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## Agricultural Law Update

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### Editor

Linda Grim McCormick

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Letters and editorial contributions are welcome and should be directed to:

Linda Grim McCormick, Editor,

2816 C.R. 163

Alvin, TX 77511

ph. 281-388-0155

e-mail: lindamccormick@gotsky.com.

For AALA membership information, contact:

Robert Achenbach, Executive Director

AALA

P.O. 835

Brownsville, OR 97327

Ph. 541-466-5444; Fax 541-466-3311

E-mail: RobertA@aglaw-assn.org.

## PROTECTING YOUR INTELLECTUAL PROPERTY

### WITH LITIGATION INSURANCE

-by John Kenney and Jeff Todd\*

American agriculture defines progress through invention. In the 1830s, over 250 man hours were required to farm five acres of wheat. Today, through inventions, less than five man hours are required to produce wheat from the same acreage.

One of the most famous inventions in American agriculture is Eli Whitney's cotton gin, which was patented in 1794. While this invention revolutionized the process of cotton production, legal battles with infringers kept Whitney and his partner in court during the first 10 years of the patent's life. Whitney eventually sold his patent to the state of South Carolina. Ironically, Whitney did not become rich until he invented a musket manufacturing process.

Today, inventions continue to revolutionize agriculture. "Intellectual property" creates value for agri-business and producers. Intellectual property includes patents, trademarks, copyrights, trade secrets and other intangible assets. Intellectual property allows businesses to build a competitive niche which differentiates them in the marketplace. Rights to a valid patent, trademark or copyright can also be licensed to create a revenue source. However, as Eli Whitney learned, protecting or defending these rights can require costly litigation.

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*\*Trial attorneys with McAfee & Taft, Oklahoma City, OK, representing agriculture industry clients in intellectual property litigation matters.*

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## FARM BILL UPDATE: CONGRESS PASSES THE FOOD, CONSERVATION, AND ENERGY ACT OF 2008

- by Anne C. Hazlett\*

On June 18, 2008, Congress overrode a presidential veto of H.R. 6124, The Food, Conservation, and Energy Act of 2008. Passed by a margin of 317-109 in the U.S. House of Representatives and 80-14 in the Senate, this legislation will govern agriculture policy through fiscal year 2012. The measure reauthorizes the farm bill passed in 2002, The Farm Security and Rural Investment Act, Pub. L. No. 107-171, 116 Stat. 134.

Passage of the 2008 farm bill legislation marked the end of a nearly a three year process. Development of the bill started in 2005 when various agriculture trade groups began releasing their policy recommendations for the next farm bill and the U.S. Department of Agriculture (USDA) held field hearings around the country to discuss this legislation with interested constituents. In 2006, the U.S. House and Senate Agriculture Committees both held regional field hearings around the country as well as hearings in Washington, D.C. on select farm bill topics that continued well into 2007. Following a markup by the House Agriculture Committee in mid-July, the House of Representatives passed the legislation on July 27, 2007 by a vote of 231-191. Later that year, following a markup by both the Senate

(cont. on page 3)

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*\*Minority Counsel, U.S. Senate Agriculture Committee*

# Kenney & Todd - PROTECTING YOUR INTELLECTUAL PROPERTY WITH LITIGATION INSURANCE (cont. from p. 1)

Intellectual property litigation – whether pursuing infringement or defending against a claim of infringement – can be expensive. Of course, many factors such as the nature of the product, amount of money at issue, jurisdiction, etc., can cause these costs to vary significantly. Surveys have found median costs range from approximately \$600,000 to \$5,000,000 for patent litigation; \$300,000 to \$1,000,000 for copyright litigation; and \$250,000 to \$1,250,000 for trademark litigation.

The cost of attorneys' fees and expenses, including experts, can deter or preclude the ability to engage in intellectual property litigation for many businesses. If a defendant loses a claim of infringement, it can also be subject to a substantial damage award. In the case of a finding of willful infringement, treble or punitive damages may be awarded. In some cases, attorneys' fees can be awarded by the court to the winner.

Businesses with substantial reserves and/or cash flow may choose to assume the risk of incurring these significant costs. On the other hand, in many instances, it makes good business sense to consider insuring some of this risk. Commercial general liability insurance does not ordinarily cover these claims. (There are exceptions and these policies should be investigated in light of the facts in each case.) However, abatement policies designed to cover this type of claim are available which reimburse litigation costs and other expenses incurred by the insured in seeking to enforce its patents, trademarks or copyrights against alleged infringers. Defense policies are also

available which are specifically designed to reimburse litigation costs defending against charges of intellectual property infringement. Coverage is also available to insure all or part of damages which may be awarded against the insured.

