GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

DIRT

Fairness | Integrity | Expertise | Hard Work | Common Sense

for those who work to feed the world

Fall 2016

The Many Faces of Our Land

The Midwest is the Heartland of the Heartland. Its greatest single
Force is dirt – fat dirt; out of its soil each year
More wealth is produced than in all of the gold mines of the world.
Gently the land rises and falls, not flat, not broken into steep hills,
But always tilting its fertile face to the sun.

—In tribute to Paul Engle

Gislason & Hunter LLP is pleased to support these Agriculture Events and Programs

AgriGrowth Annual Meeting
Sponsor
November 10, 2016
Xcel Energy Center, St. Paul

Minnesota Farm Bureau
Young Farmer/Rancher Awards Program
November 18, 2016
DoubleTree Hotel, Bloomington

MN Pork Producers Taste of Elegance
Sponsor
January 16, 2017
Minneapolis Hilton

Ag Expo
Minnesota Soybean Growers/
Minnesota Corn Growers
Sponsor and Speaker
January 25&26, 2017
Mankato Verizon Center

Southern Minnesota Children's Museum
Sponsor

Agriculture Education Display

Minnesota FFA Foundation
Star Sponsor

FFA is dedicated to agriculture education and leadership development in the Ag industry.

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

LOCATIONS

NEW ULM
2700 S. Broadway
P.O. Box 458
New Ulm, MN 56073-0458
P 507-354-3111
F 507-354-8447

MINNEAPOLIS
701 Xenia Ave. S., Suite 500
Minneapolis, MN 55416
P 763-225-6000
F 763-225-6099

MANKATO
Landkamer Building, Suite 200
124 East Walnut Street
Mankato, MN 56001
P 507-387-1115
F 507-387-4413

DES MOINES
Bank of America Bldg.
317 Sixth Avenue, Suite 1400
Des Moines, IA 50309
P 515-244-6199
F 515-244-6493

www.gislason.com

6

CONTENTS

02 **Sponsorships**
AgriGrowth Annual Meeting
Minnesota Farm Bureau Young Farmer/Rancher Awards Program
MN Pork Producers Taste of Elegance
Ag Expo – Minnesota Soybean Growers/ Minnesota Corn Growers
Southern Minnesota Children's Museum Agriculture Education Display
Minnesota FFA Foundation

06 **Protecting the Health of Minnesota's Animals: The Board of Animal Health**
by Beth S. Thompson, JD, DVM
Executive Director | State Veterinarian
MN Board of Animal Health
A review of the Board's structure and operation, with a look at lessons learned from the 2015 avian flu outbreak.

10 **Commodity Groups Challenge EPA Release of Producer's Personal Information, Redux**
by Gary Koch
Rights of farm organizations and their farmer members to protect themselves from unwarranted invasion of personal privacy.

14 **The National Bioengineered Food Disclosure Law**
by Dustan Cross
An overview of the law's requirements, and some impact assessment.

18 **The Beginning of the End of Valuation Discounts for Family Farms and Businesses?**
by Kaitlin Pals
Proposed Section 2704 Regulations and Valuation of Family Farm Entities.

FALL 2016

22 **Boundary Line Disputes**
by Jeff Braegelmann
How Minnesota courts set new boundary lines under the Doctrine of Boundary by Practical Location.

28 **When Should Grandpa Stop Driving?**
by Cory Genelin
You owe your family, your farm, and your fellow motorists the duty to make that decision with safety in mind.

32 **Why Elections Matter: Governmental Functions Under the Direction and Control of the USDA**
by Dean Zimmerli
With its wide scope of authority and pressing issues, the next president's selection for seceretary of Agriculture is important.

36 **The High Cost of Overtime**
by David Sturges
A brief overview of the executive update to the Fair Labor Standards Act ("FLSA") overtime regulations and lawmakers' challenges to it.

40 **Regulatory Overreach – GIPSA's Renewed Effort to Regulate Contractual Relationships in the Livestock Industry**
by Matthew Berger
Summary of proposed regulations that pose significant threats, and of the response process, including opportunities for farmers to submit comments.

44 **Built-in-gains Tax Discount in Farm Entity Valuation**
by David Kim
A discussian of valuation of equity in closely held farm business entities, involving various tax discounts.

52 **Federal Issues Update**
by Brian Foster
- U.S. Congress – Minimal Legislation, Lots of Politics, a Lame Duck
- Looking Ahead – Elections and Issues

56 **Case Law Update**
by Rick Halbur, Seth Harrington and Chris Bowler
- Partitioning the family farm
- Dakota Access Pipeline
- Retail facilities, OSHA exemptions, and hazardous chemicals
- Federal courts, USDA, and wetlands determinations
- Farmers' Right To Privacy
- Criteria for establishing "Farm Tenancy"

Protecting the Health of Minnesota's Animals:

The Board of Animal Health

by Beth Thompson

The Boards history is both interesting and insightful. During the mid-to-late 1800s, human doctors and the state's health board were grappling with tuberculosis (TB) and glanders. Both of these diseases are zoonotic, with cases of TB in cattle and ongoing struggles with glanders in horses. The state health board hired local veterinarians to assist in cases, and attempted to quarantine and/or destroy diseased animals. As the livestock population increased in Minnesota, so did disease issues. In 1903, with the support of livestock groups, the "Livestock Sanitary Board" was formed through a legislative effort. In 1980, the name of this agency changed to the Board of Animal Health.

Currently, the Board has approximately 40 employees, with office staff located in St. Paul, the Minnesota Poultry Testing Laboratory in Willmar, and field staff located throughout the state. Throughout its 100+ years, the Board has dealt with diseases across species, and successfully eradicated major diseases including pseudorabies, Brucellosis and, most recently, TB in 2011. The diseases of interest for the Board are those diseases that are either detrimental to our livestock industries or zoonotic diseases.

The Board is a somewhat unique animal health agency as compared to other states. The Board is a separate and distinct agency, with a five-member board consisting of two veterinarians and three members representing the large livestock groups: poultry, pigs and cattle. The executive director/state veterinarian is hired each year by the board members. While the board members are appointed on a rotating basis by the governor, this structure adds continuity to the agency, the state veterinarian and staff and, most importantly, its purpose. In many states, the animal health board is part of a larger agency, where the state veterinarian may be subject to the changes in political appointments. Minnesota's structure for animal health issues has served the livestock industries well over time.

Today, the Board continues to protect the health of the animals in Minnesota. Much has changed over the years, both in the livestock groups the agency serves and in the way the Board's work is done, but the focus remains the same. The ongoing surveillance and testing for program diseases, in addition to the relationships built and maintained by Board staff, are the basis for disease response.

In 2015, the Board's emergency planning was put to the test with the introduction of highly pathogenic avian influenza (HPAI). This was the first introduction of HPAI, a foreign animal disease, into the state. Minnesota is ranked number one

nationwide for turkey production, and has a large broiler industry and egg industry. The Board had prepared alongside the poultry industry for many years, when faced with low pathogenic cases of influenza. Low pathogenic influenza differs from HPAI, notably in the amount of mortality. During 2015, HPAI resulted in very high mortality. Low pathogenic influenza results in minimal mortality, and the state does see cases on a yearly basis.

During March through June 2015, poultry on over 100 farms were infected and 9 million birds were depopulated. The work that was done was a cooperative effort among the Board, producers and producer groups, other state and local agencies, and the United States Department of Agriculture. An incident command structure was set up and maintained throughout the response. This structure can be used in any type of emergency response situation, from forest fires to tornadoes. At certain points in the response, up to 7 new affected sites were identified each day with approximately 500 workers involved in the response. Control zones were created around each affected site, with movements into, within and out of the zones being permitted. Surveillance testing of poultry occurred in each of these zones, to determine whether the virus had spread in the proximity of the sites. Samples were taken to the UMN Veterinary Diagnostic Lab for testing; if the premises identification number (PIN) was not known or did not accompany the sample, workers had to assign a PIN. A PIN was also required for indemnification. After depopulation of birds on an affected site, compost piles were built and maintained, and buildings were cleaned. Testing for residual virus was completed at various points in the cleaning process. The enormity of the work done and the complexity of the organization of the response was possible due to the determination of all involved.

There were many lessons learned in 2015—a list which is applicable to any livestock species in

a disease situation. Importantly, with some foreign animal diseases, there may be multiple susceptible species. Knowing the location of animals and being able to exactly identify those sites, owners and workers is key to allowing business continuity. Business continuity is essential for the individual producer, but also for the care and welfare of the animals. Stopping the movement of a flow of pigs or the delivery of feed or fuel to a farm is not acceptable. Training in disease response is important for regulatory workers, but in a large or rapidly unfolding situation, there will need to be an influx of other assistance. Farm workers and veterinarians can be trained to assist in surveillance, animal handling and other related pieces of the response. Using local, county and regional resources, including people, is high on the list for future emergency planning.

And, the list goes on. In a foreign animal disease situation, planning and preparation are key because there will be the element of "you don't know what you don't know." Industry has done a good job of formulating business continuity plans that dovetail with regulatory response. On the farm level, time is vital during a response, and producers can assist greatly by doing a few tasks:

- Maintain a relationship with a herd or flock veterinarian.
- Make sure you have a premises identification number, and use that number for lab submissions.
- Include your workers and employees in continuity of business planning.
- Practice good biosecurity every day.

The Board has a long history of working alongside producers and veterinarians. No two days are the same at the Board, but the overall goal of protecting the health of animals in our state remains the same. During an emergency response, having long-standing relationships and uniting objectives is essential and valuable.

Beth S. Thompson, JD, DVM
Executive Director | State Veterinarian
MN Board of Animal Health

Dr. Beth Thompson joined the Minnesota Board of Animal Health in 2008 as a Senior Veterinarian. Her focus was the TB eradication program in northwestern Minnesota, in addition to the swine and equine programs, and carcass disposal. In 2014, Dr. Thompson became an Assistant Director and soon after, added emergency planning to her duties.

In June 2016, Dr. Thompson was selected as the state veterinarian. She is the 8th executive director of the Board of Animal Health since its inception in 1903.

Dr. Thompson is the vice chair of the United States Animal Health Association TB committee, chair of the American Veterinary Medical Association judicial committee, and serves various roles with the Minnesota Veterinary Medical Association.

Dr. Thompson obtained her DVM and Swine Certificate from the University of Minnesota College of Veterinary Medicine in 2007, and a Juris Doctorate from William Mitchell College of Law in 1992.

COMMODITY GROUPS CHALLENGE EPA RELEASE OF PRODUCER'S PERSONAL INFORMATION, REDUX

by Gary Koch

American Farm Bureau Federation; National Pork Producers Council, Plaintiffs—Appellants,
v.
U.S. Environmental Protection Agency, et al., Defendants—Appellees
and
Food & Water Watch; Environmental Integrity Project; Iowa Citizens for Community Improvement, Intervenor Defendants—Appellees
and
National Federation of Independent Business and Small Business Legal Center, Amicus on Behalf of Appellant(s).

THE LAWSUIT

In the Winter 2014 issue of *Dirt*, we reported on the lawsuit commenced by the American Farm Bureau Federation and the National Pork Producers Council ("AFB") against the Environmental Protection Agency and its Administrator, Gina McCarthy ("EPA"). The claim of AFB was that the EPA should not disclose to the public personal information of farmers and farm families. The EPA answered the complaint, asserting that it had properly applied the law and was entitled to release the information. In addition, three advocacy groups ("Intervenors") intervened in the litigation for purposes of asserting claims that release of the information was required under law.

The United States District Court, in Minneapolis, Minnesota, after hearing arguments of the parties, issued an order for summary judgment in favor of the EPA and Intervenors. After the EPA agreed to stay any release of information,

pending appeal, AFB appealed the District Court's ruling to the United States Court of Appeals for the 8th Circuit. The 8th Circuit (one of thirteen such appellate courts across the nation) is the appellate court that adjudicates appeals from U.S. District Court decisions in a seven-state area in the Midwest. The Circuit Courts of Appeal are the last appellate body before the United States Supreme Court.

The 8th Circuit issued its order on September 9, 2016. In its order the 8th Circuit reversed the decision of the District Court and remanded the case for further proceedings consistent with its order.

BACKGROUND

As reported in our prior article, release of personal information of farmers had its genesis in litigation arising from the EPA's 2008 revised National Pollutant Discharge Elimination System ("NPDES") regulation for Concentrated Animal Feeding Operation ("CAFO"). To settle potential litigation on disclosure of farmers' personal information, the EPA agreed to offer a proposed rule relating to CAFO operations and information that, in turn, would be available to the public.

A proposed rule was subsequently issued. The proposed rule would have required all large and medium-sized CAFOs to provide the EPA with information about the location, contacts (e.g., names, addresses, telephone numbers, and e-mail addresses), type and number of animals at a CAFO, and acreage under control of the CAFO operation. AFB objected to the proposed rule as exceeding the EPA's authority and the rule was subsequently withdrawn.

After withdrawing the proposed rule, the EPA entered into an agreement with state regulators. The agreement provided for the collection and exchange of information about CAFO operations, on a state-by-state basis. The EPA obtained information on farm operations from at least 35 states. The information was reduced to a spreadsheet format. The spreadsheet information contained a vast array of information about livestock operations and their owners. Besides the location of a facility, information included names of individuals (sometimes not even owners), land holdings beyond the facility, locations of personal residences, and private contact information.

It is this back-door collection of information, and disclosure of the same, that gave rise to the AFB lawsuit. Public advocacy groups sought to obtain the state information from the EPA pursuant to a Freedom of Information Act ("FOIA") request. Under FOIA, citizens may request, and the government must disclose "information" kept by the government; unless the information is protected by one of the exemptions to disclosure as listed in FOIA. In this case, AFB has asserted that the state information collected by the EPA constituted "personal information" protectable under FOIA Exemption 6—the release of which would constitute unwarranted invasion of personal privacy.

DISTRICT COURT RULING

As noted above, the District Court ruled in favor of the EPA. The District Court's ruling was based on two separate, but intertwined, legal theories.

First, the District Court ruled that AFB did not have "standing" to prosecute the lawsuit. Under law, a Federal Court cannot render an advisory opinion. There must be an actual "case or controversy" showing that the party bringing the suit has suffered injury in fact; that there is a connection between the injury and the challenged conduct; and, that a favorable decision by the court would redress the alleged injury. In applying the foregoing elements of standing, the District Court must assume, for purposes of argument, that the allegation of harm made by the plaintiff on the face of the complaint (without receipt of evidence) is true. Accordingly, a Court may not decide the underlying merits of the claim in determining whether the plaintiff has standing (the right to bring the lawsuit). The District Court, for reasons found by the 8th Circuit to be in error, ruled that AFB failed to demonstrate standing—i.e., injury to its farmer/members. The ruling on standing by the District Court impermissibly considered the underlying merits of the AFB claim.

Confusing the issue of standing with a decision on the merits of the AFB claim, the District Court went directly to the merits. The District Court found then that AFB had not established a case that EPA had acted arbitrarily in applying FOIA Exemption 6. In its analysis, the District Court found that the government's interest in disclosing the information (enabling citizens to be watchdogs of government) outweighed any right of privacy claimed by AFB as protectable under FOIA Exemption 6.

At this point, and in lieu of a hearing to prohibit disclosure of information pending appeal, the EPA agreed that there would be no further disclosure of information pending appeal to the 8th Circuit.

