



FARM & FOOD LAW: A Guide for Lawyers in the Legal Services Food Hub Network

Maine Edition

Prepared by the University of
Maine School of Law for
Conservation Law Foundation



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Legal Disclaimer: The legal information contained herein does not constitute individualized legal advice upon which readers may rely. Readers should consult with an attorney for individualized legal advice and neither take nor refrain from taking action based on information in this Guide.

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INTRODUCTION Agriculture in Maine and throughout the United States is at a crossroads. As a result of growing concerns about the environmental, economic, and health impacts of our food system, there is rising consumer interest in purchasing from local producers. A diverse group of farmers and food entrepreneurs, including many young and beginning farmers, have nimbly adjusted to the rising demand for fresh, local, and sustainably produced food.¹ However, farmers and other food producers face a variety of laws, regulations, and business challenges. Many new, primarily small-scale, farmers and food entrepreneurs cannot afford legal assistance at the rates usually charged in Maine. In response, Conservation Law Foundation's (CLF) Legal Services Food Hub (Hub) has gathered members of the legal community who have interest in providing much-needed pro bono counsel to local, small-scale farmers and food entrepreneurs.

For some of these interested attorneys, serving farm and food clients may be a new endeavor. They may be unfamiliar with agriculture and food-specific laws, as well as the cultural and business realities of farm life. Although farm and food clients share much in common with other clients seeking business and legal advice, their distinctive characteristics present new and exciting opportunities to the legal community. By familiarizing themselves with this nuanced industry, attorneys who do not specialize in food and agricultural law will most certainly feel better equipped to advise or advocate effectively for farmers and food entrepreneurs.

Only 10% of surveyed farmers used legal services; in contrast, nearly 70% of small businesses did so.

Source: Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013).

Similarly, many small-scale farmers and food entrepreneurs are unfamiliar with attorneys and the practice of law. Often, transactional legal counseling could significantly benefit farmers and their businesses, yet they commonly do not seek out legal services. Only 10% of surveyed farmers used legal services; in contrast, nearly 70% of small businesses did so.² When asked why they did not seek legal advice, farmers responded that they did not think attorneys understood the industry well enough to be of service or that they did not believe attorneys could actually help.³ This sentiment illustrates a disconnect between the agricultural and the legal sectors. The extraordinarily high cost of legal services compounds this problem. In Maine, the 2012 annual average net cash income of farms was only \$20,141 (which includes farms operating

¹ Press Release, U.S. Dep't of Agric., 2012 Census of Agriculture Reveals New Trends in Farming (May 2, 2014), http://www.agcensus.usda.gov/Newsroom/2014/05_02_2014.php; U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE, DEMOGRAPHICS OVERVIEW, available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demographics/demographics.pdf.

² See Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013), <http://vimeo.com/80411482>; see also A. Bryan Endres et al., *The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey*, 69 MONT. L. REV. 135 (2010). To better understand farmers' need for legal services and targeted educational programming, the authors of *The Legal Needs of Farmers*, with the support of several cooperating organizations, conducted a family farm legal needs survey of Illinois farmers in 2007.

³ See Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013), <http://vimeo.com/80411482>.

at a loss as well as those earning a profit).⁴ Agriculture is also an economically risky industry. Farmers make substantial financial investments. Returns depend on factors out of their control, such as the weather, natural disasters, and fluctuating local and global markets. This inherent vulnerability can have direct and often adverse effects on the income of small-scale farmers and food entrepreneurs. As a result, many farm businesses in Maine are unable to afford legal assistance.⁵

ABOUT THE LEGAL SERVICES FOOD HUB Because of the lack of legal services for small-scale farmers and food entrepreneurs who are helping grow the local and regional food system, CLF created the Hub. The Hub brings together attorneys in Maine who want to provide pro bono legal assistance to farmers, food entrepreneurs, and organizations that support them. The Hub not only serves to connect attorneys to clients, but through *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* it also seeks to supply resources for attorneys as they provide legal counsel to this new group of clients. To qualify for pro bono services offered by the Hub, a farmer or food entrepreneur must meet the following criteria: (a) the annual net income of the business must not exceed \$30,000; (b) the applicant's household income must not exceed 400% of the Federal Poverty Level; and (c) the farm or food enterprise must have annual revenue of at least \$5,000 in the previous tax year OR have started operating within the last three years.⁶ These criteria ensure that the Hub serves those who truly need pro bono legal assistance and have shown a commitment to growing the local food system.

To learn more about the Legal Services Food Hub, visit www.legalservicesfoodhub.org.

ABOUT CONSERVATION LAW FOUNDATION CLF is a non-profit environmental advocacy organization based in New England.⁷ CLF believes that a thriving New England means a thriving local food system—the region's communities, environment, and economy depend on it. CLF's Farm and Food Initiative is building on CLF's long track record of successful policy reform in New England by developing and advancing local, state, regional, and national policy reforms that better support farm and food enterprises and reduce legal hurdles for sustainable agricultural production in New England. CLF works with farmers, food entrepreneurs, consumers, and other stakeholders to provide the legal and policy scaffolding to construct a robust regional food system. To learn more about CLF, visit www.clf.org.

ABOUT THIS GUIDE The University of Maine School of Law collaborated with CLF to create the Maine Edition of *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* to help attorneys build successful relationships with small-scale farmers and food entrepreneurs in Maine, as well as other

⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 5 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_004_005.pdf.

⁵ See Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013), <http://vimeo.com/80411482>.

⁶ These criteria do not apply to farm-and-food-related organizations.

⁷ CONSERVATION L. FOUND., <http://www.clf.org>.

food-related businesses, non-profit organizations, and community groups. The Maine Edition builds off of the Massachusetts Edition of *Farm & Food Law*, created by the Harvard Food Law and Policy Clinic. This guide provides a vocabulary and working knowledge of common legal issues encountered by participants in Maine's local food economy.

Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network is a work in progress and will be updated to include new chapters and respond to the needs of Hub attorneys. **The Maine edition of *Farm & Food Law* focuses on the legal needs of farmers**; future editions will also focus on the legal needs of food entrepreneurs.

Using this Guide *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* is intended to serve as a reference for attorneys. Although *Farm & Food Law* can be read in its entirety, each chapter is meant to be its own standalone document. Where appropriate, *Farm & Food Law* directs the reader to other relevant chapters. Other topics, such as taxation, land acquisition, liability issues, and food labeling, may be included in future versions.

What's Inside? The Maine edition of *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* includes five chapters. Each chapter aims to describe small-scale farming and food business practices in Maine, identify relevant food and agricultural laws, and list references for more in-depth information. It contains the following chapters:

- **Chapter I: Maine Farming and Local Food Economy** This chapter provides the reader with demographic information about farmers and agriculture in Maine. Based on the United States Department of Agriculture's (USDA) recently released 2012 Census of Agriculture, this chapter helps attorneys understand the agricultural context in which they are working.
- **Chapter II: Business Structures** This chapter focuses on and evaluates the different business structures farmers may choose for their farm operations.
- **Chapter III: Food Safety** This chapter introduces the attorney to a few of the main food safety laws and standards governing the production and handling of produce in the United States. Although Hub attorneys are not yet helping farmers with food safety compliance, the topic is important to farmers, and attorneys need a working knowledge of the issues.
- **Chapter IV: Farm Transitions** This chapter discusses the farm transition process, which addresses farm transfer issues. This chapter highlights issues of concern common among farmers and provides solutions to address those concerns.
- **Chapter V: Intellectual Property** This chapter examines copyright, patent, and trademark issues that farmers may encounter.

Small-scale farmers and food entrepreneurs in Maine are part of a robust movement to enrich their local food economies and communities. Attorneys in Maine who wish to serve these clients can be part of this dynamic and truly homegrown initiative through the Legal Services Food Hub.

CHAPTER I: MAINE FARMING AND LOCAL FOOD ECONOMY

An understanding of the nature of Maine agriculture is necessary to advise or advocate effectively for small-scale farmers and food entrepreneurs, as well as other food-related businesses, non-profit organizations, and community groups. This chapter lays out some of the basic information relevant to farming and the local food economy in Maine.

OVERVIEW Attorneys who wish to serve farmers or food entrepreneurs in Maine will first need to understand the unique and highly varied characteristics of Maine farming and the local food economy. This section gives an overview of the location, size, demographics, and organization of Maine farms; the different agricultural products and farming techniques that are employed across the state; and the common marketing and selling strategies used by small-scale farmers and food entrepreneurs in Maine.¹

1. Location, Size, Demographics, and Organization of Maine Farms This section provides a general overview of the geography of farms in Maine: where they are located, their size, their demographics, and how they are organized.

2. Agricultural Products and Farming Techniques This section provides a general overview of the scope and variety of common agricultural products and farming techniques that producers employ in Maine.

3. Marketing and Selling Agricultural Products This section provides an overview of the marketing and sales strategies Maine farmers use to connect their products with consumers.

LOCATION, SIZE, DEMOGRAPHICS, AND ORGANIZATION OF MAINE

FARMS According to the 2012 Census of Agriculture, there are 8,173 farms in Maine.² The land in farms³ accounts for about 7% of total land in the state, or approximately 1,454,104 acres.⁴ The average farm is 178 acres, an increase of about 7% since 2007, but still much smaller than the national average of 434 acres.⁵ Over a quarter of the farms (2,278) in Maine are between 10 and 49 acres and about 15%

¹ The 2012 Census of Agriculture is the 28th Federal Census of Agriculture and the fourth conducted by the United States Department of Agriculture's (USDA) National Agricultural Statistics Service. The results were published in February 2014 and are the most recent data available. U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, INTRODUCTION VIII (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usintro.pdf.

² "The census definition of a farm is any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. The definition has changed nine times since it was established in 1850. The current definition was first used for the 1974 Census of Agriculture and has been used in each subsequent agriculture census. This definition is consistent with the definition used for current USDA surveys." U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, INTRODUCTION VIII (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usintro.pdf; U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE PROFILE (2015), *available at* http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Maine/cp99023.pdf.

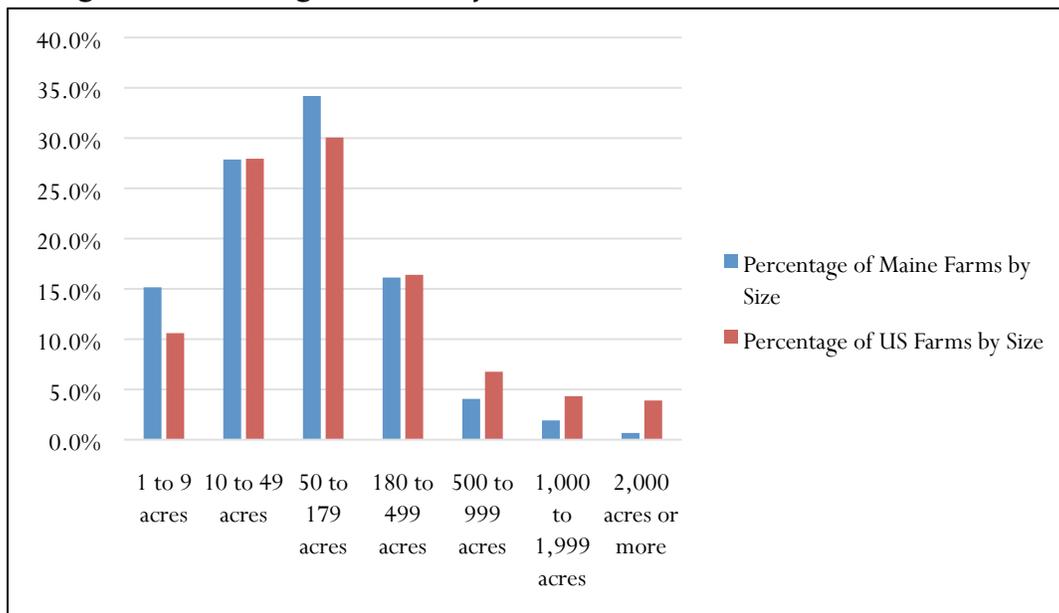
³ "The acreage designated as 'land in farms' consists primarily of agricultural land used for crops, pasture, or grazing." U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, APPENDIX B (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf.

⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1(2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf; U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, *available at* <http://quickfacts.census.gov/qfd/states/23000.html>.

⁵ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usb1.pdf.

(1,239) are less than nine acres.⁶ Maine ranks 37th in average farm size, but has the greatest number of farms of the New England states, and the land in farms increased 8% since 2007.⁷ Not surprisingly then, about 95% of Maine farms qualify as “small farms,” with less than \$250,000 in annual sales.⁸ To be eligible for pro bono legal services through the Legal Services Food Hub (Hub), a farmer or food entrepreneur must meet the following income criteria: a) the farm or food enterprise’s net annual sales must not exceed \$30,000; AND b) the farmer or food entrepreneur’s annual household income must not exceed 400% of the Federal Poverty Level; AND (c) the farm or food enterprise must have annual revenue of at least \$5,000 in the prior tax year OR have started operating within the last three years.

Figure 1. Percentage of Farms by Size, Maine and the United States, 2012⁹



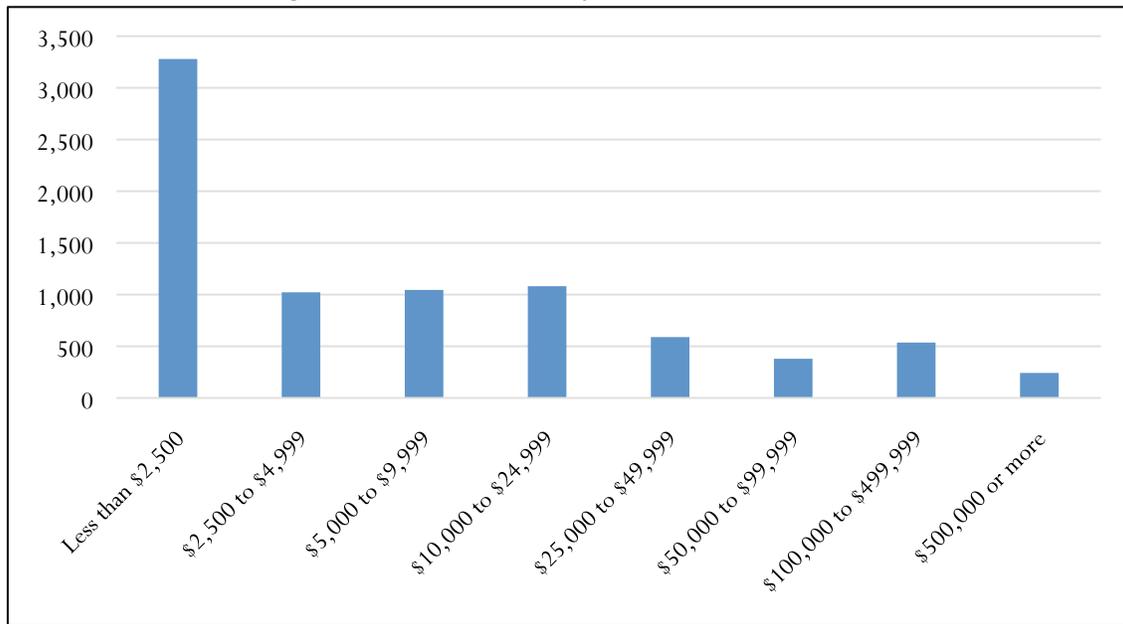
⁶ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1(2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf; U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, *available at* <http://quickfacts.census.gov/qfd/states/23000.html>.

⁷ Gary Keough, *Maine Agriculture is Up in More Ways than One*, U.S. DEP’T OF AGRIC., BLOG (July 10, 2014), <http://blogs.usda.gov/2014/07/10/maine-agriculture-is-up-in-more-ways-than-one/>.

⁸ USDA defines small farms as “farms with less than \$250,000 gross receipts annually, on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets.” *Small Farms*, U.S. DEP’T OF AGRIC., NAT’L AGRIC. LIBRARY, <http://agclass.nal.usda.gov/mtwdk.exe?k=glossary&l=60&w=9487&n=1&s=5&t=2> (last visited Apr. 22, 2015); U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 64 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_064_064.pdf.

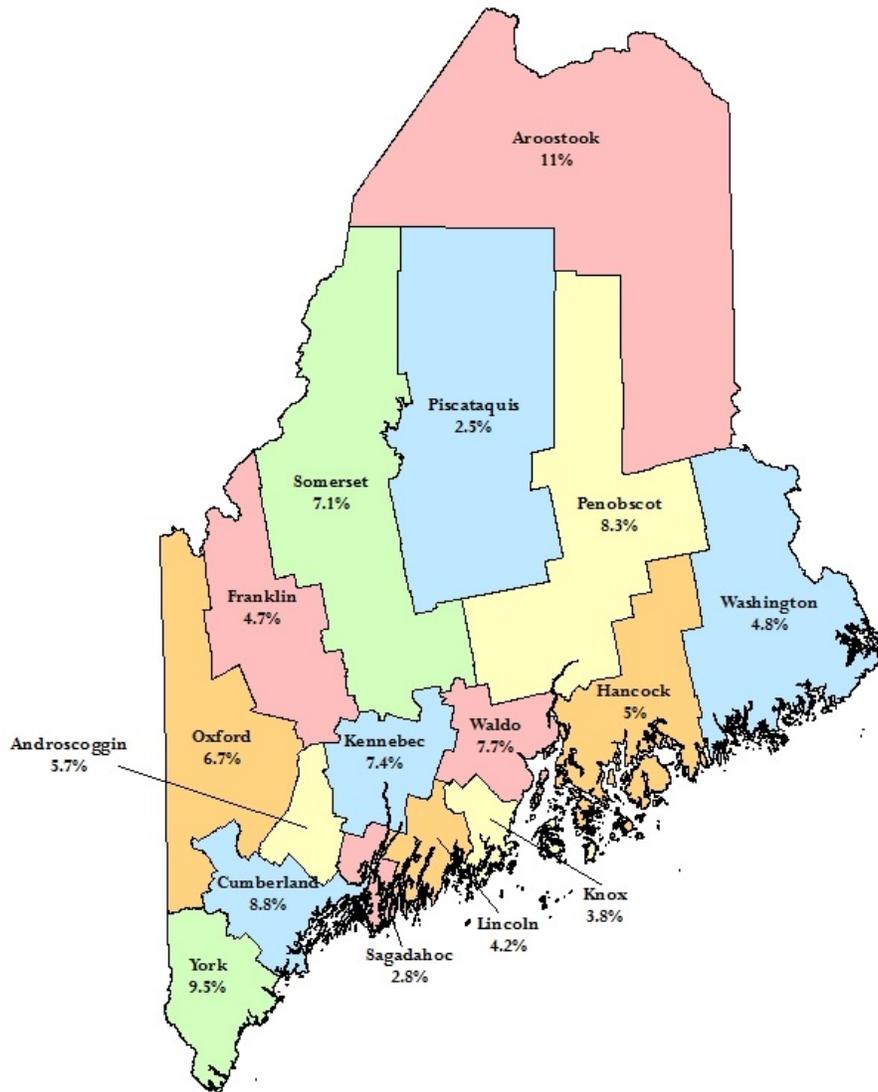
⁹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 64 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_064_064.pdf; U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 64 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_064_064.pdf.

Figure 2. Maine Farms by Value of Sales, 2012¹⁰



¹⁰ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

Figure 3. Percentage of Farms in Maine by County, 2012¹¹



Farms are spread across Maine, with the greatest number of farms located in Aroostook County (11%) and the lowest concentration in Piscataquis County (2.5%) and Sagadahoc County (2.8%).¹²

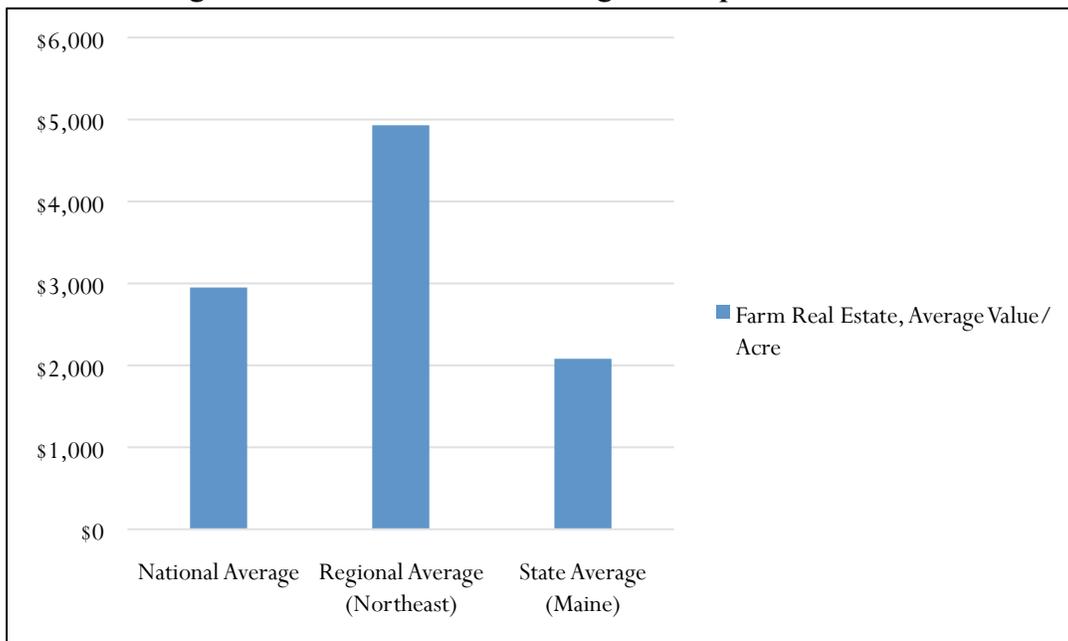
Maine farmland had an average real estate value¹³ of \$2,080 per acre in 2014, one of the lowest in the nation.¹⁴ Maine farm real estate values are the lowest in the Northeast¹⁵ region and fall below the regional

¹¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, COUNTY LEVEL DATA, TABLE 1 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Maine/st23_2_001_001.pdf.

¹² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, COUNTY LEVEL DATA, TABLE 1 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Maine/st23_2_001_001.pdf.

average of \$4,930 per acre, as well as below the national average of \$2,950 per acre.¹⁶ Despite the relatively low average value of farmland, young and beginning farmers may find it nearly impossible to purchase land outright. However, in some areas of the state the cost of farmland can be much higher, making larger parcels not easily affordable for new farmers.¹⁷ It is difficult for new farmers to get a loan to purchase a farm due to the reluctance of lenders to give farm loans because of the perceived risk. This is especially true if the farmer has never bought one before.¹⁸ Not surprisingly then, many new farms are relatively small, often under 100 acres. There is an acute need for sound farm-transfer planning in order to preserve the agricultural production of farmland. This topic is discussed in more depth in Chapter IV.

Figure 4. Farm Real Estate Average Value per Acre, 2014¹⁹



There are 13,168 farm operators in Maine; about 59% of them are male (7,770), and 41% are female (5,398).²⁰ The vast majority of the principal operators on farms in Maine are white (98%),²¹ and the average

¹³ Farm Real Estate value is “a measurement of the value of all land and buildings on farms.” U.S. DEP’T OF AGRIC., LAND VALUES 2014 SUMMARY 4 (2014), available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/land0814.pdf.

¹⁴ U.S. DEP’T OF AGRIC., LAND VALUES 2014 SUMMARY 8 (2014), available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/land0814.pdf.

¹⁵ The “Northeast” region includes Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. U.S. DEP’T OF AGRIC., LAND VALUES 2014 SUMMARY 8 (2014), available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/land0814.pdf.

¹⁶ U.S. DEP’T OF AGRIC., LAND VALUES 2014 SUMMARY 4, 8 (2014), available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/land0814.pdf.

¹⁷ ME. FARMLAND TRUST, AM. FARMLAND TRUST, MAINEWATCH INST., CULTIVATING MAINE’S AGRICULTURAL FUTURE: A GUIDE FOR TOWNS, LAND TRUSTS, AND FARM SUPPORTERS (2011), available at http://www.farmlandinfo.org/sites/default/files/MainePlanningforAg_2011_1.pdf (last visited Apr. 22, 2015).

¹⁸ Email communication with Nina Young, Maine Farms Realty, April 3, 2015.

¹⁹ U.S. DEP’T OF AGRIC., LAND VALUES 2014 SUMMARY 4, 8 (2014), available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/land0814.pdf.

age of the principal operator is 57 years old.²² Most of these farmers have been on farms for more than 10 years.²³ However, a growing number of farmers in Maine are classified by the U.S. Department of Agriculture (USDA) as “beginning” farmers, meaning they have operated a farm for 10 years or less either as a sole operator or with others who have operated a farm for 10 years or less.²⁴ The 2012 Census of Agriculture reported that 2,425 Maine farmers had been on the farm for less than 10 years, meaning that about a quarter of all farms in the state are operated by beginning farmers.²⁵

Most Maine farms operate as sole proprietorships, owned by a family or an individual (85%).²⁶ A small proportion of farms are organized as corporations (7%)²⁷ or partnerships (6.4%).²⁸ Cooperatives, estates, trusts, and institutional farms represent only 1.6% of all farms.²⁹ This topic is discussed in more depth in Chapter II.

AGRICULTURAL PRODUCTS AND FARMING TECHNIQUES Diversity is a defining characteristic of Maine agriculture. Farms grow and sell a variety of products, and small-scale farmers and food entrepreneurs engage in many different farming activities. The top five crop items that

²⁰ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 55 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_055_055.pdf.

²¹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 60 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_060_060.pdf.

²² U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE MAINE STATE DATA, TABLE 69 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_069_069.pdf.

²³ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 55 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_055_055.pdf.

²⁴ U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., BEGINNING FARMER (2009), *available at* <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib53.aspx#.U48IgvldWS0>.

²⁵ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 70 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_070_070.pdf.

²⁶ In Maine, 6,929 farms have a legal status of “family or individual” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

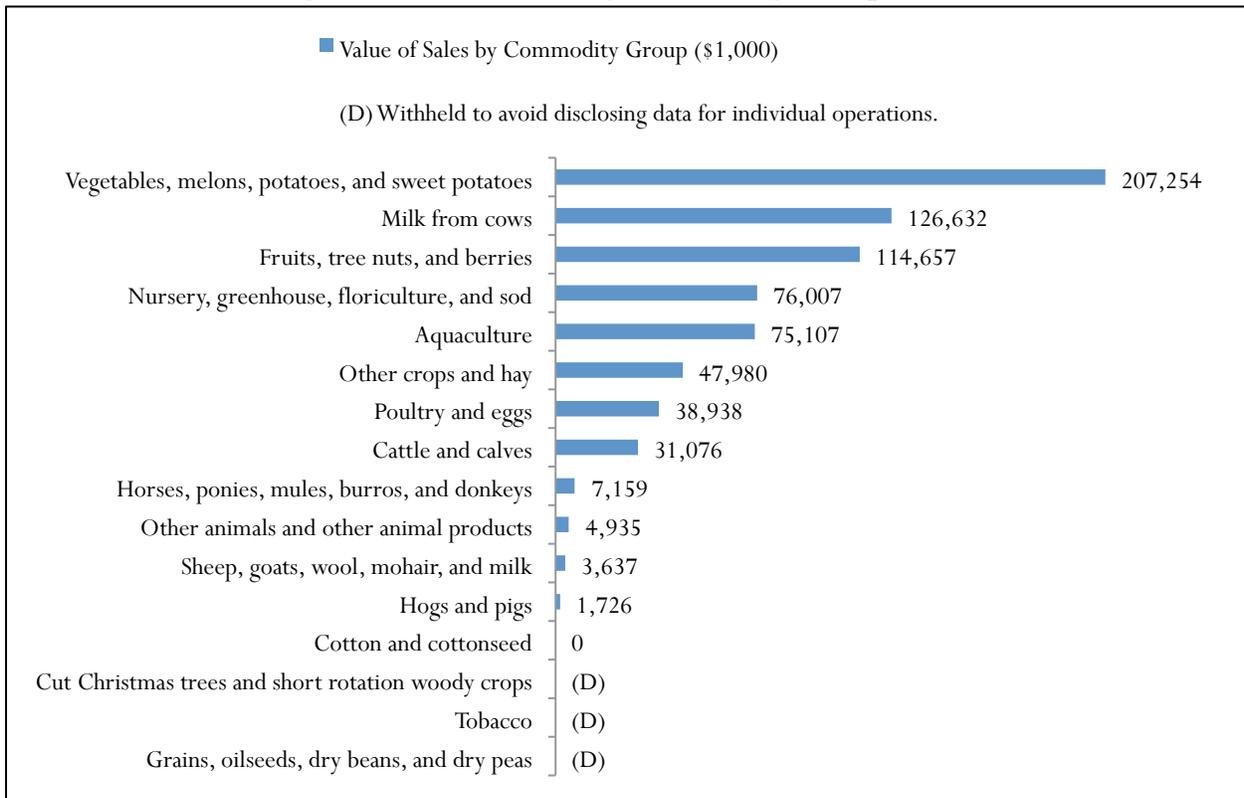
²⁷ In Maine, 582 farms have a legal status of “corporation” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

²⁸ In Maine, 525 farms have a legal status of “partnership” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

²⁹ In Maine, 137 farms have a legal status of “Other – co-operative, estate or trust, institutional, etc.” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

account for the largest amount of acreage are hay, vegetables, potatoes, berries, and wild blueberries.³⁰ However, this does not mean that all of these products have the highest sales. For example, hay is grown on 35% of Maine farms, making it the most commonly grown crop in the state.³¹ It has a number of uses on the farm and needs much more acreage than “other crops” (crops other than the top five), but the market value of “other crops and hay” accounted for only 6.3% of the total market value of agricultural products sold.³²

Figure 5. Value of Sales by Commodity Group, 2012³³



The top crop items that account for the largest amount of sales are vegetables, melons, potatoes, and sweet potatoes; milk from cows; fruits, tree nuts, and berries; nursery, greenhouse, floriculture, and sod; and aquaculture.³⁴

³⁰ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE PROFILE, COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Maine/cp99023.pdf.

