

# A PROPOSAL TO REGULATE FARM ANIMAL CONFINEMENT IN THE UNITED STATES AND AN OVERVIEW OF CURRENT AND PROPOSED LAWS ON THE SUBJECT

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## I. INTRODUCTION

According to the 2007 Census of Agriculture administered by the National Agricultural Statistic Service, almost half a billion hogs are sold each

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year, with a yearly market value of over 18 billion dollars.<sup>1</sup> Of those hogs sold, almost 98% of them come from farms that have over one thousand hogs.<sup>2</sup> Further, there are almost 350 million laying hens in the United States, resulting in the yearly sale of almost two billion dozen eggs.<sup>3</sup> Of those hens, 341 million, or 97% of the total population, live on farms with over ten thousand hens.<sup>4</sup>

With such a large number of animals on a single farm, the space that each animal is given is necessarily regulated. Breeding sows are often kept in cages known as “gestation crates” (or “stalls”), while sows that have recently given birth are kept in “farrowing crates” (or “stalls”).<sup>5</sup> These stalls “allow the sow to stand, lie, eat and drink, but may not allow them to turn around.”<sup>6</sup> The gestation stalls allow the producer “to feed and observe each sow individually to meet her needs” and protect “her from other aggressive sows.”<sup>7</sup> Farrowing stalls, after the sow gives birth, allow “the piglets more opportunity to escape being crushed when the sow lies down.”<sup>8</sup> Laying hens are confined in “battery cages” that allow sixty-seven to eighty-six square inches of usable space per bird.<sup>9</sup> According to the guidelines, “additional space may be more stressful as more aggressive tendencies become manifest.”<sup>10</sup>

As with every story, however, there are two sides to the ethics of animal confinement.<sup>11</sup> The Humane Society of the United States, (“HSUS”), argues that “[t]he intensive confinement of these [cages] severely impairs the animals’ welfare, as they are unable to exercise, fully extend their limbs, or engage in many

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1. NAT’L AGRIC. STATISTICS SERV., 2007 CENSUS, <http://151.121.3.59/> (last visited Nov. 30, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. See NAT’L PORK BOARD, 2003 SWINE CARE HANDBOOK 8-9 (2002), available at <http://www.pork.org/PorkScience/Documents/swine%20care%20handbook%202003.pdf>.

6. *Id.* at 8.

7. *Id.*

8. *Id.* at 9.

9. UNITED EGG PRODUCERS, UNITED EGG PRODUCERS ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS 11 (2008), available at <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf>.

10. *Id.*

11. See William Reppy, Jr. & Jeff Welty, *Farm Animal Welfare, Legislation and Trade*, 70 LAW & CONTEMP. PROBS. 325 (2007) (analysis by proponents of animal confinement laws); see also Nicole Fox, Note & Comment, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 WHITTIER L. REV. 145 (1995) (legal analysis by a proponent of animal confinement laws).

important natural behaviors.”<sup>12</sup> Further, “[a]s a result of the severe restriction within these barren housing systems, animals can experience significant and prolonged physical and psychological assaults. Indeed, extensive scientific evidence shows that intensively confined farm animals are frustrated, distressed, and suffering.”<sup>13</sup>

Determining who should regulate the amount of space an animal is given has become a very public and contentious issue in the last ten years. Proponents of state regulation claim that the cages amount to animal cruelty, while the opponents argue that they are merely engaging in normal animal husbandry. The debate is exacerbated because, while all fifty states have enacted some form of legislation prohibiting cruelty to animals, about thirty states exempt “common,” “normal” or “customary” farm animal husbandry practices from coverage under the law.<sup>14</sup>

As of the writing of this article, eleven states and the federal government have tried and failed to pass some form of legislation overriding this exemption and controlling living conditions through regulation or through purchasing power, while four more states—Oregon, Colorado, Maine and Michigan—have already passed them through the legislature.<sup>15</sup> Further, three more states have passed laws that limit local control in establishing animal health and welfare standards.

However, in addition to the typical legislative process, there are currently twenty-three states that allow initiatives to be placed on the ballot.<sup>16</sup> An initiative is the proposal of a new law or constitutional amendment that is then placed on the ballot by petition, that is, by collecting signatures of a certain number of citi-

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12. HUMANE SOC’Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF INTENSIVELY CONFINED ANIMALS IN BATTERY CAGES, GESTATION CRATES AND VEAL CRATES 1 (2008), available at <http://www.hsus.org/web-files/PDF/Far/hsus-the-welfare-of-intensively-confined-animals.pdf>.

13. *Id.*

14. David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 212-16 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

15. For discussions on the federal government’s lack of regulation of this issue, see Jimena Uralde, Comment, *Congress’ Failure to Enact Animal Welfare Legislation for the Rearing of Farm Animals: What is Truly at Stake?*, 9 U. MIAMI BUS. L. REV. 193 (2001). Also see Amy Mosel, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133 (2001).

16. See Initiative & Referendum Inst. at the Univ. of S. Cal., *Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions*, <http://www.ian.drinsti-tute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf>. (last visited Nov. 30, 2009).

zens.<sup>17</sup> Three states—Florida, Arizona, and California— have already passed animal confinement laws through a ballot initiative, and the HSUS has indicated its willingness to bring initiatives to other states in an attempt to regulate the issue.<sup>18</sup>

One of those targeted states, Ohio, decided to take preemptive action to the threatened ballot proposal. State legislators recently sponsored a ballot initiative of their own, which created a “Livestock Care Standards Board,” responsible for the establishment of standards governing the care and well-being of livestock and poultry in Ohio. The Ohio initiative, which was put in front of the voters on November 3, 2009, passed by a margin of almost two-to-one.<sup>19</sup> And, while the initiative does not directly mandate space requirements for farm animals, it is strongly related in that it creates a board to regulate those issues.

This article will outline the farm animal confinement laws that have passed, the ones that have been brought in front of various legislatures but not passed, and give examples of the ones pending in front of state legislatures across the country. It will then discuss how animal agriculture can inform the public on these issues so that a regulatory system may be adopted that considers the health and welfare of the animals, but also allows for flexibility due to changing scientific developments and accepted animal husbandry practices.

## II. CURRENT STATUTES

### A. Florida

In November 2002, the first statute passed, via initiative, in Florida. Sponsored by a group named Floridians for Humane Farms and strongly supported by the HSUS, it passed with votes tallying fifty-five percent for the initiative and forty-five percent against.<sup>20</sup> The initiative, a constitutional amendment, limited the confinement of pigs during pregnancy, holding it “unlawful for any

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17. *Id.*

18. See Monica Scott, *Michigan Farmers to Face Off with Humane Society Activists Over Animal Care Legislation*, GRAND RAPIDS PRESS, July 28, 2009, available at [http://www.mlive.com/news/grand-rapids/index.ssf/2009/07/michigan\\_farmers\\_prepared\\_to\\_f.html](http://www.mlive.com/news/grand-rapids/index.ssf/2009/07/michigan_farmers_prepared_to_f.html) (illustrating expansion of HSUS 2010 ballot initiative campaign to Michigan).

19. Jennifer Brunner, Ohio Sec’y of State, Live Unofficial Election Results, Nov. 5, 2009, <http://vote.sos.state.oh.us/pls/enrpublic/f?p=130:MYRESULTS:0>.

20. See Fla. Dept. of State, Div. of Elections, Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, <http://elections.myflorida.com/initiatives/initdetail.asp?account=34174&seqnum=1> (last visited Nov. 30 2009).

person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.”<sup>21</sup> The phrase “turning around freely” is further defined as “turning around without having to touch any side of the pig’s enclosure.”<sup>22</sup> The law includes very limited exceptions, allowing confinement only when the pig is under veterinary care—limited to a reasonable time—and for the seven days before the pig’s expected date of giving birth.<sup>23</sup> The language of the ballot initiative is very careful to limit the application specifically to agriculture. For example, it only applies to animals on a farm, which means “the land, buildings, support facilities, and other appurtenances used in the production of animals for food or fiber.”<sup>24</sup>

Persons found guilty of violating this statute are guilty of a misdemeanor of the first degree,<sup>25</sup> punishable by a definite sentence of up to a year in prison,<sup>26</sup> or “by a fine of not more than \$5000,” or both.<sup>27</sup> Each affected pig constitutes a distinct offense, with separate convictions and punishments.<sup>28</sup> Further, law enforcement officials are authorized to enforce the provisions as if they were violations of the state’s general animal abandonment provisions.<sup>29</sup> Finally, the initiative includes a provision about imparting knowledge of the acts to the principal “person.” The provision states that “[t]he knowledge or acts of agents and employees of a person in regard to a pig owned, farmed or in the custody of a person, shall be held to be the knowledge or act of such person.”<sup>30</sup> Essentially, this provision allows an agricultural producer, whether a “natural person, corporation . . . or business entity,” to be held legally responsible for the actions of the individuals responsible for the day-to-day care of the animals.<sup>31</sup>

The Florida initiative took effect six years after it passed, and thus became effective in November of 2008.<sup>32</sup> Since that time, no legal challenges have

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21. FLA. CONST. art. X, § 21(a).

