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Cari Rincker[1]

MS. VAUGHT: The *Tennessee Journal of Law and Policy* seeks to facilitate meaningful conversations about current issues in law and policy, both in our printed journals and this event every year. Today we have a unique opportunity to do just that. We have not only an outstanding range of speakers joining us, but we also have great diversity of perspectives here in our audience. Whether you are an attorney, agriculture professional, producer, educator, student or community member, we all bring a different point of view to the conversation today, and it makes sense that we are gathered here at Tennessee's land grant university to discuss how the law affects agriculture, which is our state's number one industry. There are a lot of factors impacting food and agricultural law today, and we will be discussing many of these issues. This morning we will hear about some moving trends in agriculture, including agritourism, community supported agriculture, and direct marketing to consumers. Next, we will discuss some Tennessee law and policy issues, and in the afternoon we will have a panel discussion on agricultural technology, followed by a look at professional responsibility and representing agricultural clients.

Our first presentation is going to be from Cari Rincker. She's a general practitioner in New York City with concentrations in food, agriculture and family law. She is licensed to practice in New York, New Jersey, Connecticut, Illinois, and Washington, D.C. Before starting Rincker Law, she was an associate at Budd-Falen Law Offices in Cheyenne, Wyoming, where her broad practice areas ranged from agriculture, environmental and natural

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resource issues to federal lands, wind energy development, crop insurance, property law, commercial law, and probate. Cari grew up on her family's cattle farm in Shelbyville, Illinois. She received her Bachelor's of Science in Animal Science from Texas A&M and was selected to participate in the Congressional Agriculture and Natural Resource Policy Internship Program. She then attended the University of Illinois and received a Master's in Ruminant Nutrition where she focused on beef feedlot nutrition. Cari received her law degree from Pace University School of Law in White Plains, New York, where she also completed certificates in both environmental law and international law. Everyone join me in welcoming Ms. Rincker.

MS. RINCKER: Everybody has their coffee, right? I'm going to talk for the next hour on a lot of different topics, so I hope everybody is caffeinated. I have a very substantive outline. In fact, it's 42 pages long. I really hope you take this home; it will be a great resource for all of you. I will be referring to different page numbers today for those of you that brought your laptops or iPads and will be following along on the outline. As Laura said, I'm a cattle girl. I grew up in Central Illinois on a cattle farm. I grew up showing cattle through 4−H and FFA. I was a livestock judge. I still am a livestock judge. I judge county fairs in upstate New York and throughout the country. I have degrees. My undergraduate degrees are in agriculture and animal science. I have a master's degree. I wrote a thesis on ruminant nutrition. I went to law school out east, so that's what took me out there. I'm also the Chairperson of the American Bar Association, general practice, solo and small firms, Agricultural Law Committee. That is certainly a big mouthful. For those of you that are attorneys in the room that are looking to get more involved in the Agricultural Law Committee, please reach out to me; we would love to have you be a member of our group. We do have a listserv

and we offer CLEs. We just had one actually on insurance for farmers, food entrepreneurs and agribusinesses and one next month on intellectual property, so please reach out if you are at all interested in that committee.

I have offices primarily in New York City. I'm right there in midtown Manhattan and I recently got a bar license in my home state of Illinois. I do have an office there as well. I work primarily with agricultural producers, so farmers, ranchers, livestock producers, but also small to midsize agribusinesses, and increasingly, food entrepreneurs; the people making jams and jellies in their kitchen and selling them at farmers' markets. I represent those types of clients as well.

Today we are going to be talking about a whole slew of topics. We are going to start off by talking about the Veterinary Feed Directive. I actually just spoke on this topic in Missouri. The final rule just came out in June, so I think it's very timely to go ahead and begin with that topic. Then, we will be moving into the Waters of the United States. Seems to be a hot topic right now, with the Syngenta litigation. I will briefly discuss Food labeling law, because John Dillard is going to be going into more detail on that later on this afternoon. We're going to move into a couple food safety issues, specifically raw milk and the Food Safety Modernization Act. Then move into what's going on with Idaho Ag-Gag law and cannabis law. That, by the way, is the first time I have ever said that in a presentation. I am going to talk very briefly about medical marijuana, and then to close today, if we have time, with the Farm Bill.

