



Agricultural Law Update

January 2013

YOUR AG BUSINESS NEEDS A SUCCESSION PLAN

Planning for the future of your ag business is critical. Many owners postpone succession planning and estate planning, thinking they will have plenty of time in the future or that they can "just wait until "X" happens." The problem is that often "Y" happens first and then the business owner's options are limited.

Advanced planning allows the family to transfer management and ownership how they want and to address legal, tax, and family relationship issues sooner rather than being forced to react after the death of a family member.

WHAT IS SUCCESSION PLANNING?

Succession planning is the method used to make sure your ag business continues into the future. It is a process of formally planning for a transition of management and ownership of your business from one generation to the next.

It's important to note that one plan does not fit all. Some of the options you should consider include:

- An outright sale of the family farm to the younger generation (or to a third party), or
- A plan that relies primarily on gifting or on life insurance, or
- A plan to expand a farming operation to help support more families, or to divide a large operation into discrete parts to support different families, or

- Creation of a simple business structure to allow transition in the future.

WHEN SHOULD A SUCCESSION PLAN BE DEVELOPED?

It is never too early. Members of older generations may wish to retire; younger members of farm families may want to take an ownership interest in the farm earlier in life. Often, it takes many years to fully implement a succession plan. It is also common for the plan to change during implementation to accommodate family and business changes. A well-designed plan can accommodate this flexibility. The earlier you start, the easier it is to remain flexible.

WHAT IS INCLUDED IN A SUCCESSION PLAN?

A comprehensive succession plan tackles many different issues, such as:

- Relationships among family members, for example, whether members of the younger generation can work effectively together for the foreseeable future, and whether the children working "in-the-business" and "out-of-the-business" should be treated equally, or simply fairly.
- Legal matters relating to the ownership of assets and business formation.
- Financial matters, such as the income needs of the older generation and the financial capacity of the younger generation.
- Federal and state tax concerns, such as the impact of any income, gift, estate, and generation-skipping transfer ▶

Continued on page 2 | [Succession Plan](#)

DATES TO REMEMBER:

January 14-16, 2013 | Michigan Agri-Business Association Winter Conference, Lansing Center, Lansing, MI | www.miagbiz.org

January 15-17, 2013 | Fort Wayne Farm Show, Allen County Coliseum, Fort Wayne, IN | www.tradexpos.com/ftwayne

January 23, 2013 | Succession Planning for Agribusinesses Webinar, presented by Todd Hoppe | bit.ly/Succession-Planning

January 23, 2013 | New Agricultural Law Section Organizational Meeting, State Bar of Michigan, Lansing, MI

January 24, 2013 | The Growing Michigan Conference, MSU Extension, Lansing Center Lansing, MI | bit.ly/MSUGrowing

February 7-9, 2013 | 11th Annual Great Lakes Dairy Conference (GLRDC) Frankenmuth, MI | bit.ly/GLRDC-Brochure

February 13-16, 2013 | 48th National Farm Machinery Show, Louisville, KY | www.farmmachineryshow.org

February 19-20, 2013 | Integrated Pest Management Academy (IPMA13) Michigan State University Extension, Okemos, MI | bit.ly/MSU-Pest-Management

February 28-March 2, 2013 | Commodity Classic, Kissimmee, FL | www.commodityclassic.com

February 20, 2013 | Independent Contractors vs. Employee? It Matters! Webinar, Deanna Swisher & Todd Hoppe | bit.ly/Misclassification-Webinar

taxes or Michigan real property transfer tax.

- Issues related to the tax basis in family assets. Many family farms that have been informally transferred have complex tax situations.
- Medicaid questions for members of older generations.

WHO SHOULD BE INVOLVED IN THE SUCCESSION PLANNING PROCESS?

A comprehensive succession plan requires the participation of all family members and professional advisors, such as the family’s attorney, accountant, and financial and/or business advisor. When selecting advisors, it is best to choose those with experience in both the agriculture business and succession planning.

WHAT ARE THE KEY STEPS TO SUCCESSION PLANNING?

