



**Agricultural Law Press**

Publisher/Editor

Robert P. Achenbach, Jr.

Contributing Editor

Dr. Neil E. Harl, Esq.

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**Issue Contents**

**Federal Agricultural Programs**

Conservation Reserve Program **98**

Cotton **98**

Imports/exports **98**

**Federal Estate and Gift Taxation**

Alternative valuation date **98**

Split-dollar life insurance **98**

Trusts **98**

**Federal Income Taxation**

Accounting method **98**

Disaster losses **98**

Discharge of indebtedness **99**

Electricity production credit **99**

Health savings accounts **99**

Interest rates **99**

Returns **99**

S Corporations

Built-in gains **99**

Tax shelters **99**

Theft loss **100**

**Negligence**

Employer liability **100**

# Agricultural Law Digest

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## Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 (the 2008 Farm Bill)

-by Neil E. Harl\*

After a series of delays, a Presidential veto, the discovery that one of the titles in the bill had been inadvertently omitted in the enrolled bill that had been forwarded to the White House and votes in the House of Representatives and Senate to override the veto (by a comfortable margin in both houses), the 2008 farm bill appears close to becoming law, if it is not already Law as to the original enrolled version.

In this issue of the *Digest* we are providing a summary of the major provisions in the lengthy bill.

### Tax Provisions

#### CRP "fix"

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

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

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

#### Conservation contributions

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

#### Expenses for endangered species recovery

The legislation provides for a deduction under I.R.C. § 175 for expenditures incurred for endangered species recovery. The Act refers to ". . . expenditures paid or incurred for the purpose of achieving site-specific management actions recommended in recovery plans approved pursuant to the Endangered Species Act of 1973." **Act § 15303(a)(1), amending I.R.C. § 175(c)(1).**

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

**The next  
issue of the  
Digest will be  
published on  
July 5.**

Qualified timber gains

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

Timber REITS

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

Qualified tax credit bonds

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

Cellulosic biofuel credit

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

Ethanol credit

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

Ethanol tariff

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

Agricultural bonds

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

Like-kind exchange for mutual ditch, reservoir or irrigation company stock

The legislation allows like-kind exchange treatment for exchanges involving mutual ditch, reservoir or irrigation company stock which are under I.R.C. § 501(c)(12)(A) *provided* the stock has been recognized by the state’s highest court as representing real property or interests in real property. **Act § 15342(a), adding I.R.C. § 1031(i)**

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

Agricultural chemicals security credit

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

Race horses

The legislation specifies that “any race horse” placed in service before January 1, 2014, is classified as three year property for depreciation purposes and race horses placed in service after

December 31, 2013 if more than two years old at the time the horse is placed in service by the purchaser. **Act § 15344(a), amending I.R.C. § 168(e)(3)(A)(i).**

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

Temporary relief for Kiowa County, Kansas and surrounding area

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

Limitation on excess farm losses

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

The provision is effective for taxable years beginning *after* December 31, 2009. **Act § 15351(b).**

Modification of the optional method of computing net earnings from self-employment

For many years, a farmer on the cash or accrual methods of accounting has been allowed to compute net earnings from self-employment in the regular manner or to use an optional method based on *gross* income to compute earnings from self-employment for social security purposes. See 2 Harl, *Farm Income Tax Manual* § 8.05[19] (2007 ed.). In effect, this guarantees some self-employment income in years when earnings from the farming operation are low or negative. Under the rules as they have existed for several years, if gross income is \$2400 or less, a farmer could report two-thirds of gross income as self-employment income. If gross income is more than \$2400 and net earnings from self-employment are less than \$1600, a farmer could report \$1600 as self-employment income. The figures have not been adjusted for inflation.

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

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

Information reporting on CCC transactions

The Internal Revenue Service had steadfastly refused to require Form 1099 (information) reporting for gains from payment of Commodity Credit Corporation loans with generic commodity certificates, a favorite way to avoid farm program payment limitations, until publication of *Notice 2007-63* in July of 2007, with required reporting of such gains effective January 1, 2007.

The 2008 legislation requires such information reporting for all CCC loans repaid on or after January 1, 2007, regardless of

the manner in which the loan was repaid. **Act § 15353, enacting I.R.C. § 6039J.**

Protection of social security

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

**Availability of Direct Payments**

Payment required

For each of the 2008 through 2012 crop years, direct payments are to be made on farms for which base acres and payment yields are established. **Act § 1103(a).**

Payment rate

The payment rate used to make direct payments with respect to covered commodities (other than pulse crops) are specified – wheat (52 cents per bushel); corn (28 cents per bushel); grain sorghum (35 cents per bushel); barley (24 cents per bushel); oats (2.4 cents per bushel); upland cotton (6.67 cents per pound); long-grain rice (\$2.35 per hundredweight); medium grain rice (\$2.35 per hundredweight); soybeans (44 cents per bushel); and other oilseeds (80 cents per hundredweight). **Act § 1103(b).**

Payment amount

The payment amount is the payment rate times the payment acres times the payment yield. **Act § 1103(c).**

Time for payment

The time for payment cannot be before October 1 of the year in which the crop of the covered commodity is harvested but advance payments are authorized (22 percent of the direct payment for the covered commodity for any of the 2008 through 2011 crop years) with repayment of advance payments if the producer becomes ineligible. **Act § 1103(d).**

**Availability of Counter-Cyclical Payments**

Payment required

Counter-cyclical payments are authorized if the effective price for the commodity is less than the target price for the covered commodity. Except for rice, the “effective price” for a covered commodity is the higher of the national average market price received by producers during the 12-month marketing year for the covered commodity or the national average loan rate for the covered commodity in effect plus the payment rate in effect for direct payments. For rice the calculations are based on the type or class of rice. **Act § 1104(a), (b).**

Target price

For the 2008 crop year, the target prices are – wheat (\$3.92 per bushel); corn (\$2.63 per bushel); grain sorghum (\$2.57 per bushel); barley (\$2.24 per bushel); oats (\$1.44 per bushel); upland cotton (\$0.7125 per pound); long-grain rice (\$10.50 per hundredweight); medium grain rice (\$10.50 per hundredweight); soybeans (\$5.80 per bushel); and other oilseeds (\$10.10 per hundredweight).

For the 2009 crop year, the target prices are the same as for 2008 except for the addition of dry peas (\$8.32 per hundredweight); lentils (\$12.81 per hundredweight); small chickpeas (\$10.36 per hundredweight) and large chickpeas (\$12.81 per hundredweight).

For subsequent crop years (2010 through 2012 crop years) the target prices are – wheat (\$4.17 per bushel); corn (\$2.63 per bushel);

grain sorghum (\$2.63 per bushel); barley (\$2.63 per bushel); oats (\$1.79 per bushel); upland cotton (\$0.7125 per pound); long-grain rice (\$10.50 per hundredweight); medium-grain rice (\$10.50 per hundredweight); soybeans (\$6.00 per bushel); other oilseeds (\$12.68 per hundredweight); dry peas (\$8.32 per hundredweight); lentils (\$12.81 per hundredweight); small chickpeas (\$10.36 per hundredweight); and large chickpeas (\$12.81 per hundredweight).