THE 8TH CIRCUIT COURT OF APPEALS

As already explained, the 8th Circuit reversed the decision of the District Court and remanded the case for further proceedings. The 8th Circuit decision is noteworthy for the following reasons:

First, the 8th Circuit made clear that associations like AFB and NPPC have standing to bring suit on behalf of their farmer/members as long as it can be shown

that those members would have standing to sue in their own right. The Court ruled that the allegations in AFB's complaint demonstrated that the injury suffered by farmer/members (invasion of privacy) is directly traceable to the EPA's conduct (collection and disclosure of the information).

Second, because of the District Court's discussion of the merits of the case, the 8th Circuit went beyond standing to discuss whether the EPA's position on FOIA Exemption 6 was correct. The 8th Circuit ruled that personal information obtained by the EPA, to include names, home addresses, telephone numbers, GPS coordinates of homes and information from which personal financial information could be obtained, all arguably fall within the scope of FOIA Exemption 6. Disclosure of such information would constitute a clearly unwarranted invasion of privacy. The court found this to be true even though some of the information was publicly available on the Internet or available for public review at a state level.

The 8th Circuit noted that "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because the information may be available to the public in some form. The EPA here is more than simply a second source for identical, publicly available information . . . the Agency has aggregated vast collections of data from the majority of states—much of it obtained through state-specific information requests—and provided it to requesters in a single response." The Court specifically noted that compiling "a single clearing house of information" may lead to farmers having personal privacy interests violated by the "mass aggregation and release of their personal information by the government."

Consequently, the 8th Circuit ruled that the "EPA's disclosure of spreadsheets containing personal information about owners of CAFOs would invade a substantial privacy interest of the owners while furthering little in the way of a public interest that is cognizable under FOIA. Under those circumstances, disclosure would constitute a clearly unwarranted invasion of privacy . . . and it was an abuse of discretion for the Agency to conclude otherwise."

In conclusion, the 8th Circuit declined to enter a permanent order prohibiting disclosure of all of the information collected by the EPA. Rather, the Court remanded the proceedings to the District Court for a decision on the merits—namely as to the proper scope of FOIA Exemption 6—which decision must be consistent with the 8th Circuit ruling. Accordingly, while the case is not over, the opinion of the 8th Circuit is an important statement as to the rights of farm organizations and their farmer members to protect themselves from unwarranted invasions of personal privacy, under the guise of the government performing disclosures related to carrying out governmental functions.

Gary W. Koch
507-354-3111
gkoch@gislason.com

Gary Koch brings a rare level of knowledge, skill and insight to the full spectrum of legal issues faced by businesses today. Born and raised on a farm, he is a leader in the field of agribusiness law, helping clients meet the challenges of the Midwest agricultural economy in every aspect of farming enterprise. The same range of expertise makes him a formidable advocate for businesses of all kinds.

Gary's agricultural practice covers financial, corporate and administrative law, and commercial litigation. He has been instrumental in the development of integrated agricultural production systems, and has extensive experience in environmental and land use cases.

On the financial side, in addition to working with institutions providing financing to agricultural producers and processors, Gary has successfully litigated virtually every type of commercial case. This includes several multi-state bank/commercial cases relating to competing secured claims. Gary lectures extensively throughout Minnesota on commercial, environmental and agricultural matters.

Dustan J. Cross
507-354-3111
dcross@gislason.com

THE NATIONAL BIOENGINEERED FOOD DISCLOSURE LAW

by Dustan Cross

On July 29, 2016, President Obama signed the National Bioengineered Food Disclosure Law amending the Agricultural Marketing Act of 1946. The law requires the USDA's Agricultural Marketing Service ("AMS") to develop a national mandatory system for disclosing and labeling bioengineered foods. This legislation, a compromise bill, was passed in response to increasing attempts by States to pass state laws on the mandatory Genetically Modified Organism ("GMO") labeling. Food manufacturers and others claimed these state laws forced them to submit to an inconsistent patchwork of differing labeling and disclosure standards for a widespread practice that has consistently been shown to be as safe as traditionally developed foods. The law makes clear Congress' finding that a bioengineered food that has successfully completed pre-market Federal regulatory review is not to be treated as either safer or less safe than a non-bioengineered counterpart of the food solely because of its bioengineered status.

The new law defines bioengineered food as any food that contains genetic material that has been modified through in vitro recombinant DNA techniques for which the modification could not have otherwise been obtained through conventional breeding or found in nature. To be a "food" under the law, the product in question must be intended for human consumption. The law itself will only apply to foods that are subject to the labeling requirements of either the federal Food, Drug & Cosmetic Act or the labeling requirements of the three respective Meat, Poultry and Egg Products inspection acts so long as the most predominant ingredient in the food is subject to the FDA's labeling requirements, or the food is a broth, stock, water or similar solution and the second most predominant ingredient is subject to that law.

The law requires the Secretary of Agriculture to establish a national mandatory bioengineered food disclosure standard within 2 years or by July 29, 2018. The Secretary is further directed to establish such requirements and procedures as may be necessary to carry out the standard. The law specifies that a food may bear a bioengineering disclosure only if it is in accordance with the AMS regulations. In developing these regulations, the law requires the USDA to include the following principles:

- Any food derived from an animal may not be considered bioengineered solely because the animal consumed feed that might itself contain bioengineered substances;

- The regulations will specify the amounts of bioengineered substances that must be present in food in order for the food to be considered a bioengineered food (presumably, this may be on a case-by-case basis);

- The regulations will need to establish a process for producers and manufacturers (and potentially consumers) for requesting and granting a determination by the USDA regarding other factors and conditions under which a food is considered bioengineered food.

Most significantly, the law mandates that instead of mandating a written disclosure directly on the food label stating that a particular item of food is or is not bioengineered, the USDA is required to develop regulations that allow the food manufacturer to make that disclosure by reference to a text, symbol, or electronic link (not including simply referencing URL Web pages unless the reference is embedded in the link) that a consumer can scan to locate whether the food does or does not contain bioengineered substances. In developing these regulations, the law anticipates that the food will have an electronic or digital scanning link with the words "Scan here for more food information," thereby making the label itself neutral on whether it does or does not contain bioengineered food. The required disclosure must be located in a consistent and conspicuous manner on the first production information page that appears for the product on a mobile device, Internet website page or other landing page, and that page may not contain any marketing or promotional material. Further, manufacturers and others making the required disclosures are prohibited by law from collecting, analyzing, or selling any personally identifiable information about consumers or the devices of consumers except that if it is necessary to collect personally identifiable information briefly to implement the disclosure requirements, then the information must be deleted immediately and not used for any other purpose. The law finally requires that the link must be of sufficient size to be easily and effectively scanned or read by a digital device.

The law also requires the USDA to develop alternative reasonable disclosure options for food contained in small or very small packages (which the new law does not define). The law also requires the USDA to provide an additional year for implementation for "small food manufacturers" and requires that they have an additional option of offering a telephone number or Internet website. Again, the law directs that the telephone link will be neutral as to the bioengineered content of the food, specifying that it will only say "Call for more food information."

The law specifically excludes restaurants, similar retail establishments and "very small food manufacturers" from its scope, although the definition of "small" and "very small" food manufacturers appears to be left up to the USDA through its regulatory process.

In developing these disclosure regulations, the USDA is directed by Congress to undertake a study within one year to identify potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital means. In doing so, the USDA is to consider the following:

- The availability of Internet and cellular phone network access nationally;

- The availability of land lines in stores that sell food;

- The efforts that food retailers have taken to address potential technology challenges;
- Challenges facing small and rural retailers; and
- The costs and benefits of installing in retail shops electronic or digital scanners or other evolving technology to provide the required disclosures.

If the USDA determines based upon this study that consumers would not have sufficient access to the required bioengineering disclosure, the law allows the Secretary "after consultation with food retailers and manufacturers" to require additional and comparable options to access the required disclosures. The law also further mandates that the USDA use its best efforts to develop its regulations so that they are consistent with the requirements of the Organic Foods Production Act of 1990, and is to be applied in a manner consistent with the United States obligations under any applicable treaty or other international agreement.

The law also requires food manufacturers to maintain records to establish compliance by them with the requirements of the law, and authorizes the USDA to audit such records. The law specifically directs, however, that the USDA does not have the authority to compel a food recall based solely on a violation of the disclosure requirements mandated by the Act.

The benefit to the manufacturer for these new disclosure requirements is the preemption portion of the law. In exchange for these disclosure mandates, the law provides that no State or subdivision of a State may directly or indirectly establish any requirement relating to the labeling or disclosure whether a food is bioengineered or was developed or produced using bioengineering for a food that is subject to the national disclosure standard unless the requirement is identical to the federal standards. Moreover, no State law may require the labeling of any food (including food served in a restaurant or similar establishment) relating to whether a food or seed is genetically engineered (or similar terms as determined by the USDA) or was developed or produced using genetic engineering, including any requirement for claims that a food or seed is or contains an ingredient that was developed or produced using genetic engineering.

The *quid pro quo* for this new law appears to be a federally mandated national standard that does not require disclosure of a food's bioengineered status on the package itself in exchange for the elimination of potentially more onerous, and inconsistent, patchwork regulation from the States. For instance, in a previous edition of *Dirt*, we summarized litigation arising from Vermont's enactment of Act 120, and challenges to that law by industry groups alleging claims of federal preemption, due process violations, and violations of the dormant Commerce Clause. While the District Court had upheld the constitutionality of Vermont's labeling and disclosure laws, the plaintiffs had appealed that decision to the United States Second Circuit Court of Appeals. However, shortly after enactment of the National Bioengineered Food Disclosure Standard Act, the plaintiffs voluntarily dismissed their appeal, presumably on the ground that the appeal was now moot.

Finally, a food may not be considered to be "not bioengineered" or "non-GMO" or any other similar claim describing the absence of bioengineering in the food solely because the food is not required to bear a disclosure that the food is bioengineered under this subtitle.

As with any new law of this nature, the impact on manufacturers and the challenges of implementation will depend in large part on the specific regulations proposed and adopted by USDA's AMS. Those regulations are two years away presumably, but the preemption provisions against State enforcement of separate standards is the law now. Until the regulations are adopted and implemented, it is not absolutely certain that this law will be a good thing for manufacturers and others in the food industry, but it appears to be an improvement over what the industry was otherwise facing.

The Beginning of the End of Valuation Discounts for Family Farms and Businesses?

Proposed Section 2704 Regulations and Valuation of Family Farm Entities

by Kaitlin Pals

Kaitlin Pals
507-354-3111
kpals@gislason.com

By far the most significant development in estate planning this year has been the IRS's publication of long-awaited proposed regulations pursuant to Section 2704 of the Internal Revenue Code. Section 2704 deals with valuation discounts to interests in business entities for estate and gift tax purposes. The new regulations are targeted at what the IRS perceives as a "loophole" in estate and gift taxation of family-owned business entities, including family farming operations and land owned in partnerships, corporations and LLCs.

What Are "Valuation Discounts," and How Do They Currently Affect Family Farms?

Estate planners use business entities such as LLCs, corporations and partnerships in farm succession plans for many reasons. One of the most significant benefits is that putting assets in a business entity usually allows the generation giving property to their children and grandchildren to discount the

value of those assets for gift and estate tax purposes. There are two main types of entity-based discounts: the "lack of control" or "minority" discount, and the "lack of marketability" discount. The new Section 2704 regulations would have substantial effects on the lack of control/minority-type discounts.

The concept of lack of control/minority discounts is based on economics. For example, if a hypothetical willing buyer wanted to purchase a 25% interest in a family-owned farm corporation, he would not pay the full value of 25% of the corporation's assets, because as a minority shareholder, he would not have the power to make decisions regarding the company and its assets on his own. Most importantly, he would not have the power to require the corporation sell all of its assets and distribute the proceeds to the shareholders. Because of these limits, courts have generally recognized lack of control/minority discounts of anywhere from 15% to 60% when it comes to valuing minority ownership interests in family business entities.

How Would the New Regulations Change Family Farm Business Valuations?

The new Section 2704 regulations would have a significant impact on farm families' ability to use lack of control/minority discounts in their estate plans. No one knows yet exactly how the IRS will interpret the new regulations. We should learn more about how the Section 2704 regulations will work in practice when the IRS issues its responses to public comments on the regulations. The public comment period ends in November.

The following are some of the most significant provisions of the new Section 2704 regulations, and how experts think the regulations would apply on a practical basis:

- Transfers that result in the lapse of a "liquidation right" would be subject to a claw-back if the transferor dies within three years of the date of the transfer.

  Example: Dad originally owned an 80% interest in Family Farms, LLC. Family Farms, LLC's Operating Agreement requires a 75% vote to sell the LLC's land. On July 1, 2017, Dad gives away 10% of the LLC to Son and 10% to Daughter, leaving him with only 60%. Dad dies June 30, 2019, less than three years from the date of the gift.

  Under current law, Dad's Estate would include only his remaining 60% of Family Farms, LLC. The Estate would likely get to discount the value of the Estate's interest for lack of control, because 60% is not sufficient voting power to liquidate the LLC under its Operating Agreement.

  Under the new regulations, the fact that Dad died within three years of giving away enough membership units so that he no longer had the power to liquidate the LLC on his own makes it a "lapse" of a liquidation power. Dad's Estate will be taxed as if Dad still had the right to liquidate the LLC at his death. In practice, this means that the Estate cannot take a lack of control discount.

- Currently, valuation discounts take into account state law provisions that restrict partners' or shareholders' abilities to demand that their shares be bought out. Under the new regulations, state law would no longer be considered in determining valuation discounts, unless the state law restrictions are mandatory.

  Example: Minnesota's version of the Uniform Limited Partnership Act states that a limited partner does not have an automatic right to voluntarily withdraw from a partnership and receive a distribution from the partnership of the value of their percentage ownership. However, the Act also permits partners to vary from this default rule if all the partners agree to it in a partnership agreement.

Under the new regulations, the fact that the partners *could* alter the default rule—that a limited partner cannot demand to be cashed out of a partnership—means the partnership cannot use the Minnesota law as a justification for a valuation discount, whether or not the particular partnership follows the state law's default rule.

- The regulations would also create a new class of restrictions that are to be completely disregarded for valuation purposes. These "disregarded restrictions" could be the most damaging part of the new regulations. There are at least two views on how the IRS could interpret these "disregarded restrictions":

  1. *The "Ignore the Agreement" View.* Some experts think the disregarded restrictions mean that the IRS will ignore explicit terms in agreements among the company and the family owners limiting their withdrawal rights to less than their pro rata share of the business's value. For example, a buy-sell agreement may only permit a shareholder to be bought out for 80% of the appraised value of their stock if the shareholder wants to be bought out in his first five years of ownership. Under the "Ignore the Agreement" view, this 20% discount would not be taken into account for estate tax valuation purposes, even if the company and the shareholders regularly enforced this restriction.

  2. *The "Ignore the Economics" View.* The more extreme view is that interests in all family-owned businesses will be valued as if each owner has the right to be bought out in cash or property (not a long-term note) no less than six months from demanding to withdraw from the entity. This approach would not only disregard restrictions in buy-sell agreements; it would ignore economic realities of minority ownership in a closely-held business.

  The basis for lack of control or minority discounts has always rested on the fact that nobody really wants to buy a minority interest in someone else's family farm or business. This more extreme approach under the new regulations would ignore that fact. It would not matter if it was impossible for a 20% shareholder in a family farm corporation to sell her stock for 20% of the value of the underlying assets within 6 months because no one would pay that much in reality. Her stock would still be valued as if she could do so. The "Ignore the Economics" interpretation would essentially eliminate minority discounts in family-owned businesses.