22. *Id.* § 21(c)(5).

23. *Id.* §§ 21(b)(1), (2).

24. *Id.* § 21(c)(2).

25. *Id.* § 21(d).

26. FLA. STAT. § 775.082(4)(a) (2009).

27. FLA. CONST. art. X, § 21(d).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* § 21(c)(3).

32. *Id.* § 21(g).

been filed,<sup>33</sup> and there have been no prosecutions of violations. However, it is important to note that Florida has only 5,400 breeding sows, and of that number, 770 live on farms with over 100 sows, and no sows live on farms that have over 200 animals.<sup>34</sup> As a result, it is impossible to know whether the paucity of violations is due to lack of enforcement, perfect compliance, or the miniscule number of animals to which the law applies.

### B. Arizona

The next statute put in place was also a voter initiative. Arizona's statute, titled Humane Treatment of Farm Animals Act, passed in November 2006, with the approval of sixty-two percent of the voters.<sup>35</sup> When it becomes effective on December 31, 2012, it will affect the conditions in which both pregnant sows and veal calves are kept.<sup>36</sup> It will prohibit persons from tethering or confining any pig during pregnancy or any calf raised for veal in a way that prevents the animal from lying down and fully extending his or her limbs or turning around freely.<sup>37</sup> The Arizona initiative is more extensive than Florida's. In the first place, it applies not only to pregnant sows, but also to "calves raised for veal," which means "a calf raised with the intent of selling, marketing or distributing the meat, organs or any part of such calf as a food product described as 'veal.'"<sup>38</sup> It further places more stringent requirements on the housing provided to the animal. It is now required that the creature have space to turn around freely, and it must be able to lie down and fully extend its limbs for all or a majority of every day.<sup>39</sup> Like Florida, however, the Arizona law clearly limits its application only to agriculture, restricting its reach to "land, buildings, support facilities, and other

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33. The single court opinion regarding this initiative was rendered before it was even added to the ballot, holding only that that the initiative met the requirements to be placed on the ballot. *In re* Advisory Opinion to Atty. Gen. Regarding Limiting Cruel and Inhuman Confinement of Pigs During Pregnancy, 815 So. 2d 597, 601 (Fla. 2002) (Pariente, J., concurring).

34. NAT'L AGRIC. STATISTICS SERV., *supra* note 1.

35. Arizona Secretary of State's Office, *2006 General Election Results: Proposition 204*, available at <http://www.azsos.gov/results/2006/general/BM204.htm> (last visited Nov. 30, 2009).

36. *Id.*

37. ARIZ. REV. STAT. ANN. §§ 13-2910.07(A)(1)-(2) (2009).

38. *Id.* § 13-2910.07(D)(2).

39. *Id.* §§ 13-2910.07(A)(1)-(2).

equipment that is wholly or partially used for the production of animals for food or fiber.<sup>740</sup>

Like Florida, animals covered by the law are exempt from the provisions while being treated for veterinary purposes and during the seven days before a sow is expected to give birth.<sup>41</sup> However, Arizona also provides exemptions for

1. Pigs or calves during transportation.
2. Pigs or calves in rodeo exhibitions, state or county fair exhibitions, or other similar exhibitions.
3. The killing of pigs or calves according to the provisions of chapter 13, title 3 and other applicable law and regulations[; and]
4. Pigs or calves involved in lawful scientific or agricultural research.<sup>42</sup>

Violation of this section can result in conviction of a class 1 misdemeanor.<sup>43</sup> The potential penalties include jail time of up to six months<sup>44</sup> and a fine of up to \$2,500 for individuals<sup>45</sup> or \$20,000 for an enterprise.<sup>46</sup> Fines collected as a result of enforcement of the act, along with any private or public donations that might be made, are placed in the humane treatment of farm animals fund.<sup>47</sup> The fund is administered by the state attorney general, and monies are used for expenditures required in enforcement of the act.<sup>48</sup>

### *C. Oregon*

The third statute regarding animal confinement was not a voter initiative. Instead, on February 28, 2007, Ginny Burdick, a Democratic senator from Portland, introduced SB 694. In its original form, it was considered “restrictive confinement of a calf or a pig if the person confines a calf or a pig for more than 12 hours during any 24-hour period in a manner that prevents the calf or the pig from lying down and fully extending its limbs; or [t]urning around freely.”<sup>749</sup> However, the part of the bill addressing living conditions for calves was quickly

40. *Id.* § 13-2910.07(D)(3).

41. *Id.* §§ 13-2910.07(B)(5)-(6).

42. *Id.* §§ 13-2910.07(B)(1)-(4).

43. *Id.* § 13-2910.07(C).

44. *Id.* § 13-707(A)(1).

45. *Id.* § 13-802(A).

46. *Id.* § 13-803(A)(2).

47. *Id.* § 13-2910.08.

48. *Id.*

49. S. 694, 74th Leg., Reg. Sess. (Or. 2007) (as introduced).

dropped and the bill ultimately passed on June 14, 2007,<sup>50</sup> by a 32-25 vote in the House and a 20-9 vote in the Senate.<sup>51</sup>

The legislation as passed prohibits the “restrictive confinement of a pregnant pig if the person confines a pregnant pig for more than 12 hours during any 24-hour period in a manner that prevents the pregnant pig from . . . [l]ying down and fully extending its limbs; or [t]urning around freely.”<sup>52</sup> “Turning around freely,” like the definitions in place in Arizona and Florida, means “the ability to turn in a complete circle in an enclosure without an impediment, including a tether, and without touching any side of the enclosure.”<sup>53</sup>

The written exceptions to the law are very similar to those passed in Florida and Arizona. Like Florida and Arizona both, the law provides exceptions for the seven days before a sow gives birth, as well as during treatment by a veterinarian.<sup>54</sup> The remaining four exceptions—transportation, exhibition, slaughter and research<sup>55</sup>—are the same as those found in the Arizona statute.<sup>56</sup>

In addition to the numerous similarities, there are several differences between the Oregon legislation and the initiatives passed in Florida and Arizona. One of those differences is the fact that the confinement offense is not limited to a “farm.”<sup>57</sup> Instead, the statute looks at the type of animal being confined, and limits the confinement offense to “a porcine animal of a type maintained as livestock,”<sup>58</sup> regardless of the location. Another difference is the clearly specified amount of time in which the pig must be confined before the law is triggered. Under Arizona’s law, the animal cannot be tethered or confined “for all or the majority of any day”<sup>59</sup> but does not specify a certain time length. There is no equivalent provision in Florida’s law. Instead, it is merely the act of tethering or confining the animal that is prohibited, regardless of the length of time in which

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50. Compare *id.* with OR. REV. STAT. § 600.150 (2009) and S. 694, 74th Leg., Reg. Sess. (Or. 2007) (as amended and adopted).

51. S.B. 694, 2007 Leg., Reg. Sess. (Or. 2003) (introduced Feb. 7, 2007).

52. OR. REV. STAT. § 600.150(2).

53. *Id.* § 600.150(1)(b); see also ARIZ. REV. STAT. ANN. § 13-2910.07(D)(5) (2009); FLA. CONST. art. X, § 21(c)(5).

54. OR. REV. STAT. §§ 600.150(3)(e)-(f).

55. *Id.* §§ 600.150(3)(a)-(d).

56. ARIZ. REV. STAT. ANN. §§ 13-2910.07(B)(1)-(4).

57. See OR. REV. STAT. § 600.150.

58. *Id.* § 600.150(1)(a).

59. ARIZ. REV. STAT. ANN. § 13-2910.07(A).

it is thus confined.<sup>60</sup> In Oregon's law, however, the pig must be confined in a prohibited manner for "more than 12 hours during any 24-hour period."<sup>61</sup>

The original introduction of the Oregon statute called for the offense to be labeled a "Class A misdemeanor,"<sup>62</sup> with a potential penalty of up to one year in jail<sup>63</sup> and \$6,250 in fines for individuals<sup>64</sup> or \$5,000 for a corporation.<sup>65</sup> However, the House rejected that offense classification, instead choosing to label it as a "Class A violation."<sup>66</sup> Violations, under Oregon law, are a lesser offense in which the offender may be fined but not sentenced to jail.<sup>67</sup> The penalty for a "class A" violation is a maximum fine of \$720 for individuals and up to \$1440 for corporations.<sup>68</sup>

#### D. Colorado

The next statute, also a legislative enactment, was signed into law by Colorado governor Bill Ritter on May 14, 2008.<sup>69</sup> The bill, introduced by Senate Agriculture Committee Chairman Jim Isgar (D-Hesperus) and House Agriculture Committee Chair Kathleen Curry (D-Gunnison), went through the House and Senate and passed without any subsequent amendments or deletions.<sup>70</sup> In return for its passage, the HSUS agreed to withdraw a ballot initiative petition on the same subject, which would have also phased out the confinement of egg-laying hens in battery cages.<sup>71</sup>

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60. FLA. STAT. ANN. § 828.13(2)(a) (2009).