³¹ Hay is grown on 2,859 Maine farms. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA TABLE 1 (2014), available at

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

³² U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE PROFILE, COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Maine/cp99023.pdf.

³³ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE PROFILE, COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Maine/cp99023.pdf.

Farmers participating in the Hub must be predominantly producing agricultural crops for human food production. This does not include hay or ornamental crops. Typical Maine-grown foods include potatoes, apples, wild blueberries, cranberries, broccoli, beans, dairy products, and strawberries, among others.³⁵

Maine has a thriving organic farm sector that includes 554 farms totaling \$36.4 million in sales.³⁶ The production on 457 of these 554 farms is USDA National Organic Program (NOP) certified organic.³⁷ The NOP works to ensure the integrity of organic products in the United States and throughout the world.³⁸ The term “organic” is used to describe production methods that “integrate cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”³⁹ This includes practices such as composting, spreading manure, and utilizing cover crops that emphasize retaining farm fertility. The USDA national organic certification and inspection process also ensures that participating farms do not use particular chemical treatments.⁴⁰

Some farmers perceive that it can be both costly and time-consuming to certify their operations to USDA standards.⁴¹ As such, many farmers use organic growing methods but choose not to get certified. However, the Maine Organic Farmers and Gardeners Association (MOFGA) and others have shown that growing organic can be both cost effective and efficient.⁴² NOP has a national cost share program for organic certification that pays 75% of the certification fee up to \$750 per “scope of operation.”⁴³ NOP currently recognizes four scopes of certification: crops; wild crops; livestock; and processing/handling.⁴⁴ In Maine, the cost share program is administered by the Department of Agriculture, Conservation and Forestry.⁴⁵ The

³⁴ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE PROFILE, COUNTY DATA (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Maine/cp99023.pdf.

³⁵ *Maine Economy: Agriculture*, NETSTATE, http://www.netstate.com/economy/me_economy.htm (last visited Apr. 22, 2015).

³⁶ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 54 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_053_054.pdf.

³⁷ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 54 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_053_054.pdf.

³⁸ *Nat’l Organic Program*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/nop> (last visited Apr. 22, 2015).

³⁹ *Nat’l Organic Program, Consumer Information*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateC&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPConsumers&description=Consumers&acct=nopgeninfo> (last visited Apr. 22, 2015).

⁴⁰ 7 C.F.R. §§ 205.206, 205.272 (2014).

⁴¹ *See FAQ: Becoming a Certified Operation*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NOPFAQsHowCertified&topNav=&leftNav=NationalOrganicProgram&page=NOPFAQsHowCertified&description=FAQ:%20%20Becoming%20a%20Certified%20Operation&acct=nopgeninfo> (last visited Apr. 22, 2015).

⁴² *See generally* MOFGA CERTIFICATION SERVICES, <http://www.mofgacertification.org/> (last visited Apr. 27, 2015).

⁴³ *Nat’l Organic Program*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateQ&leftNav=NationalOrganicProgram&page=NOPCostSharing&description=Organic+Cost+Share+Program> (last modified Mar. 4, 2015),

⁴⁴ U.S. DEP’T OF AGRIC., NAT’L ORGANIC PROGRAM, ORGANIC CERTIFICATION COST SHARE PROGRAM 7 (2014), *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5107908>.

⁴⁵ U.S. DEP’T OF AGRIC., ORGANIC CERTIFICATION COST SHARE PROGRAMS STATE AGENCY POINTS OF CONTACT 4 (2014), *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5107877>.

NOP has also made strides to reduce the paperwork burden by accepting records created by farmers rather than requiring specific forms.⁴⁶

The value of locally grown food is increasingly important to Mainers. Many people, including city-dwellers, now prefer to grow their own food.⁴⁷ Farming and backyard gardens in the city, commonly referred to as urban agriculture, are becoming more common.⁴⁸ Increasing numbers of homeowners and renters have an interest in raising chickens or goats for eggs, meat, or milk.⁴⁹ Several municipalities in Maine have revised their local ordinances to allow for domestic chickens or small livestock.⁵⁰

Agriculture has recently enjoyed support at various governmental levels.⁵¹ Between 2011 and 2014, 11 towns in Maine passed local food ordinances with the intention to promote local food and reduce the barriers to access.⁵² Several cities throughout Maine are working toward establishing community food councils to forward policy initiatives that promote local food, and reduce barriers for activities, such as farm stands and community gardens. For example, Bangor's Comprehensive Plan for 2012 states one of its initial objectives is to "support local agriculture."⁵³ In 2012, the City of Portland's mayor established an Initiative for a Healthy and Sustainable Food System to increase public engagement in food-related policies, identify and implement positive changes in the community's food systems, and increase access to healthier food for residents.⁵⁴

In addition, numerous cities in Maine have implemented programs that work directly with community members to support local farming. For example, Lots to Gardens in Lewiston is working to promote sustainable urban gardening and provide opportunities for people to grow their own food, create access to local food, and engage youth.⁵⁵ Cultivating Community has partnered with the City of Portland to manage several community gardens.⁵⁶

⁴⁶ Miles McEvoy, *Sound and Sensible Approach to Organic Certification*, U.S. DEP'T OF AGRIC. BLOG (Apr. 19, 2013, 1:00 PM), <http://blogs.usda.gov/2013/04/19/organic-101-sound-and-sensible-approach-to-organic-certification/>.

⁴⁷ *Food Work in Maine*, CONSERVATION L. FOUND., <http://www.clf.org/our-work/healthy-communities/farm-and-food-initiative/food-work-in-maine/> (last visited Apr. 27, 2015).

⁴⁸ U.S. DEP'T OF AGRIC., NATURAL RESOURCE CONSERVATION SERVICE, SMALL FARMERS & URBAN AGRICULTURALISTS FACT SHEET (2013), available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1083296.pdf.

⁴⁹ ME. FARMLAND TR., LOCAL POLICIES AND ORDINANCES (2014), available at <http://www.maineFarmlandtrust.org/local-policies-ordinances/>.

⁵⁰ *E.g.*, Brunswick, Me., Municipal Code of Ordinances § 4.61 et seq. (Oct. 17, 2011) Town of Brunswick Website / Town Charter/Ordinances / Town of Brunswick Ordinances Code of Ordinances (last visited Apr. 23, 2015) (regarding keeping of domesticated chickens); Portland, Me., Code § 5-400 (May 17, 2010) (regarding keeping of domesticated chickens); Portland, Me., Code § 5-400 (May 17, 2010).

⁵¹ *See, e.g.*, Joint Resolution Expressing the Sentiment of the Legislature for Food Sovereignty, L.D. 1176 (125th Legis. 2011).

⁵² Stephen R. Miller, *A Coordinated Approach to Food Safety and Land Use Law at the Urban Fringe*, 41 AM. J.L. & MED. (forthcoming 2015).

⁵³ CITY OF BANGOR PLANNING DIV., CITY OF BANGOR COMPREHENSIVE PLAN 133 (2012), available at https://www1.maine.gov/dacf/municipalplanning/comp_plans/Bangor_2012.pdf.

⁵⁴ *Mayor's Initiative for a Healthy and Sustainable Food System*, PORTLANDMAINE.GOV, <http://portlandmaine.gov/987/Healthy-Sustainable-Food-Systems-Initiat> (last visited Apr. 18, 2015).

⁵⁵ *Lots to Gardens*, ST. MARY'S HEALTH SYSTEM, <http://www.stmarysmaine.com/Nutrition-Center-of-Maine/lots-to-gardens.html> (last visited Apr. 22, 2015).

⁵⁶ CULTIVATING COMMUNITY, <https://www.cultivatingcommunity.org/>.

MARKETING AND SELLING AGRICULTURAL PRODUCTS Maine farmers sell many farm products directly to consumers through farmers’ markets, farm stands, community supported agriculture (CSA) operations, and agritourism.⁵⁷ Unlike many other areas of the country, direct-to-consumer food marketing is a defining characteristic of agriculture in Maine, and small-scale farmers and food entrepreneurs have had success with these ventures. In 2012, with 2,311 operations, Maine had nearly \$25 million in direct sales of agricultural products, which amounts to a \$6 million increase from 2007, placing Maine fifth nationally for direct-market sales measured in percent of farms.⁵⁸

Farmers’ markets are central sites for farmers or their representatives to sell directly to consumers. They are usually organized by local governments and sometimes by non-profits or for-profit entities. In Maine, the term “farmers’ market” means a building, structure, or place used by two or more farmers for the direct sale of farm and food products to consumers, where all sellers of farm and food products meet certain requirements.⁵⁹ Fresh produce, meats, milk, honey, maple syrup, and eggs are examples of products commonly seen at Maine farmers’ markets. These markets are often set up to be community hubs and, depending on the market rules, may also offer processed foods, such as jams, bread, or salsa, and even non-agricultural products like crafts and cooking gear.⁶⁰ In Maine, participating farmers primarily operate the farmers’ markets.⁶¹ Therefore, each market has its own rules, and the variation between markets can be quite distinct. Farmers’ markets’ volunteer managers wishing to formalize the legal status of their markets could be eligible to participate in the Hub.

Farm stands are on-farm or near-farm sale sites typically located along roads that border the farm. Nearby farmers may combine efforts in one farm stand, but generally each stand sells the products of a single farm. Like farmers’ markets, farm stands eliminate the middle level distribution costs and give farmers an opportunity for higher profits.⁶² However, selling direct-to-consumer can cost farmers valuable time away from the farm and has limited growth potential. For these reasons and because farmers’ markets are becoming increasingly common in Maine, farmers may look to diversify the markets into which they sell.

⁵⁷ ME. DEP’T OF AGRIC., CONSERVATION AND FORESTRY, THE AGRICULTURAL CREATIVE ECONOMY STUDY (2008), *available at* http://statedocs.maine.gov/ard_docs/1.

⁵⁸ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 2 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_002_002.pdf.

⁵⁹ *See* 7 M.R.S. § 415(2)(B) (2013) (“A person may not sell farm and food products at a market labeled ‘farmers’ market’ unless at least 75% of the products offered by that person were grown or processed by that person or under that person’s direction. A product not grown or processed by that person or under that person’s direction must have been grown or processed by and purchased directly from another farmer and the name and location of the farm must be identified on the product or on a sign in close proximity to the displayed product.”).

⁶⁰ For more information on Maine’s farmers’ markets, *see* ME. FED’N OF FARMERS’ MKTS., <http://www.mainefarmersmarkets.org/>; GET REAL. GET ME., www.getrealmaine.com.

⁶¹ Telephone Interview with Leigh Hallet, Executive Director, Maine Federation of Farmers’ Markets (Feb. 19, 2015).

⁶² ME. DEP’T OF AGRIC., CONSERVATION AND FORESTRY, THE AGRICULTURAL CREATIVE ECONOMY STUDY (2008), *available at* http://statedocs.maine.gov/ard_docs/1.

Scaling up to sell into wholesale markets presents an opportunity some farms may wish to pursue and for which those farms will likely require legal assistance.

CSA operations give the public an opportunity to invest in local agriculture by making a financial commitment to a farm in exchange for a share of the farm's products.⁶³ Typically, the farmer sells a share to a consumer before the season. In return, the consumer receives a set number of weekly boxes. These boxes, depending on the agreement, may contain fresh produce, bread products (community supported bakery), meat, or fish (community supported fishery).⁶⁴ CSAs provide farmers with necessary upfront capital and a more reliable market. The content of the boxes varies based on what the farm harvests that week. Consumers get the satisfaction of supporting a local business and receiving fresh food. CSAs may include volunteer opportunities or even offer work shares to consumers. These options allow consumers to provide in-kind farm help but can also potentially increase the farmer's liability if, for example, a consumer is injured or causes another's injury while providing such help.

Maine has several hundred farm attractions open to the public.⁶⁵ These on-farm activities are commonly referred to as agritourism.⁶⁶ Agritourism generally involves on-farm entertainment, including activities like farm tours or vacations, festivals, hiking, picnics, or workshops. It also includes pick-your-own produce operations. Some of the more popular agritourism activities in Maine include choose-and-cut Christmas tree farms, maple syrup sugarhouse tours, pick-your-own fruit and vegetable farms, animal parks, corn mazes, and cider-making operations. The Maine Department of Agriculture, Conservation and Forestry considers agritourism a valuable component of Maine's agricultural industry and a significant source of revenue for Maine farmers. Maine's "Agricultural Creative Economy" is defined as "the community of Maine farmers who are directly marketing their farm products to their retail or wholesale customers."⁶⁷ This sector includes a diverse range of products and activities. According to the 2012 Census of Agriculture, 270 Maine farms participated in agritourism and recreational services, and the average number of annual sales from these activities totaled \$6,678.⁶⁸

⁶³ SUSAN DEMUTH, *DEFINING COMMUNITY SUPPORTED AGRICULTURE* (1993), available at <http://www.nal.usda.gov/afsic/pubs/csa/csadef.shtml>; visit www.mofga.org for more information.

⁶⁴ *Maine CSA Directory*, ME. ORGANIC FARMERS AND GARDNERS ASS'N, <http://www.mofga.net/Directories/CommunitySupportedAgricultureinMaine/tabid/268/Default.aspx>.

⁶⁵ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 7 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_006_007.pdf.

⁶⁶ See 7 M.R.S. § 251(1) (2013) ("Agritourism activity" means any agricultural activity carried out on a farm or ranch that members of the general public are allowed to view or participate in, including farming, ranching, historical and cultural activities, harvest-your-own activities and attractions related to farming or ranching. An activity is an agritourism activity whether or not the participant pays to view or participate in the activity.).

⁶⁷ ME. DEP'T OF AGRIC., CONSERVATION AND FORESTRY, *THE AGRICULTURAL CREATIVE ECONOMY STUDY* (2008), available at http://statedocs.maine.gov/ard_docs/1.

⁶⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA TABLE 7 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_006_007.pdf; but see *Find a Farm*, GET REAL. GET ME.! <http://www.getrealmaine.com> for more information (listing 647 farms under agritourism organization, suggesting the number of farms performing such services may be considerably higher).

In its efforts to support small farming operations that rely on agritourism, Maine recently enacted a limited liability statute to protect farms that offer the public farming and ranching activities, pick-your-own operations, and other agritourism attractions.⁶⁹ Specifically, the act may limit the farm operators' liability for most personal injuries and property damages arising from agritourism activities as long as the farm posts signs or requires participants to sign a document stating that visitors accept the "inherent risks of the agritourism activity."⁷⁰ Providing limited liability to these types of operations could further support this growing sector.

CONCLUSION Agriculture in Maine is diverse. No two farms, or farm operators, are exactly alike. An understanding of the recent trends in farming can give an attorney who is unfamiliar with the world of agriculture an informed foundation from which to work when advising or advocating for farmers and food entrepreneurs. By connecting attorneys to clients and by providing the resources necessary to build effective and sustainable relationships, the Hub seeks to enhance the growth of local food economies and communities through legal services. The Hub's work helps to support some of Maine's agricultural and food economies' most valuable members—small-scale farmers and food entrepreneurs.

RESOURCES

2012 Census of Agriculture, Maine State Data

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/

2012 Census of Agriculture, United States Data

<http://www.agcensus.usda.gov/Publications/2012/>

⁶⁹ 7 M.R.S. §§ 251-252 (2013).

⁷⁰ 7 M.R.S. § 252(3) (2013).

CHAPTER II: BUSINESS STRUCTURES

Although the overwhelming majority of farms in Maine are sole proprietorships, farmers can benefit from counseling discussions about which business structure may best meet their needs and goals. Depending on which business structure they choose, farmers may be able to limit their liability, reduce their tax burden, transfer the business to the next generation more easily, or increase their ability to access larger markets through cooperative practices.

OVERVIEW This chapter will assist attorneys advising farmers on the business formation of their farms by providing an overview of different types of business structures and evaluating them from the perspective of a small-scale farm business.

1. Overview of Business Structures This section introduces the attorney to some of the main issues farmers face when forming their businesses. It also explains how certain issues farmers face are different from those faced by clients in other businesses.

2. Prevalence of Farm Business Structures in Maine and the United States This section provides an overview of the prevalence of various farm business structures in Maine and the United States.

3. Getting Context: Initial Questions to Ask the Farmer This section highlights some questions an attorney should ask the farmer to understand the farmer's operation and to identify issues that could be addressed by the choice of a particular business structure.

4. Major Factors in Evaluating Different Business Structures This section lists factors attorneys can use to evaluate various business structures, including ease of formation and management, limiting liability, taxation, ease of transfer, life of entity, and ability to raise capital.

5. Choosing a Business Structure This section discusses the main business structures that farmers use, including sole proprietorships, partnerships, limited liability companies, corporations, and others. Each business structure is evaluated for its usefulness for farmers.

OVERVIEW OF BUSINESS STRUCTURES Attorneys often act as business advisors for their clients, counseling on and assisting in the formation of legal business structures that help those businesses thrive. Attorneys can play that same role for farmers. Farmers face similar issues as an attorney's more traditional business clients, including raising cash, limiting liability, and finding ways to facilitate business transfers. However, some farm issues differ from traditional business clients' concerns.

For example, attorneys may be accustomed to working for clients whose income is entirely derived from their businesses. In contrast, many farmers use non-farm income to support their farms and households. In the United States, a majority (60.9%) of principal farm operators worked at least one day off the farm per year, and 39.9% of principal operators worked 200 days or more off the farm per year.¹ In Maine, 51% of

¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.

principal farm operators' primary occupation is not farming.² Even for those Maine operators who reported their primary occupations as farming, 62.5% worked at least one day off-farm and 37.5% worked more than 200 days off-farm.³

Additionally, the economic profile of farmers in the Legal Services Food Hub (Hub) may not mirror an attorney's traditional clients. Nearly 86% of Maine farms had gross annual sales of less than \$50,000.⁴ Only 2.9% of Maine farms grossed more than \$500,000.⁵ Therefore, the risks and costs of various business structures may have different weight for many Maine farmers.⁶

Finally, certain personal assets of farmers may have more protection from business creditors than those of other clients. Farmers might have fewer assets solely for personal use because a farmer's assets, such as vehicles and homes, may also be used in the operation of the farm. To satisfy a farmer's creditors, a bankruptcy judge may avoid seizing those assets that the farmer needs to make a living. Further, farmers have their own chapter of the bankruptcy code (Chapter 12, instead of Chapters 9 or 11), which provides farmers and their assets additional protection.⁷

Risk Management on Farms

Farmers have a variety of risk management tools to choose from, including certain formalized business structures. Commodity agricultural operations (those farms growing corn, soy, wheat, etc.) are eligible for an assortment of insurance options (often subsidized by the government), crop subsidies, and even disaster payments should the weather be especially bad in any given year. However, many Maine farms—particularly those eligible for assistance through the Hub—produce specialty crops (i.e., fruits, vegetables, and nuts), and they largely do not have the same options available to them. There are some insurance programs for larger specialty crop operators. The newer Whole-Farm Revenue Protection insurance provides coverage under one policy against loss of revenue that the operator expects to earn or would obtain from commodities she produces during the insurance period. But for the majority of smaller-scale specialty crop producers, government insurance, crop subsidies, and disaster payments are not tools they can use to manage their risk. Diversification of the farm operation (in terms of crops and market outlets) and smart business structure formation are important tools for these smaller-scale producers.

Still, farmers have many reasons to formalize their businesses. First, formalized structures can help farmers transfer the farm to the next generation. For example, the business may be structured to allow multiple farm operators (such as the owner and her adult children), which helps transfer knowledge and assets

² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 69 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_069_069.pdf.

³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 69 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_069_069.pdf.

⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

⁵ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

⁶ The Hub limits pro bono eligibility to farms with (a) annual revenue of at least \$5,000 in the prior tax year OR operations that started within the last three years; AND (b) net annual income of \$30,000 or less; AND (c) household income not exceeding 400% of the Federal Poverty Level. The 2015 Federal Poverty Level is \$11,770 for individuals and \$24,250 for a family of four.

⁷ 11 U.S.C. § 1201 et seq. (2012).

between generations. Second, if a farm has multiple operators, a formalized business structure can help order decision-making, compensation, and dissolution. Third, farmers participating in multi-farm endeavors may wish to segregate various farms' assets. Fourth, farmers may use a variety of business structures to segregate assets within a single operation. For instance, farmers may be advised to hold land independently from the rest of the business. Finally, farmers may engage in non-production activities, such as agritourism or processing, and may want to structure those higher-risk activities as separate businesses to limit tort and other potential liabilities.

PREVALENCE OF FARM BUSINESS STRUCTURES IN MAINE AND THE UNITED STATES

The vast majority (86.7%) of farms in the United States operate as sole proprietorships.⁸ Similarly, in Maine, 85% of farms operate as sole proprietorships.⁹ Since 2002, the total number of farms using corporations, limited liability companies, or other structures (cooperative, estate, or trust) increased, while the number of farms organized as partnerships declined.¹⁰ (The 2012 Census of Agriculture categorized farms as individual, partnership, corporation, or other.¹¹ The charts below reflect those categories, though the Guide covers a wider range of structures.)

Figure 1. United States Farms by Legal Status¹²

	2012	2007	2002
Total Number of Farms	2,109,303	2,204,792	2,128,982
Family or Individual (sole proprietorship)	1,828,946 (86.7%)	1,906,335 (86.5%)	1,909,598 (89.7%)
Partnership	137,987 (6.5%)	174,247 (7.9%)	129,593 (6.05%)
Corporations	106,746 (5.1%)	96,074 (4.3%)	73,752 (3.5%)
Other (cooperative, estate, or trust)	35,654 (1.7%)	28,136 (1.3%)	16,039 (0.75%)

⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.

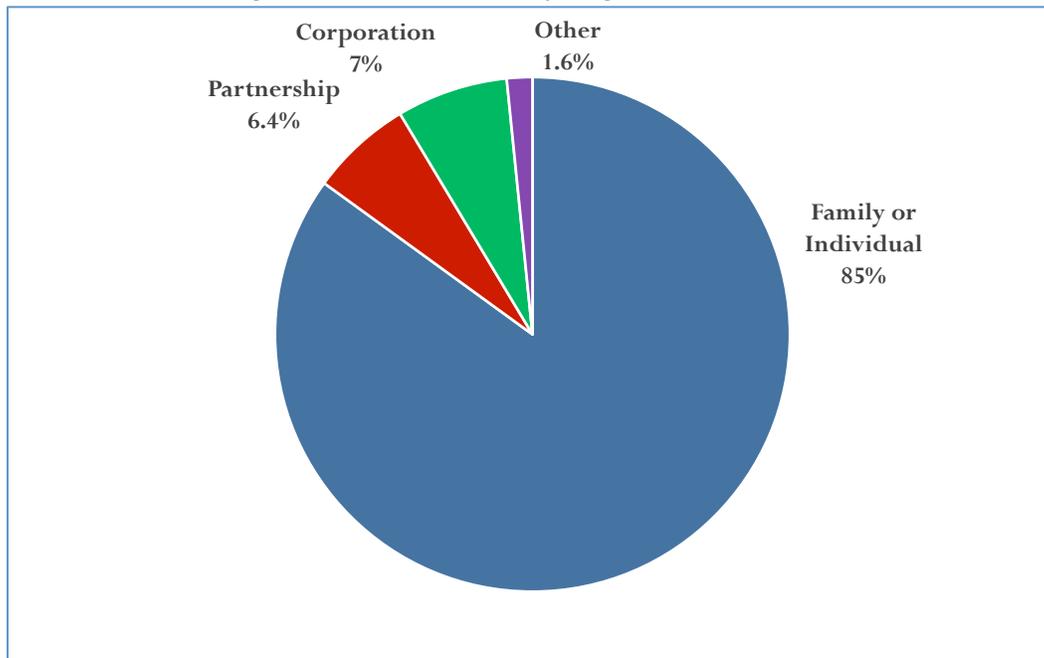
⁹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

¹⁰ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE U.S. DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf; U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st25_1_001_001.pdf.

¹¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 67 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_067_067.pdf.

¹² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.

Figure 2. Maine Farms by Legal Status in 2012¹³



GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE FARMER The attorney's first task when serving farmers will often be to identify the most useful business structures. To provide informed advice, an attorney must understand the current business operation, including its goals, challenges, and liabilities. Farmers' priorities may vary. For instance, is the farmer's goal to limit the farm's potential liability? Does the farmer want to reduce taxes? Or, would the farmer like to expand her farm operation by selling to grocery stores or through a community supported agriculture (CSA) operation? The attorney's questions and farmer's answers can serve two purposes. First, they increase the attorney's understanding. Second, they help the farmer identify and organize her operational priorities.

Attorneys should ask farmers questions about the following topics. These questions do not always directly relate to structure formation, but they do provide opportunities for an attorney to learn about the farm's risks and opportunities, which will help inform the attorney's guidance.

- **Ownership and/or Management:** Who will be participating in the management of the farm operation? Who owns the farm business? Who might gain or lose farm ownership in the future?
- **Land:** Who owns the land? Are there any mortgages or liens on the land? Does anyone lease the land? What are the terms of the leases and mortgages? Does the farmer hope to purchase land in the future? Are there any easements or other preservation restrictions on the land?

¹³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 1 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf.

- **Employees:** Does the farmer have any employees? How many? Are the employees family members of the farmer? Does the farmer consider any of the people working on the farm to be interns, volunteers, or independent contractors?
- **Collaborative Practices:** Does the farmer collaborate with other farmers? For example, does the farmer store other farmers' produce on her farm? Does the farmer share equipment with other farmers?
- **Roadside Markets and Farm Stands:** Does the farmer have, or hope to have, a roadside market or farm stand? Is the roadside market or farm stand located on property owned or controlled by the farmer? Is the farmer selling any goods he or she did not produce?
- **Wholesale Markets:** Does the farmer sell, or hope to sell, to wholesalers?
- **Value-Added Products:** Will the farmer sell products other than raw agricultural commodities (i.e., will she process them in some way)?
- **Farmers' Markets:** Does the farmer sell, or want to sell, at a farmers' market? What requirements does the farmers' market set? For instance, does the farmers' market require particular insurance, or food safety standards and practices?
- **Community Supported Agriculture:** Does the farmer have, or want to have, a CSA? If so, will members of the CSA pick up their shares on the farm, or off the farm? Will the CSA members ever come on the farm for a tour, for a gathering, and/or to do work around the farm?
- **Direct Sales to Restaurants and Other Institutions:** Does the farmer sell, or want to sell, directly to restaurants or other institutions? Does the restaurant or institution require a certain level of insurance? Does the restaurant or institution request or require compliance with food safety standards? Does the farmer do any processing (minimal or otherwise) to the product she sells to the restaurant or institution?
- **Agritourism and Other Forms of On-Farm Recreation:** Does the farmer engage in, or want to engage in, agritourism activities or other forms of on-farm recreation?
- **Pick-Your-Own:** Does the farmer have, or want to have, a pick-your-own operation; i.e., does the public come onto the farmer's land to engage in agricultural activities?
- **Permits, Licenses, and Certifications:** What permits, licenses, or certifications, if any, does the farm operation have or require?
- **Insurance:** What kind of insurance policy, if any, does the farmer hold? Do any insurance policies explicitly cover or exclude any activities that the farmer conducts (e.g., if the farmer allows members of the public to enter the farm)?
- **Other Professionals:** Does the farmer consult with any other business professionals, such as an accountant or tax preparer?
- **Financing:** How does the farmer fund the farm? Has the farmer received any grants or loans? Is the farmer interested in modifying or finding additional grants or loans?

MAJOR FACTORS IN EVALUATING DIFFERENT BUSINESS STRUCTURES

Once the attorney has an idea of the goals and needs of the farmer, the attorney will be better able to assist

the farmer in choosing the best business structure for the operation. When helping farmers decide which structure to choose, it is important to protect the farmer and her assets from unpredictable emergencies and unforeseen hardships.¹⁴ This section will familiarize the attorney with some factors that might motivate farmers to choose one business structure over another.