Let's move on to the Veterinary Feed Directive, and I actually spoke on this topic, not directly with the Veterinary Feed Directive, but with the laws regulating

antibiotics, with the New York State Bar Association, Committee on Animal and the Law in June. I have a very substantive outline on my JD Supra page. If you just Google Cari Rincker and JD Supra, you will come across this outline that goes into copious detail about laws regulating antibiotics. Briefly today, I'm just going to set the groundwork for those of you that aren't familiar on just the difference between antibiotics and antimicrobials. An antibiotic is actually a type of an antimicrobial, but not all antimicrobials are antibiotics, so it's really important, as people in the agriculture legal community, not to use those words interchangeably.

Who are the players with all this? There are three government agencies that regulate antibiotics with animals. It's primarily going to be the FDA, but the USDA certainly plays a role. It regulates antibiotics in meat, poultry and eggs, and that's through three different sub-agencies, principally two of them, but the Food Safety Modernization Act, this is the big one. These are the people that have the inspectors at the plants. They are seeing if there are any violations that are taking place there with these meat animals. The Agricultural Marketing Service, which regulates the National Organic Program, which prohibits antibiotic use. APHIS, the Animal and Plant Health Inspection Service. The FDA is the biggy. All antibiotics need to be approved by FDA. It's regulating food and drugs and livestock, excluding, though, meat, poultry and eggs, which is regulated by FDA. Then we have the Center for Disease Control, and this is under the HHS umbrella, and its big role is that it has a sub-agency, which is the National Antimicrobial Resistance Monitoring Program System, and it has a few other players that sit at the table from the USDA and FDA, and it's just sort of monitoring here with the antimicrobials resistance. As I said, new animal drugs get approved by the FDA, and under the new rule that just

was published in June, that's still the same, so the FDA is the big dog with that capacity.

So prior to 1996, the FDA had two options for distributing drugs. They were either over−the−counter or prescription. That was it. Those were the two options. At the time, the Federal Food, Drug and Cosmetic Act didn't require prescriptions for medicated animal feeds. It was viewed as being impractical, because feed mills, they need to have a pharmacist basically on−site to dispense these prescription animal feeds. Then Congress in 1996 enacted the Animal Drug Availability Act. So before 1996, we had over−the−counter and prescription. Those were the only two options. This law said, okay, we are going to have a third middle ground, it's going to be called the Veterinary Feed Directive, and then the FDA a couple years later came out with the rule on the Veterinary Feed Directive. Prior to learning about all this, I thought the Veterinary Feed Directive was a new thing, but it's not. We have had it actually since 2000. So we had the first rule published in 2000 and the second rule just came out in June. So what Veterinary Feed Directive does, it requires certain medicated feeds that the veterinarian has to then issue basically a piece of paper, which is called the Veterinary Feed Directive, for that producer to have that medicated feed.

Right now there are few drugs that are out there that actually require a Veterinary Feed Directive. I was recently home in Illinois for my family's cattle sale and I was able to talk with my hometown veterinarian about this, and he was basically telling me that he's had very little experience with the Veterinary Feed Directive, because there's been so few drugs, medicated animal feeds that require it, but nonetheless, he has had some. So what is happening now with the new rule is that almost all of the medicated animal

feeds are going to require this Veterinary Feed Directive, so it's forcing the veterinarians to really get down to business there with the VFD. So with the old law, we didn't really have a whole lot, and then there was a public outcry about this, and so this is the FDA's response then to the concerns dealing with antibiotics. As I just said, the Veterinary Feed Directive is actually the written statement from the veterinarian about the medicated animal feed that authorizes the livestock producer to go ahead and use that feed and also the feed mill for issuing the medicated animal feed.

The final rule that just came out in June is actually the third of three major publications from the FDA on this topic of antibiotics. Remember, the first VFD rule came out in 2000, so then the FDA started to get concerned about it. Publication 1, which is the guidance for the industry, GFI 209. The exact publication is also listed in your outline. It talks about the judicious use of medically important antimicrobial drugs in food−producing animals. Then Publication 2 came out I think in 2012−2013 timeline that talk more about the new animal drug and new animal drug combination products. These are also available on FDA's website. They are very easy to find for those of you that want a little bit more background information. Basically the final rule that came out in June 2015 built off of these two publications.