61. OR. REV. STAT. § 600.150(2).

62. S. 694, 74th Leg., Reg. Sess. (Or. 2007).

63. OR. REV. STAT. § 161.615(1)(a).

64. *Id.* § 161.635(1).

65. *Id.* § 161.655(1).

66. OR. REV. STAT. § 600.150(4).

67. OR. REV. STAT. § 153.008(1)(b).

68. *Id.* §§ 153.018(2)-(3).

69. Press Release, Office of Governor Bill Ritter, Governor Ritter Signs Agriculture Bills into Law (May 14, 2008), available at <http://www.colorado.gov/cs/Satellite?c=Page&cid=1210756531933&pagename=GovRitter%2FGOVRLayout>.

70. See Colorado General Assembly, Summarized Bill History, S.B. 08-201, available at <http://www.leg.state.co.us/CLICS/CLICS2008A/csl.nsf/BillFoldersAll?OpenFrameSet;http://www.colorado.gov/cs/Satellite?c=Page&cid=1210756531933&pagename=GovRitter%2FGOVRLayout>.

71. Letter from Holly Tarry and Lisa Shapiro to Kirk Mlinek, Dir. Colo. Leg. Council Staff (Jan. 25, 2008), available at <http://www.leg.state.co.us/lcs/initrefr/0708InitRefr.nsf/dac421>

This statute, like the initiative in Arizona, applies to calves raised for veal as well as to gestating sows.<sup>72</sup> It becomes effective for veal calves on January 1, 2012, and for gestating sows on January 1, 2018.<sup>73</sup>

As far as the law itself, while the ultimate goals are the same as those in the other states, the Colorado legislation outlined species specific requirements, rather than guidelines that apply to all species equally. The legislation states that:

(1) No person shall confine a calf raised for veal or gestating sow in any manner other than the following:

(a) A calf raised for veal shall be kept in a manner that allows the calf to stand up, lie down, and turn around without touching the sides of its enclosure.

(b) A gestating sow shall be kept in a manner that allows the sow to stand up, lie down, and turn around without touching the sides of its enclosure until no earlier than twelve days prior to the expected date of farrowing. At that time, a gestating sow may be kept in a farrowing unit.<sup>74</sup>

Other differences between this and the other statutes are also evident in the preceding quote. While the laws in the other three states allow for a pregnant sow to be confined for the seven days before her expected due date, Colorado allows it for up to twelve days.<sup>75</sup> Another difference is the explanation of the “farrowing unit” in which the sow may be placed before giving birth. A “farrowing unit” is “a structure in which a single gestating sow is kept immediately prior to and during farrowing for the purposes of providing care to the sow and the sow’s offspring.”<sup>76</sup> While this may not be explicitly defined as permissible in the other statutes, it is certainly implied. The final difference in this statute is found in the definition of a “gestating sow.” In Colorado, this means a “confirmed pregnant member of the porcine species.”<sup>77</sup> The other states do not specify when a sow becomes “pregnant.” While this may seem like mere semantics, it can mean the difference between confining pigs from the moment they are artificially inseminated and confining them only after some form of pregnancy check comes back positive.

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ef79ad243487256def0067clde/ed149f840eb2293c872573db00768f79/\$FILE/2007-2008%20%2364.pdf.

72. COLO. REV. STAT. § 35-50.5-103 (2009).

73. *Id.* § 35-50.5-103.

74. *Id.* § 35-50.5-102.

75. *Id.* § 35-50.5-102(1)(b).

76. *Id.* § 35-50.5-101(3).

77. *Id.* § 35-50.5-101(4).

The Colorado statute has the same exemptions as every other state since Florida,<sup>78</sup> and “persons” who may be prosecuted under the statute include “any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity.”<sup>79</sup> Violations are a “class 2 misdemeanor,”<sup>80</sup> and carry a minimum penalty of three months imprisonment, a \$250 fine, or both, up to a potential maximum of twelve months imprisonment, a \$1000 fine, or both.<sup>81</sup> The law also permits community service to be ordered, in addition to the other penalties.<sup>82</sup>

### E. California

The next law and final ballot initiative to be passed is California’s Proposition 2, which passed in November, 2008.<sup>83</sup> While the effective date of January 1, 2015 is almost six years in the future,<sup>84</sup> proponents and opponents of the initiative were both very concerned about its passage.<sup>85</sup> That concern manifested itself in the amount of money spent by each side in anticipation of the vote. Advocates for the proposition spent \$10.6 million with the largest donor, the HSUS, donating \$4.1 million.<sup>86</sup> Opponents of the proposition spent \$8.9 million, \$591,210 of which came from top donor Cal-Maine Foods.<sup>87</sup> It passed with 63.5% of the vote in November, 2008,<sup>88</sup> with a stated purpose of prohibiting the “cruel confinement of farm animals in a manner that does not allow them to turn around freely, lie

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78. *Id.* § 35-50.5-102(2).

79. *Id.* § 2-4-401(8).

80. COLO. REV. STAT. § 35-50.5-102(3).

81. COLO. REV. STAT. § 18-1.3-501(1)(a).

82. *Id.* § 18-1.3-501(2).

83. CAL. HEALTH & SAFETY CODE § 25990 (West 2009).

84. *Id.*

85. *See generally* Jonathan R. Lovvorn & Nancy V. Perry, Essay, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 149 (2009) (discussing the campaign to enact Proposition 2 from the perspective of the individuals who directed the legislative and legal program for the Humane Society of the United States and “were centrally involved in the drafting, campaigning, and litigation efforts in support of the measure”).

86. *Calif. Initiative Spending at a Glance*, S.F. CHRON., Feb. 3, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/02/03/state/n180650S85.DTL>.

87. *Id.*

88. CAL. SEC’Y OF STATE, SUPPLEMENT TO THE STATEMENT OF VOTE: STATEWIDE SUMMARY BY COUNTY FOR STATE BALLOT MEASURES 53 (Nov. 4, 2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_general/ssov/10-ballot-measures-statewide-summary-by-county.pdf](http://www.sos.ca.gov/elections/sov/2008_general/ssov/10-ballot-measures-statewide-summary-by-county.pdf).

down, stand up, and fully extend their limbs.”<sup>89</sup> To be more specific, the space requirements are identical to those of the initiative in Arizona and the law in Oregon. Covered animals must not be tethered or confined in a manner that prevents the animal from “[l]ying down, standing up, and fully extending his or her limbs” or “[t]urning around freely.”<sup>90</sup>

While there are some similarities, California has some differences from the other states as well. The first and most obvious is the addition of a third covered animal. In this case, “covered animals” include “any pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm.”<sup>91</sup> Egg-laying hens, not covered in Florida, Arizona, Colorado or Oregon laws, include “any female domesticated chicken, turkey, duck, goose, or guinea fowl kept for the purpose of egg production.”<sup>92</sup> Hens are also accorded some requirements specific to their species. A battery cage is specifically described as an “enclosure”<sup>93</sup> that is affected by the law, and for a hen to “fully extend” her limbs, she must be able to “fully spread[] both wings without touching the side of an enclosure or other egg-laying hens.”<sup>94</sup> Other differences include the clarification that a “farm” does not include live animal markets,<sup>95</sup> the specification that the proposition only covers pigs that are kept for the primary purpose of breeding,<sup>96</sup> and the expansion of the group of “persons” who may be held responsible for violations to include “any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.”<sup>97</sup>

As far as exceptions to the confinement statute, producers in California, like those in Arizona, Florida and Oregon, may confine covered animals during veterinary treatment and, for pigs, during the seven days before birth is expected.<sup>98</sup> The remaining four exceptions<sup>99</sup> are the same as those applicable in Arizona, Oregon and Colorado. The one minor difference is the specific addition

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89. Prevention of Farm Animal Cruelty Act, Cal. Prop. 2, 2008 (codified at CAL. HEALTH & SAFETY CODE § 25990).

90. CAL. HEALTH & SAFETY CODE § 25990.

91. *Id.* § 25991(b).

92. *Id.* § 25991(c).

93. *Id.* § 25991(d).

94. *Id.* § 25991(f).

95. *Id.* § 25991(e).

96. *Id.* § 25991(h).

97. *Id.* § 25991(g).

98. *Id.* §§ 25992(b), (f).

