



The Agricultural Law Letter

Published by the Law Office of
MCLEOD, WATKINSON & MILLER

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February 2003

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Michael R. McLeod

American Agriculture Loses A Great Leader, the Ultimate Public Servant

With the death of Richard Lyng on February 1, American Agriculture lost a great leader, perhaps the most competent and skillful Secretary of Agriculture in the modern era. He also set a new standard of public service in the job.

He was not the greatest orator or the highest profile leader of the Department of Agriculture. However, he mastered the art of managing the huge bureaucracy of USDA and working well with the Department's many constituencies better than any other Secretary of Agriculture. The job of Secretary of Agriculture is one of the most difficult in government, and it is routine for members of Congress to call for the resignation of the Secretary of Agriculture. However, no one ever called for Dick Lyng's resignation. He skillfully worked with members of Congress of both parties, while remaining loyal to the conservative doctrine of the Reagan Presidency.

It is impossible for a Secretary of Agriculture to satisfy all diverse and often opposing interests of small farmers, large commercial farmers, the grain trade, consumer advocates, environmentalists, the timber industry, the hunger lobby and food safety advocates. Yet, Lyng was remarkably adept at working with all sides. He disarmed his critics with his open-door policy and willingness to meet with all groups. When

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he had to disagree with a group, he did so honestly, but in a gentle way that made it hard for the group to dislike him.

Lyng earned his ability to master the Department of Agriculture the hard way, by years of experience in both the California Government and the Federal Government. He did so after a successful private sector career. Mr. Lyng, a native of Modesto, California graduated from Notre Dame in 1940 and served in the Army Air Forces in the Pacific in World War II. From 1945 to 1967, he was president of Ed J. Lyng Co., a family owned seed and bean business.

In 1967 he was appointed a deputy director of the California Agriculture Department under Governor Ronald Reagan and was promoted to director of the Department within a year. In 1969 he came to Washington as the assistant Secretary of Agriculture for Marketing and Consumer Services in the Nixon Administration.

Lyng was not entirely comfortable in the Nixon administration and left after Nixon's first term to serve six years as President of the American Meat Institute. Lyng joined the Reagan Presidential Campaign and headed up the Reagan farm campaign effort. His message found a ready audience among farmers that felt that the Department of Agriculture was more interested in consumer interests than farmer interests and a farm constituency mad about the grain embargo that occurred in the Carter administration.

When Reagan was elected, Lyng was appointed Deputy Secretary of Agriculture, where his administrative skills and insider knowledge were essential in a department, headed by John Block, a newcomer to Washington. As the number two official at USDA he handled most of the administrative responsibilities while Block was the public face of the Department.

Lyng retired in 1985 and went into business with Bill Leshner, where he served as a private consultant to some agricultural groups. One was the American Association of Crop Insurers (AACI), a group that I have represented

for many years. As a public director of AACI, he provided wise counsel and guidance to a fledgling industry that badly needed his leadership.

Although Lyng had made a decision to retire from government and had heart by-pass surgery in 1985, he could not refuse a call from his President. Thus, President Reagan appointed him Secretary of Agriculture in 1986. Lyng came to the position of Secretary with better credentials than any of his predecessors. His knowledge of the Department came from serving as an Assistant Secretary and the Deputy Secretary (the person most responsible for daily management of the Department). His service in the private sector both before his original public service and between stints in the public sector, made him realize the importance of treating his job as that of a public servant. He understood that it was important that the Department truly serve rather than dictate to its many constituencies.

Many appointed officials come to Washington with the finest of intentions but are soon overwhelmed by the complexity of their jobs. Eventually they follow the course of least resistance and allow the career bureaucracy to make the decisions. This never happened to Lyng because he had strong principles and he knew the Department too well. His accessibility to all groups prevented any subordinates, either career or appointed, from abusing their positions. All groups knew that they could talk directly to Lyng if they really had to.

Some political appointees are hamstrung by the Department's lawyers who tell them what they can or cannot do. This is a real problem for appointees who, like Lyng, are not themselves lawyers. Since most laws are vague, the lawyers often wind up making policy. Lyng did not allow this to happen. He made it clear to USDA's lawyers that he would determine the policy, and it was the lawyers' job to implement that policy in a manner consistent with the law. Of course, Lyng never tried to break the law. He simply insisted on the same kind of creative and responsive counsel that private sector executives routinely get from their attorneys.

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One key to Lyng's success was his knowledge of the limits of his power. While he served an administration whose policy was to oppose the elaborate farm subsidy programs of USDA, he knew that it was foolish to go up to Capitol Hill and waste political capital pushing that philosophy in Congress. Therefore, he was content to manage the Department in the most efficient way possible and cut red tape and excessive regulation wherever he could.

Lyng was fiercely loyal to his political patron, President Reagan. During the first Reagan term, the Director of the Office of Management and Budget was David Stockman, a hard line foe of government spending in general and farm program subsidies in particular. Stockman was encouraged to leave after making some disloyal comments about President Reagan. He then wrote a tell-all book about the Reagan Administration entitled *The Triumph of Politics: Why the Reagan Revolution Failed*. Among the people he criticized was Lyng, who he considered to be merely an advocate of wasteful farm subsidies. I read the book and kidded Mr. Lyng about it. I asked if I could send him a copy. He responded that he would borrow it, but refused to help someone as disloyal as Stockman by either buying his book or allowing anyone to buy one for him. I sent him a copy of the book, and sure enough, he returned it to me a few weeks later.

Dick Lyng served as a wise and gentle mentor to many young people who worked in agriculture. I was one of those fortunate people. He provided wise counsel to me in a number of tangible and intangible ways. He also was an early supporter of farmer-funded commodity promotion programs, one of my firm's main practice areas. When we started the National Dairy Board program, the question arose as to whether the Board could have outside counsel. The bureaucracy was adamantly opposed. Lyng, however, pointed out that USDA's Office of General Counsel did not have enough personnel to service all of the legal needs of the new National Dairy Board, which was much larger than any existing program. Thus, the National Dairy Board and other boards were able

to hire outside counsel that enabled them to function effectively.

In addition to fostering my career, Lyng helped numerous other young people on their way up the ladder. They are too numerous to mention here, but two examples are (1) Manly Molpus, who succeeded Lyng at the American Meat Institute and ultimately became CEO of the Grocery Manufacturers of America; and (2) Ann Veneman, who Lyng brought to Washington and mentored as she began a career that ultimately resulted in her being the first woman appointed to the position of Secretary of Agriculture.

Michael R. McLeod, a partner in the firm, has known every Secretary of Agriculture since Orville Freeman, who served from 1961-69.