Let's talk a little bit about what's required now under this new rule. I'm going to go through each of the stakeholders, primarily talking about veterinarians first and then moving onto livestock producers, very briefly touching on feed distributors and drug manufacturers. With veterinarians, one of the big issues now is that they must be in compliance with what's called the veterinarian-client-patient relationship. A lot of states actually have laws

requiring this already. That law must at least meet the federal standard here, which requires that the veterinarian engage with the livestock producer and assume responsibility for making medical judgments about the animal's health; two, the veterinarian have sufficient knowledge of the animal by virtue of examination and/or visit the facility where the animal is managed to initiate the preliminary diagnosis; and three, to provide for necessary follow−up evaluation or care. As I mentioned, a lot of states already have laws with this, but some states don't, and for those of you that are wondering whether or not your state has one or not, FDA is actually coming up with a list here in the next few months to help give the public and the veterinarians more information on whether or not their state complies with that. I do not know what the law is here in Tennessee on whether or not you have a veterinarian-client-patient relationship statute, but this is something to certainly think about.

Now, a couple weeks ago I was in Missouri, as I said, talking about this. I was speaking in front of the United Producers, which runs a lot of the sale barns, and there was actually a veterinarian that was there who was an extension specialist with the University of Missouri, and he was basically explaining that what this is going to require now is some face time between the veterinarian and the producers. These veterinarians are going to have to make more on−farm visits and invariably the producers are going to have to get charged for those on-farm visits, which might mean that they have less money for attorney's fees, right? So that's really what's going to be happening here, is that the veterinarian is going to have to come on-farm to see the animals themselves. Then to be clear, the veterinarian, once they are on the farm, they are going to be issuing this Veterinary Feed Directive that is in compliance with this new law.

Extra labeling use is not permitted. For those of you in the room that aren't familiar with what extra labeling use is, it is when a producer uses an antibiotic or some kind of medication contrary to what the directions say on the label. An example might be a different species. Maybe the medication is supposed to be used, under FDA approval, for cattle only and it's used for pigs or vice versa or a different dosage was used for a longer period of time. These are examples of extra labeling use, which happens, and which does happened in unique circumstances under the care and direction of the veterinarian. Under the new rule, extra labeling use is not permitted. It's going to be pretty strictly enforced. I said this comment in Missouri and that veterinarian popped up and he said extra labeling use has never been legal. I guess I just wanted to make that clear. I think it is a change, but you talk to veterinarians out there and, well, this wasn't actually prescribed before under the current law.

So let's get down to business with the Veterinary Feed Directive, what is required, what is optional, what needs to be on this fancy piece of paper. For those of you that are following along in the outline, I'm on page 34. The Veterinary Feed Directive, it makes sense, needs to have the vet and the livestock producer/client information, and it needs to have the premises at which the animals are located. A few weeks ago a livestock producer came up to me and said, well, what if it's with two different premises, do I need two different Veterinary Feed Directives? I don't know, and the regulations aren't really clear on that. I think the answer to that question will be answered here over time. My inclination is, yes, it's going to need two different Veterinary Feed Directives; one for each premises. The date of the issuance, the species, are we talking about cattle, goats, chickens? It must include the

name of the VFD drug. This makes sense. That name could be a genetic name. Is substitution allowed? This type of information needs to be included. It must also include an expiration date. Please note that the vet can write a date up to six months, so they can have this medicated animal feed for a six-month period of time, at which time there needs to be a new prescription or a refill.

A couple other requirements: The approximate number of animals to be fed, the expiration date, as I just mentioned, the drug level and the duration of use, the withdraw time of the medicated animal feed, any special instructions or cautions, the number of reorders or refills, if any, are permitted. It also must have the statement here that says the use of feed contained in this Veterinary Feed Directive drug in a manner other than as directed on the labeling is not permitted. So as I just said, extra labeling, can't do it now under the new rule. Veterinarians would say they couldn't do it before anyway. This is going to be very conspicuous on the VFD. VFD must also include an Affirmation of Intent. What the heck am I talking about? Well, if you look on page 35 of your outline, I'm offering three different choices for this Affirmation of Intent. It has to do with basically whether or not the medicated feed can be used in combination with other drugs. It also needs a veterinarian to sign it, either electronic or in written form.

As I mentioned, the VFD must include the premises ID, but it may include some additional information. And if any veterinarian comes to my office, I'm going to advise that person the more information that you can give on this I think the better. Here is some optional additional information: The location, the PIN number, you might include the specific PIN information, the description, they're Holstein, they're spotted, they're black cattle. The more description there about the cattle themselves, the

weight, the age, anything extra about the animals can go ahead and be included.