When Would These Changes Go Into Effect?

Again, no one knows. The IRS has to follow certain procedures when enacting new regulations. The earliest these could be completed is December 1, 2016, though most experts predict that the regulations would go into effect at the end of the year at the earliest. The IRS may revise the proposed rules and have to go through another cycle of public comments and responses, which would delay the effective date. Congress could also pass legislation to prevent the proposed rules from going into effect at all.

What Can I Do?

Regardless of whether the IRS makes changes to the proposed regulations or delays the effective date, the general outlook for minority/lack of control discounts for family-owned businesses, including family farms, is uncertain. Many farmers and small business owners are accelerating their gifting plans, passing interests in closely-held business entities to younger generations before the new rules go into effect. If transferring the family farm using business entities is part of your estate plan, do not delay in consulting with your attorney and tax advisors as to how the new rules may affect your plan and what course of action makes the most sense for you and your family.

BOUNDARY LINE DISPUTES

How Minnesota Courts Set New Boundary Lines Under the Doctrine of Boundary by Practical Location

by Jeff C. Braegelmann

Jeff C. Braegelmann
507-354-3111
jbraegelmann@gislason.com

Boundary by Practical Location is a legal doctrine courts use to settle boundary disputes. Under this doctrine, a court may establish a new, legally binding boundary between adjacent properties different from the boundary described in the neighbors' deeds. Underlying the Doctrine of Boundary by Practical Location is the notion that the owners of the neighboring parcels, or their predecessors, have somehow mutually relocated the legal boundary. It does not necessarily require proof of some specific, mutual agreement to relocate the boundary. The doctrine typically applies when there has been some conduct by the parties or their predecessors which the court deems sufficient to reset the property boundary.

Different from Adverse Possession.

The Doctrine of Boundary by Practical Location has some similarities to adverse possession, but they are different legal doctrines. Adverse possession may allow a party to acquire title to another's property, but adverse possession tends to operate as a more one-sided affair, not based on mutual conduct. A person might claim adverse possession of another's property when the person uses another's property in a certain manner for a sufficient period of time. Generally, laws called statutes of limitation set time limits for people to assert claims or bring legal actions. If the claim is not brought within the statutory period, it is lost. Essentially, the Doctrine of Adverse Possession operates as a 15-year statute of limitations. If someone else uses your property in a particular way for a continuous 15-year period, you can be legally barred from claiming that the property is yours. Then the person who used your property can establish legal ownership of the portion he used. The law figures that if you have not done anything to claim or recover your property or to prevent the other person from using it for 15 years, it is too late to do so.

But adverse possession requires that the other party use your property in a particular way. The party claiming adverse possession must demonstrate actual, open, continuous, exclusive, and hostile possession of your property for a period of 15 years. Actual possession requires that they in fact occupy or use your property. Open possession means possession that is observable by you, the owner of the property. The use must also be continuous for the 15-year period, at least without substantial interruption. But on this point, a court likely would look at the nature of the property. For example, a person who uses a portion of your property to raise crops between planting time and harvest time, but not during the intervening winter months, may be deemed to have continuously used your property.

Also, the person claiming adverse possession need not demonstrate that he alone used or possessed your property for 15 years. The theory of "tacking" allows the person claiming adverse possession to satisfy the 15-year requirement by showing that he or his predecessors used your property in the requisite fashion for 15 years. Also, to establish adverse possession, the use of your property must be exclusive. It must be done with the intention of excluding all others from using your property. Finally, the use also must be hostile; that is, without your consent or permission. If someone uses a portion of your property for 15 years with your consent or permission, the use is not hostile and therefore cannot establish adverse possession.

So we see that adverse possession generally involves one party acting unilaterally to use another's property while the owner sits on his rights for 15 years, does nothing to prevent that unauthorized, hostile use, and loses the property as a result. Unlike setting boundaries by practical location, with adverse possession there is no mutual agreement or mutual conduct that forms the basis for a court to change ownership of the property.

Another crucial distinction between practical location of boundaries and adverse possession claims relates to payment of real estate taxes. In an adverse possession dispute, the party claiming adverse possession may have to demonstrate that he paid real estate taxes for at least 5 consecutive years on the real estate in question if that real estate is assessed as a tract or parcel separate from other real estate. However, proof of payment of real estate taxes is not required in lawsuits relating to boundary lines.

How Courts Apply the Doctrine of Boundary by Practical Location.

In the typical boundary line dispute one neighbor claims ownership of part of his neighbor's adjoining land. One neighbor claims that the boundary is farther over onto his neighbor's land than the legal boundary depicted or described in his neighbor's plat or deed. We will refer to the "encroaching" neighbor as the claimant; that is, the party claiming that a boundary has been established by practical location different from the deeded or legally described boundary.

Under the Doctrine of Boundary by Practical Location in Minnesota, the claimant bears the burden of establishing the boundary's practical location clearly, positively, and unequivocally. The manner and weight of the evidence necessary to satisfy a court of the practical location of the boundary can vary with each case. The question becomes what type and amount of evidence will be sufficient to convince a judge that the boundary has become something other than the legally described or deeded boundary. Clear, positive, and unequivocal describe a rather high burden of proof. It makes sense to require this level of proof because, if the claimant prevails, he will succeed in taking title to and ownership of a portion of his neighbor's property.

When cases discuss the burden of establishing the practical location of a boundary, they are referring to proof of a place on the ground; that is, the route, location, or placement of the claimed boundary must be shown clearly, convincingly, and unequivocally. That may sound like a daunting burden, but is it really? You probably can think of all types of examples and situations where neighboring landowners, by their mutual conduct, have done things which pretty clearly establish what they consider to be the boundary between their properties, regardless of how their deeds or plats might legally describe the boundary. One neighbor plants a row of trees next to what he considers to be the boundary, and the other neighbor mows up to that boundary line. Neighbors often place fences, gardens, partitions, walls, rocks, landscaping, ornaments, decorative windmills, woodpiles, etc., in certain locations and leave them there for years, considering that location to be the property boundary and treating it as such. Imagine that two such neighbors are out in their yards one afternoon and a judge drives by. Suppose they flag the judge down and asked her to identify the practical location of the boundary between their properties. The judge probably could do so pretty easily after asking which row of trees, mow line, fence, windmill, etc., belongs to each of the two neighbors.

But now imagine two quarter sections of bare, tillable ground with no fence, no row of shrubs, no landscaping, and no upended bathtub grotto marking the line between them. Between these two quarter sections, bare dirt meets bare dirt. The only thing appearing to separate the two quarter sections is a plow line that moves back and forth a bit each year between the two neighbors depending upon various factors, including how straight they plow and plant, which neighbor gets out there first in the spring, and how aggressive each neighbor is about hugging, or crossing, the plow line. A Minnesota Court of Appeals case from 2010 demonstrates how the Doctrine of Boundary by Practical Location can apply to set a new boundary even in these circumstances.

How Plow Lines Became Boundary Lines.

In the Minnesota Court of Appeals case, a farmer purchased a tract of tillable land and stepped into a boundary dispute with two neighbors, one to the north and one to the west. There was no fence, hedge, or physical object separating the farmer's field from his neighbors' fields. The only mark between the fields was the plow line at which each farmer stopped plowing his own field. The plow line was visible because the parties planted different crops in their abutting fields. Before buying his tract, the farmer had it surveyed and discovered that his neighbor to the north was farming approximately four acres of the subject property and the neighbor to the west approximately 0.4 acres. The plow lines ran roughly parallel to the legally described property lines, but over onto the farmer's land. After acquiring his tract, the farmer sued his neighbors for trespass. After all, the neighbors were farming over the legally described boundary of his property. Then the neighbors counterclaimed and argued that the plow lines

had become boundaries by practical location. At trial, there was testimony that the prior owners of these properties had accepted the plow lines as the field boundaries for more than 20 years. The neighbors claiming the plow lines as boundaries testified that the plow lines varied a bit from year to year and acknowledged the lines fluctuated through the years. However, they also testified that it was a fairly common practice for farmers not to use fences to separate their abutting fields, and they testified that there had never been any dispute over the property lines until this farmer purchased his property and started this lawsuit. The trial court concluded that the encroaching neighbors had not met their burden of producing clear, positive, and unequivocal evidence to establish the practical location of the boundaries because they had not demonstrated that the plow lines remained consistent over time. The plow lines varied a bit from year to year. However, the Minnesota Court of Appeals reversed and concluded that the evidence was sufficient.

The Minnesota Court of Appeals relied on certain facts to determine the boundary in that case. There was a post set in the northwest corner of the disputed field. Near the northeast corner was a driveway approach. As to the north line, the farmers and their predecessors plowed between those two fixed endpoints, the post and the driveway. On the west side of the disputed field was a rock pile. As to the western boundary, the farmers and their predecessors plowed between that rock pile and the post in the northwest corner. The Minnesota Court of Appeals concluded, "Given the fixed endpoints of each plow line and the owners' intent to plow along the straight boundary from point to point, the boundary is sufficiently known and capable of ascertainment."[1] Therefore, the Minnesota Court of Appeals concluded that the claimants to the north and west had met their burden of proof. The evidence demonstrated that the two plow lines, north and west, had been treated as the accepted boundaries for more than 20 years by the predecessors of the farmer who purchased the property and had started the lawsuit.

Additional Requirements.

To succeed on a claim of Boundary by Practical Location it is not enough just to satisfy the burden of proving where the line has come to be practically located. The person claiming the boundary must also show one of three things; namely, that his neighbor or his neighbor's predecessors acquiesced to the boundary, agreed to the boundary, or did something which should prevent the neighbor from disputing or denying the claimed, practical boundary.

To demonstrate acquiescence, the claimant must clearly show that the neighbor or the neighbor's predecessors affirmatively consented to the claimed boundary for a period of at least 15 years. Note that this time period is the same as the adverse possession time period discussed previously. The person claiming the new boundary need not demonstrate that his neighbor knew the location of the "true" or legal boundary, but there must be proof that the neighbor did something to affirmatively assent to or acquiesce in the claimed boundary. Note that the 15-year requirement does not pertain to only the current neighbor. The tacking rule applies again. There must be proof of acquiescence for a combined 15 years by the neighbor

or his predecessors. The length of time the prior owners acquiesced gets tacked on to however long the current owner acquiesced.

Alternatively, the claimant can show that the claimant and his neighbor agreed, orally or in writing, to honor the boundary for a "substantial" period of time. The 15-year requirement does not apply to this point. The claimant need not show that his neighbor or his neighbor's predecessors agreed to honor the boundary for 15 years, only that they agreed to honor it for a substantial period.

Finally, if the claimant cannot show acquiescence or agreement, the claimant can prove circumstances that would make it unfair to allow the neighbor to dispute the new boundary. This is referred to as estoppel. This can include situations in which the neighbor is aware of the claimed boundary line but stands by and says nothing while the claimant encroaches on the neighbor's property or incurs some expense in reliance on his neighbor's silence. For example, if the claimant improved the property up to the new boundary line or set structures on the property while his neighbor stood by and said nothing, a court could conclude that it would be unfair to deprive the claimant of the new boundary line in those circumstances.

Note that you can step into, or buy into, these situations. You might purchase property under a deed with a clearly described legal boundary that a surveyor could easily read, define, and stake out on the ground. Nevertheless, if there is a dispute, the boundary might be reset under the Doctrine of Boundary by Practical Location. Again, in part this is because courts will look not only at your actions after becoming owner of the property, but also the actions of your predecessors, to determine whether there has been some mutual agreement or conduct by which you or your predecessors and your neighbor or his predecessors have relocated the boundary.

Also, when courts follow the Doctrine of Boundary by Practical Location, they do not merely create some easement or temporary right in the neighbor's property. If a claimant establishes a boundary by practical location, the result will be a binding court decision that legally sets the new boundary and therefore changes title to the property on both sides of that new boundary. A statute in Minnesota specifically allows lawsuits to determine boundaries in this fashion. In the lawsuit, the court can order that all parties with an interest in the affected properties be joined in the lawsuit. This could include co-owners or lenders holding mortgages on the affected properties. In such a lawsuit, once the court has determined a new boundary by practical location, it can appoint a surveyor to locate and establish that new boundary on the ground by setting permanent stone or iron markers. They are identified as judicial monuments, and a record of the court decision and the location of the judicial monuments can be recorded. As a legal and practical matter, the effect of such a decision is the same as if the neighbor had signed a deed to the prevailing claimant conveying ownership and title to that portion of the neighbor's property on the other side of the newly established boundary line.

---

[1] *Roehrs v. Rasmussen,* Minn. Ct. App. 2010, unpublished (2010 WL 1850796, at p. 3).

When Should Grandpa Stop Driving?

by Cory Genelin

Cory A. Genelin
507-354-3111
cgenelin@gislason.com

"Grandpa's been driving truck since Del Reeves first saw that picture of the girl wearing nothing but a smile, and a towel, in the picture, on the billboard, in the field, near the big ol' highway. He's always kept 'er shiny side up, never had a problem with Smokey, and says he'll be rollin' thunder till he's six feet under... but he's 92, nearsighted, doesn't always take his pills, and last week he tried to jump start a chicken coop." Okay, so they're not all that extreme, but we field a lot of questions like this, especially around harvest time. The short version is:

"When does Grandpa have to stop driving the truck?"

If you happen to be a commercial carrier operation, then there are multiple safety standards that will help you identify the point at which Grandpa can't be on the road. But for most clients with this concern, they are talking about a traditional farm truck, or "covered farm vehicle," as they are known in federal regulations. A "covered farm vehicle" is subject to most all of the rules governing other large commercial vehicles; but the person driving that vehicle is legally no different than any other driver. If there is no maximum driving age in your state, then Grandpa's age alone won't stop him.

A "covered farm vehicle" means a straight or articulated truck (i) registered in any state; (ii) operated by a farm owner, employee, family member, or tenant farmer; (iii) used to transport ag commodities, livestock, machinery, or supplies to or from a farm or ranch; (iv) that is not used in a for-hire motor carrier operation. Covered farm vehicles weighing 26,001 pounds or less may operate anywhere in the United States. A covered farm vehicle weighing more than 26,001 pounds may only operate in the state of registration, or across state lines within 150 miles of the farm.

By the way, putting "farm plates" on old Phantom 309 won't make it a covered farm vehicle. It's the use of the truck at the time that matters. The same truck can be a covered farm vehicle on Wednesday when Grandpa's hauling grain, and not (and therefore subject to all Federal Regulations) on Sunday when Grandpa hauls the neighbor's demo derby car to the fair for $50.

If you're going to climb Wolf Creek Pass in a covered farm vehicle you still have to comply with Federal and State regulations governing required accessories, motor vehicle size and weight, safety measures, and vehicle operation laws.

