

# TEXAS DIRECT FARM BUSINESS GUIDE



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### LEGAL DISCLAIMERS

*This Guide is not intended as legal advice.* It is not intended to, and cannot, substitute for sound legal advice from a competent, licensed attorney. Rather, it is meant to help farmers understand the many issues that must be considered when establishing and operating a direct farm business. There is more to farming than just growing crops and selling to customers. The authors' hope is that this Guide will illustrate the legal issues that direct farm entrepreneurs must consider and then guide them towards experts and additional resources that will set their direct farm businesses on a track towards success.

The legal information provided by this Guide is a general overview of the many laws and regulations that may be applicable to a direct farm business. The reader should never assume that the information contained herein applies to his or her specific situation without consulting a competent attorney in his or her home state. Further, though the authors have made every effort to ensure the accuracy of the information in this Guide, they cannot guarantee that all of it is correct. Laws, regulations, and guidelines can change at any given time, and the status of laws and regulations in the future cannot be predicted with any certainty. Therefore, every user of this Guide should at all times independently ensure that the legal information is up-to-date before using it in any way.

Any URLs provided herein are purely for the convenience of the user, and the authors of this guide disclaim any liability for the content of the referenced websites.

Finally, any opinions, findings and conclusions, or recommendations expressed in this Guide are those of the authors and do not necessarily reflect the view of the funding organizations.

## INTRODUCTION

If you are reading this Guide, then you are probably already well aware of the growing interest in local foods. Consumers seek out local producers for a variety of reasons: Some believe the food is healthier, safer and tastier. Others hope that local farmers are more invested in the community and stewardship of the land. And many people simply want to put their hard-earned dollars back in their local communities so that they can learn more about where their food comes from, as well as make connections with the people who grow it.

Although consumer demand is the primary motivation for expanded local food networks, national leaders, in an era of bioterrorism threats and increased energy costs, have recognized that direct farm businesses can play a critical role in local and regional food security plans. For

example, the Federal Farmer-to-Consumer Direct Marketing Act (7 U.S.C. Chapter 63) recognizes the importance of direct farm businesses by funding state direct marketing assistance programs and directing a yearly survey to determine what methods of direct farm marketing are being used.

Direct farm businesses are capable of meeting all these demands while increasing profitability. Selling directly to consumers increases the farmer's share of the consumer's food dollar, which often goes predominantly to middlemen and processors in conventional food supply systems. Furthermore, building a connection with customers and the community can make farming a more enjoyable and rewarding experience.

However, running a successful direct farm business can be difficult due to the labyrinth of laws and regulations. These rules touch on nearly every action a producer might take, from the obvious, such as paying taxes or hiring employees, to the unexpected, such as naming the business. To add to the complexity, these rules are implemented and enforced by over a dozen agencies, spread between local, state and federal governments, which sometimes have overlapping requirements. Just figuring out who to contact may be a daunting task, let alone knowing what questions to ask and understanding the answers. Therefore, the authors developed this guide with the intent of bringing clarity to some of the rules and providing guidance on where and how to get correct information to foster a more vibrant direct farm business environment.

The introductory section of this Guide is divided into four sections, each of which offers some basic information that should be helpful in understanding the other chapters of this Guide. These first four sections are intended as overviews that provide the general rules, but in some



cases exceptions to those rules will apply. As noted below, farmers who are considering starting (or expanding) a direct farm business should consult with an attorney to ensure full compliance with all applicable rules and regulations.

## I. USING THIS GUIDE

This guide is divided into two primary sections. Section I outlines rules that apply to all farming operations, regardless of agricultural product and marketing strategy. Section II is organized according to agricultural products. Whether the reader starts with Section I or Section II probably does not matter, but it is important to consider the information from both sections when constructing a business plan. Following are a few additional notes about the guide.

**Legal-eze:** Because this guide attempts to explain the law, the authors must use terms that have precise meaning to lawyers. Some of these terms are common English words, where the legal meaning is different or more exact than the common usage, and others are phrases based in Latin. The authors have attempted to explain specialty terms in the text, but may not always do so. For the reader's convenience, there is a glossary of terms at the back of the guide. For further reference, Law.com's **legal dictionary**<sup>1</sup> is a useful website with explanations of many common legal terms.

**Internet Links:** Throughout this Guide, the authors have provided links to websites that provide additional information and resources on various topics. These online resources are highlighted in bold text; for ease of reading, the website URLs are provided in footnotes to the bolded terms. Internet links and resources do not always remain in one place, but the supporting documents referenced in this Guide are public, and a simple Google search on key terms can in some cases locate a broken link or its updated version or location.

**Statutes and Regulations:** Throughout the text, references to specific statutes or regulations are accompanied by citations in parentheses. The authors give these citations so that the reader can look up the exact language of the text if it is of interest. Citations also are a helpful starting point for searching the internet for more information or contacting the regulatory agency or an attorney. Below is an explanation of the most common citation formats and websites for locating the legal document. In most cases, the first number is the Title, and the numbers following the code's name are chapters or subsections.

- ### U.S.C. § ## are federal laws – otherwise collectively known as the U.S. Code. They can easily be accessed at [www.gpoaccess.gov](http://www.gpoaccess.gov) (official site) or at [www.law.cornell.edu/uscode/](http://www.law.cornell.edu/uscode/) (Cornell University). Three of the most common federal statutes cited in this book are the Tax Code, which is in Title 26; the Food, Drug and Cosmetic Act, which is in Title 21; and Agriculture, which is in Title 7.

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<sup>1</sup> [www.dictionary.law.com](http://www.dictionary.law.com)

- ## C.F.R. ### are regulations implemented by federal agencies. The IRS's regulations are in Title 26 and the FDA's regulations are in Title 21. The Department of Agriculture's regulations are divided between Title 7 and Title 9. Selected CFR titles are available online at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>
- V.T.C.A. ###.### are Texas laws under Vernon's Texas Codes Annotated. The first set of numbers is the chapter and the numbers after the decimal represent the chapter's subparts. Vernon's Texas Codes are divided by subject matter through its titles, but nevertheless, the orders of the chapters reflect the specific code (for example, Title 6- The Texas Agriculture Code). The Texas Legislative Council provides a link to the Code on its website.<sup>2</sup>
- ## T.A.C. ###.### are Texas regulations under the Texas Administrative Code. The Office of the Secretary of State provides access to the Administrative Code on its website.<sup>3</sup>

**Federal vs. State law:** Federal and state law do not always impose the same requirements, and often one establishes stricter standards. Always comply with the strictest standards – the existence of a more lenient law does not excuse non-compliance with the other government's standards.

**Checklists and Further Resources:** At the end of each chapter there is a short checklist of the important issues to consider and/or information on further resources.

## II. OVERVIEW OF ADMINISTRATIVE AGENCIES

Before delving into the specifics of the laws and regulations, it may be useful to have a basic understanding of the state-federal regulatory system and which agencies have authority over what operations. The Constitution gives the U.S. Congress power to regulate any goods traveling in interstate commerce (i.e., goods that cross state lines). The U.S. Supreme Court has interpreted this to include regulatory power over activities that *affect* goods traveling in interstate commerce, even if those activities might take place completely within state lines.<sup>4</sup> In addition, however, the Constitution allocates to the states the power to regulate everything not exclusively reserved for the federal government or protected by the Constitution. Therefore, states can impose additional regulations on items within their borders that are already subject to federal regulations, as well as regulate items and activities over which the federal government does not have authority. The one limit on this allocation of power is that federal

<sup>2</sup> [http://www.tlc.state.tx.us/gtli/leginfo/media\\_statcode.html](http://www.tlc.state.tx.us/gtli/leginfo/media_statcode.html)

<sup>3</sup> <http://www.sos.state.tx.us/tac/>

<sup>4</sup> Perhaps the most striking example of this idea is *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Supreme Court held that a farmer who was growing wheat solely for his own private consumption was nonetheless subject to congressional regulation because the intrastate growth of wheat, viewed in the aggregate, had a "substantial economic effect" upon interstate commerce.

law is supreme over state law, so if the federal law contradicts or is inconsistent with a state law, the federal law controls.