Percentage of Farms Operated as Sole Proprietorships

Maine: 84.8%
Nationally: 86.7%

Source: 2012 Census of Agriculture

The attorney must be very careful to determine who the client is (e.g., the farmer? a partner? the partnership? a corporation? an investor? a limited partner?) and then must be very clear in all further dealings in order to avoid conflicts of interest. This is a common problem that can have tragic consequences. If in doubt, an attorney should ask for help from more experienced

lawyers or from the Maine Overseers of the Bar. This guide assumes that the client is the farmer, but that may not be the case.

Maine Statutes

Maine Uniform Partnership Act, 31 M.R.S.A. §1001 et seq.

Maine Uniform Limited Partnership Act, 31 M.R.S.A. §1301 et seq.

Maine Limited Liability Partnership Act, 31 M.R.S.A. §801 et seq.

Maine Limited Liability Company Act, 31 M.R.S.A. § 1501 et seq.

Maine Business Corporation Act, 13-C M.R.S.A. §101 et seq.

Maine Nonprofit Corporation Act, 13-B M.R.S.A. §101 et seq.

Cooperatives 13 M.R.S.A. §§ 1501 et seq.

First, attorneys and the client should consider the **ease of formation and management** of the organization. Farming can be very time intensive, especially for diversified and small-scale operations common in Maine. Farmers have different preferences for management and administration. Some farmers may have flexible schedules or business training and, therefore, lower administration costs. In other cases, management costs may make formation and upkeep of a formal business structure too expensive. Some business structures require fewer state and federal filings; others require organizational documents, registration, and on-going recordkeeping. The attorney and farmer should discuss administrative requirements, and highlight which requirements are on-going as opposed to one-time.

Second, the attorney must consider how the entity will be **taxed**. Businesses can create or limit tax liability. A “pass-through” entity, such as a partnership or S-corporation, is not itself subject to taxation. Instead, the entity’s owners are taxed on their share of the business income.¹⁵ In contrast, “double-taxation” entities, mostly C-corporations, must pay taxes on the business’s profits, and

¹⁴ See, e.g. *Natural Events and Disasters*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaagct/tned.html> (last visited Feb. 16, 2015).

¹⁵ See ANNETTE M. HIGBY ET AL., *A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT* (Univ. of VT. Extension ed. 2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

then any profits distributed to owners are taxed as personal income.¹⁶ But there are also benefits to a C-corporation that may justify using it. This calls for bringing in a good tax advisor/CPA/tax lawyer to run the various numbers and figure out which format actually makes the best sense.

Third, attorneys should help the farmer consider how to **limit liability**. Certain business structures limit the liability of some or all of the business's owners, while others provide no protection. As with any business, there are many ways a farmer can incur liability: an employee or visitor could be injured on the farm; pollution or hazardous materials could run off the farm; the farmer could default on a loan; or a business partner could incur a debt tied to the farm business. The attorney should identify potential liabilities and assess whether to suggest a limited liability business structure to minimize the risk. Other risk management tools, such as insurance, may address the farmer's potential liabilities more cheaply.

Fourth, attorneys should consider **ease of transfer** when discussing the business structure options with the farmer. Farmers may wish to keep the farm within the family or maintain ownership until much later in life. Others may decide to transfer sooner, or to persons outside of the family. Customizable business structures can smooth complicated transfers and carry out a farmer's unique wishes.

Similarly, the **life of the entity** is an important factor to consider when selecting a business structure. The attorney and farmer should discuss whether the farm business will terminate once she retires, or whether the farm operation will continue beyond a farmer's term. Chapter IV of this Guide has more detail about farm transitions.

Finally, the attorney should help assess the importance of **outside investment**. Certain business structures better facilitate investment. If the farmer hopes to have non-operators financially support the farm, she might consider a business structure that allows for outside investment without turning over control.

After considering these many factors with the farmer, the attorney will have a better understanding of the farmer's needs and will only then be able to advise the farmer in choosing a business structure.

CHOOSING A BUSINESS STRUCTURE A farmer may choose from many structures when formalizing her business operation. This section discusses the primary business structures available under Maine law.

Sole Proprietorships A sole proprietorship is the most common form of business ownership. It is an unincorporated business owned and run by one individual with no distinction between the business and the owner. The owner is entitled to all profits and is responsible for all the business's debts, losses, and

¹⁶ See ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT (Univ. of VT. Extension ed. 2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

liabilities.¹⁷ Most Maine farms (84.8%) are sole proprietorships.¹⁸ Forming a sole proprietorship does not require any legal filing.

If a farmer operates a sole proprietorship, she does not need to register her business with the State. However, there may be state, city, or town permits or licenses that are required to operate her business.¹⁹ Even if the farmer wishes to avoid formal organization, an attorney should still advise her client to choose a name for the business and register the farm business name with the Maine Secretary of State.²⁰ This allows the farmer to ensure that the name is not already being used by another business and that other businesses cannot use the farm's name in the future.²¹ This is a useful practice but not a legal requirement; there is no provision under Maine law that requires farmers to file trade names for sole proprietorships at the state level. Local filing, however, is mandatory. If a farmer decides to operate as a sole proprietor under a trade name, she will be required by Maine law to file with the municipal clerk where her business is located.²²

Pros for Farmers:

- **Ease of Formation and Management:** Any person who starts a farming business without organizing or filing will be considered a sole proprietor.²³ In Maine, one can establish a sole proprietorship without filing any legal documents, and there are no yearly filings or fee requirements.²⁴ The formality of a sole proprietorship requires very little time or effort from the farmer. Farmers may find this appealing because it allows them to focus on farming rather than business formalities.
- **Taxation:** The owner of a sole proprietorship is taxed on a personal level for all income and expenses from the business.²⁵ Because Hub farmers must make less than 400% of the Federal Poverty Level, their tax rates will likely be low.

Cons for Farmers:

¹⁷ *Sole Proprietorship*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/sole-proprietorship-0> (last visited Apr. 22, 2015).

¹⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA TABLE 1, 7 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_001_001.pdf. The 2012 U.S. Census of Agriculture categorizes the "family or individual" designation as sole proprietorship, and excludes partnerships and corporations.

¹⁹ *Starting a Business*, MAINE.GOV, <http://www.maine.gov/portal/business/starting.html> (last visited Apr. 22, 2015).

²⁰ ME. SECRETARY OF STATE, www.maine.gov/sos.

²¹ *How to Name a Business*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/how-name-business> (last visited Apr. 17, 2015).

²² 31 M.R.S §§ 1-2 (2014); *see also Marks & Trade Names*, MAINE.GOV, <http://www.maine.gov/sos/cec/corp/trademarks.html> (last visited Apr. 22, 2015).

²³ LARRY D. SODERQUIST ET AL., *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS* 39 (6th ed. 2005) ("[T]he legal identity of the sole proprietorship and its owner are one and the same...").

²⁴ *Frequently Asked Questions*, ME. SMALL BUS. DEV. CTR., <http://www.mainesbdc.org/index.cfm/spKey/faqs.html> (last visited Apr. 22, 2015).

²⁵ *Frequently Asked Questions*, ME. SMALL BUS. DEV. CTR., <http://www.mainesbdc.org/index.cfm/spKey/faqs.html> (last visited Apr. 22, 2015).

- **Limiting Liability:** A sole proprietorship is not distinct from its owner, so this business structure does not limit the owner’s liability. Generally, a creditor of the business can force the owner to sell personal assets in order to pay the debts and obligations of the business.²⁶ However, because the farmer’s personal assets and the farm assets may be the same, those shared-use assets may be unavailable to satisfy creditors during bankruptcy proceedings, as previously noted. Though this may appear to benefit the farmer, it can limit creditors’ willingness to loan capital.
- **Life of Entity:** A sole proprietorship terminates when the owner passes away or sells the business assets.²⁷ Therefore, sole proprietorships may be undesirable for a farmer who wishes to keep the farm business intact after she passes away, especially if the farmer has multiple heirs or complex succession needs.
- **Outside Investment:** Sole proprietorships do not allow the business owner to raise capital by selling equity interests in the business.²⁸ Therefore, if the farmer is interested in obtaining outside investments, a sole proprietorship may not be the best option.
- **Ease of Transfer:** Because sole proprietors have total control over their farming operation, they will have full rights to transfer assets to another party.²⁹ However, because a sole proprietorship has no legal identity separate from its owner, it cannot be transferred as a business. Instead, each part of the farm business, such as land, structures, and equipment, must be conveyed. Transferring the business in this manner may increase transaction costs.

Gentleman’s Agreements

Sometimes farmers enter into “gentleman’s agreements” with neighbors or relatives to share the profits from crops or to share some of the labor. Make sure to talk with the farmer about any gentleman’s agreements the farmer may have to see if the farmer has unintentionally formed a partnership. It is important to explain to the farmer that any unwritten agreements pertaining to land ownership (leases over one year or fee ownership) are likely unenforceable due to the statute of frauds. So, any agreement pertaining to land should be reduced to writing, and most such agreements will need to be recorded in the Registry of Deeds.

Partnerships A partnership is an association of two or more persons to carry on as co-owners of a business for profit.³⁰ A partner’s contribution may consist of money, property, labor, credit, and/or skill. In return for his or her contribution to the business, each partner shares in the profits and losses of the business.³¹ About 6.4% of farms in Maine are organized as partnerships.³² Of the 525 farms that identify as

²⁶ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 3:2 (2014).

²⁷ HARRY J. HAYNSWORTH, SELECTING THE FORM OF A SMALL BUSINESS ENTITY 3 (1985).

²⁸ *Sole Proprietorship*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/sole-proprietorship-0> (last visited Feb. 16, 2015).

²⁹ *Transfer Ownership*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/transfer-ownership> (last visited Feb. 16, 2015).

³⁰ 31 M.R.S. § 1001(6) (2013).

³¹ *Partnership*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/partnership> (last visited Apr. 25, 2015).

³² U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_067_067.pdf.

partnerships, 312 (59.4%) are registered under Maine law as limited partnerships and limited liability partnerships.³³

The General Partnership

A general partnership is an association of two or more persons to carry on, as co-owners, a for-profit business. All partners share equally in control of the business and liability. A general partnership is the default business structure for two or more persons who operate a business and share profits. The Uniform Partnership Act governs partnerships in Maine,³⁴ and the partnership is governed by its partnership agreement.³⁵ In Maine, there are no formation or filing requirements, and the partnership is governed by its partnership agreement with the partnership statute supplying the default rules for the relationship between the partners when there is no agreement on a specific term.³⁶ Because of the informality of some arrangements, farmers may be unknowingly operating as a partnership and doing so without having negotiated a comprehensive partnership agreement.



Percentage of Farms Operated as Partnerships

Maine: 6.4%
Nationally: 6.5%

Source: 2012 Census of Agriculture

Farmers operating as a general partnership should draft a partnership agreement.³⁷ They can set forth the specific terms that they want governing the partnership. There are some terms of a partnership that may not be varied by the agreement.³⁸ A partnership statement should be filed with the secretary of state.³⁹ The agreement should contain, at a minimum, the following:

- each partner's ownership interest;
- how profits and losses are shared;
- any obligation to contribute additional capital;
- how management and control is shared among the partners and how decisions are made;
- the extent of each partner's authority to incur debt or liabilities for the partnership;
- restrictions on transferring partnership interests;
- how to accept new partners and how current partners can withdraw from the partnership; and,
- how, and under what circumstances, the partnership will terminate.

³³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 67 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_067_067.pdf; 31 M.R.S. §§ 801-876, 1001-1105, 1301-1461 (2013).

³⁴ 31 M.R.S. § 1001 et seq. (2013).

³⁵ 31 M.R.S. § 1003(1) (2013).

³⁶ 31 M.R.S. § 1003 (2013).

³⁷ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 5:7 (2014).

³⁸ 31 M.R.S. § 1003(2) (2013).

³⁹ 31 M.R.S. § 1005 (2013).

In addition to addressing the distribution of profits, when drawing up a partnership agreement, the attorney should focus attention on the contributions of each partner to the partnership, the division of responsibility for potential risks, the authority of the partners to act on behalf of the partnership, the division of management duties, and the resolution process for disputes. It would also be advisable for the attorney to address some of the finer details, such as the process for a partner to withdraw from the partnership and the process to dissolve the partnership.

If no partnership agreement is written, an agreement may still be inferred by a judge from the words, conduct, customs, and practices of the partners. If agreement on a specific term is neither explicit nor inferable, Maine's Uniform Partnership Act will supply the terms for the operation of the partnership and the relations of the partners. However, ownership of the land will be controlled by the recorded deeds. Additionally, without a comprehensive written partnership agreement, it will be more difficult to wind down and terminate the partnership.

Pros for Farmers:

- **Ease of Formation and Management:** If there are two farmers operating one farm, any form of agreement to jointly operate the farm for profit will create a general partnership. The ease of formation and maintenance of the business structure can be a positive for farmers.
- **Taxation:** Like a sole proprietorship, partnerships receive “pass-through” tax treatment unless the partners elect to have partnership income separately taxed.⁴⁰ Partners pay income tax on any profits earned by the partnership, while the partnership itself is not taxed.⁴¹ However, partnerships may elect not to distribute excess cash to the partners and instead reinvest those profits in the business.
- **Raising Capital:** General partnerships allow for outside investments because there is no limit on the number of partners. Outside individuals can invest and become a general partner.⁴² Note: this may require modifying the partnership agreement.
- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time. (Note, however, that absent a written partnership agreement addressing dissolution, the partners may disassociate at any time, leaving the remaining partner with an economic burden to buy-out the departing partner.⁴³)

Cons for Farmers:

- **Liability:** General partnerships expose partners to both upside and downside risk. In other words, partners share in all business profits and losses, and are also exposed individually to liability for

⁴⁰ *Bulletin # 3009: How to Organize Your Business*, UMAINE COOP. EXTENSION PUBL'N, <http://umaine.edu/publications/3009e/> (last updated 2008); BERNSTEIN SHUR, *DOING BUSINESS IN MAINE* (Lex Mundi 2010), available at http://www.lexmundi.com/lexmundi/Guides_To_Doing_Business.asp.

⁴¹ *Bulletin # 3009: How to Organize Your Business*, UMAINE COOP. EXTENSION PUBL'N, <http://umaine.edu/publications/3009e/> (last updated 2008).

⁴² *Bulletin # 3009: How to Organize Your Business*, UMAINE COOP. EXTENSION PUBL'N, <http://umaine.edu/publications/3009e/> (last updated 2008).

⁴³ 31 M.R.S. §§ 1061, 1071 (2013).

business losses. All general partners are jointly and severally liable for all business obligations.⁴⁴ Creditors, and others, may sue any or all partners and recover from their personal assets.⁴⁵

- **Ease of Transfer:** In Maine, a partnership generally continues after dissolution, but only for purposes of closing the business.⁴⁶ Absent a provision in the partnership agreement to the contrary, or without the consent of the other partners, partners can grant an assignee of the partner's partnership interest their share of profits only, not the right to participate in the management and conduct of the partnership.⁴⁷ Therefore, if the farmer plans to transfer control of the farm to relatives or another party, the farmer should either ensure that the partnership agreement clearly provides for transfer of control or choose a different business structure.
- **Raising Capital:** Joint and several liability of general partners may deter outside investment because all investors who become partners will be exposed to the business's risks.⁴⁸ Or a farmer may not wish to use general partnerships to raise funds when outside investors/partners would gain the right to influence farm management.
- **Partner Relationships:** While partnerships can provide many benefits, going into business with other individuals can complicate relationships, and disagreement among partners may consume resources, cause unnecessary stress, and adversely impact the business. Seeking out new partners also can be costly and uncertain.

The Limited Liability Partnership

The limited liability partnership (LLP) is a general partnership that has adopted limited liability status.⁴⁹ The LLP limits the personal liability of all the entity's partners, which minimizes the risks to partners' personal assets.⁵⁰ To form an LLP, a farmer must choose a name and register it with the secretary of state,⁵¹ and also must register⁵² and file a Certificate of Limited Liability Partnership with the Secretary of State.⁵³ A registered limited liability partnership must maintain a registered agent in the state.⁵⁴

Pros for Farmers:

- **Taxation:** Like all partnerships, limited liability partnerships may receive "pass-through" tax treatment.⁵⁵ Partners pay income tax on any profits earned by the limited liability partnership,

⁴⁴ 31 M.R.S. § 1034(1) (2013).

⁴⁵ 31 M.R.S. § 1035 (2013).

⁴⁶ 31 M.R.S. § 1082 (2013) ("At any time after the dissolution of a partnership and before the winding up of its business is completed, all of the partners, including any dissociating partner other than a wrongfully dissociating partner, may waive the right to have the partnership's business wound up and the partnership terminated.")

⁴⁷ 31 M.R.S. §§ 1063(2)(A), 1087 (2013).

⁴⁸ See ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT (Univ. of VT. Extension ed. 2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

⁴⁹ 31 M.R.S. § 821 (2013).

⁵⁰ 31 M.R.S. § 822 (2013).

⁵¹ 31 M.R.S. § 803-A (2013).

⁵² 31 M.R.S. § 821 (2013).

⁵³ 31 M.R.S. § 822 (2013).

⁵⁴ 31 M.R.S. § 807-A (2013).

⁵⁵ 18-125 C.M.R. 806, § 2 (2006).

while the partnership itself is not taxed.⁵⁶ However, partnerships may elect not to distribute excess cash to the partners and instead reinvest those profits in the business.

- **Limited Liability:** All of the partners are protected from the LLP's liabilities, except in the case of a partner's own negligence.⁵⁷ This protection extends to all partners, even those involved in farm management.
- **Raising Capital:** LLPs may accept investments from outside investors. Because an LLP is a general partnership with limited liability status, all persons jointly carrying on a business for profit will be considered partners. In an LLP, partnership status carries with it power over the management of the partnership business. The LLP could be attractive to investors interested in farm management and who want limited liability.
- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time.

Cons for Farmers:

- **Ease of Formation and Management:** There are more formal steps and fees required to form and maintain an LLP. These requirements may deter a farmer from choosing to form an LLP.
- **Partner Relationships:** While partnerships can provide many benefits, going into business with other individuals can complicate relationships, and disagreement among partners may consume resources, cause unnecessary stress, and adversely impact the business. Seeking out new partners also can be costly and uncertain.
- **Ease of Transfer:** LLPs can face similar transfer difficulties to the general partnership.

The Limited Partnership

The limited partnership (LP) is similar to the general partnership in that there must be at least two owners but differs because the partners do not have equal obligation.⁵⁸ Under an LP, some partners are deemed "limited partners" who invest and are entitled to profits but do not have all of the rights or obligations of "general partners."⁵⁹ The general partners control business management and operations and remain liable for all business obligations.⁶⁰ The limited partners, on the other hand, enjoy a limitation on liability and have limited duties.⁶¹ An LP must file a Certificate of Limited Partnership with the secretary of state.⁶² Farmers in an LP should draft a partnership agreement addressing at least the issues discussed above regarding a general partnership.

Pros for Farmers:

⁵⁶ *Bulletin # 3009: How to Organize Your Business*, UMAINE COOP. EXTENSION PUBL'N, <http://umaine.edu/publications/3009e/> (last updated 2008).

⁵⁷ *Starting Your Own Company: Know the Basics*, LINNELL, CHOATE, & WEBBER, LLP, <http://lcwlaw.com/2012/03/starting-your-own-company-know-the-basics/> (last visited Apr. 22, 2015).

⁵⁸ 31 M.R.S. § 1302(11) (2013).

⁵⁹ 31 M.R.S. §§ 1342-43 (2013).

⁶⁰ 31 M.R.S. § 1354 (2013).

⁶¹ 31 M.R.S. § 1345 (2013).

⁶² 31 M.R.S. § 1321(1) (2013).

- **Taxation:** Like a sole proprietorship, partnerships receive “pass-through” tax treatment.⁶³ Partners pay income tax on any profits earned by the limited partnership, while the LP itself is not taxed.⁶⁴ Alternatively, partners can elect to have the LP taxed as an entity with separate taxation on profits distributed to partners (i.e, double taxation). Partnerships may elect not to distribute excess cash to the partners and instead reinvest those profits in the business.
- **Limited Liability:** LPs protect limited partners’ personal assets from business liabilities and so can encourage investors.⁶⁵ This could be a benefit for a farmer who wants multiple investors but wants to retain management and control over the farm for herself. It may also be useful in distributing interests in the farm to children or other family members without subjecting them to potential liability for the obligations of the LP.
- **Ease of Transfer:** Unless otherwise provided in the partnership agreement, an LP can be consolidated or merged with another business entity as long as all general and limited partners approve.⁶⁶ Additionally, individual partnership interests may be transferred if all partners consent to the transfer or the partnership agreement so provides.⁶⁷ (Note, however, that without any partnership agreement, transfers can be complicated.)
- **Life of Entity:** Farmers can have substantial control over the LP’s end by including termination conditions in the partnership agreement.⁶⁸
- **Raising Capital:** Unlike general partnerships, investors can provide capital without incurring any liability by becoming limited partners.⁶⁹ This is good for investors who do not wish to manage the farm and want limited liability.

Cons for Farmers:

- **Liability:** General partners in an LP remain personally liable for any and all actions the partnership takes.⁷⁰ The LP can elect in its Certificate of Limited Partnership to be a limited liability limited partnership (LLLP).⁷¹ This election will free a general partner from any personal liability for an obligation of the LLLP arising “in contract, tort or otherwise.”⁷²

⁶³ BERNSTEIN SHUR, DOING BUSINESS IN MAINE (Lex Mundi 2010), *available at* http://www.lexmundi.com/lexmundi/Guides_To_Doing_Business.asp.

⁶⁴ *Bulletin # 3009: How to Organize Your Business*, UMAINE COOP. EXTENSION PUBL’N, <http://umaine.edu/publications/3009e/> (last updated 2008).

⁶⁵ 31 M.R.S. § 1343 (2013) (explaining that a limited partner is not liable for partnership obligations “even if the limited partner participates in the management and control of the limited partnership”). The risk is that a limited partner could be so involved with the operation that the court would re-characterize the limited partner as a general partner.

⁶⁶ 31 M.R.S. §§ 1431-43 (2013).

⁶⁷ 31 M.R.S. §§ 1381-1384 (2013).

⁶⁸ 31 M.R.S. § 1373 (2013).

⁶⁹ BERNSTEIN SHUR, DOING BUSINESS IN MAINE (Lex Mundi 2010), *available at* http://www.lexmundi.com/lexmundi/Guides_To_Doing_Business.asp.

⁷⁰ 31 M.R.S. § 1354 (2013).

⁷¹ 31 M.R.S. § 1321 (2013).

⁷² 31 M.R.S. § 1354(3) (2013).

- **Partner Relationships:** While partnerships can provide many benefits, going into business with other individuals can complicate relationships, and disagreement among partners may consume resources, cause unnecessary stress, and adversely impact the business. Seeking out new partners also can be costly and uncertain.

Limited Liability Companies A limited liability company (LLC) is a hybrid type of legal structure that provides the limited liability features of a corporation and operational flexibility of a partnership.⁷³ LLCs are popular business structures among farmers because LLCs do not demand as many formal requirements as certain other business entities and are very flexible.⁷⁴ By default, LLCs are owned by members; members may also act as managers of the LLC.⁷⁵ In Maine, the law requires that the LLC have a company agreement, and within the agreement, members are able to determine how they want the company to operate and the roles of its members.⁷⁶ The operating agreement may establish one or more managers, in which case some members may not have a role in managing the LLC.⁷⁷



Pros for Farmers:

- **Ease of Formation and Management:** Although there are some steps a farmer must take to maintain an LLC, they are less onerous than other business structure filing requirements, notably those for corporations. To form an LLC, the farmer must file a certificate of formation with the secretary of state.⁷⁸ The farmer must also create an operating agreement, which details how the LLC is to be governed and provides other organizational details.⁷⁹
- **Taxation:** LLCs may elect “pass-through” or “double” taxation. As with partnerships, this customization allows members to select an optimal tax treatment. However, for those LLCs with a single member, the member must account for all profits and losses on his or her individual income taxes (pass-through).⁸⁰ For LLCs with multiple members, the profits and losses are generally allocated based on proportional ownership but may be allocated differently in the partnership agreement.⁸¹

⁷³ *Limited Liability Company*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/limited-liability-company-llc> (last visited Feb. 26, 2015).

⁷⁴ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 7:1 (2014).

⁷⁵ 31 M.R.S. § 1523 (2013).

⁷⁶ 31 M.R.S. § 1521 (2013); *Starting Your Own Company: Know the Basics*, LINNELL, CHOATE, & WEBBER, LLP, <http://lcwlaw.com/2012/03/starting-your-own-company-know-the-basics/> (last visited Apr. 22, 2015).

⁷⁷ 31 M.R.S. § 1524 (2013).

⁷⁸ 31 M.R.S. § 1531 (2013).

⁷⁹ 31 M.R.S. § 1521 (2013).

⁸⁰ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 7:5 (2014).

⁸¹ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 7:35 (2014).

- **Limited Liability:** Provided that the separateness and formalities of the LLC are respected, LLCs provide a limitation on liability for all members with respect to the debts and liabilities of the LLC.⁸² This can be attractive to farmers who want to be able to exercise control over the management of the farm and protect themselves from personal liability.
- **Ease of Transfer:** LLCs allow for the controlled transfer of interests in the LLC to other parties, including the assignment of a member's interests to another party, as expressly provided in the operating agreement.⁸³ LLCs are good for farmers who want to transfer the farm business between generations or between owners, because LLCs allow for flexible operating agreements to accommodate various transfer situations.
- **Raising Capital:** LLCs are a good type of business entity if the farmer is interested in obtaining outside investments because there can be several different classes of members or managers.⁸⁴ By using an LLC rather than a corporation, a farm business can more flexibly structure investor relationships.⁸⁵
- **Other:**
 - **Multiple Business Ventures:** An LLC is good for farmers forming a multi-farm CSA because it allows multiple members to share CSA management and limit their liability. Similarly, an LLC may be a good option for farmers who have different business ventures and want to keep them separate. For example, if the farmer hosts a fall festival that includes hayrides or other such events, the farmer may want to use an LLC for the agricultural operation and a separate LLC for the festival operation, protecting the assets of the farming venture from the potential liabilities of the festival operation.
 - **Higher-Risk Activities:** Farms that engage in higher-risk activities, such as fermenters, value-added operations, and agritourism, can create separate LLCs for those operations to protect the rest of the operation.
 - **Weighted Voting:** LLCs allow farmers to assign different weight to votes on different topics. For example, a farmer can use "one member, one vote" for operational decisions, or votes weighted by amount of investment for land sale. She can creatively allocate power by use of categories, classes, or voting rights. A lawyer advising a farmer should consult an expert if the farmer wishes to go this route.

Cons for Farmers:

- **Other:**
 - **Fees:** Annual state filing fees may be problematic for farmers with low gross income, but the filing fee for an LLC should not be prohibitive.

⁸² STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 7:15 (2014).

⁸³ 31 M.R.S. § 1571 (2013).

⁸⁴ *Starting Your Own Company: Know the Basics*, LINNELL, CHOATE, & WEBBER, LLP, <http://lcwlaw.com/2012/03/starting-your-own-company-know-the-basics/> (last visited Apr. 22, 2015).

⁸⁵ *Starting Your Own Company: Know the Basics*, LINNELL, CHOATE, & WEBBER, LLP, <http://lcwlaw.com/2012/03/starting-your-own-company-know-the-basics/> (last visited Apr. 22, 2015).

- **Paperwork:** An LLC is also not a good option for farmers who prefer not to bear paperwork or reporting burdens.
- **Personal Guarantee:** Some creditors may require farmers to personally guarantee their debts, regardless of the structure of their business, nullifying the usual protection from liability provided by the LLC structure (though this may also be true for other limited liability entities).

The Low-Profit Limited Liability Company (L3C)

The L3C is a relatively new legal form that combines aspects of a nonprofit and an LLC. There has not been much use of this form of structure as of the date the writing of this guide. Maine enacted L3C legislation effective July 1, 2011.⁸⁶ The L3C is essentially an LLC that has a primary public interest mission while, unlike a nonprofit organization, retaining an ability to generate and to distribute limited profits to its members. In Maine, a business may qualify as an L3C only if “no significant purpose of the company is the production of income or the appreciation of property.”⁸⁷

The filing fees and process are the same as for an LLC, except that the organization must specify its mission and that it intends to be an L3C. One of the major driving forces behind the creation of L3Cs was to help socially minded organizations raise funds,⁸⁸ but it is not yet clear that it will work well enough to be worth the restrictions. L3Cs are meant to attract “Program Related Investments” (PRIs). A PRI is a loan, investment, or other financial backing from a charitable foundation, except it must be made primarily to further the foundation’s social mission, with profit being only a secondary goal. Because L3Cs have a social mission written into their bylaws, the hope was that private foundations would more readily support them through PRIs. Thus far, foundations do not seem to be making many PRIs to L3Cs. A lawyer should consult with an expert in L3Cs if her client wishes to explore this option.

