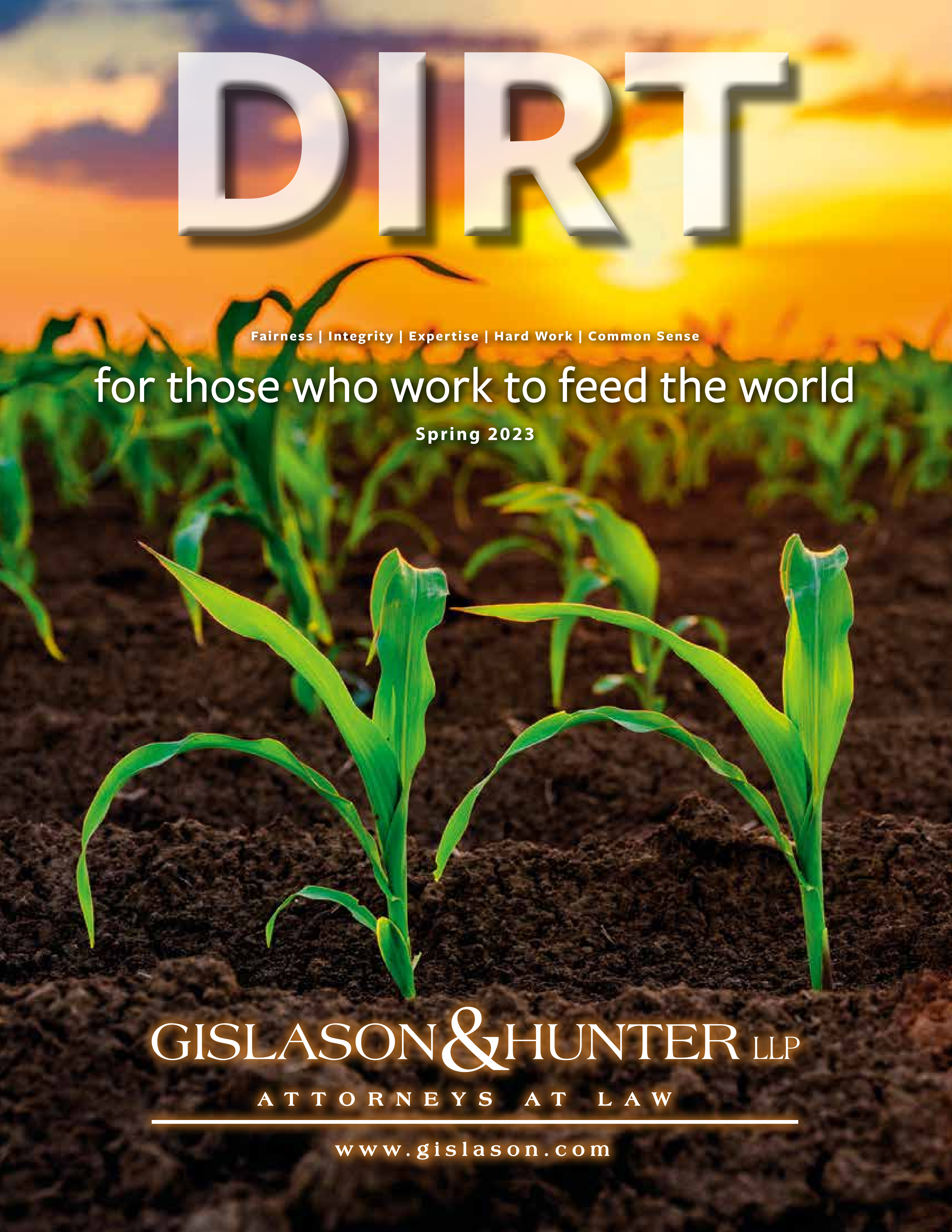

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SPRING 2023

What Do You Think of When You Think of Spring?

by Daniel J. Schwartz

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Welcome to our Spring 2023 edition of DIRT. For many of us Midwesterners, spring represents a turning point, new beginnings, a harbinger of better things to come. Longer and warmer days, spring-break vacations, green grass, graduations, and baseball are just a few of the things we think of when we think of spring.

For farmers spring can be a bit of a mixed bag. Sure, farmers are no less eager to put away their winter coats for the year than the rest of us, but for many farmers what happens in the spring will have a profound effect on their entire year. Sometimes, when the weather cooperates and farmers are able to plant their crops on time, there is much occasion for optimism. Other times, though, it seems spring never arrives; and some springs it seems the rain never stops. Thus, for the many farmers whose economic prospects depend largely on what Mother Nature decides to dole out unevenly each spring, the season can evoke feelings of opportunity and promise on the one hand, and challenge and disappointment on the other.

For decades at Gislason & Hunter we have put a special emphasis on serving the legal needs of farmers and agricultural communities. We have been heartened by the joy and relief shown on a client's face after a successful planting season; but we have also seen firsthand the anxiety and stress borne by a client when facing poor weather, poor prices, or both. In times of prosperity and in times of distress, we consider it an honor and privilege to walk side-by-side with our clients as they experience the many phenomena that are truly unique to agriculture.

Ultimately, though, we are well aware that we are mere advisors to farmers and that our readers, most of whom are farmers or connected to farming, may enjoy a break every now and then from our lawyer-speak to learn from someone who has actually walked in their shoes. In this vein, we have included in this edition of DIRT the same vital and important agricultural-law updates that our readers have to come expect from us. We are also eager to share with you the perspective (and levity) of local farmer and writer, Randy Krzmarzick. We hope you enjoy Randy's musings about his 40-plus years of farming and his theory on why a farmer might just need the advice and counsel of a lawyer.

Why We Have Lawyers... and Other Musings

by Randy Krzmarzick

Randy Krzmarzick
Guest Author, Sleepy Eye, MN

First off, I need to be honest with you. I'm not a lawyer. It's not required to be one to write for DIRT, but it's definitely a foot in the door. I know a few lawyers, though. One of them invited me to share some words in this space.

I thought about being a lawyer once. I actually got a good score on the LSAT despite being hungover. Which is another story. That was long, long ago in a college far, far away. I came back to farm the homeplace instead of law school. I'm not sure that counts for Robert Frost's Road Not Taken, but it pretty sure changed a few things for me.

Our farm is near Sleepy Eye, not far from where Dan Schwartz grew up. Dan is the lawyer who invited me here. I knew Danny when he was a crafty left-handed reliever trying to get by on guile and guts for Leavenworth, the local townball team. I think Dan would have traded some guile for a 100 mile-per-hour fastball. Wouldn't we all?