When Congress appoints an agency to implement rules, it is delegating congressional authority. Therefore, properly implemented regulations have the same authority as a statute written by Congress. “Properly implemented” means the agency promulgated the rules according to the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.) (APA), which outlines procedures for agency operation. The most common rulemaking is notice and comment, in which the agency issues a notice of proposed rulemaking in the Federal Register, receives comments from the public, and issues a final rule that takes into consideration the public’s comments. The less common form of rulemaking is known as formal rulemaking, and requires a trial-like procedure with hearings, testimony, and decisions on the record. Whether developed in a notice and comment or formal rulemaking, all rules are published in the Code of Federal Regulations (CFR).

Agencies also use guidance documents to establish policies that help the agency interpret and apply its own rules. These documents are also often called policy guides, technical information bulletins, or interpretive manuals. If not established through notice and comment or formal rule making, policies set forth in guidance documents are not binding upon the agency. Nonetheless, they help to guide and inform much of agency procedure, and many courts consider them to be persuasive evidence when determining the legitimacy or scope of an agency action.

### *State Rulemaking*

Texas has an administrative procedure act similar to the APA (V.T.C.A , Government Code, 2001.001 et seq.) that imposes a thirty day notice and comment rulemaking procedure. The Act requires the Secretary of State to compile all rules in the Texas Register and makes agency’s rules available online.

As noted above, federal laws often overlap with Texan laws on the same subject. For instance, although Congress has authority to regulate all foods that affect interstate commerce, the Food, Drug and Cosmetic act gives the Food and Drug Administration (FDA) authority only over foods shipped in interstate commerce (21 U.S.C. § 331). Texas regulates all food, including that produced and sold entirely within the state, under its own Food, Drug, and Cosmetic Act (TX FDCA) (V.T.C.A., Health and Safety Code, 431.001 et seq.). Often, Texas incorporates federal standards as Texas law.

One exception to the jurisdictional division based on inter- vs. intra-state food sales pertains to product labeling. Congress has exercised its power over all foods affecting interstate commerce by giving FDA the exclusive authority to regulate labeling of packaged foods (21 U.S.C. § 343-1).

### III. THE FOOD AND DRUG ADMINISTRATION'S FOOD CODE

Every four years, the FDA publishes a model regulation for state and local officials to use in regulating retail food sales and food service establishments. The Code's purpose is to protect public health by providing regulators with a scientifically-sound legal basis for regulating the food industry. States do not have to adopt the Food Code, but a significant number of states incorporate the Code nearly word-for-word into their regulations. Although there are some points where Texas differs from the current food code, Texas has in large part adopted the Food Code, though it does differ from the federal model language on a few points. First, FDA publishes many guidance manuals and standards for interpreting and applying the Food Code, as well as the scientific rationale for the rules the code proposes. Therefore, if a Texas inspector requires a particular material or process for production, the mandate likely has roots in the FDA's standards. Looking to the FDA's model rule may help the producer understand the purpose of the requirement or work with the inspector to reach an alternative solution that meets the food safety standards inspectors strive for.

The second impact of the Food Code's near-universal adoption is that it may make it easier for some producers to engage in interstate sales. All of Texas' neighbors have adopted some version of the Food Code, and because the Food Code standardizes the rules, complying with Texas' rules brings a producer very close to satisfying both federal and neighboring states' food safety rules. To be sure, some additional steps (or inspection certificates) may be necessary in order to sell products across state lines, but most producers who are in compliance with Texas' requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

### IV. TEXAS STATE DEPARTMENT OF HEALTH

Numerous agencies regulate agricultural production and marketing, which the individual chapters of this guide cover in more detail. However, the Texas (State) Department of Health (TSDH) has general rules that apply to all food sales, which the authors address below.

The TX FDCA prohibits the sale of adulterated food (V.T.C.A., Health and Safety Code, 431.021). Generally, adulterated means the product bears or contains any poisonous or deleterious substance which may render it injurious to health, or contains any added poisonous or added deleterious substance, other than one that is a pesticide chemical in or on a raw agricultural commodity, a food additive, a color additive, or a new animal drug (V.T.C.A., Health and Safety Code, 431.081). The TSDH regulations require all food sold at retail or at food service establishments to be from sources that comply with the food safety and labeling laws (25 T.A.C. 229.164). This means everything sold in Texas, other than raw, unprocessed commodities, must come from an inspected and licensed facility.

In addition to oversight of the content and labeling of food, the TSDH regulates construction and sanitation of food production and processing facilities (25 T.A.C. 229.64). TSDH inspectors certify facility compliance subject to general regulations concerning the construction, equipment, and processes for producing food. These regulations mandate surface sanitization, vermin control, adequate clean water, sewage disposal, sanitary facilities for employees, and adequate sanitation principles and processes. These regulations are necessarily vague because they apply to a variety of production facilities, which inspectors interpret according to the applicability for the particular operation.

Processors also must comply with specific requirements for processing different types of foods, which TSDH bases on the unique risks inherent to each food. Many times, decisions on adequacy are made by local regulators or individual inspectors. However, TSDH communicates guidance to its inspectors through uniform, ongoing training. TSDH relies on many of the training, guidance manuals, and technical documents that the FDA publishes to accompany the FDA Food Code. Although guidance manuals facilitate consistent interpretation and application of the regulations, they are not binding and individual inspectors' interpretation of their applicability to a unique set of facts may differ. However, in no case may a TSDH inspector allow a facility to fall *below* the general standards established in the regulations.

Although TSDH is the primary agency regulating direct to consumer sales of food in Texas, additional agencies have significant regulatory authority over the food supply chain. The following chart summarizes the agency activities.

## AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

Activity	Federal	State
<b>Environmental Permits</b>	Environmental Protection Agency	<ul style="list-style-type: none"> <li>- Texas Commission on Environmental Quality</li> <li>- Texas Natural Resource Conservation Commission</li> <li>- Local and County zoning boards</li> </ul>
<b>Employees &amp; Taxes</b>	<ul style="list-style-type: none"> <li>- Internal Revenue Service</li> <li>- Occupational Safety and Health Administration</li> </ul>	<ul style="list-style-type: none"> <li>- Texas Department of Insurance</li> <li>- Texas Workforce Commission</li> <li>- Texas Department of Revenue</li> </ul>
<b>Animal Welfare</b>	USDA Animal and Plant Health Inspection Service	Texas Animal Health Commission
<b>Meat, Poultry and Eggs</b>	USDA Food Safety Inspection Service, for products shipped across state lines	Texas State Department of Health agents conduct Federal inspections
<b>Food other than Meat, Poultry and Eggs</b>	Food and Drug Administration, for products shipped across state lines and for labeling of <i>all</i> packaged foods	Texas Department of State Health Services & the Texas Department of Agriculture.
<b>Organics</b>	USDA Agricultural Marketing Service	n/a

SECTION 1: FARMING OPERATIONS



## CHAPTER 1: STRUCTURING THE BUSINESS

### I. PLANNING THE DIRECT FARM BUSINESS

There are many types of direct farm businesses, including:

- Farmer's market
- Roadside stand
- U-pick
- Agri-tourism
- Community Supported Agriculture (CSAs)
- Delivery service to homes, restaurants, schools, or other institution
- Mail order/Internet site

A direct farm business may consist of one of these options, or a combination. For example, a farmer might sell products at the farmer's market on Saturday and to a CSA during the week. Or a farmer could run a U-pick pumpkin farm, a concession stand that sells foods made from

pumpkins, and offer bed and breakfast facilities to guests.

