



WASHINGTON POLICY OUTLOOK

Chip English

Davis Wright Tremaine LLP

ADPI – Dairy Ingredient Seminar

Shell Beach, California - October 8, 2013

Pretty Much Impossible to Miss –



Washington remains broken (maybe completely)
Do we even have a functioning government?
Farm Bill and FDA - FSMA are still Examples

Déjà Vu – All over again



Caveats and Thanks

Who wants to be a Congressman?

Farm Bill Update – Process

Farm Bill Update – Substance

Federal/California Milk Orders Update

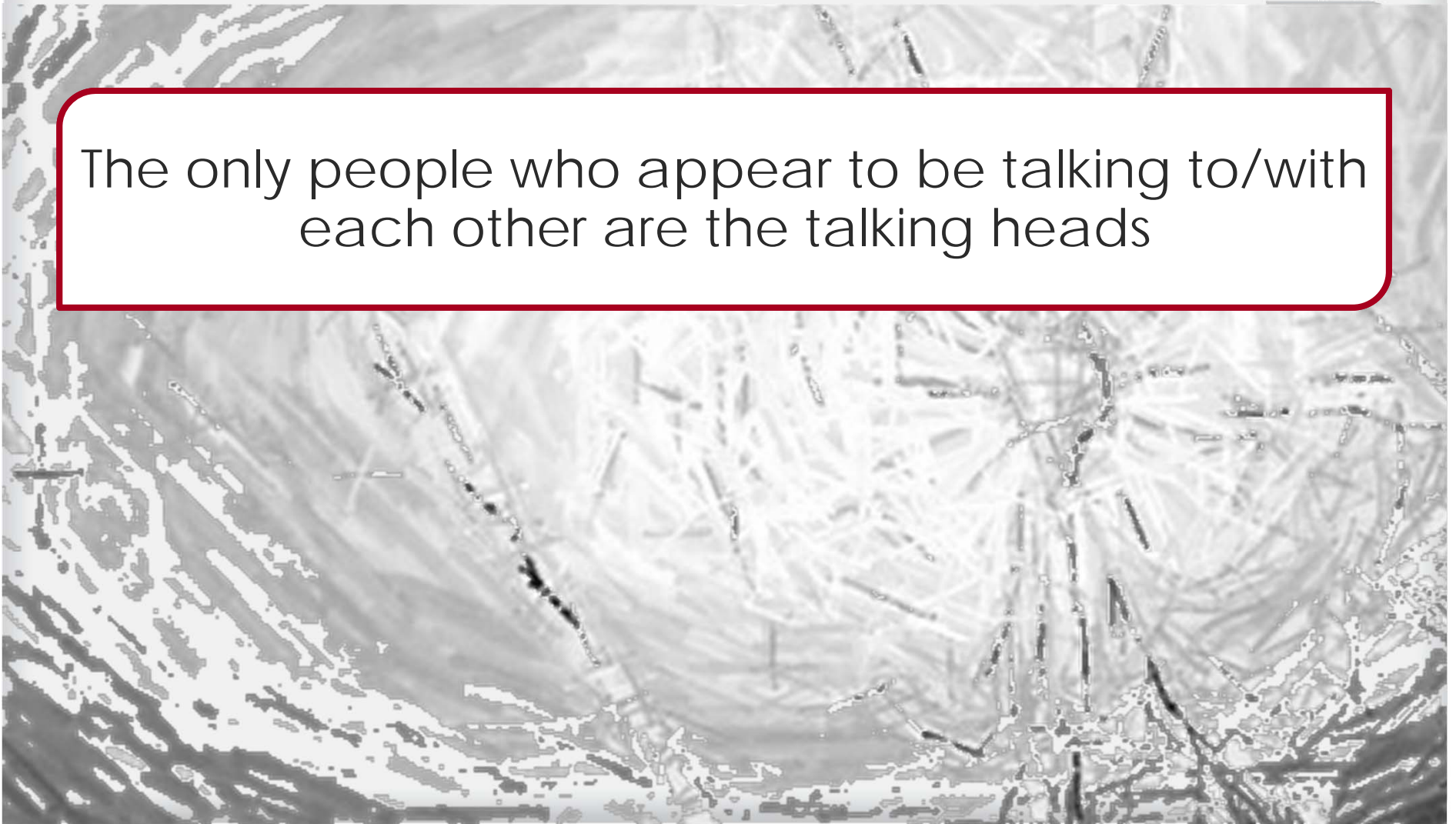
FDA Update

First Amendment and Labeling Issues

Last Year I think I told you, things could not get worse. I was wrong.



The only people who appear to be talking to/with each other are the talking heads



Farm Bill – Process and Substance



1

113TH CONGRESS
1ST SESSION

H. R. 2642

To provide for the reform and continuation of agricultural and other programs of the Department of Agriculture through fiscal year 2018, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 10, 2013

Mr. LUCAS introduced the following bill; which was referred to the Committee on Agriculture

A BILL

To provide for the reform and continuation of agricultural and other programs of the Department of Agriculture through fiscal year 2018, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Federal Agriculture Reform and Risk Management Act
6 of 2013”.