As a farmer, I am familiar with dirt and DIRT. Small-letter dirt is the source of any wealth I've created in my career. Sun, rain, and dirt are critical infrastructure here on our farm. I try to give thanks for those most days. If not for the dirt I am blessed to care for, I'd have to find a "real" job. One where you don't get to play outside all day.

I've been on the mailing list for capital-letter DIRT, so I know that, too. DIRT Magazine "includes vital information for the Agriculture and Agribusiness industry," according to the Gislason and Hunter website. More honesty with the reader, this column will not be vital. Being vital can wear you out, so consider this a break.

No doubt, there are a wide variety of readers of DIRT out there. But I'm going to assume most of you have connections to farms and to rural places. (I know, "assume" makes a you-know-what out of you and me. But I'll take my chances.)

I love cities. Here in Minnesota, we have the Cities, meaning the entire metro area. It's a bit lazy of us to lump Blaine and Woodbury and everything in between together, but it's useful shorthand. "Yeah, I had to go to the Cities yesterday. They got a lot of traffic up there."

I am glad to have Target Field, the Guthrie, and the Orpheum two hours away. I have to admit though, a certain calm returns to me when I drive past farm fields going west on 212, heading home after a ballgame or concert. We are all called to bloom where we are planted, and that can certainly be in an urban garden. But I'm glad to be a farm kid who never got too far.

Rural, by definition, means less people and more space. Urban means more people and less space. As obvious as those are, they color and detail every part of our lives. As I write, my wife is in town, so the nearest human being is a mile or so away, depending on who's home doing chores and who's off running errands.

I have ample room to stretch out here. I can sing Garth Brook songs loudly and off-key while working on machinery. I can wear ratty, grease-stained t-shirts around the yard. I can even walk outside in my underwear to go measure something on the planter in the evening. I realize none of those are attractive images, but they are a great luxury in their own way.

In a place like Sleepy Eye, there are only so many people. A lot of them have been here multiple generations. It's newsworthy when someone new moves in. In a rural place, you know everyone, or at least recognize them. I put them in three categories: people I know, people I sort of know, and people I kind of know.

A word of caution, all that familiarity comes with drawbacks. When I was young, that meant any number of people might report stupid behavior by me to my mom and dad. Now that I'm older, they can report to my wife. I suppose I could quit doing stupid things, but that seems drastic.

In his 1987 book, "How to Speak Minnesotan," Howard Mohr addressed the dilemma of waving. (It is a book I recommend, especially if you're new to living in the backwoods. Or backfields.) How often, what type, and with what intensity do you wave at someone you drive by multiple times on the same country road?

There are days in the field when my neighbor Jackie and I have our tractors synced that we are turning across the line fence from each other over and over. Do we wave every time? We have settled on a protocol where we wave heartily and vigorously the first pass, and gradually reduce to a finger lifted off the steering wheel, and finally a nod. But what about days we go home for supper and come out later? Do we begin again with the lusty opening wave? Some of this we're working out yet. We've only had forty years.

All this space between us out here is not empty. After all, nothing is ever really "empty." Astronomers have discovered dust in the open space of, well, space. Out in rural places, we've got things that are meant to be here. These are things that we built or planted or bred. Like roads and corn and pigs. Nature fills in all the rest with things like rocks and weeds and wildlife.

In some places nature calls the shots, and in other places humans do. Then there's those in between places where we sometimes disagree. Getting the rocks and weeds and critters to stay where we think they ought to be is the eternal struggle between man and nature. Every time we think we've got 'em, like some new super-herbicide, nature comes back with a cross punch, like a strain of resistant weeds. It keeps things interesting out here.

In recent years, we've had a variation of the eternal struggle play out on our farm. Woodchucks moved in next door. Or next mound, I guess you'd say. They're about as close as your neighbor in town might be. At first it was a young couple, but several of their relatives heard about the good neighborhood with mounds at a reasonable price. Now we have a development near the grove, with possible expansion down by the burn pile.

Can our species co-exist? We're feeling each other out. We already live with a variety of birds, reptiles, and small mammals. I've heard living next to people can be problematic. We've had the occasional skunk want to settle in next to us. That would be the animal equivalent of the neighbor who plays loud music late at night, mows the lawn at 6:00 AM, and unfurls large political banners even in off-election years. Thankfully skunks are rare, as are obnoxious people.

Apparently, the worst thing woodchucks can do is undermine our foundation. There we might have to draw a line. I'd like to think we could hire a mediator to resolve our differences if that happens. But woodchucks might not be reasonable and willing to negotiate and seek a middle ground where the interests of all sides are considered. Like some people. Which is why we have lawyers, I guess.

The Corporate Transparency Act: What it is and Why Agricultural Producers Should Care About it

by Daniel J. Schwartz

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Many farmers and agricultural producers have formed corporations, limited liability companies, partnerships, or other business entities to operate their farming businesses and to hold their agricultural assets. This is all for good and legitimate reasons. Entities help to protect and shield farmers and producers' personal assets from business liabilities. Entities also offer certain advantages and alternatives for transferring agricultural assets to the next generation.

Not all entities have a lawful genesis, however. So-called "corrupt actors" have for years abused entities for the purpose of obfuscating their illicit activities, including human smuggling, drug and arms trafficking, fraud, and terrorist financing. The U.S. Government has responded by enacting a series of disclosure and reporting laws aimed at uncovering those lurking behind these shell companies. Most of these laws have historically been directed at financial institutions.[1] However in 2021 Congress passed the Corporate Transparency Act (CTA). The CTA represents a significant shift in the corporate-disclosure paradigm: Whereas prior federal laws placed the onus on collecting and reporting information concerning business entities on financial and similar institutions doing business with such entities, the CTA regulates and places disclosure requirements squarely on the entities themselves.

Congress delegated rule-making authority under the CTA to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). FinCEN issued a final rule implementing the CTA's reporting requirements in September of this past year. While these regulations have answered some important questions about the CTA, uncertainties still remain. This article explores some of the "known knowns" and "known unknowns" about the CTA and its potential impact on farmers and agricultural producers.

Who—or *What*—is Regulated by the CTA?