The necessary steps include:

1. Talk to each other. Identify all parties to the plan including on-farm and off-farm family members and their interests, goals, and concerns.
2. Gather information. The family should determine what assets it owns, who owns them, and how the ownership is structured. To complete this process, the family members should gather their respective estate planning documents, business organization documents (if any), deeds to real estate, financial statements, loan documents, and documents related to other farm assets. Don’t forget that many family farms have equity interests in cooperatives. Written notices of allocation and per-unit retains, which

are assets of the family farm, can be overlooked. The more accurate and complete your information is, the smoother the planning process will be.

3. Talk to your advisors. Once you gather your information, schedule a meeting with your team of advisors to begin the planning process. The objective will be to identify the important relationships, goals, and challenges.
4. Develop a plan. This step involves developing an outline for the succession plan, which the family and advisors can critically evaluate.
5. Implement the plan. After the plan has been approved it must be implemented. This may include the formation of business entities, the purchase and sale of business assets, gifting, and drafting estate-planning documents.
6. Revisit the plan. Families should revisit their succession plan every five years, or when major changes occur, such as a death, or a proposed change in ownership or management of the farm business.

Several Foster Swift attorneys have significant experience in succession planning and addressing the unique circumstances presented by agricultural businesses and other family businesses. ■■

To learn more about how we can assist with your succession plan, please contact:

Todd W. Hoppe | 616.726.2246
Ryan Lamb | 616.796.2503
David VanderHaagen | 517.371.8102

NEW ENVIRONMENTAL LEADERS LEGISLATION

- Charles E. Barbieri

The Michigan Legislature in late December passed clean corporate citizenship legislation which was signed by Lt. Governor Calley in early January for execution. Here are some quick highlights:

SENATE BILL 939

Senate Bill 939 codifies and enlarges some of the features of the current administrative clean corporate citizen program. Section 1407 excludes companies from consideration if during the immediate prior three years they:

- i. have received criminal convictions of environmental requirements; civil fines, penalties and damages of \$10,000 or more of an environmental requirement; an assessment, consent decree or administrative consent order resulting in a fine or damages of more than \$32,500, excluding a

supplemental environmental project; or a determination of illegal action that substantially endangers the public health, safety or welfare of the environment; or

- ii. have been found to be involved in a pattern of illegal actions by the MDEQ. A recipient seeking the determination is required to address any outstanding violations by promptly resolving them, demonstrating that they did not occur; or adhering to a compliance schedule imposed by a government agency to correct the violation.

Section 1409 spells out the qualifying criteria for the designation. These criteria essentially require the adoption of an environmental management system. Section 1411 spells out the requirements for seeking the designation: ■▶

1. adopting an environmental policy,
2. establishing a program that posts the environmental policy, conducts periodic assessments, and establishes environmental goals for pollution reduction or prevention and
3. preparing environmental reports on progress.

Section 1413 requires that the application show any criminal convictions or civil fines, penalties and damages over the past three years, a certified statement showing compliance with sections 1407, 1409 and 1411, information on the environmental management system, information about the company's environmental policy, a list of environmental goals, and an indication whether the company is already a clean corporate citizen. Section 1413 requires the MDEQ to make a decision within 90 days of receiving an administratively complete application, unless an extension is arranged.

According to Section 1415, the designation will last for five years, subject to termination by the MDEQ provided proper notification is given. Also, annual reports will be required 60 days before the annual anniversary of the current designation of the company's clean corporate citizenship. Under Section 1421, parties, in addition to the public relations aspect of the designation, can receive priority for compliance assistance from the retired engineers technical assistance program, priority processing of permits and licenses, free audit training by the MDEQ, benefits afforded under the safe drinking water act and public health code,

less frequent MDEQ inspections, advance notice of inspections, benefits provided by other administrative regulations for such designation, and even avoidance of fines for prompt correction of any subsequent violations after discovery and 24 hour or other timely reporting of those violations. Benefits will not be provided if a facility's conduct creates a substantial endangerment to public health, safety, or welfare or involves an intentional or grossly negligent violation. Previous administrative rules governing the existing clean corporate citizenship program are rescinded by this act.

SENATE BILL 940

Senate Bill 940 amends the Management and Budget Act to include clean corporate citizen facilities as entities that will be given preference in purchasing decisions that the State makes.