Infringement abatement insurance is generally written on an annual basis. It is not prohibitively expensive in many situations. One company that writes this coverage, Intellectual Property Insurance Services Corporation through the carrier Gotham Insurance Company (New York Marine Group), reports that in 2006, average premiums were just over \$20,000 per year. The policy is issued as property coverage. The acts of the alleged wrongdoer must begin after the policy is in effect but may have begun during a previous continuous policy period. The insured is required to provide the insurance company with a favorable legal opinion letter from qualified intellectual property counsel regarding the issues of enforceability, validity and infringement. If the policy terms are met, the insurance company will authorize suit by counsel of the litigant's choice, subject to the insurance company's approval. The litigation expenses will then be reimbursed according to the terms of the policy.

The policy limits per claim can range from \$250,000 to \$5,000,000. There is usually a significant retention or deductible provision and typically a provision for payment of 80 percent of the costs of litigation by the insurer. A provision for recovery of some or all of these costs by the insurance company in the event of a final judgment in favor of

the insured is usually included.

Similarly, coverage is available for litigation expense reimbursement where the insured is sued for intellectual property infringement. Again, the insured must obtain a legal opinion of non-infringement. The insurance company issues an authorization for payment of defense costs under the terms of the policy after the claim is received and all conditions are met. The company shares pro rata in any award of attorneys' fees and costs up to the amount the company has spent in respect to the covered litigation. Willful acts of infringement, lawsuits which the insured was aware of or knew were imminent at the time of the purchase of the policy, asbestos liability and nuclear liability are not covered. Damages that could be awarded against the insured are also typically not covered, although coverage for certain kinds of damages can be obtained as an option. The costs for these kinds of policies are similar to those for abatement policies.

Depending on your type of business and the associated risk of having to pursue or defend intellectual property lawsuits, intellectual property litigation insurance should be carefully considered. It may provide a cost effective means of allowing you to take the necessary steps to preserve your competitive niche. Coverage can be obtained through insurance brokers, including PremierSource ([www.premier-source.com](http://www.premier-source.com)).

One must wonder whether Eli Whitney's financial success from his cotton gin would have been different if he had access to patent litigation insurance 200 years ago.

## FEDERAL AND STATE ROUND-UP -by Robert P. Achenbach, Jr., AALA Executive Director

**ADVERSE POSSESSION.** The previous owners of the plaintiff's property had constructed a fence along the western edge of the property to fence in cattle. The fence was located 40 feet onto the defendant's property. The fence was later removed but later owners of the plaintiff's property used the disputed strip as a driveway, establishing continuous use of the strip for over 50 years. When the defendant purchased the neighboring land in which the disputed strip was included on the property title, the plaintiffs had started to construct a decorative fence along the

driveway. After the driveway was completed, the defendant damaged the fence after claiming that the fence was constructed on the defendant's property. The court held that the plaintiff had title to the disputed strip by adverse possession and awarded damages to the plaintiff for the trespass of the defendant in damaging the fence. **Isom v. Clark, 2008 Wash. App. LEXIS 1447 (Wash. Ct. App. 2008).**

**CHAPTER 12 BANKRUPTCY.** The United States District Court for the Northern District of Iowa has affirmed a Bankruptcy Court decision holding that taxes incurred from the post-petition sale of Chapter 12 estate property were "claims owed to a

governmental unit" resulting from the "sale, transfer, exchange or other disposition of any farm asset used in the debtor's farming operation." Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2008 (BAPCPA), Pub. L. No. 109-8, § 1003, 119 Stat. 23 (2005), adding 11 U.S.C. § 1222(a)(2), such taxes would be eligible for discharge. For more discussion of this case and issue, see Harl, "District Court in *Knudsen* Holds for the Debtors in Chapter 12 Case," 19 *Agric. L. Dig.* 101 (2008). In re *Knudsen*, 2008 U.S. Dist. LEXIS 46275 (N.D. Iowa 2008), *aff'g*, 356 B.R. 480 (N.D. Iowa 2008)

# Hazlett - Farm Bill Update: Congress Passes The Food, Conservation, And Energy Act of

2008 - (cont. from p. 1)

Finance and Agriculture Committees, the Senate passed its version of the farm bill on December 14th by a vote of 79-14.

For six months, conferees negotiated a farm bill conference agreement that was passed in both chambers during the second week of May 2008. This legislation was then vetoed by the President on May 21st. The House and Senate easily overrode this veto shortly thereafter. See Pub. L. No. 110-234. However, an administrative error in the bill enrollment process was later discovered whereby the trade title was omitted in the version sent to the President for signature. In order to correct that mistake, both chambers passed a subsequent version of the bill that contained all of the titles negotiated. See Pub. L. No. 110-246. This legislation was later vetoed with Congress overriding that second veto as described above.

The 2008 farm bill contains 15 titles—five of which were not part of the 2002 bill. These provisions address commodities, conservation, trade, nutrition, credit, rural development, research, forestry, energy, horticulture and organic agriculture, livestock, crop insurance and disaster assistance, commodity futures trading, taxes, and other related farm program issues.