But if me and Freddy and Jake are in a covered farm vehicle, we don't have to be enrolled in a drug testing program; don't have to have a CDL; don't have to meet any physical qualifications or examinations; don't need a health card and need not comply with hours of service, inspection, repair, and maintenance regulations. The lack of any physical requirements means that as long as he can get in the cab, Grandpa will technically qualify to drive a farm truck. Grandpa may have many prescription medications or physical ailments

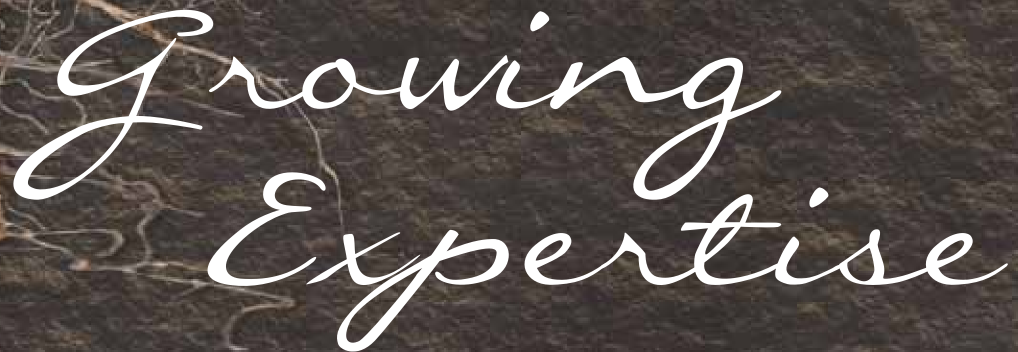
that make him unable or unsafe to drive. But, unlike a regular employer, you won't know it because you can't make him share his physical conditions and you can't make him submit to drug testing.

So if we're looking only at the law in black and white, there may never be a time when Grandpa can't legally drive the farm truck. But we also need to take negligence into account. Complying with regulations and avoiding negligence overlap, but they're not the same. Grandpa, and the farm (even if he's not getting paid), and the owner of the truck, and the owner of the grain (which had better be the farm or you've got bigger problems), can all be found liable if Grandpa commits negligence and hurts somebody or something.

Common law negligence is almost never a bright line rule. No one can say "do A, B, and C, and you'll be safe; do X, Y, or Z and you're in trouble." But the point is, before you pick through whether or not Grandpa can legally get behind the wheel, you need to think first about whether he should. I've litigated several tragic semi and farm tractor cases including fatalities. I've tried to keep this article lighthearted, but the fact is, getting this subject wrong could end a life, or cost you the farm that your family has spent several lifetimes building.

And the problem isn't going to be just Grandpa's. After an accident, a good Plaintiff's attorney is going to ask, "Why was Grandpa driving the $10,000 1978 Mack and not the six figure harvester, or tractor and wagon?" If the answer is that you didn't think he could do those things, the jury will be wondering why you thought he could manage the semi. The implication will be that you were willing to risk the safety of others before risking damage to your own equipment.

Ultimately, the answer is this: Who drives the farm truck is an employment decision like any other. You owe your family, your farm, and your fellow motorists the duty to make that decision with safety in mind. You can't let your feelings, Grandpa's feelings, or love of tradition put human life or your operation at risk. Give Grandpa enough respect to hold him to the same standard as everyone else.



For your success and security.

We are growing our expertise to bring you focused knowledge and experience for all of your real estate title opportunities.

Title Resources is happy to announce that we have acquired the respected firm of Lamm, Nelson & Cich. Both of our firms share strong roots in our region and we look forward to growing and continuing to bring you the most progressive, reliable title services available in the market.

TITLE RESOURCES

New Ulm Office
(507) 388-4425
2700 S. Broadway
New Ulm, MN 56073

City Center Mankato Office
(507) 388-4425
124 E. Walnut St. # 200
Mankato, MN 56001

Hilltop Office
(507) 345-4607
151 St. Andrews Ct #1310
Mankato, MN 56001

titleresourcesllc.com

Why Elections Matter:

Governmental Functions Under the Direction and Control of the USDA

by Dean M. Zimmerli

W hen the nation's next president is inaugurated in January, among his first tasks will be picking a cabinet, including a new Secretary of Agriculture to head the USDA.

Dean M. Zimmerli
507-354-3111
dzimmerli@gislason.com

Many do not realize the scope of the USDA's authority or the discretion the USDA has (or claims it has) over setting policy. Although Congress is tasked with creating laws, the executive branch, including the USDA, has immense power and ability to create and influence policy through its rulemaking and enforcement powers. Thus, this year's presidential election, and the selection of a new Secretary of Agriculture, can have a dramatic impact on agricultural and related policy in the years to come.

The USDA's authority ranges from nutrition and food safety policy, to agricultural and rural financing, to implementing the SNAP (formerly "food stamp") program, among others. In a variety of these areas, the USDA has discretion in how it implements and enforces the various programs created by Congress. A brief overview of the scope of the USDA's authority demonstrates the importance this agency has.

One of the earliest and most well-known responsibilities of the USDA is implementing the meat inspection program through the Food Safety Inspection Service. FSIS is charged with inspecting meat and poultry processing plants to ensure compliance with food safety standards through pre- and post-mortem inspection of animal carcasses, tissue sampling, and other procedures. The strictness with which FSIS implements various food safety measures can

significantly impact how meat and poultry processors operate their businesses. For example, the New Poultry Inspection Rule, put into effect in 2014, put greater emphasis on detecting harmful pathogens such as salmonella and campylobacter, while reducing the number of federal inspectors performing visual inspections of poultry carcasses. Instead, poultry plants were allowed to hire employees to perform visual inspections. Yet, an increase in the maximum line speed, seen as a potential area to increase efficiency, was removed from the final rule. Ultimately, the new rule was generally supported by the poultry industry and seen as modernizing old regulations. This is just one example of how the USDA's method of implementing the law can impact industry.

The USDA also enforces the Packers and Stockyards Act and several other laws under its GIPSA arm—the Grain Inspection, Packers and Stockyards Administration. GIPSA regulates grain standards, classification, and weighing. GIPSA also enforces a number of regulations relating to business practices of meat and poultry processors, which prohibit "unfair, unjustly discriminatory, or deceptive" business practices and are meant to foster fair competition in the marketplace. GIPSA administers statutory payment trusts and oversees bonds which may provide payments to producers when a meat or poultry processor fails to pay for animals delivered. Because many of the laws enforced by GIPSA are written in broad, general terms, GIPSA has fairly wide discretion in promulgating new rules and regulations. For example, GIPSA is currently considering regulations which more specifically address what constitutes an "undue or unreasonable preference" in contracts between livestock producers and processors. Significant debate has surrounded this rule since it was first proposed nearly six years ago. How the USDA moves forward on this rule may have a significant impact on the livestock industry in the coming years.

The USDA plays an increasingly important role in how food is marketed to consumers, specifically as it relates to labeling. In addition, the USDA has long promoted nutritional guidelines, first with the "food pyramid" and now with its new "Choose MyPlate" initiative. Currently, the USDA sets national standards for what can be labeled as "Organic" food, and administers the organic certification process. For example, the USDA is currently defending a lawsuit over new organic regulations which make it easier for certain synthetic substances to remain authorized in organic farming. At the other end of the food technology spectrum, the USDA was recently tasked by Congress with developing national standards for labeling foods containing ingredients from genetically modified organisms. Final rules will not be completed under the current administration, so the new Secretary of Agriculture will play an important role in determining whether any exceptions to GMO labeling will be permitted for foods containing only trace ingredients or whether 1-800 numbers or digital codes may be used to provide information about GMO ingredients in lieu of a GMO label.

The USDA, through the Natural Resources Conservation Service, manages a number of conservation programs including the Conservation Reserve Program (CRP) and the Conservation Stewardship Program (CSP). As pressure mounts from environmental activists and other government agencies such as the EPA to improve water quality and reduce the perceived impact agriculture has on the environment, the USDA may have an increasingly

important role in shaping agricultural practices in the years to come. Already, the USDA has recently revised its CSP program to include additional conservation practices.

The USDA's influence also depends on the aggressiveness with which it takes enforcement actions.

Another area where the USDA has significant impact is in financing and rural development. Most producers are quite familiar with a number of USDA programs, including ownership and operating loans from the Farm Service Agency, crop insurance programs, and farm storage facility loans. The USDA also provides rural development financing for home purchases and multi-family rental housing. The Beginning Farmers and Ranchers program makes low-interest loans available for those seeking to enter the agriculture industry as producers.

Beyond its role in implementing this array of programs through rulemaking and administration, the USDA's influence also depends on the aggressiveness with which it takes enforcement actions. For example, FSIS regularly takes enforcement actions relating to unsanitary or inhumane practices in meat and poultry processing facilities. Enforcement actions can include filing a Noncompliance Record, taking physical control of products which may be adulterated or misbranded, removing inspection employees from a facility, filing an administrative complaint and seeking a monetary penalty, and referring a case to the U.S. Attorney's Office for criminal prosecution. Penalties can include business interruption, fines and other monetary penalties, and even jail time and other criminal penalties for serious violations. Similar enforcement actions can be taken with respect to other regulations under the USDA.

The USDA has enormous influence in agricultural policy through its rulemaking efforts, implementation of various legislative programs, and enforcement actions. Moreover, the scope of the USDA's authority extends into a wide variety of areas including environmental protection, financing, and even nutritional guidelines. With this wide scope of authority, and a number of pressing issues facing the USDA, the next president's selection for Secretary of Agriculture is important in ensuring that agriculture continues to play an important role in the United States economy into the future.

The High Cost of Overtime

by David W. Sturges

David W. Sturges
507-354-3111
dsturges@gislason.com

In 2014, President Obama directed the United States Secretary of Labor to update the Fair Labor Standards Act ("FLSA") overtime regulations with a view to simplification and modernization.

In response to the President's directive, the Department of Labor published a Notice of Proposed Rulemaking (Proposed Rule) on July 6, 2015, and invited interested parties to submit written comments about the Proposed Rule. The Department of Labor received over 270,000 comments from businesses, individuals, business associations and the like. Responses in hand, it crafted a final rule (Final Rule). The Final Rule, with some minor changes, parroted the Proposed Rule and was published on May 18, 2016, with an effective date of December 1, 2016. The Final Rule has become the target of two lawsuits, and several actions by Congress, all with the common theme that they believe the Final Rule is overreaching and unlawful.

Enacted in 1938, the FLSA established minimum wage and overtime pay requirements for employees together with certain recordkeeping and employment standards. Simply put, the FLSA guarantees employees a minimum wage for all hours worked and limiting to 40 hours per week the number of hours an employee can work without receiving additional compensation—namely overtime. Exempt from the FLSA's minimum wage and overtime protections are those people employed in a "bona fide executive, administrative, or professional capacity" (the White Collar Exemption) who meet certain criteria. Also exempted from the minimum wage and overtime requirements of the FLSA are so-called highly compensated employees.

The FLSA does not itself set the guidelines or the methodology for determining whether an employee works in an executive, administrative or professional capacity. Instead, it has been left to the Department of Labor to formulate a test(s) to determine the application of the exemptions.

The tests have evolved since 1938 with the last revision undertaken in 2004. At present, in order for the exemption to apply, be it for an executive, administrator or professional, the regulations generally require: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (Salary Basis Test); (2) the amount of salary paid must meet a minimum specified amount (Salary Level Test—in 2004, the current regulations raised the overtime pay threshold from $8,060.00 to its

current level of $455 per week or $23,660 per year). Under the current highly compensated executive, administrative and professional employee exemption (HCE Exemption), employees who are paid a total annual compensation of at least $100,000 (which must include at least $455 per week paid on a salary or fee basis) are also exempt from FLSA's overtime requirement if the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee under the Duties Test; and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (Duties Test).

The all but singular focus of the Final Rule is the Salary Level Test, though the Department of Labor invited comments as to whether the Duties Test should be reconsidered. No steps to change the Duties Test were taken by the Final Rule.

The Final Rule represents the first change to the Salary Level Test since 2004 and raises the compensation necessary to qualify for the overtime exemption to $913 per week ($47,476 annually) for a full-year worker. With respect to the highly compensated employee the total compensation under the Final Rule will be $134,004 annually.

A significant change from past practice is the new provision that permits employers to count nondiscretionary bonuses, incentives and commissions toward up to 10% of the required salary level for the standard White Collar Exemptions so long as employers are paying those amounts on a quarterly or more frequent basis.

Similarly, with respect to highly compensated employees, if an employee's annual compensation does not total at least the minimum amount of $134,004, by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required regulatory level.

Another noteworthy albeit controversial change from the current regulation is a new provision that requires automatic updates to the salary level. Beginning on January 1, 2020, and every three years thereafter, the Final Rule provides that the salary level will be automatically updated in an amount equal to a specified percentile of weekly earnings of full-time non-hourly workers as published by the Bureau of Labor Statistics.

Not surprisingly, there has been substantial and vocal opposition to the Final Rule expressed by, among others, members of the House of Representatives and the Senate. There are also lawsuits that have been filed by 21 States and a lawsuit by various business associations led by various Texas Chambers of Commerce.

Congress expressed its dissatisfaction on June 7, 2016, shortly after the publication of the Final Rule, with 42 senators filing a so-called "Motion of Disapproval" under the Congressional Review Act. The resolution declares that "Congress disapproves the rule submitted by the Department of Labor relating to defining and delimiting the exemptions from minimum wage and overtime law requirements for executive, administrative, professionals . . . under the Fair Labor Standards Act of 1938; and such rule shall have no force or effect."

Some members of the House of Representatives joined the fray and passed a similar resolution. Representative Virginia Foxx, Chairman of the House Committee on Higher Education and Workforce Training, said at the time that the Department of Labor had "failed to streamline existing overtime regulations and instead finalized a rule that will stifle workplace flexibility, threaten upward mobility, and burden small business."

The resolutions have been referred to Committee with no further action taken at this time.

The House has also passed the so-called *Regulatory Relief for Small Businesses, Schools and Nonprofits Act.* Passed on the eve of the start of the congressional recess, it calls for a delay of the Final Rule for six months. Identical legislation was introduced in the Senate on September 28. President Obama has threatened to veto the legislation.

Steps by the House and the Senate to roll back the regulation notwithstanding, two lawsuits challenging the Final Rule were commenced on September 20, 2016 in the United States District Court, Eastern District of Texas. One lawsuit was brought on behalf of 21 states. A separate action was commenced by a number of local Texas chambers of commerce and other business associations. Both generally argue that the steps taken by the Department of Labor are arbitrary and capricious and contrary to law.

Both lawsuits focus on the significant jump in the compensation required to meet the Salary Level Test, arguing it effectively does away with the Duties Test. They also assert that the automatic increases that will become effective beginning in January 2020 and every three years thereafter require the opportunity for public comment.

In their lawsuit, the States argue that the new regulation violates the Tenth Amendment which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or the people."

The States also admonish the Department of Labor's action as one taken in excess of the Department's statutory jurisdiction. They argue that the exemption must be determined based upon the duties and activities actually performed by the employee as well as salary, and that salary can only be "one factor to be considered, but it cannot be a litmus test." They further argue that the FLSA does not provide for a congressional authorization that permits the "new indexing mechanism related to the salary basis test and the HCE compensation level" and that the automatic updating is unconstitutional. The approach taken by the business associations is not altogether different. They argue against what they call the "unprecedented escalator provision" and that the new minimum salary threshold exceeds the Department of Labor statutory authority under the Act.

The District Court has consolidated the cases.

On October 12, 2016, the States filed an Emergency Motion for Preliminary Injunction to enjoin the new overtime rule from becoming effective, arguing that it is important that the court intervene to prevent "irreversible budgetary damage, displacement of state policy choices about crucial governmental functions and services, workplace and administrative disruption, and possibly even eventual employee terminations." The Motion was heard by the District Court on November 16, 2016. On November 22, 2016 the District Court granted the states' Emergency Motion for Preliminary Injunction and has enjoined the Department of Labor from implementing and enforcing the new overtime rule pending further order of the court. The injunction applies on a nationwide basis. In major part, the District Court believes that the salary requirement in effect supplants the Duties Test and if Congress intended that result, Congress and not the Department of Labor should make that change.