99. *Id.* §§ 25992(a), (c), (d), (e).

of 4-H programs into the list of exhibitions where close confinement is permitted.<sup>100</sup>

Violation of the proposition is a misdemeanor, and potential punishment includes a fine of up to \$1,000, imprisonment for up to 180 days, or both.<sup>101</sup> Furthermore, the proposition is not the exclusive remedy for animal welfare law.<sup>102</sup> “Persons” charged under this law may also be charged under the general animal welfare laws.<sup>103</sup> In fact, the proposition states explicitly that it “shall not be construed to limit any state law or regulations protecting the welfare of animals, nor shall anything in this chapter prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations.”<sup>104</sup>

#### F. *Maine*

On May 13, 2009, the governor of Maine, John Baldacci, signed the most recent animal confinement law into effect after it passed through the committee and both chambers of the legislature unanimously.<sup>105</sup> The law was codified as a civil offense in the Agriculture and Animals title (Title 7),<sup>106</sup> and as a criminal offense in the Crimes title (Title 17).<sup>107</sup> Like most of the other statutes, it protects pregnant sows and veal calves. It prohibits “persons” from “tether[ing] or confin[ing] a covered animal for all or the majority of a day in a manner that prevents the animal from: A. Lying down, standing up and fully extending the animal’s limbs; and B. Turning around freely.”<sup>108</sup> Again, this statute is similar to most of the other statutes in that it regulates the space that the animal is in, rather than regulating it by the animal at issue as Colorado does. All in all, the statute is comparable to the others. It prohibits the confinement only in cases where the animal lives on a farm,<sup>109</sup> and the exceptions—for the seven days before the ex-

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100. *Id.* § 25992(d).

101. *Id.* § 25993.

102. *Id.* § 25994.

103. *Id.*

104. *Id.*

105. Humane Soc’y of the U.S., *Maine Becomes Sixth U.S. State to Ban Extreme Confinement*, May 13, 2009, [http://www.hsus.org/farm/news/ournews/maine\\_bans\\_veal\\_gestation\\_crates\\_051309.html](http://www.hsus.org/farm/news/ournews/maine_bans_veal_gestation_crates_051309.html).

106. ME. REV. STAT. ANN. tit. 7, § 4020 (2009).

107. ME. REV. STAT. ANN. tit. 17, § 1039.

108. ME. REV. STAT. ANN. tit. 7, § 4020(2); ME. REV. STAT. ANN. tit. 17, § 1039(2).

109. ME. REV. STAT. ANN. tit. 7, §§ 4020(1)(B), 4020(2); ME. REV. STAT. ANN. tit. 17, §§ 1039(1)(B), 1039(2).

pected due date, veterinarian, transportation, exhibition, slaughter and research—are also the same.<sup>110</sup>

A new provision with the California ballot was also present with Maine's legislation. Both states' statutes explicitly provide that the provisions "are in addition to, and not in lieu of, any other laws protecting animal welfare" and that "[t]his section may not be construed to limit any state law or rules protecting the welfare of animals or to prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations."<sup>111</sup> This paragraph not only allows charges to be pressed under the standard animal cruelty laws, but it allows local governmental and regulatory bodies to establish more stringent requirements for the producers located within their boundaries.

However, there are a few provisions in Maine's law that are not found in any of the others. First of all, it states that:

The affirmative defense provisions in section 4016, subsection 3 do not apply to this section. It is not an affirmative defense to alleged violations of this section that the calf or sow was kept as part of an agricultural operation and in compliance with best management practices for animal husbandry.<sup>112</sup>

Section 4016(3) of the Maine Revised Statutes Annotated, as cited in the above provision, provides persons charged with animal cruelty an affirmative defense for agricultural operations using best management practices *as determined by the department*.<sup>113</sup> As a result, this legislation takes the determination of best management practices out of the hands of the department, and instead dictates what best management practices are, or—more accurately—what they cannot be.

The other difference between this statute and those passed in other states is that violation of the law is not only a criminal offense, but a civil offense as well.<sup>114</sup> If considered a civil offense, there is no arrest power. However, if prosecuted under the criminal code, the perpetrator may be arrested or detained.<sup>115</sup> The "attorney for the State" has the right to make the decision as to which statute the defendant is charged under.<sup>116</sup> However:

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110. ME. REV. STAT. ANN. tit. 7, § 4020(3); ME. REV. STAT. ANN. tit. 17, § 1039(3).

111. ME. REV. STAT. ANN. tit. 7, § 4020(4); ME. REV. STAT. ANN. tit. 17, § 1039(4).

112. ME. REV. STAT. ANN. tit. 7, § 4020(4).

113. *Id.* tit. 7, § 4016(3) (emphasis added).

114. *Id.* tit. 7, § 4016.

115. ME. REV. STAT. ANN. tit. 17, § 1039(6).

116. *Id.*

[i]n making this election, the attorney for the State shall consider the severity of the cruelty displayed, the number of animals involved, any prior convictions or adjudications of animal cruelty entered against the defendant and such other factors as may be relevant to a determination of whether criminal or civil sanctions will best accomplish the goals of the animal welfare laws in the particular case before the attorney for the State.<sup>117</sup>

These factors, however, are not elements of the criminal offense or civil violation, and the resulting election to charge civil or criminal is not subject to judicial review.<sup>118</sup>

It is important to note that, while this statute gives standing to the “attorney for the State,” it doesn’t explicitly limit standing to that person in bringing a civil suit. However, another section of the criminal code does, and gives the right to bring suit only to “the Attorney General, the Attorney General’s representative or any other appropriate public official.”<sup>119</sup> This limitation prohibits the possibility of private-party standing.

In terms of punishment for violations of the statute, the criminal offense is a “Class D crime,”<sup>120</sup> which carries a possible penalty of up to a year in jail<sup>121</sup> and a \$2,000 fine for a person<sup>122</sup> or \$10,000 fine for an organization,<sup>123</sup> or both.<sup>124</sup> However, the civil offense does not specify a punishment, which may become an issue with enforcement of the law.

### *G. Michigan*

On June 23, 2009 legislators in the state of Michigan introduced a farm animal confinement bill that would have been an amendment to the Animal Industry Act of 1988. Rep. Mike Simpson introduced H.B. 5127,<sup>125</sup> and Sen. Wayne Kuipers introduced an identical version as S.B. 655,<sup>126</sup> while Rep. Jeff Mayes and Sen. Gerald Van Woerkom introduced companion pieces H.B. 5128<sup>127</sup>

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117. *Id.*  
118. *Id.*  
119. *Id.* tit. 17, § 4-B(1).  
120. *Id.* tit. 17, § 1039(5).  
121. *Id.* tit. 17, § 1252(2)(D).  
122. *Id.* tit. 17-A, § 1301(1-A)(D).  
123. *Id.* tit. 17-A, § 1301(3)(E).  
124. *Id.* tit. 17-A, § 1152(4).  
125. H.B. 5127, 95th Leg., Reg. Sess. (Mich. 2009).  
126. S.B. 655, 95th Leg., Reg. Sess. (Mich. 2009).  
127. H.B. 5128, 95th Leg., Reg. Sess. (Mich. 2009).

and S.B. 654,<sup>128</sup> respectively, at the same time. H.B. 5127/S.B. 655 as introduced were quite extensive, creating many provisions that establish the extent of regulations for animal confinement. Initially, the bills established that the state Department of Agriculture and the Commission on Agriculture would have “sole authority to regulate livestock health and welfare.”<sup>129</sup> They would also institute a ban on using state funds to “educate the public or promote animal care standards inconsistent with the animal care standards developed, adopted, or promulgated under this section.”<sup>130</sup>

However, the Michigan legislation as proposed in June went even further. It would have established that the animal care standards adopted and recognized by the Department of Agriculture were the same health and welfare standards established by the National Pork Board, the National Milk Producers Federation, the United Egg Producers, the National Chicken Council, the National Turkey Federation and the American Veal Association.<sup>131</sup>

The bill would have also established a system of third-party audits and certification. H.B. 5128/S.B. 654 created an Animal Advisory Council within MDA, with nine voting members.<sup>132</sup> These members would have been responsible for considering and changing the species-specific guidelines at least every five years.<sup>133</sup> Once a farm was certified, it would have been “considered in compliance with the animal care standards . . . until otherwise determined.”<sup>134</sup> Further there would have been a statutory “presumption that the raising, keeping, care, treatment, marketing, or sale of animals in compliance with the standards adopted under this section does not constitute cruelty to, or the inhumane treatment of, livestock.”<sup>135</sup>

After their introduction and first reading, the bills were referred to their respective Committees on Agriculture on June 24, 2009.<sup>136</sup> On September 16, 2009, the House bill, which had passed through committee with a few changes,

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128. S.B. 654, 95th Leg., Reg. Sess. (Mich. 2009).