**Act § 1104(c).**

Payment rate

The payment rate used to make counter-cyclical payments is the difference between the target price and the “effective price” as described above in Section 1104(b). **Act § 1104(d).**

Payment amount

If counter-cyclical payments are required to be paid, the payments are to equal to the payment rate times the payment acres times the payment yield. **Act § 1104(e)**

Time for payment

Counter-cyclical payments are to be made after the end of the marketing year for the covered commodity with an option for producers to receive partial payments on a projected basis. **Act § 1104(f).**

**Availability of Marketing Assistance Benefits**

Non-recourse marketing assistance loans

Subject to cross-compliance rules for conservation requirements, non-recourse marketing assistance loans are available for loan commodities produced on the farm. **Act § 1201.**

Loan rates for non-recourse marketing assistance loans

For the 2008 crop year, the loan rates are – wheat (\$2.75 per bushel); corn (\$1.95 per bushel); grain sorghum (\$1.95 per bushel); barley (\$1.85 per bushel); oats (\$1.33 per bushel); base quality of upland cotton (\$0.52 per pound); extra long-staple cotton (\$0.7977 per pound); long-grain rice (\$6.50 per hundredweight); medium grain rice (\$6.50 per hundredweight); soybeans (\$5.00 per bushel); other oilseeds – sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed and other seeds designated by the Secretary (\$9.30 per hundredweight). For dry peas, the loan rate is \$6.22 per hundredweight, for lentils the figure is \$11.72 per hundredweight, for small chickpeas, \$7.43 per hundredweight, for graded wool, \$1.00 per pound, non-graded wool, \$0.40 per pound, mohair, \$4.20 per pound and for honey, \$0.60 per pound.

For the 2009 crop year, the rates are the same as for 2008 except for dry peas (\$5.40 per hundredweight) and lentils (\$11.72 per hundredweight).

For 2010 through 2012 crop years, the loan rate is \$2.94 per bushel for wheat, \$1.95 for corn and grain sorghum, \$1.95 per bushel for barley, \$1.39 for oats, 52 cents per pound for base quality of upland cotton, \$0.7977 per pound for extra long staple cotton, \$6.50 per hundredweight for long-grain rice and medium grain rice, \$5.00 per bushel for soybeans and \$10.09 per hundredweight for other oilseeds (sunflower, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed and other designated oilseeds). The rate for small chickpeas is \$5.40 per hundredweight, \$11.28 for lentils, small chickpeas \$7.43, large chickpeas \$11.28, graded wool \$1.15 per pound, non-graded wool \$0.40 per pound, mohair \$4.20 per pound and honey \$0.69 per pound. **Act § 1202.**

Term of the loan

The term of the loan is nine months beginning on the first day

of the first month after the month in which the loan is made and cannot be extended. **Act § 1203.**

#### Repayment of the loan

Except for upland cotton, long-grain rice, medium grain rice, extra long-staple cotton and confectionary and any other kind of sunflower seed (other than oil sunflower seed), the loan can be repaid at a rate less than the loan rate plus interest, calculated using average market prices for the commodity during the preceding 30-day period. For upland cotton, long-grain rice and medium grain rice, the formula for repayment is to use the prevailing world market price. For long-staple cotton, the repayment rate is set by the Federal Agriculture Improvement and Reform Act of 1996, section 163. For confectionary and other kinds of sunflower seeds, the repayment rate is set at the loan rate plus interest or “the repayment rate established for oil sunflower seed.”

For the 2008 through 2011 crop years, storage costs are to be paid for cotton at the same rates as for the 2006 crop, reduced by 10 percent. In subsequent years, the reduction is 20 percent. **Act § 1204.**

#### Loan Deficiency Payments

##### Availability

Loan deficiency payments (LDPs) can be made to producers, even though the producer is eligible for a marketing assistance loan. However, loan deficiency payments may be made for unshorn pelts, hay and silage, which are not eligible for a marketing assistance loans. **Act § 1205(a).**

##### Amount of payment

The payment rate is figured for all eligible program commodities (other than extra long-staple cotton) by multiplying the loan rate by the amount of the commodity not placed under a marketing assistance loan. The payment rate is the excess of the loan rate over the rate at which a marketing assistance loan may be repaid with special rules for unshorn pelts, hay and silage.

The payment is calculated as of the date the producer requests the payment. **Act § 1205(b),(c)(d),(e)**

##### Payments in lieu of LDPs

For the 2008 through 2012 crop years, for producers who would be eligible for an LDP on wheat, barley or oats, but elects to use the acreage for livestock grazing, a payment can be made under agreement with the Secretary if the producer agrees to forego any other harvesting. Similar rules apply to triticale acreages. **Act § 1206(a),(b).**

#### Special Marketing Loan Provisions for Cotton

Special marketing loan program provisions apply to upland cotton based on an import-quota program. For extra long-staple cotton, special competitiveness provisions apply with payments made to *domestic users* of extra long-staple cotton. **Act §§ 1207, 1208**

#### Recourse Loans for High Moisture Feed Grains and Seed Cotton

For the 2008 through 2012 crop years, recourse loans are available for corn or grain sorghum having a moisture content in excess of Commodity Credit Corporation standards for producers who normally harvest all or a portion of their crop of corn or grain sorghum in a high moisture state.

Recourse loans for seed cotton are available for 2008 through 2012 crops of upland cotton and extra long-staple cotton on any production. **Act § 1209.**

#### Constructive Receipt

The legislation continues the practice of providing protection

from constructive receipt for advance payments which was commenced with the 1996 farm bill and continued in the 2002 farm bill.

Under the 2008 provision, advance payments of direct payments and counter-cyclical payments under the Food, Conservation, and Energy Act of 2008 are not subject to treatment as being constructively when made available to the producer; such payments are generally taxable on receipt. **Act § 1601(e), amending 7 U.S.C. § 7991(d)**

#### Payment Limitations

##### Limitation on payments

The limit on direct payments under the Act is \$40,000 per person (for those not participating in the “average crop revenue election” program). The limit on counter-cyclical payments is \$65,000, again for those not participating in the ACRE program. There is no longer a limit on marketing assistance benefits. **Act § 1603(b), amending 7 U.S.C. § 1308.**

##### Meaning of “person”

The 2008 Act changes the definition of “person” to mean a natural person *and does not include a legal entity*. All payments are deemed attributed to a natural person, taking into account direct and indirect ownership interests. Payments to a legal entity are to be attributed to those persons who have a direct or indirect ownership interest in the legal entity.

Payments made to a joint venture or general partnership cannot exceed the amount determined by multiplying the maximum payment amount by the number of persons and legal entities comprising the ownership of the joint venture or general partnership. Thus, those joint ventures and general partnerships *are not subject to the attribution rules applicable to other types of entities*.

The attribution of ownership in other types of legal entities is traced through four levels of ownership.

For marketing cooperatives, the attribution rules do not apply to the cooperative association of producers but apply to the producers as persons.

Payments made to children under the age of 18 are attributed to the parents of the child.