In total, the legislation spends \$287 billion over the five years of its duration. Of that amount, 14 percent will support commodity programs, 66 percent will support the nutrition title, 9 percent will support conservation programs, 8 percent will support crop insurance, and the balance will be spent on the remaining titles of the farm bill. Such expenditures represent less than 2 percent of the federal budget—with spending for agricultural producers under the commodity title representing only 0.25 of all federal spending.

## SUMMARY OF KEY TITLES

### Commodity Programs (Title I)

The 2008 farm bill continues the safety net framework established in the 2002 farm bill with several adjustments. Payment rates and payment limits for direct payments are maintained throughout the life of the bill. FCEA of 2008, § 1103. During crop years 2009 through 2011, however, there is a

minor reduction in the payment acres for which direct payments can be made. FCEA of 2008, § 1001.

With respect to the counter-cyclical and loan programs, the 2008 farm bill rebalances target prices and loan rates for many existing commodities beginning with the 2010 crop year and provides additional program coverage for pulse crops beginning in the 2009 crop year. FCEA of 2008, §§ 1104, 1202. In these adjustments, most crops are receiving an increase in support levels. However, the law contains several reforms for cotton effective for the 2008 crop year—including a reduction in its target price and modifications to the marketing loan program. FCEA of 2008, § 1207.

In addition to the traditional counter-cyclical program created in the 2002 farm bill that is based on price, the 2008 farm bill creates a revenue-based counter-cyclical program. FCEA of 2008, § 1105. Beginning in the 2009 crop year, producers will have the option to participate in a state-level revenue protection system known as the ACRE (Average Crop Revenue Election) program. Participants will agree to a reduction in direct payments and loan rates and forgo the traditional counter-cyclical program in exchange for an ACRE program that bases payments on the difference between actual state revenue for the commodity and the ACRE guarantee. Election to participate in ACRE is irrevocable and will apply to all covered commodities on the farm. In order to receive a payment under the program, the producer will need to meet two revenue tests—a state-level test as well as a farm-level test.

The legislation retains the current restriction for planting fruits and vegetables on base acres. FCEA of 2008, § 1107. However, it also adds a new pilot program under which producers receiving commodity payments in several Midwestern states will be allowed to grow fruits and vegetables for processing on base acres, thereby better enabling the processing industry to expand. While a participating producer's base acres will be reduced for that year, such planting history will be restored for subsequent crop years.

Lastly, in the area of payment limitations, the 2008 farm bill contains historic reform.

First, with respect to who is eligible for program benefits, the legislation sets a new standard under which an individual's average adjusted gross non-farm income may not exceed \$500,000 to receive benefits. FCEA of 2008, § 1604. If the average adjusted gross farm income exceeds \$750,000, an individual will no longer be eligible to receive direct payments. In addition to these limits, the law also provides an average adjusted gross non-farm income cap of \$1 million for conservation programs unless two-thirds or more of the income of the person or legal entity is average adjusted gross farm income.

Second, with respect to the amount of payments that a person can receive per year, the legislation continues the current \$40,000 limit on direct payments and \$65,000 limit on counter-cyclical payments, with the exception of payments made under the ACRE program. FCEA of 2008, § 1603. However, the bill increases transparency and accountability by eliminating the so-called "three entity rule" and requiring that payments be directly attributed to an individual rather than a corporation or a partnership.

### Conservation (Title II)

The 2008 farm bill maintains the current mix of conservation programs while making several improvements to make them work better for producers and increasing funding levels. For example, the legislation simplifies the Conservation Security Program (CSP) by replacing the current three-tiered payment system with a single incentive that is focused on the adoption of new conservation practices. FCEA of 2008, § 2301. Renamed the Conservation Stewardship Program, the CSP will continue to reward producers for achieving high levels of stewardship and addressing priority resource concerns in their area. In addition, the program will be made available nationwide.

The conservation title increases support for conservation on working lands by significantly boosting the level of funding for the Environmental Quality Incentives Program (EQIP). FCEA of 2008, § 2701. The legislation also makes programmatic adjustments to the EQIP such as a set-

(cont. on page 4)

# Hazlett - Farm Bill Update: Congress Passes The Food, Conservation, And Energy Act of 2008 - (cont. from p. 3)

aside of funding and increased cost share levels for beginning farmers and ranchers and socially disadvantaged producers, assistance for addressing air quality issues, and inclusion of forest management as a program purpose. FCEA of 2008, §§ 2503, 2509, 2501.

The new farm bill increases the number of acres enrolled in the Wetlands Reserve Program (WRP) and Grassland Reserve Program while reducing the level of acreage enrollment in the Conservation Reserve Program. FCEA of 2008, §§ 2202, 2403, 2103. In the WRP, the law also revises the procedure for valuing property and reviewing proposed acquisitions thereby making it easier to enroll wetland, acres. FCEA of 2008, § 2205. Further, it significantly increases funding for the Farmland Protection Program (FPP) and streamlines the process to receive project assistance. FCEA of 2008, §§ 2701, 2401.