The CTA places reporting obligations on what are defined in the law as "reporting companies."[2] Corporations and limited liability companies (LLCs) are each specifically identified as a type of entity meeting the definition of a reporting company under the law. But many farmers and producers own entities that are neither corporations nor LLCs, such as limited partnerships (LPs), limited liability limited partnerships

(LLLPs), general partnerships (GPs), and limited liability partnerships (LLPs). How will they determine whether any of these entities are regulated by the CTA? The answer to this question will likely turn on whether the entity was "created by the filing of a document" with the relevant state authority.[3]

An important legal distinction exists between entities that are created by a filed document and those that are not. For example, in Minnesota (and other jurisdictions) one must file a document called a "certificate of limited partnership" in order to form (or create) LPs and LLLPs.[4] GP and LLPs do not share this same creation story, however. The mere "association of two or more persons to carry on as co-owners [of] a business for profit forms" a GP. This is so "whether or not the persons intend to form" a GP.[5] Further, an LLP might be best understood as an existing GP that has elected limited liability status by the filing of statement of qualification. As the Minnesota statutes describe it: "A limited liability partnership continues to be the *same entity that existed* before the filing of a statement of qualification."[6]

The legal niceties associated with entity formation and creation appear not entirely lost on FinCEN. FinCEN indicated in published materials that it expects LPs and LLLPs to fall within the definition of a reporting company under the CTA. FinCEN has also acknowledged that GPs "in many, if not most, circumstances are *not* created by the filing of a document with a secretary of state or other similar office" and that in "such cases . . . a general partnership would *not* be a reporting company." Despite the nexus between LLPs and GPs, though, FinCEN anticipates LLPs will be considered reporting companies nevertheless.[7] Whether FinCEN's proffered interpretations will withstand scrutiny if challenged remains to be seen.

Are any Entities Exempt from the CTA?

The CTA lists twenty-three (23) separate categories of entities that are exempted entirely from the law's requirements. None of these exemptions target agricultural businesses or entities, however. They are instead focused on excluding businesses and entities that are already subject to disclosure requirements under other federal and state law, such as banks and insurance companies.[8]

The CTA is not designed to relieve small businesses from its requirements, either. On the contrary, the *fewer* employees a business entity has and the *less* revenue it generates the *more* likely it is that that the entity will subject to the CTA. The law includes a broad exemption for relatively larger businesses that can satisfy each of the following criteria: employ more than twenty (20) full-time employees; file tax returns showing more than $5,000,000 in gross receipts or sales; *and* maintain a physical operating presence in the U.S.[9] Many farmers and agricultural producers, though, will be unable to meet all three of these conditions.

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1 For example, in 1970, the Congress passed the Bank Secrecy Act (BCA), which requires banks to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. Following the 9/11 terrorist attacks, the BCA was amended by the USA PATRIOT ACT to require banks to adopt customer identification programs and anti-money laundering programs. And in 2016, the BCA regulations were amended to specifically require financial institutions to establish procedures for identifying and verifying the beneficial owners of their "legal entity customers."

2 While this definition encompasses both domestic entities and entities created under the laws of a foreign country, most (if not all) of our readers use and operate domestic entities only. This article therefore focuses on the definitional components applicable to domestic entities, or what the regulations refer to as a "domestic reporting company."

3 This is the "catch all" test set forth in the CTA and associated regulations for determining whether an entity that is neither a corporation nor an LLC is nevertheless a reporting company under the law. See 31 U.S.C. § 5336(a)(11)(A)(i); 31 CFR § 1010.380(c)(1)(i).

4 *See* Minn. Stat. § 321.0201(a).

5 Minn. Stat. § 323A.0202(a).

6 *Id.* § 323A.0201(b) (emphasis added).

7 Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59537 (Sept. 30, 2022); U.S. Treasury Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Rule Fact Sheet, available at https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet (last visited March 13, 2023).

8 *See* 31 U.S.C. § 5336(a)(11)(B); 31 CFR § 1010.380(c)(2).

9 *See* 31 U.S.C. § 5336(a)(11)(B)(xxi); 31 CFR § 1010.380(c)(2)(xxi).

Further, even for those who can pass the "large operating company" test[10] described above with respect to one of their business entities, it does not necessarily follow that all of the entities utilized in their enterprises will be exempt from the CTA. To be sure, to the extent such affiliates are subsidiaries of an already exempt, "large operating company," the CTA and its regulations make it reasonably clear that such subsidiary entities may rely on their parent company's exempt status and need not demonstrate an independent basis for exemption.[11] But there is little in the CTA's text to suggest that mere affiliation with an exempt entity—versus being a subsidiary of an exempt entity—will produce the same result.

What Information Must be Reported?

As might be expected, the CTA requires a reporting company to provide specified information about itself. This includes the company's legal name, the address of its principal place of business, the state of its formation, and the company's federal taxpayer identification number. A reporting company must also submit to FinCEN similar identifying information about each of its "beneficial owners" and "company applicants," including their full legal names, dates of birth, addresses, and a unique identifying number from an acceptable identification document together with an image of the document. Significantly, however, in its final rule FinCEN relieved reporting companies formed *before* January 1, 2024 from the requirement of reporting a company applicant's information.[12]

What is a Beneficial Owner?

The regulations define a beneficial owner as "any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company." The regulations elucidate certain control-based definitions and factors for determining whether an individual has a significant enough nexus with, or influence over, a reporting company to be deemed a beneficial owner.[13]

While certain individuals will fall squarely with the definition of a beneficial owner, other circumstances will be considerably less clear. For example, far from a bright-line test, FinCEN's final rule lists several contexts where an individual "may" be exercising control sufficient to establish a beneficial-ownership relationship under the CTA.[14] Accordingly, farmers and producers with more developed ownership and management structures will likely need to consult with attorneys and other professional to help determine which members of their ownership and management group are beneficial owners under the CTA.

What is a Company Applicant?

The regulations define a "company applicant" generally as the individual who directly files the company's formation document.[15] For corporations, this would likely include the person identified as the corporation's "incorporator" and who files the corporation's initial articles of incorporation with the Secretary of State's Office. Similarly, for LLCs, this would likely include the person identified as the LLC's "organizer" and who files the LLC's articles of organization with the Secretary of State's Office.[16] FinCEN has also indicated that there could be more than one (but no more than two) company applicants, and that a company applicant may include an individual as well "who is primarily responsible for directing or controlling the filing" of the company's formation document.[17]

When do the Reporting Requirements become Effective?

FinCEN has established two different deadlines for reporting companies to file their initial reports. Reporting companies first created *on or after* January 1, 2024 must submit their initial report to FinCEN within thirty (30) days of their formation. Reporting companies first formed *before*

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10 The regulations identify this exemption with the heading "Large operating company." 31 CFR § 1010.380(c)(2)(xxi).

