RECENT FEDERAL FARM PROGRAM DEVELOPMENTS

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I. INTRODUCTION

During the last decade or so, a dozen or more cases directly involving eligibility for federal domestic commodity programs were reported each year.[1]

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1. For discussions of many of these cases, see Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 48 OKLA. L. REV. 215 (1995); Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 25 U. MEM. L. REV. 1107 (1995); Alexander J. Pires, Jr., *Why the U.S. Claims Court Is Not a Viable Venue for Farmers: The U.S. Claims Court's Handling of Agricultural Cases, 1980-1990*, 15 U. ARK. LITTLE ROCK L.J. 223 (1993); Alan R. Malasky et al., *Resolving Federal Farm Program Disputes: Recent Developments*, 19 WM. MITCHELL L. REV. 283 (1993); Alan R. Malasky, *ASCS Appeals and Payment Limitation Revisions in the 1990 Farm Bill:*

However, the number of such cases appears to be declining. This apparent decline may be partially attributable to the simplicity of the current primary mechanism for directly transferring income to farmers—production flexibility contracts—relative to the mechanism that these contracts replaced—deficiency payments payable under the acreage reduction programs.[2] In 1996 and 1997, production flexibility contracts

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What Did the American Farmer Really Gain (or Lose)?, 68 N.D. L. REV. 365 (1992); Christopher R. Kelley & John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Review of ASCS Decisions*, 36 S.D. L. REV. 14 (1991); Alexander J. Pires, Jr. & Shelley L. Bagoly, *Federal Court Jurisdiction over USDA/ASCS Cases: How and In What Courts Farmers Can Seek Review of USDA Denials of Their Farm Subsidy Payments*, 24 IND. L. REV. 1489 (1991); Karen Sorlie Russo, *Farm Clients Beware of ASCS Mysteries*, 8 COMPLEAT LAW 57 (1991); Ralph A. Linden, *An Overview of the Commodity Credit Corporation and the Procedures and Risks of Litigating Against It*, 11 J. AGRIC. TAX'N & L. 305 (1990); Neil D. Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 HAMLINE L. REV. 633 (1989); Neil D. Hamilton, *Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S.D. L. REV. 282 (1984); Alice Devine, *Understanding the Current Crisis with the ASCS*, 9 J. AGRIC. TAX'N & L. 195 (1987). *See also* Christopher R. Kelley & Susan A. Schneider, *Selected Issues of Federal Farm Program Payments in Bankruptcy*, 14 J. AGRIC. TAX'N & L. 99 (1992).

2. *See* Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 667 (1994). Another partial explanation for the apparent decline in reported cases may lie in the fact that the current federal farm program payment limitation rules have been in effect since 1989, thus allowing ample time for those subject to the rules to become familiar with them. Because they are complex, the payment limitation rules have accounted for a significant number of the litigated farm program cases. *See id.* at 668-69.

Also, the highly erodible land ("sodbuster") and wetland conservation ("swampbuster") provisions became more "flexible" under the Federal Agriculture Improvement and Reform Act. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 311-326, 110 Stat. 888, 982-92. The result may be a reduction in the incentives for litigation. For example, a "swampbuster" violation no longer disqualifies the violator from all farm program payments as it did prior to 1996; instead, the violator is "ineligible for loans or payment in an amount determined by the Secretary to be proportionate to the severity of the violation." 16 U.S.C. § 3821(a)(2) (Supp. II 1996).

Finally, litigation over disaster assistance under the various "ad hoc" disaster assistance programs from 1988 through 1994 is coming to an end. In 1994, Congress acted to replace ad hoc disaster assistance with crop insurance in the Federal Crop Insurance Reform Act of 1994, enacted as a part of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. *See* Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, §§ 101-120, 108 Stat. 3178, 3179-3208 (codified in scattered sections of 7 U.S.C.). The Act became effective beginning with the 1995 crop year. *See id.*, 108 Stat. at 3208. However, disaster assistance litigation still lingers. *See, e.g.*, Petzoldt v. Glickman, 983 F. Supp. 873 (D. Mo. 1997); Guy v. Glickman, 945 F. Supp. 324 (D.D.C. 1996).

In October 1998, "ad hoc" disaster assistance returned after only a three year absence. In the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Congress appropriated more than $2.5 billion for crop loss assistance due to disasters. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, §§ 1102-1103, 1998 U.S.C.C.A.N. (112 Stat.) 2681, ____. Most of these funds, $1.5 billion, are available to farmers who incurred losses in the 1998 crop year. *See id.* § 1102(b), 1998 U.S.C.C.A.N. (112 Stat.) at ____. The remainder, $875 million, is available to producers who incurred multiyear crop losses in the 1998 and preceding crop years due to disasters. *See id.* § 1102(c), 1998 U.S.C.C.A.N. (112 Stat.) at ____.

transferred over $11 billion to farmers who owned or operated land with a history of producing feed grains, wheat, upland cotton, and rice.[3] To date, no reported case has dealt with a producer's eligibility for a production flexibility contract or contract payment.

Because the relative simplicity of production flexibility contracts may portend a period of calm in federal farm program litigation, Part II of this Article provides an overview of how production flexibility contracts work and briefly describes the other commodity programs.[4] Part III reviews the most significant recent case involving commodity programs,[5] *Winters Ranch Partnership v. Viadero*.[6] Because that decision involves the scope of the subpoena power granted by the Inspector General Act of 1978[7] to the United States Department of Agriculture (USDA) Inspector General, Part III also discusses Inspector General subpoenas and the role and function of the USDA Office of Inspector General.[8]

II. AN OVERVIEW OF THE MAJOR CURRENT DOMESTIC COMMODITY PROGRAMS

A. *Introduction*

At their inception in the 1930s, the domestic commodity programs "were not implemented to establish the foundational superstructure for a permanent policy of income support for agriculture."[9] Nonetheless, perhaps because "[f]armers have

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3. *See* Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 666-67 (1994).

4. *See* discussion *infra* Part II.

5. *See* discussion *infra* Part III.

6. Winters Ranch Partnership v. Viadero, 123 F.3d 327 (5th Cir. 1997).

7. 5 U.S.C. app. §§ 1-12, at 1381-99 (1994).

8. *See* discussion *infra* Part III.

9. Gordon C. Rausser & David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. DAVIS L. REV. 415, 419 (1990). The domestic commodity programs are primarily intended to promote the economic welfare of producers of certain agricultural commodities. *See id.* at 418. They do so through direct income transfers, nonrecourse and recourse loans, quotas, allotments, commodity purchases, and disaster assistance, although not all of these mechanisms apply to all program commodities. *See id.* Some of these programs directly increase their beneficiaries' wealth by providing cash payments. *See id*. Others provide financial gains indirectly, such as by allowing the repayment of loans for a sum less than the amount borrowed. *See id.* at 419. In addition, all of the programs indirectly add to farm landowner wealth because their benefits are capitalized into the value of farmland. In fact, "[m]ost of the ultimate benefit from farm programs has gone to owners of farmland or other resources in inelastic supply." Daniel A. Sumner, *Targeting and the Distribution of Program Benefits*, *in* AGRICULTURAL POLICIES IN A NEW DECADE 125, 127 (Kristen Allen ed., 1990).

long held hypnotic sway over politicians,"[10] domestic commodity programs have "taken on the appearance of a permanent fixture."[11] Not surprisingly, therefore, the Agricultural Adjustment Act of 1938[12] and the Agricultural Act of 1949[13] have become known as the "permanent" farm legislation.[14] Historically, these statutes have been amended every four to five years through the enactment of a "farm bill."[15]

The most recent farm bill, the Federal Agricultural Improvement and Reform Act of 1996 (FAIR Act), suspended or repealed significant portions of the "permanent" price support authority.[16] Most noteworthy, the FAIR Act repealed the authority for the making of direct income transfers known as "deficiency payments" to producers of feed grains, wheat, upland cotton, and rice under the respective acreage reduction programs for each of these commodities.[17] Given the economic importance and widespread production of these commodities, deficiency payments had been the primary and most visible instrument of the domestic commodity programs.[18] They were the so-called "safety net" that provided income to farmers when market prices were low.

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10. DAVID RAPP, HOW THE U.S. GOT INTO AGRICULTURE, AND WHY IT CAN'T GET OUT 7 (1988).

11. Rausser & Nielson, *supra* note 9, at 419.

12. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.).

13. Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1051 (codified as amended in scattered sections of 7 U.S.C.).

14. *See* M.C. HALLBERG, POLICY FOR AMERICAN AGRICULTURE: CHOICES AND CONSEQUENCES 30 (1992).

15. *See id.* For a concise history of federal farm program legislation, see Kristen Allen & Barbara J. Elliott, *The Current Debate and Economic Rationale for U.S. Agricultural Policy*, *in* U.S. AGRICULTURE IN A GLOBAL SETTING: AN AGENDA FOR THE FUTURE 9 (M. Ann Tutwiler ed., 1988).

16. *See* Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 171, 110 Stat. 888, 937-38 (codified in sections of title 7 of U.S.C.).

17. *See* 7 U.S.C. § 1445j(b), (c) (1994), *repealed by* Federal Agricultural Improvement and Reform Act of 1996 § 171(b)(2), 110 Stat. at 938. The repeal of the deficiency payment authority was made in Title I of the FAIR Act, a title known as the Agricultural Market Transition Act (AMTA). *See id.* §§ 101-196, 110 Stat. at 896-950.

18. With respect to the "visibility" of agricultural subsidies—the agricultural sector's direct impact on the federal budget—a Congressional Budget Office (CBO) report on 1995 federal spending:

> [F]ound that $14 billion of $28 billion in federal spending on direct subsidies and programs for all industries went to agriculture, as did $1 billion of the $2.2 billion in credit program outlays (representing the estimated cost of defaults and interest rate subsidies not loan volume). However, only $1 billion of the $32 billion in tax breaks for industry accrued to agriculture. In other words, agriculture accounted for almost one-half of all direct federal spending on industry and at least one-third of all credit program costs, but was the beneficiary of only about 3 percent of all tax expenditures.

Susan Offutt, *Subsidizing Agriculture: The Road Ahead*, CHOICES, Second Quarter 1996, at 30, 31-32. The CBO also "compared the subsidies received to each sector's contribution to Gross Domestic Product and found that subsidies to agriculture represented 11 percent of its GDP contribution, while

As a replacement for deficiency payments which were paid only when market prices were low, the FAIR Act introduced a new direct income transfer mechanism known as "production flexibility contracts."[19] During the seven-year period from 1996 through 2002, annual payments totaling over $35 billion will be made to farmers who enter into these contracts.[20] Because these payments will be made irrespective of commodity prices, this new direct income transfer mechanism represents a marked departure from the deficiency payment mechanism it replaced.[21]

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the comparable figure for the next most extensively subsidized industry, utilities, equaled only 2 percent." *Id.* at 32.

19. *See* Federal Agriculture Improvement and Reform Act of 1996 § 101(b)(1), 110 Stat. at 896.

20. *See id.*, 110 Stat. at 900.

21. The farm bill debate over what was then called the "Freedom to Farm Act" in Congress in 1995 and 1996 coincided with rising crop prices. In fact, early in 1997, a Federal Reserve Bank of Kansas City economist proclaimed 1996 a "banner year" for crop producers. *See generally* Mark Drabenstott, *Wild Ride for U.S. Agriculture Not Likely to Continue*, FEEDSTUFFS, May 19, 1997, at 38 (tracing crop prices from 1996 through April 1997). Thus, whether this change in mechanism for transferring income to farmers represented true "reform" or simply a way to transfer income to farmers when crop prices were high is open to debate. Some observers contend that it "was *rising market prices* during 1995-96 more than a new reform consensus or budget constraints that drove farm policy toward decoupled payments and less interference in field-crop production." David Orden et al., *A Farm Bill for Booming Commodity Markets*, CHOICES, Second Quarter 1996, at 13, 13 (emphasis added). In other words, "the political competition remained focused on how to be generous to farm interests (and others), not on how to cut farm programs." *Id*. at 15. "[E]ven the budget-conscious, reform-minded 104th Congress has proven responsive to agricultural interests. Allies to enact farm programs can still be found, and farm-sector advocates have now proven adept at obtaining benefits from Congress under either party." *Id*. at 16. *See also* David Orden et al., *Can Farm Policy Be Reformed?*, CHOICES, First Quarter 1996, at 4, 5.

> Inside the 104th Congress, the move toward FFA [Freedom to Farm Act] came neither from committed reformers nor from budget cutters, but instead from traditional agriculturalists who have always favored generous support for farmers. When commodity prices began a steep rise, the best way to maximize this support in the short run under the congressional budget process was to make a switch in policy instruments away from traditional deficiency payments and toward guaranteed decoupled payments. FFA's adoption by Congress last November resulted more from accounting quirks and suddenly favorable market conditions than from either budget pressure or the dominance of a new policy reform consensus.

Id. at 5.

Senator Charles E. Grassley of Iowa has offered a somewhat different view of the motives for the payments:

> These payments . . . are a legitimate transition to a free-market oriented agriculture policy. Although it is clear that U.S. farmers can compete and thrive in this free market, it is necessary to provide a safety net during this transition period. Seven years of guaranteed, fixed payments will allow farmers and their lenders to change

Domestic commodity programs now exist for feed grains, wheat, upland and extra-long staple cotton, oilseeds, rice, sugar, tobacco, peanuts, and milk.[22] These programs traditionally have been categorized as either income support programs or as price support programs.

Income support programs make direct income transfers to eligible producers.[23] Price support programs provide financial gains by means other than a direct income transfer.[24] However, one price support program, loan deficiency payments, provides a direct income transfer.[25] Another price support program, marketing assistance

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> their business practices to prepare for this new environment. This is anything but welfare. The payments are a recognition of what farmers in this country have given to the public in terms of an inexpensive and bountiful food supply.

Charles E. Grassley & James J. Jochum, *The Federal Agriculture Improvement and Reform Act of 1996: Reflections on the 1996 Farm Bill*, 1 DRAKE J. AGRIC. L. 1, 4 (1996).

Finally, irrespective of the motives for the shift to production flexibility contract payments, the primary beneficiaries of the FAIR Act are landowners. *See generally* Lyle Schertz & Warren Johnston, *Landowners: They Get the 1996 Farm Act Benefits*, CHOICES, First Quarter 1998, at 4 (discussing benefits to landowners in the FAIR Act). Landowners have always benefited the most from domestic commodity programs. *See* Rausser & Nielson, *supra* note 9, at 419. The FAIR Act, therefore, does not represent a change in the extant policy of bestowing the greatest benefits on those who own the land on which program crops are or have been produced.

22. The Secretary of Agriculture is ultimately responsible for the administration of all of the USDA programs, including the domestic commodity programs. *See* 7 C.F.R. § 2.16 (1998). The Secretary, however, has delegated operational responsibility for the domestic commodity programs to the Under Secretary for Farm and Agricultural Services who, in turn, has delegated that authority to the Administrator of the Farm Service Agency (FSA). *See id.* §§ 2.16, 2.42.

A constituent agency of the USDA, the FSA, was created in 1994 as the successor to the Agricultural Stabilization and Conservation Service (ASCS), the USDA agency which had administered the domestic commodity programs since 1961. *See* 7 U.S.C. § 6932 (1994). The FSA was originally named the Consolidated Farm Service Agency (CFSA), but the name was changed in 1995. *See* 60 Fed. Reg. 64,297, 64,297 (1995).

The FSA Administrator is located in Washington, D.C. Subject to the Administrator's general supervision, the programs are carried out in the field by a state FSA committee in each state and, at the local level, by county FSA committees, some of which may serve more than one county. *See* 7 C.F.R. § 718.1(b).

Most initial program determinations are made by the county FSA committees. A state committee, however, may take any required action not taken by a county committee or order the county committee to take that action. *See id.* § 718.1(d).

Program funding and certain other financial and logistical operations are facilitated by the Secretary's use of the Commodity Credit Corporation (CCC). Governed by the CCC Charter Act, 15 U.S.C. §§ 714-714p, the CCC is a federally chartered corporation and "an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture." 15 U.S.C. § 714 (1994 & Supp. III 1997). The CCC, however, does not administer the programs. The CCC essentially consists only of a seven-member board; it has no personnel with which to administer the programs.

