credit union members.

State-chartered credit unions were first determined to be exempt from federal income tax in 1917 by virtue of a U.S. Attorney General Opinion. In 1951, the Congress enacted Section 501(c)(14)(A) of the Internal Revenue Code (Code), which provided the statutory basis for the tax exemption. Another Code section, however, imposes a tax on the unrelated business taxable income of tax-exempt organizations – that is, income from activities that are not substantially related to the exercise or performance of the organization's exempt function.

According to IRS rules, income-producing activity is unrelated trade or business income if it (1) is generated by a trade or business; (2) the trade or business is regularly conducted; and (3) the conduct of the trade or business is not substantially related to the organization's exempt purpose or function.

In one of the TAMs, IRS reviewed whether six activities of a state-chartered credit union were related substantially to its exempt purpose of providing low cost credit for its members through mutual and non-profit operation. The activities were (1) sale of cancer insurance; (2) members financial services program (MFS); (3) sale of car warranties; (4) sale of credit life and credit disability insurance; (5) sale of collateral

Cont. on p. 2

Practitioner note on estate tax liens

Concerning the federal estate tax, much of the focus in recent years has been on whether the Congress will repeal the tax. The U.S. House has passed several "full-repeal" bills, but the Senate has not gone along. So, for the present time, a great deal of uncertainty exists in the estate planning realm due to the gradual phase-up in the federal estate tax exemption, the phase-down in the top federal estate tax rate, the elimination of the tax in 2010 (along with elimination of complete basis step-up at death), and the resurrection of the tax in 2011 with only a $1 million exemption and a 55 percent top rate (but with complete basis step-up).

A federal estate tax issue that largely escapes discussion is how the IRS goes about collecting the tax–in other words, the collection process. When a taxpayer dies, it can sometimes take years to settle property disputes. IRS uses the general estate tax lien (which is not filed anywhere and does not have to be perfected) to protect its interest in a decedent's assets while the estate is being settled, and it attaches to all of the property in the decedent's gross estate. This general lien is the IRS' primary estate tax collection tool, and it arises when an estate does not pay an estate tax liability that is due and owing. The only property the general estate tax lien does not attach to is property that is not included in the decedent's gross estate or assets that are included in the gross estate, but are expended for court-approved estate expenses.

While less than two percent of all estates owe any federal estate tax upon death, owners of businesses may have a slightly higher possibility of having a taxable estate

Cont. on page 2

protection insurance (CPI); and (6) sale of checks. IRS ruled that only the activity involving the sale of checks was related to the credit union's tax-exempt purpose. All of the other activities were considered to be unrelated to the purpose of "promotion of thrift and providing low-cost credit for its members." With respect to the credit life and disability insurance sales, IRS noted that the sales were primarily for the purpose of generating income to the credit union and some of the employees, and for the benefit of the insured rather than for the benefit of the credit union membership. As a result, the credit union will have to pay "unrelated business income tax" (UBIT) on its income from these activities – that is the same as the corporate income tax rate applied under similar rules.

The other two rulings added accidental death and dismemberment insurance, group life and health insurance, and "guaranteed auto protection" to the list of taxable activities.

The rulings seem to make sense. Banks and other financial institutions that sell similar products must pay tax on the income generated by such sales. If credit unions can do the same thing without paying tax, they would have a competitive advantage across a wide array of financial services – which are unrelated to their tax-exempt purpose.

Keep a sharp eye on this issue. It is possible that the Congress will at least put pressure on the IRS to soften its stance. Tech. Adv. Memos. 200710017, 200710018 and 200710019 (Oct. 20, 2006).

– Roger A. McEowen, Iowa State University

Agricultural Law Update

VOL. 24, NO. 3 WHOLE NO. 280 MARCH 2007
AALA Editor..........................Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail: lindamccormick@aglaw-assn.org

For AALA membership information, contact Robert Achenbach, Executive Director, AALA, P.O. Box 2025, Eugene, OR 97405. Phone 541-485-1090. E-mail RobertA@aglaw-assn.org.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: County Line Printing, Inc. 6292 NE 14th Street, Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 2816 C.R. 163, Alvin, TX 77511, 281-388-0155.

Estate tax liens/Cont. from page 1

at death. Consequently, the Congress has created special rules for business owners whose estates (i.e., the business property) are not able to pay the full amount of their estate tax within nine months after death. For example, if the primary asset of the estate is an interest in a closely-held business, an election can be made to pay the estate tax in installments over 15 years. When the installment payment election is made, the IRS utilizes a special estate tax lien (known as an I.R.C. §6324A lien). This special lien must generally be filed or perfected to be valid against third parties, and it is only valid against specific assets that the executor and the IRS agree upon.