But in any case, *the type of direct farm business selected triggers different legal considerations*. These considerations are covered within the different chapter topics throughout this Guide.

But in any case, *the type of direct farm business selected triggers different legal considerations*. This guide seeks to give direct farm business owners a solid understanding of the legal consequences of these different business models. There are many other considerations necessary to a successful business, including business planning, marketability of produce, and access to markets. Although discussion of

these topics generally is beyond the scope of this guide, the following are some resources that a producer may wish to read in order to develop or improve upon a business plan:



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### **Online Business Planning Resources**

**Business Planning Assistance** is available from the Texas Small Business and Technology Development Center (SBDCTexas), a project of the U.S. Small Business Administration. Their website, which contains guides and on-line training tools, is <http://www.sbdctexas.org/>. The program has over sixty offices throughout the state, which can provide individual consulting services such as reviewing business plans for starting or expanding businesses.

**The Guide to Direct Farm Marketing**, published by The National Sustainable Agriculture Information Center (NSAIC), through the Appropriate Technology Transfer for Rural Areas (ATTRA) program, details several direct farm business alternatives, including case studies, and provides resources for further reference. The guide is available at <http://attra.ncat.org/attra-pub/PDF/directmkt.pdf>. NSAIC publishes a wealth of other resources that can guide you in marketing, business planning, and risk management, available through their website at <http://attra.ncat.org/marketing.html>.

A potentially useful resource is the **Marketmaker™ website**, <http://national.marketmaker.uiuc.edu/>, which examines and establishes agricultural supply chain partners and helps direct farm marketers by improving knowledge of where food consumers are located and how they make food-related purchasing decisions. The Texas site is available at <http://tx.marketmaker.uiuc.edu/> and provides searchable and map-able demographic, consumption, and census data that a producer can use to identify potential markets. Producers can list themselves for free on Marketmaker, and become part of a searchable database that individual consumers, retailers, and restaurants use to find suppliers.

**How to Direct Market Farm Products on the Internet** is a 50-page guide published by the Agricultural Marketing Branch of the USDA in 2002. Although somewhat dated, the guide contains useful information on reasons to consider internet marketing, how to develop a marketing plan, how to research the market, and how to set up and market a website. The appendix contains examples of actual direct farm marketers on the internet. The guide is available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222>.

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### *Assumed Name Registration*

Direct farm business owners often adopt an "assumed name" for their business (e.g., Sunnyside Farm) when they do not wish to conduct the business in their real names (e.g., Jane and John Doe Farm). All assumed names need to be registered, but the type of business entity chosen will determine how the registration paperwork is filed. As noted above, corporations, LLCs and LLPs must register their fictitious names with the secretary of state. Otherwise, the Texas Assumed Business or Professional Name Act applies (V.T.C.A., Business and Commerce Code, 71.001 et seq.). The Act requires everyone else using an assumed name to register a certificate with county clerk of the counties in which the person does or intends to do business. Failure to comply can result in a class A misdemeanor.

## **II. CHOOSING A BUSINESS ENTITY**

One of the first steps in establishing any business is deciding the business type – that is, the formal legal structure under which the business will operate. Typical farm business entities include the sole proprietorship, partnership or limited partnership, corporation (for-profit or nonprofit), S-Corporation, limited liability company (LLC), and cooperative.

Although this section touches on the tax implications of business form choice, the subject is discussed in more detail in the “Taxation” chapter of this Guide. Because the law treats certain forms of businesses differently than others, *the following generalized information should not be considered a substitute for consulting with a qualified attorney and/or accountant prior to choosing a business form.* Consulting with a professional is important because the entity selected affects potential tax and legal liabilities, as well as business succession and estate planning. In addition, each form varies as to setup cost and complexity.

For those interested in learning more detail about entity choices for the farm business, the National Agricultural Law Center’s *An Overview of Organizational and Ownership Options Available to Agricultural Enterprises*<sup>5</sup> is helpful in understanding the legal and tax implications of the various business entities.

Finally, many business entities must file registration paperwork with the Texas Secretary of State. The forms necessary for forming entities and schedules of fees are available through the Secretary of State’s website, [www.sos.state.tx.us](http://www.sos.state.tx.us). In many cases, the Secretary of State provides for online registration and payment of fees.

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<sup>5</sup> The article is divided into two sections. Part I, covering general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships is available at [http://www.nationalaglawcenter.org/assets/articles/goforth\\_ownership1.pdf](http://www.nationalaglawcenter.org/assets/articles/goforth_ownership1.pdf). Part II covers limited liability companies, corporations, and cooperatives and is available at [http://www.nationalaglawcenter.org/assets/articles/goforth\\_ownership2.pdf](http://www.nationalaglawcenter.org/assets/articles/goforth_ownership2.pdf).

*Sole Proprietorship*

The sole proprietorship is a business owned and operated by one individual.<sup>6</sup> The entity forms automatically when an individual begins operating his or her own business. Due to the automatic formation and ease of administration, the majority of farms are owned as sole proprietorships.

Under a sole proprietorship, the law treats the owner and the business as one and the same. This makes the owner personally responsible for the business' *legal* and *tax* liabilities. Therefore, a creditor of the business can force the owner to sell personal assets in order to pay off the business' debts; on the other hand, assets from the business may be used to satisfy personal debts - an action normally prohibited in most forms of business entities. Additionally, the individual owner is taxed personally on the profits generated by the sole proprietorship – this makes filing taxes somewhat easier because no separate tax filing is necessary.

Though sole proprietorships can form automatically, sole proprietorships that operate under an assumed name (e.g., John Doe operates a direct farm business using the name "Green Acres" instead of "John Doe's Farm"), must file a certificate with the clerk of the county(ies) in which the business operates. A list of clerks by area is available on the Secretary of State's website.<sup>7</sup>

**A. Corporations**

The Texas Business Corporation Act and the Texas Professional Corporations Act govern the formation and operation of corporations in Texas. A corporation is formed by filing certificates of formation with the Texas Secretary of State. (V.T.C.A., Business Organizations Code, 4.152). The certificates of formation dictate the management of the corporation's affairs and outline the issuance of shares to shareholders. A board of directors manages the business, while the shareholders own (and thus finance) the business. The Texas Secretary of State's website provides a very simple "fill in the blank" sheet to register with the Department.<sup>8</sup>

The corporate form is advantageous in some respects because it is a separate legal entity from its owners, such that the owners are not personally liable for the corporation's liabilities and debts. On the other hand, incorporation is time-consuming and expensive due to the paperwork and filings required by the statute. Further, there are many statutory and administrative formalities that *must* be followed when operating the corporation. Owners that fail to follow these formalities may lose personal liability protection. Finally, corporations are subject to "double taxation" whereby the government taxes the corporation on its profits and the owners/shareholders pay individual income tax on profits distributed as dividends.

<sup>6</sup> In a very limited exception, spouses may co-own a sole proprietorship. This can impact filing and paying taxes, but otherwise makes little difference.