11 *See* 31 U.S.C. § 5336(a)(11)(B)(xxii); 31 CFR § 1010.380(c)(2)(xxii).

12 *See* 31 U.S.C. § 5336(b); 31 CFR § 1010.380(b).

13 31 CFR § 1010.380(d).

14 31 CFR § 1010.380(d)(1)(ii).

15 31 CFR § 1010.380(e)(1).

16 *See* Minn. Stat. § 302A.101; Minn. Stat. § 322C.0201, Subd. 1.

17 31 CFR § 1010.380(e)(3); Treasury Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Rule Fact Sheet, available at https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet (last visited March 13, 2023) ("The rule defines a company applicant to be only two persons.").

January 1, 2024 have an additional year – until January 1, 2025 – to file their initial reports with FinCEN.[18]

Are there Any Penalties for Violating the CTA?

The CTA and its associated regulations make it unlawful for any person to willfully fail to provide complete beneficial ownership information to FinCEN, or to willfully provide false or fraudulent beneficial ownership information to FinCEN. Violators face the prospect of monetary penalties, imprisonment, or both.[19]

What Should Farmers and Producers do to Prepare for the CTA?

The good news for farmers and producers is that FinCEN has allowed a reasonable amount of time for existing entities to make their initial reports under the CTA. As noted above, however, determining whether any entity is a reporting company in the first place, and who all of its beneficial owners are, may not always be clear. Those with existing entities should therefore use this time to consult with their attorneys and other advisors to determine whether and the extent to which they may be required to report under the CTA. This will help to avoid creating the circumstances for incorrect or untimely filings when the January 1, 2025 deadline arrives.

Further, those considering forming a new entity in the near future should pay close attention the January 1, 2024 cut-off date set forth in FinCEN's final rule. As noted above, if the entity is formed on or after January 1, 2024 and meets the definition of a reporting company under the CTA, the entity will have only thirty (30) days following its formation to make its initial report to FinCEN.

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[18] 31 CFR § 1010.380(a)(1).

[19] *See* 31 U.S.C. § 5336(h); 31 CFR § 1010.380(g).

Right to Repair Laws

by Rick J. Halbur and Alexander H. Asawa

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Farming equipment manufactured today has more software than ever before. The increased sophistication of this equipment has benefitted the agricultural industry in significant ways. For example, the integration of newer technologies into agricultural implements has resulted in measurable gains in productivity, yields, and revenue. However, the increasing sophistication of technology is not without drawbacks. As many farmers and producers have discovered, manufacturers have sometimes imposed various restrictions and policies that limit the ability of equipment owners to make repairs to their own equipment or take their equipment to a local repair shop. These restrictions can take many forms, from limiting the availability of certain parts, repair manuals, and diagnostic tools, to software locks and lockouts. This occasionally results in increased costs, delays, and headaches for

people who want to repair their own equipment, especially in agriculture where timing is critical and equipment is purchased, maintained, and expected to last. That is where right to repair laws come in.

What Are Right to Repair Laws?

Right to repair laws are designed to require manufacturers to make repair tools, parts, and software available to consumers and independent repair shops on fair and reasonable terms. As such, these laws are intended to reduce the maintenance costs and increase the convenience and availability of repairs. This is critical to farmers and producers who rely on their equipment to keep their farming operations productive.

Federal Right to Repair

In 2021, the President of the United States signed an executive order directing the Federal Trade Commission ("FTC") to address certain "unfair anticompetitive restrictions on third-party or self-repair" efforts, specifically identifying certain "restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment." In response, the FTC increased its enforcement against illegal repair restrictions. However, those actions are primarily aimed at unfair competition, deceptive conduct, and unlawful "tying," which is the practice of tying a manufacturer's warranty to the use of a specific service provider. As of this writing, there has been no direct action by the FTC against agricultural equipment manufacturers.

However, in 2022 various farmers and producers filed a class action antitrust lawsuit against John Deere alleging various violations of the Sherman Antitrust Act related to restrictions on software and repair tools necessary for the repair and maintenance of equipment with engine control units. The Department of Justice's Antitrust Division voiced its support for the plaintiffs in that lawsuit in a statement of intent filed with the court on February 14, 2023. That litigation remains ongoing. Around this same timeframe, on January 8, 2023, John Deere issued a Memorandum of Understanding between itself and the American Farm Bureau Federation ("AFBF") stating that John Deere would "ensure that Farmers and Independent Repair Facilities will be able to access and obtain, per subscription or sale, [John Deere's] tools, Specialty Tools, Software, and Documentation" on fair and reasonable terms. However, this memorandum is legally unenforceable and contains multiple limitations, including a requirement that the AFBF "encourage state Farm Bureaus to refrain from introducing, promoting, or supporting federal or state right to repair legislation" that may impose obligations beyond what John Deere and the AFBF agreed to in their memorandum.

On the Congressional front, in February 2022 a bill named the Agricultural Right to Repair Act was introduced in the Senate. This bill would have required equipment manufacturers to "make available certain documentation, parts, software, and tools" for electronically enabled agricultural equipment. However, this bill did not make it out of committee during the last Congressional term.

Right to Repair in Minnesota

Currently, Minnesota does not have a right to repair law. However, in February 2023, Minnesota joined the increasing number of states with proposed right to repair bills when legislation titled the Digital Fair Repair Act was introduced in the Minnesota House of Representatives. This proposed legislation would require that original equipment manufacturers make documentation, parts, and tools,

including software, available to independent repair providers and equipment owners on fair and reasonable terms for diagnostic, maintenance, or repair purposes. Should this bill pass, farmers and producers would be able to obtain certain software necessary to diagnose and repair their equipment directly from the manufacturer on fair and reasonable terms, without being compelled to contract with a specific repair provider authorized by the manufacturer. While the days of making most repairs to a tractor with only a wrench set, hammer, and ingenuity are probably behind us, the Digital Fair Repair Act would allow farmers and producers to exercise more control over the equipment they own. This will undoubtedly be of great interest to farmers and producers in Minnesota who rely on their equipment to put food on the table for people across the county and around the world.

Negotiating Wind and Solar Agreements

by Dean M. Zimmerli

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The drum beat toward renewable energy continues. Recently, Minnesota enacted new legislation requiring that 100% of the State's energy be produced from carbon-free sources by 2040. This is not a distant, far-off goal. Though some new technologies might fill the gap, the obvious sources to meet this goal are wind and solar, which are expected to grow considerably in the next decades.