129. Mich. H.B. 5127; Mich. S.B. 655.

130. Mich. H.B. 5127; Mich. S.B. 655.

131. Mich. H.B. 5127; Mich. S.B. 655.

132. H.B. 5128, 95th Leg., Reg. Sess. (Mich. 2009); S.B. 654, 95th Leg., Reg. Sess.

(Mich. 2009).

133. Mich. H.B. 5128; Mich. S.B. 654.

134. Mich. H.B. 5127; Mich. S.B. 655.

135. Mich. H.B. 5127; Mich. S.B. 655.

136. No. 58 State of Mich. J. of the H.R., 95th Leg., Reg. Sess. (2009), available at [http://www.legislature.mi.gov/\(S\(zxq23k45zxktniznoxeh55\)\)/documents/2009-2010/Journal/House/pdf/2009-HJ-06-23-058.pdf](http://www.legislature.mi.gov/(S(zxq23k45zxktniznoxeh55))/documents/2009-2010/Journal/House/pdf/2009-HJ-06-23-058.pdf).

was read a second time and voted on. Immediately after it failed to pass, Rep. Simpson (the primary sponsor of the original bill) proposed a new and amazingly different version. The House voted on the new version that very day, and it passed.<sup>137</sup> Two weeks later, on September 30, the Senate took up the House version, considered it, and passed it that day with a single minor change in the effective dates.<sup>138</sup> The House and Senate versions were reconciled the very next day, October 1st, and the bill was ordered enrolled for the Governor's signature.<sup>139</sup> On October 12, 2009, Governor Granholm signed the bill into law.<sup>140</sup>

The Michigan legislation that was ultimately passed is strikingly similar to the ballot initiative that was passed in California. To be more specific, the space requirements are identical to those of the initiatives in Arizona and California, as well as the law in Oregon. Covered animals must not be tethered or confined in a manner that prevents the animal from "lying down, standing up, and fully extending his or her limbs" or "turning around freely."<sup>141</sup>

Also like California, the Michigan statute includes the addition of a third covered animal. In this case, "covered animals" include "any pig during pregnancy, calf raised for veal, or egg-laying hen that is kept on a farm"<sup>142</sup> The definition of "egg-laying hens" is also identical to the definition in California. However, the slight difference between California and Michigan is evident in the definition of "fully extending its limbs," as it applies to the hens. The Michigan law states that "In the case of egg-laying hens, fully extending its limbs means fully spreading both wings without touching the side of an enclosure or other egg-laying hens and having access to at least 1.0 square feet of usable floor space

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137. Not all Representatives were happy with the substitution. "Rep. Agema, having reserved the right to explain his protest against the passage of the bill, made the following statement: 'Mr. Speaker and members of the House: This is like negotiating with terrorists. They put a gun to your head and say if you don't sign this something else worse might happen. We are bending to an organization out of fear and giving more regulations to our farmers. A yes vote means you fear something else worse might happen but may not. I don't believe this is good legislation—too many assumptions.'" No. 74 State of Mich. J. of the H.R., 95th Leg., Reg. Sess. (2009), available at [http://www.legislature.mi.gov/S\(he1hnu55xdgkyc45dsj35hvy\)/documents/2009-2010/Journal/House/pdf/2009-HJ-09-16-074.pdf](http://www.legislature.mi.gov/S(he1hnu55xdgkyc45dsj35hvy)/documents/2009-2010/Journal/House/pdf/2009-HJ-09-16-074.pdf).

138. *Id.*

139. *Id.*

140. Hoosier Ag Today, *Michigan Governor Signs Animal Welfare Law*, [http://www.hoosieragtoday.com/wire/news/00504\\_michiganbill\\_193951.php](http://www.hoosieragtoday.com/wire/news/00504_michiganbill_193951.php) (last visited Nov. 30, 2009).

141. MICH COMP. LAWS §287.746(2) (2009).

142. MICH COMP. LAWS §287.746(1)(B).

per hen.”<sup>143</sup> California’s statute does not specify a minimum amount of space. This may become significant because of the inclusion of the word “usable” in the definition, which would probably exclude space occupied by feeders and watering apparatus, as well as that occupied by other hens. Like California, a “farm” does not include live animal markets,<sup>144</sup> covered pigs include only those that are kept for the primary purpose of breeding,<sup>145</sup> and the “persons” who may be held responsible for violations to include “any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.”<sup>146</sup>

In terms of exceptions, Michigan’s legislation is also identical to the proposition that was passed in California. The law does not apply during veterinary treatment,<sup>147</sup> scientific or agricultural research,<sup>148</sup> transportation,<sup>149</sup> rodeo or other similar exhibitions,<sup>150</sup> and, in the case of a gestating sow, during the seven days before birth is expected.<sup>151</sup>

The only major difference between Michigan’s law and California’s initiative is in the penalties that they carry. Violation of California’s statute is a criminal misdemeanor,<sup>152</sup> while violation of Michigan’s statute allows the Department of Agriculture or the Attorney General to bring “a civil action to restrain, by temporary or permanent injunction, any act or practice in violation of this section.”<sup>153</sup> However, the potential criminal penalties set forth in Section 44 of the Animal Industry Act,<sup>154</sup> which include a felony punishable by a fine between \$1,000.00 and \$50,000.00, and/or imprisonment of up to five years,<sup>155</sup> are not applicable to violations of the animal confinement section.<sup>156</sup> Defenses to the charge may not include those “relating to customary animal husbandry or farm-

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143. MICH COMP. LAWS §287.746(1)(G).
  144. MICH COMP. LAWS §287.746(1)(E).
  145. MICH COMP. LAWS §287.746(1)(H).
  146. MICH COMP. LAWS §287.746(1)(I).
  147. MICH COMP. LAWS §287.746(3)(B).
  148. MICH COMP. LAWS §287.746(3)(A).
  149. MICH COMP. LAWS §287.746(3)(C).
  150. MICH COMP. LAWS §287.746(3)(D).
  151. MICH COMP. LAWS §287.746(3)(F).
  152. CAL. HEALTH & SAFETY CODE § 25993.
  153. MICH COMP. LAWS §287.746(4).
  154. MICH COMP. LAWS § 287.744(1).
  155. *Id.*
  156. MICH COMP. LAWS §287.746(4).

ing practices involving livestock ... are not considered a defense to an action brought for the violation of this section involving a covered animal.”<sup>157</sup>

Another provision in Michigan’s law that is strikingly similar to California’s, and also to Maine’s, is the section that provides that the statutory protections “are in addition to, and not in lieu of, any other laws protecting animal welfare. This section shall not be construed to limit any other state law or rules protecting the welfare of animals.”<sup>158</sup> It differs from the others only in that Michigan’s statute implicitly limits the power to protect the welfare of animals to “state law or rules,” whereas California’s and Maine’s enactments both allow local governmental and regulatory bodies to establish more stringent requirements for the producers located within their boundaries.

The Michigan law as initially passed through the House would have taken effect for veal calves one year after its enactment date, and for hens and sows, it would have gone into effect ten years after it was enacted.<sup>159</sup> The Senate’s version, which was ultimately adopted as the reconciled version and was signed into law becomes effective for veal calves on October 1, 2012,<sup>160</sup> and for covered hens and sows ten years after the section’s enactment date.<sup>161</sup>

#### H. *Ohio*

After being specifically targeted as the next state in which HSUS would bring a ballot initiative,<sup>162</sup> legislators in both the House and Senate submitted joint resolutions that would add an amendment to the Ohio Constitution to create a board that would set livestock welfare standards.

The joint resolutions were introduced on Thursday, June 18, 2009. On Monday, June 22, Ohio Gov. Ted Strickland threw his support behind the proposed amendment,<sup>163</sup> and a vote was held in each respective chamber on Thursday, June 25. Both passed, and the respective versions were reconciled on July

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157. MICH COMP. LAWS §287.746(4).

158. MICH COMP. LAWS §287.746(5).

159. *Id.*

160. *Id.*

161. *Id.*

162. Terry Kinney, *Ohio Governor Backs Plan for Livestock Standards*, ABC NEWS, June 23, 2009, <http://abcnews.go.com/Business/wireStory?id=7904514>.