<sup>7</sup> <http://www.sos.state.tx.us/elections/voter/cclerks.shtml>

<sup>8</sup> [http://www.sos.state.tx.us/corp/forms/201\\_boc.pdf](http://www.sos.state.tx.us/corp/forms/201_boc.pdf)

The Internal Revenue Service Code classifies corporations as either "Subchapter C-Corporations" or "Subchapter S-Corporations." The IRS considers all corporations C-Corporations unless shareholders elect S-Corporation status. Electing Subchapter-S status with the IRS, if certain requirements are met, may avoid this double taxation problem.

### *S-Corporations*

S-corporations elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation. A corporation elects S-Corporation status with the IRS by filing Form 2553.<sup>9</sup> Only after the IRS accepts the registration may the corporation file its Federal taxes as an S-Corporation. Although avoiding double taxation is appealing, an S-Corporation can be difficult to establish due to many restrictions. Texas' law authorizing S-corporations at the state level uses the standards from the federal code, which limits the number of shareholders to 100. All shareholders must agree to the S-Corporation status. All shareholders must be U.S. citizens or resident aliens and only individuals, estates, certain exempt organizations, and certain trusts can be shareholders. The S-Corporation must be a U.S. company. Finally, an S-Corporation may only have one class of stock with limitations on the type of income received. S corporations in Texas form like a regular corporation. The company has to file a certificate of formation with the Texas secretary of state, which is accompanied by a \$300 fee. In addition, a Texas S corporation has to file Form 2553 with the I.R.S. within two months and 15 days of filing the company's certificate of formation.

The primary advantages of an S-corporation include the personal liability shield and the absence of double taxation. Primary drawbacks include the difficulty and expense of incorporation, the need to maintain statutorily mandated formalities, and the registration restrictions.

### ***B. Partnerships***

A *partnership* (also known as a *general partnership*) is an association of two or more persons who combine their labor, skill and/or property to carry on as co-owners of a business for profit. The Texas Uniform Partnership Act ("UPA") and Title 4 of the Texas Business Organizations Code govern the formation of partnerships in Texas (V.T.C.A., Business Organizations 151.001 et seq.). There are no formal requirements for formation of a partnership, and one is formed by default if more than one person is carrying on a business. The entity itself is not taxed, but instead tax liability passes through to the partners in pro rata shares. Partnerships, like corporations, exist in several different forms (discussed below).

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<sup>9</sup> Available at <http://www.irs.gov/pub/irs-pdf/f2553.pdf>. Instructions available at <http://www.irs.gov/pub/irs-pdf/i2553.pdf>.

The primary disadvantage to a partnership form is that each partner is an agent of the partnership and can bind the partnership. Moreover, all partners are *personally* liable jointly and severally for the debts and obligations of the partnership. This means that if the partnership lacks the assets to pay the debts, creditors may force the partners to pay the partnership's debts out of their personal assets. If one partner has no personal property, creditors can force the other partners to personally pay the full debts of the partnership, even if they were not personally responsible for the debt. If this happens, the partner who paid can sue the other partner to recover their fair share; however, this is not a desirable situation for the partnership. Another disadvantage is that if one partner dies or leaves, the partnership may dissolve. Partnership shares, therefore, are not freely transferable and create special concerns for both business succession and estate planning. Despite these limitations, partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status. From a liability perspective, however, other forms of partnership may be more desirable.

### ***Limited Partnerships***

Limited partnerships (LP) addresses the problem of exposure of the partners to unlimited personal liability by separating the partnership into two classes-- general partners, who remains personally liable for the partnership's obligations, and limited partners, who possess the same personal liability protection as the shareholders of a corporation. Although the limited partners are shielded from personal liability, the *partnership* remains liable for the actions of the general partner's wrongful act or omission, or other actionable conduct.

Title 4, Chapters 151 and 152 govern the formation of limited partnerships in Texas (V.T.C.A., Business Organizations Code, 151.001 et seq.). Among the requirements for formation and operation of an LP are filing a certificate and annual reports with the Secretary of State.

One of the benefits of an LP over a corporation is that partners may deduct their partnership losses for taxation purposes up to the extent of their investment, which is not available to corporation shareholders. Also, limited partnership interests in personal property are freely transferable.

### ***Limited Liability Limited Partnerships***

A limited liability limited partnership (LLLP) is another business entity authorized under Title 4 of the Texas Business Organizations Code. (V.T.C.A., Business Organizations Code, 153.351 et seq.). Unlike in the LP, in the LLLP, the general partner is not personally liable for obligations of the partnership solely because of their status as a general partner. The liabilities of the LLLP are the partnership's alone – similar to a corporation.

The LLLP must file the same certificate with the Secretary of State as an LP, but must elect LLLP status on the form. Every partner must sign the certificate of limited partnership that creates the limited liability limited partnership.

### *Limited Liability Partnership (LLP)*

Title 4, Subchapter J governs the formation and liabilities of a limited liability partnership. (V.T.C.A., Business Organizations Code, 152.801 et seq.). General partners in an LLP are shielded from *personal* liability for the debts and obligations of the partnership, regardless as to how the debt or obligation is created (V.T.C.A., Business Organizations Code, 152.801(a)). The *partnership* remains jointly and severally liable, however, for a partner's wrongful act or omission, or other actionable conduct, if the partner is acting in the ordinary course of business of the partnership or with authority of the partnership. This liability shield for partners is one important benefit of the LLP over the general partnership form.

To form a LLP, partners first must create a general partnership. Once formed as a partnership, one or more of the partners must file an application with the Secretary of State, which includes the name of the partnership, the federal taxpayer identification number of the partnership, the street address of the partnership's general office, the number of partners at the date of application, and a brief statement of the partnership's business. (V.T.C.A, Business Organizations Code, 152.802(a)). The name of the limited liability partnership must contain the phrase "limited liability partnership" or "LLP." (V.T.C.A., Business Organizations Code, 5.063). Instructions of applications as a limited liability partnership, utilizing Form 701, are available on the Secretary of State's website.<sup>10</sup>

### *Limited Liability Company (LLC)*

Title 3 of the Texas Business Organizations Code governs the establishment and operation of LLCs in Texas (V.T.C.A., Business Organizations Code, 3.101 et seq.). Owners form an LLC by executing and delivering Certificates of Formation to the Secretary of State. Like LLP, LLCs that intend to use fictitious or assumed names must notify and receive approval from the Secretary of State before commencing business under the fictitious name (V.T.C.A., Business and Commerce Code, 71.001 et seq).

An LLC is advantageous because the form enjoys the benefits of both the LP and a corporation. Members of an LLC have limited liability against claims and debts of the LLC and the favorable pass-through tax treatment of an LP. Yet they have more management flexibility because they can elect to manage the corporation themselves or designate managers through the articles of organization.

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<sup>10</sup> <https://direct.sos.state.tx.us/help/help-corp-filing-701.html>

LLCs, LLLPs, and LLPs are all very similar in that they provide liability shields for all the owners and managers, beneficial tax status, and flexible management options. The primary difference is how they are created, but depending on the specifics of the direct farm business

one model may offer greater benefits than the others. Hence, it is important to speak with an attorney or a tax specialist when deciding to form a business.

#### **EXAMPLES OF WHY A COOPERATIVE MIGHT FORM**

*A number of farmers seeking to establish Community Supported Agriculture (CSA) might wish to come together as a cooperative because their pooled money would allow them better marketing, access to capital, or increased diversity of their product offering. If they wanted to also sell at a farmers market, cooperative members could take turns attending the stall so that each individual can devote less time to marketing.*

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*Sheep farmers could form a cooperative in order to finance purchasing the processing equipment necessary to convert raw wool into yarns and market them to consumers.*

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*Apple farmers might form a cooperative to purchase equipment to process apples into a value added product, such as dried apples, juice, and cider. When there is a bumper crop, they could weather market variations better by converting their excess produce into a product for release onto the market at a later time, once prices have improved.*

#### **C. Cooperatives**

A cooperative is a user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage. Common reasons for forming agricultural cooperatives include improved marketing or access to markets and increased efficiency in delivering to markets.