On December 1, 2016 the Department of Labor filed a Notice of Appeal, appealing the District Court's Order to the United States Court of Appeals for the Fifth Circuit.

RULES AND
REGULATIONS

Regulatory Overreach – GIPSA's Renewed Effort to Regulate Contractual Relationships in the Livestock Industry

by Matthew Berger

Matthew C. Berger
507-354-3111
mberger@gislason.com

The 2008 Farm Bill included several amendments to the Packers & Stockyards Act of 1921 that imposed new restrictions applicable to poultry growing arrangements, swine production or marketing contracts, and other livestock and poultry contracts. The 2008 Farm Bill also specifically required the United States Department of Agriculture (the "USDA") to establish certain additional regulations applicable to such contracts.

Under the guise of satisfying this congressional mandate, the Grain Inspection, Packers & Stockyards Administration ("GIPSA")—which is part of the USDA and is responsible for administering and enforcing the Packers & Stockyards Act—published expansive new proposed regulations in June 2010 that dramatically exceeded the scope of regulations required by the 2008 Farm Bill. According to an analysis prepared by the National Pork Producers Council, the regulations proposed by GIPSA "would have limited farmers' ability to sell animals, dictated the terms of private contracts, made it harder to get farm financing, raised consumer prices and reduced choices, stifled industry innovation," and "would have cost the pork industry more than $330 million annually." In December 2011, after receiving considerable opposition from farmers and the agricultural industry, GIPSA finalized a pared-down version of the regulations that was, for the most part, limited to the regulations contemplated by Congress in the 2008 Farm Bill.

Since 2011, however, GIPSA has continued its efforts to impose its expansive regulatory agenda on American farmers. For several years, Congress expressly defunded any efforts by GIPSA to adopt the proposed regulations. Nonetheless, GIPSA attempted to implement the policies embodied in several of the abandoned regulations through informal actions. And after Congress failed to expressly defund GIPSA's rulemaking efforts in 2016, Secretary of Agriculture Tom Vilsack announced that the agency would again attempt to enact the regulations that it had abandoned in the face of public opposition in 2011. In a letter to various

agricultural trade groups dated October 13, 2016, Secretary Vilsack indicated GIPSA's intent to re-propose the same—or substantially similar—regulations as part of new rulemaking processes. This article will summarize key provisions of the abandoned 2010 proposed regulations that pose significant threats to livestock and poultry producers, and summarize the process, including opportunities for farmers to submit comments, that will be followed in GIPSA's renewed efforts to adopt these dangerous regulations.

Scope of the Packers & Stockyards Act

The Packers & Stockyards Act was enacted in response to the monopolistic power exerted by meat packers over American farmers and consumers in the early 1900s. The year following its adoption, the United States Supreme Court recognized that the Act's purpose was to secure "the free flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of the region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for market." In other words, since the time of its adoption, the Packers & Stockyards Act has been viewed primarily as an antitrust statute intended to protect free and unrestrained market competition in the livestock industry.

One of the principal provisions of the Packers & Stockyards Act prohibits "any unfair, unjustly discriminatory, or deceptive practice or device"—and "any undue or unreasonable" preference, advantage, prejudice, or disadvantage—with respect to livestock or meat. The broad terms of this prohibition, however, are not defined in the statute. Nonetheless, based on the factual circumstances and legal context from which the Packers & Stockyards Act arose, eight (8) of the eleven (11) federal courts of appeals have ruled that these statutory restrictions only apply to conduct that has or is likely to have a negative impact on competition in the marketplace (e.g., artificial influences on the prices that persons will pay for goods or services in the marketplace); the other three federal courts of appeals have not considered or ruled on this issue. This standard is generally not satisfied in the case of most ordinary contractual disputes, which therefore remain subject to resolution by local courts or arbitration (as agreed upon by the parties to the contract) rather than by the federal government.

GIPSA, however, has long sought to ignore the history and context of the Packers & Stockyards Act and reverse the unanimous judgment of the federal courts of appeals in order to expand the scope of its administrative power. As part of its proposed rules in 2010, which were subsequently abandoned, GIPSA proposed a regulation that would have expressly provided that "[a] finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases" and that "[c]onduct can be found to violate [the Packers & Stockyards Act] without a finding of harm or likely harm to competition." Secretary Vilsack now indicates that GIPSA intends to impose its interpretation of the statute—prior to receiving any additional public comments—through the adoption of an "interim rule." GIPSA anticipates that the formal adoption of its interpretation as a regulation will cause federal courts to reverse their prior decisions and "defer" to GIPSA's expansive interpretation of its own authority under the Packers & Stockyards Act.

If successful, GIPSA's unilateral imposition of its preferred interpretation would dramatically expand the scope of the agency's regulatory power over the livestock industry. Without the long-recognized interpretation that limits the scope of the Packers & Stockyards Act to conduct that threatens competitive harm in the marketplace, GIPSA could seek to regulate or prohibit any conduct within the livestock industry by simply declaring such conduct to be "unfair, unjustly discriminatory, or deceptive." As several federal courts of appeals have warned, GIPSA's proposed interpretation of its powers under the Packers & Stockyards Act could turn the mere exercise of contractual rights or routine contract disputes into violations of federal law for which packers, dealers, or livestock producers could be held liable or for which administrative penalties could be imposed by the federal government.

Other Proposed Regulations

Secretary Vilsack has also indicated that GIPSA intends to revive two other controversial provisions of the regulations that were proposed in 2010 and subsequently abandoned in 2011 by proposing two separate new rules. First, GIPSA will seek to insert itself into negotiations for and regulate marketing contract and grower contracts by establishing "criteria" that it will consider in determining whether contract pricing or special premiums create an undue or unreasonable preference, advantage, prejudice, or disadvantage. The second proposed rule will strictly regulate the use of tournament pricing systems in grower contracts in the poultry industry.

How Can You Get Involved?

In most cases, a federal agency commences the formal rulemaking process by publishing a proposed rule in the *Federal Register*. The proposed rule will provide background information summarizing the issue(s) and action(s) under consideration, including a statement of why the proposed

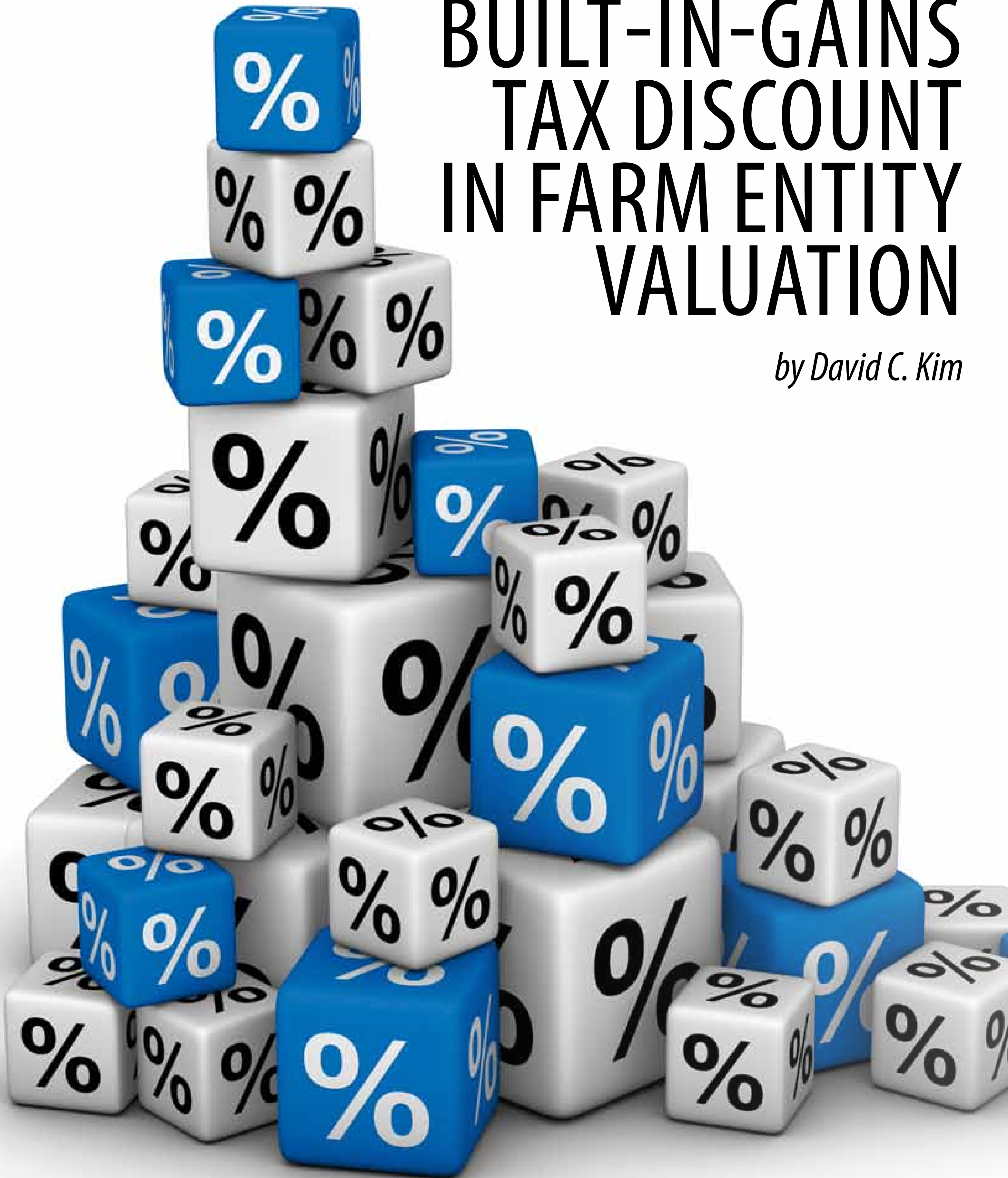
rule is necessary, and the text of the proposed regulation. The proposed rule will also establish a comment period during which the public may submit written facts, scientific data, expert opinions, and other comments related to the proposed rule. After the public comment period has expired, the agency will review the entire administrative record and, if it concludes that the proposed regulation will accomplish the identified goals or solve the identified problems, will publish and implement a final rule.

In some limited circumstances, however, a federal agency may skip the publication of a proposed rule and instead issue an interim final rule that will become effective immediately upon publication. In such cases, the agency will generally allow a period for public comment after the interim rule takes effect and will modify the rule as it deems necessary after reviewing and considering such comments.

In this case, Secretary Vilsack has indicated that GIPSA intends to proceed with an interim rule regarding the scope of the Packers & Stockyards Act (i.e., whether the Act is limited to actions that cause competitive harm) and with two proposed rules regarding its other proposed regulations. Each of these draft rules has been submitted to the White House for final review and will eventually be published in the *Federal Register*. Once published, you (and other members of the public) will have a defined period (usually 60 days) to submit comments. Such comments were integral in forcing GIPSA to abandon these proposed rules in 2011 and will again be critical in reigning in GIPSA's renewed efforts to expand the scope of its regulatory power once again. You can make sure your voice is heard on this issue by watching for updates from agricultural trade groups and submitting comments once the rules are published by GIPSA in the *Federal Register*.

BUILT-IN-GAINS TAX DISCOUNT IN FARM ENTITY VALUATION

by David C. Kim



Historically, valuing the owner's equity in farm business entities has involved various discounts. To name a few, lack of control discount, lack of marketability discount, and built-in-gains tax discount are the common examples. For minority equity interests, such as corporate shares, partnership interests, or limited liability company interests, in closely held family farm business entities, the valuation discounts based on their lack of control or lack of marketability of those interests have been generally allowed by the United States Internal Review Service ("IRS"). However, the IRS has always taken a more stringent position in allowing a discount based on the contingent tax liabilities arising from the unrealized (so built-in) capital gains inside of the assets owned by those entities (commonly called the "Built-In-Gains Tax" or "BIGT") in general. Moreover, the IRS has allowed the discount based on the BIGT discriminatorily among various different business entity forms, such as C corporations, S corporations, and partnerships. This article is to discuss various aspects of the BIGT discounts in business valuation of closely held farm entities.

I. What is BIGT and BIGT Discount?

The following hypothetical scenario explains the BIGT and any potential decrease in fair market value based on the BIGT.

We will assume:

a. As a long-term investment, David has owned one hundred percent (100%) outstanding shares of David's Farm, Inc., which is a C corporation. David's stock basis is $200,000. David's Farm, Inc. has no accumulated earnings and profits.

b. 100 tillable acres are the only assets of David's Farm, Inc., which have been owned by it several years and rented out to farmers on cash lease arrangements.

c. The cost basis of the 100 acres owned by David's Farm, Inc. is $200,000.

d. David wants to sell and Susan wants to purchase the 100 acres from David's Farm, Inc. at $1,000,000, which is deemed as fair market value of the 100 acres.

e. In theory, the transaction between David and Susan may take either of the following models:

(i) Asset Sale Model: David may cause David's Farm, Inc. to sell the 100 acres to Susan. Susan will pay $1 million to David's Farm, Inc., which then will pay capital gains tax, and distribute the remaining balance to David in the form of a corporate distribution in association with its complete liquidation in the same tax year. David will pay individual income tax on the corporate final distribution. Upon acquisition, Susan will own the 100 acres outright with its cost basis of $1 million. One year after the acquisition, Susan sells the 100 acres at $1 million to Joe.

(ii) Stock Sale Model: Alternatively, and preferably, David may attempt to sell all of his capital stock issued by David's Farm, Inc. to Susan at $1 million. Upon closing, Susan will pay to David $1 million in exchange for the stock in David's Farm, Inc. and David will pay capital gains tax on the disposition of the stock. Upon acquisition, Susan will own one hundred percent of all outstanding capital stock in David's Farm, Inc., which then changes its name to Susan's Farm, Inc. One year after the acquisition, Joe purchases the 100 acres from Susan's Farm, Inc. at $1 million. After the sale, Susan liquidates Susan's Farm, Inc. which makes its final corporate distribution to Susan, all in the same tax year.

Without considering tax consequences, both transaction models may result in similar legal outcome, which is that Susan bought the 100 acres at $1 million and sold it at $1 million. However, the above two models will result in substantially different after-tax outcome to both David and Susan illustrated as follows:

Asset Sale Model.

A. After Tax Consequences to David.

C Corporation Taxation		Amount
	Cost basis of 100 acres	$200,000
	Sale price	$1,000,000
	Realized taxable gain	$800,000
	Capital gains tax (at 35%)	$280,000
	After tax distribution to David	$520,000
David's Individual Taxation		
	Adjusted tax basis of stock	$200,000
	Corporate distribution above stock basis	$320,000
	Long term capital gains tax (at 20%)	$64,000
	After tax proceeds to David	$456,000
Total Amount of Tax		$344,000

B. After Tax Consequences to Susan.

Susan's Individual Taxation		
	Cost basis of 100 acres	$1,000,000
	Sale price	$1,000,000
	Realized taxable gain	$0
	Capital gains tax (at 35%)	$0
	After tax proceeds to Susan	$1,000,000
Total Amount of Tax		$0

Stock Sale Model.