Revocable trusts are considered to be the same person as the grantor of the trust. For irrevocable trusts and estates, the Secretary is to administer the rules in a manner that will “. . . ensure the fair and equitable treatment of the beneficiaries of the trusts and estates.” **Act § 1603(b), amending 7 U.S.C. § 1308(a)(4)**

##### Cash rent tenants

The payment limitation rules define a cash rent tenant as a person or legal entity that rents land for cash or “. . . for a crop share guaranteed as to the amount of the commodity to be paid in rent.” The provision goes on to state that a “. . . cash rent tenant who makes a significant contribution of active personal management, but not of personal labor, with respect to a farming operation shall be eligible to receive a payment . . . only if the tenant makes a significant contribution of equipment to the farming operation.” **Act § 1603(b).**

##### Federal agencies

The legislation states that a “Federal agency” is not eligible to receive any payment, benefit or loan under Title I (commodity programs) or Title XII (crop insurance and disaster assistance) of the 2008 farm bill. However, a lessee of land owned by a Federal

agency may receive payments. **Act § 1603(b).**

State and local governments

Under the Act, “a State or local government, or political subdivision or agency of the government, shall not be eligible to receive any payment, benefit, or loan . . .” under Title I (commodity programs) or Title XII (crop insurance and disaster assistance) of the 2008 farm bill. Again, a lessee of land owned by a State or local government or political subdivision or agency of the government may receive payments. **Act § 1603(b).**

Changes in farming operations

Changes will not be approved in a farming operation unless the changes are “bona fide and substantive.” The addition of a family member to a farming operation is considered a bona fide and substantive change.

If an ownership interest in land or a commodity is transferred as the result of the death of a program participant, the new owner may, if eligible to participate, succeed to the contract of the prior owner and receive payments without regard to the payments received by the new owner. However, payments may not exceed the amount the prior owner was entitled to receive under the terms of the contract at the time of death of the prior owner. **Act § 1603(b).**

Public schools

A special rule applies to public schools owned by a unit of government. A State or local government, or political subdivision or agency of government, is eligible to receive a payment for land owned by the State or local government, or political subdivision or agency of the government, that is used to maintain a public school. However, except for states with a population of less than 1,500,000, a State cannot receive more than \$500,000. That limitation presumably applies to payments received each year. Apparently, states with a population of less than 1,500,000 do not face a limitation on payments. **Act § 1603(b), amending 7 U.S.C. § 1308(a).**

Repeal of the “three-entity” rule

The Act repeals the so-called three-entity rule which limited the number of entities through which an individual could receive program payments. Under the three-entity rule, an individual who received payments as an individual could not receive payments from more than two entities. An individual did not receive payments as an individual could receive payments from up to three entities. Individuals who could potentially receive payments from more than the allowed number of entities were required to designate from which entities they would receive payments. **Act § 1603(c), amending 7 U.S.C. § 1308-1.**

Changes in the “actively engaged” rule

The legislation makes minor changes in the “actively engaged” requirement for payment eligibility.

In order to receive payments, under the new language, a person is considered to be actively engaged in a farming operation if (1) the person makes a significant contribution (based on the total value of the farming operation) to the farming operation of (a) capital, equipment or land; and (b) personal labor or active personal management; (2) the person’s share of the profits or losses from the farming operation is commensurate with the contributions of the person to the farming operation; and (3) the contributions of the person are at risk.

A legal entity is considered to be actively engaged in a

farming operation if – (1) the legal entity separately makes a significant contribution (based on the total value of the farming operation) of capital, equipment or land; (2) the stockholders or members collectively make a significant contribution of personal labor or active personal management to the operation and (3) the entity’s share of the profits or losses from the farming operation is commensurate with the contributions of the entity to the farming operation; and (4) the contributions of the entity are at risk.

The legislation recognizes six *special classes* of producers for the actively engaged test – (1) for *landowners*, a contribution of owned land is considered to meet the actively engaged in farming operation test if the returns from the land are based on the production on the land, the shares of profits or losses are commensurate with the contributions to the farming operation and the contributions are at risk; (2) for an *adult family member*, if a majority of the participants in a farming operation are family members, an adult family member is considered to be actively engaged in the farming operation if the adult family member makes a significant contribution, based on the total value of the farming operation, of active personal management or personal labor, the shares of profits or losses are commensurate with the contributions to the farming operation and the contributions are at risk; (3) for a *sharecropper*, a significant contribution of personal labor is considered to be actively engaged in farming with respect to the farming operation if the share of profits or losses is commensurate with the contributions to the farming operation and the contributions are at risk; (4) for *growers of hybrid seed*, the existence of a hybrid seed contract is not taken into consideration; (5) for *persons or entities receiving custom farming services*, the test is met if the general requirements for actively engaged are met or the landowner, adult family member, sharecropper or grower of hybrid seed requirements are satisfied – and *no other rules with respect to custom farming shall apply*; and (6) if one *spouse or estate of a deceased spouse* is determined to be actively engaged, the other spouse is considered to have met the requirements.

The 2008 legislation identifies two situations of persons who are not considered to be actively engaged – (1) a *cash rent landlord* if the landlord receives cash rent or a crop share guaranteed as to the amount of the commodity to be paid in rent and (2) *other persons* who fail to meet the standards for actively engaged. **Act § 1603(d), amending 7 U.S.C. § 1308-1.**

Adjusted gross income limitation

A person or legal entity is not eligible to receive any farm program benefits if the average adjusted non-farm income of the person or entity exceeds \$500,000. The calculation involves the last three preceding taxable years.

Moreover, a person or legal entity is not eligible to receive a *direct* payment during a crop year if the average adjusted gross farm income of the person or legal entity exceeds \$750,000.

The benefits impacted by the two rules include direct payments, counter-cyclical payments, marketing loan gains, loan deficiency payments, a payment or benefit under Section 196 of the 1996 farm bill, a payment or benefit under Section 1506 of the 2008 farm bill (the milk income loss contract program), and a payment or benefit under Title IX of the Trade Act of 1974 or subtitle B of the Federal Crop Insurance Act. **Act § 1604(a), amending 7 U.S.C. § 1308-3a(e)**

Conservation program limits

For an array of conservation benefits, a person or legal entity is

not eligible to receive benefits if average adjusted nonfarm income of the person or entity exceeds \$1,000,000 unless not less than 66.66 percent of the average adjusted gross income of the person or entity is average adjusted gross farm income. Those limitations can be waived if it is determined that “environmentally sensitive land of special significance” would be protected. **Act § 1604(a), amending 7 U.S.C. § 1308-3a(e)**

#### Storage Facility Loans

##### Loan availability

The 2008 legislation authorizes storage facility loans for constructing or upgrading storage facilities for grains, oilseeds, pulse crops, hay, renewable biomass and other storable commodities (other than sugar). **Act § 1614(a).**

##### Eligible producers

To be eligible for storage loans, a producer must have a satisfactory credit history, a need for increased storage capacity and a demonstrated ability to repay the loan. **Act § 1614(b).**

##### Term and amount of loans

The maximum term of storage facility loans is 12 years with a maximum principal amount of \$500,000. **Act § 1604(c), (d).**