An L3C can also raise money in all of the traditional ways, such as attracting investors or taking out loans. Note that, unlike donations to a nonprofit, donations to an L3C are not tax deductible. Because they have a social mission, some investors may be scared away, but the tradeoff is that this mission may attract socially minded investors and make the L3C more appealing for new funding sources, such as crowdfunding.

Pros for Farmers:

- **Limited Liability:** L3Cs enjoy the same limited liability as LLCs.
- **Raising Capital:** L3Cs can raise capital like for-profit companies but may also have access to funding sources traditionally associated with nonprofits (at least in theory).
- **Other:** Farmers can run a business with the potential to garner outside investment while prioritizing a social mission (if desired) above maximizing profitability.

⁸⁶ 31 M.R.S. § 1611 (2013).

⁸⁷ 31 M.R.S. § 1611(2) (2013).

⁸⁸ 31 M.R.S. § 1611 (2013) (expressly references Section 170(c)(2)(B) of the Internal Revenue Code of 1986 in identifying whether a business furthers “charitable or educational purposes” so as to qualify as an L3C).

Cons for Farmers:

- **Taxation:** L3Cs are not eligible for tax-exempt treatment because they do not have to satisfy the strict income-limitations imposed on nonprofit corporations.⁸⁹
- **Purpose and Oversight:** Because L3Cs must “significantly further the accomplishment of one or more charitable or educational purposes,” and cannot have a significant purpose to produce income, they may not fit with the farmer’s personal profit mission. As a very new entity, it is unclear how much oversight of this mission-fit may be imposed by the Internal Revenue Service (IRS) or state regulators.

Corporations A corporation is an independent legal entity owned by shareholders. This means that the corporation itself, not the shareholders that own it, is legally responsible for the actions of the business and debts it incurs.⁹⁰ There are 582 farms in Maine that identify as corporations.⁹¹ Of those corporate farms, 503 identify as being family held (over 98% of which have 10 or fewer stockholders).⁹² Nearly all of the farms that are not family-held corporate farms also have 10 or fewer stockholders.⁹³ For purposes of federal income tax treatment, a farm can organize as a C-corporation or as a Subchapter S-corporation. A corporation may be closely held, which means that a limited number of people are shareholders, often family members. Smaller businesses, such as those likely to participate in the Hub, often elect S-corporation status with the IRS because of its tax advantages, i.e., the availability of pass-through taxation. If a corporation is larger and desires more flexibility in structuring its classes of shares, or plans to make a public offering of shares, it will likely prefer C-corporation status, which taxes the corporation as a separate entity. This section provides a basic overview of both forms.



Percentage of Farms Operated as Corporations

Maine: 7.1%
Nationally: 5%

Source: 2012 Census of Agriculture



C-Corporations

A corporation’s designation as “C” or “S” is determined in the company’s dealings with the IRS. To form any kind of corporation in Maine you must prepare and file Articles of Incorporation.⁹⁴ These Articles of Incorporation include the name of the corporation; the number of shares the corporation is permitted to issue; the clerk of the corporation (who primarily handles the administrative

⁸⁹ 31 M.R.S. § 1611(1) (2013); see generally *Maine Low-Profit Limited Liability Companies (L3C)*, LAWFORCHANGE.COM, <http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=2577> (last visited Apr. 22, 2015).

⁹⁰ 13-C M.R.S. § 623 (2013).

⁹¹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_067_067.pdf.

⁹² U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 67(2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_067_067.pdf.

⁹³ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_067_067.pdf.

⁹⁴ 13-C M.R.S. §§ 201-07 (2013).

functions of the corporation); and the incorporators, the people forming the corporation.⁹⁵ The corporation also needs bylaws,⁹⁶ directors,⁹⁷ officers,⁹⁸ and a good record keeping system.⁹⁹ The corporation also needs to file annual reports with the secretary of state.¹⁰⁰

Pros for Farmers:

- **Limited Liability:** Shareholders are protected from the liabilities and debts of the corporation, so long as the corporation maintains business formalities such as periodic meetings of the board of directors and careful recordkeeping.¹⁰¹
- **Ease of Transfer:** Stockholders can sell their stock to a willing buyer unless prohibited by the stockholder rules of the corporation itself.¹⁰² The entire corporation can be merged with other corporations. This is quite complex and an expert attorney must be engaged.¹⁰³
- **Life of Entity:** Corporations can survive beyond the life of the shareholders—the stock passes to heirs or devisees. Dissolving a corporation in Maine can be accomplished in various ways.¹⁰⁴
- **Raising Capital:** Corporations are useful tools for raising funds because of their ability to sell equity (shares) in the corporation, which is often easier and more familiar than selling partnership interests or LLC interests. A C-corporation may offer different classes of shares, providing greater financing flexibility.

Cons for Farmers:

- **Ease of Formation and Management:** There are numerous formalities required to form a corporation. For example, the corporation must have a board of directors,¹⁰⁵ hold at least one annual shareholder meeting,¹⁰⁶ and keep a distinct business bank account.¹⁰⁷ Other restrictions apply to corporations, including detailed recordkeeping requirements. These corporate formalities may differ from the farmer's current practices, and the costs of compliance will differ based on the farmer's needs, preferences, and business administration skills. Under the law, a corporation is a separate and legally distinct "person."

⁹⁵ 13-C M.R.S. § 202 (2013).

⁹⁶ 13-C M.R.S. § 206 (2013).

⁹⁷ 13 C-M.R.S. § 801 (2013).

⁹⁸ 13-C M.R.S. § 841 (2013).

⁹⁹ 13-C M.R.S. §§ 1601-23 (2013).

¹⁰⁰ 13-C M.R.S. § 1621 (2013).

¹⁰¹ 13-C M.R.S. § 623 (2013).

¹⁰² 13-C M.R.S. § 628 (2013).

¹⁰³ 13-C M.R.S. §§ 1201-02 (2013).

¹⁰⁴ 13-C M.R.S. §§ 1401-1440 (2013); *Bulletin # 3009: How to Organize Your Business*, UMAINE COOP. EXTENSION PUBL'N, <http://umaine.edu/publications/3009e/> (last updated 2008).

¹⁰⁵ 13-C M.R.S. §§ 743, 801 (2013).

¹⁰⁶ 13-C M.R.S. § 701 (2013).

¹⁰⁷ *Corporation Basics*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/corporation-basics-29867.html> (last visited Apr. 22, 2015).

- **Taxation:** C-corporations are subject to federal and state corporate income tax, so income earned by a C-corporation is subject to double taxation.¹⁰⁸

S-Corporations

Farmers used S-corporations to limit liability and transfer the farm between generations before LLCs were available.¹⁰⁹ Farmers use S-corporations more often than C-corporations. In Maine, a corporation becomes an S-corporation only when, with the consent of all shareholders, it seeks special tax treatment by filing with the IRS.¹¹⁰ In an S-corporation, all shareholders must be natural persons, citizens, or resident aliens of the United States; there may not be more than 100 stockholders and not more than one class of stock.¹¹¹

Pros for Farmers:

- **Limited Liability:** Shareholders are protected from the liabilities and debts of the corporation, so long as the corporation maintains business formalities such as periodic meetings of the board of directors and careful recordkeeping.¹¹²
- **Ease of Transfer:** With the restrictions mentioned above concerning S-corporation stockholders, stock can be transferred to others owners if not prohibited by the Articles or bylaws.¹¹³ (However, this is not necessarily an easy or straightforward task.)
- **Life of Entity:** Corporations can survive beyond the life of the shareholders. A corporation is dissolved by shareholder vote or judicial action.¹¹⁴ Dissolving a corporation in Maine is complex—a farmer should consult an expert for assistance.
- **Taxation:** An S-corporation is taxed similarly to a partnership, where the income and losses are passed through to the shareholders based on their ownership interests.¹¹⁵

Cons for Farmers:

- **Ease of Formation and Management:** Similar to the C-corporation, there are numerous formalities required to form a corporation.
- **Raising Capital:** The S-corporation's ability to raise capital may be closer to that of a partnership or sole proprietorship. S-corporations are limited to one class of stock and 100 shareholders, who must be U.S. citizens or resident aliens.

The Nonprofit Corporation

¹⁰⁸ See generally *Maine For-Profit Corporations: Using For-Profit Corporations to Pursue Social Objectives*, LAWFORCHANGE.COM, <http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=2573> (last visited Apr. 22, 2015).

¹⁰⁹ Phone Interview with Rachel Armstrong, Executive Director, Farm Commons, May 27, 2014 (on file with author).

¹¹⁰ *Forming Your Business in Maine*, MAXFILINGS.COM, <https://maine.maxfilings.com/KC-differences-between-c-corporations-s-corporations.php> (last visited Apr. 22, 2015).

¹¹¹ 26 U.S.C. § 1361 (2012).

¹¹² *S-Corporation*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/s-corporation> (last visited Apr. 22, 2015).

¹¹³ 13-C M.R.S. §§ 1201-02 (2013).

¹¹⁴ 13-C M.R.S. §§ 1401 et seq. (2013).

¹¹⁵ See generally *Maine For-Profit Corporations: Using For-Profit Corporations to Pursue Social Objectives*, LAWFORCHANGE.COM, <http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=2573> (last visited Apr. 22, 2015).

In Maine, a nonprofit corporation is managed by a board of directors. Instead of shareholders, the nonprofit corporation may have members who choose to participate in corporate matters. Nonprofit corporations are not organized to earn profits, so no part of the income may be distributed to its members, directors, or officers. A nonprofit corporation is formed under the Maine Nonprofit Corporation Act.¹¹⁶ It can be a mutual benefit corporation or public benefit corporation. Be aware that there may be little reason to form a nonprofit unless the operation is also going to obtain 501(c)(3) status. In order to achieve federal tax-exempt status, a farm would need to be a public benefit corporation.

In Maine, a public benefit corporation may be: (1) designated as a public benefit corporation by statute; (2) tax exempt under section 501(c)(3) of the Internal Revenue Code; (3) organized for a public or charitable purpose and required to distribute assets to a similar tax exempt organization upon dissolution; or (4) established as a public benefit corporation.¹¹⁷ An existing corporation may elect to become a nonprofit corporation by amending the corporation's Articles of Organization.¹¹⁸ Nonprofit corporations must maintain complete and accurate records and books evidencing the proceedings of its members and directors, file an annual report with the secretary of state, and pay an annual filing fee.¹¹⁹

The simplest way to think of a nonprofit tax-exempt organization is that the control is separate from the benefit (you can have one or the other, but not both), and those with control cannot profit. Where profit is not the goal, this business structure may be appealing to certain farmers who wish to ensure long-term accountability for a social or environmental mission.

Pros for Farmers:

- **Taxation:** A 501(c)(3) nonprofit corporation is exempt from federal income taxes and is also exempt from paying Maine corporation taxes.
- **Limited Liability:** The members of a nonprofit corporation, if any, are generally not personally liable for the corporation's debts and liabilities.
- **Ease of Transfer:** Any two or more nonprofit corporations in Maine may merge or consolidate by adopting a plan of merger or consolidation contingent upon approval by the entities' members or directors, and filing articles of merger with the state.
- **Life of Entity:** A nonprofit corporation can survive beyond the life of the members; a nonprofit corporation is terminated by member vote or judicial action.

Cons for Farmers:

- **Ease of Formation and Management:** As with other corporate structures, this structure may impose high costs on the farmer. There are numerous filings and administrative requirements associated with nonprofit corporation status.

¹¹⁶ 13-B M.R.S. §§ 101 et seq. (2013).

¹¹⁷ 13-B M.R.S. § 1406 (2014); *see generally* *How to Tell Whether Your Nonprofit Corporation is a Public Benefit Corporation or a Mutual Benefit Corporation*, MAINE.GOV, <http://www.maine.gov/sos/cec/corp/determining.html> (last visited Apr. 23, 2015).

¹¹⁸ 13-B M.R.S. § 403 (2014); *see* 13-C M.R.S. §§ 931-32 (2013).

¹¹⁹ 13-B M.R.S. §§ 715, 1301 (2013).

- **Raising Capital:** Although nonprofit corporations are not prohibited from raising money, the directors of a nonprofit are obligated to focus primary attention on the promotion of the social mission of the corporation rather than the production of income. However, nonprofits do have access to grants that might otherwise be unavailable to for-profit businesses.

There are times when a nonprofit tax-exempt corporation may make good sense, but an expert should be consulted before going too far down the road. Forming and maintaining nonprofit status can be very technical and prone to pitfalls.

Cooperatives

Cooperatives are an increasingly popular form of business structure among farmers and food producers in the local and regional food economy. Unlike a corporation, cooperatives must further members' goals and meet their needs.¹²⁰

These needs and goals depend on the type of members; in the agricultural sector, members can be producers, purchasers, or workers. A producer cooperative might use the cooperative to market and distribute the members' products. For example, a cooperative might help small farmers who want to sell to larger institutions but cannot meet the demand alone. Similarly, dairy cooperatives help farmers share otherwise prohibitively expensive equipment, marketing, and distribution costs. This kind of purchasing cooperative allows farmers to purchase supplies or equipment together, which can lead to bulk discounts or useful sharing. In a worker cooperative, employees own and govern the business together. This might be a good option for a farmer who wants to give her employees an incentive to stay working on that particular farm, retaining their skills and experience over time. Producer and purchasing cooperatives are similar to one another in formation and structure. Worker cooperatives operate under a distinct set of laws. For this reason, the rest of the section is divided into two subparts addressing the two categories of cooperatives.

“[The] three primary operational characteristics of a co-operative [are]: **user ownership, user control, and proportional distribution** of surplus based on a member's use of the enterprise.”

Source: NEW ENG. FARMERS UNION, GROWING A FOOD SYSTEM FOR THE FUTURE: A MANUAL FOR CO-OPERATIVE ENTERPRISE DEVELOPMENT 2 (2014).

(Note that although some of the benefits of cooperatives can be achieved through other business structures, such as LLCs or nonprofits, cooperatives are unique structures. If a client calls her organization a cooperative, it must follow the cooperative statute.¹²¹ As interest in cooperatives has grown, there is more focus on protecting the term “cooperative” and ensuring that only cooperatives organized as such use the name.¹²²)

¹²⁰ See 13 M.R.S. § 1501 (2013); see also NEW ENG. FARMERS UNION, GROWING A FOOD SYSTEM FOR THE FUTURE: A MANUAL FOR CO-OPERATIVE ENTERPRISE DEVELOPMENT 1 (2014), available at http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf.

¹²¹ See 13 M.R.S. §§ 1776, 1976 (2013).

¹²² Email from Erbin Crowell, Executive Director, Neighboring Food Co-op Association to the author (June 9, 2014) (on file with author).

Producer or Purchasing Cooperatives

Under Maine law, agricultural cooperatives are organized under their own statutory sections, and articles of incorporation must be prepared and filed with the secretary of state.¹²³ The general corporation law is also applicable to cooperatives.¹²⁴ Five or more adults, engaged in agriculture as “bona fide producers of agricultural products,” or two or more associations of such producers are requirements to forming an agricultural cooperative.¹²⁵ Generally, cooperative members (the term “member” includes any agricultural producer, either corporate or individual, with whom the association shall do business, either directly or through a member cooperative association, amounting to at least \$100 during any fiscal year, and may, by the bylaws, include “employees”) purchase common stock to raise capital.¹²⁶ Cooperatives may also borrow or issue preferred stock. However, Maine does not require agricultural cooperatives to have capital stock.¹²⁷

The business of the association must be managed by a board of no fewer than three directors.¹²⁸ The members of the cooperative may adopt bylaws, which must be adopted by a majority of the members.¹²⁹ The agricultural cooperative’s bylaws must specify how voting will occur, and usually cooperatives give each member one vote, though voting can be allocated in other ways in the articles of incorporation, such as being based on patronage.¹³⁰ “Patronage” refers to “the amount of work performed as a member of an employee cooperative, measured in accordance with the articles of incorporation or bylaws.”¹³¹

The bylaws may determine the timeframe for which the association may distribute earnings and profits to its members.¹³² However, in Maine, dividends in excess of 8% of the actual cash value of the consideration received by the association may not be paid on common or preferred stock or membership capital; but dividends may be cumulative.¹³³

Pros for Farmers:

- **Control of Own Operation:** Farmers that are members of producer or purchaser cooperatives retain ownership over their own operations while also being members of the cooperative. In fact, most agricultural cooperatives are made up of sole proprietorships.¹³⁴

¹²³ See 13 M.R.S. §§ 1171, 1823-24 (2013).

¹²⁴ 13 M.R.S. § 1782 (2013).

¹²⁵ 13 M.R.S. § 1821 (2013).

¹²⁶ 13 M.R.S. § 1911 (2013).

¹²⁷ 13 M.R.S. § 1821 (2013) (“Five or more adult persons . . . or 2 or more associations of such producers, may form an association with or without capital stock.”).

¹²⁸ 13 M.R.S. § 1871 (2013).

¹²⁹ 13 M.R.S. § 1826 (2013).

¹³⁰ 13 M.R.S. § 1826 (2013).

¹³¹ 13 M.R.S. § 1972 (2013).

¹³² 13 M.R.S. § 1912 (2013).

¹³³ 13 M.R.S. § 1912 (2013).

¹³⁴ Phone Interview with Erbin Crowell, Executive Director, Neighboring Food Co-op Association (June 9, 2014) (on file with author).

- **Access to Services and Reduced Risk:** Cooperatives allow members to access business services without assuming all the risks and expenses themselves. For example, a dairy-processing cooperative might allow members to spread the costs of expensive cheese-making equipment.
- **Increased Competitiveness:** By pooling their resources and production, farmers benefit from economies of scale while retaining their small size and local control.

Cons for Farmers:

- **Coordination Challenges:** Coordination challenges and potential collective action problems could be substantial.

Worker Cooperatives

Like the producer and purchasing cooperatives, worker cooperatives are organized under state corporation law.¹³⁵ A separate chapter of the Maine Revised Statutes sets out specific requirements for worker cooperatives.¹³⁶ In a worker cooperative, all members must be employed by the cooperative.¹³⁷ Each member must own exactly one voting share, called a membership share.¹³⁸ The Employee Cooperative Corporations Act gives workers significant authority. For example, only workers can vote to amend or repeal the cooperative’s bylaws.¹³⁹ Any earnings from the worker cooperative are distributed according to the amount of work each individual contributed to the cooperative.¹⁴⁰ Worker cooperatives may merge only with other worker cooperatives.¹⁴¹

Pros for Farmers:

- **Limited Liability:** Because worker cooperatives are organized under Maine corporate laws, the members are protected from liability as they would be under a traditional corporate structure.
- **Shared Ownership:** Farmers that want to operate a business collaboratively with other farmers could benefit from a worker cooperative. Worker cooperatives allow farmers to share ownership and control over a business, as well as share the operation’s risks.
- **Ease of Transfer:** A worker cooperative’s Articles of Organization or by-laws determine the process for accepting and terminating members.¹⁴² Depending on how these documents are worded, worker cooperatives can make it easy or difficult for changes in membership. Transitioning to a worker cooperative could be used to give ownership to employees overtime.

Cons for Farmers:

¹³⁵ 13 M.R.S. § 1973 (2013) (“employee cooperative corporations are governed by Title 13-C, the Maine Business Corporation Act”).

¹³⁶ 13 M.R.S. § 1971 et seq. (2013).

¹³⁷ 13 M.R.S. § 1977 (2013).

¹³⁸ 13 M.R.S. § 1978(3) (2013).

¹³⁹ 13 M.R.S. § 1979 (2013).

¹⁴⁰ 13 M.R.S. § 1980 (2013).

¹⁴¹ 13 M.R.S. § 1984 (2013).

¹⁴² 13 M.R.S. § 1977 (2013).

- **Control of Own Operation:** Because workers in a worker cooperative are also the owners of the business, a worker cooperative might not be ideal for farmers that want to retain sole ownership and control.

CONCLUSION An attorney can offer a farmer considerable business advice. However, the most meaningful information will come from the farmers. By reviewing the initial questions with their clients and highlighting the important factors to consider, attorneys can effectively work with farmers to accomplish their goals, including: protecting their families and assets; creating thoughtful plans of action in case of unfortunate events; and building their businesses consistent with financial, social, environmental, and familial goals. In this way, attorneys can help farmers continue to steward the land and grow local economies.

RESOURCES

Farm Commons

Resources for farmers and attorneys to identify legal issues and sustainable farm law
<http://farmcommons.org/>

Sustainable Agriculture and Research Education Program

Guide to developing a business plan for farms and rural businesses
<http://www.sare.org/Learning-Center/Books/Building-a-Sustainable-Business>

New England Farmers Union

Growing A Food System for the Future: A Manual for Co-operative Enterprise Development
http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf

CHAPTER III: FOOD SAFETY

Food safety is a key concern for farmers, food entrepreneurs, retail establishments, restaurants, and consumers. The federal government recently expanded regulation of food safety practices on farms and in food processing facilities. Additionally, some industry players, such as grocery stores and institutions, have their own set of food safety standards with which farmers and food entrepreneurs may need to comply. Food safety considerations also play into many of the other business decisions farmers and food entrepreneurs make. For example, food safety concerns may influence a farmer's choice of business structure. This chapter lays out some of the basic information relevant to food safety for farmers and food entrepreneurs.

OVERVIEW Many small-scale farmers and food entrepreneurs in Maine are likely to encounter food safety regimes in some way. With the recent increase in food safety regulation by the federal government and the requirements some industry players place on producers and food entrepreneurs, food safety requirements are on the minds of many in the food and agriculture sector. Although the farmers and food entrepreneurs in the Legal Services Food Hub (Hub) will likely be exempt from some of these requirements, attorneys assisting these clients will need to be prepared to discuss food safety issues with them. This chapter provides an overview of food safety regulation in the United States and briefly describes the Food Safety Modernization Act (FSMA) and other food safety regimes relevant to farmers and food entrepreneurs in Maine.

1. Overview of Food Safety This section introduces the food safety framework in the United States. It discusses reasons why attorneys must be familiar with food safety regimes to effectively advise small-scale farmers and food entrepreneurs participating in the Hub.

2. The Food Safety Modernization Act This section describes the Food Safety Modernization Act, the proposed Produce Safety Rule and Preventive Controls Rule, and the kinds of farm businesses these regulations may impact. In Maine, many small-scale farmers and food entrepreneurs are acutely aware of and concerned about FSMA and these two rules.

3. Other Federal Food Safety Regimes This section discusses additional food safety standards and certifications that small-scale farmers and food entrepreneurs participating in the Hub may encounter, including Good Agricultural Practices and Good Handling Practices, along with brief introductions to food safety regimes for dairy, meat, and poultry.

OVERVIEW OF FOOD SAFETY Food safety is a hot topic among farmers and other food entrepreneurs. Recent nationwide food-borne illness outbreaks have been linked to foods that had rarely been implicated in prior outbreaks—for example, peppers, spinach, tomatoes, peanut butter, cookie dough, cantaloupes, and organic frozen berries.¹ Further, the United States food safety system has faced increasing criticism that its organizational complexity is an impediment to ensuring food safety in light of recent trends, such as increased consumption of imported foods and food adulteration.² In response to these

¹ U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC & FOOD SAFETY (2014), *available at* <http://www.cdc.gov/foodborneburden/PDFs/CDC-and-Food-Safety.pdf>. This CDC document lists “new and different contaminated foods” as one of the current challenges to food safety.

² RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2014), *available at* <https://www.fas.org/sgp/crs/misc/RS22600.pdf>.

outbreaks and criticisms, Congress recently passed FSMA, a sweeping act that for the first time incorporates produce safety into the country's federal food safety regime.

Federal, state, local, and private authorities share responsibility for ensuring the safety of the U.S. food supply. On the federal level, responsibility is primarily split between the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS), which is charged with regulating the safety of most meat, most poultry, and some egg products, and the U.S. Department of Health and Human Services' Food and Drug Administration (FDA), which historically regulated the safety of other food products, such as prepared foods, seafood, and most imported products.³ To a lesser degree than USDA and FDA, an estimated 15 additional federal agencies exercise control and oversight over various aspects of food safety by administering at least 30 relevant laws.

FSIS and FDA both exercise their respective authorities through inspections. Though subject to change, FDA primarily uses state agencies to perform actual inspections.⁴ In Maine, meat and poultry processing facilities are inspected through an independent state program that FSIS monitors to ensure federal compliance.⁵

Until passage of FSMA in 2010, food safety standards for produce were mostly voluntary, and many farms went largely unregulated by the federal government and nearly all states. As discussed in the FSMA section below, farms not otherwise exempted that grow certain raw produce and processed food may now be subject to standards similar to FSIS's Hazard Analysis and Critical Control Points plans.⁶

At the state level in Maine, the Maine Department of Agriculture, Conservation and Forestry (DACF) is primarily responsible for food safety and food quality laws affecting production, aggregation, and sale of agricultural products.⁷ DACF Bureau of Agriculture's Division of Quality Assurance and Regulations is charged with ensuring farms and food facilities comply with federal and state laws, regulations, and licensing regarding food quality, safety, sales, and marketing.⁸ In cooperation with the Maine Department of Health and Human Services, the Division regulates food retail establishments through implementation of the State of Maine Food Code.⁹ Additionally, municipal governments often have their own health and safety regulations that may impact farms and food entrepreneurs, most of which are based on the State of Maine Food Code.¹⁰ Finally, the private sector can play a critical role by mandating that its suppliers comply with

³ RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2014), *available at* <https://www.fas.org/sgp/crs/misc/RS22600.pdf>.

⁴ RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2014), *available at* <https://www.fas.org/sgp/crs/misc/RS22600.pdf>.

⁵ RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2014), *available at* <https://www.fas.org/sgp/crs/misc/RS22600.pdf>.

⁶ AM. FARMLAND TRUST, CONSERVATION LAW FOUND., & NE. SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 70 (2014).

⁷ *Quality Assurance & Regulations*, MAINE.GOV, <http://www.maine.gov/dacf/qar/index.shtml> (last visited Feb. 19, 2015).

⁸ *Quality Assurance & Regulations*, MAINE.GOV, <http://www.maine.gov/dacf/qar/index.shtml> (last visited Feb. 19, 2015).

⁹ 01-001 C.M.R. ch. 331 (2013); 10-144 C.M.R. ch. 200 (2013).

¹⁰ *E.g.*, Portland, Me., Code § 11-1 (Nov. 19, 2012) (adopting and modifying the State of Maine Food Code).

voluntary federal programs, such as Good Agricultural Practices (GAP) or Good Handling Practices (GHP), or by imposing their own food safety and best practice standards.¹¹

This chapter gives attorneys context about the types of issues farmers and food entrepreneurs may face and helps attorneys understand how food safety concerns play into farmers' and food entrepreneurs' decisions. Farmers will expect that attorneys be familiar with these food safety regimes. Farmers may ask attorneys questions about some of the food safety requirements they must meet. Attorneys should gain a baseline understanding of how food safety considerations can impact a farmer's operation or factor into legal analyses.

THE FOOD SAFETY MODERNIZATION ACT FSMA was signed into law in January 2011.¹² FSMA is the largest overhaul of the nation's food safety system in over 70 years.¹³ Among other changes, this extensive legislation gives FDA new authority to issue mandatory recalls of food;¹⁴ broadens FDA's authority to withdraw a food facility's registration (registration is required to introduce goods into commerce);¹⁵ and directs FDA to establish new food safety requirements for food facilities and farms.¹⁶ Although prior to the passage of FSMA FDA regulated food facilities, FDA had never regulated farms directly.

FSMA instructs FDA to promulgate various rules to fill in the details of this new food safety regime within 18 months of passage of the Act; however, FDA met none of those deadlines.¹⁷ After some litigation,¹⁸ FDA proposed many new regulations, most of which are now in the final stages of rulemaking.¹⁹ As of the time of this writing, many of the rules have not yet been finalized.²⁰

Since 2013, FDA has proposed the following rules (listed by their commonly known names) to implement FSMA:

¹¹ AM. FARMLAND TRUST, CONSERVATION LAW FOUND., & NE. SUSTAINABLE AGRIC. WORKING GRP., *NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM* 71 (2014).

¹² Food Safety Modernization Act, Pub. L. No. 111-353 (2011).

¹³ Molly Peterson, *U.S. Senate Approves Biggest Food-Safety Overhaul in 70 Years*, BLOOMBERG (Nov. 30, 2010), <http://www.bloomberg.com/news/2010-11-30/broadest-food-safety-overhaul-in-70-years-approved-by-senate-in-73-25-vote.html> (last visited June 3, 2014).

¹⁴ Food Safety Modernization Act, Pub. L. No. 111-353, § 206 (2011).

¹⁵ Food Safety Modernization Act, Pub. L. No. 111-353, § 102 (2011).