Elizabeth Haws

Agricultural Committee Assignments in the 108th Congress: A Shift in Power Brings Many New Faces

House Agriculture Committee

New faces abound on the House Agriculture Committee. There are 17 new members to the Committee; many have yet cut their teeth on convoluted agriculture policy. There is also a new leader at the helm of the committee, Rep. Bob Goodlatte (R-VA) who previously chaired the Subcommittee on Department Operations, Oversight, Nutrition and Forestry. It will be interesting to see what direction the new leadership and members take the committee. Considering Chairman Goodlatte is an attorney and his previous subcommittee experience, there will likely be more oversight hearings reviewing programs under the committee's jurisdiction. Rep. Charlie Stenholm (D-TX) will again be the Ranking Member of the committee. His experience and expertise on agriculture policy will be a keen asset to the Committee.

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The new Republican members of the House Agriculture Committee are: William Janklow (SD), Max Burns (GA), Jo Bonner (AL), Mike Rogers (AL), Steve King (IA), Chris Chocola (IN), Marilyn Musgrave (CO), and Devin Nunes (CA). New Democratic members are Rodney Alexander (LA), Frank Ballance (NC), Dennis Cardoza (CA), James Marshall (GA), Ed Case (HI), David Scott (GA), Mark Udall (CO), and Lincoln Davis (TN). Earl Pomeroy (D-ND) is rejoining the committee.

House Agriculture Subcommittee Chairs

Rep. Jerry Moran (R-KS) was tapped by Chairman Goodlatte as the new chairman of the General Farm Commodities and Risk Management Subcommittee. This subcommittee has jurisdiction over crop insurance commodities and commodity exchanges. Moran replaces former Rep. Saxby Chambliss (R-GA) who was elected to the Senate and will be serving on the Senate Agriculture Committee.

Rep. Frank Lucas (R-OK) will continue to serve as the Chairman of the Conservation, Credit, Rural Development and Research Subcommittee.

The new Chairman of the Specialty Crops and Foreign Agriculture Programs Subcommittee, which has jurisdiction over peanuts, sugar, tobacco, honey, marketing orders, foreign agricultural assistance and trade promotion programs, will be Rep. Bill Jenkins (R-TN). Rep. Terry Everett (R-AL), who formerly held the chair, gave it up to chair the Armed Services Strategic Forces Subcommittee.

Rep. Gil Gutknecht (R-MN) will be the new Chairman of the Department Operations Oversight, Nutrition and Forestry Subcommittee, which was held by Goodlatte last Congress. This subcommittee covers agency oversight, review and analysis, special investigations, food stamps, nutrition and consumer programs, forestry, energy and biobased energy production and dairy.

Rep. Robin Hayes (R-NC) will chair the Livestock and Horticulture Subcommittee, which has jurisdiction over livestock, poultry, meat, seafood and seafood products, aquaculture, animal welfare, grazing, fruits and vegetables, marketing, and promotion orders. Rep. Nick Pombo (R-CA), who took the helm as Chairman of the Resources Committee, had previously chaired the subcommittee.

House Appropriations Subcommittee on Agriculture

There was no change to membership on the House Subcommittee on Agriculture Appropriations. Rep. Henry Bonilla (R-TX) will again chair the subcommittee. Republicans retained the experience of the members who served last Congress on the subcommittee: James Walsh (NY), Jack Kingston (GA), George Nethercutt (WA), Tom Latham (IA), Jo Ann Emerson (MO), Ray LaHood (IL) and Virgil Goode (VA- Independent –caucuses with the Republicans). Rep. Marcy Kaptur (OH) will remain the Ranking Member of the Subcommittee. The following Democrat members will again serve on the Subcommittee: Rosa DeLauro (CT), Maurice Hinchey (NY), Sam Farr (CA), and Allen Boyd (FL).

Senate Agriculture Committee

The elections put the Republicans in control of the Senate. Though the margin of victory is slim, (51- 49) it brought major changes. Though he is not now making life and death decisions as the new Senate Majority Leader, Senator Bill Frist (R-TN) the talented heart surgeon, will have to perform some great feats in the Senate to push through the President's legislative agenda.

At the Senate Agriculture, Nutrition and Forestry Committee there are sweeping changes as well, starting with a new chairman, Senator Thad Cochran (R-MS). New freshmen members include Senator Elizabeth Dole (R-NC) who will chair the Subcommittee on Production and Price Competitiveness, and Senator James Talent (R-MO) will chair the Subcommittee on Marketing, Inspection and Product Promotion. Minnesota will continue to have

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representation on the committee as Senator Norm Coleman (R-MN) acquired a seat. The committee will also benefit from the previous agricultural policy experience of Senator Charles Grassley (R-IA) who will rejoin the committee and Senator Chambliss (R-GA), though a freshman senator, served a number of years on the House Agriculture Committee.

The shift in power pushed Senator Tom Harkin (D-IA) former Chairman of the Senate Agriculture Committee to the position of Ranking Member. There were no other changes to the Democratic side of the committee.

Senate Appropriations Subcommittee on Agriculture

Chairman Cochran is very powerful in the agriculture arena – not only is he Chairman of the Senate Agriculture committee – he also controls the purse strings for agriculture programs as the Chairman of the Senate Appropriations Subcommittee on Agriculture, Rural Development, and Related Agencies. Republican Senators continuing their membership on the subcommittee are Arlen Specter (PA), Kit Bond (MO), Mitch McConnell (KY), Conrad Burns (MT), and Larry Craig (ID). The Senate Democrats have not finalized their selection of members to the subcommittee; however, Senator Herb Kohl (WI) will be the Ranking Member.

Elizabeth Haws is an attorney with the firm and is the Manager and Counsel for the American Association of Crop Insurers. Prior to joining McLeod, Watkinson & Miller, she was the General Counsel and Director of Government Relations for the National Grain Trade Council. In 1992 she was Counsel and Legislative Assistant for Congressman Fred Grandy for agriculture and trade issues.

Randy Green and Richard Pasco

Trade Negotiations: A Crowded Calendar

After last year's Congressional debate on Trade Promotion Authority, the general public's attention has shifted away from trade policy. Trade pacts with Chile and Singapore have caused barely a ripple in the public mind, however absorbing they may be to trade specialists. And no current trade issue has come close to generating the emotional debate that raged over the North American Free Trade Agreement a decade ago, or the World Trade Organization meeting in Seattle in 1999.

Nevertheless, 2003 will in some ways be an extraordinarily busy year in trade policy.

- The Administration will ask Congress to approve the trade agreements with Chile and Singapore, probably in the latter half of the year, according to comments by U.S. Trade Representative Robert Zoellick.
- The United States and five Central American nations hope to complete a free trade agreement by the end of this year.
- World Trade Organization (WTO) members have set a March 31 deadline – widely expected to be missed – to agree on parameters for negotiating further worldwide cuts in agricultural protection.
- The United States and 33 other countries have an ambitious agenda for making progress toward a Free Trade Area of the Americas (FTAA) agreement.
- U.S. trade negotiators intend to launch talks on two more free-trade pacts, with Australia and (separately) with five Southern African nations.