23. *See* HALLBERG, *supra* note 14, at 26.

24. *See id.* at 25-26.

25. *See* 7 U.S.C. § 7235 (Supp. II 1996).

loans, provides an indirect income transfer by permitting loans to be paid at a rate lower than their original repayment rate.[26]

Income support through income transfers is now provided only to owner or operators of farms that have a history of producing feed grains, wheat, upland cotton, and rice.[27] These income transfers are made as production flexibility contract payments.[28] Price support is now provided for all of the commodities for which a commodity program exists: specifically, feed grains, wheat, upland and extra-long staple cotton, rice, oilseeds, tobacco, peanuts, sugar, and milk.[29] However, the mechanisms used by each commodity's price support program are not the same. Production flexibility contracts and the current price support mechanisms are described in sections B through G that follow.

B. *Income Support—Production Flexibility Contracts*

Production flexibility contracts will make payments to farm landowners and farmers over their seven-year term from 1996 through 2002.[30] These payments replace deficiency payments, the primary direct income transfer mechanism under prior law. Deficiency payments were paid to farmers who voluntarily participated in the annual acreage reduction programs for wheat, feed grains (corn, sorghum, oats, and barley), upland cotton, and rice.[31] However, payments were made only when the averaged annual market price for the commodity fell below the commodity's "target price."[32] The target price for each commodity was a statutorily specified per-unit

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26. *See id.* § 7234.

27. *See id.* § 7211.

28. *See id.*

29. *See id.* §§ 7202, 7251, 7271-7272.

30. *See* Edwin Young & Dennis A. Shields, *1996 FAIR Act Frames Farm Policy for 7 Years*, AGRIC. OUTLOOK, Apr. 1996 (Supp.), at 1, 1.

31. *See* 7 U.S.C. §§ 1444f(c), 1445b-3a(c), 1441-2(c) (1994) (repealed 1996). Deficiency payments were made available under the annual acreage reduction program (ARP) for the commodity. *See id*. § 1441-2 (e). Under an ARP, a program participant was sometimes required to set aside land, idling it from production. *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 401 (e), 104 Stat. 3400, 3408-15 (repealing 7 U.S.C. § 1444d (8)). Idled land had to be put into a conservation use (CU), also known as the acreage conservation reserve (ACR). *See id*., 104 Stat. at 3408-15.

32. *See* Food, Agriculture, Conservation, and Trade Act of 1990 § 401(1), 104 Stat. at 3404-04 (repealing 7 U.S.C. § 1444d(8)). The payment rate for deficiency payments was a per-commodity unit rate based on the difference between the target price and the commodity's averaged market price or the commodity's loan rate, whichever difference was less. *See id.*, 104 Stat. at 3403.

price deemed by Congress as adequate to cover the commodity's cost of production.[33]

Unlike deficiency payments, production flexibility contract payments are paid irrespective of crop prices.[34] In other words, even if crop prices are at historic highs, production flexibility contract payments will still be made. Likewise, at least as contemplated by the FAIR Act, if crop prices are at historic lows the payments will not be increased because the sums available for the payments have been generally pre-determined for each of the seven fiscal years during which contract payments will be made. In 1998, however, Congress "supplemented" production flexibility contract payments in response to low crop prices.[35]

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33. For a discussion of the genesis of the target price concept, see Claude T. Coffman, *Target Prices, Deficiency Payment, and the Agriculture and Consumer Protection Act of 1973*, 50 N.D. L. REV. 299 (1974). The basic way in which target prices supported farm income is explained as follows:

> The total level of government support for each of the crops covered by these [acreage reduction] programs, except soybeans and rye, is determined primarily by the target price, which sets a minimum income support on all eligible production. Farmers participating in the programs receive a deficiency payment from the government for each unit of eligible production. The payment is generally equal to the difference between the target price and the higher of the loan rate or the average market price. As a result, participating farmers are assured of receiving the target price as their gross amount of return on each unit of production up to the program yield. Target prices thus act as income supports by supplementing the cash receipts a farmer can obtain from the commodity markets. Except to the extent that they affect production decisions, target prices do not affect the market price of a commodity.

Joseph V. Kennedy & Jon Visser, *An Introduction to U.S. Agricultural Programs*, *in* AGRICULTURAL POLICIES IN A NEW DECADE 27, 30 (Kristen Allen ed., 1990).

34. *See* Kennedy & Visser, *supra* note 33, at 30.

35. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 1111, 1998 U.S.C.C.A.N. (112 Stat.) 2681, ____. This "supplement" totaled $3.057 billion, to be paid in proportion to the amount each participating owner or producer received in "regular" 1998 production flexibility contract payments. *See id*., 1998 U.S.C.C.A.N. (112 Stat.) at ____. This sum—$5.8 billion—is about one-half of the total payments authorized by the FAIR Act for the 1998 fiscal year. *See* 7 U.S.C.A, § 7213(a)(3) (West Supp. 1998). Thus, each participant will receive a supplemental payment equal to about one-half of the "regular" production flexibility contract payment that the participant received under the FAIR Act authorization for 1998. Totaled, the production flexibility contract payments appropriated for payment in 1998 exceed $8.6 billion. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 1111, 1998 U.S.C.C.A.N. (112 Stat.) at ____.

The 1998 crop year was the first year following the enactment of the FAIR Act in 1996 in which crop prices were low. It was, therefore, the first year in which the production flexibility contract payment mechanism and the will of Congress to stand by that mechanism were "tested" by low commodity prices. *See, e.g.*, Dennis A. Shields & Paul C. Westcott, *Low Prices Test 1996 Farm Act*, AGRIC. OUTLOOK, Oct. 1998, at 12; Scott Kilman, *Weaning Farmers: Crop Deregulation Is Put to the Test in New Rural Crisis*, WALL ST. J., Nov. 9, 1998, at A1. The 1998 crop year may have been a fortuitous time for this test because Congress had money to spend as a result of a budget surplus and most members of the House of Representatives and some Senators were seeking re-election. Within a

For farmers, entering into a production flexibility contract is voluntary; the only person obligated to enter into a contract is the Secretary of Agriculture.[36] The Secretary is required to offer such contracts to eligible owners and producers on farms containing eligible cropland.[37] The Secretary's authority to do so, however, expired on August 1, 1996.[38] Thus, unlike the annual opportunity to voluntarily participate in the acreage reduction programs authorized by prior law, only a one-time opportunity to enter into a production flexibility contract was available.[39]

Only an "eligible owner or producer" on a farm containing "eligible cropland" may enter into a production flexibility contract offered by the Secretary.[40] By statute, "eligible owners and producers" are defined as follows:

> (1) An owner of eligible cropland who assumes all or a part of the risk of producing a crop.

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month after Congress responded to this test by supplementing production flexibility payments for 1998, another supplement for 1999 was predicted if crop prices remain low. *See* Randall C. Gordon, *Ag Committees Likely to Focus on Crop Insurance, CFTC in 1999*, NGFA NEWSLETTER (National Grain & Feed Ass'n, Washington, D.C.), Nov. 19, 1998, at 1 (noting that congressional staff members interviewed by a representative of the National Grain and Feed Association (NGFA) indicated that "[i]f relatively low prices continue, . . . it would be more likely for Congress to provide additional funding under the current law structure—by increasing direct payments rather than increasing loan rates or permitting loan extensions").

36. The contract is entered into on the Secretary's behalf by the CCC. *See* 7 C.F.R. § 1412.102 (1998). The contract form is designated as CCC-478 and CCC-478 Appendix. *See id*. § 1412.103 (defining "contract").

37. *See* 7 U.S.C. § 7211(a) (Supp. II 1996). *See also* 7 C.F.R. § 1412.201 (containing the production flexibility contract rules); *id.* § 718 (containing rules relating to multiple programs, including production flexibility contracts).

38. *See* 7 U.S.C. §§ 7212(a)(2), 7212(c)(3).

39. The only lands excepted from the August 1, 1996, deadline are lands enrolled under a Conservation Reserve Program (CRP) contract that terminates after August 1, 1996. These lands may be enrolled under a new or expanded production flexibility contract at the beginning of the fiscal year in which the CRP contract terminates. *See id.* § 7212(a)(3)(A). For the fiscal year in which the land is first enrolled, the owner or producer may elect to receive either the production flexibility contract payment or the prorated CRP contract payment, but not both. *See id.* § 7212(a)(3)(B).

Once land has been enrolled under a contract, any producer whose share in the contract payment has not been designated for a particular fiscal year must sign the contract designating payment shares and provide certain supporting documentation by August 1 of that fiscal year. *See* Amendment to the Production, Flexibility Contract Regulations, 63 Fed. Reg. 31,102, 31,103 (1998) (to be codified at 7 C.F.R. § 1412.201(c)). All producers must sign the contract by this deadline; otherwise, none of the producers on the contract will be eligible for payments for that farm for the fiscal year. *See id*.

40. *See* 7 U.S.C. § 7211(b).

> (2) A producer (other than an owner) on eligible cropland with a share-rent lease of the eligible cropland, regardless of the length of the lease, if the owner enters into the same contract.
> (3) A producer (other than an owner) on eligible cropland who cash rents the eligible cropland under a lease expiring on or after September 30, 2002, in which case the owner is not required to enter into the contract.
> (4) A producer (other than an owner) on eligible cropland who cash rents the eligible cropland under a lease expiring before September 30, 2002. The owner of the eligible cropland may also enter into the same contract. If the producer elects to enroll less than 100 percent of the eligible cropland in the contract, the consent of the owner is required.
> (5) An owner of eligible cropland who cash rents the eligible cropland and the lease term expires before September 30, 2002, if the tenant declines to enter into a contract. In the case of an owner covered by this paragraph, contract payments shall not begin under a contract until the lease held by the tenant ends.[41]

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41. *Id.* § 7211(b)(1)-(5). *See also id.* § 7202(12) (defining "producer"); 7 C.F.R. § 1412.202 (specifying the requirements for being an "eligible producer").

The FAIR Act directs the Secretary to provide "adequate safeguards to protect the interests of tenants and sharecroppers." 7 U.S.C. § 7211(c). Later, the FAIR Act also directs that the Secretary provide "for the sharing of contract payments among the owners and producers subject to the contract on a fair and equitable basis." *Id.* § 7214(g). The implementing regulations require that "[e]ach eligible producer on a farm shall be given the opportunity to enroll in a contract and receive contract payments determined fair and equitable as agreed to by the producers on the farm and approved by the county committee." 7 C.F.R. § 1412.303(a). To that end, leasing arrangements for contract acreage must be disclosed to the appropriate county committee. *See id.* § 1412.303(a)(1).

Leasing arrangements are categorized as either cash leasing or share leasing, also known as crop-share leasing. *See* Amendment to the Production Flexibility Contract Regulations, 63 Fed. Reg. at 31,103. A cash lease is one that requires only the payment of rent irrespective of the crop's success, although payment can either be made with a sum-certain cash amount or a fixed quantity of the crop. *See id.* at 31,104 (to be codified at 7 C.F.R. § 1412.303(a)(2)), which provides: "A lease will be considered a cash lease if the lease provides for only a guaranteed sum certain cash payment, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre)." A share lease is one that requires "the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or the interest such [owner] would have had if the crop had been produced, or combination thereof . . . ." 7 C.F.R. § 1412.303(a)(3). A lease that provides for both a guaranteed payment in cash or crops and a share of the crop or its proceeds will be deemed to be cash lease if the guaranteed amount equals or exceeds the normal cash lease rate established by the county committee for the area. *See id.* § 1412.303(a)(4). However:

> [b]eginning on October 1, 1998, for years in which payment shares had not been designated prior to October 23, 1997, a producer's lease, including a lease which provides for the greater of a guaranteed amount or share of the crop or crop proceeds, shall be considered a share lease if the lease provides for both:
> (i) A guaranteed amount such as a fixed dollar amount or quantity; and
> (ii) A share of the crop proceeds.

Amendment to the Production Flexibility Contract Regulations, 63 Fed. Reg. at 31,104 (to be codified at 7 C.F.R. § 1412.303(a)(4)). Leases determined by a county FSA committee to be cash leases under the regulations in effect on January 1, 1997, will be considered cash leases if, "prior to October 23, 1997

Eligible owners and producers must also be "persons" who are "actively engaged in farming" as those terms are defined in the federal farm program payment limitation and eligibility rules.[42]

"Eligible cropland" is land that was (1) at least partially enrolled in an acreage reduction program for feed grains (corn, grain sorghum, barley, and oats), wheat, upland cotton, and rice during at least one of the 1991 through 1995 program years

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(i) The designation of shares was executed; and (ii) the county committee was provided a copy of the lease applicable for the designated years." *Id.* (to be codified at 7 C.F.R. § 1412.303(a)(6)).

Owners who rent their land under a cash lease are not eligible for contract payments. *See* 7 C.F.R. § 1412.303(a)(5). *See also* 7 U.S.C. § 7211(b)(1). Only owners who bear a portion of the risk for the crop's production can receive contract payments. *See* 7 C.F.R. § 1412.303(a)(5). *See also* 7 U.S.C. § 7211(b)(1). This means that an owner must actually farm the land, have it custom farmed, or lease it on a crop-share basis.

When the lease is a crop-share lease, neither the landlord nor the tenant may receive one hundred percent of the contract payment. *See* 7 C.F.R. § 1412.303(b). Otherwise, the division of payments provided in lease signed by all the parties to it will be approved when the county committee determines that the "interests of tenants and sharecroppers are being protected" and the "division of payments is not done in a manner to circumvent" the farm program payment limitation rules. *See id.* § 1412.303(c).

Contract payments will be denied if "[t]he landlord or operator has adopted a scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program" or if "the landlord terminated a lease in violation of state law as determined by a state court." *Id.* § 1412.304(a)(1), (2). *See also* Amendment to the Production Flexibility Contract Regulations, 63 Fed. Reg. at 31,104 (to be codified at 7 C.F.R. § 1412.304(b) (addressing the circumstances under which payments will be made if the landlord and the tenant initially failed to agree on a division of payments but later reached an agreement).

For the results of a study on the impact of production flexibility contract payments on land values and tenancy arrangements, see Lyle P. Schertz & Warren E. Johnston, *Farm Act '96: Managing Farm Resources in a New Policy Environment*, AGRIC. OUTLOOK, Aug. 1997, at 18. In general, this study found that production flexibility contract payments (PFCPs) are "being capitalized into land values and are reflected in land rental rates." *Id.* In other words, production flexibility contract payments have "increased the wealth of those who own land." *Id.* The study also found that:

> [S]ome landowners are simply discontinuing the renting of their farmland in order to 'capture' the full value of PFCP's. Instead of renting their land, these landowners are turning to custom services to operate their farms. They pay operators (sometimes the same person who had previously been a share tenant) to perform needed field work, and pay input suppliers to make the appropriate applications of fertilizers and pesticides.

Id.

42. *See* 7 C.F.R. § 1400.201. For discussions of the payment limitation rules, see *generally* Christopher R. Kelley & Alan R. Malasky, *Federal Farm Program Payment-Limitations Law: A Lawyer's Guide*, 17 WM. MITCHELL L. REV. 199 (1991) (explaining how the payment-limitations rules work); J.W. Looney & Lonnie R. Beard, *Farm Business Planning: Coordinating Farm Program Payment Rules with Tax Law*, 57 UMKC L. REV. 157 (1989) (assessing the need to coordinate business planning under new rules regarding agricultural program payment limitations).

or was "considered planted;"[43] (2) enrolled in a Conservation Reserve Program (CRP)[44] contract whose term expired, or was voluntarily terminated, on or after January 1, 1995; or (3) released by the Secretary from coverage under a CRP contract between January 1, 1995 and August 1, 1996.[45] Payments based on land enrolled in the CRP cannot be made until the CRP contract terminates, however.[46]

All eligible cropland need not be enrolled, and the land enrolled may be reduced.[47] The enrolled land is known as the "contract acreage."[48] Individual contract payments are partially based on the farm's contract acreage.[49]

In authorizing production flexibility contract payments, Congress sought to rationalize the budget process by establishing a certain and predictable annual amount for direct income transfers to farmers during the seven-year period from 1996 to 2002.[50] Deficiency payments authorized under prior law varied according to commodity prices, even as to whether they were payable at all. As a result, the sums that would be needed to pay deficiency payments remained uncertain until market prices could be determined.[51]

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43. 7 U.S.C. § 7211(d)(1) (Supp. II 1996). Land that is "considered planted" is land that would have had a crop acreage base for a contract commodity had it been enrolled in an acreage reduction program under the regulations in effect on January 1, 1996. *See* 7 C.F.R. § 1412.103 (defining "Eligible Acreage"). *See also* 7 U.S.C. § 7202(2) (defining "Considered Planted").