163. *Id.*

13th. The proposed amendment (which was called “Issue 2”) was put in front of voters on November 3, 2009, passing with almost 64% of the vote.<sup>164</sup>

The Ohio amendment creates a 13-member Ohio Livestock Care Standards Board to establish and implement standards governing the care and well-being of livestock and poultry.<sup>165</sup> The director of the state department of agriculture will be the committee chairman and the governor would appoint ten members, while the Speaker of the House of Representatives and the President of the Senate would each be responsible for one appointee. The appointees consist of three individuals representing family farms, a food safety expert, two representatives of organizations that represent farmers, a veterinarian, the state veterinarian, the dean of the agricultural department in a college or university, two members of the public representing Ohio consumers, and a member of a county humane society.<sup>166</sup> No more than seven members of the board may be of the same political party,<sup>167</sup> and the standards promulgated should attempt to maintain food safety, encourage locally grown and raised food, and protect Ohio farms and families.<sup>168</sup>

In establishing and implementing the standards, the Board will consider “agricultural best management practices for care and well-being, biosecurity, disease prevention, animal morbidity and mortality data, food safety practices, and the protection of local, affordable food supplies for consumers.”<sup>169</sup> The committee’s standards will then be administered and enforced by the state Department of Agriculture,<sup>170</sup> and the legislature is given the power to enact laws that are necessary to carry out the amendment, and to set the terms of office of the Board members, and conditions of the board member’s service on the Board.<sup>171</sup>

This amendment may not be the end of the story in Ohio, however. Shortly after the proposal was made, HSUS president Wayne Pacelle voiced his vehement disapproval, saying that it effectively “force[d] [their] hand to seek a measure for November 2010 on confinement practices.”<sup>172</sup> He reiterated that

164. Brunner, *supra* note 19.

165. OHIO CONST. art XIV, § 1(A).

166. *Id.*

167. *Id.*

168. *Id.*

169. OHIO CONST. art XIV, § 1(B).

170. OHIO CONST. art XIV, § 1(C).

171. OHIO CONST. art XIV, § 1(D).

172. Terry Kinney, *Ohio Governor Backs Plan for Livestock Standards*, ABC NEWS, June 23, 2009, <http://abcnews.go.com/Business/wireStory?id=7904514>.

point again when conceding defeat on the night of November 3, saying that HSUS is “committed to gathering signatures to put a measure on the ballot for November 2010.”<sup>173</sup>

### III. OTHER RELATED STATUTES

In reaction to the farm animal confinement legislation, several states have introduced and passed bills that, while they do not specifically address confinement, nonetheless have an impact on the subject. They take the issue out of the hands of local government, ensuring that the state legislature is the sole occupant in the regulatory arena. For example, on May 1, 2009, Sonny Perdue, the governor of Georgia signed newly enacted legislation prohibiting counties, municipalities, consolidated governments or other political subdivisions of the state from “adopt[ing] or enforc[ing] any ordinance, rule, regulation, or resolution regulating crop management or animal husbandry practices involved in the production of agricultural or farm products on any private property.”<sup>174</sup> Less than two weeks later, on May 12, 2009, Oklahoma governor Brad Henry signed similar legislation that gave the Oklahoma Department of Agriculture, Food, and Forestry power to implement state policy “regarding the care and handling of livestock in this state.”<sup>175</sup> It further states that:

[n]o municipality, county, or other political subdivision of this state shall enact or enforce any order, ordinance, or regulation concerning the care and handling of livestock within its jurisdiction that is more restrictive than rules promulgated by the Oklahoma Department of Agriculture, Food, and Forestry concerning the care and handling of livestock . . . .<sup>176</sup>

In South Carolina, the General Assembly passed S. 45, which clearly states the “intent of the General Assembly to occupy the field of regulation of care and handling of livestock and poultry.”<sup>177</sup> Further, “[a]ll local laws and ordinances related to the regulation of and the enforcement of the care and handling of livestock and poultry in this State are preempted and superseded by laws

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173. YouTube.com, Wayne Pacelle, President and CEO of the Humane Society of the United States On Ohio Issue 2, <http://www.youtube.com/watch?v=SeGs6NQjF-A> (last visited Nov. 12, 2009).

174. GA. CODE ANN. § 2-1-6(a) (2009).

175. OKLA. STAT. tit. 2, § 2-4c(A) (2009).

176. *Id.* tit. 2, § 2-4c(B).

177. S. 453, 118th Leg., Reg. Sess. (S.C. 2009) (codified at S.C. CODE ANN. § 47-4-160(C)).

enacted by the General Assembly and regulations promulgated by state agencies pursuant to those laws.<sup>178</sup> Once passed, governor Mark Sanford vetoed the legislation.<sup>179</sup> The legislature overrode the veto on June 16, 2009, and the law became effective immediately.<sup>180</sup>

#### IV. FAILED LEGISLATION ON ANIMAL CONFINEMENT

For every law addressing animal confinement that has passed, there are many others that have not. Since 2000, legislatures in twelve states have attempted to pass some form of farm animal confinement law, only to see it voted down, withdrawn, or remain in committee until the session ended.

The first proposed bill, in 2000, was from Florida, where the first ballot initiative was placed and passed.<sup>181</sup> It would protect pregnant sows and veal calves by criminalizing those who prevent the covered animals from “standing up, lying down, or turning around without any physical impediment[.]”<sup>182</sup> The bill’s language, like the constitutional amendment that was ultimately passed,<sup>183</sup> holds violators responsible for a Class 1 misdemeanor.

California, the site of the most recent ballot initiative, also has a history of failed attempts to legislate the issue. The first one, in 2003, was proposed as a restriction on confinement for pregnant sows and veal calves.<sup>184</sup> The only exception to the bill was for veterinary care.<sup>185</sup> During the course of three amendments, the legislature removed the section protecting the pigs, leaving the protections for the calves in place.<sup>186</sup> It also removed the veterinary exception completely.<sup>187</sup> However, the bill was not voted on, and when the session closed, died pursuant to Art. IV, Sec. 10(c) of the California constitution. It was the legislation introduced in 2007, however, that went much further.

Assembly Bill 594, introduced by Representative Mervyn Dymally, prevented “covered farm animals” from being kept:

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178. *Id.*

179. S.C. S. 453.

180. *Id.*

181. H.B. 1029, 102d Leg., Reg. Sess. (Fla. 2000).

182. *Id.*

183. FLA. CONST. art. X, § 21(d).

184. Assem. B. 732, 2003 Leg., Reg. Sess. (Cal. 2003) (as introduced Feb. 19, 2003).

185. *Id.*

186. Cal. Assem. B. 732 (as amended Jan. 5, 2004).

187. *Id.*

in an enclosure for all or the majority of any day that does not provide sufficient space for each animal to stand, lie down, get up, move his or her head freely, rest, turn around completely, and extend all limbs and wings without touching any part of the enclosure or other animals.<sup>188</sup>

This is fairly typical language for the statutes. What is atypical, however, is the definition of “covered farm animal,” which included “any domesticated mammal or bird that is used for food or fiber production.”<sup>189</sup> After the first amendment, “covered farm animal” was redefined to include only pregnant sows,<sup>190</sup> but as part of the second amendment, the entire bill was replaced with one that would specify the extent to which tobacco cessation programs are benefits covered under the Medi-Cal program.<sup>191</sup> Like the 2003 bill, the animal welfare turned Medi-Cal bill died when the assembly ended.<sup>192</sup>

Finally, among the states that have had ballot initiatives, Arizona also had a failed legislative attempt. This one, however, occurred after that states’ initiative had passed. In 2007, state legislators introduced HB 2536, which made the close confinement of laying hens a class one misdemeanor.<sup>193</sup> Like the others, it was never brought to a vote.

Several other states have also considered, but not passed, legislation dealing with this issue. In 2007, Connecticut legislators submitted two bills regulating the living conditions of laying hens.<sup>194</sup> Additionally, one of those bills would have also required that the state only purchase eggs laid by cage-free hens.<sup>195</sup> Also in 2007, Delaware considered a similar bill relating to laying hens,<sup>196</sup> while their neighbors in the Maryland House and Senate considered bills regulating conditions for pregnant sows.<sup>197</sup> This was not the first time, however, that Maryland had considered the issue. Similar bills had been considered in the 2003 House,<sup>198</sup> and the 2003,<sup>199</sup> 2004,<sup>200</sup> and 2005 Senate.<sup>201</sup> Each time they

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188. Assem. B. 594, 2007 Leg., Reg. Sess. (Cal. 2007) (as introduced Feb. 21, 2007).

189. *Id.*

190. Cal. Assem. B. 594 (as amended May 2, 2007).

191. Cal. Assem. B. 594 (as amended Aug. 29, 2007).

192. *Id.*

193. H.B. 2536, 48th Leg., 1st Reg. Sess. (Ariz. 2007).

194. Assem. B. 7304, 2007 Gen. Assem., Jan. Sess. (Conn. 2007); Assem. B. 6775, 2007 Gen. Assem., Jan. Sess. (Conn. 2007).