This article and the accompanying timetable provide information on some of the year's important dates, and what is supposed to happen when they roll around.

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DOHA ROUND

Full-scale WTO trade rounds traditionally last for a number of years, and events in the current Doha Round suggest that it will be no exception. Agricultural negotiators are supposed to agree by March 31 on “modalities,” the methodology by which reductions will be agreed in border protection, domestic subsidies and export subsidies – though the amount of the reductions would be negotiated over the balance of 2003 and 2004.

In reality, it appears unlikely that March 31 will bring such an agreement. Only in the last week of January did the European Union (EU) obtain approval from its member states for its negotiating proposal, after overcoming earlier opposition from France and Ireland. The final EU proposal will reportedly link a phaseout of export subsidies to similar treatment for export credits and deficiency payments – two policy tools extensively used by the United States, and whose selection presumably was not an accident. Neither this juxtaposition of policies, nor the EU’s earlier emphasis on “non-trade concerns” such as animal welfare, food safety, and geographical indicators will be helpful in bridging the gulf that separates the EU from the United States and the free-trade-oriented Cairns Group.

The February 12 release of a draft paper by the chair of the WTO agriculture negotiations, Stuart Harbinson, outlines his suggestions for negotiating modalities. The Harbinson paper includes specific demands from both the United States and the EU, which forces both camps to make politically difficult choices to meet the March 31 deadline for agreement on negotiating modalities. Specifically, the paper calls for the elimination of export subsidies as proposed by the United States, but not as quickly as sought by the United States and other members of the Cairns group. On market access, the paper would result in the EU being able to maintain higher tariffs than the United States. On domestic support, the paper calls for a flat 60% reduction in trade-distorting (i.e. “amber box”) support, which is only 5% more than the EU pro-

posed in its submission to Chairman Harbinson. The reactions to his paper among WTO member countries – will say a lot about whether much progress is likely for the balance of the year. Assuming there is no dramatic breakthrough in March, the next event that might force action is a ministerial-level meeting in Cancun, Mexico, in September, that is billed as a “mid-term review” of the Doha Round.

FREE TRADE AREA OF THE AMERICAS

On February 11, United States led the way in submitting its offer for reducing tariffs and other trade barriers in advance of the February 15 deadline for Western Hemisphere countries involved in the FTAA talks to table their offers. Brazil did not meet the deadline, and its size and influence in the hemisphere caused other nations to hesitate as well. Though exact dates are uncertain, there should be a major negotiating session in Trinidad and Tobago during the first quarter of the year. Then, requests for “improvements” in other nations’ offers – basically, counteroffers – are due by July 15, and a ministerial-level meeting is slated for Miami in November.

CENTRAL AMERICA FTA

Ten negotiating sessions during the course of this year are supposed to produce a completed U.S. - Central America Free Trade Agreement (FTA) by December 31. Besides the United States, the countries of Guatemala, El Salvador, Honduras, Costa Rica and Nicaragua are participating in these talks, which were formally launched January 8-9. The U.S. plans to table draft text at its negotiating session in Cincinnati at the end of February but is not expected to make a market access proposal until the third or fourth round of talks, which are scheduled for El Salvador in March and Miami in April.

It might seem counterintuitive that these countries are negotiating an FTA with each other at the same time that all of them are participating in the FTAA talks. Some observers see the Central America FTA as either leverage – to let Brazil and other countries in the hemisphere know that if the FTAA stalls, the

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United States has other options – or insurance, in the event that the FTAA runs into long delays.

OTHER AGREEMENTS

The FTA with Southern Africa could possibly conclude by December 31 if all goes according to plan. However, the EU's FTA with South Africa took four years to conclude, making a timetable of less than a year rather ambitious for this proposed pact. Under fast-track procedures, talks could begin at any time from this point forward.

Meanwhile, the United States and Australia are set to begin the first round of negotiations in the week of March 17 in Canberra, Australia, on a bilateral free trade agreement. In this case, the negotiations are thought unlikely to conclude before the end of 2004. Of all the recent FTAs, this one has attracted the most criticism from agricultural groups, reflecting disputes ranging from sanitary and phytosanitary barriers to Australia's use of state trading entities (STEs) for wheat, sugar and other commodities. Recently, however, some farm group have appeared less strongly opposed.

CONCLUSION

There is a cliché that runs, "When all was said and done, more was said than done." That could prove the case for trade policy this year. The issues are not easy ones and many other topics, from the sluggish economy to possible war in Iraq, compete for the attention and time of the world's heads of state and government.

At the same time, the crowded agenda makes it clear that U.S. policy makers have adopted the free trade agreement as a paradigm. An FTA is now seen as one of the primary means for cementing a close bilateral or multi-lateral relationship. And despite growing criticisms of "globalization" and the election of populist or leftist governments in many Latin American countries, Washington still sees trade liberalization as an imperative.

TIME LINES FOR KEY TRADE AGREEMENTS

145-NATION WTO

<u>Date</u>	<u>Event</u>
January 1, 1995	The World Trade Organization is established as a multilateral institution charged with administering rules for trade among member countries
November 9-13, 2001	WTO's Fourth Ministerial Conference Doha, Qatar results in the Doha Development Agenda
July 25, 2002	USTR formally announced its proposal for WTO agriculture negotiations that would cut domestic support and increase market access
July 29-30, 2002	WTO inter-sessional agricultural meeting on domestic support in Geneva
Sept. 2-3 & 6, 2002	Agricultural market access talks in Geneva
Sept. 23-25, 2002	Agricultural domestic support talks in Geneva
Nov. 18-22, 2002	Informal agriculture negotiations in Geneva
December 16, 2002	European Commission, which is the executive arm of the European Union, unveils its plan on domestic support and tariff reduction
December 18, 2002	WTO Agriculture Committee Chairman Stuart Harbinson released an overview paper summarizing the 27 different agricultural proposals
January 22-24, 2003	Agriculture meetings in Geneva February 12, 2003 WTO Agriculture Committee Chair Stuart Harbinson releases first draft of modalities (i.e., methodology for reaching tariff reduction)

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February 24-28, 2003	Scheduled meeting of WTO Agriculture Committee in Geneva to consider a first draft of the modalities
March 31, 2003	Deadline for modalities for the negotiations to be established Post
March 31, 2003	Time to address matters not directly required for the purpose of establishing draft schedules for further commitments
Mid-2003	Submission of the initial tariff schedules by the Fifth Ministerial meeting of the WTO
September 2003	Mid-term review at a ministerial meeting in Cancun, Mexico
January 1, 2005	Scheduled conclusion of negotiations
January 1, 2006	Changes in the agreement would not take effect before this date