Beyond these adjustments to existing programs, the legislation creates several new programs to address emerging environmental issues. It creates a new Agricultural Water Enhancement Program as part of the EQIP that is designed to assist producers with regional water quality or quantity projects. FCEA of 2008, § 2510. It expands conservation activities for the Chesapeake Bay with the creation of a new Chesapeake Bay Watershed Program that will provide assistance for improving water, soil, air and related resources in this region. FCEA of 2008, § 2605. The legislation also creates an environmental services initiative that directs USDA to establish technical guidelines that outline science-based methods to measure, report and record the environmental benefits from conservation activities. FCEA of 2008, § 2709. With this information, producers and agricultural landowners will be better positioned to participate in emerging environmental services markets such as carbon credit trading. Finally, the new farm bill establishes a new Cooperative Conservation Partnership Initiative that makes six percent of all conservation program funding, except for funds dedicated to the three acreage reserve programs and FPP, available for carrying out cooperative projects that bring together producers, states, non-profit

organizations and other groups in a given geographic area. FCEA of 2008, § 2707.

Outside these voluntary, assistance-based programs, the conservation title also makes an adjustment to the conservation compliance scheme for receiving farm program benefits. FCEA of 2008, §§ 2002, 2003. Under current practice, a producer who is found to be in violation of USDA requirements regarding protection of highly erodible land or wetland areas may become ineligible for commodity program payments unless the Farm Service Agency (FSA) Committee determines the producer was acting in good faith. The 2008 farm bill directs the state or district FSA director to review any determinations of good faith made by the Committee.

## Energy (Title IX)

The new farm bill expands and continues many of the energy programs from the 2002 farm bill, which was the first farm bill to contain a separate energy title. However, there is a new focus throughout the title on developing cellulosic ethanol production. For example, the bill creates a Biomass Crop Transition Program to provide assistance for the production, harvest, storage and transport of cellulosic feedstocks for energy production. FCEA of 2008, § 9001 (§ 9011). Such assistance is designed in part to compensate producers for lost opportunity costs incurred until the new biomass crops are established.

The legislation provides support for renewable fuel production from cellulosic materials in the form of grants, loans and loan guarantees to biorefinery facilities producing energy from biomass feedstocks. FCEA of 2008, § 9001 (§ 9003). It also adjusts the current Bioenergy Program to make payments to facilities that are expanding production of fuel from cellulosic feedstocks. FCEA of 2008, § 9001 (§ 9005). Lastly, the new farm bill encourages existing biorefineries and other manufacturing facilities to switch from petroleum to renewable-based energy by providing repowering grants for biomass energy systems. FCEA of 2008, § 9001 (§ 9004).

One of the biggest needs in transitioning renewable energy production from corn starch to cellulosic materials is more

research and outreach to producers with the results of such research. To address this need, the legislation establishes an Agricultural Bioenergy Feedstock and Energy Efficiency Research and Extension Initiative to provide competitive grant awards for biomass crop research and outreach. FCEA of 2008, § 7207. This effort is further augmented by funding for projects conducted under the Biomass Research and Development Act of 2000 that attempt to integrate research and development activities in the cellulosic biofuel, or "advanced biofuel," area. FCEA of 2008, § 9001 (§ 9008). The new farm bill also supports research activity by authorizing studies for biofuel infrastructure development and production of fertilizer from renewable energy sources. FCEA of 2008, §§ 9002, 9003.

The bill revamps the current Section 9006 program from the 2002 farm bill into a new Rural Energy for America Program that provides grants to help farmers, ranchers and rural small businesses with energy audits and technical assistance regarding how to use renewable energy technologies in their operation. FCEA of 2008, § 9001 (§ 9007). It enables USDA to provide grants and loan guarantees to producers and rural small businesses to purchase renewable energy systems or to make energy efficiency improvements. It also more than doubles the level of funding for this popular program and provides a 20 percent carve-out for grants of under \$20,000.

Finally, the new farm bill supports the expansion of demand for renewable energy and other biobased products through continuation of the Biobased Markets Program, an initiative that creates a federal preference for procurement of biobased products and establishes a biobased products labeling program to assist manufacturers of biobased products with branding. FCEA of 2008, § 9001 (§ 9002). In addition, the legislation further encourages the promotion of renewable energy with funding for biofuel education and demonstration projects. FCEA of 2008, § 9001 (§§ 9006, 9003).