In Texas, Chapter 52 within the Texas Agriculture Code governs the formation and operation of an agricultural cooperative (V.T.C.A., Agriculture Code, 52.001 et seq.). The Act requires an agricultural cooperative to be an association of people engaged in the production of agricultural products. The association may engage in cooperative activity in connection with a broad array of activities, including, but not limited to, financing and purchasing land or equipment, managing risk of livestock or equipment loss, marketing or producing goods, and providing health care services.

Cooperatives can be complex to establish and operate because they require coordinating numerous individuals. Moreover, there are several legal documents necessary to running an effective cooperative, including: an organization agreement securing financial commitments and patronage; articles of incorporation to be filed with the Secretary of State; bylaws governing the management of the cooperative; marketing agreements between the cooperative and its members; and membership applications. The details of operating a cooperative are beyond the scope of this guide, but there are several online

publications available on the legal aspects of cooperatives, as well as general information on starting a cooperative:

- USDA/Rural Business Cooperative Service, *Cooperative Information Report*,<sup>11</sup> September 1996, contains information on how to start a cooperative.
- *The Farmer's Legal Guide to Producer Marketing Associations*<sup>12</sup> by Doug O'Neil, D. Hamilton, and Robert Luedeman.
- USDA, *Cooperative Marketing Agreements: Legal Aspects*,<sup>13</sup> July 1992.
- USDA/Rural Business Cooperative Service, *Cooperative Information Report 40*,<sup>14</sup> 1990, provides sample legal documents for cooperatives.

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<sup>11</sup> Available at <http://www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm>

<sup>12</sup> Available at [http://www.nationalaglawcenter.org/assets/articles/obrien\\_producemarketing\\_book.pdf](http://www.nationalaglawcenter.org/assets/articles/obrien_producemarketing_book.pdf)

<sup>13</sup> Available at <http://www.rurdev.usda.gov/rbs/pub/rr106.pdf>

<sup>14</sup> Available at <http://www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2>

### III. CHECKLIST

Have you...?

- Conducted a feasibility study and developed a marketing plan?
- Consulted with an attorney or accountant regarding business entities?
  - Will you be comfortable with the liability protection that the entity offers?
  - Will your choice of business entity require any registration or ongoing paperwork?

## CHAPTER 2 - SETTING UP THE DIRECT FARM BUSINESS:

After finalizing a business plan and selecting a business entity through which to operate the direct farm business, the next steps are to:

- finalize a *site* for the direct farm business
- obtain all necessary *permits, licenses and registrations* required by the State of Texas and local governments
- adequately *insure* the operation

### I. SITING

County zoning laws, environmental regulations, and potential nuisance claims are justified considerations in choosing where to site a farm and may affect what activities are allowable on the land.

#### *A. Municipal and County Zoning*

Texas law authorizes municipal governments to develop city plans with the general “purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.” (V.T.C.A., Local Government Code, 211.001 *et seq.*). Local zoning laws may restrict some agricultural uses and buildings locations, therefore owners should check their land’s zoning uses. Furthermore, Texas law authorizes counties similar powers in zoning, but have specific zoning regulations for many tourist destinations (e.g. South Padre). (V.T.C.A., Local Government Code, 231.001 *et seq.*).

An additional zoning/siting concern arises when farmland intersects urban areas--a common situation for many direct farm operations due to the proximity to potential customers. As towns or other urban areas expand, counties or cities may change the land’s zoning classifications. For example, towns may annex farmland previously under county jurisdiction and subject the property to municipal zoning. Other land use changes may result when the county itself rezones land due to development pressures. In either situation, governments could rezone productive farmland from "agricultural" to "residential" or "commercial," etc. The existing farm operation would be grandfathered as a non-conforming use, which would allow the continuation of the farming operation, but prohibit other farm-related businesses such as farm stands or U-pick operations.

In sum, during the planning stage of the direct farm business, a careful review of local zoning ordinances is essential. These are available by contacting the county clerk or local library for a

copy of the applicable ordinances. Owners may also wish to consult with a local lawyer who is knowledgeable about property law.

### *B. Impacts on Neighboring Land*

Farming operations, whether through generation of odors, particulates or even noise, can in some circumstances have a significant impact upon land surrounding the farm. Consequently, direct farm business owners should be aware of two legal issues concerning a farm's impacts on neighboring land when choosing a farm site and planning production and processing activities: Nuisance laws, and rules pertaining to livestock facilities, and nuisance law.

#### *Nuisance Law*

A nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort and annoyance to persons of ordinary sensibilities. (*Schneider Nat'l Carriers, Inc. v. Bates.*, 147 S.W.3d 269 (Tex. 2004)). A nuisance may be a strong smell, loud noise, unsightly object, or some other condition causing substantial discomfort. Direct farm businesses must be aware of conditions they create that rise to the level of actionable nuisance, particularly those businesses in close proximity to land used for non-agricultural purposes. Courts have found livestock facilities a "nuisance" due to the presence of strong odors, flies, contaminated water and dust and litter (see, e.g., *Lacy Feed Co. v. Parrish*, 517 S.W.2d 845 (1974))(drainage of contaminated water onto plaintiff's land, along with foul odors and dust in the air constituted a nuisance).

If a nuisance action is successful, the court determine damages owed to the plaintiff, or may issue a temporary or permanent injunction, including an order shutting down the offending operation. The courts will issue an injunction only if the injury to the nearby property and residents is certain, and monetary damages are not sufficient for relief (*Rogers v. Daniel Oil and Realty Co.*, 130 Tex. 386 (1937)). However, if the nuisance is of a "recurring nature" the injunction "will lie irrespective of legal remedy at all." (*Lamb v. Kinslow*, 256 S.W.2d 903, 905 (Tex.Civ.App. -Waco 1953)). In some cases, the court may wish to move the nuisance (for example livestock pens and grazing areas), rather than enjoin, or stop the operation all together. Hence, nuisance law can impact the location of activities on a farm as much as it can impact whether an activity is allowed at all. In the alternative, a court may allow the nuisance to continue, but require the offending party to compensate the complaining party, "if a nuisance occurs several times in the years leading up to a trial, and is likely to continue, jurors will generally have enough evidence of frequency and duration to reasonably evaluate its impact on neighboring property values." (*Schneider Nat'l Carriers, Inc. v. Bates.*, 147 S.W.3d 269, 280 (Tex. 2004)).

Texas law voids any municipal or county ordinance that has the effect of making an agricultural operation a nuisance (V.T.C.A., Agriculture Code, 251.004). The law defines an agricultural operations as including cultivating the soil, producing crops for human or animal food, or planting seed, floriculture, viticulture, horticulture, silviculture, wildlife management, raising or keeping livestock or poultry, and planting cover crops. (V.T.C.A., Agriculture Code, 251.002).

The above law only applies to ordinances, and the courts can still find an agricultural operation to be a nuisance. Nonetheless, Texas law may protect some farmers from nuisance actions. Any farm that has been operating for more than one year, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation (V.T.C.A., Agriculture Code, 251.004). The law does not protect farmers from liability when they act negligently or operate the farm improperly. The law also protects expansion of a farm's agricultural activity, implementation of new technology, and changes in types of product produced. The law provides an additional protection from litigation in the form of a fee-shifting provision: That is, if the farmer is named in a nuisance suit and successfully defends against it, the court may require the losing party to pay reasonable expert fees, reasonable court costs, and reasonable attorney's fees.