34-NATION FTAA

November 1, 2002	Seventh FTAA Ministerial meeting held in Quito, Ecuador – the Trade Ministers reaffirmed their commitment to the principle of transparency in the FTAA process and released a second draft text
January 31, 2003	Comments due on the second draft consolidated texts of the FTAA
February 11, 2003	U.S. makes initial market access offers to countries participating in the FTAA
February 15, 2003	Deadline for FTAA countries to exchange initial offers in all negotiating areas, including each countries tariff-reducing offers

First quarter, 2003	FTAA Trade Negotiations Committee with meet in Port of Spain, Trinidad and Tobago to deliver further instructions on outstanding areas such as modalities for market access negotiations
July 15, 2003	Requests for improvements in the initial offers must be transmitted before this date
November 20, 2003	The next FTAA ministerial meeting will take place in Miami
2004	Ministerial meeting in Brazil
January 2005	Goal for completing the FTAA agreement

**6-NATION U.S.—
CENTRAL AMERICAN FTA**

October 18, 2002	USTR issued a notice of intent to initiate negotiations on a free trade agreement with Guatemala, El Salvador, Honduras, Costa Rica and Nicaragua
January 8-9, 2003	Formal launch of U.S. – Central American FTA
Late January, 2003	Negotiating sessions in San Jose, Costa Rica
Late February, 2003	U.S. plans to table draft text at its negotiation session in Cincinnati
December 31, 2003	Completion of negotiations after the conclusion of ten negotiating sessions throughout the year

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6-NATION U.S. – SOUTH AFRICAN FTA

- February 16, 2002 USTR met with Trade Ministers and other officials from South Africa, Botswana, Lesotho, Namibia and Swaziland in Pretoria, South Africa, to discuss the possibility of a free trade agreement
- November 4, 2002 USTR notified Congress of its intent to negotiate a free trade agreement with southern Africa
- February 4, 2003 This is the earliest date that negotiations could be launched with the Southern African Customs Union under fast-track timelines
- December 31, 2003 Goal for concluding the agreement, but it is unclear how long negotiations would take since the free trade agreement between South Africa and the European Union took four years

U.S. – AUSTRALIAN FTA

- November 13, 2002 USTR issued a notice of intent to initiate negotiations on a free trade agreement with Australia
- February 11, 2003 This is the earliest date that the Administration can launch negotiations
- Week of March 17, 2003 First round of negotiations set to begin in Canberra, Australia
- December 31, 2004 Earliest expected date for completion of negotiations

***Randy Green** is the firm's senior government relations representative. Before coming to McLeod, Watkinson & Miller, he was chief of staff for the Senate Committee on Agriculture, Nutrition and Forestry, and served during 1992 as deputy under secretary of Agriculture for international affairs and commodity programs.*

***Richard Pasco** is an attorney in the firm specializing in legislative, agricultural, food safety, and trade law.*

Richard T. Rossier

**Momentum Builds for
“Government Speech”
Argument: Second Court Rules
That Commodity Board
Produces Government Speech**

On Valentine's Day, 2003, Gladys Kessler, a Washington, D.C. federal judge, delivered a valentine of sorts to those that support federal and state commodity checkoff programs that require the payment of an assessment to fund the generic promotion of commodities such as milk, cheese, beef, soybeans, and avocados. Judge Kessler ruled in *Avocados Plus, Inc. v. Veneman* that the Hass Avocado Promotion Act did not violate the free speech or equal protection rights of those who filed suit challenging the law, finding that the speech of the Hass Avocado Board was “government speech.”

While Judge Kessler also ruled that plaintiffs' freedom of association rights had been violated, she concluded that because plaintiffs' rejected free speech claim was “the heart of their argument,” and because the balance of harms and the public interest weighed against the issuance of an injunction, she refused plaintiffs' request that she enter a court order to stop the collection of assessments on Hass avocados. The decision was a denial of plaintiffs' motion for a preliminary injunction and a final decision on the merits of plaintiffs' claim for permanent injunctive relief. Plaintiffs are expected to appeal.

Plaintiffs' complaint alleged that the Hass Avocado Promotion Act violated their free speech, freedom of association, and equal protection rights. In rejecting plaintiffs' free speech claim, Judge Kessler held that “because of the extensive government control and oversight over the Hass Avocado Board's speech, activities, composition, and expenditures, and in light of Congress' purpose in enacting the statute, the Court concludes that the Board's speech constitutes government speech.” In reaching this conclusion, she relied on a case decided in November 2002 (*Charter v. USDA*) in which a federal court in Montana ruled that the Beef Promotion Act did not violate the First Amendment

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because the speech of the Beef Board was government speech. Coming on the heels of two federal court rejections of this argument earlier in 2002 – in South Dakota in June (involving beef) and in Michigan in October (involving pork), the Avocados Plus decision adds momentum to the argument made by the government and others that the speech of these promotion boards is government speech. Government speech, they contend, is not subject to the First Amendment because the First Amendment only prevents the government from regulating private speech -- it does not stop the government from speaking.

Judge Kessler also rejected plaintiffs' equal protection argument holding that the claim was subject to "rational basis" scrutiny, the lowest level of scrutiny that can be applied to a constitutional claim, and that there was a rational basis for how importers were treated by the Act and the regulations issued by the USDA pursuant to the Act. Judge Kessler also ruled, however, that the First Amendment "protects not only the right to associate but also the right to refuse to associate" and stated that such infringements could be permitted only where the law or regulation was narrowly tailored to further a compelling government interest.

With respect to plaintiffs' claim that the Act compels them to associate with domestic avocado producers, Judge Kessler ruled that while "the government's interest in preserving and strengthening the Hass avocado industry is certainly legitimate and understandable, there is simply no evidence that the Act furthers a compelling government interest." (Emphasis in original.) As a result, she ruled, the Act violated plaintiffs' freedom of association. As noted above, however, because of Judge Kessler's rejection of plaintiffs' other constitutional claims and her balancing of the harms and the public interest, she refused to enter injunctive relief in favor of the plaintiffs.

Richard Rossier and McLeod, Watkinson & Miller represented two pro-checkoff avocado growers who intervened in support of the government in Avocados Plus, Inc. v. Veneman and argued that the Hass Avocado Promotion Act did not violate the Constitution.

