Agricultural Law Update

VOLUME 21, NUMBER 12, WHOLE NUMBER 253 NOVEMBER 2004

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Renewable Energy and Energy Efficiency Program

A "near miss" for USDA contractors under the Civil False Claims Act

The civil False Claims Act, with its unique *qui tam* enforcement mechanism, has risen to be a major concern for many American industries. The financial damages and penalties inflicted on defense and other Federal contractors in the early 1990's were followed by huge recoveries against healthcare companies in the later 1990's, which were in turn trumped by recent settlements from the oil and gas, housing, and pharmaceutical industries today. And, while lawsuits alleging violations of the civil False Claims Act are not new in the area of USDA contract law,[1] the agricultural industry dodged a major attack as a result of a recent decision by the federal District Court in Colorado.

The recent case, *United States ex rel. Bahrani v. Conagra, Inc.*,[2] not only demonstrates the potential for whistleblower suits in this area, but also imposes important limits on reverse false claims liability for individuals and corporations receiving payments under government contracts or pursuant to federal regulations. These new limits are important for government contractors in view of the fact that, for the fourth year in a row, more than a billion dollars has been paid to the federal government to resolve suits brought under the FCA.[3] Recoveries obtained by the Justice Department since the Act was amended in 1986 have climbed to more than $12 billion dollars.[4] This trend is expected to continue.

The False Claims Act prohibits, among other things, the submission of false claims for payment to the United States government. Violations of the Act are subject to treble damages and penalties of up to $11,000 per false claim.[5] *Qui tam* suits may be brought on behalf of the government by private individuals known as *qui tam* "relators" or "whistleblowers," and are initially filed under seal while the government investigates the allegations to determine whether to intervene in and take over the suit, or, occasionally, to institute a criminal investigation of the fraud allegations. If the government declines to intervene, the relator may continue the litigation without the government's active participation. If successful, a relator may receive between 15 and 30 percent of any recovery obtained on the government's behalf.

The most commonly-invoked provisions establishing liability under the FCA are Sections 3729 (a)(1), (a)(2), (a)(3), and (a)(7). Under subsections (a)(1), (a)(2), and (a)(3), relators must show that false claims have been submitted to the government for payment, or that false records or statements have been made in order to get claims paid. Section 3729 (a)(7) liability, known as reverse false claims liability, was added to the Act in a 1986 amendment in order to give the government a mechanism for recovering from someone "who makes a material representation to *avoid* paying money owed to the Government."[6] Specifically, Section 3729(a)(7) provides:

> Any person who ... knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government ... is liable to the United States Government for a civil penalty ... of not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person ....[7]

The crux of the liability under this section is thus the knowing submission of a false statement to avoid or decrease an obligation to pay the government. And the *Bahrani* case is a particularly well-reasoned opinion interpreting the requirements, and, more importantly, defining the limits of liability under Section 3729(a)(7).

Mr. Bahrani, the relator in the case, worked at the defendant Monfort, Inc.'s facility in Greeley, Colorado from 1996 to 1998, during which time he processed documents for the company's export of cattle hides and animal meat products. Mr. Bahrani alleged that Monfort "routinely altered original Export Certificates or forged new Certificates, rather than obtaining… USDA-issued 'in lieu of' Certificates, whenever the destination and/or buyer of an animal product shipment changed after the USDA had issued the shipment's Export Certificate."[8] The complaint alleged that the USDA would have charged a user fee of approximately $21 for each replacement certificate, that the defendants altered over 200 certificates each week, and that they followed this practice at Greeley and other locations for at least 10 years.[9]

The government declined to intervene in the case.[10] The allegations under Section

Cont. on page 2

3729(a)(7) in the complaint survived a motion to dismiss, based on the district court's application of a deferential standard under Rule 12(b)(6) and its acceptance of both the alleged facts underlying the allegations as well as the legal premise that, but for the fraud, the defendant would have been obligated to pay for the replacement forms for each alteration.[11] On summary judgment, however, the court's careful examination of the statutes governing certification of agricultural products for export and the regulations promulgated under them produced the result that these facts were not actionable under Section 3729(a)(7).

The court examined applicable statutory authority, regulations, and policies of the Department of Agriculture to determine whether the requisite obligation to pay for replacement certificates existed and was unlawfully avoided by the defendant in this case. As a result of its examination of these sources, the court found that the alleged obligation was "neither apparent in the regulatory scheme nor enforceable by the government in an action at law."[12] The court based its finding on a well-reasoned interpretation of the case law defining the obligation underlying reverse false claims liability.

First, the court accurately pointed out that the obligation that is "avoided" under Section 3729(a)(7) of the statute must be a real, legally enforceable duty to pay money to the government.[13] While the court noted that the Tenth Circuit had not yet addressed the requirements of the reverse false claims provision, it recognized that other courts that have addressed it agree that the obligation avoided must be one to pay or transmit money, arising under a statute, regulation, or "in contract, or at law in the form of a legal judgment or 'debt.'"[14] The court in *Bahrani* found, however, that instead of creating such a fixed legal obligation, the USDA's export certificate policy simply described procedures for issuance of export certificates in a voluntary inspection program, merely authorizing inspectors to issue the certificates, and — upon application and for sufficient reasons — to issue replacement certificates. Further, the court found, the relevant regulations said nothing about the circumstances under which a replacement certificate would be necessary, should be paid for, or was mandatory. In fact, the court found that nothing in the record established a requirement that a replacement certificate must be obtained each time an existing export certificate was changed. Indeed, the court noted that the relator's own witness described USDA policy on the issuance of replacement certificates in terms indicating that the obligation to pay for them was a contingent obligation that would arise only after the exercise of discretion by government officials, rather than a fixed legal obligation as required under the FCA.[15]