#### Geographically Disadvantaged Farmers and Ranchers

The 2008 farm bill authorizes payments to geographically disadvantaged farmers and ranchers (mainly Hawaii and Alaska) for the amount of extra costs incurred for transporting agricultural commodities or inputs. The total amount of direct reimbursement payments is not to exceed \$15,000,000 for a fiscal year. **Act § 1621.**

#### Conservation Provisions

##### Ineligibility for benefits, payments and loan

The legislation states that a person will not become ineligible for benefits, payments or loans as a result of failure of the person actively to apply a conservation plan if it is determined that the person acted “in good faith and without an intent to violate” the statutes. **Act § 2002, amending 16 U.S.C. § 3812.**

##### The conservation reserve program

The farm bill extends the conservation reserve program (CRP) for five years, through the 2012 fiscal year. **Act § 2101, amending 16 U.S.C. § 3831(a).**

The maximum enrollment for fiscal years 2010, 2011 and 2012 is set at 32,000,000 acres in the CRP at any one time. **Act § 2103, amending 16 U.S.C. § 3831(d).**

For purposes of the CRP, alfalfa and other legumes and multi-year grasses in a rotation practice are considered agricultural commodities. Alfalfa, grown in rotation, is an agricultural commodity for the purpose of determining whether highly erodible cropland has been planted or considered planted for the four of the six years requirement. **Act § 2105, amending 16 U.S.C. § 3831.**

A new section has been added authorizing a pilot program in each state for enrollment of wetland and buffer acreage in CRP. The pilot program is limited to a maximum of 1,000,000 acres with no more than 100,000 acres in any one state. **Act § 2105(a), (c), adding Section 1231(b) to the Food Security Act of 1985.**

The legislation adds a new item to the duties of participants under CRP contracts. Participants in the program are “to undertake management on the land as needed throughout the term of the contract to implement the conservation plan.” **Act § 2107, amending 16 U.S.C. § 3832(a).**

The 2008 legislation restates the prohibitions on use of CRP land and adds provisions on what can be permitted on land enrolled in the conservation reserve program – (1) managed harvesting (including the managed harvesting of biomass); (2) harvesting or grazing or other commercial use of the land in response to a drought or other emergency; (3) routine grazing or prescribed grazing for the control of invasive species; and (4) the installation of wind turbines under specified conditions. The legislation also provides for a rental payment reduction for authorized uses of CRP land. **Act § 2108(a), (b), amending 16 U.S.C. § 3832(a), (b).**

The farm bill provides for 50 percent cost sharing payments for the reasonable and necessary costs incurred by the owner or operator for maintaining trees or shrubs for windbreaks, shelterbelts and wildlife corridors including trees and shrubs lost due to conditions beyond the control of the owner or operator or because of thinning. **Act § 2109, amending 16 U.S.C. § 3834(b).**

#### Wetlands Reserve Program

##### Enrollment

The 2008 law extends the program through fiscal year 2012, sets the maximum enrollment for the wetlands reserve program at 3,041,200 acres and authorizes acreage to be enrolled that is owned by Indian Tribes. **Act §§ 2202, amending 16 U.S.C. § 3837(b), and 2203, amending 16 U.S.C. § 3837(c).**

The Act expands the determination of length of easement to encompass meeting the habitat needs of wildlife species. For easements valued at \$500,000 or less, the easement payments may continue for not more than 30 annual installments. For easements of more than \$500,000, the payments may be in lump sum or may run from five to 30 years. Restoration cost-share agreements may include compensation of up to \$50,000 per year. **Act § 2205, amending 16 U.S.C. § 3837a.**

The legislation authorizes a wetlands reserve enhancement program and a pilot reserved rights program. The latter runs through 2012 and involves reservation of grazing rights on the wetlands area so long as the grazing is compatible with the land subject to the wetlands easement, the reserved grazing rights are consistent with long-term wetlands protection and enhancement goals and the reserved rights comply with a conservation plan. **Act § 2206, amending 16 U.S.C. § 3837a.**

The legislation also repeals the payment limitations exception for state agreements for wetlands reserve enhancement. **Act § 2209, amending 16 U.S.C. § 3837d(c).**

#### Conservation Stewardship Program

##### Nature of the program

The new program, running from fiscal year 2009 through fiscal year 2012, involves a “stewardship contract” entered into for a term of five years (with a renewal for one additional five year period) that demonstrates that the producer, at the time of the contract offer, is meeting the “stewardship threshold” for at least one “resource concern” and would meet or exceed the stewardship threshold for at least one *priority* resource concern by the end of the stewardship contract. That would involve installing and adopting additional conservation activities and improving, maintaining and managing conservation activities at the time of contract acceptance. **Act § 2301(a), (b), amending the Food Security Act of 1985.**

##### Acreage enrollment and payment

The Act specifies that, to the extent practicable, an additional

12,769,000 acres are to be enrolled *for each fiscal year* and the program is to be managed to achieve a national average payment rate of \$18 per acre which is to include all costs of financial assistance, technical assistance and other expenses associated with the program.

Payment are not to be provided for “. . .the design, construction, or maintenance of animal waste storage or treatment facilities or associated waste treatment or transfer devices for animal feeding operations.”

A person or legal entity may not receive more than \$200,000 for all contracts entered into during any five year period.

Land is not eligible that has been enrolled in the conservation reserve program, the wetlands reserve program or the grassland reserve program. **Act § 2301(a), (c), amending the Food Security Act of 1985.**

#### **Farmland Protection Program**

##### Nature of program changes

The Act amends the Farmland Protection Program, limiting nonagricultural uses of land, by providing cost-share assistance for the purchase of conservation easements (or other interests) in eligible land. The entity carrying out the program must provide not less than 25 percent of the acquisition price for the easement or other interest. Conservation plans are required for highly erodible land **Act § 2401(a), amending 16 U.S.C. § 3838h.**

#### **Grassland Reserve Program**

##### Acreage enrollment and payment

The statute specifies that an additional 1,220,000 acres are to be enrolled in the program during fiscal years 2009 through 2012 through the use of 10, 15 and 20 year contracts or imposition of a permanent easement (or, in states limiting the length of easement, the maximum allowed under state law)

The annual rental payments are not to exceed 75 percent of the grazing value of the land with a limit of a maximum of \$50,000 per individual or entity each year. Easement payments are not to exceed the fair market value of the land encumbered by the easement less the grazing value of the land. **Act § 2403, amending 16 U.S.C. § 3838n.**

#### **Environmental Quality Incentives Program**

##### Enrollment and payment

The Act extends the program (which is heavily weighted toward livestock waste management practices) through the 2012 fiscal year with payments to producers that enter into contracts (from one to a maximum of ten years) to participate in the program.

The payments may not exceed 75 percent of the costs associated with planning, design, materials, equipment, installation, labor, management, maintenance or training or 100 percent of the income foregone. Higher payment rates are allowed for socially disadvantaged farmers or ranchers. Payments may not exceed \$20,000 per year for each individual or entity or \$80,000 during any six-year period. Higher limits apply to special environmental significance. **Act § 2503, amending 16 U.S.C. § 3839aa-2.**

#### **Agricultural Water Enhancement Program**

Beginning in fiscal year 2009, an agricultural water enhancement program is to be implemented as part of the environmental quality incentives program to promote ground water and surface water conservation and improved water quality. The program is to be carried out through contracts and by use of partnership agreements with participating organizations and groups.