A. After Tax Consequences to David.

David's Individual Taxation		
	Cost basis of stock in David's Farm, Inc.	$200,000
	Sale price	$1,000,000
	Realized taxable gain	$800,000
	Capital gains tax (at 20%)	$160,000
	After tax proceeds to David	$640,000
Total Amount of Tax		$160,000

B. After Tax Consequences to Susan.

C Corporation Taxation		Amount
	Cost basis of 100 acres	$200,000
	Sale price	$1,000,000
	Realized taxable gain	$800,000
	Capital gains tax (at 35%)	$280,000
	After tax distribution to Susan	$520,000
Susan's Individual Taxation		
	Adjusted tax basis of stock	$1,000,000
	Corporate distribution above stock basis (= shareholder's capital gain/loss on stock)	($320,000)
	Long term capital gains tax (at 20%)	$0
	After tax proceeds to Susan	$520,000
Total Amount of Tax		$280,000

Obviously, David will be better off by closing the deal with Susan under the Stock Sale Model. David's after-tax net proceeds under the Asset Sale Model is $456,000, whereas his after-tax net proceeds under the Stock Sale Model is $640,000. By taking the Stock Sale Model, David may save tax in the amount of $184,000 overall. To the contrary, the Stock Sale Model will result in a $280,000 tax liability to Susan under the Stock Sale Model, which she could completely avoid in the Asset Sale Model. Therefore, assuming availability of alternative other tracts of land in the market, Susan will either (i) require David to agree to the Asset Sale Model or (ii) to require David to reduce the sale price of the stock under the Stock Sale Model by $280,000. That amount of $280,000 is the BIGT which represents the unrealized corporate capital gains tax arising from the asset value appreciation of the 100 acres, built in David's Farm, Inc. As a matter of economic reality, Susan, a willing buyer in the market, will not purchase David's stock in David's Farm, Inc. without discount due to such a contingent tax liability. So, we call this discount that a hypothetical willing buyer of a C corporate stock will demand to reasonably compensate the BIGT, the "BIGT Discount."

II. When does BIGT Discount Matter?

The BIGT Discount discussion occurs under the context of (i) buying and selling appreciated assets or businesses (as illustrated above) or (ii) determining the size of any gifting or estate of a decedent involving appreciated assets or businesses. Understandably, we do not see many case laws determined by the courts in the first context, because it is the buyers and sellers who would negotiate and reach an agreement on the depth of the BIGT Discount in any given deal structured under the Stock Deal Model. By contrast, the availability and degree of allowable BIGT Discount under the context of valuing gifted assets and taxable estates for the purposes of determining gift and estate taxes appear in many battles between taxpayers and the IRS. However, the logic and calculation mechanisms applicable to BIGT Discount discussed in those gift tax and estate tax cases provide relevant insights and guidelines to the buyers and sellers of appreciated assets and businesses with similar importance.

III. Business Entity Types and BIGT Discount

a. C Corporations.

Whether or how much of the BIGT Discount is allowed also depends on the categorical distinction of the entity types of those businesses owning appreciated assets. It took a while, but, as of today, the economic realism of and justification for the BIGT Discount surrounding C corporations, as illustrated above, is well established among the IRS, the Tax Court, and many other U.S. Federal courts. In other words, as the Tax Court recognized in *Estate of Litchfield v. Commissioner of Internal Revenue,* the BIGT Discount is generally allowed in valuating closely held C corporation stocks to the extent a willing buyer of the stock in a hypothetical sale would negotiate discounts in the purchase price of the stock to estimate the corporate capital gain tax liabilities due on appreciated gains when the stock is sold. The primary rationale to justify the BIGT Discounts for C corporation stocks is based on the following two factors:

First of all, a C corporation, as a taxpayer, separate and distinct from its shareholders, will recognize taxable capital gain when it sells appreciated assets. This does not change even if it is a distribution of appreciated assets to its shareholders. As the United States Second Circuit Court of Appeals recognized in *Eisenberg,* in the case of a non-liquidating distribution of appreciated assets (meaning: the fair market value of the distributed assets exceed their adjusted basis in the hands of the distributing corporation) by a C corporation to its shareholders, taxable gain will be recognized to the distributing corporation as if such assets were sold to the shareholders at its fair market value. Accordingly, there is no avenue for a C corporation to make a tax-free distribution to its shareholders and have them sell the appreciated assets in avoidance of the corporate level taxation.

Secondly, the courts, including the United States Tax Court, and the IRS generally recognize that a willing buyer in a hypothetical sale will not disregard the contingent tax liabilities built-in the C corporation stock value. Rather, the knowledgeable buyer will negotiate discounts in the purchase price to reflect the present value of the cost of paying off the contingent tax liability in the future.

b. S Corporations.

S corporations are not subject to federal income taxes at their entity level. Instead, S corporations pass through items of income, loss, deduction, and credit to their shareholders to be included in their individual tax returns. However, for those S corporations converted from their previous C corporation status, a special rule applies under Section 1374 of the Internal Revenue Code. Thus, during the "recognition period," a tax is imposed to the S corporation if it has a net recognized built-in gain, which is taxed at the highest corporate tax rate in effect, which is currently 35%. The recognition period for this special BIGT for converted S corporations used to be ten (10) years after its conversion from a C corporation to an S corporation. However, on December 18, 2015, Congress passed the Protecting Americans From Tax Hikes (PATH) Act of 2015, as part of the Consolidated Appropriations Act, 2016, P.L. 114-113, part of which permanently limited the recognition period for the imposition of the BIGT to five (5) years. Therefore, in theory, the BIGT Discount should be available to S corporation stock to the extent of the potential BIGT during the recognition period. However, the rationale supporting the BIGT Discount disappears after the recognition period is over. As an example, the following table shows no BIGT consequence to Susan, the hypothetical buyer, even if she closes the transaction under the Stock Sale Model if David's Farm, Inc. has been an S corporation more than five (5) years at the time of the transaction:

"The knowledgeable buyer will negotiate discounts in the purchase price to reflect the present value of the cost of paying off the contingent tax liability in the future."

S Corporation Taxation		Amount
	Cost basis of 100 acres	$200,000
	Sale price	$1,000,000
	Realized taxable gain	$800,000
	Capital gains tax (at 0%)	$0
	After tax distribution to Susan	$1,000,000
Susan's Individual Taxation		
	Adjusted tax basis of stock (= Original stock basis of $1,000,000 plus S corporation undistributed gain)	$1,800,000
	Corporate distribution above stock basis (= shareholder's capital gain/loss on stock)	($800,000)
	Net shareholder gain (=S corporation gain of $800,000 less loss on shareholder stock of $800,000)	$0
	Long term capital gains tax (at 20%)	$0
	After tax proceeds to Susan	$1,000,000
Total Amount of Tax		$0

One noteworthy issue is that this model is based on the assumption that the S corporation's sale of its appreciated assets (i.e.., the 100 acres) and distribution to its shareholder is made in one single tax year (as compared to multiple years) as part of the final liquidation of the S corporation, and the negative $800,000 capital loss is recognized in conjunction with the liquidation, offsetting the realized taxable gain at the corporate level. However, if the corporate sale of the appreciated assets occurs in one tax year and the liquidation and liquidating distribution occurs in another tax year, the shareholders of an S corporation may realize taxable income without matching capital loss on the S corporation stock in the same taxable year. To the extent of such possibility and the likelihood of such mismatch, a willing buyer may negotiate discount of the S corporation stock price.

c. Partnerships.

Partnerships face similar but not exact tax rules applicable to S corporations. In a nutshell, although partnerships don't pay tax and the capital gains realized at the partnership level can result in increased basis of the partnership interests, the benefits of such increased basis may be realized only later when the partnership interest is liquidated. This is somewhat similar to a situation where an S corporation may sell assets and liquidate in multiple tax years. However, for partnerships, Section 754 of the Internal Revenue Code allows an election by a partnership to "step-up" the inside basis of the appreciated partnership property to match the outside basis of the partnership interest sold to a new buyer. Assuming the unqualified or unrestricted ability for the buyer to make the Section 754 election at the partnership level after the buyer acquires partnership interests in the partnership, no BIGT Discount may be justifiable. This is how

the Tax Court concluded in *Estate of Jones v. Commissioner of Internal Revenue,* 116 T.C. 121 (2001). *Jones* involved valuation of limited partnership units in two family limited partnerships. The taxpayers argued that a hypothetical buyer of the limited partnerships would demand discount in the price of the partnership interests based on the possibility of the general partner's non-cooperation in making the Section 754 election. The Tax Court did not buy this argument. Instead, the Tax Court concluded that "there is no reason why a section 754 election would not be made." It based its decision on the grounds of the partnership's relatively few asset holdings, the effective control that the buyer may have in the negotiation with the sellers to obtain a right to make the 754 election, and the absence of any material or adverse impact on the preexisting partners. Based on the likely 754 election, the Tax Court denied the BIGT Discount in *Jones*.

IV. Extent of BIGT Discount.

Although the tax practitioners, IRS, Tax Court, and other courts in general agree that the BIGT Discount may be considered in valuating C corporation stock, there is no assurance that those entities would agree to any particular formula, logic, or extent of the BIGT Discount globally, with the exception of those states under the jurisdiction of the U.S. Courts of Appeals for the Fifth Circuit and Eleventh Circuit. Both Fifth Circuit and Eleventh Circuit have adopted a rule under which the BIGT Discount may be allowed dollar-for-dollar of the BIGT as a matter of law. However, the Tax Court and other Courts of Appeals have not followed the 100% discount approach. In *Richmond*, the Tax Court explained why it disagrees with the 100% discount approach adopted by the Fifth Circuit and Eleventh Circuit by comparing the difference between (i) a "contingent" liability of which accrual and payment due date is uncertain to a willing buyer in a hypothetical sale of the appreciated assets inside a C corporation and (ii) an "unconditional" liability (i.e., note payable owed to a bank) of which accrual and payment due date is fixed and certain that a willing buyer will demand 100% discount to the purchase price of the assets subject to the same. Over time, the Tax Court has indicated the following factors to be considered in the BIGT Discount:

a. The BIGT Discount may be deemed reasonable to the extent of the present value of the cost of paying off the BIGT in the future.

b. Calculation of the BIGT Discount should be based on a “hypothetical” (and not actual) willing buyer and willing seller, each of whom is a rational economic actor seeking to maximize his or her own advantage in the context of the market that exists as the valuation date.

c. The actual seller (i.e., the C corporation at issue) and its business purposes, asset investment, holding and liquidation plans, and historical asset turnover rate may be considered so long as those are in alliance with a “hypothetical” willing buyer in the market. However, the actual seller’s unique investment or holding pattern or philosophy may be ignored and substituted by a typical or more standard owner’s pattern or philosophy if the actual seller’s situation is special or unique to the seller or its shareholders.

d. The valuation of the appreciated assets held inside of a C corporation may be made reflecting the BIGT Discount by applying “commonsense” assessment of all the relevant facts and circumstances as follows:

   (i) projecting the date of sale for the appreciated C corporation assets based on estimated asset turnover rate that may be adopted by a hypothetical reasonable investor;

   (ii) projecting the sale price of the assets at the time of such sale, including any appreciation in value occurring after the willing buyer’s purchase of the C corporation stock;

   (iii) projecting the BIGT at the time of such sale; and

   (iv) discounting the future sale price less the BIGT to present value.

David C. Kim
507-354-3111
dkim@gislason.com

Based on his prior experiences as an investment banker, David brings a unique balance between the law and business into his practice, which centers heavily around representing businesses and entrepreneurs in a wide range of areas including manufacturing, engineering, bio-science, financial and agricultural industries. Through his financial and legal career for over twenty years, David has accumulated expertise in corporate and commercial matters and regularly advises clients on $200-million to $500-million transactions each year. David often leads complex transactions across the U.S., as well as in growing markets overseas such as Central and South America and Asia.

Federal Issues Update

by Brian Foster

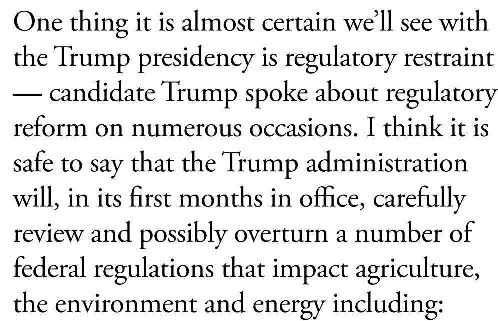
A SEA CHANGE IN WASHINGTON, DC

The big news in American politics is, of course, the general election results that saw Republican presidential candidate Donald Trump win a decisive victory, with the U.S. Senate and House staying in Republican hands. In addition, Republicans widened their control of governorships and state legislatures across the country.

It appears now, with the Trump victory and given his strident anti-trade campaign rhetoric, that the comprehensive Trans-Pacific Partnership (TPP) trade agreement is dead in its current form. It's anyone's guess what the new Trump administration will propose for trade policy once in power in 2017, but suffice it to say current and proposed trade agreements will be under close examination.

President-elect Trump made many campaign statements about immigration policy, securing the border with Mexico and the deportation of illegal immigrants. What will actually happen with respect to immigration policy when President Trump and his team get into office in January is hard to predict. The Mexican economy is already being impacted by uncertainty around Trump's future policy direction—the Mexican peso was devalued the week after the U.S. general election, making U.S. goods being sold in Mexico more expensive for those consumers.

Trump also campaigned on cutting taxes and increasing federal spending, which in the short term will increase federal budget deficits, contribute to inflation, and likely lead to upward pressure on interest rates. U.S. federal fiscal policy (taxes and spending) is ultimately in the hands of the Congress, so we expect intense negotiations in the coming years as Congress addresses tax reforms and spending levels.



One thing it is almost certain we'll see with the Trump presidency is regulatory restraint — candidate Trump spoke about regulatory reform on numerous occasions. I think it is safe to say that the Trump administration will, in its first months in office, carefully review and possibly overturn a number of federal regulations that impact agriculture, the environment and energy including:

- Waters of the United States (WOTUS) that redefines the EPA's jurisdiction under the Clean Water Act;
- Clean Power Plan, a key part of the Obama climate policy that mandates carbon emissions cuts from power plants, disproportionately impacting coal-fired plants;
- Fracking rules issued by the Interior Department that make hydraulic fracturing more difficult and costly;
- Several parts of the Dodd-Frank banking regulations, particularly the "Volcker Rule" which bans banks from engaging in their own in-house trading for profit;
- The Labor Department's overtime rule (that comes into effect December 1) that mandates time-and-a-half pay for more than four million workers when they work more than 40 hours per week; and
- FDA's menu labeling rule which requires restaurants and grocery stores to include caloric counts for the foods they sell.

U.S. CONGRESS – MINIMAL LEGISLATION, LOTS OF POLITICS, A LAME DUCK

The U.S. Congress finished up its limited fall session in late September, approving the one piece of "must-pass" legislation, a comprehensive government financing bill including a number of individual appropriations, or spending, bills all rolled into one large bill called a continuing resolution (CR). This CR funds the federal government at current spending levels through December 9, 2016.

The Congress must now pass a longer term spending bill in its current "lame duck" session; a new CR is expected to continue federal spending at current levels through March 2017. Other than that one bill, however, Congress is not expected to do much of anything else after Thanksgiving given the election results. Members of Congress, like many Americans, will be focused on details coming from the Trump transition team, including the naming of potential cabinet-level members and a Supreme Court justice nominee to replace Justice Scalia.