Importantly, there is no uniform form right now for this VFD. You can't go on FDA's website and the veterinarian can't print out this form that's in compliance with all these requirements. Part of the reason why I'm lecturing this here today is because I'm hopeful that maybe a veterinarian might go to one of you and say, hey, is this in compliance and you can go through the checklist to see that. Realistically they might not do that. They're probably going to work with some extension educators and kind of come up with their own form, but every veterinarian might have different forms but can still be compliant with all this. So this is something that you as practitioners could sort of help out with, with the compliance review with the veterinarians. The veterinarians then have to keep the original copy. They give one copy to the livestock producer and another copy to the feed distributor, and then with the original copy, they have to keep it for two years. If they are dealing with hard copy, they have got to keep the hard copy. If they are dealing with electronic copy, they've got to retain an electronic copy for two years, which, by the way, just that two-year retention period was, I guess, a little controversial, but I don't make the rule, I just let you guys know what it is.

Let's talk about the livestock producer requirements. Let's talk about what livestock producers need to do. They can't dispense a medicated animal feed without this VFD. They have to go to the veterinarian to go ahead and get this. They also have to maintain these records for two years. They have to keep an original, here again, hard copy, electronic copy, whatever form that it comes, for a two−year period of time, and these copies, by the way, must be available to the FDA upon the inspection.

We will talk about this in just a second. The FDA isn't going to come by to every single farm and check everybody's records. It's going to be a little bit more for-cause. So if the FDA thinks that there's a violation, they're going to come on the farm and that producer better have their records pretty well organized so they can easily show the FDA inspector that they have complied with the Veterinary Feed Directive. Livestock producers also cannot feed the VFD after the expiration date, so this is something to really stress to your clients as well, that even if they have feed left over, maybe the feed mill gave them too much or maybe, for whatever reason, the animals just didn't eat it, so they have feed that is left over after the expiration date, it cannot be fed. That's something to make sure that your client really strictly adheres to.

Let's discuss feed distributors. The feed distributors obviously cannot dispense this medicated animal feed now without this Veterinary Feed Directive, and here again, they have to maintain these records for two years in whatever form it came, electronic or hard copy, and also it must be available upon inspection of the FDA inspector. I wanted to note here with this recordkeeping requirement that if you were actually manufacturing the medicated animal feed, that you only need to keep the records for one year, so everything else is two years, but if you are manufacturing it, it's only for one year, which is a little bit of a controversy right now. Then the feed distributors also have to provide for one−time notifications to the FDA and say, hey, I'm going to be distributing these medicated animal feeds, and this notification just needs to have some basic information, and the feed distributor needs to do this within 30 days. This actually goes to Bethesda, Maryland, to the FDA, Center of Veterinary Medicine, Division of Animal Feeds. Interestingly, if one feed distributor is distributing medicated animal feeds to another feed distributor, then the

receiving feed distributor needs to send what is called an Acknowledgment. This Acknowledgment is just another requirement on feed distributors. For drug manufacturers, we have got another requirement here with language on caution. Federal law restricts medicated feed containing this Veterinary Feed Directive drug to use by and on the order of a licensed veterinarian, and for those of you that want to look at the regulation, 21 CFR 558.6(a).

As I mentioned before, with FDA enforcement, FDA can come by for a for-cause inspection here. I don't think that they are going to have really deep tentacles and hopping by from farm to farm, to feed distributor to feed distributor on a regular basis, but if they think there's a problem, the FDA is going to come by to make sure that your clients definitely have their records in order. The new rule that was just published in June is actually going to be effective next week, October 15th, and then from that point forward, different drugs are going to be rolled out, so they're going to move from OTC, over-the-counter, to being a Veterinary Feed Directive drug, and that change is going to actually take place over the next few years through January 1, 2017. Yes?

UNIDENTIFIED SPEAKER: Ms. Rincker, do the feds partner with the state agency, Tennessee Attorney General, in the compliance and enforcement?

MS. RINCKER: So right now I'm not fully aware –– and that question actually came up last month in Missouri. I would say probably, it's going to probably happen, but right now it's a little unclear on whether or not the State Department of Agriculture is going to get contracted out for inspection, so probably so. Who here is a little confused about this? Anybody else? I'm actually really confused about this, and that's actually part of the

problem, that there's a lot of confusion. None of us really understand it. The courts don't understand it. Definitely people in the agriculture industry are a little confused. That's why we have the litigation that we have right now in this area.