44. Under the CRP, landowners are paid annual sums to protect environmentally-sensitive lands under contracts having a minimum term of ten years, and a maximum of fifteen years. *See* 16 U.S.C. §§ 3831-3836 (1994 & Supp. II 1996).

45. *See* 7 U.S.C. § 7211(d) (Supp. II 1996). *See also* 7 C.F.R. § 1412.501 (1998) (specifying the timing for enrollment and termination of production flexibility contracts with respect to former CRP lands).

46. *See* 7 U.S.C. § 7212(a)(3) (1994 & Supp. II 1996). *See also* 7 C.F.R. § 1412.501(e) (specifying the timing of production flexibility contract payments on former CRP lands).

47. *See* 7 U.S.C. § 7211(e)-(f) (Supp. II 1996).

48. *See id.* § 7202(4) (defining "Contract Acreage"); 7 C.F.R. § 1412.103 (defining "Contract Acreage").

49. *See* 7 U.S.C. § 7214(a).

50. *See id.* § 7201(b)(1).

51. While the amount paid under production flexibility contracts is certain, the total sums paid are not likely to be less than would have been paid had the deficiency payment mechanism been continued for the seven-year period. Over $36 billion in production flexibility contract payments will be paid over seven years. During the seven years preceding 1996, about $38.6 billion was paid to farmers, primarily through deficiency payments under the various acreage reduction programs. *See* USDA, FEDERAL AGRICULTURAL IMPROVEMENT AND REFORM ACT OF 1996: A DESCRIPTION OF U.S. FARM COMMODITY PROGRAMS UNDER THE 1996 FARM BILL 12 (1996). Thus, when compared with "traditional" farm program payments over the seven years preceding 1996, production flexibility contract payments will save about $2.5 billion.

However, a comparison with projected payments over the next seven years under the deficiency payment mechanism produces an altogether different result. In 1996 alone, production flexibility contract payments cost the taxpayers $4 billion more than deficiency payments would have cost, thus consuming all of the savings and more that were "realized" from a comparison between production flexibility contract payments and payments over the last seven years. *See* C. Edwin Young & Paul C. Westcott, *1996 Farm Act Impacts: An Early Assessment*, AGRIC. OUTLOOK, Aug. 1996, at 22,

To achieve this desired certainty and predictability in the budget process, the FAIR Act requires the Secretary to expend from appropriated funds the following sums, by fiscal year, for production flexibility contract payments:

(1) For fiscal year 1996, $5,570,000,000.
(2) For fiscal year 1997, $5,385,000,000.
(3) For fiscal year 1998, $5,800,000,000.
(4) For fiscal year 1999, $5,603,000,000.
(5) For fiscal year 2000, $5,130,000,000.
(6) For fiscal year 2001, $4,130,000,000.
(7) For fiscal year 2002, $4,008,000,000.[52]

These sums are to be allocated each fiscal year on the following commodity by commodity basis:

(1) For wheat, 26.26%.
(2) For corn, 46.22%.
(3) For grain sorghum, 5.11%.
(4) For barley, 2.16%.
(5) For oats, 0.15%.
(6) For upland cotton, 11.63%.
(7) For rice, 8.47%.[53]

Also included in the available funds for each fiscal year are deficiency payments required to be refunded under prior law and refunded production flexibility contract payments for the previous fiscal year.[54] These sums are allocated to the contract commodity for which the repayment was required.[55] An additional allocation of $8.5 million is authorized for rice contract payments for each fiscal year over the seven-year contract term.[56] Subtracted from the total sums allocated to

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24. More troubling from a budget savings perspective, based on current USDA projections production flexibility contract payments could cost the taxpayer over $20 billion more than would have been expended had deficiency payments continued over the next seven years. *See id.* at 23.

52. 7 U.S.C. § 7213(a).

53. *Id.* § 7213(b). These rates are "generally derived from each commodity's share of projected deficiency payments for fiscal 1996-2002 in the Congressional Budget Office's (CBO's) February 1995 budget baseline, which assumed extension of the 1990 FACT Act." Young & Shields, *supra* note 30, at 1.

54. *See* 7 U.S.C. § 7213(c)(1)-(2).

55. *See id.*

56. *See id.* § 7213(d).

a commodity is the amount necessary to satisfy payment obligations with respect to that commodity under prior law.[57]

Individual contract payments are based on two factors: the *payment quantity* and the *payment rate*.[58] Both rates are commodity-specific, but payment quantities will differ from one farm to another.[59] The payment quantity factor generally favors large farms over small farms because it is derived from the amount of acreage historically devoted to the production of each contract commodity.[60]

A farm's payment quantity is derived by multiplying 85% of the acreage base that the farm would have had under prior law for each contract commodity by the farm program payment yield established for that commodity on that farm.[61] For example, a farm with a contract commodity acreage base of 100 acres, as established had prior law been in effect on January 1, 1996, would have a maximum of 85 contract payment acres. Assuming the farm's established program payment yield for that commodity was 105 bushels per acre, the maximum payment quantity would equal 85 acres multiplied by 105 bushels, or 8925 bushels. In this example, the payment quantity would be less only if some of the contract payment acres were enrolled under a contract.

Each contract commodity has a separate fiscal year payment rate.[62] In each fiscal year, the payment rate for each contract commodity is determined by dividing the total annual sum available for that commodity by the sum of all individual contract payment quantities for that commodity.[63] The payment rate for each contract commodity thus bears an inverse relationship to the total payment quantity

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57. *See id.* § 7213(c)(3).
58. *See id.* § 7214.
59. *See id.*
60. *See* 7 U.S.C. § 7214 (Supp. III 1997).
61. *See* 7 U.S.C. § 7214(a) (Supp. II 1996). The 85% figure is derived from the "triple base option" enacted in the Omnibus Budget Reconciliation Act of 1990. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1101, 104 Stat. 1388, 1388-1 (1990); 7 U.S.C. §§ 1441-2(c)(1)(C), 1444-2(c)(1)(C), 1444f(c)(1)(C), 1445b-3a(c)(1)(C), 1464 (1994) (repealed 1996). In essence, this provision reduced the amount of acres eligible for deficiency payments ("payment acres") by 15%. *See* Omnibus Budget Reconciliation Act of 1990 § 1101, 104 Stat. at 1388-1; 7 U.S.C. §§ 1441-2(c)(1)(C), 1444-2(c)(1)(C), 1444f(c)(1)(C), 1445b-3a(c)(1)(C), 1464 (1994) (repealed 1996). This reduction has been carried over to production flexibility contracts. *See* 7 C.F.R. § 1412.103 (1998). The regulations state that the:

> [a]nnual payment amount is the amount to be paid under a contract in effect for each fiscal year with respect to a contract commodity and equals the product of:
> (1) 85 percent of the enrolled contract acreage multiplied by
> (2) The payment yield multiplied by
> (3) The payment rate except that the total of such payments shall not exceed $40,000 per person in accordance with Part 1400 of this chapter.

Id.

62. *See* 7 U.S.C. § 7213(b) (Supp. II 1996).
63. *See id.* § 7214(c).

for that commodity. In other words, as the contract acreage enrolled for a commodity increases or decreases, the payment rate responds conversely.

Each annual contract payment is determined by multiplying the payment quantity for each of the contract commodities covered by the contract by the corresponding payment rate for each commodity.[64] For example, a farm with a single contract commodity payment quantity of 8925 bushels subject to a payment rate of $0.24 would be entitled to $2142.00. If that commodity is subject to a required deficiency payment refund under prior law and the refund has not been made, the refund amount is deducted from the production flexibility contract payment for the fiscal year in which the refund is due.[65]

A "person" may not receive more than $40,000 in production flexibility contract payments in a fiscal year.[66] However, payments derived from the repayment of deficiency payments are subject to a $50,000 per person limit for the term of the contract.[67] This $50,000 limit also applies to payments that are derived from sums that are forfeited by owners and producers whose contracts are terminated.[68] Thus,

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64. *See id.* § 7214(d).

65. *See id.* § 7214(e). Annual contract payments must be made no later than September 30 of each of the 1996 through 2002 fiscal years. *See id.* § 7212(d)(1). Owners and producers may elect to have one-half of the annual payment made on December 15th or January 15th of the fiscal year. *See id.* § 7212(d)(2)(B); 7 C.F.R. § 1412.302(a), (b); Amendment to the Production Flexibility Contract Regulations, 63 Fed. Reg. 31,102, 31,104 (1998) (to be codified at 7 C.F.R. § 1412.302(a), (b)). Fiscal years commence on October 1. On August 12, 1998, President Clinton signed the Emergency Farm Financial Relief Act to provide:

> Notwithstanding the requirements for making an annual contract payment specified in paragraphs (1) and (2), at the option of the owner or producer, the Secretary shall pay the full amount (or such portion as the owner or producer may specify) of the contract payment required to be paid for fiscal year 1999 at such time or times during that fiscal year as the owner or producer may specify.

Emergency Farm Financial Relief Act, Pub. L. No. 105-228, § 2, 1998 U.S.C.C.A.N. (112 Stat.) 1516, 1516 (1998).

66. *See* 7 U.S.C. § 1308(1). This limit does not apply to the "supplemental" payments made in 1998 under the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 1101(b)(3), 1998 U.S.C.C.A.N. (112 Stat.) 2681, ____.

The payment limitation rule known as the "three-entity rule" applies to production flexibility contract payments. *See* 7 C.F.R. § 1400.301. This rule permits a person to receive a maximum of $40,000 directly and another $20,000 indirectly from each of two "entities," thus permitting a person to receive up to $80,000 in contract payments. In 1998, participants will receive "supplemental" payments equal to about one-half of their "regular" production flexibility contract payments. Because these payments are not subject to a payment limit, a participant who uses the three-entity rule could receive up to $120,000 ($80,000 + $40,000).

67. *See* 7 U.S.C. § 7213(e).

68. *See id.*

two payment limits will apply, with each limit's applicability being dependent on the source of payment funds.

By entering into a production flexibility contract, eligible owners and producers agree to the following:

- to comply with the applicable highly erodible land ("sodbuster") provisions of Title XII of the Food Security Act of 1985, as amended;[69]
- to comply with the applicable wetland conservation ("swampbuster") provisions of Title XII of the Food Security Act of 1985, as amended;[70]
- to comply with the planting flexibility requirements of the FAIR Act discussed below;[71]
- to "use the land subject to the contract for an agricultural or related activity, but not for a nonagricultural or industrial use, as determined by the Secretary";[72] and
- to either purchase crop insurance at least the catastrophic risk protection coverage level or to agree in writing to forego receiving emergency crop assistance payments.[73]

The planting flexibility requirements permit any commodity or crop to be planted on contract acreage, subject to certain limitations and exceptions.[74] The limitations prohibit the planting of fruits and vegetables other than lentils, mung beans, and dry peas on contract acreage.[75] Excepted from these limitations are the planting of a fruit or vegetable in any region in which there is a history of double-

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69. *See id.* § 7211(a)(1). The highly erodible land provisions are set forth at 16 U.S.C. §§ 3801-3814 (Supp. II 1996).

70. *See id.* § 7211(a)(2). The wetland conservation provisions are set forth at 16 U.S.C. §§ 3801, 3821-3824 (Supp. II 1996).

71. *See id.* § 7211(a)(3).

72. *Id.* § 7211(a)(4). "Agricultural use" has been defined by the Secretary as "devoting the land to annual or perennial crops, including conserving uses, pasture, aquaculture or plantings of trees for any purpose. Land may be left fallow, but weeds must be controlled." 7 C.F.R. § 718.2 (1998) (defining "agricultural use").

73. *See* 7 U.S.C. § 1508(b)(7)(A). *See also id.* § 7211(b)(6). Under the Omnibus Consolidated and Emergency Supplemental Appropriations Act, persons who did not purchase crop insurance are nonetheless eligible for the disaster assistance authorized by that Act. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 1102(g)(1), 1998 U.S.C.C.A.N. (112 Stat.) 2681, ____. As a condition of receiving disaster assistance, however, they must agree to purchase crop insurance for the 1999 and 2000 crops. *See id.*, 1998 U.S.C.C.A.N. (112 Stat.) at ____.

74. *See* 7 U.S.C. § 7218(a). *See also* 7 C.F.R. § 1412.206 (specifying the planting flexibility requirements). For a discussion of the impacts of the planting flexibility permitted under the FAIR Act, see Paul Westcott & Ed Young, *1996 Farm Act Sets Stage for Acreage Shifts*, AGRIC. OUTLOOK, Sept. 1997, at 13.

75. *See* 7 U.S.C. § 7218(b)(1).

cropping of contract commodities with fruits or vegetables.[76] Also excepted is the planting of fruits and vegetables on any farm that has a history of planting fruits or vegetables on contract acreage[77] and the planting of fruits and vegetables by producer who has an established planting history of a fruit or vegetable.[78]

So long as the contract acreage remains in an agricultural use or related activity, a commercial crop need not be planted on it.[79] If a commercial crop is not planted, the contract acreage must be protected from weeds and erosion, including by planting a cover crop "if determined necessary by the county committee."[80] Land that is not contract acreage is not subject to any planting restrictions.

Production flexibility contracts are subject to termination for a violation of a contract requirement.[81] When a contract is terminated, "the owner or producer shall forfeit all rights to receive future contract payments on each farm in which the owner or producer has an interest and shall refund to the Secretary all contract payments received by the owner or producer during the period of violation, together with interest on the contract payments as determined by the Secretary."[82] In lieu of terminating a contract, the Secretary may either require the owner or operator to refund

> that part of the contract payments received by the owner or producer during the period of the violation, together with interest on the contract payments as determined by the Secretary; or to accept a reduction in the amount of future contract payments that is proportionate to the severity of the violation, as determined by the Secretary.[83]

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76. *See id.* § 7218(b)(2)(A).

77. *See id.* § 7218(b)(2)(B).

78. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 § 1102(g)(1), 1998 U.S.C.C.A.N. (112 Stat.) at ____; 7 U.S.C. § 7218(b)(2)(C). In either these circumstances, contract payments are reduced by an acre for each acre planted to the fruit or vegetable. *See* 7 U.S.C. § 7218(b)(2)(B), (C)(ii). In the latter circumstance, the quantity planted by the producer may not exceed the producer's average annual planting history for the fruit or vegetable in the 1991 through 1995 crop years, excluding those crops years in which no plantings were made. *See id.* § 7218(b)(2)(C)(i). The regulations specify those counties where histories of doublecropping have been established. *See* 7 C.F.R. § 1412.206(d).

79. *See id.* § 718.2 (defining "agricultural use").

80. *Id.* § 1412.401(c).

81. *See id.* § 1412.401(a).

82. 7 U.S.C. § 7216(a). *See also* 7 C.F.R. § 1412.401(a) (specifying the grounds for contract termination).

83. 7 U.S.C. § 7216(b)(1)-(2). *See also* 7 C.F.R. § 1412.401(b) (specifying the procedures for reductions in payments).