But, here is the unresolved issue– when the IRS files the special estate tax lien, does that extinguish the general estate tax lien? The answer to the question is not very clear. The issue has never been squarely addressed by any court, although two bankruptcy courts and a federal district court have come close. In a recent Chief Counsel Advice Memorandum, IRS stated in a footnote that their position is that the general lien "continues to attach to all property except the property subject to the section 6324A [special estate tax] lien." IRS also admitted that the issue has never been decided directly by the courts. Also, the statute is not entirely clear on the issue. The practical problem is that a special lien (which must be filed or otherwise perfected) could mislead third parties who search the records. The special lien will show up in the records, but the general lien will not since it is not filed anywhere. So, if the general lien is not extinguished (in its entirety) when the special estate tax lien is filed– third parties might assume that the estate has completely taken care of its estate tax obligations (or that the IRS will not pursue any estate assets except those subject to the special estate tax lien).

Is there a way around this problem? One approach might be to require IRS to file the general estate tax lien at the same time it files the special lien.

That would eliminate the chance that IRS could benefit from a "secret" general estate tax lien. One thing is for sure–if Congress does not amend the statute, it is practically a certainty that the issue will eventually get litigated. If that occurs, there is always the chance that the courts will not agree with the IRS' position.

The recent IRS ruling is FAA 20070801F (Dec. 20, 2006).

–Roger McEowen, Iowa State University

Editor's clarification and update on the Nebraska corporate-farming ban in-depth article from last month: The *American Agricultural Law Update* misprinted the final sentence of Professor Schutz's article, "Nebraska corporate-farming ban unconstitutional: what does "the farm" mean?" It should have read as follows: "Under the Eighth Circuit's view of the dormant commerce clause, legislators, task-force members, and anyone lobbying for I-300-like legislation would be well-advised to refrain from using the word "Nebraska", and they should ask themselves, "What does 'the farm' mean?'"

The extra language in the February issue was biographical information. Professor Schutz grew up on a farm in south-central Nebraska. Since that article was printed, the Agriculture Committee of the Nebraska Legislature held a hearing on LB516. Testimony included support for a corporate-farming ban that accommodates the structural needs of new operators and support for an in-depth task force study of the issue. Opposition testimony included calls for a quicker response than the two-year study mentioned in the bill, as well as criticisms concerning what types of interest would be represented on the task force. Some also called for the committee to conduct the hearings that the task force would conduct under the bill. LB516 has been denominated as a priority bill for the Agriculture Committee.

In the *Jones* case, the district court issued a permanent injunction and declaratory judgment after the Eighth Circuit's mandate issued. The parties stipulated to the payment of attorney fees for the six plaintiffs in the amount of $298,812.51, as well as costs of $3,301.65. In that stipulation, the State reserved its right to further pursue its appeal options. At this point, the State has filed another appeal to the Eighth Circuit attacking the declaratory judgment and the permanent injunction. The U.S. Supreme Court denied the petition for writ of certiorari on April 2, 2007. 75 U.S.L.W. 3403.

–Anthony Schutz, University of Nebraska, College of Law

Pennsylvania Commonwealth Court decision on the Agriculture, Communities and Rural Environment Act (ACRE), Act 38 of 2005.

Since its passage on July 6, 2005, many agricultural producers and community officials looked to the courts for interpretation of the authority that the ACRE law gives the Attorney General to take action against local governments that adopt ordinances that limit or restrict agricultural operations in Pennsylvania. Recent editions of *Agricultural Law Update* highlighted these initial decisions. The case reported in this article is the latest decision to be handed down and is one that adds significant breadth to a growing body of law in this area. In many ways it supports the ACRE concept of giving the Attorney General authority to critically review local government action and a structure to implement that authority.

On February 20, 2007, Pennsylvania's Commonwealth Court handed down its decision in *Commonwealth v. Richmond Township and its Board of Supervisors* (No. 360, M.D. 2006). The Attorney General exercised his authority under ACRE to address enforcement of Richmond Township's 2000 ordinance that established a variety of restrictions on intensive agricultural operations in the Township that are inconsistent with other state policies and statutes. Similar to earlier cases, the ordinance in this case was one that was passed before the ACRE law became effective, but it is an ordinance that the Township is enforcing.

Kevin and Mary Jane Weaver own a farming operation in Richmond Township that was classified as an intensive agricultural operation. The Weavers filed a request for a variance and a special exception in regard to their operation. On March 28, 2005 the Weavers filed a land use appeal with the Township's Zoning Hearing Board. The Board held several hearings on the Weavers' claim that the Township's denial of their requests was unlawful since it relied on the fact that the Weavers failed to comply with a Township set-back requirement, a requirement that the Weavers claim to be unauthorized as it is preempted by state law that affects regulations that are inconsistent or more stringent than state law requirements, such as the Nutrient Management Act.

