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AGRIBUSINESS LAW

MAY 2014

EPA PROPOSES CHANGES:

SEEKING TOUGHER PESTICIDE SAFETY STANDARDS

BY JANE C. HOFMEYER, ATTORNEY

The U.S. Environmental Protection Agency (EPA) recently announced proposed revisions to its Worker Protection Standard for agricultural pesticides for the first time since the existing standard was established in 1992.

According to EPA estimates, 1.1 billion pounds of pesticides are used annually in the United States, and approximately 10 to 20 thousand physician-diagnosed pesticide poisonings occur each year among the approximately 2 million U. S. agricultural workers. This figure does not take into account the number of pesticide poisonings which go unreported, which is likely substantial.

The proposed changes to the Farm Worker Protection Standard include:

- Increased frequency of mandatory trainings (from once every five years to annually) to inform farmworkers about the protections they are afforded under the law.

  These protections include:
  - Restrictions on entering pesticide treated fields and surrounding areas
  - Decontamination supplies,
  - Access to information and use of personal protective equipment
  - Expanded trainings to include instructions to reduce take-home exposure from pesticides on work clothing and other safety topics.

  It would reduce the "grace period" under which newly hired workers could work without such training from five to two days and require that employers keep records of pesticide training for two years. Recordkeeping is currently not required.

- Expanded mandatory posting of signs to show where applications have occurred for the most hazardous pesticides. The signs will prohibit re-entry into pesticide treated fields until residues decline to a safe level.

- Creation of 25 to 100 foot buffer zones around areas where

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Connect with Community

Every day, Kids' Food Basket (KFB) attacks childhood hunger one sack supper at a time.

This local organization is dedicated to serving well-balanced meals to 6,000 kids in the greater Grand Rapids and Muskegon area.

YOU Can Help Too!

See how YOU can help on page 4!

Spotlight: Eugene A. Franks

Eugene has practiced law on the lakeshore for nearly 30 years. As a member of Smith Haughey's Agricultural and Agribusiness Industry Team, Eugene excels at navigating through the "legalese" in contracts and other documents related to land acquisition, leasing and various tax issues for area farmers and growers.

It has been said that when dealing with legal documents, it's not what is in the documents that should concern you, but rather what isn't. Eugene's experience allows him to effectively counsel farmers and agribusiness owners with common sense solutions.

Eugene can be contacted at 231-724-4334 or efranks@shrr.com.

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pesticides have been applied to protect workers and others from exposure to pesticide overspray and fumes.

- Prohibition of anyone under the age of 16 from handling pesticides or being allowed early re-entry into treated fields and other areas. The current standard has no minimum age. Farm owners' immediate families are exempted from this requirement. Currently, the Fair Labor Standards Act regulates the handling of toxicity category one and two pesticides for anyone under the age of 16. However, all pesticides, regardless of toxicity, would be regulated with the new proposal. To be eligible for family farm exemption, the farm must not be a corporation.

- Measures to improve the states' ability to enforce compliance, including requiring employers to keep records of application-specific pesticide information as well as farmworker training and early entry notification for two years.

- Adoption of Occupational Safety and Health Administration (OSHA) standards for Personal Protection Equipment (respirators), ensuring respirators are providing protection, including fit test, medical evaluation, and training.

- Requirement to make information specific to pesticide application, including the pesticide label and Safety Data Sheets, available to farmworkers or their advocates (including medical personnel).

The EPA has prepared an analysis of the potential costs and impacts associated with the proposed changes. The EPA estimates a savings of $5 to $14 million per year after adjustment for under reporting of pesticide incidents. It points to the reduced effects of acute and lower chronic pesticide exposure to workers, handlers, and farmworker families, including a range of illnesses such as Non-Hodgkin's Lymphoma, Prostate Cancer, Parkinson's disease, Lung Cancer, Chronic Bronchitis and Asthma.

The EPA estimates the proposed changes will not have a significant impact on a substantial number of small businesses and will have a negligible effect on jobs and employment.

The EPA is seeking your input on the proposed changes. The comment period is open until June 17, 2014. For information on the EPA's Proposed Worker Protection Standard, including tips for commenting, visit http://www.epa.gov/oppfead1/safety/workers/proposed/index.html.

Contact Jane Hofmeyer at jhofmeyer@shrr.com or 616-458-5388.

Keeping the Farm in the Family

Gift Planning by Defined Valuation Clauses

BY GEORGE F. BEARUP, ATTORNEY

We regularly counsel our clients on their desires to keep the farm in the family. Farms tend to embody a lot of family history and hard work that their owners want to pass on to their kids and grandchildren. Although there are numerous ways to pass it on, one of the ways often contemplated is by a gift during the farmer's lifetime, for many reasons including tax planning or to encourage family members to pursue farming as a profession and lifestyle. When giving a lifetime gift, it is critical that the gift transaction be properly documented and structured to prevent negative consequences, including taxes, interest and penalties.