195. Conn. Assem. B. 7304.

196. H.B. 95, 144th Gen. Assem., Reg. Sess. (Del. 2007).

197. H.B. 1246, 2007 Gen. Assem., Reg. Sess. (Md. 2007); S.B. 821, 2007 Gen. Assem., Reg. Sess. (Md. 2007).

198. H.B. 755, 2003 Gen. Assem., Reg. Sess. (Md. 2003).

were introduced the bills were withdrawn, rejected, or not submitted for a vote after an unfavorable committee report.<sup>202</sup> In 2007, the Vermont Senate considered a bill that would require the state to purchase only eggs from humanely raised chickens,<sup>203</sup> while the House was considering one that would not only direct the purchasing of eggs, but it would also have regulated the living conditions of hens located in the state.<sup>204</sup>

The New Hampshire House also considered, during 2007, whether the state should only purchase cage-free eggs,<sup>205</sup> or whether they should regulate hens' living conditions.<sup>206</sup> Ultimately, however, they decided that it would be "inexpedient to legislate" on these issues.<sup>207</sup>

In 2008, New York considered two bills on the topic. The first would have regulated housing for veal calves and pregnant pigs, and it had the standard language for confinement size and exceptions.<sup>208</sup> Violation of the restrictions would have resulted in a "Class A" misdemeanor,<sup>209</sup> with a potential penalty of up to one year<sup>210</sup> and up to \$1000.<sup>211</sup> The other, A10093A, regulated the housing space required for laying hens.<sup>212</sup> However, this bill went far beyond the language typically found in these proposals. If passed, it would have outlawed all cages for egg-laying hens.<sup>213</sup> Specifically,

[i]t shall be unlawful for any person to confine any hen kept for the purpose of egg production in a cage, except for the purposes of transportation, veterinary care, lawful exhibition at a fair, scientific tests, experiments or investigations performed or conducted in laboratories or institutions which are approved for such purposes by the Commissioner of Health, or lawful slaughter.<sup>214</sup>

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199. S.B. 271, 2003 Gen. Assem., Reg. Sess. (Md. 2003).
  200. S.B. 417, 2004 Gen. Assem., Reg. Sess. (Md. 2004).
  201. S.B. 470, 2005 Gen. Assem., Reg. Sess. (Md. 2005).
  202. *See, e.g.*, Md. H.B. 1246; *see also* Md. S.B. 470.
  203. S. 202, 2007 Leg., Reg. Sess. (Vt. 2007) (as introduced).
  204. H. 311, 2007 Leg., Reg. Sess. (Vt. 2007) (as introduced).
  205. H.B. 332, 2007 Gen. Court, Reg. Sess. (N.H. 2007) (as introduced).
  206. H.B. 552, 2007 Gen. Court, Reg. Sess. (N.H. 2007) (as introduced).
  207. *See, e.g.*, N.H. H.B. 332.
  208. Assem. B. 11340, 231st Leg., Reg. Sess. (N.Y. 2008).
  209. *Id.*
  210. N.Y. PENAL LAW § 70.15(1) (McKinney 2009).
  211. *Id.* § 80.05(1).
  212. Assem. B. 10093, 231st Leg., Reg. Sess. (N.Y. 2008).
  213. *Id.*
  214. *Id.*

While the great majority of these bills were geographically centered on the East Coast, not all of them were. During the 2007-2008 legislative session, both the House and the Senate in Washington considered bills regulating the housing of veal calves and pregnant sows.<sup>215</sup> Additionally, the Senate considered one that would require that hens live in housing in which they could fully extend their wings.<sup>216</sup> As early as 2002, Hawaii considered a bill that, while not regulating the amount of space the animal had access to, would “[i]mplement[] standards developed by the Scientific Veterinarian Committee for proper treatment of pigs in pig farming.”<sup>217</sup> Finally, on January 23, 2008, Senator DiAnna Schimek of Nebraska introduced a bill that would require pregnant pigs to be kept in places that allow them to lie down, stand up, fully extend their limbs and turn in a complete circle without touching the side of an enclosure.<sup>218</sup> Five days later, she withdrew the legislation.

The federal government has also considered bills addressing the issue of animal confinement. In 2006, during the 109th Congress, Rep. Christopher Shays (R-CT) and 15 cosponsors introduced HR 5557, the “Farm Animal Stewardship Purchasing Act.”<sup>219</sup> After being referred to committee, the bill stayed there until the Congressional session ended and it died. During the 110th Congress, it was reintroduced as H.R. 1726, this time by Rep. Peter DeFazio (D-OR) and 29 cosponsors.<sup>220</sup> Again, it died shortly after introduction. These acts would have required that the Federal Government not “purchase any product derived from a covered animal” used or intended for use as food or fiber or to produce food or fiber “unless such covered animal is raised in compliance”<sup>221</sup> with certain standards. Animals not raised in compliance could not be sold for food or fiber to the military, to federal prisons, or for school lunches, to name a few places. To be in compliance, the animal must be provided:

- (1) adequate shelter which allows sufficient space for the covered animal to stand, lie down, get up, walk, move his or her head freely, rest, and turn around completely and fully extend all limbs or wings without touching any part of an enclosure;

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215. H.B. 2085, 60th Leg., Reg. Sess. (Wash. 2007); S.B. 6062, 60th Leg., 2007 Reg. Sess. (Wash. 2007).

216. S.B. 6061, 60th Leg., Reg. Sess. (Wash. 2007).

217. H.B. 2790, 21st Leg., Reg. Sess. (Haw. 2002).

218. Legis. B. 1148, 100th Leg., 2d Sess. (Neb. 2008).

219. H.R. 5557, 109th Cong. (2d Sess. 2006).

220. H.R. 1726, 110th Cong. (1st Sess. 2007).

221. H.R. 5557; H.R. 1726.

(2) daily access to adequate food and water sufficient to ensure the health and well-being of the covered animal without forced feeding or feed withdrawal; and

(3) adequate veterinary care, including prompt treatment or humane euthanasia of a sick or injured covered animal.<sup>222</sup>

The bills, which covered all “non-aquatic farm animal[s], including a pig, head of cattle, chicken, turkey, duck, goose, goat, horse, mule, sheep, rabbit, ostrich, emu, or rhea,”<sup>223</sup> also contained exceptions for transportation, exhibition, research and veterinary care.<sup>224</sup> The bills did not, however, contain exceptions for slaughter or for confinement the week before the animal is anticipated to give birth. There have been no similar bills introduced so far in the 111th Congress.

## V. CURRENT LEGISLATION

Currently, there are several states that are considering laws regarding farm animal confinement. For example, there are three bills pending in the Connecticut Joint Committee on the Environment. All three are very general and exceedingly short. The first had a public hearing on February 9, 2009.<sup>225</sup> It reads, “Be it enacted by the Senate and House of Representatives in General Assembly convened: That the general statutes be amended to require that battery cages in which egg laying hens are confined be of a size that ensures such hens have enough room to spread their wings.”<sup>226</sup> The other two, still in committee, would require “[t]hat the general statutes be amended to prohibit battery cages for egg laying hens, gestation crates for pregnant pigs and veal crates for unborn calves[,]”<sup>227</sup> and “[t]hat the general statutes be amended to regulate the caging of egg-laying hens, including the prohibition of the use of battery cages.”<sup>228</sup>

In Illinois, the proposed bill covers pigs, calves, and hens with the typical protective language.<sup>229</sup> Violation of the statute would be a “Class C” misdemeanor with a potential fine of up to \$500, imprisonment up to 180 days, or both.<sup>230</sup> A similar bill is pending in the Massachusetts House, also covering pregnant

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222. H.R. 5557; H.R. 1726.

223. H.R. 5557; H.R. 1726.

224. H.R. 5557; H.R. 1726.

225. See H.R. 5811, 2009 Gen. Assem., Jan. Sess. (Conn. 2009).

226. *Id.*

227. S.B. 123, 2009 Gen. Assem., Jan. Sess. (Conn. 2009).

228. H.R. 5464, 2009 Gen. Assem., Jan. Sess. (Conn. 2009).

229. S.B. 1337, 96th Gen. Assem., Reg. Sess. (Ill. 2009).

230. *Id.*

sows, veal calves, and laying hens.<sup>231</sup> However, the crime in Massachusetts would result in a misdemeanor conviction, with a potential penalty of up to \$1000, imprisonment of up to 180 days, or both.<sup>232</sup> Another almost identical bill has also been submitted in New York.<sup>233</sup> This one would protect all three species of animals, with the “Class A” misdemeanor conviction carrying up to \$1000 in fines, imprisonment of up to a year, or both.<sup>234</sup>

Another version of confinement legislation is currently pending in Rhode Island. Again covering all three of the animals, it makes violators guilty of a misdemeanor, and subject to a penalty of imprisonment up to 180 days, a fine of up to \$1,000, or both.<sup>235</sup> However, the proposed Rhode Island statute also stipulates that its provisions are “in addition to, and not in lieu of, any other laws protecting animal welfare.”<sup>236</sup> Further, the statute would not limit any “state laws or regulations protecting the welfare of animals,” or prohibit the adoption or enforcement of local laws and regulations on animal welfare.<sup>237</sup>

Another bill, this one in California, takes the farm animal confinement statutes to another level. This proposed legislation, which would become effective on January 1st, 2015, requires that eggs may not be sold or contracted for sale for human consumption in California if it is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in the law resulting from Proposition 2.<sup>238</sup> Violation of this statute is a “misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both that fine and imprisonment.”<sup>239</sup>

## VI. PROPOSAL TO REGULATE FARM ANIMAL CONFINEMENT

With the incredibly high percentage of animals that are raised on farms that hold thousands of animals, this is obviously not an issue that will disappear

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231. H. 815, 2009 Leg., Reg. Sess. (Mass. 2009).