Following the passage of ACRE in July, 2005, the Weavers requested a stay of the Zoning Hearing Board proceedings in order to petition the Attorney General to use his ACRE authority to address the Township's unauthorized ordinance. The Attorney General reviewed the ordinance and filed a petition with Commonwealth Court to invalidate the set-back requirement of the ordinance and enjoin the Township from enforcing it. The Township filed preliminary objections on a variety of issues, which the Court addressed.

The first preliminary objection the Court addressed was whether the Attorney General's ACRE authority extended to land use disputes that, prior to ACRE, had been considered to be under the exclusive jurisdiction of the state zoning enabling law. Under this law the dispute would have first been heard by the Township Zoning Hearing Board, followed by an appeal to the Court of Common Pleas and the Commonwealth Court and beyond, if necessary. ACRE on the other hand, directed the Attorney General's petition to go directly to Commonwealth Court where its decisions would have statewide application. Under ACRE's procedures, decisions would be made more quickly and at less cost to the producer.

Commonwealth Court concluded the authority granted the Attorney General was in conflict with the zoning enabling law, and therefore it proceeded to decide the issues rather than have the ordinance challenge decided by a Zoning Hearing Board.

A second objection involved whether the Weavers were required to complete the Zoning Hearing Board process before they could invoke the ACRE protections, an argument that is similar to the exhaustion of administrative remedies that is common in administrative law. The court held that since the Attorney General is a party to the action before the court, not the Weavers, whatever the Weavers failed to do is of no consequence to the Attorney General.

The Township also objected that the Attorney General's failure to join the Weavers in his petition was a failure to join an indispensable party whose interest would be affected by the decision as required by civil procedural rules. Commonwealth Court disagreed as the Attorney General had authority under ACRE as a public official. Joining every party with an interest is subject to reasonable limitation. Taken literally, practically every citizen in the township would have an interest that would be affected, and joining everyone would be unreasonable. In a similar manner the court dismissed the Township's objections that service upon it by certified mail instead of personal service by the Sheriff was improper and that the Notice to Plead required by Court Rules was not properly attached to the petition.

The Township's final preliminary objection received a different outcome. In this objection the Township objected to the Attorney General's allegation that the Township's 2000 Ordinance improperly prohibits or limits "normal agricultural operations." The Township argued this allegation was inadequate as it fails to specify how the Ordinance affects these operations. In the court's opinion, the Attorney General's allegation was not a conclusion of fact, which would have been proper pleading, but rather a conclusion of law that the Court was not bound to accept. In affirming the Objection that this allegation was not specific, the court gave the Attorney General leave to amend the petition and raise more details about the local ordinance effect on producers.

Under the ACRE law, a "normal agricultural operation" includes:

> The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silviculture and aquaculture crops and commodities and is:
> (1) not less than ten contiguous acres in area; or
> (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $ 10,000.
>
> The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment includes machinery designed and used for agricultural operations, including, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the Farm Safety and Occupational Health Act. Custom work is considered a normal farming practice.

The term "normal agricultural operation" is borrowed from the Pennsylvania Protection of Agricultural Operations from Nuisance Suits Act, (3 Pa. Cons. Stat. Ann. section 951-et seq.) the "Right to Farm" Law, and is one that has a rich history associated with it. When the Right to Farm law was passed in 1982, the term included the requirement that a normal agricultural operation be one that farmers usually and customarily adopt or use (3 Pa. Cons. Stat. Ann. sections 952). Although the "usual or customary" standard is one that makes sense in defining what a normal agricultural operation would be, it has some obvious limitations. Within a short time, the term was amended to remove the usual and customary standard and replace it with the current language including the final paragraph, which opens the door to new developments, practices and procedures that are consistent with

Cont. on page 6

The 2007 farm bill–the drafting process and provisions that could affect your clients

By Phil Fraas

The Federal "farm bill" is legislation enacted every four or five years to reauthorize and reshape farm price and income support programs. The current farm bill—the Farm Security and Rural Investment Act of 2002, Pub. L. 101-171, 116 Stat. 134-540—is set to expire this year, so Congress has begun the process of writing a new farm bill.

The farm bill is comprehensive, typically addressing a myriad of topics in addition to price and income support, including soil and water conservation, agricultural credit, international agricultural trade, Federal nutrition programs, rural development, and agricultural research, extension, and teaching.