Farmland is often difficult to value, as it is a closely held business interest. The risk is that if the donor of such an asset is wrong in the reported value of the gift, the IRS on audit can assess additional gift taxes, interest, and perhaps an understatement of gift tax penalty. Thus, when farmland or a closely held business interest is the subject of a gift or sale, serious consideration should be given to the use of a **defined valuation clause**, which has the effect of preventing unexpected gift tax liability arising on an IRS audit.

The IRS has historically viewed with hostility the transfer of assets, particularly farmland and closely held business interests, when the donor uses a value adjustment clause to document that transfer. However, the 2012 Tax Court decision (*Wandry*) formally upheld a defined value gift of a closely held LLC that was subsequently challenged by the IRS on audit.

For many years, donors tried to use value allocation formulae by which assets were allocated at a certain value to the donee; if the value was subsequently successfully challenged by the IRS on audit, part of the transferred assets would be shifted elsewhere (e.g., to a donor advised fund or charity), which would not result in a gift tax owed. These transfer clauses were structured so that any amount of a gift in excess of a specified amount was instead transferred to an entity that was not subject to a gift tax, like a charity, or to the donor's spouse, which would qualify for the federal gift tax marital deduction. The IRS was quick to challenge these formula allocating gifts claiming they were contrary to public policy. The IRS claimed that the formula frustrated its ability to collect taxes – its view of public policy!

But along came *Wandry*, which successfully structured the lifetime gift in a slightly different manner. A value definition clause does not operate to subsequently reduce or increase the size of a gift, or the amount of consideration that is paid for the purchase of a hard to value asset. Rather, excess value beyond a certain dollar amount remains with the donor. Restated, there is no subsequent "shift" of part of the transferred asset to another. An example of a value definition clause is the following:

> ***I transfer to the Trustees of the Trust that I established for my children a fractional share of property that is listed on Schedule A to this transfer instrument. The numerator of that fraction is $5.34 million dollars. The denominator of that fraction is the value of such property as finally determined for federal gift tax purposes after audit by the IRS, or in judicial proceedings that challenge the transferred property's value.***

This clause will always produce a gift that is $5,340,000, currently the largest federal gift tax exemption available to a donor. If the IRS values the transferred property at $8 million, then only 66.75% of the property will be transferred to the donee, which produces a gift of $5,340,000 covered by the donor's then available federal gift tax lifetime exemption.

In light of the *Wandry* case, serious consideration should be given to the use of a value definition formula gift rather than estimating the value of the gift coupled with the hope that the reported value is sustained on a subsequent IRS audit. However, relying upon a value definition clause is not a complete safe harbor. The *Wandry* decision is only a Memorandum Decision of the Tax Court, which is given less weight than a regular decision of that Court. Moreover, the IRS subsequent to the *Wandry* decision, announced its "non-acquiesence" with that result. [IRS Announcement 212-46 IRB 3] But with those risks known, reliance upon a value definition clause should allow a donor to transfer a set dollar amount of an interest in illiquid or a hard-to-value asset without having to worry about potential gift tax liability arising from an IRS audit.

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This newsletter is published by:

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Muskegon and Traverse City

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Because of the nature of the formula, which is dependent upon whether the value is accepted by the IRS, it is sometimes better to transfer the hard-to-value asset to a Trust which is classified for federal income tax purposes as a *grantor trust*, for which the transferor is required to pay the income tax. The income tax reporting issues that cause administrative headaches in the years that follow the use of a defined value gift (How much was actually transferred? How much was actually retained by the transferor?) can be alleviated if the beneficiary of the gift is a *grantor trust*, where all of the income derived from the transferred interest will be allocated to the donor no matter how the interest is ultimately determined to be owned between the donor and the donee.

Once the three year IRS statute of limitations on IRS audits passes, the *grantor trust* classification can then be terminated, thus causing all future income derived from the gifted asset to be taxed either to the Trust or to the trust beneficiaries.

With the gift of hard to value assets like real estate or closely held business interests, there always lurks the risk of large gift tax liability from an IRS challenge to increase the value of the gifted assets. Relying upon a defined value gift (or sale) clause like that used in *Wandry* is a viable method to reduce the gift tax exposure to the donor, notwithstanding the IRS' noted hostility to the formula based transfers.

Contact George Bearup at gbearup@shrr.com or 231-486-4510.

Join the Attack!

About 6,000 sack suppers are delivered each day to area schools.

The need for sack suppers and its nutritionally-packed contents is on the rise.

Here is where YOU can help! KFB is in need of seasonal fruit and vegetables. To begin tackling this project, KFB is looking to form a local task force to start the conversation and make connections with area farmers and growers.

This group is open to anyone that holds an interest in KFB and/or the farming community.

Want to join the attack? Contact Jane Berkey at jane@kidsfoodbasket.com.