Richard Pasco

2002 Farm Bill Implementation Continues

Implementation of the Farm Security and Rural Investment Act of 2002 (a.k.a., the new farm bill) continues to move forward, but maybe not as fast nor in the same manner as some agricultural producers envisioned. After President Bush signed the farm bill into law on May 13, 2002, many farmers believed that most of the new program details would be available by the fall of 2002. To USDA's credit, the Department was successful in implementing most of the major commodity and other agriculture programs in record time. This article will attempt to report on the most significant farm program developments over the last several months and examine some of the key issues still facing the USDA in implementing the various provisions of the 2002 farm bill.

Direct and Counter-Cyclical Program

The direct and counter-cyclical programs provide support for feed grains, wheat, cotton, rice, soybeans, other oilseeds, peanuts, wool and mohair for 2002 through 2007. Direct payments are issued regardless of market prices, while counter-cyclical payments are only made when a commodity's effective price is below its target price. Signup for the direct and counter-cyclical program for crop years 2003 and 2003 began on October 1, 2002, and ends on June 2, 2003. The ending date for owners to select base and yield options is April 1, 2003.

For the first time since the 1980's, producers can update their acreage and yield information. This is a tremendous opportunity, but it's very complex, and it requires producers to gain information on their operations over the past four years. The vast majority of producers who wish to establish or update yields will be able to use verifiable production evidence such as weight tickets, loan deficiency payments (LDPs), crop insurance appraisals or sales records.

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However, some crops were grazed, harvested as silage or hay, or fed on the farm in a manner that does not result in tangible records of measurable production. In such cases, producers may use previous LDPs on record at the county Farm Service Agency (FSA) office to establish farm yields. When LDPs are not available, but crop insurance records or other FSA records indicate the crop was grazed, harvested as silage or hay, or fed on the farm, then FSA may assign a yield based on the actual grain yield for three similar farms. In cases where producers cannot meet any of these requirements, or they have experienced abnormally low yields, then 75% of the county average yield will be used as specified in the new law.

After program participants elect their base and yield options, they may also request their first partial counter-cyclical payment, which is equal to 35% of the entire projected rate. For each commodity, the counter-cyclical payment equals the counter-cyclical payment rate multiplied by 85% of the farm's base acreage multiplied by the farm's counter-cyclical payment yield for the crop. The counter-cyclical payment rate is the amount by which the target price of the covered commodity exceeds its effective price. The effective price equals the direct payment rate plus the higher of: 1) the national average market price received by producers during the marketing year; or 2) the national loan rate for the commodity.

USDA has expressed concern about the slow pace in which farmers are signing up for the major farm programs, and has urged farmers to move quickly to sign up in order to receive intended benefits in a timely and efficient manner. The late harvest in many parts of the country kept farmers in the field longer and the complexity of the new programs has required more time for farmers to gain the proper understanding, assemble the necessary information and make their decisions, which often involve several different commodities and unknown future market conditions.

Loan Rates for Grains

On December 13, 2002, USDA announced the 2003 national and county loan rates for wheat, barley, oats, and other oilseeds. The 2002 farm bill restructured national loan rates, which required changes in the county loan rates. Farm bill conferees provided guidance to USDA, suggesting that the Department use the generally upward change in the national loan rates to revise county loan rates. Since adjustments in county loan rates to reflect changing market conditions had not been made for grains for several years, a number of disparities between loan rates and market prices had emerged over time, which affected producer benefits.

Soon after passage of the new farm bill, USDA announced the most comprehensive adjustments in more than 15 years to the county loan rate structure for 2002 crops. The restructured rates were intended to reflect the market factors affecting each crop to the fullest extent possible, and thus avoid distortions that work to the detriment of producers and the rest of the industry.

The 2003 county loan rates for wheat have been updated and remain differentiated by each of the five major classes of wheat (i.e., durum, hard red spring, hard red winter, soft red winter, and soft white) continuing the precedent established with the 2002 loan rates. By moving last year to this class-based system for wheat, the CCC now provides marketing assistance loans and LDPs that reflect actual market prices for each class, thus achieving a more equitable distribution of commodity program benefits among producers.

The New Peanut Program

The 2002 farm bill drastically changed the peanut program with the establishment of a nonrecourse marketing loan program for peanuts and additional support measures similar to other commodities. Peanuts became eligible for marketing assistance loans beginning with the 2002 crop year. If peanuts are forfeited to USDA's Commodity Credit Corporation (CCC), the Kansas City Commodity Office will pay the storage charges from the storage start date

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through the maturity date for all forfeited peanuts.

The new peanut program provides a clear mandate to USDA that the loan repayment rate should be set at a level so as to allow U.S.-grown peanuts to move into the domestic and marketplace, to “minimize potential loan forfeitures,” to “minimize the accumulation of stocks of peanuts by the Federal government,” and to “minimize the cost incurred by the Federal Government in storing peanuts.” (7 U.S.C. 7957(d) (1)(B)). These objective criteria for establishing the repayment rate are similar to the factors USDA must consider in setting the repayment rate for other commodities with marketing loan programs.

Peanut growers have expressed lots of uncertainty with USDA’s implementation of the new peanut program. Many in the peanut industry are concerned that the United States is giving up on the export market since USDA will not lower the repayment rate low enough to compete with peanut production from other countries. Clearly, USDA’s actions to date in setting the weekly national posted prices for peanuts above world market prices has undermined the expansion of U.S. peanut consumption. If the loan repayment rate is set too high for an extended period of time, then the likelihood of forfeitures increases significantly and ultimately the government is left with no other choice than having a fire sale to reduce the inventory.

Some producers have expressed concerns about the kind of economic changes the new peanut program will generate, including shifts in peanut production regions, entry of new farmers trying to grow peanuts now that anyone can grow peanuts, and the ability of irrigated regions to grow peanuts at the marketing loan level of \$355 per ton. USDA also has appointed a new Peanut Standards Board to develop new handling and quality standards for peanuts.

FSA has mailed letters notifying historic peanut producers to designate the peanut acreage bases and yields to a farm or farms in order to be eligible for 2003 direct and counter-

cyclical payments. January 6, 2003, was the opening day for historic peanut producers to begin assigning the new peanut base to particular cropland on a farm. The final date to designate their peanut base acreage and yield information to a farm or farms is March 31, 2003. The total peanut acreage and yield designated to a farm will be used for the purpose of issuing 2003 through 2007 direct, and -- if applicable -- counter-cyclical payments.

Congress wanted the new peanut program to be more farmer friendly, so it assigned a peanut base to the active peanut producer, who is the person taking the risk, regardless of whether that person owned land or not. To date no regulations have been mentioned about selling peanut base, so a market for peanut base is developing in each state. This development runs somewhat counter to the intent of the new peanut program to buy out quota owners, who were paid 55 cents per pound for the elimination of the quota.