Waters of the United States, the statute that I'm really referring here to is the Clean Water Act. So it all started with this court case with Mr. Rapanos. Mr. Rapanos in Michigan wanted to build a shopping mall by a wetland. He wanted to fill in the wetland, so he built up this shopping mall. The Michigan Department of Environmental Quality said, you can't do that, this is a federally protected land, you have got to get our permission first, and then the EPA even came in with a cease and desist and said, uh−uh, Mr. Rapanos. Mr. Rapanos didn't care, so he went forward, and this resulted in a civil suit against him by the United States. Mr. Rapanos argued that the Clean Water Act in this case gave the government jurisdiction to regulate only traditionally navigable water, while the government argued that the lands were adjacent wetlands and they were covered by the Clean Water Act.

At the district court level, the court actually sided with the government. Mr. Rapanos, you are wrong, the government is right, and then it was appealed all the way to the Supreme Court. On appeal, the Supreme Court action came down with a five−four opinion and said that the government's argument here is overly broad, that the definitional term of waters in the United States can only refer to relatively permanent standing or flowing bodies of water, not occasional, intermittent or ephemeral. With this opinion, Justice Kennedy, in his concurring opinion, started going on and on and on about how there needed to be a significant nexus to navigable waters. He suggested a more liberal, broader view, of this regulation in his concurring

opinion, which gave the EPA the great idea, let's implement this in a rule. That's essentially what happened.

This rule was actually published in June 2015. Lots was happening this summer with all this and it became effective just recently, about six weeks ago, on August 28, 2015. So what does this rule say? This is an EPA rule under the Code of Federal Regulations. It says that there are six types of waters that are categorically within the federal jurisdiction. What are those six types? They are traditional navigable waters; two, they are intrastate waters, including intrastate wetlands; three, territorial seas; four, the impoundment of jurisdictional waters; five, tributaries; and six, adjacent waters. These we know the government has jurisdiction under the Clean Water Act. Then there are two categories of water on which a case-by-case determination is made: Government/not government will make a case-by-case determination. What is it? Two different things: We have got members of very specific bodies of water. For example, on prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California or Texas coastal prairie wetlands. These case-by-case determinations are going to be made. The second one − and this is the kicker, this is the one where all the fuss is about − a water body that, due to its location within a certain distance − it doesn't say X number of miles, it says a certain distance from a high tide or a high water mark of jurisdictional water − has a significant nexus to that water.

I mentioned before with Justice Kennedy's concurring opinion on the *Rapanos* case, this is where he was gabbing, gabbing, gabbing about the significant nexus, which is where the EPA got that language. What in the world is a significant nexus? Well, we don't know, but this is what the EPA has said: having a significant nexus means that water, including wetlands, either alone or in a

combination with other similarly−situated waters in the region, significantly affects the chemical, physical or biological integrity of waters used in interstate commerce. What does that mean? Well, I don't know and nobody really knows right now, which is why North Dakota filed for a preliminary injunction basically saying we need more information, we don't understand this, and in the meantime we are going to stop what's happening here with the enforcement, and other states joined, 13 states to be exact: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico and the Dakotas and Wyoming. They claim that the new WOTUS rule is a threat to state sovereignty because it asserts federal jurisdiction over wetlands and waters that should be subject to state control. So they are arguing it's overly broad. What is the status of the litigation? Well, there's a PRO right now and that's sort of the status with WOTUS. Makes a little bit more sense? Clear as mud? Yes?

UNIDENTIFIED SPEAKER: That PRO, does that apply just to 13 states, or did they extend that to the entire United States? There has been a little bit of confusion about that.

MS. RINCKER: Right. That's a good question, and if anybody knows the answer to that, please, Mr. Dillard?

MR. DILLARD: EPA kind of made the announcement that they are going to move forward under the assumption that it applies to just 13 states. North Dakota's Attorney General went back to court to say no, this should be a national injunction, and that was denied, so, yeah, it's just the 13 states.

MS. RINCKER: So we are going forward, and really the issue with this is, we don't know what this

means. This is really vague, and then it's talking about a certain location, a certain distance, from high tide or high water, a significant nexus. What in the world does this mean? That's really the crux of a lot of the confusion here.