Courts in other states with similar statutes have sometimes found the laws unconstitutional because the government requires neighboring property owners to bear a burden -- the nuisance -- without compensating them for it. The best defense for direct farm businesses is to operate in a reasonable, non-negligent manner and minimize potential interference with neighboring property.

### *Containing Animals*

In addition to avoiding activities that could be nuisances, it is important to adequately contain any animals. The applicable set of laws were mostly passed in the late 19<sup>th</sup> century and are therefore somewhat outdated, considering that most modern farming methods effectively confine and separate animals. However, farmers should be aware of these laws, because the penalties for loose and unconfined animals can be harsh.

Texas law authorizes counties to pass provisions prohibiting livestock from running at large (V.T.C.A., Agriculture Code, 143.021/143.071). Farmers who operate in counties that have passed such ordinances will be liable for any damages to crops the animals cause, as well as the cost of care and upkeep the animals incur if a neighbor catches and cares for the loose animal. A person has committed an offense if they knowingly allows one of his/her animal's on the property of another, fails or refuses to keep up an animal that is prohibited from running at large, etc, which qualifies as a Class C misdemeanor. (V.T.C.A., Agriculture Code, 143.034). There also exist laws which prohibit livestock from straying onto public highways. (V.T.C.A., Agriculture Code, 143.101 et seq.). With this in mind the law provides immunity from liability

for a person who strikes and injures or kills an unattended animal straying on the highway, unless the driver of the vehicle was grossly negligent or had a willful intent to harm the animal. (V.T.C.A., Agriculture Code, 143.103). This is also a Class C misdemeanor and will become an additional misdemeanor for each day the livestock is roaming at large on or around the highways. (V.T.C.A., Agriculture Code, 143.108). Therefore, livestock owners should be vigilant and build adequate fences in order to protect others' property as well as preserve public safety to both drivers as well as their own animals.

## II. REGISTRATION AND PERMITS

### A. FDA Food Facility Registration

The Federal Food, Drug and Cosmetic Act (FDCA) requires all facilities that hold, pack, manufacture or produce food (but not meat, poultry, or egg products) for animal or human consumption in the U.S. to register with the U.S. Food and Drug Administration (FDA) prior to beginning manufacturing/processing, packing, or holding food (21 U.S.C. § 350d). Facilities that fail to register face civil fines and/or criminal prosecution. Farms, retail facilities, restaurants, nonprofit food facilities, fishing vessels, and operations regulated exclusively by USDA throughout the entire facility (e.g., meat, poultry, and egg products) are **exempt** from the registration requirement. Therefore, many types of direct farm businesses are exempt from registration requirements (21 C.F.R. §1.226).<sup>15</sup> Whether a direct farm business qualifies for an exception to the registration requirement depends on the definitions set forth in FDA regulations:

- **Farm** (21 C.F.R. § 1.227(b)(3)): a facility in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both. Washing, trimming of outer leaves of, and cooling produce are considered part of harvesting. The term "farm" includes:
  - o Facilities that pack or hold food, provided that all food used in such activities is grown, raised, or consumed on that farm or another farm under the same ownership; and,
  - o Facilities that manufacture or process food, provided that all food used in such activities is consumed on that farm or another farm under the same ownership.
- **Restaurant** (21 C.F.R. § 1.227(b)(10)): a facility that prepares and sells food directly to consumers for immediate consumption.

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<sup>15</sup> FDA has published a helpful 16-page guide on facility registration titled *What You Need to Know About Registration of Food Facilities*, available at <http://www.directfarmbusiness.org/storage/fsbtreg.pdf>. The Guide explains who must register (including exemptions), and how to register.

- “Restaurant” **does not** include facilities that provide food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers.
  - Entities in which food is provided to humans, such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens are restaurants; and,
  - Pet shelters, kennels, and veterinary facilities in which food is provided to animals are restaurants.
- **Retail Food Establishment** (21 C.F.R. § 1.227(b)(11)): an establishment that sells food products directly to consumers as its primary function. *A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers* (emphasis added). A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term “consumers” does not include businesses. A “retail food establishment” includes grocery stores, convenience stores, and vending machine locations.

Many questions arise about whether a facility qualifies for an exemption under these definitions. FDA considers some facilities “mixed-type” that require registration. For example, a maple syrup operation that harvests maple sap and then heats the maple sap into syrup for sale *to a distributor or grocery store* is an example of mixed-type facility that requires registration, because even though taking sap from a tree is harvesting, heating sap into syrup is considered processing. Processing the sap for consumption off the farm removes the facility from the farm exception, and the facility would not qualify for the retail food establishment exception because the final product is not sold directly to consumers. On the other hand, if the farmer sold the sap at a road side stand, then it would qualify for the retail food establishment exception because the farmer would be selling directly to consumers.

The FDA has published a **guidance document**<sup>16</sup> that contains a long list of questions and answers regarding whether an exception to registration applies. There are also flowcharts at the end of this section that may assist in determining whether a facility is exempt from registration.

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<sup>16</sup> Available online at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm082703.htm#fn1>

Businesses that are uncertain whether they must register should contact an attorney or the FDA help line at 1-800-216-7331.

FDA maintains a **webpage**<sup>17</sup> that contains step-by-step instructions and tutorials for registering online or by mail. Facilities must only register once. However, if information about the facility changes, the facility must update the registration within 60 days of the change. If a facility relocates, it must cancel the existing registration and submit a new registration. If the facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

The Food Safety Modernization Act, 21 U.S.C. Chapter 27, may also have a significant impact on the direct marketing of food; however at the time of this publication the regulations for implementing this legislation have not been published.

### ***B. Federal and State Environmental Regulations***

Another set of permitting issues a farmer might encounter are environmental permits and regulations. Environmental permitting is very complex and individualized because multiple agencies may have regulatory authority depending on the surrounding environment and potential pollutants involved. This section gives a brief overview of some of the most common issues, however, it is not comprehensive. The National Association of State Departments of Agriculture (NASDA), in conjunction with the National Center for Agricultural Law Research and Information, has published a more comprehensive *Guide to State Environmental Laws Affecting Texas Agriculture*, available online.<sup>18</sup> Federal environmental programs also may apply to agricultural operations, such as the Endangered Species Act and the Safe Drinking Water Act. For brief summaries of EPA's programs, visit the **EPA's website**.<sup>19</sup> NASDA publishes another companion *Guide to Federal Environmental Laws Affecting Agriculture*, which is available **online**.<sup>20</sup>

### *Waste Management*

There are multiple laws and rules pertaining to animal waste management in Texas, including, but not limited to the Federal Clean Water Act (CWA) (33 U.S.C. § 1541, *et seq.*) and the Texas Solid Waste Disposal Act (TSWDA). (V.T.C.A., Health and Safety Code, Chapter 361).