This new wind and solar development will happen almost exclusively on rural land in greater Minnesota. Though their governments might not be insisting on it with the same legal force as Minnesota, surrounding states including Iowa, South Dakota, and Wisconsin are likely to see similar investments in wind and solar in the coming years. Though these renewable energy projects are often encouraged by government, in most cases, they are private, commercial projects. The developers that are pursuing renewable projects must obtain the rights to construct these projects by negotiating with private landowners.

Generally, a renewable developer will look to obtain a lease or easement agreement with a landowner. These leases or easements will typically provide the renewable developers the following rights: to review and study the property to determine whether to construct the project in the first place; to construct and install turbines or solar panels as the case may, together with transmission lines and other necessary infrastructure; to restrict the landowners from engaging in activities on the property that would interfere with the renewable project; and to generate effects that the landowner agrees to tolerate such as glare, noise, flicker, shadows, etc; In short, the developer seeks to obtain the right to build and operate a wind farm or solar farm on the landowner's property. Particularly in the case of wind farms which could encompass dozens or hundreds of wind turbines over thousands of acres, these projects requires that many landowners in the same area sign these agreements to allow construction. These agreements (or notices of the agreement) will be recorded in the land records like a mortgage or deed and can bind the property for many years.

If approached by a wind or solar developer to sign an agreement to allow development of a renewable project, a landowner should carefully review the proposed lease or easement terms and consider having legal counsel review the often-byzantine and complex agreements. The following are some provisions to pay particular attention to.

Length of Time

It should be no surprise that these types of agreements are not short term. Instead, agreements to allow the construction of a wind or solar farm are usually better measured in decades than in months or years. Landowners should carefully review all the provisions relating to the length of the easement or lease terms and recognize that it may encumber the land for several generations and limit how the property is used going forward.

Generally, agreements are split into several periods or phases, starting with a development or construction period. Usually ranging between 3-7 years, the development period is the time frame during which the developer will finalize its plans, obtain permits and other government approvals and construct and install the equipment necessary to put the renewable project into operation. Because the developer is often looking to sign up many landowners for a project, it may be that if it is unable to secure agreements with enough landowners during this initial period, it may abandon the project all together without doing any work.

The length of the development or construction period should be explicitly set out in the agreement; it should not be an open-ended timeframe during which the developer can indefinitely decide whether and when to construct the project. Development periods are often allowed under the agreement to be renewed or extended beyond the initial development term. For example, an agreement might provide for a five-year development term which the developer can extend for an additional two-year period. While this concept is fine and gives the developer flexibility depending on how quickly the project is progressing, the agreement should not allow unlimited extensions of the development period which would effectively turn a short timeframe into an unlimited duration. The agreement should be clear that if no project is constructed during the development period, the agreement will terminate.

Generally, there will be an operations period following the development period. The operation period may be for an initial term of 20-30 years, and will typically start once the wind farm or solar project begins producing electricity and selling it commercially. Again, many agreements allow for this operation period to be extended or renewed for additional periods. Adding all of the potential terms together can result in agreement lengths spanning a half century or more.

Some agreements may provide that this period can essentially be reset at zero if the equipment is replaced. For example, if a wind turbine is removed and replaced 20 years into the agreement, some agreements allow the operations period to restart when the new turbine is activated. Landowners should consider negotiating to limit or eliminate this provision, which would allow a potentially indefinite term.

Following the operation of the wind farm, most agreements allow the developer 1-2 years to remove the equipment and restore the property. Landowners should carefully review whether they are entitled to be compensated during that time.

Land Encumbered by the Agreement

The scope and amount of land that may be subject to the agreement can vary wildly. Ideally a landowner would know at the front end exactly where all structures, roads, and utilities would be installed and limit the easement or lease to cover only that land. However, this is usually not ideal from the developer's perspective.

Particularly for large wind farms, developers typically want to secure large swaths of land from many landowners—sometimes totaling in the tens of thousands of acres—where the wind farm will ultimately be built. This will allow the developer to analyze the best placement of the turbines to make them more efficient and make the construction perhaps less costly by optimizing the utilities and other infrastructure running between the turbines. While a landowner may sign an

agreement covering two hundred acres, ultimately this land may end up with just one or no turbines actually placed on the property.

Even if a wind or solar developer does not want to commit to the exact placement of the turbines or other equipment when signing the agreement on the front end, landowners may be able to limit the coverage of the lease from portions of the property. For example, perhaps if a landowner owns a quarter section with a homestead on it, the landowner would agree to put 120 acres under an agreement but carve out the homestead and the surrounding 40-acres to ensure no turbine or solar array is built too close to the residence and provide additional flexibility with the use of that property.

Use of Remaining Property

The terms of the easement or lease will often limit the ability of the landowner to use their property in certain ways, even for the areas that are not occupied by some improvement by the developer. For example, a wind lease may provide that a landowner may not erect a structure or plant trees within a certain distance of a wind turbine over concerns that such structures might disrupt the wind flow. Some agreements may restrict all construction except with the developer's consent.

Landowners should carefully review what restrictions are placed on their use of remaining property and negotiate carve outs that allow the most flexibility going forward without impacting the operation of the energy development.

Crop Damage Payments

The construction of the wind or solar farm and associated infrastructure is almost certain to impact growing crops. Landowners should ensure that any proposed agreement provides for reimbursement for crops damaged by construction or other operations relating to the renewable development. These terms should be clear about how the damage is measured and what pricing mechanism is used to value the crops. These terms should also provide a simple solution for resolving any disputes, such as by referring the matter to an independent crop insurance adjuster. Some agreements appear to limit this reimbursement for crop damage to the landowner's crops, but this language should be revised to make clear that a renter is entitled to be compensated for their lost crops as well, because even if the landowner is the only farmer now, given the length of the agreements, it is likely that at some point the land will be farmed by a tenant.

Compensation and the Most-Favored Nation

The compensations that a landowner may receive under a wind or solar lease can be complex and confusing. Many developers offer sign-up bonuses simply for agreeing to any lease or easement for their land. Beyond that, the agreements may provide for one amount of per-acre payment during the initial development period and a different rate during the operation period. Landowners may be entitled to one-time or annual payments for infrastructure such as roads and utility lines. The agreement may provide for additional annual payments if a turbine or solar panel is actually installed on the landowner's property. Various progress payments may be due as the developer reaches milestones on the project. Because of the variety of ways an agreement may compensate a landowner, it is nearly impossible to compare as between different developers which is providing a better payment stream, and the answer may depend on items that are unknown when entering the agreement, such as whether a turbine will actually be installed on a particular parcel. Landowners should carefully review these payment terms to determine whether they believe they provide a fair tradeoff for giving up rights to their property.