Moreover, even assuming that the obligation to pay a user fee had the requisite, legally fixed characteristic, the better-reasoned case law addressing the issue and relied on by the court in this case also requires that the obligation be one that "pre-exists the acts in which the defendant engages to avoid it."[16] For example, in *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, the Sixth Circuit did not extend reverse false claims liability to the defendants' failure to post a customs bond because the duty to post the bond arose only *after* the defendants had allegedly violated the underlying customs law requiring them to mark merchandise with the correct country of origin information.[17] Extending reverse false claims liability in that case would have attached penalties to defendants' actions before those actions violated an existing obligation, and the Sixth Circuit found such an expansion of Section 3729(a)(7) liability unsupportable under the statute. The Fifth and Eighth Circuits have also recognized that obligations must be already in existence as well as legally fixed for reverse false claims liability to attach.[18]

Applying the logic of the decisions in these circuits, the court in *Bahrani* properly recognized that the obligation to pay for a replacement certificate arose in this case, if at all, only after the defendant altered the existing export certificate. Thus, the act of altering the certificate was not actionable as a reverse false claim, because at the time of the alteration, no obligation to pay for a replacement certificate was in existence.

The district court's decision in *Bahrani* is fully supported by the case law of other circuits that have addressed the issue, and establishes reasonable parameters in the definition of reverse false claims liability under the False Claims Act. Moreover, the court's interpretation of Conagra's liability in this context avoids the assessment of "millions, perhaps billions, of dollars in penalties and treble damages" against Conagra for behavior that might or might not have resulted in the creation of any obligation to pay the government.[19] The *Bahrani* case is an example of the dangers of potential liability — astronomical in some cases— which can result if the False Claims Act is misapplied.

—John T. Boese, co-chair of the Litigation Department in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP, where he represents a broad spectrum of defendants in civil, criminal, debarment, and exclusion cases arising from Federal fraud investigations of government contractors and grantees, healthcare providers, oil and gas companies, and other organizations. Mr. Boese is the author of the book Civil False Claims and Qui Tam Actions (Aspen Law & Business, 2d ed. Supp. 2004-2). The views reflected here present case law that remains subject to appeals and further review and reconsideration in other courts and cases. The statements herein do not necessarily present the position of the author's firm or clients of the firm, and should not be imputed to them.

Editor's note: Mr. Boese was lead counsel for the defendants in the case before the Sixth Circuit in *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, on which the *Bahrani* case relied for its holding on reverse false claims liability.

---

[1] *See, e.g., Aero Union Corp. v. United States*, 47 Fed. Cl. 677 (2000); *Thakor v. United States*, 55 F. Supp.2d 1103 (D. Nev. 1999); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F. 3d 1139 (9th Cir. 1998).

[2] No. Civ. A. 00-K-1077, 2004 WL 2244533 (D. Colo. Sept. 30, 2004).

[3] *See* Fiscal Year 2003 *Qui Tam* Statistics, *at* http://www.ffhsj.com/quitam/fcastats.htm.

[4] Press Release, DOJ, Justice Dept. Civil Fraud Recoveries Total $2.1 Billion for FY 2003; False Claims Act Recoveries Exceed $12 Billion Since 1986 (Nov. 10, 2003), *at* http://www.usdoj.gov/opa/pr/2003/No-

Continued on page 7

Agricultural Law Update

VOL. 21, NO. 12, WHOLE NO. 253 NOVEMBER 2004
AALA Editor.....Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail:
lgmccormick@academicplanet.com

Contributing Editors: John T. Boese, Washington, D.C.; Robert P. Achenbach, Eugene, OR; Neil E. Harl, Ames, IA; Roger A. McEowen, Ames, IA.

For AALA membership information, contact Robert Achenbach, Interim Executive Director, AALA, P.O. Box 2025, Eugene, OR 97405. Phone 541-485-1090. E-mail RobertA@aglaw-assn.org.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

AALA 2004, the year in review

As 2004 comes to a close in the flurry of winter weather and holidays and we begin to look forward to 2005, it is a fitting time to consider the activities of the AALA in 2004 in light of the goals and aspirations for 2005.

Perhaps foremost of the new initiatives this year was 2004 President Susan Schneider's appointment of Maureen Kelly Moseman as chair of the Membership Committee with a charge to establish a membership recruitment program to bring new members and non-renewing former members into the association. The committee met almost once a month to hammer out the details of a mailing campaign in the late spring and a membership recruitment campaign for 2005 which encouraged all members to recruit new members by personal contacts. In November 2003, the AALA membership rolls had dropped to 527, but under the enthusiastic leadership of Moseman, surpassed its goal of increasing the AALA membership by over 20 percent to a current 683 members. The 2005 Membership Recruitment Program was introduced at the 2004 annual conference in Des Moines. A complete description of the program and forms are also available online. Not content to rest on these laurels, the committee members have already outlined their goals for 2005, including the continued development toward a student division of the AALA, increasing awareness of students at colleges and law schools throughout the nation, the establisment of stronger contacts with state bar associations, development of new AALA member benefits, and creation of permanent membership campaign procedures.