All parties "receiving a share of a contract's payment are jointly and severally liable for contract violations and resulting repayment."[84]

Loss of control over the contract acreage through its foreclosure terminates the owner's or producer's right to future contract payments. Payments received on contract acreage that has been foreclosed on are not required to be refunded if "the Secretary determines that forgiving the repayments is appropriate to provide fair and equitable treatment."[85] If, however, the owner or producer continues or resumes operation or control of the contract acreage, the contract in effect on the date of foreclosure remains in force.[86]

A transfer or a change in the interest of an owner or producer in the contract acreage subject to a contract terminates the contract on the date of the transfer or change "unless the transferee or owner of the acreage agrees to assume all obligations under the contract."[87] The transferee or owner may request the Secretary to modify the contract, as, for example, might be appropriate if shares in a crop-share tenancy are changed.[88] The Secretary may make requested modifications if they "are consistent with the objectives [of the production flexibility contract program], as determined by the Secretary."[89] Owners or producers must notify the county committee of transfers or changes in interests.[90]

C. *Price Support for Feed Grains, Wheat, Upland and Extra-Long Staple Cotton, Rice, and Oilseeds*

Price support for feed grains, wheat, upland and extra-long staple cotton, rice, and oilseeds is provided through nonrecourse marketing assistance loans.[91] Loan deficiency payments are also available for each of these commodities, except extra-

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84. 7 C.F.R. § 1412.404. The Secretary's decision to terminate a contract or to reduce in contract payments is administratively reviewable before the USDA National Appeals Division (USDA NAD). *See* 7 U.S.C. §§ 6991-7002 (1994 & Supp. II 1996) (containing the authority and procedures for the USDA NAD appeals process); 7 C.F.R. pt. 11 (outlining the USDA NAD appeal regulations). The Eighth Circuit has held that the Equal Access to Justice Act, 5 U.S.C. § 504, applies to USDA NAD proceedings. *See* Lane v. USDA, 120 F.3d 106, 108-10 (8th Cir. 1997).

Exhaustion of administrative remedies prior to seeking judicial review of any decision of the Secretary, the USDA, or any of the USDA's constituent agencies and their officers and employees is required by statute. *See* 7 U.S.C. § 6912(e). For a recent case explaining the scope of that statute and its relationship with the USDA NAD appeals process, see Bastek v. Federal Crop Ins. Corp., 145 F.3d 90, 94 (2d Cir. 1998).

85. 7 U.S.C. § 7216(c)(1) (Supp. II 1996).

86. *See id.* § 7216(b)(2).

87. *Id.* § 7217(a). *See also* 7 C.F.R. § 1412.207 (specifying the "succession-in-interest" requirements).

88. *See* 7 U.S.C. § 7217(b).

89. *Id.*

90. *See* 7 C.F.R. § 1412.207(d).

91. *See id.* § 1421.1, 1427.1.

long staple cotton.[92] Recourse loans are available for high moisture feed grains and seed cotton.[93]

1. *Nonrecourse Marketing Assistance Loans*

Only producers who have entered into a production flexibility contract are eligible for nonrecourse marketing assistance loans for feed grains, wheat, upland cotton, and rice.[94] Each of these commodities is eligible for a loan irrespective of whether it was produced on the farm's contract acreage.[95]

Producers are not required to have entered into a production flexibility contract to be eligible for a nonrecourse marketing assistance loan for extra-long staple cotton and oilseeds. Any production of extra-long staple cotton and oilseeds is eligible.[96]

Obtaining a nonrecourse marketing assistance loan is voluntary.[97] Eligible producers may obtain such a loan at the end of the crop year by using all or a portion of their eligible crop as collateral.[98] The loan and the pledging of the crop as collateral are documented by a note and a security agreement, both of which must be entered into by certain deadlines.[99]

A producer must have a "beneficial interest" in the commodity tendered as collateral.[100] In general, a producer holds a beneficial interest in the commodity by having control over, title to, and risk of loss in the commodity.[101] Other requirements may apply, however.[102] In addition, the commodities must be stored in approved storage at the time of the disbursement of the loan proceeds and be of merchantable quality.[103]

Basic loan rates are established for each eligible commodity. These rates, and the provisions for their adjustment for each marketing year, vary by commodity.[104]

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92. *See id.* § 1421.1, 1427.23.

93. *See id.* § 1421 (containing the loan and loan deficiency payment rules for grains and similarly handled commodities); *see id.* § 1427 (containing the loan and loan deficiency payment rules for cotton).

94. *See* 7 U.S.C. § 7231(b)(1).

95. *See id.*

96. *See id.* § 7231(b)(2).

97. *See id.* § 7231(a).

98. *See* 7 C.F.R. § 1421.4.

99. *See id.* § 1421.5(a).

100. *See id.* § 1421.5(c)(1).

101. *See id.* § 1421.5(c)(2).

102. *See id.*

103. *See id.* § 1421.5(b)(1).

104. *See* 7 U.S.C. § 7232 (Supp. II 1996).

Once established, the basic loan rate may be adjusted further to reflect the quality and location of the commodity.[105] The resulting basic loan rates, expressed in per-unit sums, are the rates at which loans are made.

Nonrecourse marketing assistance loans for feed grains, rice, and wheat have a nine-month term.[106] Loans for upland cotton have a ten-month term.[107] These terms cannot be extended.[108]

In lieu of repaying a loan in cash, a producer may forfeit the commodity to the CCC.[109] This feature gives the loans their characterization as "nonrecourse" loans. Because the loans have this nonrecourse feature, the loan rate has tended historically to establish the floor for the domestic market price of the commodity. However, marketing assistance loans and their predecessors, marketing loans, were added in part to eliminate the price floors created by the loan rates. Marketing assistance loans allow the nonrecourse loans to be repaid at a rate lower than the original or basic loan rate.[110]

The basic loan rate at the loan's inception is not necessarily the repayment rate, with the exception of extra-long staple cotton.[111] For feed grains, wheat, and oilseeds the Secretary is required to establish a repayment rate at the lesser of the basic loan rate or a rate that the Secretary determines will "(A) minimize potential loan forfeitures; (B) minimize the accumulation of stocks of the commodity by the Federal Government; (C) minimize the cost incurred by the Federal Government in storing the commodity; and (D) allow the commodity produced in the United States to be marketed freely and competitively, both domestically and internationally."[112]

For upland cotton and rice, the Secretary is required to establish a repayment rate at the lesser of the basic loan rate or the prevailing world market price for each commodity, adjusted to United States quality and location.[113] Special adjustments to world market price apply to upland cotton.[114] The basic loan rate for extra-long staple cotton, however, is always the repayment rate.[115]

When the repayment rate is lower than the basic loan rate, producers realize a financial gain corresponding to the difference between the two rates, minus storage costs.[116] Nonrecourse marketing assistance loans accrue an interest obligation,

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105. *See* 7 C.F.R. § 1421.7(a).
106. *See* 7 U.S.C. § 7233(a).
107. *See id.* § 7233(b).
108. *See id.* § 7236(c).
109. *See id.* § 7284(a). *See also* 7 C.F.R. § 1421.9.
110. *See* HALLBERG, *supra* note 14 at 27 (discussing the effects of nonrecourse loans and marketing loans on commodity prices).
111. *See* 7 U.S.C. § 7234.
112. *Id.* § 7234(a).
113. *See id.* § 7234(c).
114. *See id.* § 7234(e).
115. *See id.* § 7234(c).
116. The amount of this gain is subject to a $75,000 limit. *See* 7 U.S.C. § 1308(2) (1994 & Supp. II 1996).

however, and each loan carries a nonrefundable loan service fee.[117] In general, the interest rate is equal to one percent over the interest rate charged by the United States Treasury for funds borrowed by the CCC on the date the loan is disbursed.[118]

Producers who obtain a nonrecourse marketing assistance loan must comply with the highly erodible land ("sodbuster") and wetland conservation ("swampbuster") requirements.[119] In addition, producers are responsible for any deficiency in grade, quality, or quantity of any commodity under loan and for any failure to properly care for, preserve, and deliver the commodity.[120]

2. *Loan Deficiency Payments*

Loan deficiency payments are available to producers of feed grains, wheat, upland cotton, rice, and oilseeds who are eligible to obtain a nonrecourse marketing assistance loan but who chose to forego obtaining one.[121] In exchange for not obtaining a loan, these producers can receive loan deficiency payments.[122] In part, these payments are made because, by not obtaining a loan, these producers avoid imposing on the government the administrative costs associated with making a loan and the potential for their forfeiture of the commodity in lieu of repaying the loan in cash.

The loan deficiency payment rate is the difference between the commodity's basic loan rate and its repayment rate.[123] The quantity to which this rate is applied is "the quantity of the loan commodity that the producers on a farm are eligible to place under loan but for which the producers forgo obtaining the loan in return for payments . . . ."[124]

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117. *See* 7 C.F.R. § 1421.12(a) (1998).

118. *See id.* § 1405.1(a).

119. *See* 7 U.S.C. § 7231(c) (Supp. II 1996).

120. *See id.* § 7284(b). Participants who violate program rules may, in some circumstances, be subject to liquidated damages and penalties. *See* 7 C.F.R. § 1421.16(b), (c). For example, the unauthorized removal or disposition of a commodity pledged as collateral for a loan or the incorrect certification of the quantity of the commodity under the loan may trigger the assessment of liquidated damages against the violator. *See id.* The violator may also be barred from receiving nonrecourse loans and loan deficiency payments for up to thirty-six months. *See id.* § 1421.16(g). These sanctions have been held not to be punitive for purposes of the Fifth Amendment's Double Jeopardy Clause. *See* United States v. Drake, 934 F. Supp. 953, 959 (N.D. Ill. 1996).

121. Loan deficiency payments are not available for extra-long staple cotton because the basic loan rate is always the repayment rate for extra-long staple cotton. *See* 7 U.S.C. § 7235(d).

122. *See id.* § 7235(a); 7 C.F.R. §§ 1421.29, 1427.23.

123. *See* 7 U.S.C. § 7235(c).

124. *Id.* § 7235(b). These payments are subject to a $75,000 limit. *See* 7 U.S.C. § 1308(2) (1994 & Supp. II 1996).

3. *Recourse Loans*

Producers of corn and grain sorghum who have entered into a production flexibility contract and who "normally harvest all or a portion of their crop of corn or grain sorghum in a high moisture state" are eligible for recourse loans.[125] Producers of upland cotton who have entered into a production flexibility contract are also eligible for recourse seed cotton loans.[126] Repayment of these loans is at the loan rate established by the Secretary.[127]

D. *Production Controls and Price Support for Tobacco*

Production controls in the form of farm marketing quotas are authorized for all types of tobacco except cigar wrapper and perique. These quotas, which set limits on the amount of tobacco that can be marketed without penalty, are intended to balance the flow of tobacco in market channels.

Marketing quotas, however, must be approved by more than two-thirds of the farmers who grow that type of tobacco.[128] Referendums are held every three years. In exchange for approving a marketing quota, price support is offered to the farmers who produce the tobacco subject to the quota.[129] In other words, price support is available only when a marketing quota is in effect. Thus, even though authorized, neither marketing quotas nor price support will be in effect unless two-thirds of the farmers who grow that type of tobacco agree to be bound by a marketing quota.[130]

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125. 7 U.S.C. § 7237(a) (Supp. II 1996); 7 C.F.R. § 1421.31.

126. *See* 7 U.S.C. § 7237(b); 7 C.F.R. § 1427.160.

127. *See* 7 U.S.C. § 7237(c).

128. *See* 7 U.S.C. § 1312(c) (1994).

129. *See id.*

130. The establishment of farm marketing quotas begins with the Secretary proclaiming a "national marketing quota" for the next three succeeding marketing years. *See id.* §§ 1312, 1314c(b), 1314e(a). After such a proclamation, a referendum is conducted to determine whether the farmers who grow that type of tobacco approve of the quota. *See id.* Two-thirds of those farmers voting must approve. *See id.*

If approved, the national marketing quota is apportioned among tobacco-producing farms on either an acreage, poundage, or acreage-poundage basis, depending on the type of tobacco.[131] These quotas are tied to specific farms, and their sale, lease, or transfer is subject to restrictions.[132]

When farm marketing quotas are in effect, tobacco farmers are eligible for price support for tobacco produced within the limits of their farm's quota.[133] A support price, in the form of a loan rate expressed in cents per pound, is established for each type and grade of tobacco.[134] Eligible farmers receive the loan rate for their type and grade of tobacco even if a buyer does not bid at that level.

The price support program is carried out through farmer-owned cooperative marketing associations that have entered into loan agreements with the CCC.[135]

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131. For tobaccos subject to acreage allotments, the national marketing quota is converted into a national acreage allotment which is then apportioned to individual farms. The amount produced on a farm's acreage allotment is the farm's marketing quota. *See id.* § 1313(b). Farmers who exceed their farm marketing quota are penalized at the rate of 75% of the tobacco's average market price for the immediately preceding marketing year. *See id.* § 1314(a).

Under poundage quotas, which are authorized for burley tobacco, the national marketing quota is apportioned to individual farms based on the yield established for the farm multiplied by the acreage allotment for the farm before the poundage quota went into effect. The resulting farm poundage quota is adjusted in each succeeding year by a national factor. *See id.* § 1314e(c)-(e). Each farm's quota is also adjusted each year to reflect any over or undermarketings relative to the quota in the preceding marketing year. *See id.* § 1314e(e). Marketings in excess of 103% of the quota are subject to financial penalties. *See id.* § 1314e(i).

Acreage-poundage allotments are authorized for flue-cured tobacco. *See id.* § 1314c. The apportionment of the national marketing quota involves the determination of a "national average yield goal," which is "the yield per acre which on a national average basis the Secretary determines will improve or insure the usability of the tobacco and increase the net return per pound to the growers." *Id.* § 1314c(a)(2). The national average marketing quota is divided by the national average yield goal to arrive at the *national acreage allotment*. *See id.* § 1314c(a)(3). Allocations to individual farms are then made by uniformly adjusting each farm's acreage allotment for the preceding year so that the total of all farm allotments for the current year equals the *national acreage allotment*. *See id.* § 1314c(a)(4). The marketing quota for individual farms, expressed in pounds, is then determined by multiplying the individual farm's established yield by the farm's adjusted acreage allotment. *See id.* § 1314c(a)(7)-(8). Farmers who market more than 103% of their farm's quota are subject to financial penalties. *See id.* § 1314c(g).

The Eleventh Circuit has held that the imposition of a civil penalty on a tobacco dealer for marketing tobacco in excess of the marketing quota was not punishment for purposes of the Fifth Amendment's Double Jeopardy Clause and did not violate the Excessive Fines Clause of the Eighth Amendment. *See* Cole v. USDA, 133 F.3d 803, 809 (11th Cir. 1998).

132. *See* 7 U.S.C. §§ 1314b, 1314d, 1314e(g).

133. *See id.* § 1445(c). *See also* 7 C.F.R. pt. 1464, subpt. A (outlining the Tobacco Loan Program Rules).

134. *See* 7 U.S.C. § 1445(f) (1994 & Supp. II 1996).

135. *See* 7 U.S.C. § 1445-1(a)(1) (1994).

Using funds borrowed from the CCC, these associations automatically buy the tobacco not sold at the support rate and pay their members at the price support loan rate price for that tobacco.[136] The associations then eventually sell the tobacco. In the meantime, the tobacco serves as collateral for the loans from the CCC, and its sale provides the funds to repay the loan.

To cover potential losses incurred by their cooperative marketing associations, farmers must pay assessments into a CCC account established by their cooperative associations.[137] If the sale proceeds from the collateral securing the CCC loan are insufficient to repay the loan, the balance must be supplied by the farmers through these assessments.[138] Farmers who fail to pay these assessments are subject to the penalties that also apply to marketing in excess of the farm's marketing quota.[139] To the extent practical, purchasers of flue-cured and burley tobacco are also required to pay into these accounts the same amount as paid by farmers.[140] Other than administrative expenses, the net costs of operating the price support program cannot be borne by the federal government. For this reason, it is characterized as a "no net cost" program.