The CWA (33 U.S.C. § 1541, *et seq.*) requires facilities that house exceptionally large numbers of animals to obtain permits under the National Pollutant Discharge Elimination System (NPDES). The Texas Commission of Environmental Quality (TCEQ) issues NPDES permits in Texas

<sup>17</sup> <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm>

<sup>18</sup> <http://www.nasda.org/nasda/nasda/Foundation/state/Texas.pdf>

<sup>19</sup> <http://www.epa.gov/agriculture/agmatrix.pdf>

<sup>20</sup> <http://www.nasda.org/nasda/nasda/foundation/state/Federal.pdf>

through an agreement with the federal EPA. NPDES permits protect water quality by requiring facilities that release pollution into surface waters to treat their water discharges. TCEQ sets pollutant limits for NPDES permits based on the facility's operation and the impairment of the water body that the facility's water runs to. On November 20, 2008, the EPA published a final rule (73 FR 70418) that revised the NPDES permitting requirements and the Effluent Limitation Guidelines and Standards for CAFOS in response to the order issued by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The 2008 CAFO rule included a number of changes, including a requirement that CAFO owners or operators that discharge or propose to discharge must apply for an NPDES permit. The 2008 CAFO rule also created a voluntary option for unpermitted CAFO owners and operators to certify to the permitting authority that the CAFO does not discharge or does not propose to discharge. Furthermore, on March 15, 2011, the U.S. Court of Appeals for the 5<sup>th</sup> Circuit issued an opinion, that among other things, vacated those portions of the 2008 CAFO rule requiring CAFOs that propose to discharge to apply for an NPDES permit. *National Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5<sup>th</sup> Cir. 2011). The "propose to discharge" requirement has now been removed from the regulations. CAFOs must obtain a permit if there is a man-made ditch or pipe carrying runoff to a surface water or if the animals have direct contact with surface waters (33 U.S.C. § 1342; 40 C.F.R. §§ 122.23, 122.24). The regulations treat multiple facilities as a single feeding operation for purposes of determining the number of animals if they are owned by a common owner, adjacent to each other, and use a common area or system for disposal of wastes. Regardless of whether a farm uses liquid or dry land waste management systems, it must obtain an NPDES permit by contacting the TCEQ Water Office, or on their website.<sup>21</sup>

As of the writing of this guide, there was a petition pending before the EPA to also regulate CAFOs air emission under the Clean Air Act. Updates on the status of that petition may be available through the **EPA's website**.<sup>22</sup>

The Texas Commission on Environmental Quality (TCEQ) regulations (30 T.A.C. 321) require Concentrated Animal Feeding Operations (CAFOs) to be operated in a manner, which prevents the creation of a nuisance or air pollution. The regulations require CAFOs to develop and implement pollution control plans, for air, surface, and groundwater pollution. The regulations define CAFOs in three categories, depending on the size. Large CAFOs are operations, longer than forty-five (45) days, with either 1,000 cattle, 1,000 veal calves, 700 mature dairy cattle, 2,500 swine over 55 pounds, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 125,000 chickens, 30,000 laying hens or broilers, or 5,000 ducks. (30 T.A.C. 321.32(13)(A)). The category or size of the animal feeding operation determines the type and level of permits that the TCEQ may require. All farmers interested in becoming involved in a CAFO or beginning their own should

<sup>21</sup> <http://www.tceq.texas.gov/about/organization/water.html>

<sup>22</sup> [www.epa.gov](http://www.epa.gov)

contact the Commission for complete permit requirements or visit their webpage for waste management permits.<sup>23</sup>

The final set of waste management laws pertain to nutrient management when applying animal waste to lands. The Texas Natural Resource Conservation Commission will collect soil samples from permitted waste application fields, which are associated with concentrated animal feeding operations. (V.T.C.A., Water Code, 26.504 (a)). The samples will be tested for phosphorous, in particular, as well as other nutrients designated by the commission, and will occur seldom (not annually). (V.T.C.A., Water Code 26.504 (a,b)). Those operators whose samples find phosphorous in a quantity more than 500 parts per million will be required to submit a nutrient utilization plan, outlining how to lessen the phosphorous levels. (V.T.C.A., Water Code, 26.504 (c)). Texas A&M University's Extension programs provide different programs to assist producers in their nutrient management including the Texas Nutrient Management Certification Program and the Texas Cooperative Extension Soil, Water, and Forage Testing Laboratory, available at their website.<sup>24</sup>

### *Wetlands*

The Clean Water Act also requires landowners to obtain permits from the Army Corp of Engineers (the Corps) to discharge dredge or fill materials into waters of the United States (33 U.S.C. § 1344). This means a farm may need a permit to do construction or bulldozing in wetlands. These permits, known as Section 404 permits, are only an issue for new farms – the law has an exception for normal farming, silviculture and ranching activities that are part of an established, ongoing operation (33 U.S.C. § 1344(f)). Therefore, new farms and farms resuming operations on land that has been unused for so long that modifications to the hydrological regime are necessary to resume operations should determine if they need a permit. The Corps defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas” (33 C.F.R. § 328.3). Farmers who have land that may be considered wetlands should contact the Army Corps of Engineers district office for your county to determine whether a permit is needed. There are three Army Corps districts in Texas, and the Corps maintains an **online map**<sup>25</sup> that is useful in determining which district has jurisdiction.

<sup>23</sup> [http://www.tceq.texas.gov/permitting/waste\\_permits/waste\\_mgmt.html](http://www.tceq.texas.gov/permitting/waste_permits/waste_mgmt.html)

<sup>24</sup> <http://srwgis.tamu.edu/texas/hot-topics-in-texas/nutrient-management/>

<sup>25</sup> <http://www.swl.usace.army.mil/regulatory/images/districtlettersize.pdf>

### *Pesticide Regulation*

*The Federal Insecticide, Fungicide, and Rodenticide Act* (FIFRA) (7 U.S.C. Chapter 6) requires EPA to approve all pesticides sold or distributed in the U.S. Upon approval, the pesticides will be subject to labeling requirements, and applicators must comply with the use and application approvals on the labels. Applicators must meet training and certification standards. The FIFRA is also the law that establishes the worker protection standards discussed in the Labor and Employment Chapter. Texas regulations similarly require registration and regulate the labeling, sale, distribution, and application of pesticides in Texas (4 T.A.C. 7.10 *et. seq.*). Pesticide control is administered by the Department of Agriculture and their website provides multiple resources as to the permitted pesticides in Texas as well as the necessary forms to register the pesticide a farmer may be using.<sup>26</sup>

### *Environmental Incentives Programs*

There are numerous state and federal programs that provide financial and technical assistance to farmers who practice environmentally conscientious agriculture. Providing detailed explanations of how all the programs work is beyond the scope of this guide. The programs generally work by requiring the farmer to enroll their lands or sign a contract for a certain number of years. In exchange for implementing certain practices (or sometimes building structures), the farmer receives annual payments or technical assistance from the various agencies. A farmer's lands will probably need to be approved as eligible for the program (i.e., capable of furthering the program's purpose or priority goals) and will be subject to inspection to ensure ongoing compliance with the program. For more information on the federal programs, see the USDA's Natural Resource Conservation Service's **webpage**<sup>27</sup> or the National Agricultural Law Center's Reading Room on conservation programs.<sup>28</sup>

Another program that direct farm businesses may wish to participate in is the National Organics Program. Under this program, once a farm has been certified as organic, it can place the official USDA Organic label on its products. For more information on Organic certification, see the "Organic Marketing" chapter of this Guide or the Center's Reading Room on the National Organic Program.<sup>29</sup>

### *C. Animal Disease Traceability*

<sup>26</sup><http://www.texasagriculture.gov/RegulatoryPrograms/Pesticides/PesticideProductRegistration/PesticideProductRegistrationForms.aspx>

<sup>27</sup><http://www.nrcs.usda.gov/programs/>

<sup>28</sup><http://www.nationalaglawcenter.org/readingrooms/conservation/>

<sup>29</sup><http://www.nationalaglawcenter.org/readingrooms/organicprogram/>

To protect the health of U.S. livestock and poultry and the economic well-being of those industries, the USDA's Animal and Plant Health Inspection Service (APHIS) developed the National Animal Identification System (NAIS) under the Bush administration to identify and record the movement of livestock, poultry and other farmed animals throughout the United States. In the event of an animal disease outbreak, through NAIS, APHIS aimed to achieve a 48-hour trace back of the movements of any diseased or exposed animal. NAIS consisted of three components: premises registration, animal identification and animal tracing.