232. *Id.*

233. Assem. B. 8163, 2009 Leg., 231st Sess. (N.Y. 2009).

234. *Id.*

235. H. 6133, 2009 Gen. Assem., Jan. Sess. (R.I. 2009).

236. *Id.*

237. *Id.*

238. Assem. B. 1437, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

239. *Id.*

from the public eye anytime soon. And, in fact, some organizations are doing everything in their power to ensure that it does not.<sup>240</sup> Commercials portraying gestation crates and battery cages, with a voiceover asking for a specific vote or for donations to save the creatures are commonplace in states with an ongoing ballot initiative and in those without.<sup>241</sup>

At the same time, it is an issue that can have lasting effects on both agriculture and an area's economy. A recent study by an Ohio State University professor outlined the potential effects of an animal confinement statute.

Ohio would lose: laborers, livestock and crop producers, and the economy as a whole. Ohio's laying hen enterprise, second only in the nation to that of Iowa and 38 percent greater than that of California in 2007, would be decimated. Applying the latter percentage to the available estimate of job loss in California, Ohio's loss from Prop 2-type legislation would total 7,928 jobs and associated income.<sup>242</sup>

A similar, but more extensive, study was conducted before the California initiative, and it reached a comparable result. In that case, the researchers found that:

[T]he expected impact would be the almost complete elimination of egg production in California within the six-year adjustment period. Non-cage production costs are simply too far above the costs of the cage systems used in other states to allow California producers to compete with imported eggs in the conventional egg market. The most likely outcome, therefore, is the elimination of almost all of the California egg industry over a few years.<sup>243</sup>

With these potential effects looming, it is important that animal agriculture develop and implement a plan to establish a regulatory system that considers

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240. See Humane Soc'y of the U.S., Factory Farming Campaign, <http://www.hsus.org/farm/> (last visited Nov. 30, 2009).

241. Humane Soc'y of the U.S., Yes! On Prop 2: Better Now, [http://video.hsus.org/?fr\\_story=4bcd2ef925605815f7a62b56d4ca9852efa69e5a&rf=bn](http://video.hsus.org/?fr_story=4bcd2ef925605815f7a62b56d4ca9852efa69e5a&rf=bn), (last visited Nov. 30, 2009)

242. LUTHER TWEETEN, OHIO STATE UNIV. EXTENSION, THE ECONOMICS OF ANIMAL WELFARE REGULATIONS PROPOSED FOR OHIO 4 (2009), available at <http://coshocton.osu.edu/ag/animalwelfare%20tweeten.pdf>.

243. DANIEL A. SUMNER ET AL., UNIV. OF CAL. AGRIC. ISSUES CTR., ECONOMIC EFFECTS OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN CALIFORNIA iv (2008), available at <http://aic.ucdavis.edu/publications/eggs/executivesummaryeggs.pdf>; cf. PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA, available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Industrial\\_Agriculture/PCIFAP\\_FINAL.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Industrial_Agriculture/PCIFAP_FINAL.pdf) (harmful societal effects of large-scale animal agriculture outweigh danger to producers).

the health and welfare of the animals, but also allows for flexibility due to changing scientific developments and accepted animal husbandry practices.

The solution that just passed in Ohio and which was included in the initial Michigan proposal, involving the creation of a board to oversee the situation and set standards, allows just that. The composition and appointment of members would be decided on a state by state basis, and chosen by and from residents of that specific state. The board will be able to review animal welfare standards and industry concerns, and work to implement them together into a plan that will accommodate both groups.

Further, the establishment of a board will allow for more fluid changes to animal confinement restrictions. If the restrictions are legislated and codified, then they must be changed through the legislative process. This can make it difficult to make changes as new scientific research is developed and new animal welfare and husbandry standards evolve. For example, Florida's pig-confinement initiative was passed as a constitutional amendment.<sup>244</sup> Their amendment states that it is unlawful to confine or "tether a pig . . . in such a way that she is prevented from turning around freely."<sup>245</sup> However, the majority of the animal confinement laws that have been passed or proposed go further, requiring that the animal be able to stand up, lie down, and turn around without touching the sides of its enclosure. If residents of Florida wished to amend the statute to include other language, they must go through the entire amendment process before the changed restrictions can be put in place. However, if the animal confinement rule was instead a regulation that was issued as a result of the collaborative process of the board, it could be refined and reshaped with greater ease. As new restrictions were established in different parts of the country, the board could consider them when implementing its state's regulations.

Once the board has been established, the next issue is determining the individuals who should be on the board. The board in Ohio is composed of thirteen people, as discussed above. Their members are varied, and include individuals from agriculture groups, humane society representatives, veterinarians, and food safety experts.<sup>246</sup> The original proposal for the Michigan board members would have included the Michigan Department of Agriculture Director as head of the board, along with two veterinarians specializing in food animal and livestock health issues, two individuals directly involved in agriculture production, one

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244. See FLA. CONST. art. X, § 21.

245. *Id.* § 21(a).

246. OHIO CONST. art XIV, § 1(A).

animal welfare and husbandry researcher, one individual representing an animal welfare agency, one individual representing the food processing industry in Michigan, one individual representing the retail food industry in Michigan and one individual representing restaurants.<sup>247</sup>

Overall, the Ohio proposal is the better scheme. While the board setup in the Michigan proposal was the start of a good idea, the proposed members would more likely be too partisan on the side of agriculture to participate in a meaningful debate on the standards that should be implemented. Even the food industry and restaurant industry representatives have an incentive to minimize changes to the existing system, as those changes would lead to a higher input cost for their constituents.<sup>248</sup>

In contrast, the Ohio board includes two consumer group representatives on the board.<sup>249</sup> This will be beneficial because their ideas will open up another avenue of communication in determining what the public considers important in animal confinement requirements. Further, those representatives and the board as a whole will be making decisions based on actual beliefs and standards of the state residents, rather than by responding to the set agenda of national organizations. Finally, allowing the head of the House and the Senate to each appoint one member to the board is a good idea.<sup>250</sup> That allows the state to accommodate a changing balance of power and the potential changes in constituent views that would lead to a different chamber composition.

However, the main drawback to the Ohio board composition is the number of governor appointees that are members. The chair of the board is the state director of agriculture,<sup>251</sup> a appointee of the governor. In addition to the chair, the governor is responsible for seating ten of the remaining twelve committee members.<sup>252</sup> This responsibility could lead to partisanship on the part of the governor, appointing members with a specific stance on the issue.

Further, while some flexibility and change in the regulation is important, as discussed above, giving one individual the ability to nominate so many people could lead to a change in regulations every four years. For the agricultural industry, that might have a devastating effect, as producers might be required to drasti-

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247. H.B. 5128, 95th Leg., Reg. Sess. (Mich. 2009); S.B. 654, 95th Leg., Reg. Sess. (Mich. 2009).

248. SUMNER ET AL., *supra* note 245, at ii.

249. OHIO CONST. art XIV, § 1(A)(2)(g).

250. OHIO CONST. art XIV, § 1(A)(2)(h)(3)-(4).

251. OHIO CONST. art XIV, § 1(A)(1).

252. OHIO CONST. art XIV, § 1(A)(2).

cally modify their facilities in order to conform to new regulations every few years. A better option might be to have the board members be elected officials, with the prerequisite that they may only run for the slot in which they have the proper qualifications. That would also allow the board to have longer terms than the standard four year term given to the governor, and those terms could be staggered, allowing the board to maintain a certain extent of continuity from term to term. While Ohio attempted to address the issue of the terms and conditions of the board members by giving the General Assembly the authority to set the terms of office of the Board members and the conditions for the Board members' service on the Board, it still allows the governor power to appoint the vast majority of those serving.

With new legislative proposals being considered every session for farm animal confinement laws, and the HSUS vigorously pursuing ballot proposals across the nation, these laws, and more importantly, these issues, are not going to just disappear if they are ignored. Animal agriculture must realize that, and take affirmative steps to address the problem before it is answered for them. They can do that by creating a regulatory system that considers the health and welfare of the animals, but also allows for flexibility due to changing scientific developments and accepted animal husbandry practices. This system would be most effectively introduced and maintained through the implementation of animal welfare boards that are responsible for promulgating acceptable standards. In the meantime, however, it is important to know the specifics of the laws that have already been passed, as well as those that have been proposed because, as of right now, states are taking legislative action rather than implementing regulatory restrictions.