¹⁶ Food Safety Modernization Act, Pub. L. No. 111-353, §§ 103, 105 (2011).

¹⁷ Helena Bottemiller, *Obama Administration Sued for Delay of FSMA Implementation*, FOOD SAFETY NEWS (Aug. 31, 2012), <http://www.foodsafetynews.com/2012/08/obama-administration-sued-for-delay-on-fsma-implementation/#.U3DaMIFdV8E> (last visited Feb. 25, 2015).

¹⁸ *FDA Settles Lawsuit Over FSMA Rules*, Nat'l Sustainable Agric. Coal. (Feb. 21, 2014), <http://sustainableagriculture.net/blog/new-fsma-rule-timetable/>.

¹⁹ Lydia Zuraw, *FSMA Gets New Deadlines for Final Rules*, FOOD SAFETY NEWS (Feb. 21, 2014), <http://www.foodsafetynews.com/2014/02/fsma-gets-new-deadlines-for-final-rules/#.U3DbToFdV8E> (last visited Feb. 25, 2015).

²⁰ For updates on rulemaking, see Resources section *infra*.

- Produce Safety Rule (PSR)²¹
- Preventive Controls Rule for Human Food (PCR)²²
- Third-Party Accreditation Rule (TPAR)²³
- Foreign Supplier Verification Programs Rule (FSVR)²⁴
- Preventive Controls Rule for Food for Animals (PCRA)²⁵
- Focused Mitigation Strategies to Protect Against Intentional Adulteration Rule²⁶
- Sanitary Transportation of Human and Animal Food Rule²⁷

²¹ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pts. 1, 16, 105, et al.), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00123.pdf> (hereinafter Original PSR); Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. 58434 (supplemental notice of proposed rulemaking Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 112), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-09-29/pdf/2014-22447.pdf> (hereinafter Supplemental PSR).

²² Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 78 Fed. Reg. 3646 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pts. 1, 16, 106, 110, 114, 117, 120, 123, 129, 179, and 211), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00125.pdf> (hereinafter Original PCR); Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 79 Fed. Reg. 58524 (supplemental notice of proposed rulemaking Sept. 29, 2014) (to be codified at 21 C.F.R. pts. 1, 16, and 117), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-09-29/pdf/2014-22446.pdf> (hereinafter Supplemental PCR).

²³ Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications, 78 Fed. Reg. 45782 (proposed July 29, 2013) (to be codified at 21 C.F.R. pts. 1 and 16), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-07-29/pdf/2013-17994.pdf> (hereinafter TPAR) (proposing to “provide for accreditation of third-party auditors/certification bodies to conduct food safety audits of foreign food entities, including registered foreign food facilities, and to issue food and facility certifications, under [FSMA]”).

²⁴ Food and Drug Administration Food Safety Modernization Act: Proposed Rules on Foreign Supplier Verification Programs and the Accreditation of Third-Party Auditors/Certification Bodies; Public Meetings, 78 Fed. Reg. 57320 (proposed Sept. 18, 2013) (to be codified at 21 C.F.R. pts. 1 and 16) *available at* <http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0143-0028> (hereinafter Original FSVR) (proposing regulations to “require importers to help ensure that food imported into the United States is produced in compliance with processes and procedures, including reasonably appropriate risk-based preventive controls, that provide the same level of public health protection as those required under the hazard analysis and risk-based preventive controls and standards for produce safety sections of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), is not adulterated, and is not misbranded with respect to food allergen labeling”); Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, 79 Fed. Reg. 58574 (supplemental notice of proposed rulemaking Sept. 19, 2014) (to be codified at 21 C.F.R. pt. 1) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-09-29/pdf/2014-22448.pdf> (hereinafter Supplemental FSVR) (primarily proposing to revise the proposed requirements regarding compliance status review of food and foreign suppliers, hazard analysis, and supplier verification activities).

²⁵ Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Food for Animals, 78 Fed. Reg. 64736 (proposed Oct. 29, 2013) (to be codified at 21 C.F.R. pts. 16, 225, 500, 507, and 509) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-10-29/pdf/2013-25126.pdf> (hereinafter Original PCRA); Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Food for Animals, 79 Fed. Reg. 58476 (supplemental notice of proposed rulemaking Sept. 29, 2014) (to be codified at 21 C.F.R. pts. 16, 117, and 507) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-09-29/pdf/2014-22445.pdf> (hereinafter Supplemental PCRA) (regulating facilities that manufacture animal feed and proposing similar requirements to the PCR for humans).

²⁶ Focused Mitigation Strategies To Protect Food Against Intentional Adulteration, 78 Fed. Reg. 78014 (proposed Dec. 24, 2013) (to be codified at 21 C.F.R. pts. 16 and 121) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-12-24/pdf/2013-30373.pdf> (proposing to require that registered domestic and foreign food facilities identify and implement focused mitigation strategies to significantly minimize or prevent significant vulnerabilities identified at actionable process steps in a food operation in an effort to protect food from intentional adulteration of food caused by acts of terrorism).

²⁷ Sanitary Transportation of Human and Animal Food, 79 Fed. Reg. 7006 (proposed Feb. 5, 2014) (to be codified 21 C.F.R. pt. 1) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-02-05/pdf/2014-02188.pdf> (proposing to “establish requirements for shippers, carriers by motor vehicle and rail vehicle, and receivers engaged in the transportation of food, including food for animals, to use sanitary transportation practices to ensure the safety of the food they transport”).

The PSR and the PCR are two of the most significant rules for farmers and food entrepreneurs.²⁸ Although most Hub clients will likely be exempted, lawyers should know the basic components of these two rules. As such, this chapter discusses the PSR and PCR below.

FDA originally proposed these rules in January 2013²⁹ and closed the comment period in mid-November 2013 after three extensions.³⁰ In December 2013, FDA published a press release indicating that, based on comments received in November, it would issue revised language for certain parts of both rules as interim proposed rules open to comments again before finalizing the rules.³¹ FDA released the Supplemental PSR and the Supplemental PCR in September 2014, and closed both comment periods that December. At the time of this writing, FDA announced that it anticipates finalizing the PSR on October 31, 2015, and the PCR on August 30, 2015.³²

Produce Safety Rule (PSR) The proposed PSR establishes on-farm food safety requirements for farms that are conducting covered activities (growing, harvesting, packing, or holding) on covered produce (mainly fruits and vegetables that are generally consumed raw and not grown for personal use).³³ As changed by FDA in the Supplemental PSR, the rule provides that a “farm” is not required to register as a food facility—which would subject it to the PCR requirements—merely because it “packs” or “holds” raw agricultural commodities grown on another farm under different ownership.³⁴ This is a significant change from the Original PSR, in which a farm would have been

“Covered Produce” under the PSR

The non-exhaustive list includes “almonds, apples, apricots, aprium, asian pear, avocados, babaco, bamboo shoots, bananas, Belgian endive, blackberries, blueberries, broccoli, cabbage, cantaloupe, carambola, carrots, cauliflower, celery, cherries, citrus (such as clementine, grapefruit, lemons, limes, mandarin, oranges, tangerines, tangors, and unqi fruit), cucumbers, curly endive, garlic, grapes, green beans, guava, herbs (such as basil, chives, cilantro, mint, oregano, and parsley), honeydew, kiwifruit, lettuce, mangos, other melons (such as canary, crenshaw, and persian), mushrooms, nectarine, onions, papaya, passion fruit, peaches, pears, peas, peppers (such as bell and hot), pineapple, plums, plumcot, radish, raspberries, red currant, scallions, snow peas, spinach, sprouts (such as alfalfa and mung bean), strawberries, summer squash (such as patty pan, yellow, and zucchini), tomatoes, walnuts, watercress, and watermelon.”

Source: 78 Fed. Reg. 3504, 3629.

²⁸ See *What is the Food Safety Modernization Act (FSMA)?*, NAT’L SUSTAINABLE AGRIC. COAL., <http://www.sustainableagriculture.net/fsma/overview-and-background/> (last visited Feb. 20, 2015).

²⁹ Original PSR, 78 Fed. Reg. 3504; Original PCR, 78 Fed. Reg. 3646.

³⁰ Constituent Update, FDA Extends Public Comment Period 60 Days for Proposed Rules on Preventive Controls for Human Food, Produce Safety (Aug. 8, 2013),

<http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm364189.htm?source=govdelivery> (last visited June 20, 2014); Dan Flynn, *Pushback Begins Against FSMA On-the-Farm Rules*, FOOD SAFETY NEWS (Nov. 15, 2013), <http://www.foodsafetynews.com/2013/11/pushback-begins-against-fsma-on-the-farm-rules/#.U3DedYFdv8E>.

³¹ Press Release, Statement from FDA Deputy Commissioner for Foods and Veterinary Medicine, Michael Taylor, on Key Provisions of the Proposed FSMA Rules Affecting Farmers (Dec. 19, 2014), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm379397.htm>.

³² FDA, PRESIDENT’S FY 2016 BUDGET REQUEST: KEY INVESTMENTS FOR IMPLEMENTING THE FDA FOOD SAFETY MODERNIZATION ACT (FSMA) 2 (2015), available at <http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM432580.pdf>.

³³ Original PSR, 78 Fed. Reg. at 3629 (Subpart A, §§ 112.1-112.3).

³⁴ Supplemental PSR, 79 Fed. Reg. at 58470–71 (Subpart A, § 112.3) (revises the definitions of covered activity, farm, harvesting, holding, and packing); Press Release, FDA, Key Updates to the Proposed Rule for Produce Safety (last updated Jan.

considered a “facility” merely by packing and holding produce from another farm. However, as discussed below, some confusion still remains regarding what circumstances will render a farm a so-called “farm mixed-type facility” regulated under *both* the PSR *and* the PCR.³⁵ A farm will be subject to all the PSR requirements unless it is not covered or is subject to an exemption or modified requirements.

Coverage under the PSR breaks down into four categories:

- **Farms that are Not Covered:**
 - Non-Produce Farms: Farms that do not grow covered produce.³⁶
 - Excluded Farms: Farms whose annual average produce sales do not exceed \$25,000 (“de minimis exclusion”).³⁷
- **Farms that are Covered but Subject to Modified Requirements:**
 - Produce that is Further Processed: Farms whose covered produce undergoes further processing that subjects the produce to a kill-step that “adequately reduces the presence of microorganisms of public health significance.”³⁸
 - Requirements: A farm that is subject to modified requirements must still comply with recordkeeping requirements under the PSR.³⁹
- **Farms that are Covered but Subject to a Qualified Exemption:**
 - Local and Regional Market Participants: Farms that are a certain size and sell primarily to local and regional markets.
 - Farms whose annual average sales of food are less than \$500,000 and that sell half of their product to “qualified end users” are subject to a different set of modified requirements, called a “qualified exemption” or the direct-marketing exemption.⁴⁰
 - Qualified end-users are consumers and restaurants and retail food establishments within the same state or 275 miles of the farm selling the produce.⁴¹

12, 2015), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm> (“The definition of ‘farm’ [as revised in the supplemental PSR means that] means a farm would no longer be required to register as food facility merely because it packs or holds raw agricultural commodities grown on another farm under different ownership. FDA is proposing that such activities would be subject to the [PSR] rather than the [PCR]”); for the definitions originally proposed, which would have subjected such farms to the PCR rather than the PSR, *see* Original PSR, 78 Fed. Reg. at 3630–31 (Subpart A, § 112.3) (definitions of covered activity, harvesting, holding, and packing).

³⁵ Original PSR, 78 Fed. Reg. at 3631 (Subpart A, § 112.3).

³⁶ *See* Original PSR, 78 Fed. Reg. at 3630 (Subpart A, § 112.3).

³⁷ This exclusion was created through the regulations, not through the statute. In the Original PSR, FDA calculated the sales threshold based on “all food” sales, but FDA now proposes to calculate it based on only “produce” sales. Original PSR, 78 Fed. Reg. at 3632 (Subpart A, § 112.4); Supplemental PSR, 79 Fed. Reg. at 58471 (Subpart A, § 112.4). During the Supplemental PSR comment period, FDA sought comment on whether it should be calculated on only “covered produce.” Supplemental PSR, 79 Fed. Reg. at 58440.

³⁸ Original PSR, 78 Fed. Reg. at 3630 (Subpart A, § 112.2(b)).

³⁹ Original PSR, 78 Fed. Reg. at 3642 (Subpart O).

⁴⁰ Original PSR, 78 Fed. Reg. at 3630–32 (Subpart A, §§ 112.3, 112.5); unlike extremely small farms, FDA did not revise this threshold to be calculated based on produce sales because, it explained, the “monetary threshold for the qualified exemption with modified requirements, however, would not change because that exemption is defined by statute,” Press Release, FDA, Key Updates to the Proposed Rule for Produce Safety (last updated Jan. 12, 2015), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm>.

⁴¹ Original PSR, 78 Fed. Reg. at 3632 (Subpart A, § 112.3).

- **Requirements:** A farm that is subject to a qualified exemption must comply with the following modified requirements (including recordkeeping):
 - Display name and complete business address on food package label or at point of purchase;⁴² and,
 - Adhere to exemption withdrawal proceedings, if applicable.⁴³ If FDA withdraws a farm's qualified exemption, the farm must come into compliance with all provisions of the PSR within 60 days of the withdrawal order, or before the next growing season if operations have ceased.⁴⁴ A farm whose exemption has been withdrawn may have it reinstated when certain circumstances are present and a farm follows the required procedures.⁴⁵
- **Farms that are Covered:**
 - **Farms that Grow Produce:** Farms that grow, harvest, pack, or hold produce that is generally consumed raw.⁴⁶
 - **Farm Mixed-Type Facility:** Farms that perform activities that *do not* trigger registration as a facility and activities that *do* require registration as a facility.⁴⁷ These farms are subject to both the PSR and the PCR.
 - **Requirements:** A farm that is covered must comply with requirements (including recordkeeping) in the following categories, some of which are discussed briefly below:
 - worker training and health and hygiene;⁴⁸
 - agricultural water;⁴⁹
 - biological soil amendments;⁵⁰
 - treatment of wild and domesticated animals;⁵¹ and
 - equipment, tools, and buildings.⁵²

The PSR presents the first time the federal government has stepped in to regulate on-farm practices regarding produce safety. The increased role of government in the daily practices of farms is a big shift for many farmers and may impose significant costs.

⁴² Original PSR, 78 Fed. Reg. at 3632–33 (Subpart A, § 112.6).

⁴³ Original PSR, 78 Fed. Reg. at 3644 (Subpart R, §§ 112.203–12); Supplemental PSR, 79 Fed. Reg. at 58473 (Subpart R, § 112.201-202, 112.213).

⁴⁴ Original PSR, 78 Fed. Reg. at 3644 (Subpart R, §§ 112.204–05).

⁴⁵ Supplemental PSR, 79 Fed. Reg. at 58473 (Subpart R, §§ 112.213).

⁴⁶ For more information, *see* text box *supra* page 48.

⁴⁷ Original PSR, 78 Fed. Reg. at 3631 (Subpart A, § 112.3).

⁴⁸ Original PSR, 78 Fed. Reg. at 3633–34 (Subparts C, D).

⁴⁹ Original PSR, 78 Fed. Reg. at 3634–36 (Subpart E, §§ 112.41–43, 112.46–49); Supplemental PSR, 79 Fed. Reg. at 58471 (Subpart E, §§ 112.44, 112.45, 112.50).

⁵⁰ Original PSR, 78 Fed. Reg. at 3636–38 (Subpart F); Supplemental PSR, 79 Fed. Reg. at 58472 (Subpart F, §§ 112.56, 112.60).

⁵¹ Original PSR, 78 Fed. Reg. at 3638 (Subpart I); Supplemental PSR, 79 Fed. Reg. at 58473 (Subpart F, § 112.84).

⁵² Original PSR, 78 Fed. Reg. at 3638–40 (Subpart L).

Although many farmers in Maine will fall under the qualified exemption, uncertainty remains over how the sales threshold will be calculated. As originally proposed, all exemptions, including the de minimis exclusion for sales not more than \$25,000, were based on “all food” sales, not just produce. This means farms not growing primarily produce (such as dairy), but with a small produce operation, could have been subject to the entire PSR, even though the PSR would exclude a standalone produce operation of that size. Based on comments to this effect, FDA did revise the de minimis exclusion threshold calculation to be based on produce sales, not all food sales. However, this revision is based on *all* produce sales, not just produce covered under the rule, i.e., produce normally consumed raw. This is an important distinction for some Maine farms that grow and sell crops like potatoes that are not “covered produce.” A farm could sell \$25,000 or less in covered produce but, when potatoes are added to the sales figure, sell more than \$25,000, pushing it out of the de minimis category based on a crop that is not even regulated under the rule.⁵³

FDA’s process for withdrawing an exemption also may cause confusion and frustration among farmers. As originally proposed, the PSR did not provide for any warnings before withdrawing an exemption. Nor did it allow a farm to regain its qualified exempt status if the alleged problem was resolved.⁵⁴ This uncertainty would have made it difficult for farmers to anticipate how the PSR would impact their farm operations. FDA revised considerably the procedures for withdrawing an exemption in the Supplemental PSR to address this uncertainty. As it is now written, the Supplemental PSR proposes that FDA will consider other actions, such as a warning letter, to protect public health prior to issuing a withdrawal.⁵⁵ FDA must notify the farm of the circumstances jeopardizing withdrawal, provide an opportunity to address the issues, consider the actions the farm takes to address the issues, and follow procedures for reinstating a withdrawn exemption.⁵⁶

The water testing and biological soil amendment standards caused the most concern among farmers during the comment period for the proposed regulations. Farmers in New England argued that the standards were made for larger operations and would be too costly and unworkable for smaller-scale farmers. In light of comments that raised some of these concerns, both standards were considerably revised in the Supplemental PSR. FDA now proposes various revisions to the microbial standard for water applied during the growing of produce to reflect the 2012 Environmental Protection Agency recreational water quality criteria.⁵⁷ FDA proposes to create more flexibility for agricultural water that does not initially meet the water quality criteria by considering alternatives to immediately discontinuing use, creating a tiered approach to treating water, and testing water less frequently.⁵⁸

⁵³ Press Release, FDA, Key Updates to the Proposed Rule for Produce Safety (last updated Jan. 12, 2015), *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm>.

⁵⁴ Original PSR, 78 Fed. Reg. at 3644–46 (Subpart R).

⁵⁵ Supplemental PSR, 79 Fed. Reg. at 58473 (Subpart R, §§ 112.201–02, 112.213).

⁵⁶ Supplemental PSR, 79 Fed. Reg. at 58473 (Subpart R, §§ 112.201–02, 112.213).

⁵⁷ Supplemental PSR, 79 Fed. Reg. at 58443, 58471–72 (Subpart E, §§ 112.44, 112.50).

⁵⁸ Supplemental PSR, 79 Fed. Reg. at 58443, 58471–72 (Subpart E, §§ 112.44, 112.50).

FDA also proposes to remove the originally proposed nine-month interval waiting requirement between the application of untreated biological soil amendment of animal origin (e.g., manure) and crop harvesting, and instead proposes to study the topic over a period of five to 10 years.⁵⁹ Additionally, it proposes to eliminate the 45-day minimum application interval requirement for compost and composted manures, without need for any further study.⁶⁰

Finally, as discussed more below, farm operations that conduct processing beyond the low-risk activities identified in the proposed rules will be subject to both the PSR and the PCR.⁶¹

Farmers may raise other concerns about the PSR and its effects on their businesses. Attorneys can look to this guide and to publications from farm advocacy organizations in Maine and nationally that are helping farmers understand FSMA. The Resources section below lists some of those resources.

Preventive Controls Rule (PCR) Attorneys also need to be familiar with the PCR. This proposed regulation is more relevant to the attorneys' food entrepreneur clients, but as mentioned above, certain farm operations may be subject to both the PSR and the PCR.

The PCR, as originally proposed and supplemented, establishes food safety requirements for food facilities that manufacture, process, pack, or hold food for consumption in the United States.⁶² Prior to FSMA, all facilities were required to comply with current good manufacturing practices (c-GMPs). In addition, certain higher-risk facilities (e.g., juice and seafood facilities) were required to create food safety plans (called hazard analysis and critical control point (HACCP) plans). Post-FSMA, facilities must comply with updated c-GMPs, and all facilities must now create food safety plans (called hazard analysis and risk-based preventive controls (HARP-C)).⁶³

Coverage under the PCR breaks down into three categories:

➤ **Facilities that are Exempt from the HARP-C Requirements:**

- Farms: Operations that only grow, harvest, pack, and hold produce (because they are technically not “facilities” and are instead subject to the PSR). The PCR exempts these operations from the c-GMPs as well. As changed in the Supplemental PCR, a farm does not have to register as a facility with FDA for packing or holding produce grown on a separately owned farm.
- Small and Very Small Farm Mixed-Type Facilities that Conduct Certain Activities on the Farm: FDA proposed to exempt from the HARP-C requirements low-risk facility activities

⁵⁹ Supplemental PSR, 79 Fed. Reg. at 58460–63, 58472 (Subpart F, §§ 112.56, 112.60).

⁶⁰ Supplemental PSR, 79 Fed. Reg. at 58460–63, 58472 (Subpart F, §§ 112.56, 112.60).

⁶¹ Original PCR, 78 Fed. Reg. at 3800–02 (Subpart A, § 117.5); Supplemental PCR, 79 Fed. Reg. at 58564 (Subpart A, § 117.5).

⁶² 21 C.F.R. § 1.227(b)(2) (2014) (current definition of “facility”).

⁶³ Original PCR, 78 Fed. Reg. at 3802–08 (Part 117, Subparts B and C); Supplemental PCR, 79 Fed. Reg. at 58564–72 (Subpart C).

that occur on small and very small farms.⁶⁴ The farm mixed-type facility must both be a small or very small business⁶⁵ and must conduct only low-risk activities on the farm.⁶⁶ These low-risk activities are listed in the proposed rule and include chopping peanuts, making maple syrup, and waxing intact produce.⁶⁷

- Retail Food Establishments: Prior to FSMA, retail food establishments, such as grocery stores and restaurants that sell the majority of their food directly to consumers, did not have to register as facilities with FDA.⁶⁸ FSMA directs FDA to clarify through rulemaking that roadside stands, CSAs, and other direct-to-consumer operations that sell the majority of their food directly to consumers are retail food establishments and, therefore, do not have to register as facilities.⁶⁹ Although FDA has issued guidance to this effect,⁷⁰ it has not made such clarification through rulemaking.⁷¹

➤ **Facilities that are Subject to a Qualified Exemption:**

- Local and Regional Market Participants: Facilities that are a certain size and sell primarily to local and regional markets are called “qualified facilities.” To be a “qualified facility,” the facility must have less than \$500,000 in average annual sales of food over the past three years and more than half of those sales must be to qualified end-users (i.e., the same definition as the PSR).⁷²
- Requirements: Qualified facilities must comply with the following requirements:
 - updated c-GMPs;⁷³
 - less onerous HARP-C standards, which include either a modified food safety plan or compliance with non-federal food safety standards;⁷⁴ and
 - exemption withdrawal proceedings, if applicable. The FDA can withdraw this qualified exemption; if this happens, the facility must come into compliance with all the applicable provisions of the PCR within 60 days of the withdrawal order.⁷⁵

⁶⁴ Original PCR, 78 Fed. Reg. at 3801 (Subpart A, § 117.5(g), (h)).

⁶⁵ “Small business” is defined as a business with less than 500 employees. After soliciting comment in the Original PCR, 78 Fed. Reg. at 3800 (Subpart A, § 117.3), FDA proposed to define “very small business” as one with average annual sales of less than \$1 million. Supplemental PCR, 79 Fed. Reg. at 58564 (Subpart A, § 117.3).

⁶⁶ Original PCR, 78 Fed. Reg. at 3800–02 (Subpart A, § 117.5); Supplemental PCR, 79 Fed. Reg. at 58564 (Subpart A, § 117.5).

⁶⁷ Original PCR, 78 Fed. Reg. at 3800–02 (Subpart A, § 117.5); Supplemental PCR, 79 Fed. Reg. at 58564 (Subpart A, § 117.5).

⁶⁸ 21 U.S.C. 350d(c) (2012).

⁶⁹ Food Safety Modernization Act, Pub. L. No. 111-353, § 102(c) (2011).

⁷⁰ Questions and Answers Regarding Food Facility Registration (Sixth Edition); Guidance for Industry; Availability, 79 Fed. Reg. 68810 (proposed Nov. 19, 2014) (to be codified at 21 C.F.R. pt. 10) available at <http://www.gpo.gov/fdsys/pkg/FR-2014-11-19/pdf/2014-27290.pdf>.

⁷¹ *Direct-to-Consumer Marketing—Preventive Controls Rule*, NAT’L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/fsma/learn-about-the-issues/direct-to-consumer-marketing-preventive-controls-rule/> (last visited Mar. 17, 2015) (“Without this clarification and under the regulations are currently proposed, CSAs or other direct marketers – in addition to being subject to the proposed Produce Rule – could be considered facilities that have to register with FDA and are subject to the Preventive Controls Rule.”).

⁷² Original PCR, 78 Fed. Reg. at 3799–3800 (Subpart A, § 117.3).

⁷³ Original PCR, 78 Fed. Reg. at 3802–05 (Subpart B).

⁷⁴ Original PCR, 78 Fed. Reg. at 3808 (Subpart D, § 117.201).

➤ **Facilities that are Covered:**

- Facilities: Establishments that manufacture, process, pack, or hold food for consumption in the United States.⁷⁶
- Farm Mixed-Type Facilities: Farm mixed-type facilities are farms that conduct facility activities, such as manufacturing or processing food beyond the exempted low-risk activities cited above, such as making salsa or cheese. The PCR covers only the *facility* activities of a farm mixed-type facility, not the *farm* activities.
- Requirements: Covered facilities are required to comply with the following requirements:
 - updated c-GMPs;⁷⁷ and
 - HARP-C standards, which as originally proposed and supplemented include identifying manufacturing and processing activities that might pose a food safety risk, creating a food safety plan to prevent those risks, monitoring the processes, fixing any problems, keeping records of manufacturing and processing activities, establishing a risk-based supplier verification program for raw material and ingredients identified as a significant hazard that is controlled by the supplier, identifying corrective actions a facility will take in the event controls are inadequate or fail, and performing various verification measures, including environmental monitoring and food testing.⁷⁸

In the Original PCR, FDA proposed to classify as “facility activities” certain activities conducted by small- and mid-sized farms, such as holding and packing another farm’s produce (e.g., a multi-farm community supported agriculture operation). This would have significantly increased the requirements with which those farms must comply, particularly with regard to low-risk activities like holding another farm’s produce. As discussed in the above PSR section, FDA has revised this to some extent, but there remains some uncertainty about precisely what conditions may trigger regulation under the PCR.

The same concerns raised about the qualified exemption provisions in the PSR apply to the PCR as well. As currently written, the PCR does not contain a de minimis exclusion as the PSR does. This means that, unless an exemption applies under the PCR, if a farm conducts activities that make it a mixed-type facility, it would have to comply with the PCR no matter its size.

Most of the farmers that attorneys will encounter through the Hub will likely fall under an exemption from either or both of the proposed rules. However, FDA can withdraw many of the exemptions under the PSR and PCR under certain circumstances. As such, attorneys should become familiar with the basic coverage provisions and requirements of the proposed rules.

⁷⁵ Original PCR, 78 Fed. Reg. at 3809–10 (Subpart E).

⁷⁶ 21 U.S.C. § 350d(a)(1) (2014).

⁷⁷ Original PCR, 78 Fed. Reg. at 3802–05 (Subpart B).

⁷⁸ Original PCR, 78 Fed. Reg. at 3805–08 (Subpart C); Supplemental PCR, 79 Fed. Reg. 58564-72 (Subpart C); *What is the Preventive Controls Rule?*, NAT’L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/fsma/overview-and-background/what-is-the-preventive-controls-rule/> (last visited Feb. 24, 2015).

Even if a client is subject to either the PSR or PCR, the proposed compliance period for both rules gives farmers, depending on their size, two to four years after the final rule is issued to comply;⁷⁹ and farmers will have additional flexibility with certain requirements, such as the water quality standards.⁸⁰ Further, despite FSMA's legislative mandate and President Obama's budget proposals, the funding necessary to implement FSMA remains in doubt.⁸¹ The role of state governments in implementing and ensuring compliance with the standards remains unclear and further litigation is possible. Despite this uncertainty and lengthy compliance period, attorneys working with small-scale farmers and food entrepreneurs in the Hub should learn the basics of these two proposed rules. The food industry is already beginning to shift its own food safety requirements based on the new government food safety standards. By learning the basics of FSMA, attorneys will be able to speak with clients about possible business implications of the two rules.