E. *Price Support for Peanuts*

The 1996 FAIR Act revised the peanut program to make it, like the tobacco program, a "no net cost" program. In addition, the FAIR Act suspended peanut acreage allotments for the 1996 through 2002 crops.[141]

If two-thirds of the peanut farmers voting in annual referendums approve, poundage quotas are established for peanuts for the succeeding five-year periods.[142] A farm poundage quota is established for each farm for each marketing year.[143]

136. *See id.* § 1445-1(b).

137. *See id.* §§ 1445-1 to 1445-2.

138. *See id.* § 1445-2(e).

139. *See id.* § 1314.

140. *See id.* §§ 1445-1(d), 1445-2(d).

141. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 171(a)(1)(B), 110 Stat. 888, 937. For a brief discussion of the history of the peanut program through the FAIR Act, see Competitive Enter. Inst v. USDA, 954 F. Supp. 265, 267-69 (D.D.C. 1996).

142. *See* 7 U.S.C. § 1358-1(d). After approval, in each succeeding marketing year the Secretary establishes a national poundage quota for peanuts at the level "that is equal to the quantity of peanuts (in tons) that the Secretary estimates will be devoted in each such marketing year to domestic edible use (except seed) and related uses." 7 U.S.C. § 1358-1(a)(1) (1994 & Supp. II 1996). This poundage quota is apportioned among the states so that, for the 1996 though the 2002 marketing years, the poundage quota allocated to each state is equal to the percentage of the national poundage quota allocated to farms in that state for the 1995 marketing year. *See* 7 U.S.C. § 1358-1(a)(3) (Supp. II 1996).

143. *See* 7 U.S.C. § 1358-1(b) (1994 & Supp. II 1996). Effective beginning with the 1998 crop, however, farm poundage quotas may not be established for a farm owned or controlled by a public entity other than a university used for research purposes or a person who is not a producer and who resides in another state. *See* 7 U.S.C. § 1358-1(b)(1)(D) (Supp. II 1996).

These established quotas may be adjusted or permanently or temporarily released.[144] The sale, leasing, or transfer of quotas is subject to restrictions.[145]

Peanuts eligible for domestic edible use marketed from a farm having a farm poundage quota without exceeding the farm poundage quota of the farm for the marketing year are known as "quota peanuts."[146] Peanuts marketed from a farm without a farm poundage quota or marketed in excess of the farm's quota for the marketing year are known as "additional peanuts."[147]

The distinction between "quota peanuts" and "additional peanuts" is significant for three reasons. First, only "quota peanuts" may be retained for use as seed and other uses on a farm.[148] Second, only "quota peanuts" may be marketed for domestic edible use; "additional peanuts" must be crushed for oil or meal or exported unless they are owned or controlled by the CCC.[149] In this regard, penalties apply to excessive or over-quota marketing of "quota peanuts" and the improper marketing of "additional peanuts."[150] Third, the price support level is substantially higher for "quota peanuts" than it is for "additional peanuts."[151]

Price-support is provided through nonrecourse loans, primarily through nonrecourse warehouse storage loans to approved grower associations operated primarily for the purpose of carrying out the loan activities.[152] The associations must establish segregated pools for "quota" and "additional" peanuts.[153] While gains from the operation of these are to be distributed to the farmers who placed peanuts in the pools, any losses are ultimately to be paid through marketing assessments collected from farmers and the first purchasers of peanuts.[154] In this manner, the price support program operates at "no net cost" to the federal government.

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144. *See* 7 U.S.C. § 1358-1(b)(2)-(8) (1994 & Supp. II 1996).

145. *See id.* § 1358b.

146. *See* 7 U.S.C. § 1358-1(e)(4) (1994).

147. *See id.* § 1358-1(e)(1).

148. *See id.* § 1359a(b)(1).

149. *See id.* § 1359a(b)(2), (g).

150. *See* 7 U.S.C. § 1359a (1994 & Supp. II 1996).

151. By statute, the national average price-support level for "quota peanuts" is $610 per ton. *See* 7 U.S.C. § 7271(a)(2) (Supp. II 1996). The national average price-support level for "additional peanuts" is established by the Secretary and, for the 1996 crop, the rate was $132 per ton. *See id.* § 7271(b)(1).

152. *See id.* § 7271(c). *See also* 7 C.F.R. pt. 1446 (1998) (containing the peanut marketing, storage, handling, and disposition rules for the 1996 through 2002 crops of peanuts).

153. *See* 7 U.S.C. § 7271(c)(2).

154. *See id.* § 7271(d), (g).

F. *Price Support for Sugar*

Sugar is produced from sugarcane and sugarbeets. Sugarcane and sugarbeet prices are supported through recourse and nonrecourse loans and tariff rate import quotas.[155] The 1996 FAIR Act instituted a new program for recourse and nonrecourse loans and related marketing assessments and repealed the authority for the existing loan and assessment programs.[156] Also, marketing allotments that were in effect for the 1995 and earlier crops were suspended for the 1996 through 2002 crops by the FAIR Act.[157]

Price support loans for sugarcane and sugarbeets are made available to processors, not producers.[158] However, processors who participate in the loan program are obligated to pay minimum prices to producers "that are proportional to the value of the loan received by the processor for sugar beets and sugarcane delivered by producers served by the processor."[159]

Subject to adjustments, the loan rate for domestically-grown sugarcane is $0.18 per pound for raw cane sugar, and the loan rate for domestically-grown sugarbeets is $0.229 per pound for refined beet sugar for the 1996 through 2002 crops.[160] The loans are generally for nine-month terms.[161]

The loans are nonrecourse loans in fiscal years in which the tariff rate import quota is established above 1.5 million short tons, raw value, at any time during the fiscal year.[162] Otherwise, the loans are recourse loans—they cannot be settled by forfeiture of the collateral sugar. Instead, they must be repaid in cash.

When the loans are nonrecourse loans, a penalty is assessed for forfeiting the sugar collateral in lieu of repaying the loan. The penalty for cane sugar is $0.01 per pound.[163] The penalty for beet sugar bears "the same relation to the penalty for cane sugar as the marketing assessment for sugar beets bears to the marketing assessment for sugarcane," for example, $0.0107 per pound.[164] When such penalties are assessed against a processor, the payments the processor owes to the producers of the sugarcane or sugarbeets is reduced by the same amount.[165]

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155. Historically, the sugar program has been "the most concentrated benefits package in the array of commodity programs, with more money flowing to fewer producers than in any other (legal) crop." WILLARD W. COCHRANE & C. FORD RUNGE, REFORMING FARM POLICY: TOWARD A NATIONAL AGENDA 75 (1992).

156. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 171(b)(2)(H), 110 Stat. 888, 938.

157. *See id.*, 110 Stat. at 937.

158. *See* 7 C.F.R. pt. 1435, subpt. B (1998).

159. 7 U.S.C. § 7272(e)(3).

160. *See id.* § 7272(a)-(c).

161. *See id.* § 7272(d).

162. *See id.* § 7272(e)(2).

163. *See id.* § 7272(g)(2).

164. *Id.* § 7272(g)(3).

165. *See id.* § 7272(g)(4).

So that the loan program will operate at "no net cost" to the federal government, processors of sugarcane and sugarbeets are required to remit nonrefundable marketing assessments to the CCC in each fiscal year from 1996 through 2002.[166] The rates for each crop for each fiscal year are established by statute, and civil penalties may be assessed against processors who fail to make timely remittances.[167]

G. *Price Support for Dairy Products*

The 1996 FAIR Act instituted a new price support program for milk, repealing the existing program.[168] The FAIR Act also mandated changes to milk marketing orders,[169] which are beyond the scope of this Article because marketing orders are not considered to be domestic commodity programs.

Under the milk price support program, the Secretary is required to support the price of milk in the contiguous forty-eight states through the purchase of cheese, butter, and nonfat dry milk produced from milk.[170] From 1996 through 1999, however, the milk support price per hundredweight of milk containing 3.67% butterfat will decline at the rate of $0.15 per year from $10.35 in 1996 to $9.90 in 1999.[171] The Secretary may allocate the rate of price support between purchases of nonfat dry milk and butter in a manner that minimizes CCC expenditures.[172] The milk price support program terminates on December 31, 1999.[173]

Beginning on January 1, 2000, a recourse loan program will be available for commercial processors of eligible dairy products—cheddar cheese, butter, and nonfat dry milk.[174] These loans are intended "to assist the processors to manage inventories of eligible dairy products and assure a greater degree of price stability for the dairy industry during the year."[175] The loan rate established by the Secretary is to reflect a milk equivalent value of $9.90 per hundredweight of milk containing 3.67%

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166. *See id.* § 7272(f)(2).

167. *See id.* § 7272(f). *See also* 7 C.F.R. §§ 1435.200-.204 (1998).

168. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 141(g), 110 Stat. 888, 915. For a discussion of recent milk prices and the impact of federal policies on those prices, see Robert Cropp, *Milk Money: How Dairy Cooperatives Impact Farm-Level Milk Prices*, RURAL COOPERATIVES, Nov.-Dec. 1997, at 4.

169. *See* 7 U.S.C. § 7253 (Supp. II 1996).

170. *See id.* § 7251(a).

171. *See id.* § 7251(b); 7 C.F.R. § 1430.2.

172. *See* 7 U.S.C. § 7251(d)(1).

173. *See id.* § 7251(h).

174. *See id.* § 7252(d)-(e).

175. *Id.* § 7252(a).

butterfat.[176] The original term of the loan is not to extend beyond the end of the fiscal year in which it is made, but the term may be extended up to the end of the next fiscal year.[177]

III. USDA Office of Inspector General Subpoenas—*Winters Ranch Partnership v. Viadero*

Participation in a domestic commodity program carries with it the possibility that the USDA will seek information about the participant beyond what the participant voluntarily discloses in the program application and related documents.[178] For example, to ascertain compliance with program requirements, representatives of the Farm Service Agency (FSA) and the Natural Resources Conservation Service (NRCS) may enter a participant's farm.[179] In addition, as a condition for the receipt of benefits, program participants are under a general obligation "to furnish reports or data which are necessary to determine benefits" at the FSA's request.[180]

The FSA and the NRCS, however, are not the only constituent USDA agencies that can seek information from commodity program participants. The USDA's Office of Inspector General (OIG), established by the Inspector General Act of 1978,[181] has broad investigatory authority, including the authority to issue subpoenas.[182] By virtue of its subpoena authority, the OIG's investigatory authority is inherently more compulsory than the authority of the FSA and the NRCS, neither of which possess subpoena authority.[183] If a program participant refuses to provide

176. *See id.* § 7252(b).

177. *See id.* § 7252(c).

178. *See, e.g.*, 7 C.F.R. § 1400.2(e) (1998). Among the more significant documents related to the program application is the farm operating plan used to determine whether the applicant is a "person" who is "actively engaged in farming" under the payment limitation rules applicable to production flexibility contracts and CRP payments. *Id*. The farm operating plan calls for the participant to reveal, among other matters, information about the land, equipment, capital, labor, and management used in the farming operation. *See id.* § 1400.201.

179. *See, e.g., id.* § 718.4(b) (authorizing a right of entry applicable to all programs administered by the FSA under Chapter XIV of Title 7 of the Code of Federal Regulations); *id.* § 1410.55(a) (authorizing a right of entry applicable to land enrolled in the Conservation Reserve Program). *See also id.* § 12.6(c) (setting forth the on-site inspection authority of the NRCS regarding the highly erodible land ("sodbuster"); *id.* § 12.30(c)(4) (setting forth the wetland conservation ("swampbuster") provisions). Under section 718.4(b), a participant may refuse entry by the FSA and may request the FSA to provide written authorization for the entry. However, "[i]f entry is not allowed within 30 days of such written authorization," all program benefits for that farm will be denied. *Id.* § 718.4(b)(1).

180. *Id.* § 718.4(c).

181. 5 U.S.C. app. §§ 1-12, at 1381-99 (1994).

182. *See id.* § 6(a)(4), at 1386.

183. In addition to the broad investigatory and subpoena authority given to the USDA OIG by the Inspector General Act of 1978, USDA's OIG agents are authorized by the Agriculture and Food Act of 1981 to make felony arrests, execute search warrants, and carry firearms. *See* 7 U.S.C. § 2270 (1994

the information requested by the FSA or NRCS, the only potential sanction is the loss of program benefits.[184] An OIG subpoena, on other hand, is judicially enforceable. A participant who refuses to comply with a court order enforcing the subpoena may face sanctions for contempt. Moreover, OIG requests for information are sometimes a prelude to criminal and civil actions against a program participant for program fraud.[185] Thus, a request for information from the OIG, though a subpoena or otherwise, is not to be taken lightly.[186]

The Fifth Circuit's recent decision in *Winters Ranch Partnership v. Viadero*[187] illustrates aspects of the OIG's investigatory role in connection with domestic commodity programs and the breadth of the OIG's authority in that regard.[188] The *Winters Ranch Partnership* litigation arose from an OIG "audit" of the participation of the members of a farm partnership in the 1991 and 1992 wool and mohair programs.[189] The partnership and its members responded to OIG subpoenas by seeking a pre-enforcement declaratory judgment that the OIG had exceeded its authority under the Inspector General Act of 1978[190] in issuing the subpoenas.

When the Inspector General Act of 1978 established the USDA's OIG,[191] it transferred to the OIG the functions previously performed by the USDA "Office of Investigation" and "Office of Audit."[192] The Act also permits the transfer of other

& Supp. II 1996). *See also* 7 C.F.R. § 2610.1(d) (implementing 7 U.S.C. § 2270). In this respect, the law enforcement authority of the USDA's OIG is more extensive and more clearly defined than it is for the Inspectors General in other agencies. *See* James R. Richards & William S. Fields, *The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs?*, 12 GEO. MASON L. REV. 227, 228-40 (1990).

184. *See* 7 C.F.R. § 718.4 (c).

185. *See, e.g.*, Inspector Gen. of the USDA v. Glenn, 122 F.3d 1007 (11th Cir. 1997); United States v. Walser, 3 F.3d 380 (11th Cir. 1993).

186. "[T]he agency Inspector General has become a power to be reckoned with in all of the major agencies." WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 20, at 111 (3d ed. 1997). *See also* United States v. Espy, 989 F. Supp. 17, 37-38 (D.D.C. 1997) (issuing an order addressing various motions regarding indictment against former USDA Secretary Espy based on, among other charges, allegations that he made a false statement to an Inspector General agent and hindered an Inspector General's investigation by tampering with witnesses), *overruled by* 145 F.3d 1369 (D.C. Cir. 1998).

187. Winters Ranch Partnership v. Viadero, 123 F.3d 327 (5th Cir. 1997).

188. *See id.* at 333.

189. *See id.* at 328-29.

190. 5 U.S.C. app. §§ 1-12, 1381-1399 (1994).

191. *See id.* §§ 2, 11, at 1381, 1397.

192. *See id.* § 9(a)(1)(A), at 1395; 7 C.F.R. § 2610.1(a) (1998). These offices had been established in 1977 by Secretary Bob Bergland. *See* Margaret J. Gates & Marjorie Fine Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 ALA. L. REV. 473, 480 (1985).

functions "properly related to the functions of the Office [of Inspector General]" which would, "if so transferred, further [the] purposes of the Act."[193] However, the Act expressly provides that "there shall not be transferred to an Inspector General . . . program operating responsibilities."[194]

The issue in *Winters Ranch Partnership* was whether the OIG's "audit" of the partnership and its members transgressed the Act's prohibition against the transfer of "program operating responsibilities" to an Inspector General.[195] The Fifth Circuit's resolution of that issue has significant implications for commodity program participants because the "audit" at issue was the type of audit that the OIG frequently conducts. In addition, the Fifth Circuit's decision provides the occasion to examine the authority of the OIG to conduct investigations of program participants. The discussion that follows begins with an overview of the authority of the OIG as conveyed by the Inspector General Act,[196] followed by a brief review of federal agency subpoena powers.[197] It concludes with an explanation of the *Winters Ranch Partnership* decision.[198]

A. *The Inspector General Act of 1978*

In addition to establishing the OIG, the Inspector General Act of 1978 established Offices of Inspector General in other federal agencies.[199] Amendments to the Act have added virtually every federal agency to that list.[200]

The Act was a response to congressional concerns that agency inefficiency and program fraud and abuse were "reaching epidemic proportions."[201] The OIGs

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193. 5 U.S.C. app. § 9(a)(2), at 1396.