Nutrition programs, primarily the food stamp program, take up a large part of the money allocated to the farm bill programs. USDA, in its farm bill proposal, did a projection of the farm bill baseline, that is, the amount that will be spent on farm programs over the next 10 years if current programs are extended without change. Its estimate is that the food stamp and related programs would cost $438 billion over that period, which is roughly 70% of the total estimated cost of $619 billion. To view the USDA web page dedicated to the farm bill and its proposals, go to www.usda.gov, and click on the farm bill icon.

Notwithstanding its large budget impacts, the nutrition title usually is not the main focus of congressional debate during the farm bill process. That honor still goes to the price and income protection programs, which years ago were the sole focus of the farm bill.

The farm bill drafting process

The agriculture committees of the Senate and House of Representatives will do the bulk of the work actually crafting the farm bill. Farm policies tend to be technical in nature, requiring specialized expertise; so usually the rest of Congress looks to the agriculture committees to devise farm policies that best meet the national interest, and then approves their work by large margins.

The agriculture committees have been holding extensive hearings on farm bill issues for a year now, and will continue doing so for another month or so. In addition, they recently put in their farm bill budget requests.

Phil Fraas is a solo practitioner in Washington, D.C.

A key determinant in crafting a farm bill is the amount of money available for it. Congress is expected to decide on the agriculture committee budget requests some time in April or May. Many expect that the agriculture committees will get authority to spend roughly the same amount in the new farm bill as would be spent if current programs are extended. Of course, the committees will have the discretion to change funding priorities as appropriate.

The chairmen of the agriculture committees recently announced their schedule for actual drafting of the farm bill, and it is an ambitious one. The committees will hold mark-up sessions in June; take the bill to the floor and then to joint Senate-House conference in July; give their staffs the month of August to put the conference agreement into the correct legislative language, and then take the conference report to the floor for final approval in September.

If Congress adheres to these timelines, it will be the first time the farm bill will have been finished that early since 1977. For farm bills since, completion in late December has been the norm, and on occasion the debate has run over, well into the next year.

The September deadline, however, remains critical because farmers need to know what the price and income support rules are going to be well in advance of preparation for spring 2008 planting. In addition, many other farm bill programs not tied to planting cycles expire or need renewal by the end of this fiscal year, which is September 30.

Some farm bill issues of interest to rural and agricultural law practitioners

The 2007 farm bill will address literally hundreds of farm and rural policies and programs. It would be impossible to do justice to even just the major programs in a short article such as this. So, highlighted here are five issues the resolution of which could have a substantial impact on the clients of rural and agricultural law practitioners.

Payment limitations

Federal law limits to $360,000 the amount of farm program payments a person can receive annually. Over the years, there has been much litigation on the application of the limitations in particular circumstances, and on the scope and meaning of USDA's regulations to implement payment limitations (*see* 7 C.F.R. parts 795 and 1400). In recent years, the litigation has died down as the law has become settled on specific issues, and farmers and their advisers have become more familiar with the details of the limitations.

That period of quiet could change substantially if USDA's farm bill proposals are adopted by Congress. Among its major payment limitation proposals, USDA proposes to decrease the adjusted gross income (AGI) eligibility cap for payments from the current $2.5 million to $200,000. The AGI cap prohibits *any* payments to a person whose adjusted gross income for a year exceeds it.

In arguing that this substantial reduction in the AGI cap will not substantially reduce the overall amount of payments made under the farm programs, USDA cites Internal Revenue Service data that show that, in 2004, there were 38,000 tax filers who had an AGI of $200,000 or more and received farm program payments. These persons received only 4.9% of all farm program payments, or approximately $400,000,000. They include 25,000 who filed Schedule F as farm proprietors (which is about 1.2% of all Schedule F filers) and 13,000 who filed Form 4835, which is used by tax filers who do not materially participate in running a farm to report farm rental income or expenses (that number is 2% of all Form 4835 filers).

USDA also would replace the so-called "three-entity" rule with direct attribution of payments. Under the three-entity rule, an individual can receive payments through three entities, such as family farm corporations and partnerships.

In addition, USDA proposes to issue new rules to strengthen what it characterizes as the difficult-to-measure requirements for the active management contribution to a farm operation that enables individuals or entitles to qualify for program payments without contributing labor to the operation. The details of the new rules have not yet been specified. USDA notes that, under its proposal, landowners who contribute land to a farm operation and receive crop share rent would continue to be considered actively engaged in agriculture and eligible for program payments.

Further worth noting here, USDA's proposal would repeal the separate payment limitations for honey, peanut, and wool and mohair program payments.

Opposition to USDA's payment limit changes, especially the change in the AGI cap, is already mounting in Congress, but there still is a reasonable likelihood that we will see some payment limit changes come out of this farm bill. First, USDA estimates that its proposed changes would save $1.5 billion over 10 years, thus freeing up money for new priorities in an otherwise extremely tight farm bill budget. Also, there is a vocal constituency for payment limitation reform in Congress who believes the current payment limit rules tilt the playing field too far toward the largest operators.