SENATE BILLS 941 AND 942

Senate Bills 941 and 942 amend the Public Health Code and Safe Drinking Water Act in order to make them subject to the clean corporate citizen program. ■■



Charles E. Barbieri
Attorney

P: 517.371.8155
E: cbarbieri@fosterswift.com

FOSTER SWIFT ATTORNEY DISCUSSES CREDITORS' RIGHTS IN STAMP FARMS CASE

When a large farming operation seeks bankruptcy protection, the effects can be far-reaching. A bankruptcy filing can leave creditors – including lenders, suppliers, and farmland lessors – in limbo for months while a plan of reorganization is negotiated or while assets are liquidated.

Such uncertainty resulted when Decatur-based Stamp Farms filed for Chapter 11 bankruptcy protection on November 30, 2012. Stamp Farms leases over 27,000 acres of land from southwest Michigan farmers, and its bankruptcy filing left landowners questioning the future of those leases and the important income stream they generate.

To address those concerns, Foster Swift attorney Laura Genovich spoke to about 50 farmers on December 21, 2012, at an informational session in Van Buren County hosted by the Michigan

Farm Bureau. Laura, an experienced bankruptcy attorney and trustee, explained general bankruptcy law concepts and spoke in detail about how farmland leases are treated in Chapter 11 bankruptcy cases. She also provided an update about the current status of the Stamp Farms bankruptcy case and gave farmers pointers as to when they might need legal representation in connection with the bankruptcy.

The Kalamazoo Gazette covered Laura's presentation, and their section-cover story can be read here:

bit.ly/Laura-Presentation

Farmers with questions about the Stamp Farms bankruptcy or other bankruptcy law issues can contact Laura directly at 616.726.2238 or lgenovich@fosterswift.com. ■■

NEW COMPLIMENTARY EDUCATIONAL OPPORTUNITIES

WEBINARS

SUCCESSION PLANNING FOR AGRIBUSINESS

January 23, 2013

Register at: bit.ly/Succession-Planning

Cost: FREE

Planning for succession is a very important part of managing a farm business. Failure to plan can cause significant business problems, such as the sale of farming assets to settle estates, and family disharmony.

Succession planning allows you to anticipate and prepare for future events that may adversely affect farm business management. A good plan takes into consideration:

- retirement incomes;
- support for incoming generations;
- motivation for younger generations; and
- exploration of off farm alternatives for children who do not wish to pursue farming.

This one hour webinar led by attorney Todd Hoppe is geared for adults of all generations involved in the family agri-business. Todd has acquired a high level of expertise handling the broad array of entity and personal issues facing family-owned businesses. He regularly assists family-owned businesses with organizational structure, operations, intergenerational planning for ownership and management matters as well as provides counsel for income and transfer tax planning concerns. In many instances his work for family-owned business incorporates crafting estate plans that ensure clients' business and wealth distribution goals are fulfilled.

INDEPENDENT CONTRACTOR OR EMPLOYEE? MISCLASSIFICATION CAN BE COSTLY!

February 20, 2013

Register: bit.ly/Misclassification-Webinar

Cost: FREE

Using independent contractors has been a mainstay for many agri-businesses. Accurate classification of individuals as employees or independent contractors is more important than ever due to data sharing among governmental agencies and increased enforcement. Where the probability that your classification will be challenged has substantially increased, you need to know the potential adverse consequences of misclassification and the steps that you can take to minimize your risk.

This webinar will provide an overview of:

- A review of the factors that are considered, to determine whether an individual is an employee or an independent contractor

- The importance of a well-drafted Independent Contractor Agreement
- The financial repercussions for misclassification
- What to do if you are audited or if a "contractor" files for unemployment or otherwise calls your classification into question
- The availability of amnesty programs

The program will be led by attorneys Deanna Swisher and Todd Hoppe. Deanna is a commercial litigator with extensive experience with crafting and defending independent contractor agreements. Todd is a business and tax attorney who regularly counsels clients on tax compliance.