Payments are to be made that are “appropriate” and that are within the amount of CCC funds allotted for the program -- \$73,000,000 for fiscal years 2009 and 2010, \$74,000,000 in 2011 and \$60,000,000 for 2012 and “each fiscal year thereafter.” **Act § 2510, amending 16 U.S.C. § 3839aa-9.**

#### **Other Conservation Programs**

The legislation extends the Conservation of Private Grazing Land Program through 2012, amends the Wildlife Habitat Incentive Program, extends the Grassroots Source Water Protection Program through 2012, authorizes the Great Lakes Basin Program for Soil Erosion and Sediment Control through 2012, provides authority for the Chesapeake Bay Watershed Program and provides funding through 2012 and creates the Voluntary Public Access and Habitat Incentive Program with funding through 2012. **Act §§ 2601 through 2606.**

#### **Livestock**

##### Mandatory price reporting

An enhanced system of electronic reporting is to be implemented not later than one year after funds have been appropriated. Also, a study is to be made of packer processing plants in terms of the effects on producers and consumers and the effects of a confidentiality requirement for mandatory reporting. **Act § 11001, amending 7 U.S.C. § 1636(g).**

##### Country-of-origin labeling (COOL)

The legislation amends the COOL requirement by specifying that a retailer of a covered commodity that is beef, lamb, pork, chicken or goat meat may designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that was – (1) exclusively born, raised and slaughtered in the United States; (2) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the U.S. and slaughtered in the U.S. or (3) present in the U.S. on or before July 15, 2008 and, once present in the U.S., remained continuously in the U.S.

For animals with multiple countries of origin, the retailer of a covered commodity (beef, lamb, pork, chicken or goat meat) may designate as countries of origin all of the countries “in which the animal may have been born, raised, or slaughtered.”

For animals imported into the U.S. for immediate slaughter, the country of origin is to be listed as the country from which the animal was imported and the U.S.

For ground meat, the notice of country of origin is to list all countries of origin or a list of “all reasonably possible countries of origin. . . .” **Act § 11002, amending 7 U.S.C. § 1638 et seq.**

##### Packers and Stockyards Report

The Secretary of Agriculture is required to submit to Congress, annually, through 2012, a report of investigations into possible violations of the Act. **Act § 11004, amending 7 U.S.C. § 228d and following.**

##### Production contracts

The legislation includes a provision on production contracts giving a poultry grower or a swine production contract grower the right to cancel a poultry growing arrangement or swine production contract within three business days after execution of the contract or any cancellation date specified in the poultry growing arrangement or swine production contract. [Note: could that be one day after execution or the same day of execution?] Such production arrangements must also disclose additional capital

investments which may be required of the grower. These provisions are applicable to any growing arrangement or production contract entered into, amended, altered, modified, renewed or extended after the date of enactment of the farm bill.

The legislation also contains a provision that the forum for resolving any dispute among the parties to a poultry growing arrangement or swine production contract is to be “. . . the Federal judicial district in which the principle [sic] part of the performance takes place under the arrangement or contract.”

Any livestock or poultry contract containing a provision on the use of arbitration to resolve any controversy that may arise under the contract must contain a provision allowing a producer or grower to decline to be bound by the arbitration provision. **Act § 11005, amending 7 U.S.C. § 198 et seq.**

#### Interstate shipments of meat under state inspection

Meats and meat food products in compliance with the State inspection program of the State in which the establishment with no more than 25 employees is located that has been selected to ship carcasses, portions of carcasses and meat items in interstate commerce can display a Federal mark, stamp, tag or label of inspection. The provision is effective on the date that final regulations are published (not later than 18 months after the effective date of the provision). **Act § 11015(a), amending 21 U.S.C. § 601 et seq.**

A separate provision applies to poultry. **Act § 11015(b), amending 21 U.S.C. § 451 et seq.**

#### **Average Crop Revenue Election Program (ACRE)**

##### Nature of the program

The ACRE program is a new approach to providing federal farm program benefits. As an alternative to receiving counter-cyclical payments, and in exchange for a 20 percent reduction in direct payments and a 30 percent reduction in marketing assistance loan rates, producers may make an *irrevocable* election for the 2009 through 2012 crop years, to instead receive average crop revenue election payments. All producers on the farm must make the election for the election to be effective. **Act § 1105(a).**

##### ACRE payments

If the actual State revenue for the crop year for the covered commodity in the State is less than the ACRE program guarantee for the crop year, payments are to be made. The actual State revenue is obtained by multiplying the State yield for each planted acre and the national average market price for the crop year. The actual State yield is the quantity of the commodity produced in the State for the crop year divided by the number of acres that were planted. The national average market price is the greater of the national average market price during the 12-month marketing year or the marketing assistance loan rate.

The ACRE program guarantee for a crop year for a covered commodity equals 90 percent of the product obtained by multiplying the benchmark State yield for each planted acre for the crop year and the ACRE program guarantee price for the covered commodity. If at least 25 percent of the acreage is irrigated and at least 25 percent is non-irrigated, a separate ACRE program guarantee is to be calculated for the irrigated and non-irrigated areas of the State.

The benchmark State yield is the average yield for the commodity in the State for the five most recent crop years, excluding each of the crop years with the highest and lowest yields. If that figure

cannot be established, the Secretary has the authority to assign a benchmark State yield.

The ACRE program guarantee price is the simple average of the national average market price received by producers in a State for the two most recent crop years. Thus, in periods of high commodity prices, as now, the ACRE program is more attractive.

However, the payments are made only if the actual farm revenue for the crop year for the covered commodity is less than the farm ACRE benchmark revenue for the crop year. The actual farm revenue is the actual yield for the covered commodity by the national average market price for the crop year. The farm ACRE benchmark revenue is determined by multiplying the average yield on the farm for the five most recent crop years by the ACRE program guarantee price for the crop year and adding that to the amount of the per acre crop insurance premium required to be paid by the producer for the crop year. **Act, § 1105(b) through (f)**

##### Payment amount

The calculation of the payment amount is fairly complicated and involves several steps –

- Calculate the difference between the ACRE program guarantee for the crop year for the covered commodity *and* the actual State revenue from the crop year for the covered commodity,
- Take the lesser of that figure and 25 percent of the ACRE program guarantee for the crop year for the covered commodity,
- Calculate 83.3 percent of the acreage planted or considered planted to the covered commodity (for the 2009 through 2011 crop years), 85 percent for the 2012 crop year,
- Divide the average yield per planted acre for the covered commodity for the five most recent crop years, excluding the crop years with the highest and lowest yields, by the benchmark State yield for the crop year.