194. *Id.*

195. Winters Ranch Partnership v. Viadero, 123 F.3d 327, 328-30 (5th Cir. 1997).

196. *See* discussion *infra* Part III.A.

197. *See* discussion *infra* Part III.B.

198. *See* discussion *infra* Part III.C.

199. The USDA was among twelve agencies and departments designated in the original Act. For listings of law review and other commentary on the legislative history of the Inspector General Act, see William S. Fields, *The Enigma of Bureaucratic Accountability*, 43 CATH. U. L. REV. 505, 506 n.5 (1994) (reviewing PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 26 (1993)).

200. *See* 5 U.S.C. app. §§ 2, 8, 8A-H, 9, 11, at 1381-99 (1994).

201. S. REP. NO. 95-1071, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2679. The Report of the Senate Committee on Governmental Affairs that accompanied the Act:

> [B]lamed these failures in large part on deficiencies in the organization and incentives of executive branch auditors and investigators. The Inspectors General were, therefore, to provide intra-agency cohesion and a sense of mission in the struggle against waste and mismanagement as well as to further important communication between agencies: 'this type of coordination and leadership strengthens cooperation between the agency and the Department of Justice in investigating and prosecuting fraud cases.'

established by the Act are "independent and objective units" within the agencies and departments designated by the Act, and their principal mandate is "to conduct and supervise audits and investigations relating to the programs and operations" of their agency or department.[202] These audits and investigations are "to address the misuse of time, information and money in government agency activities."[203] This audit and investigatory authority is not limited to examining agencies: "The legislative history of the Act . . . makes plain that Congress intended the IG's investigatory authority to extend to the investigation of recipients of government funding as well as to government agencies themselves."[204]

The Inspector General concept has military origins traceable to George Washington's Continental Army.[205] However, "[t]he most immediate ancestor of today's Inspector Generals was the Inspector General created administratively in the Department of Agriculture as a result of the 1962 Billie Sol Estes scandal . . . . As Roy Neal, one of the investigators who examined Estes' activities, later noted, 'Billie Sol Estes may not have given birth to the Inspector General concept, but he was most certainly the midwife.'"[206]

Billie Sol Estes was a notorious manipulator of anhydrous ammonia, grain storage, and cotton allotments.[207] In 1962, he was convicted of swindling farmers by inducing them to purchase ammonia tanks that did not exist, and the United States Supreme Court's reversal of that conviction is a landmark decision on the televising of criminal trials.[208] Mr. Estes, however, is not remembered for his contributions to constitutional law. To the contrary, his infamy has been described by former Senator Sam Nunn of Georgia as follows:

> Even experts have trouble understanding the federal farm program at times. But when white collar criminals get into the act, deliberately making their

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United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1145 (D.C. Cir. 1987) (quoting S. REP. NO. 95-1071, at 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2681-82). *See also* Burlington Northern R.R. Co. v. Office of Inspector Gen., 983 F.2d 631, 634 (5th Cir. 1993). The purpose of the Act was "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies." S. REP. NO. 95-1071, at 1, *reprinted in* 1978 U.S.C.C.A.N. at 2676.

202. 5 U.S.C. app. §§ 2(1), 4(a)(1), at 1381, 1383 (1994).

203. United States v. Hunton & Williams, 952 F. Supp. 843, 849 (D.D.C. 1997).

204. Adair v. Rose Law Firm, 867 F. Supp. 1111, 1116 (D.D.C. 1994).

205. *See* William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON INDEP. L. REV. 97, 99 (1993).

206. *Id.* at 101-02.

207. *See id.* at 101. He also had been the chairman of the Texas State ASCS Committee. *See* JAMES BOVARD, THE FARM FIASCO 253 (1991).

208. *See* Estes v. Texas, 381 U.S. 532, 552 (1965).

> manipulations as complicated and disguised as possible, it is an even greater challenge to make sense of what has happened. In the case of Billie Sol Estes, the hearings of the Permanent Sub-committee on Investigations covered 39 days from June 1962 to November 1963. The record was printed in eight volumes comprising nearly 3000 pages of testimony and exhibits.
> Estes, who neither smoked nor drank was a lay preacher in his church, built his empire on anhydrous ammonia, a cheap fertilizer widely used in large-scale farming. With his fertilizer sales booming, Estes moved into the grain storage business and began to exploit the federal cotton allotment program. By 1961, when he was only thirty-six years old, Estes owned or had an interest in forty-one business enterprises, maintained forty-five accounts in Texas banks, and had become a strong supporter of Democratic politicians. The scandal caused by his fraud on the farm program embarrassed Agriculture Secretary Orville Freeman, and three of Freeman's underlings were fired because of their association with Estes. Another aide resigned under a cloud.[209]

The Billie Sol Estes scandal produced more than resignations in the USDA. It revealed serious deficiencies in the USDA's audit and investigative units. Three of these units had knowledge or suspicions about Estes' activities, "but the units failed to communicate with each other or the Secretary about the case and further embarrassed the government."[210] Not surprisingly, "[t]he final report of the subcommittee that investigated the Estes incident contained sharp criticism of the Department of Agriculture's audit and investigative capabilities."[211]

Secretary Freeman responded to the scandal by creating, in 1962, an Office of Inspector General within the USDA.[212] This OIG was both praised and criticized in a 1968 General Accounting Office report, and it was emulated at the Department of Housing and Urban Development in 1972.[213] Though abolished by Secretary Earl Butz in 1974,[214] the Office was the first to resemble the offices established by the Inspector General Act of 1978.[215]

Because the Offices of Inspector General are intended to be "independent and objective units,"[216] Inspectors General are appointed by the President, subject to the advice and consent of the Senate, and the President alone has the power to remove

209. Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 44 (1986) (footnotes omitted).
210. Gates & Knowles, *supra* note 192, at 478 (footnotes omitted).
211. Fields & Robinson, *supra* note 205, at 101.
212. *See* Gates & Knowles, *supra* note 192, at 479.
213. *See id.* at 479-80.
214. *See id.* at 480.
215. *See id.* at 477.
216. 5 U.S.C. app. § 2, at 1381 (1994).

them from office.[217] Appointments are required to be made "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[218] The Act also limits the authority of agency and department heads over the Inspector General.[219] The Act also seeks to ensure the independence and objectivity of Inspectors General by prohibiting the transfer to them of "program operating responsibilities."[220] This restriction has been described as addressing two concerns:

> [F]irst, to prevent agency heads from restricting the independence and discretion of the Inspector Generals by assigning to them responsibilities that would divert their time and resources from the audit and investigative missions assigned to them by the Act; and second, to preserve the Inspector Generals' impartiality and objectivity by not allowing them to be put in a position where they would be operating the very programs that they are supposed to oversee.[221]

The Act assigns the various Offices of Inspector General three functions:

> (1) to conduct and supervise audits and investigations relating to the programs and operations of the [designated agencies and departments];
> (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in

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217. *See id.* § 3(a), at 1382. The Inspectors General in certain designated "federal entities" are appointed by the agency head. *Id.* § 8G(c), at 1393.

218. *Id.* § 3(a), at 1382. For a discussion of the philosophies and practices of Presidents Carter, Reagan, and Bush regarding the appointments of Inspectors General and the functioning of their Offices, see Fields, *supra* note 199, at 508-16.

219. *See* 5 U.S.C. app. § 3(a), at 1382. In this regard, section 3(a) of the Act provides as follows:

> Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

Id.

220. *Id.* § 9(a)(2), at 1396.

221. Fields & Robinson, *supra* note 205, at 107-08 (footnotes omitted).

> the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and
> (3) to provide a means for keeping the head of the [agency or department] and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action . . . .[222]

Inspectors General are given various duties and responsibilities related to these functions.[223] The Act also grants Inspectors General broad powers to pursue their missions.[224] These powers include the authority "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable . . . ."[225] Of particular relevance to the *Winters Ranch Partnership* decision, Inspectors General are authorized "to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court . . . ."[226]

Although a principal function of the Inspectors General, including the OIG, is to conduct audits of their respective agency's finances and performance,[227] "the investigatory role of Inspectors General has become very substantial and the

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222. 5 U.S.C. app. § 2, at 1381.

223. *See id.* § 4, at 1382-83. In addition to having the duty and responsibility to conduct audits and investigations, Inspectors General are required to review existing and proposed legislation and regulations as to their impact on agency efficiency and on the prevention or detection of fraud and abuse, and "to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by [the agency or department] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations . . . ." *Id*. § 4(a)(1)-(3), at 1382.

Inspectors General are also assigned responsibilities for coordinating among agencies at the federal, state, and local levels on matters pertaining to program and operational economy and efficiency and the prevention and detection of fraud and abuse and reporting their findings and recommendations to the agency or department head and Congress. *See id*. §§ 4(a)(4), (5), at 1382-83. As to program fraud and abuse, "each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *Id*. § 4(d), at 1383.

224. *See id.* §§ 6(a)(2), 7(a), 9(a)(2), at 1381-99. The USDA's OIG also has the authority to make felony arrests, execute search warrants, and carry firearms. *See* 7 U.S.C. § 2270 (1994).

225. 5 U.S.C. app. § 6(a)(2), at 1386.

226. *Id*. § 6(a)(4), at 1386. *See also* Winters Ranch Partnership v. Viadero, 123 F.3d 327, 333 (5th Cir. 1997).

227. *See* Fields & Robinson, *supra* note 205, at 111-18. Within the OIG, the audit functions are carried out by: the Assistant Inspector General for Audit (AIG/A), whose offices are in Washington, D.C.; a Financial Management and Automated Data Processing (ADP) Audit Operations staff located in Kansas City, Missouri; and six regional offices (RIG/A). *See* 7 C.F.R. § 2610.2(b)(2) (1998). *See also id.* § 2610.3(a) (setting forth addresses of the six Audit Regional Offices).

Department of Justice has encouraged use of the Inspector's office for investigating purposes . . . ."[228] Indeed, "[s]ince the enactment of the Inspector General Act, Inspectors General have taken an ever increasing role in the investigation of government fraud. At the present time they are now involved in approximately ninety percent of those investigations."[229]

Since many of these investigations involve, or potentially involve, the issuance of subpoenas, the scope of the OIG's subpoena authority and the means of enforcing subpoenas are pertinent considerations. The discussion that follows addresses both considerations.

B. *The USDA OIG's Subpoena Authority*

Administrative agencies do not have the inherent authority to issue subpoenas; an enabling statute is required.[230] The need for an enabling statute is dictated by the basic principle that an administrative agency is a "creature of statute."[231] Because agencies are statutory creations, their authority is both granted and limited by

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228. Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 599 (1994); *see also* Richards & Fields, *supra* note 183, at 233 ("stating Inspectors General are by their nature criminal investigators is clear from the language of the Act."). Within the OIG, the investigatory functions are performed by the Assistant Inspector General for Investigations (AIG/I), whose offices are in Washington, D.C., and seven regional offices (RIG/I). *See* 7 C.F.R. § 2610.2(b)(3). *See also id.* § 2610.3(b) (setting forth the addresses of the seven Investigations Regional Offices).

229. Richards & Fields, *supra* note 183, at 248. Inspectors General have the authority to cooperate "with divisions of the Justice Department exercising criminal prosecutorial authority." United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1146 (D.C. Cir. 1987). As to the interplay between grand jury secrecy requirements and the use of Inspector General subpoenas, see, e.g., United States v. Educational Dev. Network Corp., 884 F.2d 737 (3d Cir. 1989).

230. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 3.8, at 125 (3d ed. 1991). The Administrative Procedure Act (APA) does not contain an independent grant of subpoena power. The APA only permits the issuance of subpoenas "authorized by law." 5 U.S.C. §§ 555(d), 556(c)(2) (1994).

Though an agency must be authorized by a statute other than the APA to issue a subpoena, an agency may have certain implied powers related to that authority. For example, in conjunction with its statutory subpoena authority, an agency may have the implied power to subject a subpoena to a protective order. *See* Exxon Corp. v. FTC, 665 F.2d 1274, 1277-78 (D.C. Cir. 1981). For a discussion of the ancillary or implied powers for federal agencies, see GARY J. EDLES & JEROME NELSON, FEDERAL REGULATORY PROCESS: AGENCY PRACTICES AND PROCEDURES § 3.3 (2d ed. 1996).

231. Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974). *See also* SCHWARTZ, *supra* note 230, § 4.4, at 171.

statute.[232] Agency action must be within statutory limits; "if it is outside them, or ultra vires, it is invalid."[233]

Most agencies have been given subpoena authority.[234] Inspectors General possess that authority by virtue of section 6(a)(4) of the Inspector General Act.[235] Congress recognized that giving Inspectors General subpoena power was "absolutely essential to the discharge of [their] functions."[236] "The purpose behind giving the Inspector[s] General subpoena power was to encourage prompt and thorough cooperation with OIG investigations."[237]

The subpoena authority given to Inspectors General is broad.[238] The Inspector General Act provides that Inspectors General may "require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence *necessary in the performance of the functions assigned by this Act* . . . ."[239] The judicial recognition of the breadth of this authority is reflected in the rejection of the argument that the term "necessary" is a limitation on the authority: "There is . . . no legislative history that suggests Congress intended by the use of this word ["necessary"] to limit the scope of the

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232. *See Soriano*, 494 F.2d at 683. *See also* SCHWARTZ, *supra* note 230, § 4.4, at 171. "[T]he determinative question is not what the [agency] thinks it should do but what Congress has said it can do." Civil Aeronautics Bd. v. Delta Air Lines, 367 U.S. 316, 322 (1961).

233. SCHWARTZ, *supra* note 230, § 4.4, at 171. *See also* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS 893 (9th ed. 1995) (noting that, with respect to investigatory powers, "[m]ost modern regulatory statutes are so broad . . . that findings of ultra vires are rare." (footnote omitted)).

234. For discussions of the development of investigatory and subpoena authority in federal administrative agencies, see 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.1 (3d ed. 1994); 3 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 20.01 (1997); Steve R. Johnson, Note, *Reasonable Relation Reassessed: The Examination of Private Documents by Federal Regulatory Agencies*, 56 N.Y.U. L. REV. 742, 744-53 (1981).

235. *See* 5 U.S.C. app. § 6(a)(4), at 1386 (1994).

236. S. REP. NO. 95-1071, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2709.

237. United States *ex rel.* Agency for Int'l Dev. v. First Nat'l Bank of Maryland, 866 F. Supp. 884, 887 (D. Md. 1994) (citation omitted).

238. *See* Burlington Northern R.R. Co. v. Office of Inspector Gen., 983 F.2d 631, 641 (5th Cir. 1993) (holding that "the Inspector General Act of 1978 gives Inspectors General broad—not limited—investigatory and subpoena powers."); United States v. Westinghouse Elec. Corp., 788 F.2d 164, 165 (3d Cir. 1986) (stating "Congress gave the Inspector General broad subpoena power.").

239. 5 U.S.C. app. § 6(a)(4), at 1386 (emphasis added). Section 6(a)(4) also provides "[t]hat procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies." *Id.* This is the only substantive restriction in section 6(a)(4). *See* United States v. New York State Dep't of Taxation & Fin., 807 F. Supp. 237, 238 (N.D.N.Y. 1992) ("The only substantive restriction relates to subpoenas issued to other federal agencies; after adding that limitation, Congress left the Inspector Generals' remaining subpoena power essentially unfettered."). However, the language of section 6(a)(4) references only documentary evidence; it does not authorize "a subpoena requiring the attendance of a witness to give oral testimony." United States v. Iannone, 610 F.2d 943, 945 (D.C. Cir. 1979).