SEMINAR

AGRICULTURAL MARKETING: FUNDAMENTAL TOOLS AND STRATEGIES FOR AN EVER-CHANGING MARKETPLACE

Featured Presenter: Naomi Blohm
Senior Market Advisor, Stewart-Peterson

Date: Tuesday, March 5, 2013

8:30 a.m. – 12:00 noon

Location: Foster Swift Collins & Smith PC
313 S. Washington Square, Lansing MI 48933

Register: Call Kim Hafley at 517.371.8112
or reply@fosterswift.com

Cost: Free



The half-day program provides an overview of the marketing fundamentals necessary to develop a consistent, disciplined marketing strategy in an era of unpredictability. With growing market volatility and narrowing profit margins, understanding the significance for marketing and market scenario planning is crucial to long-term success. Topics covered include:

- Market analysis including the world economic conditions, political scenarios and resulting supply and demand
- Basics of the cash marketing tools including how and when to utilize them
- How futures contracts work
- Tracking and managing input costs
- Tools in the ag marketing toolbox
- Risk management and scenario strategies

Walk away with strategies that your farm can use today. Examples will include the grain, livestock and milk markets.

Naomi Blohm is an expert at advising farmers how to manage their cash marketing needs and properly use futures and options. She also helps individuals understand the importance of managing basis, delivery point considerations, cash flow needs and storage capacity. Naomi is co-creator and presenter of Stewart-Peterson's program "Women to Women: Educating Women about Farm Marketing."

Known for her ability to clearly communicate complex concepts, Naomi regularly leads marketing and risk management seminars throughout the United States and has been the featured speaker for many organizations, including the Wisconsin Corn/Soy Expo, Commodity Classic, Top Producer and Farm Credit Services. She also regularly provides media commentary on Market to Market, produced by Iowa Television and aired on PBS stations across America, as well as Top Farmer Intelligence Report, www.agweb.com and others.

Naomi earned her Bachelor of Arts in Political Science with a minor in Agriculture Business at the University of Wisconsin in Platteville. She has a Master of Science in Adult Education with an emphasis in Ag Economics, from the University of Wisconsin, Platteville, and a Master Certificate in Global Education from the University of Wisconsin, Oshkosh.

I-9 COMPLIANCE – 2013 UPDATES & PLANNING ITEMS

- Ryan E. Lamb

Since 1986, the U.S. has placed upon employers the burden of acting as gate-keepers in the enforcement of the immigration laws. The government's policies view employers as "magnets," and the primary root cause of illegal immigration. The I-9 Form, deceptively simple in appearance, creates numerous and complex compliance issues for employers. I-9 enforcement is not primarily concerned with locating illegal workers with the goal of deporting them. Instead, I-9 enforcement is heavily focused on Form I-9 itself, and the employer's strict accuracy in completing the

form and complying with related regulations in assembling its workforce. Thus, employers who do not dot every "i" and cross every "t" in strict compliance with U.S. Immigration and Customs Enforcement (ICE)'s exacting standards are at risk for penalties, regardless of whether any unlawful employment exists!

As we begin 2013, here are some updates and reminders for your consideration:

- **New Proposed Form I-9:** U.S. Citizenship and Immigration Services (USCIS) has proposed a 

Continued on page 6 | **I-9 Compliance**

new and updated version of Form I-9, which is intended to be more explicit, detailed, and user-friendly. USCIS has received numerous comments from stakeholders in response to these changes. The new Form is expected to be released soon.

- **Enforcement Activity Continues to Increase:** I-9 audits, assessment of fines, and charging of criminal penalties by ICE continues to increase, and has increased dramatically since fiscal year 2007.
- **Internal I-9 Compliance Policy:** Every employer should have a formal internal I-9 Compliance Policy detailing the employer's exact policies and procedures for properly completing, verifying and retaining I-9 and employment authorization documentation, for assigning supervisory responsibility within the company for these duties, for ensuring adequate training of I-9 responsible employees, and for self-audits or other periodic internal monitoring efforts to ensure compliance. The best defense and response to an I-9 Audit or ICE investigation is

documentation establishing the employer's consistent pattern of responsible good faith efforts to maintain an I-9 compliant workforce.