One way a landowner may feel more comfortable with signing onto an agreement is if the agreement provides for adjustments for inflation and includes a "most-favored nation" clause. Inflation adjustments will raise the annual payments due under the agreement to correspond with rising inflation, often tying the raises to the consumer-price index or similar inflation measurement. A most-favor nation clause will generally provide that a landowner is entitled have their payment amounts adjusted up to the highest amount the developer agrees to pay to any other landowner in the development; thus, a landowner who signs up early need not worry as much that a neighbor might get a better deal by holding out longer because that first landowner will be entitled to receive the higher payment amounts anyhow.

Mortgages and Assignments

Financing concerns—both for the landowner and developer—are important provisions that must be addressed in any agreement. Landowners will often have existing mortgages on their property or may wish to have the option of mortgaging their property in the future. For existing landowner mortgages, developers will typically insist that the landowner's lender sign a subordination, non-disturbance, and attornment agreement (SNDA) as a condition of the landowner signing up. These SNDAs provide protection to the developer in the event the landowner defaults on the mortgage and the lender forecloses.

However, future mortgages that a landowner may enter into do not pose the same risks to a developer as a pre-existing mortgage and a landowner should be entitled to freely mortgage or otherwise sell or convey his or her property without further consent of the developer. If the developer insists on some sort of consent, the agreement should provide that the developer's consent may not be unreasonably withheld.

On the other hand, the developer themselves may, as part of financing the project, wish to mortgage or assign their rights under the lease or easement agreement and will typically want significant latitude to be able to do this without needing consent of the dozens of landowners on the project. Generally this is tolerable from a landowners perspective, so long as new owner of the project remains fully obligated under the agreement, but the devil will be in the details.

Payment of Landowner's Legal Fees

Given the complexity of wind or solar agreements and the serious impact that they can have on a landowner's interest in their property over the life the agreement, it may be wise to have an attorney review the agreement, suggest edits, or explain complicated terms. Developers may agree to reimburse a landowner for their costs incurred in hiring an attorney to review the agreement on the landowner's behalf.

Summary

Signing an easement or lease for a renewable energy development is a significant decision. The payments owed will range in the tens of thousands of dollars, and the encumbrance on the land may last for generations. The terms proposed from the developer will invariably be one-sided to primarily suit the developer's needs. It is imperative that before signing on to one of these agreements, binding heirs and encumbering land, that landowners carefully review the terms to ensure it is a fair deal for all parties.

An Employee's Use of FMLA Leave to Reduce the Workday Could Continue Indefinitely

by Brittany R. King-Asamoa

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On February 9, 2023, the Wage and Hour Division of the U.S. Department of Labor (WHD) issued Opinion Letter FMLA2023-1-A clarifying an employee's right to use leave under the Family and Medical Leave Act (FMLA) to reduce the employee's work schedule. The right is guaranteed for eligible employees, irrespective of the availability of reasonable accommodations under the Americans with Disabilities Act (ADA). The opinion highlights FMLA regulations that routinely create compliance issues for employers.

The WHD utilizes opinion letters as opportunities to provide the public with guidance on the federal agency's enforcement of certain federal labor laws. Generally, employers and workers can present issues to the WHD and request a written opinion detailing the law's application to specific issues. The agency will then publish an official opinion applying only those laws the agency is responsible for enforcing to the specific facts stated in the request for the opinion letter. To no surprise, the WHD does not issue opinion letters on matters a requestor[1] is presently litigating or for which a requestor is being investigated.

Opinion Letter FMLA2023-1-A is the WHD's answer to the question: Can employees with a chronic serious health condition use FMLA leave to reduce their work schedule for an indefinite period of time, when the reduced schedules present staffing challenges for the employer. The requestor further questioned whether these reduced schedule requests could alternatively be treated as requests for reasonable accommodations under the ADA.

The WHD concluded: "[A]n eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement."[2] The opinion reminds employers that "serious health condition" under the FMLA and "disability" under the ADA are not synonymous.[3] Each law provides employees with certain rights and protections. Employers must ensure compliance with both laws. To accomplish this, employers should review leave requests and work restriction notices carefully to determine the employer's obligations (if any) under the FMLA, ADA, and other laws (e.g. workers' compensation laws).

Under the FMLA, eligible employees may take up to 12 workweeks of unpaid leave for a serious health condition in a 12-month period.[4] A serious health condition under the FMLA is "an illness, injury, impairment, or physical or mental condition" involving inpatient care or continuing treatment by a health care provider.[5] Employers may require employees to provide a medical certification completed by a health care provider that verifies the serious health condition and certifies the medical necessity for FMLA leave. "Once an eligible employee communicates a need to take leave for an FMLA-

[1] For purposes of this article, "requestor" shall mean the individual submitting a requesting an opinion letter from the WHD.

[2] WHD Opinion Letter FMLA2023-1-A at 1.

[3] The Equal Employment Opportunity Commission is the federal agency responsible for enforcing the ADA, not the WHD.

[4] Employer sets the 12-month period by policy pursuant to 29 U.S.C. § 825.200(b).

[5] 29 U.S.C. § 2611(11).

qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave."[6] Put another way, the employer cannot select to treat the leave request as solely a reasonable accommodation request under the ADA and disregard the employee's rights under the FMLA. Employers must designate leave as protected FMLA leave and provide the eligible employee with notice of such designation within five (5) business days of acquiring sufficient information to determine the leave is for an FMLA-qualifying reason.[7]

FMLA leave may be taken intermittently or on a reduced schedule under certain circumstances.[8] Use of FMLA leave on an intermittent basis or reduced schedule is calculated based on actual leave taken. Only hours the employee would regularly be required to work but is unable to work due to an FMLA-qualifying reason are counted as FMLA leave taken. An employee's hourly equivalent of FMLA leave entitlement must be determined based on the hours employee is regularly scheduled to work during a workweek when leave is taken.[9]

This is a great reminder for employers requiring employees to work more than 40 hours in a workweek. Consider the following example: Employee is regularly scheduled to work 50-hour weeks, 10-hour days. Employee is eligible for up to 600 hours of FMLA leave in a 12-month period (50 hours x 12 workweeks). Due to a serious medical condition, Employee takes FMLA leave reducing her schedule to 8-hour days. Employee thus takes 2 hours FMLA leave each workday on the reduced schedule.