Sugar Marketing Allotment Program

The major change sugar policy contained in the 2002 farm bill was the return to marketing allotments, which reinstated the Secretary of Agriculture’s ability to balance sugar supply with demand during times of surplus to avoid forfeitures on CCC-backed loans that could result in government costs. Specifically, the farm bill reinstated the authority of USDA to impose domestic marketing allotments in order to balance markets, avoid forfeitures, and comply with import commitments under the WTO and the NAFTA. The farm bill also directed the Secretary of Agriculture to operate the sugar policy, to the maximum extent practicable, at no cost to the U.S. Treasury, by avoiding sugar loan forfeitures.

Sugar marketing allotments were in effect for the 1992/1993 and 1994/1995 seasons with mixed results. Both consumers and producers were unhappy with the effects of the marketing allotments, so they were dropped from the 1996 farm bill.

On August 27, 2002, USDA announced the overall allotment quantity (“OAQ”) for the

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2002/2003 marketing year based on the estimated domestic deliveries for food use and beginning sugar stock just prior to the announcement. The OAQ was set at 7.7 million short tons, raw value (STRV).

In setting the OAQ at this level, sweetener users believe that USDA failed to implement the sugar marketing allotments in a manner consistent with the substantive and procedural requirements of the 2002 farm bill. Users argued that the establishment of an unreasonably low overall allotment quantity level caused prices to rise, and thus harmed sweetener users and U.S. consumers.

On January 10, 2003, USDA announced an OAQ increase of 500,000 STRV, which raises the OAQ to 8.2 million STRV. The beet sugar allotment was increased to 4.457 million STRV and the cane sugar allotment was increased to 3.743 million STRV. USDA also announced it will sell all remaining refined and raw CCC sugar inventories. On January 15, USDA announced state cane allotments and processor allocations of the beet and cane sugar marketing allotments.

The sugar OAQ for a crop year is calculated by subtracting the sum of 1.532 million STRV and carry-in sugar stocks (including inventory owned by the CCC) from USDA's estimate of sugar consumption and reasonable carryover stocks at the end of the crop year. The OAQ is divided between refined beet sugar at 54.35% of the overall quantity and raw cane sugar at 45.65% of the overall quantity.

Wool & Mohair Program

On December 16, 2002, USDA announced that producers of wool and mohair were eligible to apply for either a nine-month, nonrecourse marketing assistance loan or a LDP. Under the new wool and mohair program, producers have until January 31, 2003, to request LDPs or loans for 2002-crop wool and mohair that have not yet been marketed and remain in storage. Each year thereafter, the period to request loans and LDPs will extend until

January 31 of the year following the crop year in which the applicable commodity is sheared. Wool and mohair nonrecourse marketing assistance loans provide eligible producers with interim financing on their production and facilitate the orderly marketing of the commodity throughout the year. Instead of selling the wool and mohair immediately after shearing, a nonrecourse loan allows a producer to store the production, pledging the commodity itself as collateral. The loan helps an eligible producer pay bills when they come due without having to sell the wool or mohair at a time of year when prices tend to be lower.

To be eligible for a nine-month marketing assistance loan or LDP for wool or mohair, producers must demonstrate compliance with wetlands and highly erodible land conservation requirements.

Ungraded wool offered as loan collateral will secure a nonrecourse loan made at a rate of 40 cents per pound. The repayment amount, per pound, for ungraded wool, without regard to quality, will be announced each Tuesday. Instead of obtaining a loan, producers may request LDPs on ungraded wool, with the LDP rate being the difference between 40 cents per pound and the announced repayment amount applicable during the week.

For graded wool, loans will be based on the statutory rate of \$1 per pound, "grease basis" (which is directly off the animal), but will be issued to producers on a "clean basis," using yield data from the core test report. A core test refers to a lab test where the diameter of the fiber is measured. Core test reports will only be accepted from a testing facility approved by the CCC. Loan rates will be adjusted based on a schedule of quality premiums and discounts being offered in the current market.

Milk Income Loss Contract Program

Section 1502 of the new farm bill (7 U.S.C. 7981) authorized the Milk Income Loss Contract (MILC) Program to financially compensate dairy producers when domestic milk prices fall below a specified level. The MILC program is available to producers on dairy op-

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erations throughout the United States, if the dairy operation produces and commercially markets milk during the period for December 1, 2001 – September 30, 2005. To be approved for the program, producers must be in compliance with highly erodible and wetland conservation provisions and must enter into a contract with the CCC to provide monthly marketing data. Eligible dairy producers can apply for program benefits anytime during this sign-up period, which began August 13, 2002.

As required by the 2002 farm bill, USDA will apply the same definition for a dairy operation as used in previous dairy market loss assistance programs. A dairy operation is any person or group of persons who as a single unit, as determined by the CCC, commercially produces and markets cow milk and has production facilities located in the United States. Producers on dairy operations are not permitted to reconstitute a dairy operation for the sole purpose of receiving additional payments.

MILC payments are made on a monthly basis when the Boston Class I milk price falls below \$16.94 per hundredweight (cwt). When the Boston milk price exceeds \$16.94 cwt, no payments will be made to the dairy operation and production for that month will not count towards the operation's maximum eligible production. Payments are issued up to a maximum of 2.4 million pounds of milk produced and marketed by the operation per fiscal year. Payments are issued no later than 60 calendar days after FSA receives production evidence for the applicable month.

Beginning with the 2003 fiscal year, dairy producers who do not want their payments to begin with the first month of the fiscal year must select the month they want to start receiving payments. Producers will be eligible for the payment rate in the month they select, plus payment rates for the consecutive months that follow. All producers involved in a single dairy operation must agree to the starting month. The dairy operation assumes the risk of not reaching the maximum payment quantity based on the month selected by its producers.

The Boston Class I fluid milk price is announced to the public the Friday on or before the 23rd of each month. As a result of this schedule, producers must make their payment start-month selection on or before the 15th of the month before the month for which payment is sought.

Conservation Programs

It is not an overstatement to point out that the 2002 farm bill provides the most significant investment in conservation in history, since the bill provides an 80% increase in funding for conservation efforts. The new farm bill continued the Conservation Reserve Program (CRP), which makes annual rental payments based on the agriculture rental value of the land, and provides cost-share assistance for up to 50% of the participant's costs in establishing approved conservation practices. In October 2002, USDA made \$1.6 billion in annual rental payments to producers. The farm bill also increased the ceiling for the CRP from 34.6 million acres to 39.2 million acres, and added more partnerships and services.

The farm bill provides a total of \$5.5 billion for the Environmental Quality Incentives Program (EQIP) and to date USDA has paid out over \$400 million to 19,000 applications. EQIP offers financial and technical help to assist eligible participants install or implement structural and management practices on eligible agricultural land. EQIP offers contracts with a minimum term that ends one year after the implementation of the last scheduled practices and a maximum term of ten years. The new EQIP program no longer provides for geographic priority areas and the cap on large confined livestock operations is eliminated. The new rules and regulations for EQIP are expected in the near future.