One of the best indicators of the strength of an organization is its ability to function smoothly through leadership changes. The AALA has been fortunate to have so many dedicated, experienced, and active members that the annual change of officers and board members has served to improve the quality of the AALA's activities. For the second time in three years, the association was faced with the loss of an executive director after the unexpected withdrawal of the executive director at the AAEA to take another position in Florida. The withdrawal left both associations without an executive director, and the AALA board felt that the AAEA would not be able to provide sufficient services during the search for a new executive director. Fortunately, I was able to offer my services as interim director immediately and, after one month of transition, was able to have my office in Eugene, OR set up to provide full services to the association. Time was of the essence because the membership committee had plans for a spring membership drive and the annual conference loomed large with plenty of pre-conference details to cover over the summer. The board was also concerned that the unbudgeted transition costs did not require dipping into the association's reserves. Although the AAEA used a proprietary computer system to store and manage the AALA records, we were able to convert most of the records to my computer with minimal expense and loss of data. The transition did result in some unbudgeted expenses, so I made it one of my priorities to seek cost savings to offset the transition costs.

The first cost savings measure was the elimination of the use of a contracted webmaster for the AALA web site. My knowledge of html and web site management allowed me to incorporate the webmaster position within the duties of the executive director. In 2005 I will be hiring web design services to update the functions and appearance of the AALA web site, but the daily maintenance will be my responsibility.

The second cost savings measure was to perform most of the design and printing activities in-house with a minimum of outside services. Most of the conference handbooks were printed and assembled by me, the conference papers were submitted as digital files and converted to PDF by me, and the CD handbook files were assembled by me.

The cost-saving measures were effective in reducing the conference expenses significantly but were made doubly effective by 2004 President-elect Bill Bridgforth's efforts to obtain over $12,000 in sponsorships for the annual conference in Des Moines. The extra revenue and reduced costs produced a budget surplus for 2004, instead of an initially projected deficit. A full 2004 budget report will be published in the January 2005 *Update*.

Although the cost-savings will mainly accrue in later years, effective for the November 2004 issue of the Update, the *Update* will be available to members in an e-mail version as an attached PDF file. This version of the *Update* has the clear advantages of reduced publication costs and faster delivery. Initial response has been very favorable with many members enthusiastically wanting to help the association control costs while providing a faster service. If you have not received an e-mail with the details, we may have an out-of-date e-mail address for you or none. For a sample of this new version of the *Update* or to start your e-mail subscription, please send me an e-mail at RobertA@aglaw-assn.org.

With most of a year's experience as executive director behind me, I can now focus on exploring new ways to provide service to the association and its members. I am working with the National Agricultural Law Center on expanding the publication of AALA materials and the web access of AALA members. This year, the agricultural law bibliography was transferred to the NALC web site in order to provide wider visibility to the bibliography. As mentioned above, I will be working with a web page designer on the AALA web site to increase its functionality and ease of use. As usual, much of the planning for 2005 will center on the annual symposium in Kansas City on October 7 & 8. This year we will return to offering a printed handbook to all attendees and provide a CD of the presentations after the conference.

In the coming years, I would like to explore the possibilities for a second annual symposium, the conversion of the *Update* into a major scholarly law journal, an active web listserv, a full student division of the AALA, and an annual tuition scholarship award for students of agricultural law. Although I am not the leadership of the association, I feel that it my responsibility to initiate, plan and execute association activities that benefit the members and help the association grow and prosper, under the guidance and supervision of the board. I am always open to member suggestions for improving my services and welcome member phone calls and e-mails anytime.

I would be derelict in my duties if I did not end this review and prospective with a reminder to all members to look for the membership renewal packets in December and reminders in February to renew your AALA membership. Please give some consideration to increasing your membership status to sustaining member. It will speed up development of AALA programs and benefits. Also consider calling Bill Bridgforth or Don Uchtmann and offering your services on AALA board committees. It is a great way to get to know others in the agricultural law field and I do most of the work.

I hope this article has been informative for you. I plan to provide periodic updates about association activities and encourage all members to participate in providing articles for the *Update* about their portion of the agricultural law world. A major purpose of this association is to help its members to communicate and I will do all I can to facilitate that communciation.

—Robert P. Achenbach, Jr.
AALA Executive Director
P.O. Box 2025
Eugene, OR 97402
Ph 541-485-1090
Fx 541-302-1958
RobertA@aglaw-assn.org

American Jobs Creation Act of 2004: a summary of selected provisions

By Neil E. Harl and Roger A. McEowen

The American Jobs Creation Act of 2004, H.R. 4520, was signed into law on October 22, 2004. The lengthy bill repealed the Extra-Territorial Income Exclusion Act of 2000, Pub. L. No. 106-519, and also enacted into law numerous other provisions of significance to farm and ranch taxpayers.