The WHD concluded Opinion Letter FMLA2019-1-A with a reminder that "employee[s] may continue to use FMLA leave for an indefinite period of time as long as they continue to be eligible and have a qualifying reason for leave. . . . [I]f the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely."[10] When an employee exhausts FMLA leave, employers should consult an attorney to determine whether the employee has additional rights under the ADA, workers' compensation law, or other applicable laws.

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6 WHD Opinion Letter FMLA2019-1-A at 2.

7 29 C.F.R. § 825.300(d)(1) (requiring one designation notice per FMLA-qualifying reason in a 12-month period).

8 29 C.F.R. §§ 825.120(b), 825.202, 825.203.

9 Other calculations of leave for employees with varying work schedules are set forth in 29 C.F.R. § 825.205(b). The employee's average weekly schedule over the 12 months immediately preceding leave, including scheduled hours the employee took leave, shall be used to determine

10 WHD Opinion Letter FMLA2023-1-A at 3-4.

Proposed Federal Trade Commission Rule Could Broadly Ban Non-Compete Agreements

by Christopher E. Bowler

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Attraction and retention of a talented workforce is a common priority and, oftentimes, a challenge in today's employment environment. Similarly, employers may look for ways to help ensure that when they devote time and resources to training employees, those employees do not subsequently begin working for a direct competitor of the employer. One common tool that an employer may try to utilize to prevent such a situation is a non-compete agreement (**"NCA"**). However, the Federal Trade Commission (**"FTC"**) recently proposed new administrative rules that could curtail the use of NCAs on a federal level, and so the current outlook on the effectiveness of NCAs is in an uncertain state. This article discusses various limitations on NCAs as they exist now, and then provides an overview of the rule proposed by the FTC.

I. NCAs: Governed by State Law and Trending Towards Limitations.

Historically, NCAs have been governed exclusively by state law. Accordingly, there is currently a broad spectrum of treatment for NCAs, depending on the jurisdiction. Some states, such as Minnesota, do not have any statutes or regulations governing NCAs. Rather, NCAs in specific professions (such as lawyers, health care workers, etc.) are governed by ethical rules promulgated by state boards, and NCAs in broader contexts are subject to judicial "common law."

For instance, Minnesota caselaw holds that NCAs are disfavored, and that, in determining whether to enforce a certain NCA, courts must balance the employer's interest in protection from unfair competition against the employee's right to earn a livelihood, using certain factors as benchmarks in their determinations. Such balancing tests typically end up simply muddying the water and leaving employers unsure of their legal protections.

Other states have enacted statutes that provide varying levels of detailed guidance regarding the legality of NCAs. For instance, Illinois has recently enacted a comprehensive statute providing for the broad prohibition of NCAs between employers and employees who are low-wage workers, covered by a collective bargaining agreement, or are members of specific fields.

In general, states have been trending against NCAs in recent years. For example, in 2019, Maryland, Maine, New Hampshire, and Rhode Island all passed legislation restricting NCAs for low-wage workers. In 2020, Virginia and Nevada took similar steps. In 2021, Oregon amended its NCA statute to erode their enforceability, and Nevada amended its laws to penalize employers that attempted to enforce already-prohibited NCAs. The District of Columbia simply banned NCAs outright in nearly all circumstances. The Minnesota legislature has been debating bills that would ban all NCAs with employees who make less than a certain salary threshold or meet other criteria over the past few years. On top of these state-led initiatives, the FTC proposed its own rule on January 5, 2023, to address the use of NCAs.

II. The FTC's Proposed Rule on NCAs.

The FTC's proposed rule can be seen as the culmination of state action like that discussed above, as well as a response to multiple years of encouragement from the Biden Administration. In short, the FTC's proposed rule would broadly prohibit employers from entering into NCAs with "workers," which includes both employees and independent contractors. The rule has been introduced through a "notice of proposed rulemaking," which is a public notice issued by an independent agency of the federal government that wishes to add, remove, or change an administrative rule or regulation as part of the agency rulemaking process. Once a notice of proposed rulemaking is issued, the public has the opportunity to submit comments to the agency in either support or opposition to the proposed rule. If a rule is ultimately passed, it becomes enforceable but could still be subject to challenge through the litigation process.

In this instance, the FTC's proposed rule includes multiple parts. First, it would provide an official definition of an NCA as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."

Second, the proposed rule would include the application of a "functional test" in determining whether a contractual provision is truly an NCA; namely, if the provision would have the "effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer." The proposed rule also lists the following examples of *de facto*, although perhaps non-traditional, NCAs:

1. A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.

2. A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.

Third, the proposed rule does not provide for the "grandfathering in" of previously made NCAs. To the contrary, the new rule would require employers to rescind existing NCAs within 180 days of publication of a final rule, and to provide individualized notice to current and former workers who were previously covered by an NCA that the NCA is no longer in effect. The proposed rule provides model language for employers to use in providing such written notice to their workers. Notably, the proposed rule provides a limited exception for NCAs that were entered into in connection with the sale of a business or business assets; however, the FTC is careful to note that these NCAs are still subject to Federal antitrust law and other applicable laws.

Lastly, the proposed rule notes that the FTC's new rule would supersede any State laws allowing for the use of NCAs or that in any way would be inconsistent with the new rule. However, any State law that provided for greater protections for workers would still be valid and enforceable.

The FTC is now seeking public comment on several modifications to the proposed rule, including whether franchisees should also be covered; whether different standards should apply to senior executives; and whether low-wage and high-wage workers should be treated differently under the new rule. The period for public comments opened on January 9, 2023, and remains open until March 10, 2023. Subsequent action on the proposed rule is not expected for several months following the close of the public comment period.

As was expected, the proposed rule has already garnered significant response. FTC Commissioner Christine Wilson has already issued a dissenting statement, and the U.S. Chamber of Commerce has declared the proposed rule "blatantly unlawful" in a press release on January 5, 2023. Ultimately, any final rule will undoubtedly include significant changes from the wide-sweeping blanket ban as proposed and will also face numerous challenges in court.

While the proposed rule has not yet reached a stage that would require employer action, it is important for employers to be aware of the legislative – and now regulatory – trends at the state and federal levels targeting the use of NCAs. Employers will want to begin tailoring their separation agreements to comply with any current applicable state law, while still maintaining protections of their trade secrets or confidential information, both of which are still legally protectable outside the use of an NCA.