#### **Crop Insurance and Disaster Assistance Programs**

##### Settlement of claims on farm-stored production

At the option of the producer with farm-stored commodities, settlement of a crop insurance claim may be delayed for up to four months after the last date claims may be submitted under the insurance policy. **Act § 12013, amending 7 U.S.C. § 1508(j).**

##### Prohibition on premium adjustments

Under the bill, no premium reductions are to be made on crop insurance policies other than under specified circumstances. **Act § 12004, amending 7 U.S.C. § 1508(a).**

#### **Credit**

##### Conservation loans and loan guarantees

The legislation authorizes conservation loans and 75 percent conservation loan guarantees to farmers or ranchers, farm cooperatives, private domestic corporations, partnerships, joint operations, trusts or limited liability companies “. . . that are controlled by farmers or ranchers and engaged primarily and directly in agricultural production in the United States.” **Act § 5002, amending 7 U.S.C. § 1924.**

##### Farm ownership loans

The figure of \$200,000 is increased to \$300,000 for farm ownership loans. **Act § 5003, amending 7 U.S.C. § 1925(a)(2).**

##### Down payment loans

Down payment loans may not exceed 45 percent of the lesser of (1) the purchase price of the farm or ranch to be acquired, (2) the



appraised value of the farm or ranch to be acquired or (3) \$500,000. The interest rate is obtained by subtracting four percent from the interest rate for farm ownership loans or 1.5 percent. **Act § 5004, amending 7 U.S.C. § 1935.**

Beginning farmer or rancher and socially disadvantaged farmer or rancher contract land sales program

The Act authorizes 10-year guarantees for land contracts to a qualified beginning farmer or rancher or socially disadvantaged farmer or rancher if the buyer is contributing at least five percent of the purchase price and the purchase price is \$500,000 or less. **Act § 5005, amending 7 U.S.C. § 1936.**

Operating loans

The figure of \$200,000 is increased to \$300,000. **Act § 5102, amending 7 U.S.C. § 1943(a)(1).**

Emergency loans

Equine farmers or ranchers are made eligible for emergency loans. **Act § 5201, amending 7 U.S.C. § 1961(a).**

Right of first refusal to reacquire homestead

The legislation extends the right to reacquire homestead property to immediate family members of the borrower-owner as well as socially disadvantaged farmers or ranchers. **Act § 5305, amending 7 U.S.C. § 2000(c)(4)(B).**

**Rural Development**

Grant authority

The legislation extends the authority to make water, waste disposal and wastewater facility grants through 2012. **Act § 6001, amending 7 U.S.C. § 1926(a)(2)(B)(vii).**

Predevelopment planning grants

The Act established a program to make predevelopment planning grants to financially distressed communities in rural areas with populations of 2,500 or fewer inhabitants for water and waste disposal projects. The program is referred to as the Social Evaluation Assistance for Rural Communities and Households (SEARCH). The grants may be made up to 100 percent of the eligible costs. Up to four percent of the funds available for a fiscal year for water, waste disposal and essential community facility activities can be used for the SEARCH program. **Act § 6002, adding 7 U.S.C. § 1926(a)(2)(C).**

Rural business opportunity grants

The authority for rural business opportunity grants is extended through 2012. **Act § 6003, amending § 1926(a)(11)(D).**

Interest rates for water and waste disposal facilities

For direct loans subject to the five percent interest rate limitation, the interest rate is set equal to 60 percent of the current market yield for outstanding municipal obligations with remaining periods to maturity comparable to the average maturity of the loan, adjusted to the nearest 1/8 of one percent. For those loans subject to the seven percent interest rate limitation, the rate is set at 80 percent rather than 60 percent. **Act § 6011, amending 7 U.S.C. § 1927(a)(3).**

**Supplemental Agricultural Disaster Assistance**

Agricultural Disaster Relief Trust Fund

The 2008 Act creates an Agricultural Disaster Relief Trust Fund. Amounts from the Fund are to be used to provide crop disaster assistance payments to eligible producers on a farm in an amount equal to 60 percent of the difference between the disaster assistance program guarantee and the total farm revenue. The disaster assistance program guarantee may not be greater than 90

percent of the sum of expected revenue for each of the crops on the farm. **Act § 15101, amending 19 U.S.C. § 2101.**

Amounts may also be paid from the trust fund for livestock indemnity payments to livestock producers who have incurred death losses in excess of the normal mortality rate due to adverse weather, including losses due to hurricanes, floods, blizzards, disease, wildfires, extreme heat and extreme cold. The payment rates are 75 percent of the market value of the livestock the day before death.

The coverage includes owned, leased, purchased, acquired under a contract of purchase, produced under contract or sold or otherwise disposed of due to a qualifying event during the current production year or one or both of the two production years preceding the current production year. Coverage does not extend to livestock that were or have been in a feedlot “. . . on the beginning date of the qualifying drought or fire condition . . . “ as part of the normal business operation of the livestock producer. The legislation excludes an owner, cash or share rent lessee or contract grower of livestock who rents or leases pastureland or grazing land owned by another person on a rate-of-gain basis.

A livestock producer may receive assistance for grazing losses for covered livestock that occur on land (other than CRP land) that is native or improved pastureland with permanent vegetative cover or is planted to a crop planted specifically for the purpose of providing grazing for covered livestock.

The payment rate for assistance is, in the case of drought, set at 60 percent of the lesser of the monthly feed cost of all covered livestock owned or leased by the producer or the monthly feed cost calculated using the normal carrying capacity of the of the eligible grazing land of the producer. **Id.**

Limitations on assistance

The total amount of payments received, directly or indirectly, by a person or legal entity (excluding a joint venture or general partnership) may not exceed \$100,000 for any crop year. Except for livestock indemnity payments, producers are not eligible if they did not obtain insurance coverage under the Federal Crop Insurance Act with not less than 50 percent yield coverage at 55 percent of the insurable price. That requirement is waived for 2008 if the producer pays a risk protection plan fee or the date of enactment was after the close of FCIA coverage sign-up. **Id.**

The Trust Fund

The Trust Fund is to be funded with 3.08 percent of the amounts received in the general fund of the U.S. Treasury during fiscal years 2008 through 2011 attributable to the duties collected on articles entered or withdrawn from warehouse, for consumption under the Harmonized Tariff Schedule of the United States. Advances, with interest, are authorized. **Act § 15101, adding § 902(b)(1) (the Agricultural Disaster Trust Fund).**

**Payment of Corporate Estimated Taxes**

The 2008 legislation increases the percentage of taxes on corporations to be paid as estimated taxes (in effect on the date of enactment of the legislation) is increased by 7.5 percent. **Act § 15202.**

# CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

## FEDERAL AGRICULTURAL PROGRAMS

**CONSERVATION RESERVE PROGRAM.** The CCC has announced the opportunity to allow Conservation Reserve Program (CRP) participants with certain established vegetative cover to voluntarily modify the CRP contract to utilize certain CRP land enrolled for a critical feed use this year without a rental reduction. Producers will be required to obtain a modified conservation plan to include, among other things, haying or grazing of the established cover. **73 Fed. Reg. 31053 (May 30, 2008).**