Repeal of ETI

The legislation repeals the Extra-Territorial Income Exclusion Act of 2000 effective for transactions after December 31, 2004, subject to transitional rules for 2005 and 2006 and binding contracts in effect on September 17, 2003. **Act Sec. 101(a), (c).**

Although the legislation could be clearer, the Conference Committee Report confirms that the phase-out rule provides taxpayers with 80 percent of their otherwise applicable ETI benefits for transactions during 2005 and 60 percent of their otherwise applicable ETI benefits for transactions during 2006. **H. Rep. No. 108-755, 108th Cong., 2d Sess. (2004).**

Deduction for income from domestic production activities

The Extra-Territorial Income Exclusion Act of 2000 is essentially replaced by a deduction ultimately equal to nine percent of the lesser of—(1) the "qualified production activities income" of the taxpayer for the taxable year or (2) taxable income for the year. This taxable income limitation excludes taxpayers with current year net operating losses or with NOL carryovers that eliminate current year taxable income. The transition percentage is three percent for 2005 and 2006 and six percent for 2007, 2008 and 2009. **Act Sec. 102(a), enacting I.R.C. § 199.** The deduction cannot exceed 50 percent of the W-2 wages of the employer for the taxable year. **I.R.C. § 199(b).**

The term "qualified production activities income" equals the taxpayer's domestic production gross receipts over the sum of the cost of goods sold, other expenses allocable to such receipts and a ratable portion of other expenses and losses not directly allocable to such receipts. **I.R.C. § 199(c).** The provision references some existing guidance for determining the proper allocation of costs and expenses (for example, I.R.C. § 263A rules in determining cost of goods sold and I.R.C. § 861 in determining other costs and expenses).

A key part of the provision is the definition of "domestic production gross receipts" which includes gross receipts derived from—(1) any lease, rental, license, sale, exchange or other disposition of qualifying production property which was manufactured, produced, grown, or extracted by the taxpayer in whole or significant part within the United States; (2) any qualified film produced by the taxpayer; (3) electricity, natural gas or potable water produced by the taxpayer in the United States; (4) construction performed in the United States; or (5) engineering or architectural services performed in the United States (for construction projects in the United States). **I.R.C. § 199(c)(4)(A).**

The Senate bill specifically provided that property would be treated as produced in "significant part" by the taxpayer within the United States if more than 50 percent of the aggregate development and production costs were incurred by the taxpayer in the United States. However, the House bill contained no such guidance and the conference bill follows the House version.

The Conference Committee states, as to electricity—

> In the case of a taxpayer who owns a facility for the production of electricity, whether the taxpayer's facility is part of a regulated utility or an independent power facility, the taxpayer's gross receipts from the production of electricity at that facility are qualified domestic production gross receipts. However, to the extent that the taxpayer is an integrated producer that generates electricity and delivers electricity to end users any gross receipts properly attributable to the transmission of electricity from the generating facility to a point of local distribution and any gross receipts properly attributable to the distribution of electricity to final customers are not qualified domestic gross receipts.

The term specifically does not include the sale of food and beverages prepared by the taxpayer at a retail establishment and the transmission or distribution of electricity, natural gas or potable water. Likewise, the term does not include property leased, licensed or rented by the taxpayer for use by a related person. **I.R.C. § 199(c)(4)(B).**

The deduction is available to S corporations, partnerships, estates, trusts and other pass-through entities and also to individuals. **I.R.C. § 199(d)(1), (2).**

For pass-through entities, the wage limitation is applied by allocating to the pass-through entity individual (such as a partner) the person's allocable share of W-2 wages or a portion of the qualified production activities income allocated to that person for the taxable year. **I.R.C. § 199(d)(1)(B).**

Deductions are allowed to cooperatives engaged in manufacturing, production, growth or extraction and to cooperatives engaged in the marketing of agricultural or horticultural products. **I.R.C. § 199(d)(3).**

The new deduction is allowed for alternative minimum tax purposes. The provision allows for the qualified production activities income deduction for purposes of computing minimum taxable income (including adjusted current earnings). The AMT deduction is determined by reference to the lesser of the qualified production activities income (as determined for the regular tax) or the alternative minimum taxable income without regard to this deduction. **I.R.C. § 199(d)(6).**

Timber cutting election

The legislation specifies that an election under I.R.C. § 631(a) made for a taxable year ending before the date of enactment of the Act can be revoked by the taxpayer for any taxable year ending after the date of enactment. **Act Sec. 102(c).**

Sec. 179 depreciation

Under the legislation, expense method depreciation (Section 179 depreciation) is continued for 2006 and 2007 at the level of $100,000 (inflation adjusted). The figure is $102,000 for 2004. **Act Sec. 201, amending I.R.C. § 179(b), (c), (d).**

Livestock sold because of weather-related conditions

The Act extends from two years to four years the period for reinvestment of the proceeds from sale of livestock held for draft, dairy or breeding purposes because of weather-related conditions. **Act Sec. 311(b), amending I.R.C. § 1033(e)(2)(A).** The Secretary is given authority to extend, on a regional basis, the period for replacement if the weather-related conditions continue for more than three years. **Act Sec. 311(b), amending I.R.C. § 1033(e)(2)(B).**

The Act also expands the provision on sale because of environmental contamination (I.R.C. § 1033(f)) to apply also to sale of eligible livestock because of weather-related conditions except for investment in real property which is reserved for soil contamination or other environmental contamination. **Act Sec. 311(a), amending I.R.C. § 1033(f).**

The Act amends the provision applicable to the one-year deferral for sale or exchange of livestock because of weather-related conditions to state that an election is valid if made during the replacement period for

Neil E. Harl is Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University. Member of the Iowa Bar.