Let's talk very briefly about the Syngenta litigation, and the reason why I'm bringing this up is because I'm from Illinois, corn country, and a lot of farmers have been calling my parents' house and calling my office and what does Cari think about this, I'm getting this in the mail, should I join this lawsuit, should I not join this lawsuit? I think it's good to just be generally aware about what's happening here with this litigation. I'm not involved with this case in any capacity right now. In 2013, China refused to accept shipment of corn that contained Syngenta's MIR 162 trait. That's basically for insect resistance. For those of you that are following along in the outline, I'm on page 11. China rejected this because the GMO had not yet received a safety certification from China due to incomplete submission of materials and statistics by Syngenta. So China ended up rejecting 887,000 tonnes. That's actually spelled t−o−n−n−e−s because that's a metric ton, which I have just now learned. A metric tonne is about 2,200 pounds or 1.1 tonne.

Due to the presence of this trait, China was just rejecting everything they thought that might even have this trait, and because China was rejecting all this, this arguably caused a decrease in the market of all U.S. corn, not just the corn with MIR 162, but all U.S. corn, which is why − and I'll talk about here in a second the class action suits – many are inviting all corn producers to join hands. This allegedly has caused more than $1 billion in losses to U.S. farmers. There have been a few lawsuits. I'm on page 12 of your outline right now. The first one was actually filed by Cargill in September 2014, and Cargill argued that

Syngenta allegedly − they broadly commercialized a new product before receiving approval from a key export line like China. Then Transcoastal, for those of you that aren't familiar with Transcoastal, they are a major exporter of livestock feed products. They sued Syngenta for $41 million. We have these two lawsuits by companies, and then we also have lawsuits by farmers.

Essentially what has happened here, there were a few different lawsuits. They basically now have been consolidated into this case in Kansas. It survived the motion to dismiss and is currently waiting for class certification. My father even got this letter. There are many law firms that are involved in this class action lawsuit against Syngenta. With food labeling, John Dillard is going to be talking about GMO labeling here this afternoon in the Vermont litigation, so I want you to sit tight and wait for his lecture on the topic. I do have a lot of information in your outline on this, so please go ahead and refer to that, but essentially John will give the background on that. Vermont passed a law stating that starting in July 2016, so next summer, that all foods sold in Vermont must be labeled stating that it contained GMO, so sit tight for John's lecture on the topic.

We have come to origin labeling. Is anybody else a little exhausted with this topic? I feel a little exhausted, because I just feel like there's been a lot of drama over this. Canada sued, WTO, the World Trade Organization, then Mexico joined, and a whole series of different arguments. For those of you that aren't familiar with Country of Origin Labeling, it's this: Look at the label here, you see how we have the country of origin, from cattle born in Mexico, raised and slaughtered in the United States. The label actually has to say where the cattle were born, raised and harvested, and they can be different countries, like this one

here, born in Mexico, raised and harvested in the United States. We are dealing mostly with meats, also fresh and frozen fruits and vegetables, peanuts, pecans, Macadamia nuts, and Ginseng.

In October 2014, so about a year ago now, the World Trade Organization ruled in favor of Canada and Mexico in this dispute over COOL. My secretary, as she was proofreading my presentation today, I had MCOOL. For those of you that aren't familiar, that means Mandatory Country of Origin Labeling, and the reason why I make that distinction is because previous to that, it was voluntary, so it was VCOOL, and then it turned into MCOOL. It's just COOL, the WTO stated they unfairly discriminated against meat imports and gave an advantage to domestic meat products, because the consumer is only going to buy beef that has been born, raised and harvested in the United States, and I'm going to discriminate against products that were perhaps raised in Mexico or Canada, and this is under NAFTA, the North American Free Trade Agreement. That's the issue here. However, the WTO compliance panel found the labels abide with consumers with information regarding the source of meat and dismissed Canada and Mexico's claim that the labels did not serve their intended purpose.

After the October 2014 ruling, the United States appealed to the appellate body within the WTO decision, but the appellate body said forget that, you're wrong, United States, you need to go back and change your law. This just happened in May 2015. In June 2015 − we had a busy summer with food and agriculture law − in June 2015 Canada requested authorization from the WTO to suspend application of certain tariff concessions for the United States for burdening the WTO Free Trade Law under NAFTA. The United States objected to this level, which

tariff concessions would be suspended, and then the Canadian government claimed that requiring COOL on meat has cost them a combined $900 million in losses. Where are we today in June 2015 following this WTO ruling? The U.S. House of Representatives passed the bill to repeal COOL for beef, pork and chicken in order to possibly avoid billions of dollars in tariffs that could be imposed by Canada and Mexico, and it's anticipated this is going to face opposition in the senate. Stay tuned for what's happening with COOL.