## Livestock (Title XI)

The 2008 farm bill contains a separate livestock title with several key provisions. First, the legislation strengthens producer protections in contract production (cont. on page 5)

# Hazlett - Farm Bill Update: Congress Passes The Food, Conservation, And Energy Act of 2008 - (cont. from p. 4)

arrangements by directing that any livestock or poultry contract that has an arbitration clause also allow the producer to decline arbitration upon entering into the contract. FCEA of 2008, § 11005 (§ 210). The bill specifies that producers have a right to cancel production contracts as well as requires a conspicuous statement in the contract disclosing that additional capital investments may be required of the producer during the contractual term. FCEA of 2008, § 11005 (§ 208). In addition, the legislation specifies that the venue for resolving any dispute arising from a production contract will be the federal judicial district in which the principal part of the performance takes place and that the contract may specify which state's law is to apply to any issues that arise. FCEA of 2008, § 11005 (§ 209). The bill will also require USDA to publish regulations under the Packers and Stockyards Act to establish criteria for the Department to consider in addressing several questions relating to when the relationship between a producer and contractor is considered unfair. FCEA of 2008, § 11006.

Second, the livestock title clarifies the requirements for country of origin labeling. FCEA of 2008, § 11002. The bill addresses requirements for meat from animals originating in multiple countries. It also adds chicken, goat meat, ginseng, peanuts, pecans and macadamia nuts to the list of products required to be labeled. The country-of-origin labeling requirements will take effect on September 30, 2008.

Third, the new farm bill creates new marketing opportunities for producers by allowing certain state-inspected slaughter facilities to ship meat or poultry into interstate commerce. FCEA of 2008, § 11015. To be eligible, a facility must have 25 or fewer employees and meet all requirements of the Federal Meat Inspection Act and the Poultry Products Inspection Act.

## Credit (Title V)

In the credit title, the farm bill makes some improvements to existing programs and adds several new provisions to assist beginning farmers and ranchers. The legislation increases the direct farm ownership and operating loan limits for

the first time in two decades in recognition of the increased credit needs resulting from higher land and input costs. FCEA of 2008, §§ 5003, 5102.

To assist beginning farmers and ranchers, the bill tweaks the down payment loan program by reducing the applicable interest rate, increasing the loan duration, reducing the down payment requirement from the producer, and increasing the maximum purchase price. FCEA of 2008, § 5004. It also adds socially-disadvantaged producers as eligible for assistance.

In addition, the new farm bill creates a pilot program for beginning farmer and rancher individual development accounts. FCEA of 2008, § 5301. Here, USDA will provide grants to qualified non-profit organizations and government agencies to assist beginning producers. Under the pilot, a beginning farmer or rancher who completes financial training and establishes a savings plan will receive a match by the participating entity for any money saved towards a new capital expenditure.

The legislation also establishes the contract land sales pilot program created under the 2002 farm bill as a permanent program to be implemented nationwide. FCEA of 2008, § 5005. There, USDA encourages the transfer of land to the next generation of producers by providing a loan guarantee for a private seller of farmland who uses a land contract to transfer farmland to a beginning farmer or rancher or socially-disadvantaged producer.

Lastly, the bill increases the loan fund set-asides for beginning farmers and ranchers in the USDA direct and guaranteed loan programs. FCEA of 2008, § 5302. For direct farm ownership loans, the set-aside is raised to not less than 75 percent. For operating loans, the set-aside for direct loans is raised to not less than 50 percent with the set-aside in guaranteed loans increased to not less than 40 percent. Particularly as the availability of funds for these programs is limited, such increases will provide greater opportunities for beginning farmers and ranchers.

## **OTHER PROVISIONS**

Beyond these areas of primary interest to production agriculture, other major

provisions included in the 2008 farm bill include:

Commodity programs (Title I)- peanuts, sugar, and dairy.

Trade and international food assistance (Title III)- food aid operation and oversight, emergency food response, funds for humanitarian emergencies, local and regional procurement of food for humanitarian assistance, export market development, export credit guarantee programs, and establishment of a softwood lumber declaration program.

Nutrition (Title IV)- assistance to food banks, updates and improvements to the food stamp program, fresh fruits and vegetables to school children, procurement of food for school meal programs, senior farmers' market nutrition program, and various projects to address specific nutrition issues.

Rural development (Title VI)- water and wastewater loans, broadband service to rural areas, assistance for rural microentrepreneurs, regional planning and development authorities, rural collaborative investment, definition of "rural area," and value-added agriculture.

Research (Title VII)- structure of agriculture research programs, level of research funding, organic agriculture research and extension, specialty crop research, and beginning farmer and rancher development.

Forestry (VIII)- forest resource planning, cost-share and technical assistance for forest health management, emergency forestry restoration assistance, authorities to prevent illegal logging practices, and open space conservation.

Horticulture and organic agriculture (Title X)- farmers' markets, organic transition, organic data collection, specialty crop block grants, and plant pest and disease control.

Crop insurance and disaster (Title XII)- crop insurance efficiency and delivery, detection of fraud and abuse, crop insurance research and development, crop production on native sod, and a new disaster assistance program.