The new farm bill establishes the Conservation Security Program (CSP) for fiscal years 2003 through 2007 to reward stewardship and provide an incentive for addressing additional resource concerns on agricultural working lands. Rules for the new CSP are expected to be available by mid-year 2003. The Wetland Reserve Program (WRP) is reau-

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thorized in the new farm bill through 2007. The WRP is a voluntary program offering landowners financial and technical assistance to restore and protect wetlands and associated uplands through permanent easements, 30-year easements, and long-term restoration agreements. The farm bill increases the overall program acreage cap to 2,275,000 acres and caps annual acreage enrollment at 250,000 acres.

Country of Origin Labeling Provisions

The farm bill added a new "Subtitle D – Country of Origin Labeling," to the Agricultural Marketing Act of 1946" (7 U.S.C. 1638). These new provisions directed USDA to issue voluntary guidelines by September 30, 2002, and issue mandatory country of origin labeling regulations by September 30, 2004, for covered commodities under this statute. USDA published its voluntary guidelines in the Federal Register on October 11, 2002. These voluntary guidelines are viewed by many as the potential blueprint for implementation of mandatory country of origin labeling.

In fact, the guidelines reflect the views of the Agricultural Marketing Service (AMS) in its initial interpretation of the farm bill provisions on country of origin labeling and the type of regulatory requirements that the agency would seek if it had to issue regulations today. Fortunately, stakeholders can submit comments on the guidelines until April 9, 2003, and there is also the opportunity for Congressional hearings before the final regulations have to be implemented on September 30, 2004. Detailed recordkeeping by retailers and the food supply chain, as to the country of origin, will be a critical element of complying with the law and the final regulations that AMS will develop and implement.

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FDA Proposes Rules for Registration and Prior Notice Provisions of the Bioterrorism Act

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) was signed into law last June to address concerns regarding the security of the U.S. food supply. The primary Senate author of the Act was Pat Roberts (R-KS) who had previously served as Chairman of the House Agriculture Committee and currently serves as the Chairman of the Senate Select Committee on Intelligence. The Bioterrorism Act includes three key provisions relevant to agriculture - registration of food facilities, establishment and maintenance of records, and prior notice of imported food. The Food and Drug Administration (FDA) is responsible for rule-making in all three of these areas.

On February 3, FDA published for comment proposed regulations for the Bioterrorism Act to implement the registration and prior provisions. These proposed regulations are published in the February 3 issue of the Federal Register (68 Fed. Reg. 5378 and 5428, respectively). Comments must be submitted to FDA by April 4, 2003.

This article discusses these two sets of proposed regulation in some detail. In particular, both the Bioterrorism Act and these regulations are quite ambiguous in spelling out who is exempt from registering with FDA under the Act. These ambiguities have the potential to lead to a great amount of confusion within the agricultural industry, and they could have considerable cost implications when regulations are formulated regarding the maintenance of records.

Registration of Food Facilities

Under the Bioterrorism Act, all domestic or foreign facilities that manufacture, process, pack, distribute, receive, or hold food for con-

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sumption by humans or animals in the U.S. must register with FDA no later than December 12, 2003, unless they are exempted under the act. It is important to note that the term "food" is very broad and includes human food and animal feed, as well as live food animals. Other terms, such as "hold," are also broadly defined. "Holding" includes any storage of food (although "storage" is not defined).

There are several exemptions to this general rule. One should be careful to read the descriptions of these exemptions (discussed in detail below) carefully before concluding a given business is, indeed, exempt. The proposed regulations attempt to clarify who must register and give details regarding the registration process.

Application and Exemptions

The blanket rule of the Bioterrorism Act is that all facilities, foreign and domestic, engaged in the manufacturing, processing, packing, or holding of food for human and animal consumption in the U.S. must register unless the facility qualifies for one of the listed exceptions. In the proposed rule, FDA interprets this to apply to all domestic facilities, regardless of whether they are engaged in interstate commerce.

Although, the Act lists several very important exemptions and the proposed regulations provide further detail, both the Act and the proposed regulations present a great deal of ambiguity. The language of the Act is very general, simply stating that the term "facilities... does not include farms, restaurants, other retail food establishments, non-profit establishments [that prepare or serve food], and fishing vessels." Foreign facilities that produce food that undergoes further processing or packaging in another foreign facility are also exempt. Finally, there is an exemption for facilities that are regulated exclusively by USDA (specifically, under the Federal Meat Inspection Act, Poultry Products Inspection Act, or Egg Products Inspection Act). The proposed regulations offer more detail to these exemptions - providing effective guid-

ance in some areas and very little in others.

Regarding areas of exclusive USDA jurisdiction, the Bioterrorism Act specifically states that it shall not be construed to alter the jurisdiction between USDA and FDA. As such, the proposed FDA regulations provide that any facility regulated exclusively, throughout the entire facility, by USDA is exempt from registration. This would include such facilities as meat and poultry slaughterhouses. Facilities jointly regulated by USDA and FDA, however, will be required to register. For example, any egg processing facility that sells shell eggs is subject to regulation by FDA as well as USDA. Such a facility is not exempt, and will be required to register with FDA.

Ambiguity in the "Farm" Exemption

The language of the Bioterrorism Act regarding this exemption is quite vague - stating merely that "farms" are not "facilities" and thus indicating that farms are not required to register. The problem is that the Act does not define the term "farm." FDA has provided a more thorough definition of the term, but this definition is fraught with ambiguities and leads to many questions. The proposed regulations define "farm" as follows:

Farm means a facility in one general physical location devoted to the growing of crops for food, the raising of animals for food (including seafood), or both. The term "farm" includes:

- (i) Facilities that pack or hold food, provided that all food used in such activities is grown or raised on that farm or is consumed on that farm; and
- (ii) Facilities that manufacture/process food, provided that all food used in such activities is consumed on that farm or another farm under the same ownership.

As with virtually every attempt to define a "farm", this definition brings about a multitude of questions. This is especially true here because the preamble to the regulations states

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that the farm exemption "does not extend to facilities that grow crops and raise animals and also manufacture/process food that is sold for consumption off the facility because such activities are not incidental to farming." As an example, the preamble states that a farm that grows oranges and then processes them into orange juice for sale to a distributor will not be exempt.