Details of USDA's payment limitation proposals can be accessed by clicking on "download full proposal" in the right column of USDA's farm bill web page and going to the section of the proposal entitled "Title I Commodity Programs." The description of the payment limit proposals is on pages 18-20 of that section.

Assistance for renewable energy development

The recent explosion of projects in rural United States to build ethanol facilities is well documented in the press. With the Nation firmly committed to developing alternative sources of energy to reduce dependence on foreign oil, it is anticipated that the demand for ethanol and other biofuels will intensify in coming years.

In tune with this new policy orientation, the USDA farm bill proposal has a major renewable energy title. It would authorize more than $1.6 billion in new funding and would target programs to develop cellulosic ethanol production. Included would be $500 million for bio-energy research; $500 million for alternative energy and energy efficiency projects that directly help farmers, ranchers, and rural small businesses; and $210 million to support $2.1 billion in loan guarantees for cellulosic ethanol projects in rural areas. Because biofuel has many supporters on Capitol Hill, look for the USDA proposals to be adopted or even increased by Congress in the farm bill.

New provisions affecting fruit and vegetable producers

Practitioners representing fruit and vegetable producers have not had to worry about the farm bill programs up until now because the farm bill price and income programs have focused on grains, oilseeds, and cotton only. It could be different by the time the 2007 farm bill becomes law.

The United States is now confronting a World Trade Organization (WTO) compliance problem that most likely will be addressed in the farm bill and possibly adversely affect fruit and vegetable producers. Under WTO rules, U.S. direct farm payments are classified as trade-distorting because the limitations on planting flexibility that those payments are tied to currently prohibit the planting of fruits, vegetables, and wild rice on base acres eligible for payments. It is believed that, to meet our commitments to reduce trade-distorting support programs, the U.S. must lift that prohibition on planting fruits, vegetables, and wild rice on base acres.

USDA is proposing just that, and Congress will have to give every consideration to adding that proposal in the farm bill, given the importance of world trade and WTO compliance to U.S. agriculture. Naturally, fruit and vegetable producers will oppose losing this protection from competing production by program crop growers. So, to make the medicine moreeasy to swallow, USDA is also proposing that the farm bill authorize an additional $2.75 billion for purchases of fruits and vegetables for the school lunch and other nutrition programs.

It is hard to say how this issue will be resolved, but it likely will be hotly debated.

Agribusiness competition

In the past few years, some members of Congress have become increasingly concerned about the possible harmful effects of mergers and acquisitions that are leading to consolidation in agribusiness. This has led for some to call for a competition package in the farm bill to toughen rules under the Agricultural Fair Practices Act, and improve enforcement of the Packers and Stockyards Act. Since one of those calling for action is the chairman of the Senate Committee on Agriculture, Nutrition, and Forestry, Sen. Tom Harkin (Dem.-Iowa), look for serious consideration to be given to a competition package being included in the farm bill.

Disaster assistance

USDA's farm bill proposal would cut spending under the crop insurance program by $2.5 billion over 10 years, to enable it to increase spending in other parts of the farm bill. Primarily, the savings would come from two changes: (1) reducing the expected loss ratio for the program from 1.075 to an actuarially balanced level of 1.00, which would effectively increase premium costs; and (2) a series of cost-cutting moves, including reductions in premium subsidies and in administrative and operating expense reimbursement to the companies that actually sell the policies to farmers.

Whether or not Congress adopts these recommendations, there likely will be a vigorous effort to remedy the disaster assistance dilemma. A perennial problem the government faces in helping farmers deal with natural disasters is that, while ideally all disaster assistance would be in the form of crop insurance indemnification, for various reasons (including lack of full participation and coverage in the crop insurance program), farmers turn to Congress for direct payments to supplement insurance indemnities whenever a major disaster hits. The result has been a patchwork series of ad hoc disaster payment measures enacted into law over the last 20 years.

The Chairman of the House Committee on Agriculture, Cong. Collin Peterson (Dem.-Minn.), has spoken out strongly about the need to replace this current ad hoc method of assistance with a permanent disaster assistance program that is fair and efficient.

It can be expected that the House Committee will try to come up with such a measure; and both the House and Senate will give close consideration to the USDA crop insurance cost-cutting proposals because of the potential savings involved. The ultimate result could be major changes in how the Federal government provides disaster assistance to farmers.

Summary

We should have the first inklings of how things might go on these issues and others that might affect your clients when the Agriculture Committee chairmen release their positions on the issues in May. Then, things become much clearer by June, when the committees start casting votes on the issues. In interim, you can keep abreast of developments by checking my farm bill blog, www.farmbill2007.com, which will chronicle farm bill developments on a weekly basis.