Commodity futures trading (Title XIII)-

(cont. on page 6)

# Hazlett - Farm Bill Update: Congress Passes The Food, Conservation, And Energy Act of 2008 - (cont. from p. 5)

reauthorization of Commodity Exchange Act, increased transparency in energy markets, protection of consumers from fraud in foreign currency contracts, and expansion of civil and criminal penalties for violations of the Commodity Exchange Act.

Miscellaneous (Title XIV)- food safety, agricultural security, technical assistance for socially-disadvantaged farmers and ranchers, and animal welfare.

Taxes (Title XV)- endangered species recovery expenditures, timber, energy, agricultural chemicals security, race horses, loan limits on agricultural bonds, limitations on excess farm losses, and information reporting for Commodity Credit Corporation transactions.

## REACTIONS

Since Congress began passing a farm bill in the 1930s, this sort of legislation has ordinarily attracted little public attention when it comes up for reauthorization every five to seven years. The 2008 farm bill was different, however, getting much attention for garnering enough votes to override a veto by President Bush-- only the second time in his Administration that this has happened. The legislation has also received significant attention in light of several policy issues that were hotly debated in its development ranging from the type of operations that should receive government support, to the appropriate balance between food and fuel production, to the relationship between domestic farm policy and U.S. commitments in various trade agreements.

As the farm bill process moves from Congress to the Administration for implementation, there are vocal reactions to the new law on both sides. Following the President's first veto of the legislation in late May, more than 1,000 farm, nutrition and conservation organizations sent a letter to Congress urging legislators to override the veto. Signed by interests ranging from the American Farm Bureau Federation to Catholic Charities of Los Angeles to Quail Forever, the letter read in part: "This is by no means a perfect piece of legislation, and none of our organizations achieved everything we had individually requested. However, it is a carefully balanced compromise of policy priorities that has broad support among organizations

representing the nation's agriculture, conservation and nutrition interests." Letter from FCEA supporters to Members of Congress (May 21, 2008) (copy posted at: <http://agriculture.house.gov/inside/Legislation/110/FB/Conf/CoalitionLetter.pdf>)

On the other hand, some poverty organizations, environmental interests and taxpayer groups have criticized the law for failing to reform the current policy in a manner that will assist small or beginning producers, break the cycle of poverty in developing countries, or shift American agriculture into more of a free market system. For example, following the President's May 21st veto, Raymond Offenheiser, president of Oxfam America, issued the following statement: "President Bush's veto of the Farm Bill today should get Congress started on a better bill for America's farmers, taxpayers and trade interests. Unfortunately, we know that Congress passed on every single opportunity to make necessary reforms and shift funds from wasteful agricultural subsidies for large scale farms to food aid to meet the needs of the poor." Statement by Raymond C. Offenheiser, "Oxfam's Reaction to Bush Farm Bill Veto," (May 21, 2008) ([http://www.oxfamamerica.org/newsandpublications/press\\_releases/oxfams-reaction-to-bush-farm-bill-veto](http://www.oxfamamerica.org/newsandpublications/press_releases/oxfams-reaction-to-bush-farm-bill-veto)).

Such interests are joined by the Bush Administration which had put forth its own farm bill proposal in early 2007. In vetoing H.R. 6124, President Bush stated: "For a year and half, I have consistently asked that the Congress pass a good farm bill that I can sign. Regrettably, the Congress has failed to do so. At a time of high food prices and record farm income, this bill lacks program reform and fiscal discipline." Message to the House of Representatives from President George W. Bush, (June 18, 2008) (<http://www.whitehouse.gov/news/releases/2008/06/20080618-1.html>).

## LOOKING AHEAD

Despite the Administration's objections to the new farm bill legislation, USDA has moved quickly into implementation of the law. In addition to developing regulations to implement the many provisions in this omnibus legislation, the Department has

created a website for interested parties to keep up with the implementation process-- [www.usda.gov/farmbill](http://www.usda.gov/farmbill). It has also set the payment rates and begun the sign-up process for several benefits under the commodity title.

Given the differing perspectives between many legislators and the Administration on the new farm bill, Congress will likely play an active oversight role in the implementation process to ensure that its intent is achieved. Beyond Congressional interest, there will also be considerable oversight from the many groups affected to ensure that the efforts they put forth in the long and difficult legislative process are in fact fully realized. Regardless of the different interests at stake, however, the manner in which the new farm bill is implemented will play a critical role in its ultimate outcome on rural and urban constituents alike.

