

Olson Ag Law Update

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This issue of the Olson AgLaw Update continues its coverage of the 2014 Farm Bill. Topics covered include the “Peanut Apocalypse,” farm program regulations, payment limitation requirements, and the future “actively engaged in personal management” regulation.

WILL THERE BE A PEANUT APOCALYPSE?

The “peanut apocalypse,” if it occurs, will be the result of three new provisions in the 2014 Farm Bill.

First, cotton base acres were converted to “generic” base acres. Generic base acres, unlike regular base acres, get the payment for the crop actually grown on those acres. And, the new Farm Bill retained the old peanut base as well. Peanut payments will be made both on the old peanut base, regardless of what is grown, and on generic base when actually used to grow peanuts.

Second, the new Price Loss Coverage program sets a generous reference price of \$535 per ton for peanuts. This year the average contract price for peanuts so far is substantially under this price.

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Please read further on next page

Some farmers are planting more peanuts this year because 1) they can get a peanut payment on their generic base acres as well as on their regular peanut base acres and 2) they believe the PLC peanut payment may be as much as \$85 to \$100 per ton on these base acres, making up for a mediocre contract price. The high peanut reference price, combined with the new generic base acres, may result in a significant increase in peanut production, in turn driving prices lower.

However, for the first time in many years, the farm bill now contains a payment limit on marketing loan gains. This third new provision may ultimately cause the true peanut apocalypse.

Here is how the marketing loan gain works. Peanut farmers typically put their crop into a 9 month government loan at harvest, receiving the loan rate of \$355 per ton from USDA and such additional amount from a peanut buyer to make up the total contract price. The farmer then assigns his or her right to redeem the peanuts from the loan to the peanut buyer.

If, after harvest, the Secretary of Agriculture determines that there are more peanuts than the market can handle, the Secretary may reduce the loan repayment rate below \$355 per ton. If, for example, the Secretary sets the loan repayment rate at \$325 per ton, the peanut buyers, under the assignments received from the farmers, will redeem the peanuts from storage at the lower rate, reduce their sales price, increase sales to peanut users, and thus clear the market.

Unfortunately for the farmers, however, the \$30 dollar difference is a “marketing loan gain” that goes against a farmer’s \$125,000 per person limit on peanut payments. Indeed, if a farmer has sold enough peanuts that are then redeemed at the lower price, marketing loan gains may use up the farmer’s payment limit.

And here is the rub. The \$125,000 peanut payment limit is a combined limit for marketing loan gains and PLC payments. The PLC payment on the 2014 crop will not be made until October of 2015. By that time, if the loan repayment rate has been reduced, the farmer’s payment limit may have been used up, and the farmer will receive no PLC payment.

The irony is that the high PLC payments that encouraged farmers to plant more peanuts may not ever get to those farmers. The peanut apocalypse may not occur. But if it does, expect lower peanut prices and reduced PLC payments. See recent article from the Miami Herald on this issue at the following link: <http://www.miamiherald.com/2014/06/05/4160532/peanut-growers-worry-about-unintended.html>

FARM PROGRAM REGULATIONS NOT EXPECTED UNTIL AT LEAST DECEMBER

Secretary of Agriculture Vilsack has stated recently that the Farm Service Agency regulations implementing the new Agriculture Risk Coverage and Payment Loss Coverage programs will not be issued until the end of the year. USDA has not set the date for making an election between the ARC and PLC programs, but, according to Vilsack, that date will not likely be until sometime after harvest.

FSA has just sent out its first informal guidance to its County Offices on the new farm programs. The following is a link to that document: http://www.fsa.usda.gov/Internet/FSA_Notice/arcplc_3.pdf.

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NEW PAYMENT LIMITATIONS HANDBOOK

The Farm Service Agency has issued its updated Payment Limitations Handbook, 5-PL. This handbook provides guidance on the rules that govern eligibility for farm program payments and limits on those payments. 5-PL does not appear to contain many changes from the prior handbook, 4-PL. 5-PL may be read online at: http://www.fsa.usda.gov/Internet/FSA_File/5-pl_r00_a01.pdf. A summary of payment limitation requirements can be found at: http://www.fsa.usda.gov/Internet/FSA_Notice/pl_260.pdf. These requirements include the actively engaged in farming, significant contribution, commensurate interest, and at risk rules that applied under the 2008 Farm Bill and continue to apply under the new Farm Bill.

DO FAMILY MEMBERS HAVE TO SATISFY THE ACTIVELY ENGAGED RULES?

The Farm Bill contains a requirement that the Secretary of Agriculture publish a regulation that defines “active personal management” for payment limitations purposes. Active personal management is one of the significant contribution rules. USDA has not yet published this regulation, but when it does, there may be changes to 5-PL on that one eligibility requirement.

Some people have suggested that the active personal management regulation will grant farming operations consisting solely of family members an exemption from complying with all of the actively engaged in farming rules, including all the “significant contribution” rules and the “commensurate interest” and “at risk” rules. This is not correct.

Section 1604 of the new Farm Bill requires USDA to publish regulations defining a “significant contribution of active personal management,” and the last sentence of Section 1604 states that “the Secretary shall not apply the regulations . . . to individuals or entities comprised solely of family members” However, this limitation applies only to active personal management and not to the other actively engaged in farming rules.

Also, it is unclear what exactly this sentence means. The term “entities” has typically been used by USDA to refer to limited liability companies, corporations, and limited partnerships but not to general partnerships. If USDA maintains this definition, the active personal management family exemption would apply to family members within a limited liability company, corporation, or limited partnership but not to family members within a general partnership. This would essentially leave the active personal management requirement the same for general partner family members as it was under the old farm bill.

We will have to wait for the regulations to know what approach USDA takes. In any event, the other actively engaged rules, including significant contribution of active personal labor, will still apply. It is possible that if a family member doesn’t have to meet the management requirements, he or she will nevertheless have to satisfy the active personal labor requirements.

Again, we will need to see what the USDA regulations say. The statute requires that the regulations be published within 180 days of the enactment of the Farm Bill, but the Secretary has already said they will be late. Also, these new regulations will not be effective until the 2015 crop year.

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OLSON AG LAW PRACTICE AREAS

Most of you know that I do a lot of work on farm program matters including payment limitations planning, USDA administrative appeals and federal litigation. You may not know that my practice also includes the following:

- Water Law
- Crop insurance arbitration and litigation.
- Conservation easement planning and drafting.
- Perishable Agricultural Commodities Act litigation.
- Farm finance planning and litigation.
- Chapter 12 farm bankruptcies.
- Farm transition (estate) planning.
- Representation of farmers in commercial disputes including landlord tenant matters.
- Advice and representation on other specialized areas of agricultural law.

Please give me a call if you think I may be able to help you with any of these matters.

Disclaimer: All of the information provided in this Update is of a general nature and may not be applicable to your farming operation, transaction or dispute. This information should not be substituted for advice from a competent attorney who is familiar with the specific facts of your case, transaction or situation.