ACRE/ cont. from page 3
the growth and development of technology in the agricultural sector.

The change in the definition that removes the "usual and customary" standard is significant for it allows the agricultural sector to evolve in response to a variety of factors but still retain its treatment as normal. Within the agricultural sector, considerable change occurred in the past 20 years and the flexibility inherent in the definition of a "normal agricultural operation" that qualifies for Right to Farm protection has been a crucial part in promoting that development by extending Right to Farm protection to these new activities, practices, equipment, and procedures, provided they are consistent with technological development within the agricultural industry. Incorporating this definition into ACRE extends the protection of that law as well.

—John Becker, Penn State University

New booklet on farmers' market rules

Farmers' Legal Action Group, Inc. (FLAG) announces a new booklet, *Understanding Farmers' Market Rules*. The booklet contains important legal information for farmers who sell their vegetables, fruits, flowers, meats, and other foods at farmers' markets. FLAG wrote the booklet to help answer questions it received from farmers. Farmers' markets are especially popular among beginning farmers, immigrant farmers, specialty crop farmers, and limited resource farmers. Many farmers who are interested in direct marketing and value-added agriculture begin by selling at farmers' markets. Because farmers' markets appeal to new farmers and to farmers with little direct marketing experience, there is a greater need for information for farmers to turn to when they have questions.

The booklet is intended to help farmers understand their responsibilities and rights as farmers' market vendors....The focus of the booklet is on preventing problems by improving understanding of market rules. But the booklet offers practical suggestions farmers can follow to try to resolve any problems that may arise. It also gives ideas on how to learn about other requirements that may apply to sales at a farmers' market. In addition to market rules, a market vendor's rights and responsibilities may also be governed by federal, state, and local laws.

A free copy of the article can be requested by calling FLAG's office at 651-223-5400. Minnesota callers may dial FLAG's office at 1-877-860-4349. The article can also be downloaded from FLAG's website at: www.flaginc.org.

—FLAG news release

Federal Register summary from February 24, 2007 to March 23, 2007

BRUCELLOSIS. The APHIS has adopted as final regulations amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Wyoming from Class A to Class Free. **72 Fed. Reg. 13428 (March 22, 2007)**.

CROP INSURANCE. The FCIC has adopted as final regulations amending the Common Crop Insurance Regulations, Walnut Crop Insurance Provisions and Almond Crop Insurance Provisions to reduce the insurable age requirements for almonds and walnuts because of the new varieties available. The changes will be applicable for the 2007 and succeeding crop years. **72 Fed. Reg. 10908 (March 12, 2007)**.

GRADING. The AMS has adopted as final regulations increasing the fees and charges for federal voluntary egg, poultry, and rabbit grading, certification, and audit services, and establishing a separate billing rate for the audit services. **72 Fed. Reg. 11773 (March 14, 2007)**.

KARNAL BUNT. The APHIS has adopted as final regulations removing areas in Maricopa and Pinal counties in Arizona and Archer, Baylor, Knox, McCulloch, San Saba, Throckmorton, and Young counties in Texas from the list of regulated areas subject to quarantine for Karnal bunt. **72 Fed. Reg. 10593 (March 9, 2007)**.

NATIONAL ORGANIC PROGRAM. The AMS has issued proposed regulations which amend the USDA's National List of Allowed and Prohibited Substances regulations to reflect recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board from November 17, 2005 through October 19, 2006. The recommendations addressed in this proposed rule pertain to the continued exemption and prohibition of 169 substances in organic production and handling. Consistent with the recommendations from the NOSB, this proposed rule would renew 166 of the 169 exemptions and prohibitions on the National List (along with any restrictive annotations), and remove 3 exemptions from the National List. **72 Fed. Reg. 9872 (March 6, 2007)**.

VETERINARIANS. The APHIS has issued amended proposed regulations making three changes related to a proposed rule published at 71 Fed. Reg. 31109 (June 1, 2006), that would amend the regulations regarding the National Veterinary Accreditation Program. The June 2006 proposed rule would establish two accreditation categories in place of the current single category, add requirements for supplemental training and renewal of accreditation, and offer accreditation specializations. The amendments to the proposed rule adjust the scope of the two accreditation categories to require initial accreditation training for veterinarians seeking accreditation; to require newly accredited veterinarians to renew their accreditation three years after completing initial accreditation training; and to reduce the training required for renewal of accreditation from the amount discussed in the June 2006 proposal. **72 Fed. Reg. 8634 (Feb. 27, 2007).**