Roger A. McEowen is Associate Professor of Agricultural Law, Department of Agricultural Education and Studies, Iowa State University, Ames, Iowa. Member of the Nebraska and Kansas Bars.

livestock under I.R.C. § 1033(e) if I.R.C. § 1033(e) applies to a sale or exchange of livestock. That means the election can be made within the four-year period. **Act Sec. 311(c), amending I.R.C. § 451(e).**

The various amendments in Act Sec. 311 apply to any taxable year with respect to which the due date (without regard to extensions) for the return is after December 31, 2002. **Act Sec. 311(d).**

Income averaging and AMT

The Act provides that, in computing alternative minimum tax, the regular tax liability for farmers and fishermen is determined without regard to income averaging. Thus, a farmer receives the full benefit of income averaging. **Act Sec. 314(a), amending I.R.C. § 55(c).** The Act also extends income averaging to fishermen. **Act Sec. 314(b), amending I.R.C. § 1301(a).** These amendments are effective for taxable years beginning after December 31, 2003. **Act Sec. 314(c).**

Capital gain treatment for timber

Under the Act, in the case of a sale of timber by the owner of land from which the timber is cut, the requirement that a taxpayer retain an economic interest in the timber in order to treat gains as capital gains under I.R.C. § 631(b) does not apply. Outright sales of timber by the landowner will qualify for capital gains treatment in the same manner as sales with a retained economic interest qualify presently, except that the usual tax rules relating to the income from the sale of timber will apply. **Act Sec. 315(a), amending I.R.C. § 631(b).** The provision is effective for sales after December 31, 2004. **Act Sec. 315(c).**

Expensing of reforestation expenditures

The Act allows up to $10,000 of qualified reforestation expenditures to be deducted in the year paid or incurred (expensed). Qualified expenditures above $10,000 are to be amortized over 84 months. **Act Sec. 322(a), amending I.R.C. § 194(b).** The Act also repeals the reforestation credit. **Act Sec. 322(d), repealing I.R.C. § 46.** The amendments apply to expenditures paid or incurred after the date of enactment. **Act Sec. 322(e).**

Tobacco buy-out

The Act repeals the tobacco farm program, effective with the 2005 crop, going back to the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1311 et seq., and eliminating references to tobacco, in exchange for contract payments in 2005 through 2014. **Act Sec. 611.**

Luxury SUVs

The Act limits the expense method depreciation under I.R.C. § 179 for sport utility vehicles to $25,000. "Sport utility vehicle" is defined as four-wheeled vehicle, primarily designed to carry passengers over public streets, roads and highways, which is not subject to I.R.C. § 280F (limiting depreciation for "passenger automobile") and which is rated at not more than 14,000 pounds gross vehicle weight. The term does not include vehicles designed to have a seating capacity of more than nine persons behind the driver's seat, equipped with a cargo area of at least six feet in interior length which is an open area or is designed for use as an open area but is enclosed by a cap and is not readily accessible from the passenger compartment or has an integral enclosure, fully enclosing the driver compartment and load carrying device, does not have seating rearward of the driver's seat and has no body section protruding more than 30 inches ahead of the leading edge of the windshield. **Act Sec. 910(a), amending I.R.C. § 179(b)(6).** The provision is effective for property placed in service after the date of enactment. **Act Sec. 910(b).**

Depreciating leasehold improvements and restaurant property

The Act classifies "qualified leasehold improvement property" and "qualified restaurant property" as 15-year property for depreciation purposes if placed in service before January 1, 2006. **Act Sec. 211, amending I.R.C. § 168(e)(3)(E).** "Qualified restaurant property" means I.R.C. § 1250 property which is an improvement to a building if placed in service more than three years after the building was first placed in service and more than 50 percent of the square footage is devoted to preparation and consumption of prepared meals. **I.R.C. § 168(e)(7).** Qualified leasehold property has the meaning given to the term by I.R.C. § 168(k)(3) with specified exceptions. **I.R.C. § 168(e)(6).** Both categories of property are required to use straight-line depreciation. **I.R.C. § 168(b)(3)(G), (H).** The provision is effective for property placed in service after the date of enactment of the Act. **Act Sec. 211(f).**

S corporations

The Act provides that a husband and wife (and their estates) are treated as one shareholder and, in the case of a family with respect to which an election is in effect, all members of the family are treated as one shareholder. **Act Sec. 231(a), amending I.R.C. § 1361(c)(1).** The provision is effective for taxable years beginning after December 31, 2004. **Act Sec. 231(c)(1).**

The Act also raises the limitation on the number of shareholders in an S corporation from 75 to 100, effective for taxable years beginning after December 31, 2004. **Act Sec. 232(a), (b), amending I.R.C. § 1361(b)(1)(A).**

The Act provides for the transfer of suspended losses when stock in an S corporation is transferred between spouses or a former spouse incident to a divorce. **Act Sec. 235(a), amending I.R.C. § 1366(d)(2).**

IRA as owner of S corporation bank

The legislation allows a trust which constitutes an IRA, including Roth IRAs, to own stock in a bank operated as an S corporation to the extent of the stock held by the IRA as of the date of enactment. **Act Sec. 233, amending I.R.C. § 1361(c)(2)(A).**

Potential current beneficiaries of an electing small business trust

The Act specifies that an unexercised power of appointment is to be disregarded in determining potential beneficiaries of an ESBT. **Act Sec. 234(a), amending I.R.C. § 1361(e)(2).** The provision is effective for taxable years beginning after December 31, 2004. **Act Sec. 234(b).**