Earlier in the summer, a compromise GMO labeling bill was passed and signed into law that sets a time-table for a "path" to nationwide, mandatory GMO disclosure in foods, pre-empting a patchwork of state labeling laws, including Vermont's which took effect July 1. Meat and dairy products, as well as foods that contain mostly meat, from animals that are fed GMO feed, are exempt from the labeling requirement.

What lies ahead now that the GMO labeling bill has been signed into law is a long path of development of regulations to implement the law. The rule-making process will include numerous opportunities for supporters and detractors of GMO disclosure labels to submit comments and attempt to influence the direction of the rule-making process. I would expect at least a year, or even two, before we see regulations nearing a final version.

Recently, livestock producers scored two important court victories over animal activists: the U.S. District Court for the District of Columbia dismissed a lawsuit brought by the Humane Society of the United States (HSUS) and other activist groups against the Environmental Protection Agency (EPA), alleging the agency would not regulate confined animal feeding operations (CAFOs) under the Clean Air Act. The groups requested in 2009 that the EPA begin rulemaking to regulate air emissions from CAFOs.

And, a federal appeals court ruled in favor of the National Pork Producers Council (NPPC) and the American Farm Bureau Federation in a challenge to EPA's release in 2013 of extensive private and personal information on thousands of farmers to environmental groups.

LOOKING AHEAD – A NEW PRESIDENT, A NEW CONGRESS, SOME FAMILIAR ISSUES

There was little discussion about agriculture and food policy during the heated presidential campaign, and so far, there is little coming out of the Trump transition team about a potential nominee to replace Tom Vilsack as Secretary of Agriculture; expect to hear about key USDA appointments and other signals about Trump administration agriculture policy soon after Thanksgiving.

Given the sharp and prolonged downturn in farm-level commodity prices, federal legislators have indicated they will begin hearings early next year on a new Farm Bill; there has already been discussion among House and Senate agricultural committee leaders of moving up passage of a Farm Bill earlier than 2018.

In the last Congress, both the House and Senate drafted legislation aimed at comprehensive tax reform, but leadership changes at the tax-writing House Ways and Means and Senate Finance committees resulted in little action on tax reform by this Congress. Reports from the House, especially, indicate a strong desire and significant momentum for taking on reform of the federal tax code in 2017, but the specific direction of federal tax reform will depend largely on what intentions the Trump administration communicates to Congress.

Comprehensive immigration reform also stalled in the current Congress, impacted by the heated rhetoric of the presidential campaign; any new initiatives on immigration and other federal workforce issues will have to wait until President Trump and a new Congress are in office. One thing is for sure, the next four years will be interesting.

Brian Foster is the founder and principal of Insight Enterprise Consulting, LLC, a government affairs and international agribusiness development consulting firm.

He is an agribusiness and agricultural policy consultant with international work experience in Eastern Europe, Latin America, Africa and Asia. He managed Pioneer Hi-Bred International's seed businesses in Bulgaria and Ukraine, and now provides consulting services in agricultural production and farm management, marketing, and business strategy and planning to clients around the world.

In the U.S., Foster provides business development and agricultural policy advice to clients in the livestock and meat industries. He has served as Director of Business Development and Marketing for Christensen Farms in Sleepy Eye, Minnesota, and was Legislative Assistant on agricultural issues for former U.S. Congressman Tim Penny of Minnesota.

His education includes a master's degree in Agronomy from Iowa State University and an MBA from Purdue. Foster served as a U.S. Peace Corps volunteer in Costa Rica, providing technical assistance services to dairy farmers – he speaks fluent Spanish.

RECENT CASES OF INTEREST

Iowa Court Of Appeals Rules In Favor Of Partitioning The Family Farm

Wihlm v. Campbell, No. 15-0011 (Iowa Ct. App. Sept. 14, 2016).

THE PARTIES: The parties to this appellate case are three siblings who inherited farmland in north-central Iowa from their father.

THE FACTS: This case arose due to a dispute among three siblings as to how several parcels of real estate were to be distributed following the death of their father. The three siblings inherited approximately 300 acres upon their father's death as tenants in common. The land at issue was divided into several parcels in two counties in Iowa, including a 60-acre parcel, a 160-acre parcel, and two 40-acre parcels.

Two of the siblings, Wihlm and Balek, sought to partition the parcels by sale and divide the proceeds. The third sibling, Shirley, requested an in-kind partition, at least with respect to her share. If Wihlm and Balek had prevailed with their request, all of the inherited land would

Rick Halbur
507-354-3111
rhalbur@gislason.com

Seth Harrington
507-354-3111
sharrington@gislason.com

Chris Bowler
507-354-3111
cbowler@gislason.com

have been sold and the proceeds would have been divided among the three siblings. Shirley requested an in-kind partition, which if granted would have awarded approximately 79 acres to Shirley. Shirley elected to pursue the in-kind partition as to the 79 acres, at least in part, because this parcel included a multi-generational homestead.

The district court ordered that all of the parcels be sold and that the proceeds be divided equally among the three siblings. Shirley appealed to the Iowa Court of Appeals.

THE DISPUTE: The primary dispute between the parties was whether the various real estate parcels inherited from the parties' father should be divided by sale with the proceeds distributed equally among the siblings, or whether at least part of the inherited land should be divided in-kind, which would allow for one sibling to retain a parcel that included a multi-generational homestead.

LEGAL ISSUES: The primary issue on appeal was whether a partition in-kind was "equitable and practicable" in this case. The Iowa Court of Appeals acknowledged that as a general rule, the common law and many statutes favor partitions in-kind, but this is no longer the rule in Iowa. As the law currently stands, partitions by sale are now favored in Iowa. In Iowa, the law places the burden on the objecting party to show that an in-kind partition is both "equitable and practicable."

CONCLUSIONS: The Iowa Court of Appeals disagreed with the district court and remanded the case to the district court so that the 79-acre parcel with the multi-generational homestead could be partitioned in-kind for Shirley and the remaining parcels could be partitioned by sale with the proceeds to be divided among Wihlm and Balek.

The Iowa Court of Appeals rejected the district court's determination that a partition by sale was needed because the true market value of the parcels could not be ascertained, finding that real estate appraisals are mere "speculation" and "guesswork." The district court arrived at this conclusion in large part because two of the three expert witnesses had opined that appraising farmland was so speculative that a partition by sale would be more appropriate than a partition in-kind. The remaining expert witness, who unlike the first two experts was a certified real estate appraiser, opined that an in-kind division would be fair and equitable in this case.

The Iowa Court of Appeals determined that Shirley's requested in-kind partition was equitable because it would not materially affect the sale of the remaining parcels, and an in-kind partition with respect to the 79-acre parcel with the multi-generational homestead was favored due to the "sentimental attachment" that she may have to this parcel. Furthermore, the partition in-kind was practicable because the 79-acre parcel was easily identifiable and largely contiguous with no topographical issues that would make the division impracticable.

Legal Challenges to Dakota Access Pipeline Continue
Richard R. Lamb, et al v. Iowa Utilities Board, No CVCV051997 (Polk County IA Dis. Ct. Aug. 29, 2016).

THE PARTIES: The main parties to this dispute include over one dozen Iowa agricultural landowners, the Iowa Utilities Board, a three-member public utilities commission which regulates and supervises all pipelines in Iowa, and Dakota Access, LLC, a subsidiary of a large natural gas and propane company which is constructing an oil pipeline running from the Bakken oil fields in North Dakota to Illinois.

THE FACTS: On March 10, 2016, the Board issued its Final Decision and Order, which granted a permit to Dakota Access to construct a hazardous liquid pipeline. Dakota Access sought the permit to build a 1,168-mile pipeline to transport crude oil from the Bakken oil production area in North Dakota to a refining station in Patoka, Illinois. Approximately 346 miles of the proposed pipeline are set to be built in Iowa. The Order gave Dakota Access eminent domain authority over real estate parcels in the proposed pipeline's path in the event that Dakota Access was unable to negotiate voluntary easements from property owners.

On May 27, 2016, the landowners filed a petition for judicial review, and the Court scheduled a final hearing for December 15, 2016.

Dakota Access began constructing the pipeline in Iowa in June 2016. A significant amount of work has already been completed on that portion of the pipeline that will be constructed in Iowa. By August 2016, Dakota Access had nearly reached some of the landowners' respective properties, which set off a flurry of legal activity.

Initially, the landowners made an emergency motion to the Polk County District Court to "stay" the Utility Board's Order, to temporarily block Dakota Access from constructing the pipeline on the landowners' respective properties until the Court could make a final decision after the December hearing. The Court denied the motion and stated that the landowners were first required to ask the Utilities Board to stay enforcement of its own Order before asking the Court to block enforcement of said Order.

The landowners immediately filed an emergency motion with the Board to temporarily block construction, and the Board denied the motion. The landowners subsequently filed a second emergency motion with the Court to again seek a stay on the Order to prevent Dakota Access from constructing the proposed pipeline on the landowners' respective properties.

THE DISPUTE: The landowners wished to prevent Dakota Access from constructing the proposed pipeline on the landowners' respective properties until the final hearing date.

LEGAL ISSUES: The Court was asked to review the Utilities Board's denial of the requested stay based on four factors established by Iowa law, namely: (1) the extent to which the applicant is likely to prevail when the court finally disposes of

the matter; (2) the extent to which the applicant will suffer irreparable injury if relief is not granted; (3) the extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings; and (4) the extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

CONCLUSIONS: The Court determined that all four of the above-cited factors weighed against granting a stay in this case. Accordingly, the landowners' second emergency motion to the Court for a stay on the Order was denied.

This case is still ongoing and controversial. While the landowners were unsuccessful in obtaining a stay to prevent the imminent construction of the proposed pipeline on the their properties, the landowners have submitted filings in support of judicial review. More updates on this case will follow in the future.

Retail facilities still enjoy broad OSHA exemptions for the sale and storage of hazardous chemicals . . . for now. *Agricultural Retailers Association v. United States Dept. of Labor*, 837 F.3d 60 (D.C. Cir. 2016).

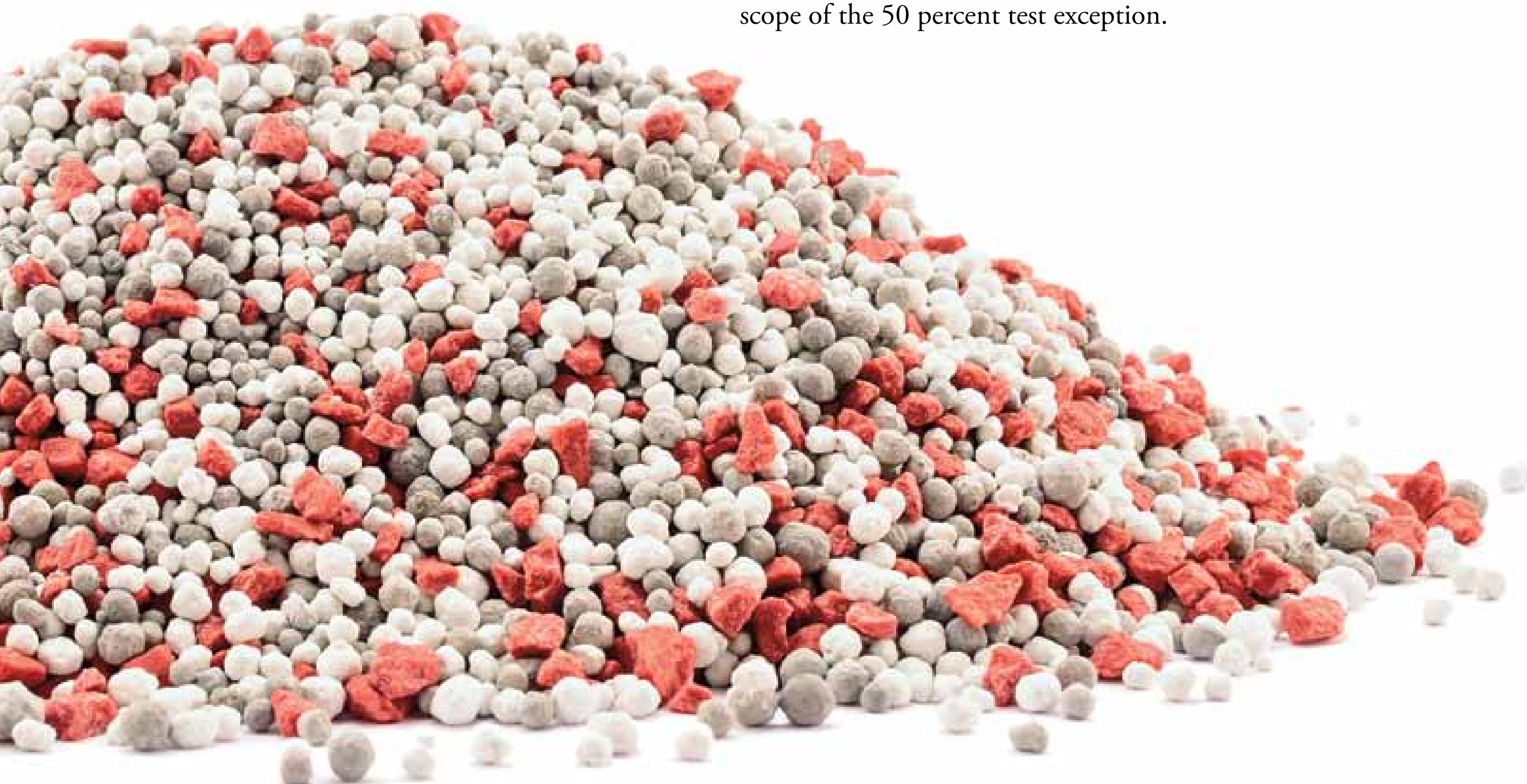
THE PARTIES: The Petitioners in this case were the Agricultural Retailers Association, a national trade group representing feed, seed, nutrient and equipment retailers, and The Fertilizer Institute, a trade group representing fertilizer manufacturers, transporters and retailers. The Respondent was the Occupational Safety and Health Administration ("OSHA"), a federal agency responsible for regulating workplace safety.

THE FACTS: In April 2013, a chemical explosion at a fertilizer storage and distribution facility in West, Texas, led to the deaths of 15 people and injured many others. Although the fertilizer company stored large quantities of anhydrous ammonia and ammonium nitrate for sale in bulk to farmers, it was exempt from OSHA's Process Safety Management Standard (PSMS) because the company generated more than half of its income from direct sales to end users (an exception known as the "50 percent test"). The PSMS protects those who work with or near highly hazardous chemicals.

After the Texas explosion, President Obama issued an executive order that directed the Secretary of Labor to review the PSMS. In response, OSHA rescinded all prior policy and interpretation related to the 50 percent test. OSHA limited the exception to retail facilities that sell small quantities of hazardous chemicals to end users. This revised exception meant that chemical companies that sell in bulk to end users were no longer exempt.

THE DISPUTE: The Agricultural Retailers Association argued that OSHA improperly modified the 50 percent test by not following notice-and-comment rulemaking. Normally, if a federal agency wants to pass a new rule, it must go through a formal procedure that includes giving the public the opportunity to submit comments on the new rule. OSHA responded by arguing it was only interpreting an existing standard, which did not require notice-and-comment rulemaking.

LEGAL ISSUE: OSHA's position created two legal issues. First, the court needed to determine whether it had jurisdiction over the Petitioners' challenge, because a mere interpretation of a standard is not subject to direct review by the U.S. Court of Appeals. Second, if the court had jurisdiction, the court needed to decide whether OSHA followed proper procedure when limiting the scope of the 50 percent test exception.