- **Conduct an I-9 Self-Audit:** Once an employer has its compliance policy in place, it should promptly conduct its initial self-audit, guided by its attorney. If an employer has a good compliance policy in place and has processed self-audits before, this is typically a good time of year to engage in an annual review and self-audit.

The experienced immigration and employment attorneys at Foster Swift welcome an opportunity to discuss a comprehensive approach to your agricultural business. ■■



Ryan E. Lamb
Attorney

P: 616.796.2503
E: rlamb@fosterswift.com

COMMENT ON PROPOSED FDA FOOD SAFETY RULES BY MAY 16, 2013

On January 4, 2013, the U.S. Food and Drug Administration announced its proposal of new food safety rules. The public may submit online or written comments on the proposed rules by May 16, 2013. The proposed rule titled "Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food" states that it would "revise FDA's current good manufacturing practice (CGMP) regulations regarding the manufacturing, processing, packing or holding of human food. . ." The proposed rule would add new preventative controls provisions as required by the FDA Food Safety Modernization Act, including requirements for covered facilities to maintain a food safety plan, perform a hazard analysis, institute preventative controls for mitigation of those hazards. Covered facilities would be required to monitor their controls, verify their effectiveness, take appropriate corrective actions, and maintain records documenting these

actions. The proposed rule would also clarify other requirements of the CGMP regulations (last updated in 1986) and clarify the scope of the exemption for farms in FDA's current food facility registration regulations. The proposed rule titled "Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption" states that it would "establish science-based minimum standards for the safe growing, harvesting, packing, and holding of produce on farms." The proposed rule includes regulations regarding working training health and hygiene, agricultural water, biological soil amendments, domesticated and wild animals, equipment, tools, and buildings, and sprouts. ■■

To view the FDA's news release about the proposed regulations (which contains links to the full text of the proposed rules) please visit: bit.ly/FDA-Food-Safety

USDA ANNOUNCED PUBLICATION OF FINAL RULE FOR ANIMAL DISEASE TRACEABILITY

- Liza C. Moore

On December 20, 2012, the U.S. Department of Agriculture announced the publication of a final rule regarding animal disease traceability, titled "Traceability for Livestock Moving Interstate."

The proposed rule was published in August 2011. The government received over 1,600 comments on the proposed rule. The final rule has several changes from the proposed ■▶

Animal Disease | Continued from page 6

rule, in light of the comments. Agriculture Secretary Tom Vilsack said "With the final rule announced today, the United States now has a flexible, effective animal disease traceability system for livestock moving interstate, without undue burdens for ranchers and U.S. livestock businesses." According to Secretary Vilsack, "The final rule meets the diverse needs of the countryside where states and tribes can develop systems for tracking animals that work best for them and their producers, while addressing any gaps in our overall disease response efforts." The final rule requires livestock moved interstate to be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation, such as owner-shipper statements or brand certificates. ■■

To view the USDA Animal and Plant Health Inspection Service announcement (which contains links to the full text of the final rule and an APHIS Q&A publication) please visit: www.aphis.usda.gov/traceability



Liza C. Moore
Attorney

P: 517.371.8281
E: lmoore@fosterswift.com

BEWARE OF THE RECEIVER YOU CHOOSE

- Scott A. Chernich & Patricia J. Scott

Due to current economic challenges, many creditors seek the appointment of a state court Receiver to manage property in which it holds an interest.¹ The appointment of a Receiver has often been referred to as "State Court Bankruptcy." In this regard, Receivers are known as "arms of the court."

Similar to a bankruptcy, creditors must keep in mind that Receivers are appointed to manage all of the Debtor's assets and liabilities – creating what is called a "Receivership Estate." Even though it is often the debtor's largest secured creditor that seeks, and benefits from, the appointment of a Receiver, the Receiver's obligations and duties are to the entire estate and to all creditors.

It is important for a creditor to thoroughly research the background and experience of a Receiver and ask for credentials and references before seeking his or her appointment. Once appointed, it is difficult to have a Receiver removed or a receivership terminated if the Receiver is "reasonably" fulfilling his or her duties. Generally, a Receiver is appointed by the Court pursuant to state statute. As a result, a Court order is required to terminate a receivership. In the instance of a debtor's business being mismanaged, the last thing a creditor wants to do is have a Receiver appointed who will continue to mismanage the business. The expense of a receivership is far too great to end up "stuck" with a mediocre Receiver.