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**IRS ISSUES GUIDANCE ON 2008 FARM BILL DISASTER RELIEF**  
-by Robert P. Achenbach, Jr., AALA Executive Director

**IRS GUIDANCE ON 2008 DISASTER ASSISTANCE.** As noted in Neil Harl's article on Page 7 below, the Food, Conservation, and Energy Act of 2008, commonly referred to as the 2008 Farm Bill, includes several tax relief provisions for the 24 disaster-area counties in Kansas struck by storms and tornadoes from May 4 to June 1, 2007. Included are Barton, Clay, Cloud, Comanche, Dickinson, Edwards, Ellsworth, Kiowa, Leavenworth, Lyon, McPherson, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Pratt, Reno, Rice, Riley, Saline, Shawnee, Smith and Stafford counties. These relief provisions are described in IRS Publication 4492-A, Information for Taxpayers Affected by the May 4, 2007, Kansas Storms and Tornadoes. **KS-MO 2008-33, July 9, 2008.**

*Let the farmer forevermore be honored in his calling; for they who labor in the earth are the chosen people of God. - Thomas Jefferson*

# TAX PROVISIONS OF THE FOOD, CONSERVATION, AND ENERGY ACT OF 2008, Pub. L. No. 110-246 (the 2008 Farm Bill)\*

-by Neil E. Harl\*\*

**CRP “fix.”** The legislation includes a partial “fix” on the long-running dispute between taxpayers and the Internal Revenue Service over whether all Conservation Reserve Program payments should be subjected to the 15.3 percent self-employment tax. IRS had insisted in a 2003 Chief Counsel ruling and a late 2006 Notice, that *all* CRP payments were subject to SE tax, contrary to prior rulings and cases on the issue.

The provision in the 2008 farm bill provides that individuals receiving benefits under sections 202 or 203 of the Social Security Act (retirement benefits and disability benefits) are not subject to SE tax on CRP payments. The legislation does not address the plight of mere investors in land bid into the CRP (whose CRP land does not bear a “direct nexus” to a farm or ranch business). Thus, the basic issue involved – where the line is drawn between a “trade or business” on the one hand and an investment activity on the other – continues to be a problem and likely must await litigation to establish where that line is to be drawn. **Act § 15301(a), amending I.R.C. § 1402(a)(1) and 16 U.S.C. § 3833(a).**

The provision is effective for payments made after December 31, 2007. **Act § 15301(c).**

**Conservation contributions.** The legislation extends for two years (through 2009) for individuals and corporations the provision permitting deductions for conservation contributions. The bill changes “December 31, 2007” to “December 31, 2009” in Internal Revenue Code § 170(b)(1)(E)(vi). **Act § 15302(a), amending I.R.C. § 170(b)(1)(E)(vi).**

**Expenses for endangered species recovery.** The legislation provides for a deduction under I.R.C. § 175 for expenditures incurred for endangered species recovery. The Act refers to “. . . expenditures paid or incurred for the purpose of achieving site-specific management actions recommended in recovery plans approved pursuant to

the Endangered Species Act of 1973.” **Act § 15303(a)(1), amending I.R.C. § 175(c)(1).**

**Qualified timber gains.** The bill authorizes, for a period of one year, beginning in taxable years ending after the date of enactment, a 15 percent maximum rate for qualified timber gains for corporations. **Act § 15311(a), amending I.R.C. § 1201(b).**

**Timber REITS.** The Act provides that gain from real property includes timber gains and that mineral royalty income is qualifying income for timber REITS. Also, the term “Timber Real Estate Investment Trust” is defined to mean a real estate investment trust in which more than 50 percent in value of its total assets consist of real property held in connection with the trade or business of producing timber. **Act §§ 15312, 15313, amending I.R.C. § 856.**

**Qualified tax credit bonds.** The legislation authorizes “qualified tax credit bonds” which mean “qualified forestry conservation bonds” with a credit authorized with limitations on expenditure of bond proceeds. **Act § 15316, enacting I.R.C. §§ 54A, 54B.**

**Cellulosic biofuel credit.** The legislation provides for a biofuel credit of \$1.01 per gallon for cellulosic biofuels except for cellulosic biofuels which are alcohol (the credit for those is reduced by the amount of ethanol and other credits). **Act § 15321, amending I.R.C. § 40(a)**

**Ethanol credit.** The 51 cents per gallon ethanol fuels credit is reduced to 45 cents per gallon, effective after 2008. **Act, § 15331(b).**

**Ethanol tariff.** The bill extends for two years (to January 1, 2011) the ethanol tariff (of 54 cents per gallon) which is levied on imported ethanol. **Act § 15333.**

**Agricultural bonds.** The Act increases from \$250,000 to \$450,000 the loan limit on agricultural bonds relating to the exception for first-time farmers. After 2008, the amount is to be adjusted for inflation. **Act § 15341(a).**

**Like-kind exchange for mutual ditch, reservoir or irrigation company stock.** The legislation allows like-kind exchange treatment for exchanges involving mutual ditch, reservoir or irrigation company stock

which are under I.R.C. § 501(c)(12)(A) *provided* the stock has been recognized by the state’s highest court as representing real property or interests in real property. **Act § 15342(a), adding I.R.C. § 1031(i)**