CONCLUSIONS: The court held in favor of the Petitioners. The court first defined "standard." In doing so, the court focused on whether OSHA's new definition was a remedial measure addressing known hazards, or an administrative effort designed to uncover potential hazards. The former implicated a modification of the standard subject to notice-and-comment rulemaking. Because OSHA was responding to a known risk (chemical plant accidents), the purpose and effect of the new definition was to modify an existing standard. This made OSHA's actions subject to notice-and-comment rulemaking.

Although the court vacated OSHA's new definition, the court noted it was not ruling on the substance of OSHA's modified standard, but merely the procedure. Therefore, the substantive validity of OSHA's new definition remains undetermined. This means OSHA may still be able to enact the rule, if it follows the full notice-and-comment procedure.

Federal courts are still giving the USDA broad discretion when making wetlands determinations. *Foster v. Vilsack,* 820 F.3d 330 (8th Cir. 2016), *petition for cert. filed,* 2016 WL 4254313 (U.S. Aug. 8, 2016) (No. 16-186).

THE PARTIES: Arlen and Cindy Foster are South Dakota farmers who had a portion of their farmland deemed a wetland by the United States Department of Agriculture ("USDA").

THE FACTS: In 1985, Congress passed the Food Security Act, which contains "swampbuster provisions" authorizing the USDA to determine whether certain lands qualify as wetlands. The goal of the provisions was to combat the disappearance of wetlands, in particular when such wetlands are converted into cropland. If the USDA finds wetlands have been manipulated into cropland, the farmer may become ineligible for federal farm program payments.

In 2002, Arlen Foster sought a wetlands determination from the National Resource Conservation Service (NRCS), a division of the USDA. In 2011, a less-than-one acre "prairie pothole" on the Fosters' land was deemed a wetland. The Fosters appealed to the USDA National Appeals Division (NAD). The NAD agreed with the NRCS's wetland determination.

Next, the Fosters filed a complaint against the USDA in federal district court. The district court held that in order to overturn the USDA's decision, the Fosters would have to prove that the decision was "arbitrary, capricious or contrary to law." The court found that the USDA's factual findings were supported by the record, and granted the USDA summary judgment. The Fosters then appealed to the Eighth Circuit, which agreed with the lower court.

THE DISPUTE: The Fosters have appealed to the U.S. Supreme Court, arguing that the Eighth Circuit used the wrong standard in evaluating whether the USDA properly interpreted its own rules in their determination that the farmland contained wetlands.

LEGAL ISSUES: There are two key issues on appeal. First, the Fosters are asking the Supreme Court to determine what level of deference federal courts should give the USDA in interpreting their field manuals. The Eighth Circuit held that courts should give broad deference to an agency's interpretation of its own regulations, according to the Supreme Court case *Auer v. Robbins.* The Fosters argue that *Auer* should not be extended to these sorts of internal agency interpretations. Second, the Fosters argue that the USDA's use of a predetermined comparison site located over 30 miles from the subject property without notice to the Fosters violated their rights to due process under the Fifth Amendment of the U.S. Constitution.

CONCLUSIONS: The Supreme Court has not yet decided whether it will hear this case, though the American Farm Bureau and other groups have filed *amicus* briefs. If the Supreme Court takes this case, their decision could have a significant impact on how much deference courts must give to government agencies in interpreting their own rules. If the Court holds in favor of the Fosters, it may open the door for more successful challenges to USDA and other agency determinations, especially regarding wetlands.

Eighth Circuit Rules In Favor Of Farmers' Right To Privacy. *American Farm Bureau Federation; National Pork Producers Council v. U.S. Environmental Protection Agency,* No. 15-1234, 2016 WL 4709117 (8th Cir. Sept. 9, 2016).

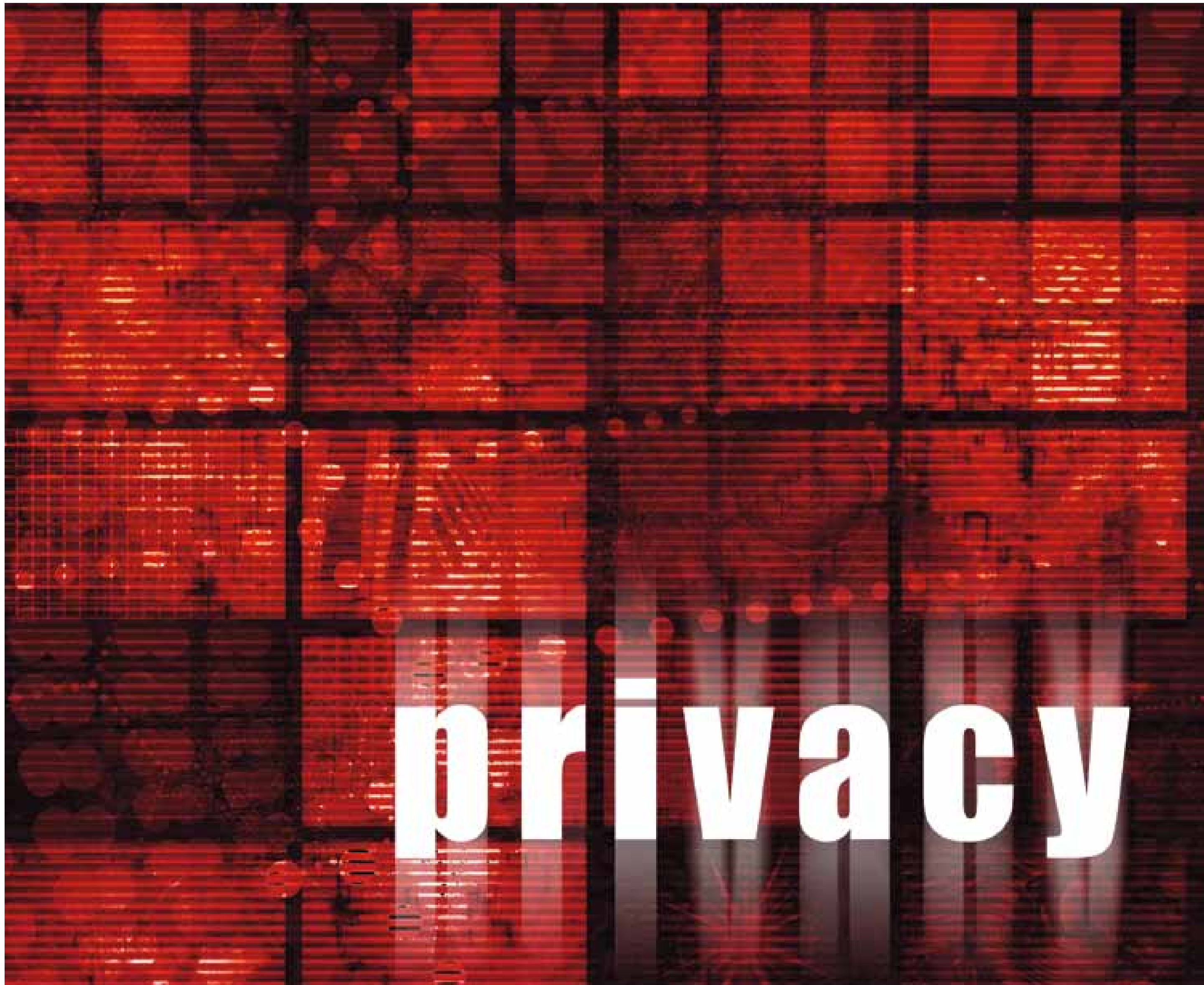
THE PARTIES: The American Farm Bureau Federation is a nonprofit general farm organization, and the National Pork Producers Council is an organization that conducts public policy outreach to support U.S. pork producers and other industry stakeholders. The Environmental Protection Agency is an agency of the U.S. federal government that writes and enforces environmental regulations based on laws passed by Congress.

THE FACTS: In 2008, the Environmental Protection Agency issued a proposed rule requiring all Confined Animal Feedlot Operations ("CAFOs") to submit certain information to it, including personal information of operators. Although this proposed rule was withdrawn after numerous objections, the Environmental Protection Agency continued attempts to collect information about livestock producers in 35 states. This information included names, telephone numbers, GPS coordinates of private homes, personal addresses, and financial and operational information about farmers such as total farm acres under production, names of employees, and details about production practices. When such information was obtained by the Environmental Protection Agency, it became subject to the Freedom of Information Act ("FOIA"), which could allow citizens to compel its disclosure.

THE DISPUTE: On becoming aware of the actual and potential disclosure of private information of their farmer members, the American Farm Bureau Federation and the National Pork Producers Council initiated litigation to prevent such disclosure.

LEGAL ISSUE: The American Farm Bureau Federation and the National Pork Producers Council asserted that the government must not respond to a FOIA request if the information requested consists of, as specified by the Act, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Also at issue was whether the American Farm Bureau Federation and the National Pork Producers Council had legal standing to bring the lawsuit on behalf of their members.



CONCLUSIONS: After finding that they had the requisite standing, the Eighth Circuit Court of Appeals ruled in favor of the American Farm Bureau Federation and the National Pork Producers Council, concluding that the disclosure of information about CAFO owners does implicate substantial privacy interests and that the disclosure of farmers' information would constitute a substantial invasion of privacy. The Court also noted examples of trespass and bioterrorism that could result from use of the private information which the Environmental Protection Agency had collected.

This case represents an important victory for the American Farm Bureau Federation, the National Pork Producers Council, and all livestock producers.

“Farm Tenancy” May Exist On The Sole Basis Of A Single Horse. *Porter v. Harden,* 884 N.W.2d 225 (Table), 2016 WL 2748270 (Iowa Ct. App. 2016).

THE PARTIES: The Porters were individuals who owned land in Iowa. The Hardens were individuals who rented the Porters’ land.

THE FACTS: The Hardens had rented the Porters’ property for approximately 24 years under a tenancy at will. The property was smaller than 40 acres, and the Hardens had a 38-year-old horse that was grazed on the premises. The Hardens’ main use of the property was for residential purposes.

THE DISPUTE: The Porters decided to terminate the Hardens’ tenancy, so they sent the Hardens a 30-day notice of termination, then sent the Hardens a 3-day notice to quit, and then brought a forcible entry and detainer action (i.e., an eviction action). On its face, this process was sufficient to terminate a typical tenancy at will under Iowa law.

LEGAL ISSUE: The Hardens argued that the Porters were required to comply with special Iowa leasehold termination laws that applied to farm tenancies. Specifically, if an Iowa leasehold meets the definition of a farm tenancy, a notice to terminate the leasehold must be delivered on or before September 1 for termination March 1 of the following year—something that the Porters had not done.

An Iowa farm tenancy, in turn, includes a leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land. Thus, the case ultimately came down to whether the Hardens’ interest constituted a farm tenancy because of the single horse on the property.

CONCLUSIONS: The Iowa Court of Appeals held that the Hardens' interest constituted a farm tenancy, notwithstanding the apparent absurdity of that result. The Court's decision was based on a strict reading of the statutes in question, which had been amended in 2006 and 2013. In short, the Court did not allow common sense to overcome what it saw as clear statutory language.

This case illustrates the care with which certain types of leases should be approached. Although the facts of this situation are quite unique, less unique cases could arise that mandate strict adherence to particular statutory procedures.

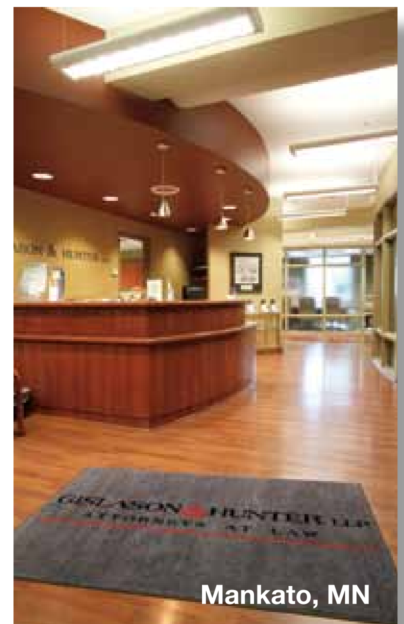
Gislason & Hunter
AGRICULTURE PRACTICE GROUP

Daniel A. Beckman	Minneapolis Office
Matthew C. Berger	New Ulm Office
Jeff C. Braegelmann	New Ulm Office
Dustan J. Cross	New Ulm Office, Des Moines Office
Michael S. Dove	New Ulm Office
Reed H. Glawe	New Ulm Office, Des Moines Office
David Hoelmer	Mankato Office
David C. Kim	New Ulm Office
Brittany R. King-Asamoa	Mankato Office
Gary W. Koch	New Ulm Office, Des Moines Office
Kaitlin M. Pals	New Ulm Office
Mark S. Ullery	New Ulm Office
Wade R. Wacholz	Minneapolis Office
Andrew A. Willaert Jr.	Mankato Office, Des Moines Office
C. Thomas Wilson	New Ulm Office
Sara N. Wilson	Minneapolis Office
Dean Zimmerli	New Ulm Office

Minneapolis, MN

New Ulm, MN

Des Moines, IA


Mankato, MN

Ag Practice Services

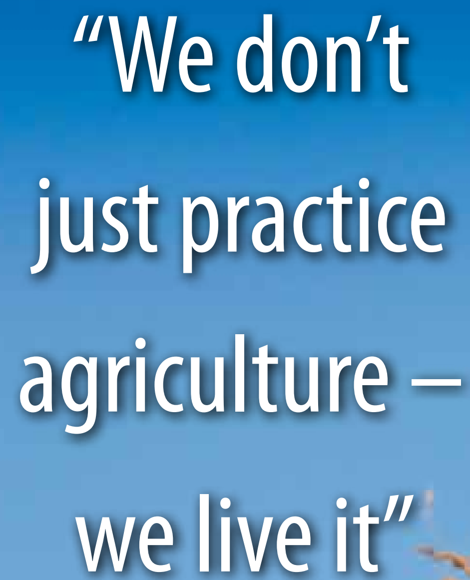
Gislason & Hunter is well-recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agricultural industry. Our attorneys represent and advise a broad spectrum of national, regional, and local agribusiness clients – including livestock producers, packers, input suppliers, agricultural lenders, and individual farmers – in all aspects of their operations. Our work in agricultural matters includes both transactional advice and litigation in the following areas:

- Bankruptcy
- Business Formation and Restructuring
- Commercial Transactions
- Employment Issues
- Environmental Regulations
- Estate and Succession Planning
- Financing and Debt Restructuring
- Foreclosure and Debt Collection
- Governmental Regulations and Program Payments
- Insurance Disputes
- Intellectual Property Rights
- Manufacturing and Distribution
- Marketing and Production Contracts
- Personal Injury Claims
- Zoning and Permitting Issues

REPRESENTATIVE MATTERS

- Negotiated and drafted long-term marketing agreements for large, multi-state swine producers
- Drafted both turn-by-turn and long-term independent grower agreements for swine producers
- Drafted credit agreements, forbearance agreements, and other loan documents for loans to agricultural producers
- Structured multi-state production and distribution systems
- Negotiated and drafted asset acquisition and disposition agreements of all sizes
- Provided advice and representation for banks, bank participations, and bank syndications related to agricultural loans
- Litigated commercial and corporate disputes in state and federal courts throughout the Midwest
- Represented agricultural producers and allied industries before local, state, and federal regulatory agencies

This publication is not intended to be responsive to any individual situation or concerns as the content of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.



GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com