Inspector General's subpoena power. A constricted interpretation would be at odds with the broad powers conferred on the Inspector General by the statute."[240]

Moreover, as is discussed below, the determination of what information is "necessary" is essentially the Inspector General's responsibility:

> In view of the well-established principle of deference to agency discretion in issuing subpoenas and in the absence of contrary legislative history, we believe Congress intended that the courts accept the Inspector General's determination of what information is 'necessary to carry out the functions assigned by this Act' so long as the information is relevant to an Inspector General function.[241]

Notwithstanding the broad subpoena power given to Inspectors General, their subpoenas, like virtually all federal agency subpoenas, are not self-enforcing.[242] Only a federal court can enforce a subpoena issued by an Inspector General.[243] Whether an Inspector General's subpoena will be enforced is determined by the same standards for enforcing other agency subpoenas, standards that take into account the legislation authorizing the subpoena and the underlying investigation.

A court will enforce an Inspector General's subpoena if "(1) the Inspector General's investigation is within its authority; (2) the subpoena's demand is not too indefinite or overly burdensome; (3) and the information sought is reasonably relevant."[244] A subpoena will not be enforced, however, if it is issued for an improper purpose, such as to harass, to coerce a settlement of a collateral dispute, "or for any other purpose reflecting on the good faith of the particular investigation."[245]

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240. *Westinghouse Elec. Corp.*, 788 F.2d at 170.

241. *Id.* at 171.

242. Since the Supreme Court's decision in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), the rule has been that, as a matter of due process, federal agencies cannot be given the power to enforce their subpoenas. *See* Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285, 286 (10th Cir. 1964). *See also* SCHWARTZ, *supra* note 230, § 3.10, at 130 (stating "[a]s a general rule, an agency subpoena standing alone is a mere paper document; it has no legal effect until it is enforced by a court."). Whether Congress can constitutionally give agencies enforcement authority is an unresolved question. *See* 1 DAVIS & PIERCE, *supra* note 234, § 4.2, at 143 (noting that "[i]t is hard to know whether the broad holding [in *ICC v. Brimson*] remains good law because Congress has not tested it," except to recently confer on the Federal Aviation Administration "experimental power" to enforce its subpoenas).

243. The Inspector General Act provides that "in the case of contumacy or refusal to obey, [an Inspector General subpoena] shall be enforceable by order of any appropriate United States district court." 5 U.S.C. app. § 6(a)(4), at 1386.

244. Inspector Gen. of the USDA v. Glenn, 122 F.3d 1007, 1009 (11th Cir. 1997) (citations omitted).

245. United States v. Powell, 379 U.S. 48, 58 (1964). *See also* Inspector Gen., United States Dep't of Housing and Urban Dev. v. St. Nicholas Apartments, 947 F. Supp. 386, 391 (D. Ill. 1996)

Subpoenas are subject to evidentiary privileges,[246] including the Fifth Amendment privilege against self-incrimination,[247] and they must be issued in proper form.

Prior to the Fifth Circuit's decision in *Winters Ranch Partnership*, the most significant decision focusing solely on the issue of whether an Inspector General's subpoena was within the Inspector General's authority was the Fifth Circuit's decision in *Burlington Northern R.R. Co. v. Office of Inspector General.*[248] *Winters Ranch Partnership*, in turn, clarified the holding in *Burlington Northern*. Therefore, since the two decisions are closely related in their analysis, they will be discussed together *infra* Part III.C.

(rejecting a challenge to a subpoena based on allegations of gross misconduct by Inspector General agents on the basis of the "totality of the circumstances" test adopted in *SEC v. ESM Government Securities, Inc*., 645 F.2d 310, 317-18 (5th Cir. 1981)). In exceptional circumstances, discovery may be permitted by the subpoena target on the issue of whether the subpoena should be quashed as an abuse of process. *See In re* EEOC, 709 F.2d 392, 400 (5th Cir. 1983); SEC v. Dresser Indus. Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980).

246. *See generally* United States v. Lockheed Martin Corp., 995 F. Supp. 1460 (M.D. Fla. 1998) (involving assertion of the attorney-client privilege, work product doctrine, and self-examination investigation privilege); *Glenn*, 122 F.3d at 1007 (involving assertion of accountant-client privilege). Inspector General subpoenas are also subject to the Right to Financial Privacy Act. *See* 12 U.S.C. §§ 3401-3422, United States v. First Nat'l Bank of Maryland, 866 F. Supp. 884, 886 (D. Md. 1994). However, by virtue of the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution, such subpoenas are not subject to state privacy laws. *See First Nat'l Bank of Maryland*, 866 F. Supp. at 886-87. *See also* United States v. New York State Dep't of Taxation & Finance, 807 F. Supp. 237, 240-43 (N.D.N.Y. 1992).

247. *See* U.S. CONST. amend V. The Fifth Amendment privilege may be very limited. Among the limitations are the following:

> (1) Records of corporations and other organizations, even including a partnership of three partners, are not subject to the privilege. (2) One person's records in the custody of another person may be denied the privilege. (3) Records of a person 'not compelled to do anything' may be used. (4) A person given immunity may be compelled to be a witness against himself. (5) Records required to be kept are outside the privilege. (6) Compulsory reporting is often permissible.

1 DAVIS & PIERCE, *supra* note 234, § 4.6, at 167.

248. Burlington Northern R.R., Co. v. Office of Inspector Gen., 983 F.2d 631 (5th Cir. 1993).

As background to the discussion of *Burlington Northern* and *Winters Ranch Partnership*, the courts have read the statutory investigatory powers of Inspectors General broadly. For example, in *United States v. Hunton & Williams*[249] the court was presented with the issue of whether the Inspector General for the Resolution Trust Corporation (RTC) had the authority to subpoena certain documents from Hunton & Williams, a private law firm that had provided legal services to the RTC relating to several failed savings and loans institutions.[250] The subpoena was issued in connection with an audit of legal fees and expenses billed to the RTC which were being reviewed by the Inspector General to prevent fraud and abuse.[251]

Among the objections raised by Hunton & Williams to the subpoena was the claim that the Inspector General did not have the authority to investigate the law firm as an outside contractor.[252] The court, however, concluded that the Inspector General had the authority to audit outside contractors for fraud and abuse.[253] It noted that:

> [T]he legislative history of the [Inspector General] Act clearly indicates that Congress specifically intended to extend the OIG's power of review over private entities working closely with government agencies because such entities are privy to highly confidential information and are paid large sums of federal funds for their services, creating a potential risk for abuse both inside and outside government agencies.[254]

As significant, the court also observed that "[t]here is no explicit limit on the OIG's authority to conduct such investigations anywhere in the Inspector General Act."[255] The court then recited the well-established principle derived from the Supreme Court's decision in *United States v. Morton Salt Co.*[256] that federal agency

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249. United States v. Hunton & Williams, 952 F. Supp. 843 (D.D.C. 1997).

250. *See id.* at 846.

251. *See id.*

252. *See id.* at 848.

253. *See id.* at 849.

254. *Id.* (citing Adair v. Rose Law Firm, 867 F. Supp. 1111, 1115 (D. D.C. 1994)). The authority of the Inspectors General to investigate farm program participants, as recipients of federal funds, for fraud and abuse is beyond doubt. *See, e.g.*, Inspector Gen. of the USDA v. Glenn, 122 F.3d 1007, 1011 (11th Cir. 1997) (upholding a subpoena directed at farm program participants where the USDA OIG had received a "hotline" complaint regarding questionable payments). *See also Adair*, 867 F. Supp. at 1116 (stating "[t]he legislative history of the Act . . . makes plain that Congress intended the IG's investigatory authority to extend to recipients of government funding as well as to government agencies themselves.").

255. *Hunton & Williams*, 952 F. Supp. at 849.

256. United States v. Morton Salt Co., 338 U.S. 632 (1950).

subpoenas, including those issued by an Inspector General, need not be based on a "particularized suspicion" of fraud or abuse: "The OIG may initiate an audit or investigation of a federal recipient without particularized suspicion since '[a]n administrative agency . . . can investigate merely on suspicion that the law is being violated, *or even just because it wants assurance that it is not*.'"[257]

The Supreme Court's decision in *Morton Salt* was the last in a trilogy of cases expanding agency investigative powers against Fourth Amendment challenges. These cases were a marked retreat from the Court's 1924 decision in *FTC v. American Tobacco Co.*[258] In *American Tobacco*, the Court condemned agency "fishing expeditions" and required the agency to have "some ground" for supposing that the subpoenaed documents contained relevant evidence.[259]

In the first of these cases, *Endicott Johnson Corp. v. Perkins*,[260] the Court refused to condition the enforcement of a Department of Labor subpoena on a preliminary showing by the Department that the target company was covered by the Walsh-Healy Act which the investigation was intended to enforce.[261] The Court ruled that the issue of coverage was not for the district court, and so long as "[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, . . . it was the duty of the District Court to order its production for the Secretary's consideration."[262]

Endicott Johnson was followed in *Oklahoma Press Publishing Co. v. Walling*[263] which effectively overruled *American Tobacco's* requirement that the agency have "some ground" for seeking the information. The Court in *Oklahoma Press* invoked *Endicott Johnson* to hold that the district court lacked the power to

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257. *Hunton & Williams*, 952 F. Supp. at 849 (quoting *Morton Salt Co.*, 338 U.S. at 642-43) (emphasis added).

258. FTC v. American Tobacco Co., 264 U.S. 298 (1924).

259. *Id.* at 305-06.

260. Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

261. *See id.* at 508.

262. *Id.* at 509. The differences between *American Tobacco* and *Endicott Johnson* have been noted:

> *Endicott-Johnson* was clearly inconsistent with *American Tobacco*. The justices in *Endicott* apparently perceived no Fourth Amendment problem in enforcing a subpoena against a party whom the Department may have lacked jurisdiction. Yet, in *American Tobacco*, the FTC was required to establish that it had probable cause to believe the documents it sought were relevant to whether the tobacco companies had committed a violation. The Court offered no explanation of why it was unimportant whether an agency 'probably' had jurisdiction over a party, but it was important whether the documents being sought 'probably' were relevant to finding a violation.

RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 8.2.3, at 428 (1985). *See also* United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 470-71 (2d Cir. 1996) (discussing the significance of *Endicott Johnson* as "a watershed in administrative investigations").

263. Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946).

decide whether the subpoena's target was within the agency's jurisdiction and by dispensing with any requirement for the agency to show probable cause.[264] As for probable cause, the Court stated that the investigative function of the agency "is essentially the same as the grand jury's," and it must not be limited "by forecasts of the probable result of the investigation."[265] The Court observed: "The very purpose of the subpoena . . . is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so."[266]

The Court returned to the grand jury analogy in the third case of the trilogy, *Morton Salt*. There, with reference to the investigatory powers of the FTC, the Court underscored its rejection of any prohibition against agency "fishing expeditions":

> It has a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[267]

The Court also indicated that as long as the investigation is not "of such a sweeping nature and so unrelated to the matter properly under inquiry to exceed the investigatory power, official curiosity" motivated by the agency's desire "to satisfy [itself] that corporate behavior is consistent with the law and the public interest" is enough to support an agency subpoena.[268]

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264. *See id.* at 215-16.

265. *Id.* at 216. In the same vein, the Court also stated that "[i]t is not necessary . . . that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Id.* at 208-09.

266. *Id.* at 201.

267. United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

268. *Id*. at 652. For a recent discussion of the *Morton Salt* standard in a case involving personal, as opposed to corporate, financial records, see *In re* Gimbel, 77 F.3d 593, 598-99 (2d Cir. 1996). In the District of Columbia Circuit, where financial records are subpoenaed to determine the cost-effectiveness of agency litigation against an entity or individual, whether an "articulable suspicion" of wrongdoing is required may depend on whether the records are corporate or personal. *Compare* FTC v. Invention Submission Corp., 965 F.2d 1086 (D.C. Cir. 1992), *with* RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994). *See generally* RTC v. Thornton, 41 F.3d 1539 (D.C. Cir. 1994) (holding that RTC lacked statutory authority to subpoena financial documents solely to ascertain cost-effectiveness of pursuing litigation once such litigation commenced); *In re* Sealed Case, 42 F.3d 1412 (D.C. Cir. 1994) (holding that OTS had authority to issue subpoenas for purpose of determining whether directors personally benefited from use of escrow funds from their mortgage company).

These cases make at least three points. First, "[a] subpoena enforcement proceeding is . . . not the proper forum in which to litigate the question of jurisdiction or coverage under a particular statute."[269] Second, "[p]robable cause is irrelevant to administrative subpoena power because the agency may use the power to inform itself as to whether probable cause exists."[270] Third, "the Fourth Amendment is satisfied, in the subpoena case, by the court's determination that the investigation is authorized and the testimony or documents sought are relevant to the inquiry."[271] In other words, the information sought must be "reasonably relevant" to the agency's inquiry.[272]

As the *Hunton & Williams* decision also illustrates, the burden of establishing the unreasonableness of a subpoena is on the target.[273] In *Hunton*, the court underscored the fact that judicial inquiry into the relevancy of the information sought to the inquiry is highly deferential to the agency with two observations. First, the court noted that "'[r]easonably relevant' means 'merely' that the information must be relevant to some (any) inquiry that the [agency] is authorized to undertake."[274] Second, the court observed that it was obliged to "defer to the agency's appraisal of relevancy in connection with an investigative subpoena as long as it is not 'obviously wrong.'"[275] The court rejected the argument made by Hunton & Williams that the

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269. SCHWARTZ, *supra* note 230, § 3.12, at 134. For a recent case invoking this principle, see United States v. Sturm, Ruger & Co., 84 F.3d 1, 5 (1st Cir. 1996).

270. SCHWARTZ, *supra* note 230, § 3.14 at 141.

271. *Id.*

272. *See Morton Salt Co.*, 338 U.S. at 652.

273. *See* United States v. Hunton & Williams, 952 F. Supp. 843, 855 (D.D.C. 1997). In seeking enforcement of the subpoena, the agency will be the moving party. Thus, the standards for subpoena enforcement are typically formulated as requiring the agency to make the requisite showing. *See* Burlington Northern R.R. Co. v. Office of Inspector Gen., 983 F.2d 631, 637, n.2 (setting forth expressions of the standards by the Supreme Court and several courts of appeals). Nonetheless, the burden of proving any challenge to a subpoena rests on the challenger. *See, e.g.*, Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 218 (1946).

274. *Hunton & Williams*, 952 F. Supp. at 854 (quoting United States v. Oncology Serv. Corp., 60 F.3d 1015, 1020 (3d Cir. 1995)).

275. *Id.* (citations omitted). The Third Circuit has expressed this standard with respect to a subpoena issued under the Inspector General Act as follows:

> In view of the well-established principle of deference to agency discretion in issuing subpoenas and in the absence of contrary legislative history, we believe Congress intended that the courts accept the Inspector General's determination of what information is 'necessary to carry out the functions assigned by this Act' so long as the information is relevant to an Inspector General function.

United States v. Westinghouse Elec. Corp., 788 F.2d 164, 171 (3d Cir. 1986). *See also* SCHWARTZ, *supra* note 230, § 3.15, at 144 (stating "[t]he Fourth Amendment may still require that the records demanded by such agency's subpoena be 'relevant to the matter in issue,' but the test is relevance to the specific purpose of the investigation, and the purpose is determined by the investigators themselves."); 1 DAVIS & PIERCE, *supra* note 234, § 4.5, at 164. (noting that "[a]n agency with power to investigate may make an investigation that is a broad as it reasonably finds to be appropriate, but a demand for

"arbitrary or capricious" standard of the Administrative Procedure Act[276] determines whether a subpoena is reasonably relevant.[277]

The requirement of reasonableness includes the requirement that the subpoena be sufficiently definite—the documents must be adequately specified.[278] In addition, the subpoena's demand must not be unduly burdensome.[279] Nonetheless, "[a] subpoena must be almost inconceivably vague or oppressive for a court to find it had not been 'confined to the rudimentary principles of justice'. . . ."[280] Courts, however, have the power to modify subpoenas to reduce the burden on targets or to provide other safeguards, such as protecting confidentiality.[281]

Given the broad subpoena authority given to Inspectors General under the Inspector General Act and the otherwise narrow limits on federal agency subpoena power, the following observation is an apt one: "[o]nce the facial propriety of the subpoena is established as falling within the Inspector General's mandate, a successful attack by the party subpoenaed is unlikely."[282] This observation brings us to the *Winters Ranch Partnership* decision where the subpoena targets sought to quash a OIG subpoena on the grounds that the inquiry fell outside of the Inspector General's mandate.[283]

C. Winters Ranch Partnership v. Viadero

In *Winters Ranch Partnership* the members of the partnership participated in the 1991 through 1993 wool and mohair programs.[284] In 1993, the OIG developed plans to audit the administration of the payment eligibility and limitation rules applicable to the wool and mohair program by the Agricultural Stabilization and Conservation Service (ASCS), the predecessor agency to the Farm Service Agency

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information must be relevant to the investigation and may not be broader than is reasonably necessary. The breadth of an investigation is for the investigators to determine.").