The preamble does not address, however, to what extent an operation must be "devoted" to growing crops or raising animals. Most farms engage in other incidental activities, and it is not clear at what point these activities give rise to the obligation to register. For example, consider a situation in which a farmer has a grain silo on his farm that he uses to store grain (some or all of which he purchases) to feed cattle on that farm. The farmer does not fall under category (i) in the definition of "farm" because the grain he held was not all grown on his own farm. Then assume that on occasion he sells a small amount of grain out of that silo to his neighbor when the neighbor is running short on feed. Now, the farmer doesn't qualify for category (ii) of the definition of "farm" because all of the grain he held was not consumed on his own farm. Is the farmer required to register? One could create countless scenarios with the same type of questions.

In the proposed regulations, FDA offers a potential solution to the particular quandary mentioned above. A "retail facility" is also exempt from registration. Such a facility is defined as one that sells food directly to customers. In the situation above, the farmer is selling his grain directly to the farmer who will use it, and he may be exempt as a "retail facility." The problem is that FDA cites some legislative history suggesting that the "retail facility" exemption is intended to apply only to food sold for human consumption. FDA is accepting comments on whether this should also apply to retail facilities selling food for animal consumption. The outcome of this determination will be very important to farmers and ranchers as well as businesses such as feed stores.

The questions will not end there, however. Endeavors such as those grazing feeder cattle will still have to ponder whether or not they must register. Interestingly, the preamble states that feedlots would be exempt, but this conclusion has to be based on an interpretation of the term "raising," which is not defined in statute or regulation. Also, feedlots are often engaged in hedging activities that might include selling some of the feed that they mix to other feedlots or individuals in the area. It is not at all clear when such activities cease to be incidental to farming and give rise to the obligation of registering.

There is a strange irony in this situation in that registration "just to be safe" appears to be an easier option than pursuing a dialogue with FDA officials to determine whether or not a specific operation is exempt. Indeed, the proposed regulations provide no mechanism for an individual or business to inquire as to whether or not they are required to register. Further, failure to register is considered a prohibited act under the Food, Drug and Cosmetic Act and could be subject to criminal and civil action. If the regulations are adopted with these ambiguities, many operations that are unaware of the registration requirements or assume they are exempt might find themselves inadvertently in violation of the law. Furthermore, the requirements ultimately will not end with registration. Entities that are required to register with FDA will ultimately be required to maintain certain types of records.

Registration Deadlines

The Bioterrorism Act requires that all covered facilities must register by December 12, 2003 (regardless of whether the FDA regulations are finalized by that date). FDA states in its proposed regulation that by October 12, 2003, it will publish either a final rule setting forth final registration requirements or a notice providing a registration address. Registrations mailed to FDA before the publication of that document will not be accepted.

All facilities in operation before December 12, 2003 will be required to register by that date. Any facility that begins operations after

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December 12, 2003 will be required to register before beginning the covered activities.

Registration Process

The proposed regulations state that FDA is devoting the majority of its resources for registration to building an electronic registration system. FDA plans to provide an online form that will only be accepted by the electronic registration system if all mandatory fields are completed. Registration by mail will also be allowed and will be accomplished by requesting a registration form from FDA. Registration will be considered complete for electronic registration when FDA transmits the facility's electronic registration number. For registration by mail, registration is complete once data is entered into the registration system. There will be no registration fee.

The registration form will require general information about the facility, including names, address, phone numbers, etc. The registration form will also identify the type of facility and, in the case of human food facilities, will identify the general product categories related to the facility. The FDA proposed regulations include a draft registration form.

Confidentiality

Businesses required to comply with the registration provisions will naturally be concerned about public access to potentially sensitive information that might be included on the registration forms. The Bioterrorism Act stipulates that all registration information is exempt from the requirements of the Freedom of Information Act. FDA has codified this provision in its proposed regulations.

Overall, the registration process should be relatively painless. It will require a one-time registration and will only require further action should a facility undergo major changes in operation. The most important aspect of these regulations is determining whether a given facility is covered and should be registered. Under the current proposed regulations, that will be a challenging feat in many instances.

Prior Notice of Imported Food

The second set of proposed regulations published by FDA relate to the Bioterrorism Act's requirement for prior notification of imported food. This requirement mandates that notice be provided to FDA prior to importation of most food items. The Act requires that prior notification begin by December 12, 2003. These provisions will be monumentally important to businesses involved in importing food products because late, inaccurate, or incomplete prior notice will result in products being refused entry into the U.S.

"Imported Food" Subject to These Regulations

Prior notice requirements will apply to all food brought across the U.S. border, regardless of whether the food is intended for domestic consumption, with two exceptions. The scope of these requirements means that they will apply to food merely passing through the U. S. For example, food from Mexico being shipped to Canada through the U.S. is covered. The two categories of imported food not subject to the prior notice requirements are food individual travelers carry in their personal baggage and those foods subject to the exclusive jurisdiction of USDA. The second category includes foods that, at the time of importation, are under USDA's exclusive jurisdiction under the Federal Meat Inspection Act, Poultry Inspection Act, or Egg Products Inspection Act.

Who Submits Notice

The proposed regulations require that the purchaser or importer of an article who resides or maintains a place of business in the U. S. is authorized to submit notice. For food passing through the U.S., prior notice must be submitted by the arriving carrier or the in-bond carrier.

Contents of Notice

For each article of food imported, FDA will require name, address, and other contact information for the individual submitting notice, the manufacturer, grower(s) (if known), shipper, importer, owner, consignee, and/or all carriers.

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Prior notification will also require information pertaining to entry type, the Automated Commercial System (ACS) entry number, identity of the article of food, country of origin, and anticipated arrival information. If any of the required anticipated arrival information changes prior to arrival, the submission must be amended. FDA has provided a draft prior notice submission form in the proposed regulations.

Timing and Method of Filing

The proposed regulations require that notice be submitted to FDA no later than noon of the calendar day prior to the day the article will arrive at a border crossing or port of entry. Notice cannot be submitted more than five days before arrival of the goods. Additionally, prior notice cannot be filed until all required information is available. All filings, amendments, and updates must be submitted electronically through FDA's Prior Notice System.

* * *

Although significantly fewer entities would be affected by the prior notice requirements than by the registration provisions, the average costs of prior notice to industry are significantly higher. The registration provisions require only a one-time submission to FDA and should represent only a small burden to an individual business on the occasion of registering and any occasion that requires updating the registration. Prior notice, on the other hand, will be an ongoing process that adds a new layer of requirements for those importing food products. The Bioterrorism Act also includes provisions that will require facilities that manufacture, process, pack, distribute, receive, or hold food to establish and maintain records regarding immediate previous sources and immediate subsequent recipients of food. Farms and restaurants will be exempt from these provisions). The record-maintenance provisions will require considerably more effort and expense than the registration provisions. Given this fact, issues such as the definition of a "farm" will become even more important in the formulation of these regulations. The Act requires FDA to issue final

regulations on this issue by December 12, 2003. FDA has requested general comments on these provisions but has not yet published proposed regulations.

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