QSST losses and at risk amounts

Under the legislation, for purposes of I.R.C. §§ 465, 469, the disposition of S corporation stock by the trust is treated as a disposition by the beneficiary, effective for transfers after December 31, 2004. **Act Sec. 236(a), (b), amending I.R.C. § 1361(d)(1).**

Bank S corporations and passive income test

For purposes of the 25 percent rule for S corporations owning banks, where the S corporation has accumulated earnings and profits, the term "passive investment income" does not include interest income earned or dividends on stock required to be held, effective for taxable years beginning after December 31, 2004. **Act Sec. 237(a).**

Invalid qualified subchapter S subsidiary elections

The Act provides relief for invalid qualified Subchapter S subsidiary elections, effective for elections made and terminations made after December 31, 2004. **Act Sec. 238(a), (b), amending I.R.C. §§ 1361(b), 1362(f).**

Alcohol and biodiesel fuel credits

The new law does not change the temporary duty on ethanol. The law eliminates reduced rates of excise tax for most alcohol-blended fuels and imposes the full rate of excise tax on most alcohol-blended fuels (18.3 cents per gallon on gasoline blends and 24.3 cents per gallon of diesel-blended fuel). In place of reduced rates, the legislation creates two new excise tax credits: the alcohol fuel mixture credit and the biodiesel mixture credit. The sum of these credits may be taken against the tax imposed on taxable fuels. The new law allows taxpayers to file a claim for payment equal to the amount of these credits for biodiesel or alcohol used to produce an eligible mixture. Under certain circumstances, a tax is imposed if an alcohol fuel mixture credit or biodiesel fuel mixture credit is claimed with respect to alcohol or biodiesel used in the production of any alcohol or biodiesel mix-

Cont. on p. 6

American Jobs Creation Act/cont. from page 5
ture, which is subsequently used for a purpose for which the credit is not allowed or changed into a substance that does not qualify for the credit. The legislation eliminates the General Fund retention of certain taxes on alcohol fuels, and credits these taxes to the Highway Trust Fund. The Highway Trust Fund is credited with the full amount of tax imposed on alcohol and biodiesel fuel mixtures. The legislation also extends the present-law alcohol fuels income tax credit through December 31, 2010. **Act Sec. 301(a), adding I.R.C. § 6426.**

Alcohol fuel mixture excise tax credit

The provision eliminates the reduced rates of excise tax for most alcohol-blended fuels. Under the provision, the full rate of tax for taxable fuels is imposed on both alcohol fuel mixtures and the taxable fuel used to produce an alcohol fuel mixture. In lieu of the reduced excise tax rates, the provision provides for an excise tax credit, the alcohol fuel mixture credit. The alcohol fuel mixture credit is 51 cents for each gallon of alcohol used by a person in producing an alcohol fuel mixture for sale or use in a trade or business of the taxpayer. For mixtures not containing ethanol (renewable source methanol), the credit is 60 cents per gallon.

For purposes of the alcohol fuel mixture credit, an "alcohol fuel mixture" is a mixture of alcohol and a taxable fuel that (1) is sold by the taxpayer producing such mixture to any person for use as a fuel or (2) is used as a fuel by the taxpayer producing the mixture. Alcohol for this purpose includes methanol, ethanol and alcohol gallon equivalent of ETBE or other ethers produced from such alcohol. It does not include petroleum or coal-based alcohols or alcohols with a proof less than 190. The excise tax credit is coordinated with the alcohol fuels income tax credit and is available through December 31, 2010. **Act Sec. 301, adding I.R.C. § 6426(b).**

Biodiesel fuel mixture excise tax credit

The Act also provides an excise tax credit for biodiesel mixtures. The credit is 50 cents for each gallon of biodiesel used by the taxpayer in producing a qualified biodiesel mixture for sale or use in a trade or business of the taxpayer. A qualified biodiesel mixture is a mixture of biodiesel and diesel fuel that—(1) is sold by the taxpayer producing the mixture to any person for use as a fuel or (2) is used as a fuel by the taxpayer producing the mixture. **Act Sec. 301, adding I.R.C. § 6426(c).** In the use of agri-biodiesel, the credit is $1.00 per gallon. **Act Sec. 301, adding I.R.C. § 6426(c)(2)(B).**

The credit is not available for any sale or use for any period after December 31, 2006. **Act Sec. 301, adding I.R.C. § 6426(c)(6).**

Dividends on cooperative stock without reducing patronage dividends

The Act provides that net earnings of a cooperative are not to be reduced by amounts paid during the year as dividends on capital stock or other proprietary capital interests of the organization to the extent the activities of incorporation or bylaws or other contract with patrons provide that such dividends are in addition to amounts payable to patrons derived from business done with or for patrons during the taxable year. **Act Sec. 312(a), amending I.R.C. § 1388(a).** The amendment is effective for distributions in taxable years beginning after the date of enactment. **Act Sec. 312(b).**

Allocation of small ethanol producer credit

The Act specifies that, for a cooperative, any portion of the small ethanol producer credit at the election of the cooperative, may be apportioned pro rata among the patrons on the basis of the quantity or value of business done with or for the patrons during the taxable year. **Act Sec. 313(a), adding I.R.C. § 40(g)(6).** The provision is effective for taxable years ending after the date of enactment. **Act Sec. 313(b).**

Modification of cooperative marketing sales

The Act extends extension of cooperative marketing rules to include value-added processing involving animals. **Act Sec. 316(a). amending I.R.C. § 1388(k).** The provision is effective for taxable years beginning after the date of enactment. **Act Sec. 316(c).**

