

Olson Ag Law Update

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This issue of the Olson Ag Law Update discusses the likely termination of the direct and countercyclical payment programs in the next farm bill and the implications for farm subsidies, farm leasing, payment limitation planning and farm structuring. It also discusses other planning issues that farmers should consider as they address farm program changes.

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Farm Program Developments

The current farm bill has one more year to go, expiring at the end of 2012. But, the next farm bill may well be written, at least in part, by the end of this year. The new “super committee,” charged with finding by November \$1.2 trillion in deficit reductions over 10 years, appears ready to take a hard look at reducing agricultural subsidies.

However, given the current political climate, it is possible that the super committee may not be able to reach an agreement on how to achieve the \$1.2 trillion reduction. In such event, the Budget Control Act requires that cuts be imposed across the board on all programs except for certain social and entitlement programs including Medicare, Social Security and food stamps. This process, known as sequestration, would reduce the funding for existing farm programs by approximately \$15.6 billion. How that funding cut would be allocated amongst specific farm programs would be left to the next farm bill to be enacted in 2012 or perhaps 2013.

Some farm groups are rapidly coming to the conclusion that under either scenario, super committee agreement or sequestration, **the direct and countercyclical programs are likely dead**. The questions then become when the programs will be terminated and whether the DCP monies can be directed to other new or existing programs.

The **National Cotton Council** recently threw in the towel on DCP payments and has proposed in their place a **new revenue based crop insurance program** that “would provide an effective tool for growers to manage that portion of their risks for which affordable options are not currently available.” This policy would be subsidized like other crop insurance policies.

The Council also has proposed a **modified marketing loan** that would be adjusted to satisfy the holdings of the Brazil WTO case. The NCC argues that this is necessary to “remove the threat of imminent retaliation against exports of U.S. goods, services and intellectual property.”

The **National Corn Growers Association** supports legislation recently introduced by Senators Brown, Thune, Durbin and Lugar. Like the NCC proposal, this legislation would eliminate direct and countercyclical payments and would also eliminate the SURE crop disaster program. These programs would be replaced with a restructured ACRE program called the **Aggregate Risk and Revenue Management program or ARRM**.

ARRM would be a revenue guarantee program but, unlike ACRE, would be elected annually and would be based on planted acres. Revenue guarantees would be calculated on a five year Olympic average within crop reporting districts rather than on a statewide basis. ARRM payments are designed to cover losses not compensated by crop insurance and would be capped at 15% of the farm revenue guarantee. ARRM is estimated to save the government approximately \$19.8 billion over 10 years as compared to current programs.

The President has recently sent a \$4.4 trillion deficit reduction plan to Congress. This plan includes \$33 billion in savings from farm programs. The Administration proposes to eliminate direct but not countercyclical payments, reduce crop insurance subsidies, and reduce

conservation program funding. **The proposal would cut crop insurance subsidies by about \$8 billion.** This reduction, if enacted, might limit the effectiveness of the NCC and ARRM proposals.

There will likely be other farm program proposals thrown on the table before any final decision is made. Modifications of current proposals are also likely. The common thread, however, in these proposals is the elimination of the DCP programs.

Implications of Doing Away with DCP

Doing away with the direct and countercyclical payment programs will certainly reduce farm subsidies. It will have other consequences for farmers as well, some of which may be beneficial.

First, abolishing DCP will likely make “base acres” and “established yields” irrelevant. Payments under a new revenue guarantee program, whether like ARRM or in the form of improved crop insurance policies, will be calculated on planted acres and actual production, not on base acres and established yields. This could have a leveling effect on land rents. Cropland will not rent for more simply because it has more base or a certain type of base. It will only justify higher rents if it is better land. Since revenue payments are based on actual production, landlords may have more incentive to rent their land reasonably because there will no longer be payments that they can collect by letting the land lay fallow.

Second, if DCP goes away so will restrictions on what crops can be grown on certain land. Under ARRM, eligibility for revenue guarantee payments would not be lost by growing fruits and vegetables on land formerly devoted to commodity crops although fruits and vegetables themselves may not be covered under ARRM. Under the DCP program, not only payments but base acres could be lost by growing prohibited crops.

Third, planning to maximize farm program payments may become much easier. Many large farming operations have more partners than they would otherwise prefer in order to maximize the DCP payments the operation receives. These operations could shed partners and simplify their bookkeeping and farm program compliance activities.

Payment limits may still be relevant for conservation payments, but generally speaking most farms do not need that many limits to maximize conservation payments. Also, conservation payments are likely to be reduced in the new farm bill.

The Adjusted Gross Income limitations are likely to remain in effect but addressing these limitations rarely involves adding new partners. At most, one partner without an AGI problem will be substituted for one who exceeds those limits. Also, AGI limits have never applied to crop insurance payments in the past and are not likely to be applied to any new crop revenue insurance products.

So far I have heard no discussion about imposing a payment limitation on loan deficiency payments and marketing loan gains or about abolishing the separate limit for peanuts. However,

should either of those things occur in a new farm bill, payment limitation planning may retain some of its current importance.

But as always, the devil is the details, and the specific language of any bill enacted to do away with DCP and replace it with some other program or programs will have to be studied carefully before we will fully understand the effects of the new legislation.

Restructuring Your Farm and Planning for the Future

All farmers should review their farm structure as soon as possible after the new farm bill is enacted to make sure they can receive whatever farm program benefits are available under the new law. It may be advisable for some farmers to start the farm planning process at the end of this year to make sure they are ready to address farm bill changes when they are eventually enacted.

This would be a good time to address other farm planning matters as well. Every farmer should address the following questions on a regular basis:

- Is my tax house in order or do I need to talk to my accountant about minimizing taxes, or, alternatively, about paying some tax now to avoid a large tax bill in the future?
- Is my farming structure, i.e., partnership, corporation, limited liability company, sole proprietorship, etc., set up properly for both tax and farm program purposes.
- Is my farm structured so as to limit my liability against large tort claims caused by the negligence of my employees, and do I have enough insurance?
- Do I have a plan for transferring my farming operation or farm assets to the next generation, either before or after my death, and, if so, do I have the proper documents in place, i.e., wills, trusts, limited partnerships, deeds, etc., to carry out my plan?
- Have I talked to my attorney, my accountant, my insurance agent and, most importantly, my spouse and children about my farm transition plan?

Good planning can avoid a myriad of problems down the road and is always much less expensive than trying to solve problems after they occur. Please let me know if I can be of assistance in helping you address any of these planning issues.

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:

- **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 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.