—Robert P. Achenbach, Jr., AALA Executive Director

State and Federal roundup

ANIMALS. The plaintiffs were injured when their car struck a bull on the highway. The bull was owned by one defendant but kept on the farm owned by the defendant's son. The evidence showed that the son had known about three prior escapes by the bull and had erected an electric fence which had otherwise prevented the escape of the bull. The evidence also showed that no damage to the fence was seen on the day of the accident. The defendant testified that the defendant did not know about the escapes and had not inspected all of the fence. The trial court granted "no evidence" summary judgment as to the defendant and the plaintiffs appealed, arguing that the defendant's failure to do anything to prevent the bull from escaping was sufficient to raise a material issue of fact as to whether the defendant breached a duty to prevent the escape of the bull. Under Tex. Agric. Code section 143.074, owners of livestock owe a duty to not permit livestock to run at large. The court held that the mere ownership of the bull was not sufficient to show a breach of the duty where the bull was not kept in the owner's possession and the owner did not know that the bull had escaped from the possessor's property. The court noted that, in order for the statutory duty to apply, the owner had to permit the bull to run at large and the evidence in this case did not show that the defendant had, through act or omission, permitted the bull to run at large; therefore, the defen-

Cont. on page 7

State and federal roundup/Cont. from p. 6
dant did not breach any duty to the plaintiffs and summary judgment was proper. **Van Horne v. Harris, 2007 Tex. App. LEXIS 2266 (Tex. Ct. App. 2007)**.

CHAPTER 12 BANKRUPTCY. The debtor was a farm partnership of four individuals and a limited liability corporation. The debtor had assets of just over $5 million and total claims of just over $3 million. The Chapter 12 plan provided for interest payments on secured claims, new priority security interests for operating loans, and payoff of all claims within five years by obtaining new financing. The creditors objected to the plan because (1) of bad faith in that the partnership was poorly controlled as to the financing obtained pre-petition and (2) the plan was not feasible. The court held that poor pre-petition management of the financial affairs of the partnership business was not sufficient cause for bad faith filing of the bankruptcy petition. The debtor's plan acknowledged that the history of the farm did not support a feasible plan, but the debtor proposed changes in the farm operation to make the farm more profitable, including (1) elimination of Christmas and orange tree operations, (2) planting more reliable crops and increasing crop yields, and (3) change from grass seed to wheat seed crops. The creditors objected to the plan as unfeasible because even with the rosy profit projections, the refinancing of all the debts was not possible. The court, in a "letter" to the parties' counsel, confirmed the plan on the condition that the debtor submit a modified plan which provided for the contingency that, if the profit projections did not occur, the debtor would institute more drastic provisions, including liquidation of assets. ***In re* Volker, 2007 Bankr. LEXIS 708 (Bankr. D. Or. 2007)**.

CHAPTER 12 BANKRUPTCY. The debtors, husband and wife, filed for Chapter 12 bankruptcy, and a creditor objected to the debtors' eligibility for Chapter 12 based on the debtors' Schedule F income reported for the tax year before filing for bankruptcy. In particular, the creditor argued that the proceeds from the sale of a truck and trailer were not farm income because the depreciation for the equipment was reported on Schedule C, Form 4562. The court noted that the truck and trailer were used primarily for farm operations in hauling hay, straw, and cattle; therefore, the proceeds of the sale of the equipment were farm income. With the sale proceeds included in farm income, the debtors' farm income for the tax year prior to the bankruptcy petition was 51.47 percent of total income and qualified the debtors for Chapter 12. ***In re* Wilson, 2007 Bankr. LEXIS 359 (Bankr. D. Mont. 2007)**.

DOMESTIC PRODUCTION DEDUCTION. The IRS has adopted as final regulations a revision of previously issued final regulations to clarify that an agricultural or horticultural cooperative may apply the rules for cooperatives provided in I.R.C. section 199(d)(3) and Treas. Reg. section 1.199-6 to any portion of the I.R.C. section 199 deduction that is not passed through to its patrons. In addition, a cooperative's qualified production activities income is computed without taking into account any deduction allowable under I.R.C. sections 1382(b)) or 1382(c), relating to patronage dividends, per-unit retain allocations, and nonpatronage distributions. **72 Fed. Reg. 12969 (March 20, 2007)**.