**COTTON.** The CCC has adopted as final regulations revising the upland cotton regulations to use Far East prices instead of Northern Europe prices in determining the upland cotton adjusted world price (AWP). The AWP is used to determine repayment rates for marketing assistance loans and to establish loan deficiency payments. **73 Fed. Reg. 30274 (May 27, 2008).**

The AMS has adopted as final regulation raising the user fees for cotton producers for 2008 crop cotton classification services under the Cotton Statistics and Estimates Act and the Cotton Standards Act of 1923. The fee for the 2008 crop increases to \$2.00 per bale. **73 Fed. Reg. 30734 (May 29, 2008).**

**IMPORTS/EXPORTS.** The APHIS has issued proposed regulations amending the regulations concerning user fees for import- and export-related services that APHIS provides for animals, animal products, birds, germ plasm, organisms, and vectors. The proposed regulations increase those fees for fiscal years 2009 through 2013 in order to ensure that the fees accurately reflect the anticipated costs of providing the services each year. **73 Fed. Reg. 31771 (June 4, 2008).**

## FEDERAL ESTATE AND GIFT TAXATION

**ALTERNATE VALUATION DATE.** The decedent's estate executor hired an attorney to file the federal estate tax return within one year of the due date for the return but the attorney failed to make the alternate valuation date election. The IRS granted the estate an extension of time to file an amended return with the election. **Ltr. Rul. 200821003, Jan. 7, 2008.**

**SPLIT-DOLLAR LIFE INSURANCE.** The taxpayer husband created an irrevocable trust, which was the designated owner of two second-to-die life insurance policies on the lives of the husband and wife. Under the agreement, the trustee was designated as the owner of the policies and could exercise all rights of ownership except the right of the couple upon the agreement's termination to be repaid the cash surrender value of the policies prior to termination. While the couple was living, the

trust was obligated to pay premiums equal to the cost of current life insurance protection on their joint lives. During the life of the survivor of the couple, the trust would pay that portion of the premiums equal to the lesser of the P.S. 58 table (see *Rev. Rul. 55-747, 1955-2 C.B. 228*) amount, or the rate for annually renewable term insurance generally available for standard risks. The taxpayers were obligated to pay the balance. The trustee also executed a collateral assignment, assigning the policies to the taxpayers but retaining all rights of ownership in the policies except the right of the taxpayers or the estate of the survivor to receive the amount specified on termination of the agreement. The IRS ruled that the premium payments made by the taxpayers pursuant to the split-dollar life insurance agreement did not result in a taxable gift by the couple under I.R.C. § 2511. The IRS also ruled that, because the taxpayers did not retain any incidents of ownership in the policies under the agreement and the collateral assignment, the proceeds of the policies payable to the trust were not includible in the gross estate of the second to die of either spouse under I.R.C. § 2042(2). However, the IRS ruled that the portion of the proceeds payable to the survivor's estate was includible under I.R.C. § 2042(1). **Ltr. Rul. 200822003, Jan. 28, 2008.**

**TRUSTS.** The taxpayer established an irrevocable trust for the benefit of the taxpayer. The trust was modified to provide the trustee with the discretion to reimburse the taxpayer for any income taxes attributable to the inclusion of trust income in the taxpayer's taxable income. The discretion was subject to the approval of a "reimbursement committee" and at least one beneficiary who qualified as an adverse party under I.R.C. § 672(c). The IRS ruled that the modification of the trust did not cause inclusion of the trust in the taxpayer's gross estate. **Ltr. Rul. 200822008, Feb. 6, 2008.**

## FEDERAL INCOME TAXATION

**ACCOUNTING METHOD.** The IRS has ruled that a public utility changed its method of accounting when the utility changed its treatment of sewer connection fees from nontaxable capital contributions to taxable income. **Rev. Rul. 2008-30, I.R.B. 2008-25.**

**DISASTER LOSSES.** On May 8, 2008, the president determined that certain areas in Mississippi are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of severe storms and flooding, which began on March 20, 2008. **FEMA-1753-DR.** On May 9, 2008, the president determined that certain areas in Oklahoma are eligible for assistance from the government under the Act as a result of severe storms, tornadoes and flooding, which began on April 9, 2008. **FEMA-1754-DR.** On May 9, 2008, the president determined that certain areas in Maine are eligible for assistance from the government under the Act as a result of severe storms

and flooding, which began on April 28, 2008. **FEMA-1755-DR.** On May 8, 2008, the president determined that certain areas in Oklahoma are eligible for assistance from the government under the Act as a result of severe storms, tornadoes and flooding, which began on May 10, 2008. **FEMA-1756-DR.** On May 19, 2008, the president determined that certain areas in Kentucky are eligible for assistance from the government under the Act as a result of severe storms, tornadoes, landslides and flooding, which began on April 3, 2008. **FEMA-1757-DR.** On May 20, 2008, the president determined that certain areas in Arkansas are eligible for assistance from the government under the Act as a result of severe storms, tornadoes and flooding, which began on May 2, 2008. **FEMA-1758-DR.** On May 22, 2008, the president determined that certain areas in South Dakota are eligible for assistance from the government under the Act as a result of near record snow which began on May 1, 2008. **FEMA-1759-DR.** On May 23, 2008, the president determined that certain areas in Missouri are eligible for assistance from the government under the Act as a result of severe storms and tornadoes, which began on May 10, 2008. **FEMA-1760-DR.** On May 23, 2008, the president determined that certain areas in Georgia are eligible for assistance from the government under the Act as a result of severe storms, and tornadoes, which began on May 11, 2008. **FEMA-1761-DR.** On May 20, 2008, the president determined that certain areas in Colorado are eligible for assistance from the government under the Act as a result of severe storms and tornadoes, which began on May 22, 2008. **FEMA-1762-DR.** On May 27, 2008, the president determined that certain areas in Iowa are eligible for assistance from the government under the Act as a result of severe storms, tornadoes and flooding, which began on May 25, 2008. **FEMA-1763-DR.** On May 28, 2008, the president determined that certain areas in Mississippi are eligible for assistance from the government under the Act as a result of severe storms and tornadoes which began on April 4, 2008. **FEMA-1764-DR.** Taxpayers who sustained losses attributable to these disasters may deduct the losses on their 2007 returns.