276. 5 U.S.C. § 706(2)(A) (1994).

277. *See Hunton & Williams*, 952 F. Supp. at 854 n.28.

278. *See, e.g*., *Oklahoma Press Publ'g Co.*, 327 U.S. at 209.

279. *See* Inspector Gen. v. St. Nicholas Apartments, 947 F. Supp. 386, 392 (C.D. Ill. 1996). "To establish a claim that an administrative subpoena is excessively burdensome, the party being investigated 'must show that compliance would threaten the normal operation of its business.'" *Id*. at 392 (quoting EEOC v. Quad/Graphics, Inc., 63 F.3d 642, 648 (7th Cir. 1995)).

280. STRAUSS ET AL., *supra* note 233, at 901 (quoting Adams v. FTC, 296 F.2d 861, 866 (8th Cir. 1961)).

281. *See, e.g.*, Civil Aeronautics Bd. v. Hermann, 353 U.S. 322, 323 (1957); Adair v. Rose Law Firm, 867 F. Supp. 1111, 1118-19 (D.D.C. 1994).

282. Hughes, *supra* note 228, at 600.

283. *See* Winters Ranch Partnership v. Viadero, 123 F.3d 327, 329 (5th Cir. 1997).

284. *See id*.

(FSA) that briefly was known as the Consolidated Farm Service Agency (CFSA).[285] The partners were among the program participants selected as a sample "to test whether the agency's administration of the program effectively prevented violations of payment limitation and eligibility requirements."[286]

In 1994, the OIG began its audit of the partners' program participation by requesting the partners to provide certain documents relating to their farming operation.[287] As noted in the district court's opinion, the OIG referred to the audit in its correspondence with the partners as a "payment limitation review" to determine whether the farming operation had been carried out as represented by the partners.[288]

The partners initially cooperated with the OIG.[289] When the OIG discovered discrepancies in the documents submitted by the partners, it advised the FSA of these discrepancies and recommended that the FSA begin its own investigation.[290] Several months after the initiation of the OIG's audit, the FSA began its own "end-of-year review" of the partner's compliance with the payment eligibility and limitation rules.[291] In early 1995, counsel for the partners advised the OIG that the partners henceforth would cooperate only with the FSA, not the OIG.[292] The OIG responded

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285. *See id*. The functions of the ASCS were transferred to the CFSA in 1994. *See* Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 226, 108 Stat. 3178, 3214. A year later, the CFSA became the FSA. *See* Agency Name Change, 60 Fed. Reg. 64,297, 64,297 (1995). Though the court in *Winters Ranch Partnership* refers to the agency as the CFSA, this Article refers to it as the FSA.

286. *Winters Ranch Partnership*, 123 F.3d at 329. The selection process was explained by the court as follows:

> After studying payment limitations records for 1989 and 1990 and comparing them with records for 1991, 1992, and 1993, the IG determined to select for independent IG investigation those producers who had received payments in excess of $200,000 in 1989 and 1990 and new producers who had received more than $50,000 in 1991. [Winters Ranch Partnership (WRP)] was one of the six producers who fell into this category because: prior to 1991, only plaintiff David Winters of the WRP group participated in the program and he received $424,715.27 for 1989 and $595,689.61 for 1990. David Winters, his wife Sara Winters, and their two children formed WRP after payment limitations were imposed effective in the 1991 marketing year. Based on representations by the WRP group, the CFSA approved their classifications as four 'persons' actively engaged in farming during the 1991, 1992, and 1993 marketing years. The combined wool and mohair payments to the WRP for 1991, 1992, and 1993 were $670,200.62, $755,687.71 and $695,120.32, respectively.

Id. at 332.

287. *See id.*

288. Winters Ranch Partnership v. Viadero, 901 F. Supp. 237, 238 (W.D. Tex. 1995), *rev'd*, 123 F.3d 327 (5th Cir. 1997).

289. *See Winters Ranch Partnership*, 123 F.3d at 329.

290. *See id.* at 332.

291. *See id*.

292. *See id.*

by issuing subpoenas seeking additional documents.[293] The partners filed suit seeking a declaratory judgment that the subpoenas were for a purpose outside of the OIG's authority.[294] The OIG counterclaimed for enforcement of the subpoenas.[295] On cross-motions for summary judgment, the partners prevailed and the OIG appealed.[296]

In entering judgment for the partners, the district court had held that the subpoenas were beyond the OIG's subpoena authority under the Inspector General Act of 1978.[297] The court relied chiefly on the Fifth Circuit's decision in *Burlington Northern R.R. Co. v. Office of Inspector General*,[298] which had construed the Act to prohibit an Inspector General from assuming, as part of a long-term continuing plan, the regulatory compliance functions delegated to the agency.[299] The district court found that the subpoenas had been issued for the express purpose of conducting individual "payment limitation reviews" pursuant to a long-term regulatory plan.[300] Having found that purpose, the district court concluded that the IG audit which the subpoenas were intended to further amounted to the IG's improper assumption and duplication of the program operating responsibilities of the FSA.[301]

In reversing the district court, the Fifth Circuit sharply disagreed with the district court's findings as to the purpose of the subpoenas.[302] More significant, the court appeared to narrow the scope of its earlier decision in *Burlington Northern*.[303]

In *Burlington Northern*, the Fifth Circuit had rebuffed an attempt by the Inspector General of the Railroad Retirement Board to use the subpoena authority granted by the Inspector General Act to audit the Burlington Northern Railroad.[304] The audit was intended to determine if the railroad was properly paying the taxes it was required to pay to fund employee benefit programs administered by the Railroad

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293. *See id.*

294. *See id.*

295. *See id.* at 329.

296. *See id.*

297. *See id.* at 327.

298. Burlington Northern R.R. Co. v. Office of Inspector Gen., 983 F.2d 631 (5th Cir. 1993).

299. *See id.* at 641-42.

300. *See* Winters Ranch Partnership v. Viadero, 901 F. Supp. 237, 242 (W.D. Tex. 1995), *rev'd*, 123 F.3d 327 (5th Cir. 1997).

301. *See id.*

302. *See Winters Ranch Partnership*, 123 F.3d at 332.

303. The *Burlington Northern* decision has been distinguished by the United States District Court for the District of Columbia. *See* Adair v. Rose Law Firm, 867 F. Supp. 1111, 1117 (D.C. Cir. 1994); United States v. Hunton & Williams, 952 F. Supp. 843, 850-51 (D.C. Cir. 1997). *See also* Inspector Gen. v. Glenn, 122 F.3d 1007, 1009-10 (11th Cir. 1997); Inspector Gen. v. St. Nicholas Apartments, 947 F. Supp. 386, 389-90 (C.D. Ill. 1996). *See also* Fields, *supra* note 199, at 516.

304. *See Burlington Northern R.R. Co.*, 983 F.2d at 633.

Retirement Board.[305] Though the Railroad Retirement Board had the authority to investigate whether railroads were properly paying their taxes, the Board had never done so.[306] Instead, the Board had relied on audits conducted by the Internal Revenue Service.[307]

Concerned about the adequacy of the Board's reliance on IRS audits to ensure tax payment compliance, the Board's Inspector General began auditing the railroads.[308] When the Inspector General subpoenaed the records of Burlington Northern, the railroad challenged the Inspector General's authority on the grounds that the audit was an improper exercise of regulatory authority rather than a proper exercise of oversight authority under the Inspector General Act.[309] The Inspector General subsequently claimed that he was only exercising oversight authority, but the district court agreed with Burlington Northern.[310]

In affirming the district court, the Fifth Circuit agreed with the district court's finding that the Inspector General's plan "was not to conduct 'spot checks' of railroads like Burlington Northern, but rather, to assume a regular auditing function to detect tax noncompliance and to perhaps assume a tax collecting function."[311] The Fifth Circuit then held that the Inspector General Act did not authorize the Inspector General "to issue a subpoena in aid of a regularly-scheduled tax compliance audit of a railroad company" because such "regulatory compliance investigations or audits" are solely within the province of the agency and are not to be carried out directly by the agency's Inspector General.[312]

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305. *See id.* at 634.
306. *See id.*
307. *See id.* at 633-34.
308. *See id*. at 635.
309. *See id.*
310. *See id.*
311. *Id.* at 640.
312. *Id.* at 640-41.

For the district court in *Winters Ranch Partnership*, the subpoenas issued by the USDA IG to the members of the Winters Ranch Partnership squarely fell within the scope of Fifth Circuit's decision in *Burlington Northern*.[313] The OIG audit was expressly characterized as a "payment limitation review" to determine whether their farming operation was carried out as represented to the predecessor agency of the FSA, the ASCS.[314] Shortly after the IG initiated its audit of the partners, the FSA requested most of the same records in connection with an end-of-year payment limitation review it was conducting.[315] Such payment limitation reviews were conducted regularly by the FSA and its predecessor, the ASCS, as part of their farm program administration responsibilities.[316]

Though the IG defended the subpoenas by arguing that the audit was an "oversight" audit and by pointing to "boiler-plate" recitations in the subpoenas asserting that they were issued to further the functions given to the IG in the Inspector General Act, the district court dismissed these contentions as post hoc rationalizations.[317] It found that the "undisputed evidence" established that the IG's audit was of a "regulatory, rather than oversight, nature," and was thus analogous to the audit in *Burlington Northern*.[318] The district court also concluded that the IG's review was being conducted pursuant to "long-term regulatory plan," which also brought it within the scope of *Burlington Northern*.[319] On these grounds, the district court refused to enforce the subpoenas.[320]

The Fifth Circuit, however, found the facts in the appeal record before it were distinguishable from the facts of *Burlington Northern*.[321] Indeed, the Fifth Circuit's findings as to the material facts differed sharply from those of the district court.

According to the Fifth Circuit, the IG was only conducting a "spot check" of the partners' payment limitation compliance.[322] The IG was not implementing a "long-term regulatory plan," as the district court had found.[323] Noting that the IG had selected six wool and mohair producers for an audit to determine to what extent, if any, the six producers had defrauded or abused the program, the Fifth Circuit

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313. *See* Winters Ranch Partnership v. Viadero, 901 F. Supp. 237, 242 (W.D. Tex. 1995), *rev'd*, 123 F.3d 327 (5th Cir. 1997).

314. *See id.* at 238-39.

315. *See id.* at 238.

316. *See id.*

317. *See id.* at 242.

318. *Id.*

319. *See id.*

320. *See id.*

321. *See* Winters Ranch Partnership v. Viadero, 123 F.3d 327, 335 (5th Cir. 1997).

322. *Id.* at 240.

323. *See id.* at 335-36.

found that the purpose of the IG's audit was not limited to determining whether the producers had complied with the payment limitation rules.[324] It concluded that oversight of the agency was, in fact, the audit's ultimate purpose.[325]

The Fifth Circuit also found no legal significance in the fact that both the IG and the FSA were contemporaneously seeking virtually the same records.[326] It characterized the IG's actions as duplicating no more than the investigatory techniques of the FSA and found that neither the Inspector General Act nor *Burlington Northern* barred the IG from "emulating" the investigatory techniques of the CFSA.[327]

As to whether an impermissible transfer of functions had occurred from the agency to the IG, the Fifth Circuit opined that "no transfer of function can occur simply because the IG emulates a function normally performed by the agency as part of the IG's own independent investigation."[328] As explained by the Fifth Circuit, for a transfer of function to occur, "the agency would have to relinquish its own performance of that function."[329] Here, according to the Fifth Circuit, "the IG did not assume, and the CFSA did not cede, any of the agency's program operating responsibilities."[330] Rather, in the court's words, the IG was conducting a "spot check" of six producers; the IG was not filling a "void left by the CFSA in primary agency program administration . . . purpose of the IG's investigation was to test the effectiveness of the agency's discharge of a program operating responsibility as the Act authorizes and as this court clearly indicated an IG may do in *Burlington*

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324. *See id.* at 333.

325. *See id.* at 333. Specifically, the Fifth Circuit drew the following findings from the evidence:

> From the undisputed material evidentiary facts, we find that the IG issued the administrative subpoenas for two purposes. The immediate purpose was to obtain information relevant to whether each member of the WRP group met program eligibility requirements; whether any member of the group had received support payments in excess of that for which he or she was eligible; and whether the group or any of its members had participated in a scheme or device to evade price support limitations. The ultimate purpose of the subpoenas was to obtain information to complete the IG's survey program designed to determine whether the agency's procedures for detecting and preventing fraud and abuse were effective and whether deficiencies were prevalent in the agency's price support programs, and, if so, to determine the scope, patterns, and possible antidotes for the problem, and to enable the IG to make recommendations as to necessary or desirable remedial measures to the head of the agency and to Congress.

Id.

326. *See id.* at 334-35.

327. *See id.*

328. *Id.* at 334.

329. *Id.* (citing Burlington Northern R.R. Co. v. Office of Inspector Gen., 983 F.2d 631, 642 (5th Cir. 1993)).

330. *Id.* at 336.

Northern."[331] Summing up its assessment of the facts, the Fifth Circuit concluded that "[t]he record does not support the district court's inferences that the IG's investigation usurped the agency's program operating responsibilities, was long-term, or was not being conducted for legitimate purposes under the Act as represented by the IG."[332]

In *Winters Ranch Partnership*, the Fifth Circuit clearly limited the rule of *Burlington Northern* to its facts, facts that it found were "crucially different" from those before it.[333] Nonetheless, in their Suggestion For Rehearing En Banc, the Winters Ranch Partnership and its partners argued that the Fifth Circuit's decision "eviscerated" its holding in *Burlington Northern*, noting that "it is difficult to imagine any case in which an IG could not justify the duplication of *any* agency function by simply stating that the overall purpose of taking on the agency's responsibility was to perfect the IG's oversight of the agency."[334] The court, however, was not persuaded. It denied the Partnership's Suggestion For Rehearing En Banc and Petition For Panel Rehearing.[335]

IV. CONCLUSION

The recent developments in federal farm programs have been largely legislative, and even those developments did not alter the basic program mechanisms established by the FAIR Act of 1996. Now in their third year of operation, the domestic commodity programs instituted by the FAIR Act have not changed structurally. Thus, the principal change in domestic commodity programs made by the FAIR Act—the substitution of deficiency payments with production flexibility contract payments as the mechanism for directly transferring income to farmers—still stands.

While it can be assumed that disputes over production flexibility contract payments will eventually reach the courts, that has not happened yet. Given the minimal and relatively straight-forward requirements of the production flexibility contracts, however, litigation over contract payments is not likely to generate the number of reported decisions as did the acreage reduction programs which the production flexibility contracts replaced.

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331. *Id.*

332. *Id.* at 335.

333. *Id.*

334. Respondents' Suggestion for Rehearing En Banc at 8, Winters Ranch Partnership v. Viadero, 123 F.3d 327 (5th Cir. 1997) (No. 95-50902).

335. Winters Ranch Partnership v. Viadero, 123 F.3d. 327, 336 (5th Cir. 1997).

Even though farm program litigation has declined in volume in the last year or so, decisions like that in *Winters Ranch Partnership* illustrate the potential significance of farm program litigation beyond its impact on the litigants. To the extent that the Fifth Circuit "clarified" its decision in *Burlington Northern* in *Winters Ranch Partnership*, federal farm program litigation had a significant impact on the scope of the authority of Inspectors General throughout the federal government.