OTHER FOOD SAFETY REGIMES Beyond FDA's regulation of food safety, farmers may participate in or wish to understand other food safety standards and checklists. USDA created the Good Agricultural Practices and Good Handling Practices quality certification programs to allow farmers to demonstrate compliance with strong food safety practices.⁸² In Maine, DACF's Quality Assurance and Regulations Division assists farmers in complying with GAP and GHP certification through its Quality Assurance Program. Other private marketing labels and audits exist to address food safety concerns.

Good Agricultural Practices/Good Handling Practices USDA created the GAP/GHP quality certification as one option for farmers who want to show that they are growing and/or processing food safely.⁸³ GAP/GHP audits are voluntary certifications that focus on best agricultural practices to verify that fruits and vegetables are produced, packed, handled, and stored in a manner that minimizes risks of microbial food safety hazards. GAP/GHP certification is not a legal requirement, though it is preferred or required by many larger or institutional purchasers, such as grocery stores or schools. If the farmer is selling at a farmers' market or roadside stand, there would be no need for GAP/GHP certification. The audit evaluates food safety practices throughout the supply chain from harvesting to packaging to transporting. The program provides verification that certified farmers are following generally recognized industry best practices to reduce the risk of contamination. A GAP/GHP audit requires that someone from USDA, or the state counterpart acting on behalf of USDA, visit the farm to assess the farm's practices.

⁷⁹ For more information on the PSR compliance dates, see PSR Original, 78 Fed. Reg. at 3533–34; for more information on the PCR compliance dates, see PCR Original, 78 Fed. Reg. at 3673–74.

⁸⁰ PSR Original, 78 Fed. Reg. at 3534.

⁸¹ Michael R. Taylor, *Making the Case for Critical FSMA Funding*, FDA VOICE (Feb. 3, 2015), <http://blogs.fda.gov/fdavoices/index.php/2015/02/making-the-case-for-critical-fsma-funding/> (last visited Feb. 25, 2015).

⁸² *Fresh Fruit and Vegetable Audit Programs*, U.S. DEP'T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/gapghp> (last visited Apr. 22, 2015).

⁸³ *Fresh Fruit and Vegetable Audit Programs*, U.S. DEP'T OF AGRIC. AGRIC. MKTG. SER., http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram#P25_1498 (last visited Apr. 22, 2015).

The primary challenge with using GAP/GHP certification is that, depending on the size of the farm and the potential sales earnings, the certification process may be quite expensive. USDA may require growers to make costly upgrades to their farms, such as constructing fences around the perimeter of the farm to keep out livestock and wildlife, or building restrooms for employees.⁸⁴ Some local food advocates in Maine fear the perceived movement by private retailers to require GAP/GHP certification will stifle the options for farmers looking to expand their markets.⁸⁵ In addition to these changes, the certification must be renewed annually (or multiple times per year if different crops are grown in different seasons), and paying for a USDA certifier to come to the farm for each of these certifications is costly. Grant-funded programs may exist to enable farmers to comply without significant costs.⁸⁶

In 2011, USDA incorporated the Produce GAP Harmonized Food Safety Standard into its GAP and GHP audit program. The goal of GAP Harmonized is “one audit by any credible third party, acceptable to all buyers.”⁸⁷ GAP Harmonized sets standards and audit checklists for pre- and post-harvest operations for all fresh produce commodities, all sizes of on-farm operations, and all regions in the United States.

Food Safety Regimes for Dairy Dairy policy in Maine, like the other New England and Mid-Atlantic states, is governed by a complicated mix of federal and state laws regarding pricing, risk management tools, farm financial support programs, conservation practices, and farm energy support.⁸⁸ State and local agencies regulate milk sanitation and safety through implementation of a state version of FDA’s Pasteurized Milk Ordinance.⁸⁹

In light of recent highly publicized litigation in Maine, Hub lawyers in Maine may be asked about the sale of raw milk.⁹⁰ Raw milk can be sold retail intrastate so long as the producer complies with state licensing

⁸⁴ According to Ebay.com, a porta john costs approximately \$875 with shipping before the fee for set-up (Ebay search on Nov. 21, 2013) (on file with authors). University of Florida researchers found that the average cost of materials for constructing 14 miles of field fence was approximately \$1250 (including materials). DEREK L. BARBER, UNIV. OF FLA. INST. OF FOOD & AGRIC. EXTENSION, ESTIMATED LIVESTOCK FENCING COSTS FOR THE SMALL-FARM OWNER (2012), *available at* <http://edis.ifas.ufl.edu/an258>.

⁸⁵ See e.g., Russell Libby, *Food Safety Concerns Are Leading to Solutions That Won’t Work for Small and Diversified Farms*, MAINE ORGANIC FARMERS AND GARDENERS ASS’N (MOFGA) (May 9, 2007), <http://www.mofga.org/Default.aspx?tabid=735> (last visited Feb. 24, 2015).

⁸⁶ Press Release, Me. Dep’t Agric., Conservation and Forestry, USDA Specialty Crop Block Grants Create New Economic Opportunities and Grow Markets for Local Producers (Oct. 9, 2014), <http://www.maine.gov/dacf/about/news/news.shtml?id=629341> (announcing a grant-funded project lead by a Maine agricultural services company, Ag Matters, LLC, to provide audit preparation assistance to Maine specialty crop growers that are required to comply with GAP/GAH certification audits) (last visited Feb. 25, 2015).

⁸⁷ *GAP Harmonization Initiative*, UNITED FRESH PRODUCE ASS’N, <http://www.unitedfresh.org/food-safety/gap-harmonization-initiative/> (last visited Mar. 25, 2015).

⁸⁸ See generally AM. FARMLAND TRUST, CONSERVATION LAW FOUND., & NE. SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 76-77 (2014) (providing an overview of federal and state programs regulating milk in the food safety context, including the Milk Income Loss Contract Program, Pasteurized Milk Ordinance, state raw milk laws, FDA oversight of dairy processing facilities, and the Milk Marketing Order System).

⁸⁹ See generally AM. FARMLAND TRUST, CONSERVATION LAW FOUND., & NE. SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 76-77 (2014); 7 M.R.S. § 2910 (2013).

⁹⁰ See *Maine v. Brown*, 2014 ME 79, 95 A.3d 82.

requirements; it may not be sold in interstate commerce.⁹¹ Maine dairy processing facilities are regulated by the state through the Maine DACF's Milk Inspection Program⁹² and are subject to FDA oversight at the federal level.⁹³ Hub attorneys should be aware of the challenges that Maine's current dairy infrastructure presents for farmers or food entrepreneurs seeking to form dairy cooperatives or engage in other aggregation efforts.⁹⁴

Food Safety Regime for Meat and Poultry Like many of its New England neighbors, Maine's demand for more locally produced and processed meat and poultry is rising, often faster than the available supply.⁹⁵ Farmers and commentators frequently point to the complex set of federal regulations overseen by multiple federal agencies as one significant reason for this predicament.⁹⁶ Broadly speaking, the federal government ensures the safety of meat and poultry through two acts: (1) the Federal Meat Inspection Act (FMIA);⁹⁷ and (2) the Poultry Products Inspect Act (PPIA).⁹⁸ FMIA establishes inspection requirements for cattle, sheep, swine, and goats and products thereof.⁹⁹ FMIA exempts meat intended for personal consumption when it is processed by the farmer or by a custom slaughterer.¹⁰⁰ Meanwhile, PPIA establishes inspection requirements for poultry and poultry products.¹⁰¹

Federal law traditionally mandated that meat and poultry could be put in interstate commerce only if it was federally inspected, but the 2008 Farm Bill created the Cooperative Interstate Shipment program that may somewhat relax this requirement. In Maine, a poultry processor need only comply with Maine's poultry inspection service, not the PPIA, when slaughtering fewer than 20,000 birds per year. A processor that slaughters fewer than 1,000 birds per year that the processor raised for her own consumption is exempted

⁹¹ 7 M.R.S. § 2902-B (2014); 21 C.F.R. § 1240.61 (2013).

⁹² 7 M.R.S. § 2910 (2013).

⁹³ AM. FARMLAND TRUST, CONSERVATION LAW FOUND., & NE. SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 76 (2014).

⁹⁴ See e.g., James McCarthy, *Moo Milk Farmers Disband, Will Seek Individual Contracts*, MAINEBIZ (July 7, 2014), <http://www.mainebiz.biz/article/20140707/NEWS0101/140709973/moo-milk-farmers-disband-will-see-individual-contracts> (detailing the rise and collapse of Maine's Own Organic Milk, a company founded in 2009 as an aggregator of 12 organic dairy farmers who were dropped by Hood).

⁹⁵ See generally Jo Anne Bander, *Maine's Growing Meat Sector*, ME. ORGANIC FARMERS AND GARDENERS ASS'N, <http://www.mofga.org/Publications/MaineOrganicFarmerGardener/Summer2010/Meat/tabid/1615/Default.aspx>; BLUE RIBBON COMMISSION ON LAND CONSERVATION REPORT TO THE GOVERNORS, NEW ENG. GOVERNORS' CONFERENCE, INC., 21 (2010), available at http://efc.muskie.usm.maine.edu/docs/2010_clc_report.pdf (concluding that a lack of slaughter and processing capacity is an impediment to meeting the consumer demand for locally produced meat in New England).

⁹⁶ AM. FARMLAND TRUST, CONSERVATION LAW FOUND., & NE. SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 78 (2014).

⁹⁷ 21 U.S.C. §§ 601 et seq. (2014).

⁹⁸ 21 U.S.C. §§ 451 et seq. (2014).

⁹⁹ 21 U.S.C. § 601(j) (2014).

¹⁰⁰ 9 C.F.R. § 303.1 (2014).

¹⁰¹ 21 U.S.C. §§ 452-53 (2014).

from the full requirements and does not need to ensure an inspector is present.¹⁰² Further exemptions exist under the PPIA, but are beyond the scope of this brief overview.¹⁰³

CONCLUSION Food safety is critical for farmers and food entrepreneurs. Although the federal food safety regulations are still in the process of being finalized, attorneys assisting small-scale farmers and food entrepreneurs will likely be asked questions about FSMA and how it applies to a farm's or food business's operation. Even if the client's operation falls under one of the exemptions, it is critical that the attorney be familiar with the overarching topics and issues that FSMA presents. Food safety concerns may play into other decisions the farmer has to make. For example, if the farmer's operation is a farm mixed-type facility, with both produce farming and processing, the farmer may want to choose a business structure that allows the farmer to have two separate businesses that each limit the farmer's liability. Food safety concerns may also affect what types of markets the farmer may pursue, such as farmers' markets, wholesale markets, or community supported agriculture. Attorneys should be prepared to discuss these concerns with the farmer, and to consider how food safety issues impact the farm or food business.

RESOURCES

National Sustainable Agriculture Coalition, Food Safety Modernization Act

<http://sustainableagriculture.net/fsma/>

United States Food and Drug Administration, Food Safety Modernization Act

<http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm>

University of Maine Cooperative Extension, Cooperative Extension: Food & Health

<http://umaine.edu/food-health/food-safety/>

Maine Department of Agriculture, Conservation and Forestry, Quality Assurance and Regulations

<https://www1.maine.gov/dacf/qar/index.shtml>

¹⁰² 22 M.R.S. §§ 2514, 2517-C (2013); 01-001 C.M.R. ch. 238 (2008).

¹⁰³ *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry Products Inspection Act*, U.S. DEP'T AGRIC. (Apr. 2006), http://afdo.org/resources/Documents/topical-index/2013/Poultry_Slaughter_Exemption_0406.pdf.

CHAPTER IV: FARM TRANSITIONS

Nearly every farmer faces the complex process of transferring a farm's assets to the next generation. In fact, a 2010 report projected that 70% of agricultural land will change hands over the next 20 years. While many of the fundamental aspects of business and estate planning law are applicable in the agricultural context, there are unique aspects of the agricultural community that attorneys must consider to effectively advise a farmer. This chapter lays out some of the basic information relevant to transitioning the farm.

OVERVIEW Attorneys serving farmers in Maine will likely need to advise their clients on farm transition issues. A farm transition is the process the current farmer(s), successor farmer(s), and any other interested parties undertake to transfer a farm from its current ownership and management to new ownership and management. It is often complex, emotional, and time consuming.

1. Farm Transition Overview This section provides a general overview of Maine's agricultural demographics and their influence on the farm transition process, as well as a brief description of some of the defining characteristics of the farm transition process.

2. Getting Context: Initial Questions to Ask the Farmer and Common Concerns This section provides a framework in which an attorney and a farmer can identify the overarching goals of the farm transition, as well as the potential impacts on a variety of stakeholders.

3. Goals of Farm Transition This section provides an overview of topics that will likely arise in the farm transition process, including preserving agricultural land and production, transferring management and control of the operation, and protecting the interests of farmers, their families, and any other people involved in or affected by the transition.

4. Potential Solutions for Farm Transition Goals This section provides short descriptions of potential pathways or solutions an attorney and farmer may pursue to accomplish the farm transition, including sales, purchase agreements, trusts, conservation easements, business structures, land-linking programs, and life insurance.

FARM TRANSITION OVERVIEW Attorneys can play a critical role in the farm transition process. Ideally, they are present from beginning to end in order to ensure a successful transition. Farm transfer is a process, and farmers need attorneys to help them make decisions that protect their assets, reduce risks that might limit farm productivity, preserve family relationships, and potentially conserve farmland. In the farm transition process, attorneys will likely encounter tensions between business decisions and family decisions. Helping farmers to resolve these tensions is an important part of a successful transition to the next generation.

In many ways, transitioning the farm to new ownership is no different from estate planning or business transfers for non-farm clients. The goal is still to transfer the client's assets according to her wishes and to minimize tax liability. While estate plans only transfer *assets* to the next generation, business succession plans must also transfer *management* and *control* and can therefore be more complicated. An excellent farm business succession plan can be undone by an estate plan that does not consider its impact on the business succession plan. When compared to estate planning or business transfers for non-farm clients, farmers often care about more than simply who will receive what property or their own tax burdens; they tend to care about what will be done with the property after it passes to the next generation.¹ In particular, farmers may wish to ensure that their land remains in agricultural production or that only certain organic or sustainable farming practices are used.²

Farmers in Maine by Age

- 60% are over 54 years old;
- 22.1% are between 45 – 54 years old;
- 9.6% are between 35 – 44 years old; and
- 8.3% are 34 years and younger.

Source: U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 69 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_069_069.pdf.

For most farmers, a farm transition concerns both personal and business assets. Assets like tractors, harvesters, and other farming equipment may comprise a large portion of the farmer's estate. To ensure the farm business stays viable, managerial control over the farm assets and operation can be gradually transferred to the successor before the farmer's death or retirement.³ This approach gives successors an opportunity to gain requisite skills and farm management experience while the retiring farmer is available to guide and support the successor.⁴ While the transfer of assets may be straightforward, the transfer of management and control to the next generation is commonly more difficult and time consuming.

¹ Jane Primerano, *Land Trust a Way to Get Farmland Preservation*, AMERICANFARM.COM (Mar. 15, 2015), <http://www.americanfarm.com/publications/the-new-jersey-farmer/archives/2228-land-trust-a-way-to-get-farmland-preservation>.

² Karen Thimke, *Organic Fact Sheet: Estate Planning and the Sustainable or Organic Farm*, MIDWEST ORGANIC AND SUSTAINABLE EDUC. SERVICE (2013), http://mosesorganic.org/wp-content/uploads/Publications/Fact_Sheets/39EstatePlanning.pdf.

³ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning>; Kevin Spafford, *How to Grow Into a Leader*, FARM J. LEGACY PROJECT (Dec. 18, 2014), http://www.farmjournallegacyproject.com/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/; *Nine Business Succession-Planning Mistakes to Avoid*, FIN. PLAN. ASS'N (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

⁴ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning> (last visited Apr. 27, 2015); Kevin Spafford, *How to Grow Into a Leader*, FARM J. LEGACY PROJECT (Dec. 18, 2014), http://www.farmjournallegacyproject.com/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/; *Nine Business Succession-Planning Mistakes to Avoid*, FIN. PLAN. ASS'N (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

Farm transition planning is a growing need in Maine. Maine Farmland Trust estimates 400,000 acres of Maine's prime farmland will transition from one generation to the next within a few years.⁵ And a 2010 report projects that nationwide 70% of agricultural land will change hands over the next 20 years.⁶ This is due, in part, to the average age of Maine farmers. Data from the 2012 Census of Agriculture shows that the average age of Maine farmers is 57,⁷ and the number of farmers aged 55 years and older grew between 2007 and 2012.⁸ However, Maine is also seeing an increasing trend among the younger generations to enter farming. This indicates that although many farmers are likely to retire in the coming years, a growing pool of young farmers may be interested in taking their place. The number of farmers in Maine 34 years and younger grew from 2007 to 2012.⁹ Additionally, the number of farmers in Maine who are classified by the U.S. Department of Agriculture (USDA) as "beginning" farmers is on the rise. To qualify as a "beginning farmer," the farmer must have operated a farm for 10 years or less.¹⁰ The 2012 Census of Agriculture reported that 2,031 Maine farmers fit this definition, meaning that beginning farmers make up almost a quarter of all farmers in the state.¹¹

Historically, farms were kept in the family. However, farm successors are increasingly coming from outside the family, even from non-farming backgrounds.¹² In 2010, only half of farmland transfers across the United States happened within families.¹³ Farm transfers to a successor within the family or outside of the family present many of the same issues. For this reason, this chapter focuses on concerns for any farmer transitioning a farm. While the content of this chapter is largely geared toward attorneys advising farmers who own their farming operations, many of the same basic principles may apply to farm clients who share ownership of their businesses or lease their farmland.

⁵ *About Maine Farmland Trust*, ME. FARMLAND TR, <http://www.maineFarmlandtrust.org/about-maine-farmland-trust/> (last visited Apr. 27, 2015).

⁶ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP, EXECUTIVE SUMMARY AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT RESEARCH REPORT I (2010), *available at* <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

⁷ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf.

⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf.

⁹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf.

¹⁰ Mary Ahearn & Doris Newton, *Beginning Farmers and Ranchers*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. (May 2009), <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib53.aspx#.U48IgvldWSo>.

¹¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 70 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_070_070.pdf.

¹² THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP, EXECUTIVE SUMMARY AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT RESEARCH REPORT I (2010), *available at* <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

¹³ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP, EXECUTIVE SUMMARY AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT RESEARCH REPORT I (2010), *available at* <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE FARMER AND COMMON CONCERNS

All farm clients need to plan for transition. If the farmer waits until a major event to begin her planning process, the event may significantly limit her transition choices or rush decision-making. This decision-making process can often take a decade or more because of its emotional nature.¹⁴ For many, farming is not just a career; it is a way of life. Therefore, letting go of control and involvement can be challenging. Without a plan in place, the farmer's assets will be divided evenly among farming and non-farming family members, and the farm business will be less likely to remain intact.¹⁵

Farm clients have unique needs. Accordingly, attorneys should be careful to gather information specific to the farm, along with their usual questions, to assess the needs of the asset transfer. Additionally, attorneys should encourage the farm owner and family members to have open, frequent, and continuing conversations about the transition plans. The importance of conversations of this nature cannot be overstated. But these conversations are often postponed or avoided altogether because they are difficult for families. Attorneys should carefully consider their ethical obligations before participating directly in these family discussions.¹⁶ It is important that an attorney equip her client with the resources¹⁷ to conduct these meetings and to reach consensus with the family about how to proceed. Otherwise, the attorney's role may create unnecessary contention.

The following section provides some suggested preliminary questions for attorneys to use to frame discussions with farmer clients about farm transitions.

Identifying Individual Goals for the Transition Attorneys should first help farmers identify their personal goals with respect to the farm business.¹⁸ Failure to identify and build consensus around goals will inhibit the transition process.¹⁹

¹⁴ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning> (last visited Apr. 27, 2015).

¹⁵ NEW JERSEY FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11(2013), *available at* http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

¹⁶ Email from Kevin Spafford, Succession Planning Expert, Farm Journal Legacy Project, to author (Mar. 17, 2014) (on file with author).

¹⁷ See Maine Farmlink *Resources*, ME. FARMLINK (2014), <http://www.mainefarmlink.org/farm-transfer-resources> (last visited Apr. 27, 2015); Farm Credit East *Products and Services*, FARM CREDIT EAST, <https://www.farmcrediteast.com/Products-and-Services.aspx> (last visited Apr. 27, 2015).

¹⁸ There are a number of questionnaires available online for this purpose. FARM JOURNAL LEGACY PROJECT, LEGACY WORKBOOK 13 (2013), *available at* http://www.agweb.com/assets/1/6/LegacyWorkbook_9-13.pdf; LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 2 (2012), *available at* <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>; LAND FOR GOOD, TRANSFERRING THE FARM: WHERE DO I START? 4-5 (2012), *available at* <http://landforgood.org/wp-content/uploads/LFG-Transferring-The-Farm-Guide.pdf>; GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, PREPARING TO TRANSFER THE FARM BUSINESS (2013), *available at* <http://www.cffm.umn.edu/publications/pubs/farmmgttopics/transferringthefarmseries.pdf>.

¹⁹ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning> (last visited Apr. 27, 2015).

➤ **Goals for the Transfer**

- Profits
 - Does the farmer want to maximize profits in the short- or long-term?
 - Does the farmer want to sell the land?
 - Does the farmer need to secure funds for retirement?
- Public Benefits
 - Does the farmer want to donate the land to a nonprofit entity or land trust?
 - Does the farmer have environmental goals, such as minimizing the farm’s carbon footprint or limiting farm runoff?
 - Does the farmer have any community development goals, such as educational or public health initiatives, infrastructure investment plans, or partnerships with local nonprofit entities?
- Private Benefits of Others
 - Does the farmer want to contribute to someone else’s private benefit, such as a family member, friend, or beginning farmer?
 - Does the farmer want to provide financial security for her surviving spouse?
 - Does the farmer want to minimize tax liability?
 - Does the farmer want to transfer as much wealth as possible to someone else?
 - Does the farmer want to provide equitable treatment to family members?
- Speed of Transfer
 - How quickly does the farmer need to receive funds from the transfer?
 - Can the farmer afford to use a long-term or other gradual transfer?
 - A successful transfer process may take many years, even decades; does the farmer understand the time needed to complete the transition?²⁰

Discussing the Future of the Farm Farmers often have specific ideas for the future uses of their farms. If the farmers have not done so already, attorneys should work with them to identify their visions for the future of the farm with respect to land use, management and control, and any additional farm operations.

➤ **The Future of the Farm**

- Vision for the Land
 - Should the land continue to be used for agricultural purposes?
 - Should the successor use similar farming practices, such as sustainable methods?
 - Must the successor maintain the farm’s natural resources?
 - Can a certain percentage of the land be preserved for habitat or part of a set-aside program like the Conservation Reserve Program (CRP)?²¹

²⁰ Comment from Amanda Beal, Policy and Research Fellow, Maine Farmland Trust, to author (Apr. 13, 2015) (on file with author).

- Does the farmer want to continue to live on the land after the transfer?
- Where does the farmer anticipate that the successor will live after the transfer?
- Does the farmer have a specific timeline for the transition in mind?
- Vision for Management and Control
 - Will the farm transfer be within the family or outside the family?
 - Will the transfer support a beginning farmer?
 - Is the farmer interested in structuring a mentorship period with her successor so that she is fully prepared to take over management and control?
 - Will full management and ownership be relinquished immediately or gradually?
 - Will the new farmer employ the existing farmer after the transition?
- Vision for the Operation
 - Will the farm business have an educational mission, such as training the next generation of farmers?
 - Will the farm business incorporate a social mission, such as donating produce?
 - Will the business engage in activities other than production, such as running a farm stand or inviting tour groups?
 - Will the farm business engage in processing or value-added activities?
 - Will the anticipated successor share the same vision as the farmer?

Discussing the Future of the Family and Other Stakeholders Many individuals are affected by the transition of a farm. Attorneys should work with farmers to identify their visions for the future of their families. They should also consult other stakeholders with respect to ownership, management, wealth, and current relationships.

- Future of the Family (Legacy)
 - Family Ownership
 - Does the farmer own her land, or share ownership with family members? Do any non-family members own the land?
 - Does the family wish to keep some or all of the land that they own?
 - If the farmer were to die, retire, or become disabled, would the farmer's family have enough financial resources to keep the land together or continue to farm?
 - What effect would a divorce have upon the ownership of farm assets?
 - Family Management
 - Does a family member wish to manage the farm?

²¹ The Farm Service Agency administers the CRP in which farmers remove environmentally sensitive land from agricultural production in exchange for a yearly rental payment. The goal of CRP is to improve water quality, prevent soil erosion, and reduce loss of wildlife habitat. *Conservation Reserve Program*, U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp>.

- Which family members want to have a role in farm management? If more than one family member wants to participate in management how will responsibilities and control be divided?
 - Do those family members have the personal capacity to manage the farm?
 - Family Financial Security
 - Will the farmer's spouse and family be able to live comfortably after the death or disability of the farmer?
 - Does the family have sufficient assets to overcome an unanticipated disaster such as drought or disease?
 - Family Dynamics
 - Has the farmer spoken with the family as a whole about her desires?
 - Do family members have opinions about the farm transfer process?
 - Who should care for the farmer's minor children or aging parents?
 - Does a family member expect to take over the family farming business?
 - Are family members worried that they will lose their say in the business?
- Effects of the Transition on Other Stakeholders
 - Current Dependents
 - Who does the current business support?
 - Does the current business need to continue to support those people after the transition?
 - Current Customer Base
 - Who are the farm's current customers?
 - Do the future opinions of current customers matter to the farmer?
 - Does the farmer participate in a CSA operation?
 - Business Relationships
 - Does the farm participate in farmers' markets or farm stands?
 - Does the farm have contracts with other businesses?
 - Does the farm have any contracts with the National Resource Conservation Service, the State, or land trusts that impose long term or permanent requirements on the farm use?
 - Does the farmer have crop insurance and/or USDA Farm Service Agency (FSA) loans?
 - Does the farm's success depend on the viability of a separate business entity?
 - Employees and Tenants
 - Does the farm have employees or tenants?
 - How will the transfer impact farm employees or tenants?
 - What is the quantity and quality of the employees or tenants?
 - What are the terms of employment?

Valuing the Assets and Liabilities of the Farm and the Farmer Evaluating assets in an agricultural context can be particularly complex. Often, the farmer's business and personal assets are indistinguishable. Additionally, the value of intangible assets, such as a spot at a local farmers' market or a good community reputation, are difficult to assess. On the other hand, financial liabilities can be significant and affect the feasibility of the farm transfer. Attorneys should work with farmers to identify all of their potential assets and liabilities and understand when and how they should be transferred.

- Evaluating the Farmer's Assets and Liabilities
 - Viability of the Farm
 - Is the farm currently financially viable?
 - Are there current threats to the farm's viability?
 - Does the farmer own or lease the land?
 - Multiple Types of Assets/Liabilities
 - What are the farmer's land assets/liabilities?
 - Are there mortgages, other liens, or easements on the land?
 - What is the quality of the land?
 - What are the farm's ecological resources (e.g., water, soil, drainage)?
 - What is the quality of the farm's ecological resources?
 - What are the farmer's non-land farm assets/liabilities?
 - Does the farmer have a house on the farm?
 - Does the farmer have a barn or other farm structures used for farming purposes?
 - Does the farmer have any equipment, such as a tractor or tiller?
 - What is the condition of these assets?
 - Who holds the title to the assets?
 - Are there liens on the farm?
 - Does the farmer want to transfer those assets as well?
 - Transferring Assets/Liabilities
 - Does the farmer intend to transfer all farm assets to her successor or will some be sold or given to others?
 - Does the farmer want the successor to assume the farm's liabilities or does she intend to settle them prior to or as part of the transfer?

Common Concerns In the process of planning for a farm transition, there are common concerns that farmers may have, regardless of the size of the business or the method of transfer. Attorneys should be aware of these concerns and encourage farmers to address them.

- Common Concerns Among Farmers
 - Finding a successor.

- Treating family fairly and preserving relationships.
- Affecting land prices by the farm's transfer.
- Keeping the farm together.
- Preserving the land for agriculture instead of development.
- Transferring managerial control over the farm, including potential reluctance to relinquish control.
- Lacking liquidity for farmer and potential purchasers.
- Having adequate resources to retire comfortably.

USDA Farm Service Agency

For eligible applicants FSA has loan assistance for farm transitions with up to \$300,000 in direct funding for real estate and up to \$300,000 in direct funding for operating purposes.

Source: U.S. DEP'T OF AGRIC., FARM SERVICE AGENCY, FARM LOANS, 2014 FARM BILL FACT SHEET (2014), available at http://www.fsa.usda.gov/Internet/FSA_File/loanprograms2014.pdf.

GOALS OF FARM TRANSITION

This section discusses three concerns attorneys can help farmers address. First, clients may wish to keep their farms working as a farm or ensure that particular farming practices continue. Second, farms face unique management challenges because farmers may not wish to relinquish control or may need time to train their successors. Third, farmers may want to address the interests of a wide range of people in the farm transition process, including the farmer, the family, the farm successor, and other stakeholders.