FEDERAL TAXATION. I.R.C. section 447(i) provides that if a family farming corporation is required to change its accounting method prior to June 9, 1997, it must establish and maintain a suspense account instead of taking adjustments with respect to the amounts included in the suspense accounts. I.R.C. section 447(i)(5) provides that no suspense account may be established with respect to changes of accounting method after June 8, 1997, and I.R.C. section 447(i)(5)(B) provides for the phasing out of suspense accounts over 20 years, setting the amount of annual reduction to be based on an "applicable portion" of the account. The use of the same amount as the applicable portion every year by some taxpayers was inconsistent with the statute, which indicates that the reduction amount must reflect prior reductions. In a Chief Counsel advice letter, the IRS ruled that the applicable portion should be recalculated on an annual basis during the first 20 years and that the applicable portion for a taxable year will be greater than the applicable portion in a prior year whenever the suspense account was reduced in a prior year by an amount less than the applicable portion for that year. **CCA Ltr. Rul. 200708071, Jan. 22, 2007**.

HORSE PROTECTION ACT. The petitioner's Tennessee Walking Horse was inspected after arriving at a horse show by the show's HPA compliance person and two veterinarians. The three inspectors concluded that the horse's feet had been sored by use of chemicals or mechanical means and issued tickets for violation of the HPA. The petitioner argued that the horse's feet suffered from a long transport to the show, the petitioner had never been cited before for soring a horse in over 15 years, and that the repeated examinations by three persons could have explained the reactions of the horse. The Administrative Law Judge dismissed the violations because the petitioner had successfully rebutted the evidence sufficient to cast doubt on the existence of soring. On administrative appeal, the Judicial Officer reinstated the violations, ruling that the rebuttal arguments were insufficient to overturn the on-site inspections of three trained inspectors. Although the court noted that the issue was close, the court held that the Judicial Officer's ruling was affirmed because it was based on substantial evidence of the professional examinations. **Zahnd v. U.S.D.A., 2007 U.S. App. LEXIS 3752 (11th Cir. 2007)**.

INSURANCE. The insured operated a farm and lived with the parent of the injured person. The injured person was age 16 at the time of the accident, which occurred on the farm while the person was operating a corn chopper. The insurance company refused to defend or indemnify the insured against the claims of the injured person because the insurance policy excluded coverage for "any ... person under the age of twenty-one in [the] care [of an insured] or in the care of [an insured's] resident relatives...." The court held that the insurance policy covered the insured's liability in this case because the testimony of the injured person, the parent, and the insured demonstrated that the insured had no control over or care of the injured person at the time of the accident. **Chautauqua Patrons Ins. Ass'n v. Ross, 2007 N.Y. App. Div. LEXIS 3366 (Sup. Ct. N.Y. 2007)**.

SECURED TRANSACTIONS. The debtor had granted to a bank a blanket security interest in the debtor's personal property. The debtor also purchased two pieces of farm equipment from a dealer and granted the dealer a security interest in the equipment. The dealer filed financing statements but listed the name of the debtor as "Mike Borden" instead of the debtor's full name of "Michael Borden." The bank argued that the dealer's security interest was unperfected because the financing statement included a misleading name in using Mike instead of Michael. The evidence showed that the debtor often signed legal documents with the name Mike. The court noted that the state's web-based U.C.C. search system did not allow for generic character searches to account for all variations of a debtor's name. The court held that the full legal name of a debtor was required for perfection of a financing statement, placing the burden on a filing creditor to determine the debtor's legal name and not on a searching creditor who would have to guess at the possible legal name. ***In re* Borden, 353 B.R. 886 (Bankr. D. Neb. 2006)**.

—Robert P. Achenbach, Jr. AALA Executive Director

Agricultural Law Update
6292 N.E. 14th Street
Des Moines, IA 50313

First Class Mail
U.S. POSTAGE
PAID
Des Moines, Iowa
Permit No. 5297

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Board Nominations

The AALA Board Nominations Committee is seeking suggestions for nomination for the 2008-2010 board and the 2008 president-elect. Please contact Don Uchtmann, e-mail: uchtmann@uiuc.edu by May 1, 2007.

2007 Annual Conference

President-elect Roger McEowen is well into the planning of an excellent program for the 2007 Annual Agricultural Law Symposium at the Wyndham Hotel (soon to be renamed as an Westin Hotel) in sunny downtown San Diego, CA, October 19-20, 2007. As soon as the program is virtually complete, we will post it on the AALA web site. Mark your calendars and plan a trip to enjoy the sights, sounds, animals and sunshine. Brochures will be printed and mailed as soon as the program plans are complete.

2006 Conference Handbook on CD-ROM

Didn't attend the conference in Savannah but still want a copy of the papers? Get the entire written handbook plus the 1998-2006 past issues of the *Agricultural Law Update* on CD. The files are in searchable PDF with a table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. Box 2025, Eugene, OR 97402 or e-mail RobertA@aglaw-assn.org Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2006 conference registration form on the AALA web site.

Robert P. Achenbach, Jr,
AALA Executive Director
RobertA@aglaw-assn.org
Ph 541-485-1090 Fax 541-302-1958