After choosing a Receiver, a creditor should make sure all duties are clearly spelled out in the order appointing the Receiver. In particular, the order should at a minimum define:

1. The Receiver's duties, authority and obligations in managing and preserving the property;
2. When and how the Receiver will be compensated;
3. Who will be responsible for pursuing litigation matters and seeking the Court's approval for the sale of property and for other various circumstances;
4. Who will pay the attorney fees associated with litigation matters and obtaining Court approval; and
5. The format and frequency that accountings will be produced to the Court and creditors.

The appointment of a Receiver can be a very effective tool, particularly when there are assets to be managed. However, if the wrong Receiver is appointed, the receivership can become detrimental to the creditors' interests. ■■



Scott A. Chernich
Attorney

P: 517.371.8133
E: schernich@fosterswift.com



Patricia J. Scott
Attorney

P: 517.371.8132
E: pjscott@fosterswift.com

¹ Receivers can also be appointed for several other reasons, such as to: enforce judgments, enforce construction liens, dissolve corporations, and operate establishments possessing liquor licenses.



RESPOND TO CENSUS OF AGRICULTURE BY FEBRUARY 4, 2013

The U.S. Department of Agriculture mailed 2012 Census of Agriculture forms to farmers and ranchers in late December 2012. Federal law requires all agricultural producers to respond; completed Census forms are due by February 4, 2013 and may be returned by mail or online. The Census of Agriculture will collect information about farming and ranching operations on topics ranging from land use to expenditures to production practices. The gathered information will be used to make

decisions about loan availability, the location and staffing of service centers, and farm programs and policies. Individual information will be kept confidential—NASS uses the information only for statistical purposes and publishes data only in tabulated totals.

For more information about the Census of Agriculture, please visit: www.agcensus.usda.gov/index.php ■■

FOOD AND AGRICULTURE EXPORT MARKETING SERVICES

Two great programs are out there and available to farms and agribusiness interested in expanding their operation to include exporting.

1. **The Michigan Department of Agriculture** - For a comprehensive overview of Michigan food export and agriculture export services that we offer in partnership with the Food Export Association, please see our "Working Together to Reach the World" export brochure. For more information, please contact Jamie Zmitko-Somers, International Marketing Program Manager, directly at 517.241.3628.
2. **State Trade Export Promotion (STEP)** - Michigan companies

with fewer than 500 employees may qualify for financial assistance for export-related activities. The STEP Program offers a wide variety of export resources and assistance to help companies launch, expand and enhance exporting opportunities. ■■

For more information visit: www.michiganadvantage.org/STEP/.

The application for applying to STEP can be found on the MEDC website medc.force.com/ExportAssistance.

AGRICULTURAL ATTORNEYS:

GROUP LEADER

Liza C. Moore
517.371.8281
lmoore@fosterswift.com

Charles E. Barbieri | 517.371.8155
Scott A. Chernich | 517.371.8133
James B. Doezema | 616.726.2205
Julie I. Fershtman | 248.785.4731
Brian G. Goodenough | 517.371.8147
Todd W. Hoppe | 616.726.2246
Charles A. Janssen | 517.371.8262
Ryan E. Lamb | 616.796.2503

David M. Lick | 517.371.8294
Steve L. Owen | 517.371.8282
Jean G. Shtokal | 517.371.8276
Patricia J. Scott | 517.371.8132
Scott A. Storey | 517.371.8159
Deanna Swisher | 517.371.8136
Lynwood P. VandenBosch | 616.726.2201
David VanderHaagen | 517.371.8102

LANSING

FARMINGTON HILLS

GRAND RAPIDS

DETROIT

MARQUETTE

HOLLAND

Foster Swift Collins & Smith, PC **Agricultural Law Update** is intended for our clients and friends. This newsletter highlights specific areas of law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.

IRS Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication is not intended to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed in this communication.

Proud supporter
of