With food safety, I'm going to talk a little bit about raw milk. I get a lot of questions about this, the Peanut Corporation of America trial, and close with FSMA, Food Safety and Modernization Act. For those of you that are following in the outline, I'm on page 21, and for those of you who are not familiar with what raw milk is, it's basically milk that has not been sanitized yet, pasteurized to kill the bacteria. Proponents of raw milk, they're activists, they love it, they think that it helps with allergies and asthma.

Federal law prohibits dairies from distributing raw milk across state lines in final packaging ready for consumption, but it may be distributed across state lines if it's going to be pasteurized or used to make aged cheese. The sale of raw milk is completely prohibited in 18 states, and I highlight New Jersey because I'm bar licensed there, but it's completely prohibited in these 18 states. Raw milk in 17 states restricts the sale only on the farm where milk is produced, along with specific labeling requirements. I just wanted to also note that Tennessee is on this list of these 17 states, and from what I gather, that in Tennessee, herd leasing programs, cattle shares and goat shares are prohibited. Did you have experience with the cow shares or goat shares?

UNIDENTIFIED SPEAKER: Cow shares are legal in Tennessee.

MS. RINCKER: They are. They are not prohibited. They are allowed under cow shares, goat shares and herd leasing programs. In the 16 states they allow the sale of raw milk at retail stores separate from farms where milk was produced with appropriate labeling. Connecticut is another state that I work in; for example, it could only be sold at farmers' markets. There's been a couple court cases. I just wanted to note a few of them. I'm on page 22 of your outline for those of you that want to get the case citations that have a little bit more detail about this litigation. One is *The Organic Pastures v. FDA*. In 2012, the U.S.'s largest raw milk dairy sued the FDA for failure to respond to a petition by The Organic Pasture to have law changing banning the sale of raw milk across state lines. Then there was another lawsuit that happened more recently in April 2015. A Santa Cruz, California, resident commenced a lawsuit against a farm company after he became ill with bacteria from drinking tainted raw milk that led back to this dairy.

With food safety, I wanted to note this court case for a few reasons. First of all, I found out about this from the American Agricultural Law Association's listserv from Professor Richardson. So for those of you that want to get more involved in about what is happening in agriculture law and policy, I highly recommend getting involved with American Agricultural Law Association. It's a very helpful listserv that sends updates to various court cases on their happenings.

In way of background, in 2008 a salmonella outbreak was traced back to a peanut butter manufacturer

that ended up killing nine people and sickened 714 across 46 states. In September 2014, after a seven-week jury trial, the former CEO of this company and his brother were found guilty of 76 counts linked to intentionally shipping out salmonella-contaminated peanuts. In September 2015, they were sentenced to 28 years in prison for knowingly shipping out deadly food. He was given a 20-year sentence while Mary Wilkinson, the plant quality assurance manager, was sentenced to five years, so the CEO had to serve four times as much time as the quality assurance manager. Why do I share this information with you? Number one, I think it's always good, as agricultural lawyers and food lawyers, to have a little bit of horror stories to tell our clients to get them to straighten up and really listen to us and to really pay attention to the laws and the regulations in his this area, because this is a nightmare for company and this person.

Second, I wanted to also put in a little note that in two weeks in Charleston, South Carolina, I will be monitoring a panel on multimedia use for attorneys on how to deal with these types nightmare cases from a public relations standpoint. I was having this conversation with Laura last night, who has an ag communications background. I think as attorneys we need to be prepared on how to handle these potentially high-profiled cases, maybe a client that has a food safety issue. FSMA, Food Safety and Modernization Act, was signed in the law in January 2011, wanting to overhaul the food statutory regulations. FSMA requires facilities that produce and sell food to be registered and it provides regulations for facilities to ensure food is processed and sold safely. Analysis of hazards and risk−based preventative controls is really what FSMA is about. FSMA creates a food safety plan that food facilities −− that's a key word here −− food facilities must follow for identification of hazards in food and preventative controls

to ensure hazards are treated properly. I am on page 24 of your very long outline for those of you that are following along.