Preserving Agricultural Land and Production

Farmers often have significant interest in what happens to their farms after the farmer is gone.²² Frequently, farmers care deeply about whether the farmland will continue to be used for agricultural purposes and, if so, what types of farming practices will be used.²³ For instance, a farmer who has carefully conserved soil may wish to ensure that her successor uses the same, or better, techniques, so the farmland is protected from erosion. Historically, farmers protected their farm legacy by passing the farm to family members with shared values. However, today, farmers often transfer their farms outside the family. Whether the transfer is to family or outsiders, the farmer's preferences may conflict with those of the successor.²⁴ Legal tools—many of which are discussed below in the fourth section—can help farmers share their values with the next generation and hold successors accountable to the transferring farmer's broader goals.

²² N.C. FARM TRANSITION NETWORK, PLANNING THE FUTURE OF YOUR FARM (2012), available at http://pubs.ext.vt.edu/446/446-610/446-610_pdf.pdf; Jeanne Bernick, *Trust Worthy*, FARM J. LEGACY PROJECT (June 30, 2012), http://www.farmjournallegacyproject.com/article/legacy2012_trust_worthy/.

²³ KA. STATE UNIV. AGRIC. EXPERIMENT STATION AND COOP. EXTENSION SERV., TRANSITION PLANNING: 12 STEPS TO KEEP THE FAMILY FARMING (2012), available at <http://www.agmanager.info/farmmgmt/planning/MF3074.pdf>.

²⁴ ADRIENNE LAMBERTI, TALKING THE TALK: REVOLUTION IN AGRICULTURAL COMMUNICATION 89 (2007); Jeanne Bernick, *Trust Worthy*, FARM J. LEGACY PROJECT (June 30, 2012), http://www.farmjournallegacyproject.com/article/legacy2012_trust_worthy/.

Additionally, farms can be extremely vulnerable to development. This is in large part because farmland prices are low relative to the cost of land already zoned for development, and because suburban farmland is likely to be much more valuable if used for housing or retail rather than for agriculture purposes.²⁵ This is particularly true in southern and coastal parts of New England where the value of farmland rises to more than twice the national average.²⁶ As more land shifts from agricultural use, the value of the remaining undeveloped land increases. However, Maine farmland is not priced as highly as farmland in other New England states. In 2014 the average real estate value of Maine farmland was \$2,080 per acre, whereas in other more densely populated New England states, it was as high as \$11,200 per acre.²⁷ Still, Maine real estate values vary across the state. Farmland in the more urban southern and coastal regions may be much more valuable than that in other parts of the state.²⁸ In addition to pressure from developers, it may be difficult to keep a farm's land undivided/intact if the farmer has many heirs. In some cases, the desire to farm can conflict with interests of non-farming dependents, who may want to maximize the transfer value by selling farmland to the highest bidder.

Protecting farmland is also becoming of greater importance to many farm transitions because taking advantage of programs that pay landowners in return for farmland protection may be the only way the transition is affordable to the new farmer.²⁹ In order to help farmers identify what programs they might benefit from, attorneys can leverage resources in Maine, such as the Department of Agriculture, Conservation and Forestry's Farmland Protection Specialist and Maine Farmland Trust's legal team.³⁰

Transferring Management and Control over the Operation In many cases, to ensure a successful farm transition, the successor needs an opportunity to develop experience managing the farm business.³¹ Because farmers are so deeply connected to their farms, they may struggle to relinquish control over farm operations.³² As a result, successors may not be given a sufficient opportunity to develop management skills prior to taking control of the farm.³³ A plan that provides for gradual transition over a

²⁵ *Preserving Agricultural Land and Farming Opportunities*, SMART GROWTH/ SMART ENERGY, http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-ag.html (last visited Apr. 22, 2015).

²⁶ CONSERVATION LAW FOUNDATION, *NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM B1* (2014), available at http://www.clf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULLL.pdf.

²⁷ U.S. DEP'T OF AGRIC.: NATIONAL AGRICULTURAL STATISTICS SERVICE, *LAND VALUES 2014 SUMMARY* (2014), available at http://www.nass.usda.gov/Publications/Todays_Reports/reports/land0814.pdf.

²⁸ U.S. DEP'T OF AGRIC.: ECONOMIC RESEARCH SERVICE, *TRENDS IN U.S. FARMLAND VALUES AND OWNERSHIP 21* (2012), available at http://www.ers.usda.gov/media/377487/eib92_2_.pdf.

²⁹ Comment from John Piotti, President and CEO, Maine Farmland Trust, to author (Apr. 13, 2015).

³⁰ *Farmland Protection Program*, ME. DEP'T OF AGRIC., CONSERVATION AND FORESTRY, <http://www.maineFarmlandtrust.org/about-maine-farmland-trust/board-of-directors-staff/> (last visited Apr. 22, 2015).

³¹ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning> (last visited Apr. 27, 2015).

³² *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp> (last visited Apr. 27, 2015); *Succession-Planning Mistakes to Avoid*, FIN. PLAN. ASS'N (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

³³ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning>; Kevin Spafford, *How to Grow Into a Leader*, FARM J. LEGACY PROJECT (Dec. 18, 2014), http://www.farmjournallegacyproject.com/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/;

period of several years can help the farmer and her successor develop a trusting relationship.³⁴ The successor gains experience managing the farm, and the farmer provides mentorship. Gradual transitions can be accomplished by creating an employer-employee relationship between the current owner and successor before the transition. Such a relationship can help each party develop a sense of whether the transition will be successful.

Transition plans can help farmers maintain their quality of life. For instance, a gradual transition plan could allow the farmer to continue to live on the farm during retirement.³⁵ A gradual transition may help the farmer address any concerns about the future of the farm by allowing the farmer to reduce involvement in the farm operation over a longer period of time.

Even if a farmer plans to transfer the land to multiple children or other family members, the attorney should advise the farmer to consider how best to transfer management over the farm. Passing the farm to multiple heirs can create tenuous joint farming situations, which can be difficult to maintain over the long term. Breaking up the farm to satisfy multiple heirs can destroy the farm operation. In particular, if one heir does not wish to farm, that heir must be bought out or she can sue for partition, which would also break up the farm.³⁶ Therefore, considering the compensation of non-farming family members is an important element of transferring control. However, if non-farming members do not anticipate or plan on being compensated, it may be beneficial to have that agreement in writing to avoid future complications.

Protecting People Farm clients need to balance a variety of concerns when planning for transition. For farms to be successful after transition, farmers must provide sufficient resources to their successors. Farmers may also be concerned with their own retirement savings, long-term care planning, and the needs of surviving dependents. They may also worry about the impact of the farm transfer on other stakeholders, such as business partners, customers, and neighbors.

First, the farm transition plans and transfer agreements—like all business transfers—should be in writing.³⁷ Farm transitions can be emotionally charged and contingent on many factors. Parties should explicitly address in writing what must happen in the case of breach. For example, if a successor works for the farmer in return for the future transfer of the farm, how will that individual be compensated if the transfer never goes through?

Nine Business Succession-Planning Mistakes to Avoid, FIN. PLAN. ASS'N (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

³⁴ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP, EXECUTIVE SUMMARY AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT RESEARCH REPORT 4 (2010), *available at* <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

³⁵ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning>; *Nine Business Succession-Planning Mistakes to Avoid*, FIN. PLAN. ASS'N (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

³⁶ 14 M.R.S. § 6501 (2013).

³⁷ GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, *TREATMENT OF HEIRS IN THE TRANSFER PROCESS* (2014), *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

Second, the farm transition needs to address the farmer's own monetary needs. Farm transitions are unique, in part because the farmer's assets are largely illiquid; tractors, harvesters, other equipment, and land may be essential for farm operation and hold most of the farmer's wealth. Therefore, farmers may struggle to balance retirement needs and farm solvency.³⁸ Gifting these assets to the next generation may be necessary for a successful farm operation, but doing so may leave the older generation with very little retirement income.³⁹

Third, the farm transition process needs to consider the successor's financial ability to take over the farm operation. Successors may not have enough capital to do an outright purchase of the farm's assets.⁴⁰ Gathering sufficient capital to obtain the farm assets can be even more difficult for farming families if the older generation suddenly passes away and the assets are distributed equally among the farmer's family and have to be bought back.⁴¹ Successors need to take into consideration the farm's financial viability. It may not be in the successor's best interest to take over a farm that is not profitable or would take too much investment to become profitable.⁴²

Fourth, the farm transition may need to take into account the impact of the transition on the farmer's family. When the farmer wants to transfer the farm business to a single child or family member, it can be difficult to compensate the other, non-farming members of the family in the estate settlement process.⁴³ Keeping the farm in the family traditionally involved transferring control over all the farm's assets to a single member of the younger generation.⁴⁴ However, this can exclude non-farming family members from their portion of the estate. Finding alternative means to compensate non-farming family members, such as through life insurance policies, discussed in the next section, is a key part of a farm transition.

Treating each family member fairly during the farm transition process may require distributing assets unequally.⁴⁵ For instance, the farmer's family members may have contributed unequally to the farm's

³⁸ See ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 34 (Univ. of VT. Extension ed. 2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

³⁹ See ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 34 (Univ. of VT. Extension ed. 2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

⁴⁰ Sara Schafer, *Matters of the Estate*, FARM J. LEGACY PROJECT (June 30, 2012) http://www.farmjournallegacyproject.com/article/legacy2012_matters_of_the_estate-sara-schafer/.

⁴¹ Email from Kevin Spafford, Succession Planning Expert, Farm Journal Legacy Project, to author (Mar. 17, 2014) (on file with author).

⁴² *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning> (last visited Apr. 27, 2015).

⁴³ Sara Schafer, *Matters of the Estate*, FARM J. LEGACY PROJECT (June 30, 2012) http://www.farmjournallegacyproject.com/article/legacy2012_matters_of_the_estate-sara-schafer/.

⁴⁴ *Farmland Transfer Webinar*, AM. FARMLAND TR., <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning>.

⁴⁵ UNIV. OF MINN. EXTENSION, PUTTING A VALUE ON SWEAT EQUITY (2011), available at <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/umn-ext-putting-a-value-on-sweat-equity.pdf>.

growth over the years.⁴⁶ Family members who worked on the farm or who have invested in the farm's development may deserve a larger share of the farm portion of the estate.⁴⁷ The apparent disparity in treatment, however, could produce resentment, and the farmer will likely want to ensure that her family members feel that the farm transition process is fair.

A common farm transition mistake is moving forward on a plan that reflects the interests of only some stakeholders.⁴⁸ Similar to transfers for non-farming clients, this can lead to prolonged battles between affected parties.⁴⁹ Unless every family member is given the opportunity to express his or her opinions about the future of the farm, it is likely impossible to devise a farm transition plan that works for everyone.

A successful transition plan can address common concerns like liquidity, retirement savings, and equality between heirs using a variety of legal tools, several of which are introduced below.

POTENTIAL SOLUTIONS FOR FARM TRANSITION GOALS Attorneys can use a variety of tools to transfer farmland, assets, and managerial control. This section briefly discusses sales, leases, purchase agreements, trusts, conservation easements, business structures, land-linking programs, and life insurance as potential means for accomplishing farm transition goals. The implications of each method are analyzed using the three topics discussed above: preserving agricultural land and production; transferring management and control; and protecting people. Each tool has benefits and drawbacks depending on the farmer's unique needs and priorities. These tools are not exclusive and can often complement each other.

Outright Sales Farmers can transfer their farmland and assets to the new owners through an outright sale, meaning that there will be no ongoing management or ownership role for the farmer post sale. Outright sales are simple, primarily protecting the farmer and her estate.

➤ **Preserving Agricultural Land and Production**

- Benefits:

⁴⁶ UNIV. OF MINN. EXTENSION, PUTTING A VALUE ON SWEAT EQUITY (2011), *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/umn-ext-putting-a-value-on-sweat-equity.pdf>.

⁴⁷ UNIV. OF MINN. EXTENSION, PUTTING A VALUE ON SWEAT EQUITY (2011), *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/umn-ext-putting-a-value-on-sweat-equity.pdf>.

⁴⁸ N.J. FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11 (2013), *available at* http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

⁴⁹ N.J. FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11 (2013), *available at* http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

- If the family is unwilling or unable to continue the farm, sales may be an effective way to transfer the farm to a person outside the family who shares the farmer's values.
 - Drawback:
 - Absent specific conditions, outright sales do not provide control over the farm's future uses.
- **Transferring Management and Control over the Operation**
 - Benefits:
 - As a seller, the farmer freely controls to whom she ultimately sells the farm.
 - Sale-leasebacks may be used to transfer land ownership into a lease. These can raise capital, while allowing the farmer to retain managerial control.
 - Drawbacks:
 - With most sales, the farmer cannot direct the purchaser's management of the farm.
 - Outright sales may not allow gradual transfer of ownership and management.
- **Protecting People**
 - Benefits:
 - Outright sales usually produce liquid capital, which is easily distributed between the farmer and other stakeholders.
 - Drawbacks:
 - Because farm assets are often held for a very long time, the farmer likely has a low tax basis, which means there could be a large tax liability upon sale. However, if sold, the farmer may be able to take advantage of the lower rate on long-term capital gains depending on the type of asset.⁵⁰
 - Buyers may not be able to afford the outright purchase of land and assets, or doing so may hinder their ability to weather unforeseen risks after sale.

Tailored Sales More uniquely constructed sale arrangements can give sellers and purchasers greater control over the transition process. For instance, the farmer may grant the purchaser an option on the farm, i.e., the right to purchase assets at a later date for a specified price.⁵¹ Alternatively, the farm can be sold over time through an installment contract.

- **Preserving Agricultural Land and Production**
 - Benefits:

⁵⁰ Tracy T. Grondine & Mace Thornton, *Cap Gains Tax Precludes Farmers from Passing Torch*, AM. FARM BUREAU FED'N (September 20, 2012), <http://www.fb.org/index.php?action=newsroom.news&year=2012&file=nr0920.html>.

⁵¹ GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, *TREATMENT OF HEIRS IN THE TRANSFER PROCESS* (2014), available at <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

- The length of the contract allows farmers to include conditions to ensure that the purchaser acts in accordance with the values set out in the contract.
 - Drawbacks:
 - Unless included in the contract, the farmer has no control over the land's future use.
- **Transferring Management and Control over the Operation**
 - Benefits:
 - The farmer and purchaser have the opportunity to develop a cooperative working and mentorship relationship for gradually transferring ownership and control of the farm.
 - Sales can be structured to allow farm purchasers to gain ownership of the farm assets incrementally over time.⁵²
 - Gradual sales and seller financing can help beginning farmers to slowly take over the management and assets of a farm operation.⁵³
- **Protecting People**
 - Benefits:
 - Tailored sales can increase affordability and financial security for both farmers and successors.
 - Drawbacks:
 - Long-term transitions create more opportunities for either the seller or purchaser to breach the contract and terminate the sale.
 - Gradual sales delay the farmer's receipt of sale funds.

Trusts Trusts have a variety of applications in the farming context. For instance, the successor may be designated as the trustee of the business's assets, while the retiring farmer and other heirs are designated as the trust's beneficiaries. Trusts protect retiring farmers and non-farming heirs and provide some control over the farm's future.

➤ **Preserving Agricultural Land and Production**

- Benefits:
 - Trusts can be particularly helpful when dealing with farmers who have strong convictions about how the farm business should be managed after they are gone.

⁵² GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, TREATMENT OF HEIRS IN THE TRANSFER PROCESS (2014), *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

⁵³ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP, EXECUTIVE SUMMARY AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT RESEARCH REPORT 4 (2010), *available at* <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

Farmers can require their trustees to ensure that their vision for the farm's future will be carried out by the farm successor.

- Trust documents can establish conditions for use of the land to promote the farmer's goals.
- The farmer controls how long the trust will last, facilitating transfer to future generations.
- Drawbacks:
 - Overly restrictive trust provisions may limit the future operator's flexibility in responding to social or environmental changes.

➤ **Transferring Management and Control over the Operation**

- Benefits:
 - By delaying the transfer of assets, trusts can provide the farmer and purchaser an opportunity to develop a working relationship.
 - The trust allows the farmer to separate management from benefit. Therefore, the farmer can designate individual leadership and multiple beneficiaries.
- Drawbacks:
 - Trusts invest trustees with a great deal of power, which may impinge on the successor's autonomy.



Restrictive Covenants that Run with the Land

Because they limit how a subsequent owner may use farmland, restrictive covenants that run with the land and deed restrictions are similar to conservation easements. However, there are notable differences. They are generally easier to create, but may be more challenging to enforce. For more information about the similarities and differences please visit: <http://landstewardshipproject.org/farmtransitionsconservationfinancingdeedrestrictionorrestrictivecovenant>.

➤ **Protecting People**

- Benefits:
 - Trusts can divide the returns on essential farm assets, without forcing a sale or dividing control. In this way, they can fairly distribute assets among many beneficiaries.
 - Trusts may be transferred before death, which can reduce estate tax liability.
- Drawbacks:
 - A trustee may act contrary to trust documents. This could lead to conflict, and beneficiaries might have to bring legal action to protect themselves. Therefore, it is important to choose the trustee wisely.

Conservation Easements A conservation easement is a deed restriction voluntarily placed on a landowner's property that inhibits future owners from using the land for non-farm development.⁵⁴ Maine law dictates requirements for the creation, maintenance, and termination of conservation easements.⁵⁵ The Maine Department of Agriculture, Conservation and Forestry maintains a statewide registry of conservation easements. Registration is mandatory for holders of a conservation easement and must be renewed every year by March 30.⁵⁶

Conservation easements can be a great tool for ensuring that farmland remains in agricultural production while simultaneously securing liquid capital or a reduced tax liability. The easement can be tailored to match the farmer's exact specifications for how the farmland will be used in the future.⁵⁷ The farmer maintains most management and ownership control, but she and future owners are restricted from developing the land, in perpetuity. The farmer may still receive all the benefits of farming, such as selling crops. But she may have limited rights to build on the land.

Conservation easements can be sold or given in the same manner as any other property interest. Typically, however, conservation easements are donated or sold to a government agency or a non-profit land trust.⁵⁸ The Maine Land Trust Network website has information for most of these land trusts.⁵⁹

➤ **Preserving Agricultural Land and Production**

- Benefits:
 - Conservation easements protect land for agricultural production in perpetuity.
 - By preventing development, easements can make the land more affordable for beginning farmers. They also dramatically reduce incentives to sell for non-agricultural uses.
- Drawbacks:
 - By eliminating the development value, farmers who preserve land they also plan to use as their source of retirement funds may receive less than the maximum amount possible, which could in turn adversely affect their ability to retire or their financial security in retirement.
 - Depending on how the contract is written, the conservation requirements may overly restrict farming practices, resulting in unforeseen negative environmental effects in the future.

⁵⁴ AM. FARMLAND TR., *Farmland Information Center, Fact Sheet: Agricultural Conservation Easements* (June 2008), <http://www.massland.org/files/ACE062008.pdf>.

⁵⁵ 33 M.R.S. §§ 476-79-B (2013).

⁵⁶ *Farmland Protection Program*, ME. DEP'T OF AGRIC., CONSERVATION AND FORESTRY, http://www.maine.gov/dacf/about/commissioners/conservation_easement_registry/index.shtml (last visited Apr. 22, 2015).

⁵⁷ AM. FARMLAND TR., *Farmland Information Center, Fact Sheet: Agricultural Conservation Easements* (June 2008), <http://www.massland.org/files/ACE062008.pdf>.

⁵⁸ AM. FARMLAND TR., *Farmland Information Center, Fact Sheet: Agricultural Conservation Easements* (June 2008), <http://www.massland.org/files/ACE062008.pdf>.

⁵⁹ *Find a Land Trust*, ME. LAND TR. NETWORK (2014), <http://www.mltn.org/search.php> (last visited Apr. 22, 2015).

➤ **Transferring Management and Control over the Operation**

- Benefits:
 - Conservation easements dictate in what ways farmland can and cannot be used, and in that respect the farmer has some control over how the successor farms the land. The easement can be written to incorporate the farmer's values.
- Drawbacks:
 - Conservation easements do not require farming mentorship or business training, which may be a drawback for farmers that want to provide mentorship and training to their successors.
 - Conservation easement sales transfer some oversight and control to the easement holder, namely the government or land trust.

➤ **Protecting People**

- Benefits:
 - The sale of a conservation easement may lead to a large cash payment, which can be used to satisfy the financial needs of non-farming heirs or pay existing debt.
 - By restricting use of all future owners, easements may lower property values and therefore reduce property, estate, and other taxes.
 - If the farmer donates part or all of the easement to a nonprofit land trust, the donated value may be deductible under section 170(f) of the Internal Revenue Code.
- Drawbacks:
 - Conservation easements prevent sales for purposes other than agriculture or conservation, potentially negatively affecting the financial benefits for the farmer's heirs.

Business Structures Business structures provide a variety of forms for transferring responsibilities for farm assets over an extended period of time. Chapter II of this Guide describes the various business structures available to farm businesses. This section briefly describes how the selection of a business structure can further the goals of preserving agricultural land and production, transferring management and control of the operation, and protecting people.

A formal business structure may ensure that the farmer and her heirs are compensated even if the successor takes over all management responsibilities.⁶⁰ These parties can become partners or members in the farm business, while the farm successor becomes the sole manager.⁶¹ Each heir collects a portion of the farm

⁶⁰ LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 11(2012), *available at* <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>.

⁶¹ LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 11 (2012), *available at* <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>.

profits, but the successor retains exclusive managerial control.⁶² If the successor is interested in eventually assuming full ownership, a purchase agreement can allow the successor to obtain others' ownership interests over time.⁶³

➤ **Preserving Agricultural Land and Production**

- Benefits:
 - Specific agricultural goals can be included in Articles of Incorporation, and other organizational documents. These goals will bind future officers of the farm organization, and ensure the farmer's values continue.
- Drawbacks:
 - As with trusts and easements, narrow language in corporate documents can limit flexibility or inappropriately bind future farmers.
 - Because corporations must usually maximize shareholder value, organizing as a traditional corporation might create a fiduciary duty contrary to agricultural purposes. For instance, with high land prices a farmer who wishes to continue to farm and who serves as the chief executive of the farm corporation might be compelled by the shareholders to sell the farm for development purposes.

➤ **Transferring Management and Control over the Operation**

- Benefits:
 - Farm organizations may be structured to allow both the farmer and successor to operate the farm simultaneously. Organizational documents can clarify specific roles and duties, establish decision-making processes, and thereby stabilize complicated farming relationships.
 - Organizational structures can divide roles and responsibilities between multiple successors with different competencies and interests.
 - Formal organization hedges against the sudden death or disability of the farmer by ensuring that the farm will continue to be owned by a single entity.
 - Formal organizing documents allow the farmer to explicitly control the transition process and, in particular, allow gradual management transfers.
- Drawbacks:
 - Without clear documents dividing roles, multiple operators can create confusion and conflicts.

➤ **Protecting People**

- Benefits:
 - Formal business structures may be used to limit estate tax liability.

⁶² IOWA STATE UNIV. EXTENSION, LIMITED PARTNERSHIP AND FAMILY LIMITED PARTNERSHIPS (2009), *available at* <https://www.extension.iastate.edu/agdm/wholefarm/pdf/BFC13LimitedPartner.pdf>.

⁶³ GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, TREATMENT OF HEIRS IN THE TRANSFER PROCESS (2014), *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

- These structures can be organized so the successor gains ownership with sweat equity, or pays more slowly over time.
- Limited liability business structures can be used to protect family assets, and non-managing participants.
- Formal business structures can help divide assets among many dependents.
- Drawbacks:
 - Depending on the structure, formation and formality costs may outweigh the above benefits.
 - A formal business structure may overly limit other stakeholders' ability to protect or influence the farm.

Life Insurance Life insurance can be used to compensate non-farming family members in the estate settlement process without granting them an ownership interest in the farm business. The proceeds from a farmer's life insurance plan can go exclusively to the non-farming family members.⁶⁴ This enables the older generation to transfer all of the farm assets to the successor without excluding the non-farming family members from their fair share of the estate.

Land-linking Programs For farmers whose family members are not interested in taking over the farming business, land-linking programs can help to identify possible farm successors from outside the family. Land-linking programs are designed to connect retiring farmers who want to see their farm businesses continue into the future with aspiring farmers who are looking to secure farmland.⁶⁵ Land-linking programs maintain a database of available farmland and farmers looking to buy or lease land; they facilitate matches by acting as liaisons between the farmer and landowner.⁶⁶ Tenure arrangements offered through land-linking programs may include sale, rent, lease, farmer manager, or other options.⁶⁷

Land-linking programs also provide additional services such as free technical assistance in forming tenure agreements.⁶⁸ Programs may facilitate farm transfers by providing educational support, property assessment, business planning services, and suggested matches.⁶⁹ In some cases, land-linking programs may also include services to help communities by identifying unused, viable farmland and encouraging

⁶⁴ GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, TREATMENT OF HEIRS IN THE TRANSFER PROCESS (2014), available at <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

⁶⁵ MAINE FARMLINK, <http://www.maineфарmlink.org> (last visited Apr. 22, 2015).

⁶⁶ *How the Farmland Matching Service Works*, NEW ENTRY SUSTAINABLE FARMING PROJECT, <http://nesfp.nutrition.tufts.edu/farmland/how-farmland-matching-service-works> (last visited Apr. 22, 2015).

⁶⁷ *New England Landlink*, NEW ENG. SMALL FARM INST., http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/ (last visited Apr. 22, 2015).

⁶⁸ *How the Farmland Matching Service Works*, NEW ENTRY SUSTAINABLE FARMING PROJECT, <http://nesfp.nutrition.tufts.edu/farmland/how-farmland-matching-service-works> (last visited Apr. 22, 2015).

⁶⁹ See KATHY RUHF & JON JAFFE, LAND FOR GOOD, SUCCESSFUL FARM TRANSFER PLANNING FOR FARMERS WITHOUT AN IDENTIFIED SUCCESSOR 13 (2012), available at <http://landforgood.org/wp-content/uploads/LFG-Farm-Transfer-Planning-Without-An-Identified-Successor-Handbook.pdf>.

landowners to lease their land to a farmer in order to increase active agriculture in the community.⁷⁰ Maine FarmLink⁷¹ and New England Landlink⁷² list available Maine farmland for would-be farmers.

➤ **Preserving Agricultural Land and Production**

- Benefits:
 - Land-linking programs help the farmer find a successor who wants to farm. By drawing from a larger pool, land-linking programs can help the farmer find a successor with shared values.
 - Use of the land-linking programs supports the community of beginning farmers.
- Drawbacks:
 - Land-linking programs cannot legally guarantee future farming.

➤ **Transferring Management and Control over the Operation**

- Benefits:
 - The farmer can search land-linking databases for a successor farmer with interest and experience in the farming practices she wants to continue.
- Drawbacks:
 - If the farmer is linked with someone she does not know as a potential successor, she may decide during the planning and transition process that the person is not a good fit and have to restart the process.

➤ **Protecting People**

- Benefits:
 - Finding a successor interested in farming can take the pressure off the family if there is no family member who wants to take over the farm.
- Drawbacks:
 - Bringing a new person and new perspectives into a farm transition process can disrupt the progress that has already been made on identifying common goals.

CONCLUSION Transition planning can be very complicated. It is best for farmers to start as soon as possible and revisit plans with life or financial changes. Every farm family is unique, and every family requires a different farm transition plan to satisfy its individual needs. Any attempt to take a one-size-fits-all approach with farmers is bound to fail. Therefore, it is important to solicit client-specific information and to facilitate constructive family conversations. Attorneys must help clients and their families, or other successors, settle on a collective vision for the farm. Only then can the attorney assisting with the farm

⁷⁰ See *Resources on Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT, <http://nesfp.nutrition.tufts.edu/farmland> (last visited Apr. 22, 2015).

⁷¹ ME. FARMLINK, <http://www.maineфарmlink.org>.

⁷² NEW ENG. LANDLINK, http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/.

transfer process begin to assess the potential legal options and put together a plan that comes closest to satisfying everyone.

RESOURCES

Maine Farmland Trust

<http://www.maineFarmlandtrust.org>

American Farmland Trust

Information for Farmland Advisors on Farm Transfer

<http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estate-planning>

California Farmlink

Farm Succession Guidebook

<http://www.californiafarmlink.org/succession-planning/farm-succession-guidebook>

Farm Transfer New England

<http://www.farmtransfernewengland.net/resources.htm>

Land for Good

Handbook for Farmers without Identified Successors

<http://landforgood.org/wp-content/uploads/LFG-Farm-Transfer-Planning-Without-An-Identified-Successor-Handbook.pdf>

Handbook on Farm Succession and Transfer Strategies for the Junior Farmer

<http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>

Maine FarmLink

<http://www.maineFarmlink.org>

New England Landlink

http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/massachusetts/

New England Farmland Finder

<http://newenglandfarmlandfinder.org/>

Tufts University New Entry Sustainable Farming Project

<http://nesfp.nutrition.tufts.edu/>

CHAPTER V: INTELLECTUAL PROPERTY

An understanding of intellectual property issues that may arise for farmers is important for advising them effectively on how to protect their brands. This chapter details some of the basic information on intellectual property law relevant to farming and the local food sector in Maine.