**DISCHARGE OF INDEBTEDNESS.** The taxpayers purchased a house but sold the house in a "short" sale for less than the mortgage loan. The lender agreed to accept the proceeds of the sale in full satisfaction of the mortgage loan balance and issued a Form 1099-C to the taxpayers for the \$74,494 forgiven in the transaction. The taxpayers failed to prove that any of the exceptions of I.R.C. § 108(a) applied to the discharge of indebtedness income; therefore, the court held that the full amount forgiven was taxable income. **Stevens v. Comm'r, T.C. Summary Op. 2008-61.**

**ELECTRICITY PRODUCTION CREDIT.** The IRS has announced the 2008 inflation adjustment factor (1.3854) and reference price used in determining the availability of the renewable electricity production credit to taxpayers producing electricity using wind at 3.29 cents per kilowatt hour. The inflation adjustment factor and reference prices apply to calendar year 2008 sales of kilowatt hours of electricity produced in the U.S. and its possessions from qualified energy resources and refined coal. The factor is 1.0591 for Indian coal. The renewable electricity production credit for calendar year 2008 is 2.1 cents per kilowatt hour on sales of electricity produced from wind energy, closed-loop biomass, geothermal energy and solar energy and 1.0 cent per kilowatt hour on sales of electricity produced from open-loop

biomass, small irrigation power, landfill gas, trash combustion and qualified hydropower facilities. **Notice 2008-48, I.R.B. 2008-21.**

**HEALTH SAVINGS ACCOUNTS.** The IRS has issued guidance on the proper tax treatment of qualified health savings account (HSA) funding distributions, effective for tax years beginning after 2006. A qualified HSA funding distribution is a one-time, direct transfer from an individual's traditional individual retirement account (IRA) or Roth IRA to the individual's HSA. The IRS guidance reflects the rules provided in I.R.C. § 408(d)(9), as added by the Tax Relief and Health Care Act of 2006 (Pub. L. No. 109-432), and includes numerous examples that illustrate how these rules should be applied. **Notice 2008-51, I.R.B. 2008-25.**

The IRS has issued guidance on contributions to Health Savings Accounts (HSAs) with respect to amendments made to I.R.C. § 232 by the Tax Relief and Health Care Act of 2006 (Pub. L. No. 109-432). The guidance addresses establishing HSAs, annual and monthly HSA contribution limits, HSA distributions not used for qualified medical expenses and excise taxes on excess contributions. **Notice 2008-52, I.R.B. 2008-25.**

**INTEREST RATE.** The IRS has announced that, for the period July 1, 2008 through September 30, 2008, the interest rate paid on tax overpayments decreases to 5 percent (4 percent in the case of a corporation) and for underpayments decreases to 5 percent. The interest rate for underpayments by large corporations decreases to 7 percent. The overpayment rate for the portion of a corporate overpayment exceeding \$10,000 decreases to 2.5 percent. **Rev. Rul. 2008-27, I.R.B. 2008-26.**

**RETURNS.** The IRS has announced that the IRS is postponing until July 28 certain deadlines for taxpayers who reside or have a business in the Butler, Blackhawk, Buchanan and Delaware counties, in the May 25, 2008, Iowa storm and tornado disaster area. The postponement applies to return filing, tax payment and certain other time-sensitive acts otherwise due between May 25 and July 28. In addition, the IRS will waive the failure to deposit penalties for employment and excise deposits due on or after May 25 and on or before June 9, as long as the deposits were made by June 9. **Iowa Storm, Tornado Victims May Qualify for IRS Disaster Relief, MIL-2008-35, May 30, 2008.**

#### S CORPORATIONS

**BUILT-IN GAINS.** The taxpayer corporation owned mineral interests when the corporation elected to change from a C corporation to an S corporation. The taxpayer mined the minerals and processed them after the election and during the 10-year recognition period. The IRS ruled that the income from the minerals mined and processed after the subchapter S election were not built-in gains under I.R.C. § 1374(d)(3). **Ltr. Rul. 200821022, Dec. 21, 2007.**

**TAX SHELTERS.** The court approved an injunction against a multi-level marketing organization for organizing and promoting abusive tax shelter schemes where the organization and members of its executive council knew that statements made in promotion conferences were false and would cause irreparable harm to customers and the government. **United States v. Pinnacle Quest International, 2008-1 U.S. Tax Cas. (CCH) ¶ 50,349 (N.D. Fla. 2008).**



**THEFT LOSS.** The taxpayer was the sole shareholder of an S corporation. The taxpayer claimed theft losses from embezzlement over several tax years, claiming that an employee embezzled funds from the corporation. However, the taxpayer failed to provide written evidence to support the embezzlement claim and no criminal action was brought in state court against the employees. The taxpayer filed a police report but no arrests were made. The IRS disallowed all but a small portion of the claimed losses and the court upheld the IRS determination because the taxpayer failed to substantiate the amount and character of the losses. In addition, a penalty for substantial underpayment of tax was imposed. The appellate court affirmed in a decision designated as not for publication. **Geiger v. Comm’r, 2008-1 U.S. Tax Cas. (CCH) ¶ 50,358 (11th Cir. 2008), aff’g, T.C. Memo. 2006-271.**

## NEGLIGENCE

**EMPLOYER LIABILITY.** The plaintiff worked as a farmhand on the defendant’s farm. The plaintiff was injured while trying to start a tractor while standing on the ground next to the tractor. The plaintiff claimed that the defendant was negligent in failing to properly instruct the plaintiff as to the operation of the tractor. The court noted that the plaintiff’s own evidence demonstrated that the plaintiff had 38 years of experience in operating tractors and that the accident occurred because the plaintiff left the tractor in gear when the plaintiff attempted to start the tractor while standing in front of a wheel. The court agreed with the trial court finding that the accident was caused by the plaintiff’s own actions and not from any action or omission by the defendant and upheld summary judgment for the defendant. **Jackson v. Murphy Farm and Ranch, Inc., 2008 Miss. App. 306 (Miss. Ct. App. 2008).**

### FARM INCOME TAX, ESTATE AND BUSINESS PLANNING SEMINARS by Neil E. Harl

#### Outrigger Keauhou Beach Resort, Big Island, Hawai’i. January 6-10, 2009

Spend a week in Hawai’i in January 2009 and attend a world-class seminar on Farm Income Tax, Estate and Business Planning by Dr. Neil E. Harl. The seminar is scheduled for January 6-10, 2009 at the spectacular ocean-front Outrigger Keauhou Beach Resort on Keauhou Bay, 12 miles south of the Kona International Airport on the Big Island, Hawai’i.

Seminar sessions run from 8:00 a.m. to 12:00 p.m. each day, Tuesday through Saturday, with a continental breakfast and break refreshments included in the registration fee. Each participant will receive a copy of Dr. Harl’s 400+ page seminar manual *Farm Income Tax: Annotated Materials* and the 600+ page seminar manual, *Farm Estate and Business Planning: Annotated Materials*, both of which will be updated just prior to the seminar.

The Agricultural Law Press has made arrangements for substantial discounts on partial ocean view hotel rooms at the Outrigger Keauhou Beach Resort, the site of the seminar. The seminar registration fee is \$645 for current subscribers to the *Agricultural Law Digest*, the *Agricultural Law Manual* or the *Principles of Agricultural Law*. The registration fee for nonsubscribers is \$695. For more information call Robert Achenbach at 541-466-5544 or e-mail at robert@agrilawpress.com.

### AALA ANNUAL AGRICULTURAL LAW SYMPOSIUM

The American Agricultural Law Association is holding its 29th annual Agricultural law Symposium on October 24 & 25, 2008 at the Marriott Hotel in downtown Minneapolis, MN.

Topics will include annual updates on bankruptcy, income and estate tax, federal farm programs, food safety and environmental law. Special panel presentations are being planned for topics of special interest to Minnesota and Midwest practitioners, as well as panel discussions on national agricultural law topics.

More information can be found on the AALA web site <http://www.aglaw-assn.org> or by contacting Robert Achenbach, AALA Executive Director at RobertA@aglaw-assn.org or by phone at 541-466-5444.