Are Direct Payments Here To Stay In 2013?

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House Agriculture Committee Chairman Frank Lucas, R-Okla., has seemingly gone out of his way to assure producers that they can count on receiving direct payments in October. Sign-up for the direct and counter-cyclical payment program (DCP) runs from Feb. 19-Aug 2.

"This is the law of the land," Lucas emphasized in a statement regarding the farm bill extension, as if to underscore that the payments, which he has long championed, are here to stay for 2013. That's despite the fact that direct payments – paid regardless of planting – have become a political hot button in recent years.

But several of my sources remain convinced that Congress will remove direct payment funding – either through sequestration or as part of some other congressional effort to cut spending. There was already one attempt this year – albeit one that failed – to offset funding for Hurricane Sandy by using $5.7 billion in direct payments.

"I think a lot of people have assumed that we've got our farm bill in place for 2013, and it's true as long as Congress doesn't pass any new legislation," says Pat Westhoff, director of the Food and Agricultural Policy Research Institute at the University of Missouri. "I think it would be a mistake to assume these things are written in stone. Some in Congress may want to come back and at least reexamine if not actually make changes in the bill they approved a month ago."

Asked if farmers will be able to count on receiving direct program payments later this year, Roger McEowen, a professor with the Center for Ag Law and Taxation at Iowa State University, says flatly: "We don't know."

He adds that an "argument can be made that, if a producer signed up, the government would have to honor that (direct payment) program even if it was terminated later this year."

If so, Farm Service Agency offices could be very busy Feb. 19, the first day of sign-up.

Those who say that USDA will have a contractual obligation to pay direct or other farm program payments in 2013 to program participants point to a 1996 U.S. Supreme Court case, *United States v. Winstar Corp.*

In that case, the government created rules for failing thrifts during the savings and loan crisis of the 1980's, which were later rescinded by Congress. Three of the thrifts impacted by the decision – two of which were seized and liquidated by federal regulators for failure to meet required capital requirements, and the third, which avoided seizure through a private recapitalization – successfully filed suit against the United States in the Court of Federal Claims, seeking damages for breach of contract. The Supreme Court upheld the damages.

Even though the Winstar case does not apply directly to agriculture, one of the decisive principles in the case is that parties are presumed to contract with knowledge of the law existing at the time. Failure to make payment on a signed contract, therefore, would be a breach.

"Congress can do whatever it wants," says Harrison Pittman, Director of the National Agricultural Law Center at the University of Arkansas. "But the Winstar case is a strong indication that, if direct payments are totally removed from a program, there is a legal basis for plaintiffs to take legal action."

Lenders appear to be cautiously optimistic that direct payments will be forthcoming in 2013. Mitchell Harris, CEO of Ag Texas in Lubbock, says he is including direct payments in his projections for 2013 and encouraging customers to sign up early for the 2013 farm program.

"We are assuming that a sound farm policy body will honor the extension of the current policy and develop some consistent direction sometime in 2013 to apply to 2014 and beyond," he told *Agri-Pulse*.

"However, we are not including the government payments in our long-term forecast of profitability and debt service calculations," Harris adds. "Basically, we are showing the current cash-flow to include government payments to support current year operating lines."

Going forward, the elimination of direct payments and other price supports could be the "nail in the coffin" for some Texas growers.

"We are having consultative conversations around aligning customers' business plans to withstand no government support but crop insurance in future years," Harris said.

"In addition, we have added over $20 million in capital the last 3 years to be better positioned to help our customers through more challenging times," Harris explained.

"The reality of low cotton prices and no direct or counter-cyclical program (CCP) payments will not produce positive results. Our cotton farmers are dealing with the third year of a severe drought, declining cotton prices and anticipation of weak farm policy. If these three stresses continue, the fallout will be significant in the largest cotton patch in the United States." Δ

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