Farm Bill – Process



Senate passed legislation June 10 but the House
but the House rejected its own Farm Bill June 20

Significant Funding Differences – primarily Food
Stamp (SNAP) Program

So House then passed two separate bills – Farm Bill
and SNAP (\$40 Billion in cuts)

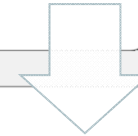
House has not (September 30) appointed
Conferees, but did on September 28 repass one
bill to replace the two separate bills

Farm Bill – Process

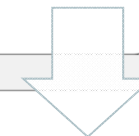


Extension? How long? Of What?

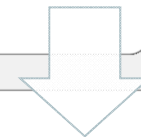
BTW – MILC has again expired – paid \$193M in 2013



Fall 2013 – barely on radar screen in D.C.



Consequences of not having Farm Bill or Extension
– So called Milk Cliff?



Parity Prices effective January 1, 2013 – Milk 75%
of parity = \$37.13 (September 2013)

Farm Bill – Process



All other commodities are based upon crop year, but other than dairy wheat, rice and cotton minimum parity prices are above current market prices

How will markets react if there is no Farm Bill and No Extension –

My own take on so-called Milk Cliff

Like Last Year - Stay Tuned

Farm Bill - Substance



Much remains the same as my report in 2012, but the Senate and House versions have significant differences to resolve –

1. Goodlatte-Scott Dairy Amendment
2. Repeals Permanent Law
3. FDA – FSMA implementation
4. King Amendment
5. Overall funding and of course SNAP



Farm Bill - Substance – Dairy



Replaces Support Price Program with Voluntary Margin Insurance Program

Opponents question whether margin insurance program is really voluntary – will financing institutions require that farmers sign up for margin insurance?

Voluntary margin insurance program is then tied to supply controls when prices are low (Senate Version) – House adopted Goodlatte-Scott

Farm Bill - Substance – Dairy



Some analysis suggests that disincentive to increase production when prices are low can be overcome by very large increase in production – that is if you are going to blow past the caps, you go all in

Repeals present price support program and DEIP, but permanent law remains in place (Senate). House repeals permanent law

Requires USDA to perform analysis of two class pricing for FMMO system

Farm Bill - Substance – Other



King Amendment – designed to counter California's caged hen regulations, permits CA to have its own law, but CA cannot prevent sale of products in California produced elsewhere

Language appears to be very broad. While not likely as broad as some environmental critics, creates litigation risk especially in my opinion (which is not shared by all) as to California Fluid Milk Standards