Extension of declaratory judgments to farmers' cooperatives

The Act extends declaratory judgments to exempt cooperatives with respect to initial classification or continuing classification of a cooperative as a tax-exempt organization. **Act Sec. 317(a), amending I.R.C. § 7428(a)(1).**

Rural mail carriers

The Act specifies that if the expenses incurred by an employee for the use of a vehicle as a rural mail carrier exceed the qualified reimbursements for such expenses, the excess is to be taken into account in computing the miscellaneous itemized deduction. **Act Sec. 318(a), amending I.R.C. § 162(o).**

The provision applies to taxable years beginning after December 31, 2003. **Act Sec. 318(c).**

Election to deduct state and local sales taxes in lieu of state and local income taxes

The Act allows, by election, after 2003, a deduction for state and local income taxes or state and local general sales taxes. The provision states that, in the case of food, clothing, medical supplies and motor vehicles, the fact that the tax does not apply to some or all of the items is not to be taken into account in determining whether the tax applies to a broad range of classes of items. **Act Sec. 501(a), amending I.R.C. § 164(b).**

A compensating use tax is treated as a general sales tax for this purpose. **Act Sec. 501(a), amending I.R.C. § 164(b)(5)(E).**

In the case of motor vehicles, if the rate of tax exceeds the general rate, the excess is disregarded. **Act Sec. 501(a), amending I.R.C. § 164(b)(5)(F).**

Tables are to be provided based on average consumption on a state-by-state basis. **Act Sec. 501(a), amending I.R.C. § 164(b)(5)(H).**

Business related credits and AMT

The Act allows the alcohol fuel credit and the credit for electricity produced from renewable resources (to the extent attributed to electricity or refined coal) against regular and minimum tax. **Act Sec. 711(a), amending I.R.C. § 38(c).**

Sale of principal residence in like-kind exchange within five years of sale

The Act denies the I.R.C. § 121 exclusion to property acquired in a like-kind exchange within the prior five-year period beginning with the date of property acquisition. The provision is designed to counter situations where—(1) the property is exchanged for residential real property, tax free, under I.R.C. § 1031; (2) the property is converted to personal use; and (3) a tax-free sale is arranged under I.R.C. § 121. **Act Sec. 840(a), amending I.R.C. § 121(d).**

The amendment applies to sales or exchanges after the date of enactment. **Act Sec. 840(b).**

Donations of motor vehicles, boats and airplanes

The Act imposes limits on donated property, such as used automobiles (but also including boats and airplanes) with a claimed value in excess of $500 by requiring contemporaneous substantiation of value and providing that sale of the vehicle by the donee (without improvements or significant intervening use) limits the charitable deduction to the gross proceeds received from the sale. **Act Sec. 884(a), amending I.R.C. § 170(f)(12).** The provision is effective for contributions made after December 31, 2004. **Act Sec. 884(a).**

Nonqualified deferred compensation plans

The legislation provides new rules for requiring the inclusion of deferred compensation from nonqualified deferred compensation plans in gross income. **Act Sec. 885(a), enacting I.R.C. § 409A.** The provision is effective for amounts deferred after

Continued on page 7

American Jobs Creation Act/Cont. from p. 6
December 31, 2004. **Act Sec. 885(d).**

User fees

The authority to levy user fees is extended through September 30, 2014. **Act Sec. 891, amending I.R.C. § 7528(c).**

Satisfaction of debt with partnership interest

The Act specifies that cancellation of indebtedness income is realized on transfer of a capital or profits interest in a partnership to a creditor in satisfaction of recourse or nonrecourse indebtedness, based on the fair market value of the stock or interest. The amount recognized is the amount if the debt were satisfied with money equal to the fair market value of the partnership interest. **Act Sec. 896(a), amending I.R.C. § 108(e)(8).** The provision applies to cancellations of indebtedness occurring on or after the date of enactment. **Act Sec. 896(b).**

Divisive, type D reorganizations

The Act states that, in a reorganization under I.R.C. § 368(a)(1)(D), with respect to which stock or securities of the corporation are distributed in a transaction qualifying under I.R.C. § 355, the distribution is nontaxable only to the extent the sum of money and the fair market value of other property transferred to creditors does not exceed the adjusted bases of the property transferred. **Act Sec. 898(a), amending I.R.C. § 361(b)(3).**

Controlled group of corporations

The Act modifies the definition for "brother-sister" controlled groups to state that a brother-sister controlled group is two or more corporations if five or fewer persons who are individuals, estates or trusts own stock possessing at least 80 percent of the total combined power of all classes of stock entitled to vote, or at least 80 percent of the total value of shares of all classes of stock, of each corporation, and more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each corporation. **Act Sec. 900(a), amending I.R.C. § 1563(a)(2).** The provision is effective for taxable years beginning after the date of enactment. **Act Sec. 900(c).**

Reprinted with permission from Volume 15, Number 21 of the Agricultural Law Digest.

Near miss/cont. from page 2
vember/03 civ 613.htm.

[5] 31 U.S.C. §3729(a).

[6] S. Rep. No. 99-345, 99th Cong. (2d Sess. 1986), at 15, 18 (emphasis added).

[7] 31 U.S.C. § 3729(a)(7).

[8] *United States ex rel. Bahrani v. Conagra Inc.,* 183 F. Supp.2d 1272, 1273 (D. Colo. 2002).