Federal Regulatory Update

by Matthew C. Berger

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During the first two years of the Biden administration, when Democrats held majorities in both houses of Congresses, much of the activity in Washington focused on traditional lawmaking. But with the new Republican majority in the House of Representatives in January 2023, a flurry of new rulemaking activity signals a focus on regulatory action by administrative agencies. Many of these new regulations and proposed regulations may have a significant impact on farmers. This article will summarize a few of the key rules that have been enacted or proposed already in 2023.

Waters of the United States (WOTUS) Rule

Under the federal Clean Water Act, the scope of the Environmental Protection Agency's regulatory authority is generally limited to "navigable waters." The Act, however, broadly defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." The inherent ambiguity of this definition has resulted in several court cases and rulemaking efforts that have continued for several years.

After years of legal wrangling and confusion, the Obama administration enacted the "Clean Water Rule" on June 29, 2015, that adopted an extremely broad definition of "waters of the United States" and would have dramatically expanded the scope of federal authority beyond traditional navigable waters. This rule was challenged in federal court by a number of farm and business groups, as well as several states, and was subsequently repealed by the Trump administration on October 22, 2019.

A few months later, on January 23, 2020, the Trump administration enacted the "Navigable Waters Protection Rule" that more narrowly defined "waters of the United States." Specifically, this rule limited the definition of "waters of the United States" to "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters." The Trump administration's rule was also challenged in federal court (this time primarily by environmental activists).

On January 18, 2023, the Biden administration published a final rule that repeals the Trump administration rule and (yet again) redefines the term "waters of the United States." Under this rule, "waters of the United States" include (1) traditional navigable waters, the territorial seas; and interstate waters; (2) impoundments and tributaries of these waters; (3) wetlands that are adjacent to (and have a continuous surface connection with) any of these waters; (4) other waters that have "relatively permanent, standing or continuously flowing waters" and that have a continuous surface connection with such waters; and (5) other waters that have a "significant nexus" with (i.e., that significantly affect the chemical, physical, or biological integrity of) such waters. Although slightly narrower than the Obama administration's rule, this rule would again significantly expand the scope of the federal government's authority beyond traditional navigable waters.

While this issue may seem to be highly technical, and something that only lawyers or government bureaucrats would be interested in following, the impact of this issue on farmers and other landowners is significant. The Clean Water Act requires an NPDES permit for discharge of a pollutant from a "point source" to "navigable waters" (i.e., "waters of the United States"). And a Concentrated Animal Feeding Operation (CAFO)—which includes a feedlot that confines 700 or more mature dairy cattle, 1,000 or more beef cattle or cow/calf pairs, 2,500 swine weighing more than 55 pounds (or 10,000 or more swine weighing less than 55 pounds), or 55,000 or more turkeys (among others)—is a "point source" under the law. Thus, the definition of "waters of the United States" has a significant impact on whether or livestock facilities need a permit and, if so, the type of permit that you need.

Although the Biden administration's rule has an effective date of March 20, 2023, several farm and business groups, as well as several states, have already announced legal challenges to the rule. Thus, the uncertainty surrounding this issue will continue until these court cases are resolved (and may continue with future administrations).

CAFO Rulemaking Study

As noted above, a CAFO is a "point source" that is subject to regulation under the Clean Water Act. The United States Environmental Protection Agency enacted a regulation that defines a CAFO, establishes a process for the EPA to designate a feedlot as a CAFO if the feedlot does not otherwise meet the regulatory definition, establishes procedures for a CAFO to obtain coverage under an NPDES permit, and regulates discharges of manure and other pollutants from a CAFO.

In January 2023, the EPA announced that it intends to "undertake a detailed study of" CAFOs in anticipation of the agency adopting new rules to regulate CAFOs. This represents an initial stage of the likely rulemaking process for a new rule that the agency is likely to propose down the road.

Packers & Stockyards Act Rulemaking

The Packers & Stockyards Act is an antitrust law that Congress first enacted more than 100 years ago in response to widespread abusive practices by many meatpackers at that time. As amended over the years, the Act generally prohibits "unfair, unjustly discriminatory, or deceptive practice[s] or device[s]" and "undue or unreasonable preference[s] or advantage[s]" by packers, swine contractors, and live poultry dealers. While these terms appear, at first blush, to be broad, federal courts have consistently recognized that the Act is not intended to "upset the traditional principles of freedom of contract" and have interpreted the law (consistent with other antitrust laws) to prohibit only practices that impact general competition in the marketplace (such as practices that apportion supply, manipulate prices, or create monopolies).

The United States Department of Agriculture recently proposed a new rule that would dramatically redefine and expand the scope of these statutory restrictions. If enacted, the proposed rule would effectively allow unelected bureaucrats to retroactively prohibit any practices by swine contractors or live poultry dealers that they deem to be unfair or unreasonable, regardless of whether the practice actually has any impact on competition in the marketplace. The proposed rule would also impose new and significant recordkeeping requirements on swine contractors and live poultry dealers.

The public comment period on these proposed rules has ended, but the proposed rules have not yet been finalized. If adopted, however, the proposed rules would inject significant uncertainty into contract grower relationships that are common among swine and poultry producers and may cause many swine contractors and live poultry dealers to reconsider whether to continue utilizing contract growers to care for their pigs and birds or whether to instead build or purchase their own facilities and hire employees to care for the animals. This development would have significant negative consequences on many family farmers who rely on these common contractual relationships as a steady source of income and a natural supplement to their crop farming operations.

Noncompete Agreement Rulemaking

Another article in this issue of *Dirt* describes noncompete agreements. On January 19, 2023, the Federal Trade Commission published a proposed rule that would prohibit employers from entering into (or attempting to enter into) noncompete agreements with their workers, maintaining existing noncompete agreements with workers, or representing to workers that they are subject to a noncompete clause. The proposed rule would also require employers to notify existing workers who are currently subject to a noncompete agreement that the agreement is no longer valid and may not be enforced.

This rule, if adopted, would represent a substantial departure from the existing law in most states and would prohibit an agreement that many businesses use to protect their proprietary information and trade secrets when employees leave. Although the proposed rule is not specifically directed at agricultural businesses, many agricultural businesses (like many other types of businesses) commonly use these agreements and would be impacted if the proposed rule were enacted.

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:

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- 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
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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

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