The amendment is effective for exchanges *completed* after the date of enactment of the legislation. **Act § 15342(b).**

**Agricultural chemicals security credit.** The Act adds a credit of 30-percent of “qualified security expenditures” with a limit of \$100,000 for any “facility,” and a maximum of \$2,000,000 for any taxable year for any taxpayer for costs incurred to secure agricultural chemicals including employee training, security lighting and conducting a “security vulnerability assessment.” **Act § 15343(a), adding I.R.C. § 450.**

**Race horses.** The legislation specifies that “any race horse” placed in service before January 1, 2014, is classified as three-year property for depreciation purposes and race horses placed in service after December 31, 2013 if more than two years old at the time the horse is placed in service by the purchaser. **Act § 15344(a), amending I.R.C. § 168(e)(3)(A)(i).**

The provision is effective for property placed in service after December 31, 2008. **Act § 15344(b).**

**Temporary relief for Kiowa County, Kansas and surrounding area.** The bill authorizes an array of special relief provisions for Kiowa County, Kansas and the surrounding area because of storms beginning on May 4, 2007. **Act § 15345**

**Limitation on excess farm losses.** For taxpayers other than a C corporation receiving an “applicable subsidy,” excess farm losses (the greater of \$300,000, \$150,000 for married taxpayers filing separately or the net farm income for the previous five years) are disallowed against non-farm income. For partnerships and S corporations, the limitation is applied at the partner or shareholder level. The term “applicable subsidy” includes direct or counter-cyclical payments or any Commodity Credit Corporation loan. The limitation is applied before the passive activity loss rules of I.R.C. § 469. **Act § 15351(a), adding I.R.C. § 461(j).**

The provision is effective for taxable

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\*This article is an excerpt from Harl, “Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246 (the 2008 Farm Bill),” 19 *Agric. L. Dig.* 89 (2008). Reprinted by permission.

\*\* Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University; member of the Iowa Bar.



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years beginning *after December 31, 2009*.  
**Act § 15351(b).**

**Modification of the optional method of computing net earnings from self-employment.** For many years, a farmer on the cash or accrual methods of accounting has been allowed to compute net earnings from self-employment in the regular manner or to use an optional method based on *gross* income to compute earnings from self-employment for social security purposes. See 2 Harl, *Farm Income Tax Manual* § 8.05[19] (2007 ed.). In effect, this guarantees some self-employment income in years when earnings from the farming operation are low or negative. Under the rules as they have existed for several years, if gross income is \$2400 or less, a farmer could report two-thirds of gross income as self-employment income. If gross income is

more than \$2400 and net earnings from self-employment are less than \$1600, a farmer could report \$1600 as self-employment income. The figures have not been adjusted for inflation.

Under the 2008 legislation, the “\$2400” figure is replaced by “upper limit”, which is 150 percent of the “lower limit.” The “\$1600” figure is replaced by “lower limit” – which is the sum of the amounts required under Section 213(d) of the Social Security Act for a quarter of coverage. For 2007, that figure was \$1,000. The amount is inflation adjusted annually. **Act § 15352, (a), (b), amending I.R.C. § 1402(a)(17) and the Social Security Act § 211(a)(16).**

The change is effective for taxable years beginning after December 31, 2007. **Act § 15352(c).**

**Information reporting on CCC transactions.** The Internal Revenue Service had steadfastly refused to require Form 1099 (information) reporting for gains from

payment of Commodity Credit Corporation loans with generic commodity certificates, a favorite way to avoid farm program payment limitations, until publication of *Notice 2007-63* in July of 2007, with required reporting of such gains effective January 1, 2007.

The 2008 legislation requires such information reporting for all CCC loans repaid on or after January 1, 2007, regardless of the manner in which the loan was repaid. **Act § 15353, enacting I.R.C. § 6039J.**

**Protection of social security.** With several of the provisions in the 2008 Act impacting the social security system, particularly those involving self-employment income, the Act mandates an annual transfer of funds from the general revenues of the federal government to the social security trust funds in amounts ranging from \$5,000,000 for fiscal year 2009 to \$7,000,000 for fiscal year 2017. **Act § 15361.**

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**From the Executive Director:**

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**Conference Sponsorships.** Each year the AALA receives sponsorships for assistance with the various costs of the annual conference. Several member firms have already come forward with generous sponsorships of the Friday evening reception, breakfasts, student travel sponsorships and others. Sponsorships start at \$500 and all sponsors are acknowledged at the conference in the handbook and at the sponsored event. If your firm is interested in showing its support for the AALA through a conference sponsorship, please contact me (RobertA@aglaw-assn.org or 541-466-5444) as soon as possible so I can mention your sponsorship in the conference brochure to be mailed in late July.

Robert P. Achenbach, Jr., AALA Executive Director