[9] *United States ex rel. Bahrani v. Conagra Inc.,* No. Civ. A. 00-K-1077, 2004 WL 2244533, at *1 (D. Colo. Sept. 30, 2004).

[10] While the DOJ does not normally explain its rationale for intervening in these cases, in the vast majority of cases, the reason is that the case has no — or very little — merit. Statistics compiled by the Department of Justice on recoveries in *qui tam* cases illustrate this point, demonstrating that recovery totals in cases pursued by the government are higher than those in declined cases. For example, in 2003, $1,395,344,339 was recovered in intervened cases, whereas the amount recovered during that period in declined cases was $85,042,086. *See* Fiscal Year 2003 *Qui Tam* Statistics, *at* http://www.ffhsj.com/quitam/fcastats.htm. This has been a continuous trend in recoveries since the FCA was strengthened and amended in 1986.

[11] *Bahrani*, 2004 WL 2244533, at *2, 3.

[12] *Id.* at *4.

[13] *Id*. at *2 (citing *American Textile Mfrs. Inst., Inc. (ATMI) v. Limited, Inc.,* 190 F. 3d 729, 734-35 (6th Cir. 1999)).

[14] *Id.* (citing *United States ex rel. S. Prawer & Co. v. Verrill & Dana,* 946 F. Supp. 87, 89, 93-95 (D. Me. 1996)).

[15] In describing USDA policy on obtaining replacement certificates, the relator's witness, Dr. Mina, a retired USDA Deputy Administrator for Field Operations, stated that the "certifying official will initial…[changes] or, if the changes are major, he will issue a replacement or in lieu of certificate at the request of the exporter." *Id.* at *4 (emphasis omitted). The court did not find that the obligation to pay for replacement certificates under this formulation rose to the level of obligation required under the FCA. Specifically, the court found that "[t]he definition of 'obligation' under §3729 (a)(7) does not include those contingent obligations that arise only because the government has prohibited an act (changing an official USDA export certificate without notifying the USDA—there are other means of enforcing that obligation), or that may arise once the government exercises discretion (an inspector declining to initial a 'major' change to an export certificate so the exporter must request, and pay for, a replacement)." *Id.* at *5.

[16] *Id.* at *2 (citing *ATMI*, 190 F. 3d at 734-35).

[17] *ATMI*, 190 F. 3d at 736-41.

[18] *See United States ex rel. Bain v. Georgia Gulf Corp.,* 386 F.3d 648 (5th Cir. 2004); *United States v. Q Int'l Courier, Inc.*, 131 F. 3d 770 (8th Cir. 1997).

[19] *Bahrani*, 2004 WL 2244533, at *5.

Position announcement

Farmers' Legal Action Group, Inc. (FLAG) is a national nonprofit law firm dedicated to providing legal services to family farmers and their rural communities in order to help keep family farmers on the land. FLAG provides a combination of legal education and farmer-friendly publications, backup support to advocates and attorneys serving family farmers, impact litigation on key issues, and legislative and administrative technical assistance services to its client organizations, with the goal of preserving the family farm system of agriculture in this country.

Position: Executive Director

Qualifications: Applicants should have (1) a law degree or substantive knowledge of agriculture issues; (2) demonstrated fund raising ability from foundations; (3) a demonstrated commitment to public interest/social justice work; (4) experience running a non-profit organization; and (5) good listening skills and ability to coordinate work of dedicated and talented staff. Experience with agricultural law and/or legal services is a plus. The Executive Director works in collaboration with the Development Director to develop potential foundation funding sources, establish and maintain relations with funders, and write grant proposals.

Compensation: Depends on experience.

Benefits: FLAG offers excellent benefits, including health coverage, SEP plan, flexible working hours, transportation subsidy, etc.

EOE: FLAG is an equal opportunity employer and encourages applications from women and people of color.

Applications: E-mail or mail (1) a cover letter explaining qualifications for and interest in position; (2) resume; and (3) list of three references to:

Farmers' Legal Action Group, Inc.
ATTN: Executive Director Search
360 N. Robert Street, Suite 500
St. Paul, MN 55101
hiring1@flaginc.org

Agricultural Law Update
6292 N.E. 14th Street
Des Moines, IA 50313

First Class Mail
U.S. POSTAGE
PAID
Des Moines, Iowa
Permit No. 5297

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

The new year rapidly approaches and that means that it is time to renew your membership to the AALA. Membership renewal packets should be arriving shortly and I urge everyone to return their membership dues promptly to avoid unintentional interruption in your Update subscription and other member benefits. Recent graduates should notice the new membership category of "new professional" for $60 for members who are within three years, as of January 1, 2005, of graduating from a college or law school. Members should also read the information about the new membership recruitment program which provides the chance to win a free registration to the 2005 annual conference in Kansas City. In addition, members should check the information listed on the AALA online database for accuracy and completeness. To log on to the "members only" portion of the web site, use your last name as the username and your member number as the password. The membership renewal forms will have your member number listed.

The membership dues remains the same due to the printing and mailing cost savings from the e-mail version of theUpdate. If you did not receive an e-mail with a sample PDF file Update, please send me an e-mail at RobertA@aglaw-assn.org and I will send a sample file ASAP.

As always, I look forward to hearing from all members about suggestions for improving your membership benefits.

Robert P. Achenbach, Jr.
Executive Director
P.O. Box 2025
Eugene, OR 97402
Ph 541-485-1090
Fx 541-302-1958