Farm Bill – Conference

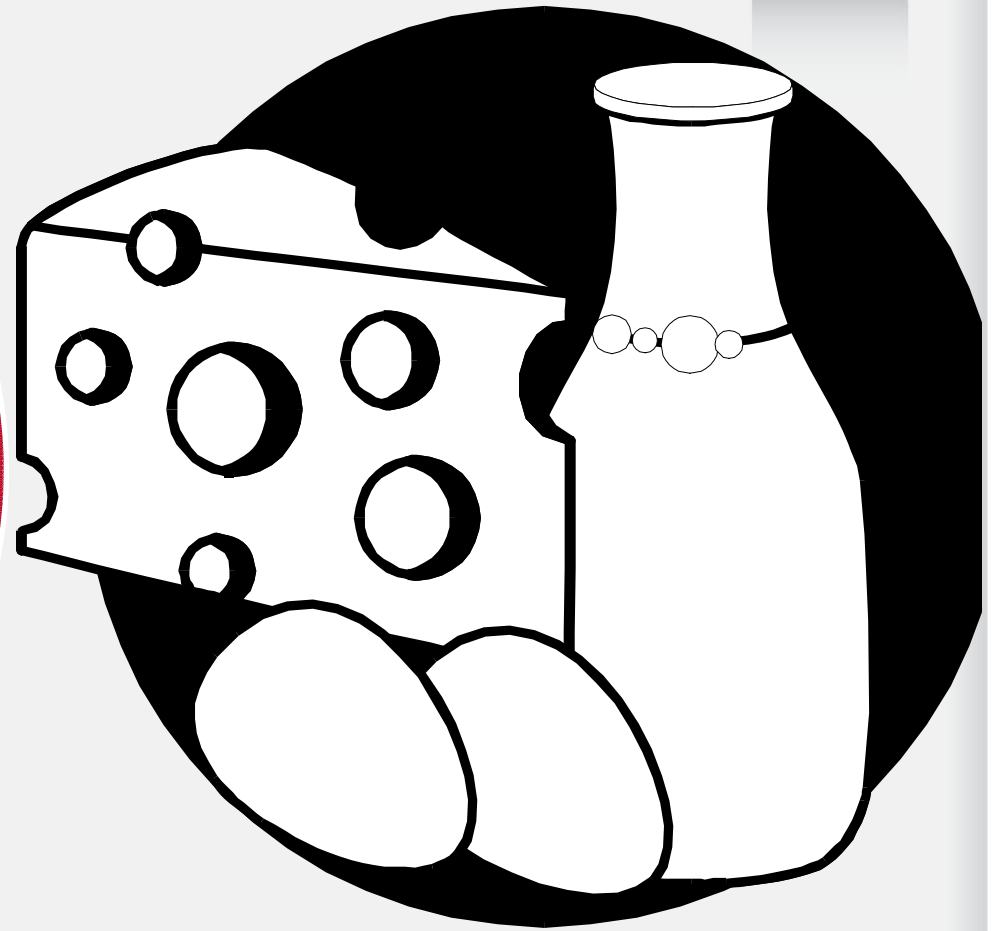


- How does all this get fixed?
 - What major differences can Senate live with?
 - Can a conferenced bill pass the House?
 - How?
-
- This is why most observers predict another extension
 - Why even that is poor option

FMMO Update



Generally Another
Quiet Year
But



FMMO Update



- Northeast Agriculture Commissioners led by Maine are seeking solutions to FMMO pricing/cost of production issues
- No proposals submitted to USDA (yet)
- Northeast has some unique challenges – Class I (use dropping) and Class II (use increasing)
- Decoupling may be on the table – my view.

FMMO Update



- Open question this fall as to FMMO ability to move milk to where it is needed.
- Milk supplies in September (east) tightest since 2006
- Order 1 – Call Provision eliminated in FMMO Reform (1999). One goal of FMMO Reform was greater uniformity among orders.
- Goal made sense, but reality is that FMMO markets are different

California Updates



Continued widespread farmer dissatisfaction with California milk pricing due to perception that differences in whey factor in formulae depresses CA price relative to FMMO price

FMMO price is not legally effective in Idaho – but appears to be starting point



California Updates



FMMO plants not required to pay FMMO minimum prices for milk purchased from other handlers; also split plant operations permitted with some milk not subject to pricing

Still CA dairy farmers unhappy – lost Mandamus action in California state court, multiple CDFA hearings, and much difficult fighting in Sacramento in Legislature

CA dairy farmers actually seriously studying FMMO option.

Be careful what you ask for?

FDA – Food Safety Modernization Act Implementation



FDA has published Proposed Rules for most major categories, but not sanitary transport or intentional adulteration

Statutory Deadlines have passed

Most comment periods expire in November 2013

Litigation against FDA over non-implementation of FSMA



Center for Food Safety Sued FDA in California
Seeking Mandamus

FDA now subject to mandatory timelines

All comment periods must close by March 31,
2014

All Final Regulations must be published by June
30, 2015

Litigation against FDA over non-implementation of FSMA



FDA says it cannot meet some deadlines

Prevention of Intentional Contamination

Sanitary transportation standards

FDA appeal to 9th Circuit

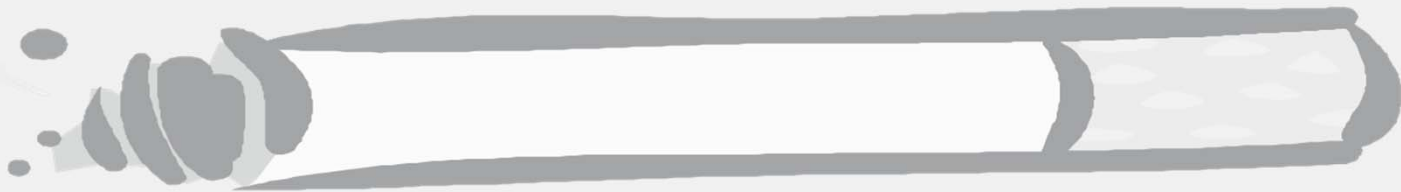
And remember the Farm Bill Amendment

Update from last year's program – the First Amendment



Cigarette warning labels required by FDA held unlawful by lower courts, but case is likely headed to U.S. Supreme Court and major disagreement among First Amendment lawyers as to outcome.

Remember you should care because If FDA can regulate cigarette labeling, why not whole milk labels?



Update from last year's program – the First Amendment



FDA Standards of Identity have never really been challenged.

Recent “dispute” over flavored milk raises real issues.

But Commercial speech still subject to greater restrictions than political speech

Food Labeling – A Real Word of Warning



This is growing trend.

Example – Challenge Butter Spread with Canola Oil



Questions?



Chip English
Partner
202.973.4272
chipenglish@dwt.com

About Davis Wright Tremaine



- Over 500 lawyers
- Full-service transactional, litigation and regulatory practices
- Strong industry teams, particularly in communications, media, technology, health care, energy, financial services, hospitality and life sciences