FSMA also provides for oversight and management of preventative controls requiring processes to kill pathogens and are monitored for appropriate temperatures as well. As I said here, the key word here is food facilities, and the reason for that is because farms are exempt, but we need to think about what the definition of a farm is here, and FSMA actually divides things out into a primary producing farm and a secondary activities farm. I'm going to go ahead and break those two down. A primary producing farm is an operation under one management in one general, but not necessarily contiguous, location. Like my family's farm is made up of a couple different farms in the same area. That would be an example there, of harvesting crops, raising of animals, et cetera. This also includes farms that compact or hold raw agricultural commodities. So what is a secondary activities farm? This is an operation that is not located on the primary farm but is devoted to harvesting, packing or holding raw agricultural commodities. These are also exempt under this requirement. It allows facilities that are not specifically on a farm to qualify under the farm label, to not be subject to preventative controls. Here's an example. An example would be where nuts are holed and dehydrated by an operation not located on the orchard before going to the processing plants. I have a client of mine who grows peppers and making sauce, but what she does is, she takes her peppers and then she goes to a commercial kitchen. She actually crosses state lines to go to the commercial kitchen. She's not considered a farm under this definition, and therefore, needs to be registered as a food facility with the FDA under FSMA. That's really, at the end of the day, what I wanted to press home, is, ask your clients a little bit

more information about the processing.

Idaho Ag-Gag. I'm on page 25 of your outline. This is a controversial and defensive topic. I actually spoke on this topic last March in front of the New York State Bar Association, Committees on Animals and the Law. I have an entire outline posted on my JD Supra page on ag-gag laws and then also hiring practices for farms, and this outline does not include that information on hiring practices, but as I was speaking with John, I actually think it's a really good use of energy while we have a lot of practitioners in the room. I think when clients come and they ask you questions about ag-gag, maybe the focus needs to really be on hiring practices to make sure that they are hiring the right people on their farms. I actually sometimes get some hate e-mail from people who read my online materials about ag law. It's just a very controversial area.

So what is ag-gag? It refers to the anti-whistleblower law that restricts employees, basically restricts undercover employees from taking unauthorized videos illustrating alleged animal cruelty on farms. Here's an example: At the presentation I gave last March, there was an attorney who went undercover for an animal activist group in New York, and he, with no experience on a farm, was able to get a job on a dairy and then take video with his phone, and then he immediately quit and then he got a job in a swine facility and then he got a job in a chicken facility. That's what we are talking about, is somebody who is undercover. The whole point of them getting the employment was for them to try to get some undercover video and they release it on YouTube in hope of having like a public outcry about what's happening.

There are these ag-gag laws now that state that this

is criminal. In New York where I'm at there is no ag-gag law. The first ag-gag law was enacted in 1990 and that was in Kansas. Actually, in your outline I have included the entire ag-gags statutes, so I have each of these state statutes right there in the outline, on pages 26 to 29. Kansas was in 1990. North Dakota and Montana was in 1991, and then we had a triplet in 2012. So it's quite a big chunk of time, over ten years, Iowa, Missouri and Utah. Then in 2013 was Arkansas. 2014 is Idaho, and that's where we are right now, and this is on pages 29 to 30.

In way of background, in 2012 an animal welfare group released a graphic video that was taken undercover of workers at this Idaho dairy. Has anybody seen the video? I haven't seen the video. In response to this video, the Idaho Dairymen's Association drafted legislation to criminalize this activity. They decided they wanted an ag-gag law. The law provides that a person commits the crime of interference with agricultural production when a person knowingly enters an agricultural facility that is not open to the public and without the facility owner's expressed consent or pursuant to judicial notice of statutory authorization makes this audio or video recording of the conduct of an agricultural production operation. The animal activist groups in Idaho were not happy and they went to go file suit saying that it was unconstitutional, that it violated free speech.

In August 2015, the U.S. District Court judge in Idaho found that this ag-gag law was unconstitutional for criminalizing certain types of speech. In his decision he actually wrote that although the state may not agree with the message certain groups seek to convey about the Idaho agricultural production facilities, such as releasing secretly recorded videos of animal abuse to the internet and calling for boycotts, it cannot deny such groups equal protection of

the laws in their exercise of their right to free speech. So as of September 2015, as of last month, the Idaho Attorney General is awaiting a formal order striking down the law before deciding whether or not they are going to appeal. We don't really know what is going to happen. For those of you that want to learn all about medical marijuana law, look at your outline. The reason why I wanted to note this was, I actually know a few cannabis attorneys in New York City who wanted to meet me as an agricultural lawyer, so I actually think that over the next decade there might be some synergies between ag cannabis lawyers and agricultural and environmental attorneys. I thank you for your time and attention, and I'll be speaking very soon on local food. Thank you.

MS. VAUGHT: Thank you, Cari. We appreciate your attendance here today and we look forward to your commentary on our next panel as well.