OVERVIEW Copyright, patent, and trademark law—the three areas of intellectual property (IP) law—are relevant to farmers to varying degrees. This section gives an overview of each IP area and explains how an attorney can expect IP law to apply to Maine farmers.

1. Copyright Law This section explores why copyright issues are uncommon with farmers in Maine, while offering some examples of when these issues may arise.

2. Patent Law This section provides a general overview of patent law relative to Maine farmers. It includes information on different types of patents, historical context, and applicable law.

3. Trademark Law This section explains why trademark law is the area of IP most relevant to Maine farmers. It provides a brief overview of the law and includes points for a lawyer to consider when advising farmers on their branding decisions.

COPYRIGHT LAW Farmers in Maine are typically not in the business of writing books or screenplays, works often associated with copyright protection. But Maine farmers can produce websites, create cookbooks, take photos, or distribute brochures advertising specialized produce or agritourism. In these scenarios, farmers may be able to copyright their materials.

There are three requirements for a work to be copyrighted: the work must be (1) **fixed** (for instance, the work cannot be an ice sculpture that is melting)¹; (2) **original** (the work must be independently created, not copied, and have a “modicum of creativity”); and (3) a work of **authorship**. Works of authorship are defined as being one of the following: literary works; musical works, including any of the accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recording; architectural works; and compilations and derivative works.²

If a farmer is able to show that the work in question (whether it be content on a website, in a brochure, etc.) is creative and original, it is possible to gain copyright protection. Additionally, copyright protection arises automatically when the work is created and lasts as long as the life of the author plus 70 years.³ In other words, it is not necessary for the author of the work to register it to ensure the work is protected by copyright. However, a copyright registration is a prerequisite to bringing a copyright infringement lawsuit.

¹ Note, however, that a photograph of the ice sculpture could possibly be protected, as the image would be “fixed.”

² 17 U.S.C. §§ 102, 103 (2012).

³ 17 U.S.C. § 302 (2012).

The process for registering a copyright involves the filing appropriate forms and fee along with samples of the work with the U.S. Copyright Office.⁴

If a farmer notices that someone has copied her original content without permission, she could potentially sue for copyright infringement.⁵ It might be appropriate to send a Cease and Desist Letter in this situation as a first step. However, it is best to consult with an experienced copyright lawyer before doing so.

When creating a website, a farmer should save drafts of the site content. That way she could prove she used that particular language first if challenged. Additionally, you could advise the farmer to place the copyright symbol (©) on the content she wishes to protect, along with the year of publication and the author's name. Displaying this information acts as a reminder to the public that the material is not to be copied. However, as previously mentioned, copyright protections arise automatically once a work is created, whether or not the © symbol is visible.

If copyright infringement is a concern, the Federal Digital Millennium Copyright Act (DMCA) allows copyright owners to begin the process of removing the infringer's work.⁶ IP law allows for fair use, which refers to certain uses of copyright protected material that are acceptable. These uses include the following: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."⁷ Fair use lists factors to consider in determining whether the use is "fair," such as the purpose of the use and how that use impacts the potential market for the copyrighted work.⁸

Copyright law includes more than what has been discussed here, but these are some of the ways that the issue might arise in the context of working with Maine farmers. Much will depend on the goals of the particular farmer.

PATENT LAW Almost everything made by humans and the processes for making human-made products are potentially patentable.⁹ The U.S. Patent and Trademark Office (USPTO) issues three types of patents: utility; design; and plant.¹⁰ Utility patents are granted for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."¹¹ This includes

⁴ See U.S. COPYRIGHT OFFICE, REGISTERING A COPYRIGHT WITH THE U.S. COPYRIGHT OFFICE (2014), available at <http://www.copyright.gov/fls/sl35.pdf>.

⁵ See generally 17 U.S.C. § 501 (2012).

⁶ To learn more about the DMCA Takedown Notice, see visit: <http://icopyright.com/discovery-copyright-infringement-detection/how-to-use-a-dmca-takedown-notice-to-protect-your-online-brand>.

⁷ 17 U.S.C. § 107 (2012).

⁸ 17 U.S.C. § 107 (2012).

⁹ *General Information Covering Patents*, U.S. PATENT AND TRADEMARK OFFICE (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-31>.

¹⁰ *General Information Covering Patents*, U.S. PATENT AND TRADEMARK OFFICE (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-31>.

¹¹ *General Information Covering Patents*, U.S. PATENT AND TRADEMARK OFFICE (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-31>.

products like tractors, farm machinery or its components, and fertilizers.¹² Design patents are given for unique, ornamental designs, though design patents are not commonly obtained in the farming business. Farmers might seek design patents for works such as holiday wreaths or original designs of scarecrows.¹³ Plant patents are awarded to “anyone who has invented or discovered and asexually reproduced any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber-propagated plant or a plant found in an uncultivated state.”¹⁴ The exclusion for “tuber-propagated plants” refers to crops such as the potato that reproduce by means of a thickened part of the root. This exception was created because these are the only asexually reproducing plants where the part of the plant that is eaten is also the part that reproduces.¹⁵ Plant patents include genetically engineered plant species, as well as new plant species bred or created by universities, businesses, or someone else.

When an individual or an organization holds a patent, that entity is given the right to exclude others from “making, using, offering for sale, or selling or importing into the United States” the patented thing or process.¹⁶ Farmers can leverage patents for their own protection, but should be aware that patents can limit their uses of certain products, such as seeds.

Patents are not the only means of limiting Maine farmers’ ability to use seeds and other farm products. The Plant Variety Protection Act (PVP) directs the Plant Variety Protection Office to issue Certificates of Protection that grant IP rights to creators of sexually reproduced or tuber-propagated new varieties of plants.¹⁷ Fortunately for farmers, the PVP has two significant exemptions. First, farmers who legally purchase protected seeds can replant on their own property.¹⁸ Second, protected seeds can be replanted for research and development of new varieties of plants.¹⁹

On the other hand, companies will often require farmers to enter into licensing agreements when purchasing seeds.²⁰ These types of agreements commonly prohibit farmers from saving seeds for purposes such as replanting or transferring the seeds to another person or farm.²¹ A farmer may not even need to sign a formal contract to be bound by a licensing agreement. Sometimes an agreement will simply be printed on

¹² Sue Purvis, *Basics of Patent Protection*, U.S. PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/sites/default/files/about/offices/ous/Cooper_Union_20130604.pdf (last visited May 8, 2015).

¹³ Sue Purvis, *Basics of Patent Protection*, U.S. PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/sites/default/files/about/offices/ous/Cooper_Union_20130604.pdf (last visited May 8, 2015).

¹⁴ *General Information Covering Patents*, U.S. PATENT AND TRADEMARK OFFICE (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-31>.

¹⁵ *General Information Covering Patents*, U.S. PATENT AND TRADEMARK OFFICE (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-31>.

¹⁶ 35 U.S.C. § 271 (2012).

¹⁷ *Plant Variety Protection Office*, U.S. DEP’T OF AGRICULTURE, <http://www.ams.usda.gov/AMSV1.0/pvpo> (last modified Mar. 10, 2015).

¹⁸ 7 U.S.C. § 2543 (2012).

¹⁹ 7 U.S.C. § 2544 (2012).

²⁰ Tiffany Dowell, *Seed Saving Law: What Farmers Need to Know*, TEX. AGRIC. L. BLOG (FEB. 4, 2015), <http://agrilife.org/texasaglaw/2015/02/04/seed-saving-law-what-farmers-need-to-know/>.

²¹ Tiffany Dowell, *Seed Saving Law: What Farmers Need to Know*, TEX. AGRIC. L. BLOG (FEB. 4, 2015), <http://agrilife.org/texasaglaw/2015/02/04/seed-saving-law-what-farmers-need-to-know/>.

the seed packaging and provide that by unsealing it the farmer agrees to its provisions.²² The U.S. Supreme Court's decision in *Bowman v. Monsanto* requires farmers to enter into licensing agreements to buy certain seeds even after their patents have expired.²³ In other instances, large seed manufacturers may require farmers buying seeds from them to purchase a "cropping system." A cropping system involves the purchase of both patented seeds and patented weed or pest controls to which the plants are resistant.²⁴

These licensing practices are prominent among international companies' genetically engineered (GE) crops like soybeans, cotton, corn, and canola.²⁵ Nationally, 93 percent, 88 percent, 86 percent, and 64 percent respectively of these crops are now GE.²⁶ With the exception of corn, these crops are not commonly grown in Maine. According to the U.S. Department of Agriculture (USDA), only seven farms grew canola in Maine in 2012, down from fourteen in 2007; thirty farms grew soybeans, up from fourteen in 2007; and there was no information on farms growing cotton.²⁷ Maine was the last state to approve the sale of patented GE sweet corn in 2007, and between 2009 and 2013, Maine farmland growing GE crops grew from 17,039 acres to 28,210 acres.²⁸ Therefore, relative to the total 1.45 million acres of active farmland and 477,343 acres of cropland, the amount of patented GE cropland is relatively small.²⁹ However, individuals or companies, no matter the size, may patent or protect seeds or plants. For example, universities, growers' associations, USDA, and other organizations all hold PVP certificates for crops such as potatoes, which are common in Maine.³⁰

To protect themselves from infringement claims, farmers should ask their seed suppliers about the status of seeds they purchase. In addition, the Plant Variety Protection Office has a certificate database to verify the protection status of plants,³¹ and the USPTO has an extensive database of patents.³²

²² Tiffany Dowell, *Seed Saving Law: What Farmers Need to Know*, TEX. AGRIC. L. BLOG (FEB. 4, 2015), <http://agriflife.org/texasaglaw/2015/02/04/seed-saving-law-what-farmers-need-to-know/>.

²³ *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1766-67 (2013) *reh'g denied*, 134 S. Ct. 24 (2013).

²⁴ CTR, FOR FOOD SAFETY & SAVE OUR SEEDS (2013), SEED GIANTS V. U.S. FARMERS (2013), *available at* http://www.centerforfoodsafety.org/files/seed-giants_final_04424.pdf.

²⁵ CTR, FOR FOOD SAFETY & SAVE OUR SEEDS, SEED GIANTS V. U.S. FARMERS (2013), *available at* http://www.centerforfoodsafety.org/files/seed-giants_final_04424.pdf.

²⁶ CTR, FOR FOOD SAFETY & SAVE OUR SEEDS, SEED GIANTS V. U.S. FARMERS (2013), *available at* http://www.centerforfoodsafety.org/files/seed-giants_final_04424.pdf.

²⁷ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 37(2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_037_037.pdf.

²⁸ Mary Pols, *Monsanto and Maine: A Look at Maine's Sometimes Fractious Relationship with the GMO Giant*, PORTLAND PRESS HERALD (May 4, 2014), http://www.pressherald.com/2014/05/04/monsanto_and_maine__a_look_at_maine_s_sometimes_fractious_relationship_w_ith_the_gmo_giant_/; 7 M.R.S. § 1052 (2013).

²⁹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MAINE STATE DATA, TABLE 8 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Maine/st23_1_008_008.pdf.

³⁰ *PVP Listings in GRIN: Potato Listings*, U.S. DEP'T OF AGRIC. (last visited May 8, 2015), <http://www.ars-grin.gov/cgi-bin/npgs/html/pvp4.pl?Potato%20201200424%20201300469>.

³¹ *Plant Variety Protection Office: Status of Certification*, U.S. DEP'T OF AGRIC. (2015), <http://www.ars-grin.gov/cgi-bin/npgs/html/pvplist.pl>.

³² *Patent Full-Text Database*, U.S. PATENT AND TRADEMARK OFFICE (2013), <http://patft.uspto.gov>.

mark. Holding a valid registration can help the farmer see results quicker, and possibly prevent costly, drawn-out litigation.

Understanding the strength of marks and the degrees of protection attributable to them is the first step in ensuring a farmer's mark can be registered. The United States has a two-tiered system governing trademarks: federal law and state law. A federal registration under the Lanham Act of 1946 generally provides a right to use a mark throughout the United States (accounting for concurrent uses or prior, superior common law rights). Registering a mark on the state register provides rights only within the state. For a farmer's mark to qualify for federal registration, she must show that her mark is being used in interstate commerce. Even if her farm is located only in Maine, and the extent of her business is selling at local farmers' markets, she could still meet the requirement for "interstate commerce" if one person from out of state buys her product. Establishing interstate commerce is not difficult.

Encouraging your client to register on the Federal Register is a good idea even if she is not planning to distribute her product to stores outside of the state. With a federal registration, her rights to the mark extend across the country. With a state registration only, rights to the mark are confined to Maine. A party with a federal registration could try to enjoin use of the same mark registered only at the state level. Having registered the mark on the Maine register would be a possible defense in establishing priority. But seeking federal registration could prevent litigation from the outset. Unlike a state registration, a mark that is registered on the Federal Register is deemed to provide constructive notice that its ownership interest is already assigned.³⁸

Before your client registers her mark on either the Maine or Federal Register, she should determine whether a party has already registered the mark. This search can be conducted through the USPTO website.³⁹ This website is a valuable resource, providing helpful information about trademarks.

Domain names are different from trademarks and thus are not registered through the USPTO.⁴⁰ Rather, your client would register a domain name through an accredited domain name registrar. As the USPTO explains, it is possible that someone else could force her to stop using her domain name if it is found to infringe on someone else's trademark rights.⁴¹

Two important questions to ask before filing a trademark application are: (1) whether the mark is registerable; and (2) how difficult it will be to protect the mark based on its strength.⁴² The next section

³⁸ 15 U.S.C. § 1072 (2012).

³⁹ *Searching Marks in USPTO Database*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademarks-getting-started/trademark-basics/searching-marks-uspto-database> (last visited May 8, 2015).

⁴⁰ U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK PROCESS: AN OVERVIEW OF A TRADEMARK APPLICATION AND MAINTENANCE PROCESS (2014), available at <http://www.uspto.gov/trademarks-getting-started/trademark-process#step1>.

⁴¹ U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK PROCESS: AN OVERVIEW OF A TRADEMARK APPLICATION AND MAINTENANCE PROCESS (2014), available at <http://www.uspto.gov/trademarks-getting-started/trademark-process#step1>.

⁴² U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK PROCESS: AN OVERVIEW OF A TRADEMARK APPLICATION AND MAINTENANCE PROCESS (2014), available at <http://www.uspto.gov/trademarks-getting-started/trademark-process#step1>.

analyzes the requirements for a strong, registerable mark in Maine. These overlap with the federal requirements.

Maine

The law in Maine includes a list of what type of mark cannot be registered in the state.⁴³ Since having a registered mark helps in both preventing others from encroaching on your client's mark and in enjoining the use of a similar mark, it is a good idea to advise your clients to register their marks, or the brand that they choose for their farm.

A mark can be registered in Maine only if the following are true:

- (A) **“The mark must not be deceptive.”**⁴⁴ A mark is “deceptive” if a reasonable consumer would be deceived about what the mark actually represents.⁴⁵
- (B) **“The mark must not falsely suggest a connection with persons, living or dead, or institutions.”**⁴⁶ The trademark your client chooses should not suggest to the public that it has a certain affiliation, when in reality it does not.⁴⁷ For example, in 2010, Nestlé Waters, a company that bottles and sells water, forced its competitor, Maine Springs, to change its labeling from “Source: Poland Spring, Maine” to “Source: Located in Poland Spring, Maine,” under the threat of litigation. Nestlé argued under Section 43 of the Lanham Act and under the Maine Uniform Deceptive Trade Practices Act that a consumer would be confused and think there was an affiliation with Nestlé company if Maine Springs did not change its labeling.⁴⁸
- (C) **“The mark must not include the flag or coat of arms or other insignia of the United States, any state or municipality, or any foreign nation.”**⁴⁹ A farmer could not incorporate the flag of Maine, for instance, in its logo. Marks containing this type of insignia cannot be registered.
- (D) **“The mark must not consist of or be comprised of the name, signature, or portrait of any living individual, except with that individual's written consent.”**⁵⁰ If your client wishes to use a person's name in the mark, she should obtain an agreement to use the name in writing.

⁴³ See 10 M.R.S. § 1522 (2013).

⁴⁴ 10 M.R.S. § 1522(A) (2013).

⁴⁵ See *Eisner v. Ellenberger*, No. CV-83-310, 1987 Me. Super. LEXIS 370, 2 (Oct. 13, 1987) (court held the Defendant's use of the name “Wisteria House” was a deceptive trade practice in violation of Maine law because it caused a likelihood of confusion or misunderstanding to the public).

⁴⁶ 10 M.R.S. § 1522(B) (2013).

⁴⁷ See *San Francisco Arts & Ath. v. Olympic Comm.*, 483 U.S. 522, 524 (1987) (Supreme Court enjoined an athletics corporation from using the word “Olympic” in its trademark because falsely suggested a connection with the United States Olympic Committee).

⁴⁸ See *Me. Springs, LLC v. Nestlé Waters N. Am., Inc.*, No. 2: 14-CV-00321-625, 2015 U.S. Dist. LEXIS 33259, 9 (D. Me. Mar. 18, 2015).

⁴⁹ 10 M.R.S. § 1522(C) (2013).

⁵⁰ 10 M.R.S. § 1522(D) (2013).

(E) **“The mark must not consist of a mark that is merely descriptive or deceptively misdescriptive of the goods or services or is primarily geographically descriptive or deceptively misdescriptive of them or is primarily merely a surname. The Secretary of State may accept that the mark has become distinctive if the applicant has used the mark continuously for five years following the date of the filing of the application for registration.”**⁵¹ The basic rule in trademark law is that a mark is not protectable (able to be registered) if that mark is merely describing what it is selling. For instance, a farmer growing and selling potatoes could try to register “Potato Farm” as the farm name. However, a trademark examiner would likely deny her application on the basis that “Potato” is considered a generic term unable to be reduced to an individual’s singular property interest.

A registered mark cannot be “deceptively misdescriptive” of the goods or services it is offering. A “deceptively misdescriptive” mark would be a mark that describes something other than what it is actually selling and a reasonable consumer would be led to believe the misdescription.⁵² For example, the Federal Circuit held that the mark LOVEE LAMB for seat covers was deceptively misdescriptive because the seat covers were not made of lambskin and a reasonable person would think they were.⁵³ Similarly, a mark cannot lead the public astray as to the origin of the goods or services.⁵⁴

For a mark to be afforded protection, it must either be distinctive on its own (inherently distinctive) or, if the mark is not distinctive, have acquired secondary meaning, which in turn makes the mark distinctive. An example of a mark that is inherently distinctive is “Ivory” for soap. There is nothing about the term “Ivory” that leads one to think automatically of soap, and a person must pause to make the connection. Conversely, the name “After-Tan” for lotion applied after being in the sun is descriptive of the product, and thus not inherently distinctive.

The Second Circuit established a “spectrum of distinctiveness” in 1976, which placed trademarks into four classes: Fanciful/Arbitrary; Suggestive; Descriptive; and Generic. The first three afford differing degrees of protection, while Generic marks are entitled to no protection.⁵⁵ While fanciful/arbitrary marks (Ivory soap, for example) and suggestive marks (such as Liquid Paper for correcting fluid) are presumed to be inherently distinctive and entitled to trademark protection, descriptive marks are only entitled to protection if the public has come to understand that the mark represents particular goods or services. For instance, “After-Tan,” our example of a descriptive mark, would become protectable only

⁵¹ 10 M.R.S. § 1522(E) (2013).

⁵² See, e.g., *Glendale Int'l Corp. v. USPTO*, 374 F. Supp. 2d 479, 480 (E.D. Va. 2005) (U.S. Patent and Trademark Office (PTO) won on Summary Judgment when it argued that the trademark “TITANIUM” was deceptively misdescriptive because the vehicles being sold did not actually contain titanium, and a reasonable consumer would be led to think otherwise).

⁵³ *In re Budge Mfg. Co.*, 857 F.2d 773, 775 (Fed. Cir. 1988).

⁵⁴ See *In re Nantucket, Inc.*, 677 F.2d 95, 95 (C.C.P.A. 1982) (Court of Customs and Patent Appeals reversed a finding that the use of “Nantucket” was geographically deceptively misdescriptive because even though the shirts did not originate in Nantucket, the court found no evidence that the public would think the shirts originated there).

⁵⁵ *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4 (2nd Cir. 1976).

once it has acquired what is termed “secondary meaning.” In other words, the public understands that the term points to the source of a particular product. One way to prove the acquisition of secondary meaning is to show that the farmer has used the mark continuously for at least five years following the filing of the application for registration.⁵⁶

“Generic” marks like “Potato Farm” are never capable of becoming distinctive or being protected. This is because generic marks connote the general category to which a product belongs, and public policy is to keep those terms away from private ownership.⁵⁷ As an example, the Superior Court in York County, Maine, found that no one could have exclusive use of the term “Maine Shellfish,” reasoning that “Maine Shellfish” fell into the same generic category as “LITE” beer—both are commonly used to refer to the type of product being sold.⁵⁸

Finally, a mark “must not be primarily geographically descriptive” and must not be “primarily merely a surname.”⁵⁹ However, if such a mark has developed secondary meaning, as previously discussed, it is possible for the mark to become distinctive. Again, once a mark is distinctive, it is capable of being registered and protected.⁶⁰

- (F) **“The mark must not consist of or comprise a mark that so resembles a mark registered in this State or a mark or trade name previously used in this State by another and not abandoned, as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive, unless the registered owner or holder of the other mark executes and files with the Secretary of State proof of authorization of the use of a similar mark by the applicant seeking to use the similar mark.”**⁶¹ The farmer will not be able to register a mark if there is already a similar mark registered and if the existence of her mark would make a reasonable consumer confused about the affiliation of the similar mark.⁶²
- (G) **“The mark must not be distinguishable from the name of a corporation, limited liability company, limited liability partnership, limited partnership or limited liability limited partnership, unless the corporation, limited liability company, limited liability partnership, limited partnership or limited liability limited partnership executes and files with the Secretary of State proof of authorization of the use of a mark similar to the**

⁵⁶ See *Outdoors, Inc. v. Kennebec Brewing Co.*, No. CV-00-64, 2000 Me. Super. LEXIS 209, 3 (Sept. 15, 2000).

⁵⁷ Note that the mark “Apple” would be generic when connected with the sale of apples, but not when connected with the sale of technology devices.

⁵⁸ *Me. Shellfish Co. v. Coast*, No. CV-11-095, 2011 Me. Super. LEXIS 85, 4 (May 16, 2011)(quoting *Miller Braving Co. v. Falstaff Brewing Corp.*, 655 F.2d 5 (1st Cir. 1981)).

⁵⁹ 10 M.R.S. § 1522(E) (2013).

⁶⁰ See *Hubbard v. Nisbet*, 159 Me. 406, 409, 193 A.2d 850, 851 (1963) (explaining when secondary meaning entitles a mark to protection).

⁶¹ 10 M.R.S. § 1522(F) (2013).

⁶² For more on how likelihood of confusion issues are dealt with in Maine, see *Knowles Co. v. Ne. Harbor Insurers*, 2003 Me. Super. LEXIS 257, 25 (Dec. 12, 2003).

real, assumed, fictitious, reserved or registered name of a corporation, limited liability company, limited liability partnership, limited partnership or limited liability limited partnership by the applicant seeking to use the mark.”⁶³ A registered mark must be the same as the company’s name with which it is affiliated unless that company has proven to the Secretary of State that it is authorized to use a dissimilar mark in connection with its business.

- (H) **“The mark must not consist of or comprise language that is obscene, contemptuous, profane or prejudicial.”**⁶⁴ Your client should not include this type of language in the name of the farm not only because of this provision, but also because of the negative effect such language might have on the farm’s image.
- (I) **“The mark must not inappropriately promote abusive or unlawful activity.”**⁶⁵ A farmer is, hopefully, unlikely to choose such a mark.
- (J) **“And notwithstanding paragraph G, the mark must not be identical to a corporate, limited liability company, limited liability partnership, limited partnership or limited liability limited partnership name, unless the corporation, limited liability company, limited liability partnership, limited partnership or limited liability limited partnership is the same entity as the applicant that is seeking to register the mark and files proof of ownership with the Secretary of State.”**⁶⁶ The mark the farmer wishes to register must not be the same as another existing company.

If you can check off all of these requirements for the chosen name of your client’s farm or business, you will likely be successful in getting the mark registered in Maine.

Federal

Your client can also register her mark on the Principal Register through the USPTO, as previously mentioned. If she chooses this route, her application will be governed by the Lanham Act. While the Lanham Act details similar qualifications for a registerable mark as found in Maine state law, there are a few differences between Maine law and the Lanham Act. One difference is that the farmer can file either a “use application” or a “bona fide intent to use application” with the USPTO. For the “use application,” the farmer must already be using her mark in commerce, must include the date of first use along with other identifying information, and must submit proof of such use. The requirements of proving use differ depending on whether the mark is for goods or services. For example, if the mark is for services, presenting the advertising of those services shows use of services, whereas if the mark is for goods, proof of use generally involves evidence of the goods themselves or showing the packaging within which such goods are contained.

⁶³ 10 M.R.S. § 1522(G) (2013).

⁶⁴ 10 M.R.S. § 1522(H) (2013).

⁶⁵ 10 M.R.S. § 1522(I) (2013).

⁶⁶ 10 M.R.S. § 1522(J) (2013).

For a “bona fide intent to use application,” the farmer need only have the intent to use the mark soon. Within six months after receiving a notice of allowance, she must submit proof that the goods or services are actually being used in interstate commerce.⁶⁷ There are steps that can be taken to appeal if the application is rejected, but that is beyond the scope of this overview.

The last point to know about registering a mark with the USPTO is that in addition to the Principal Register, there is also the Supplemental Register. The difference between the two deals with the concept of secondary meaning. If a mark is descriptive and needs to earn its secondary meaning over five years, the farmer can register her mark on the Supplemental Register as a way to start the clock. This helps prevent someone from claiming she has the same descriptive mark as your client three years in. The caveat is that your client must actually be using the mark during those years on the Supplemental Register.⁶⁸

Case Examples

The family owned ice-cream company from Skowhegan, Maine, Gifford’s Dairy, Inc., filed a complaint in 2003 against a Massachusetts company, Richardson’s Farms, Inc., for selling a version of “Maine Black Bear” ice cream and infringing on the rights that Gifford’s Dairy had acquired when it registered “Maine Black Bear” ice cream on the Principal Register in 2002.⁶⁹ The parties were able to reach a settlement and the case never went to trial.

Winterwood Farm, LLC, (Winterwood) out of Lyman, Maine, filed a complaint against JER, Inc., in 2004. In its complaint, Winterwood alleged that JER had been selling compost and falsely labeling the compost as originating from Winterwood. Winterwood had reason to believe the compost JER was selling was not the same compost that Winterwood had once sold to JER for distribution.⁷⁰ This case is also one that never made it to trial.

Both of these cases exemplify some of the ways farmers in Maine could become involved in trademark litigation. Additionally, they serve as a reminder to conduct due diligence—ensuring lack of infringement on another’s mark—before using a mark in commerce.

CONCLUSION Although intellectual property law affects almost all aspects of a Maine farmer’s business, she may never confront IP issues. However, costly litigation could possibly arise for farmers who are unaware of trademark law, have not taken steps to protect their marks, or have used another’s mark without permission. Choosing the right name for a farm or farm products, registering the trademarks on either the state or Federal Register, as well as potentially registering a domain name, are all important steps for a farmer to take in efforts to protect her unique brand.

⁶⁷ 15 U.S.C. § 1051(d) (2012).

⁶⁸ See *Fact Sheets: Selecting and Registering*, INT’L TRADEMARK ASS’N, <http://www.inta.org/TrademarkBasics/> (last visited May 8, 2015).

[FactSheets/Pages/PrincipalvsSupplementalRegister.aspx](http://www.inta.org/FactSheets/Pages/PrincipalvsSupplementalRegister.aspx).

⁶⁹ *Gifford’s Dairy, Inc. v. Richardson’s Farms, Inc.*, No. 1:03-CV-00039-GZS (D. Me. Mar 19, 2003).

⁷⁰ *Winterwood Farm, LLC v. JER, Inc.*, 377 F. Supp. 2d 34 (D. Me. 2004).

RESOURCES

U.S. Patent and Trademark Office

Information on Filing Patents

<http://www.uspto.gov/patents-getting-started/patent-process-overview>

Information on Plant Patents

<http://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/general-information-about-35-usc-161>

Trademark Process: An Overview of a Trademark Application and Maintenance Process

<http://www.uspto.gov/trademarks-getting-started/trademark-process#step1>

3-11 Gilson on Trademarks § 11.03