The program sought to protect livestock and poultry producers by enabling USDA to identify the location of a disease outbreak and which animals were exposed in order to limit the scope of quarantines and animal destruction while also adequately preventing any further spread. However, it met significant resistance from producers and state departments of agriculture. In February 2010, the USDA announced it would be overhauling the animal disease traceability system to only apply to animals traveling in interstate commerce and to be more flexible and accommodating to states' needs. On August 9, 2011, USDA issued a proposed rule to establish general regulations for improving the traceability of U.S. livestock moving interstate when animal disease events take place. Under the proposed rule, unless specifically exempted, livestock moved interstate would have to be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation, such as owner-shipper statements or brand certificates. For the most up-to-date information on the status of premises registration requirements, visit the **USDA's Animal Disease Traceability website**.<sup>30</sup>

### III. INSURANCE

In order to best determine the insurance needs of a direct farm business, it's a good idea to start with a visit to a qualified insurance agent - preferably one who is familiar with how direct farm businesses operate. Farmers should be prepared to explain their operation in detail, and should request an insurance proposal from the agent that addresses the operation's every risk and potential amount of loss. Businesses may also wish to compare policies from multiple agents. Specific types of insurance products that may be necessary include premises liability (to cover liability for injuries that may occur on the property), workers' compensation, physical damage to business property, product liability, motor vehicle, crop insurance, and some kind of casualty insurance to cover transactions until title passes to the purchaser.

Many of these insurance needs may be incorporated into a basic farm insurance policy. These include losses to the farm dwellings and outbuildings, personal property (including tractors and other equipment), and premises liability arising from some incidental on-farm business operations. Depending upon the scale of the operation and the particular insurance company, roadside farm stands and U-pick enterprises may be covered under incidental business

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<sup>30</sup> <http://www.aphis.usda.gov/traceability/>

operations in the basic farm insurance policy. Agritourism, petting zoos or seasonal farm festival activities generally are not considered incidental farm business operations for insurance purposes and will require specific endorsements. Insurance field agents may review all of the above mentioned operations and require implementation of best management practices to eliminate or reduce potential risks in the operation.

Product liability arising from raw/unprocessed farm-grown products usually falls under basic farm insurance policies. This would include unprocessed items sold at road side stands or farmers markets. Once the product is transformed to a processed good, however, the basic farm policy may not cover injuries arising from consumption of the product. For example, a farm insurance policy may cover milk from a dairy operation, but not an artisanal cheese produced on-farm. A general commercial insurance policy would fill the gap in insurance in this instance. Similarly, an on-farm business with a commercial scale kitchen would not qualify as "incidental" to the farm operation, but rather a commercial undertaking with particular insurance coverage needs.

Due to the variability of insurance coverage and prices depending upon the specific direct farm business, insurance needs and costs should be assessed early-on in the business planning process. Bank financing may require insurance expenses to be incorporated as part of the cost structure and profitability models in the business plan. Further, some potential customers (e.g., restaurants, institutional sales) may require proof of adequate insurance.

Again, it is important to discuss these issues with an insurance specialist and an attorney to ensure the business owner *and* the direct farm business have the necessary insurance coverage to protect the business assets and minimize personal liability exposure.

#### IV. CHECKLIST

##### Have you?

- Considered where you want to **locate** your business? Depending on what type of business (u-pick, agritourism, farm stand, etc.) you are considering, this requires:
  - o Reviewing applicable **zoning laws** in your area; and,
  - o investigating whether any **environmental permits** will be required under Texas and federal environmental laws.
- Looked into the **registration and permitting requirements**? Most of the registration steps are relatively simple, but failure to comply can have significant consequences.
- Informed yourself about **insurance options and costs**? Insurance (or lack thereof if something goes wrong) can represent a significant cost for a small-scale farmer. It should be considered as part of your initial overall business plan and not left as an afterthought.

#### KEY CONTACT INFORMATION

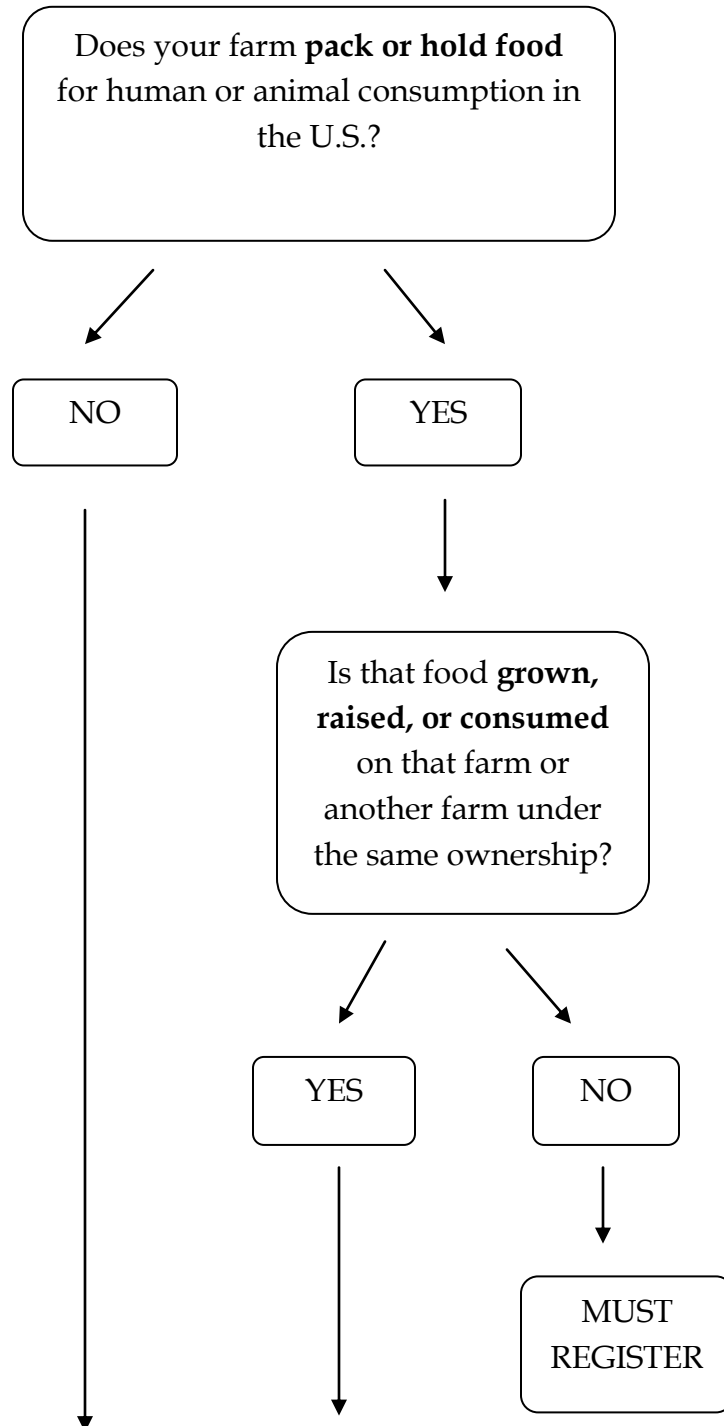
##### **U.S. Food and Drug Administration (registration of food facilities help desk)**

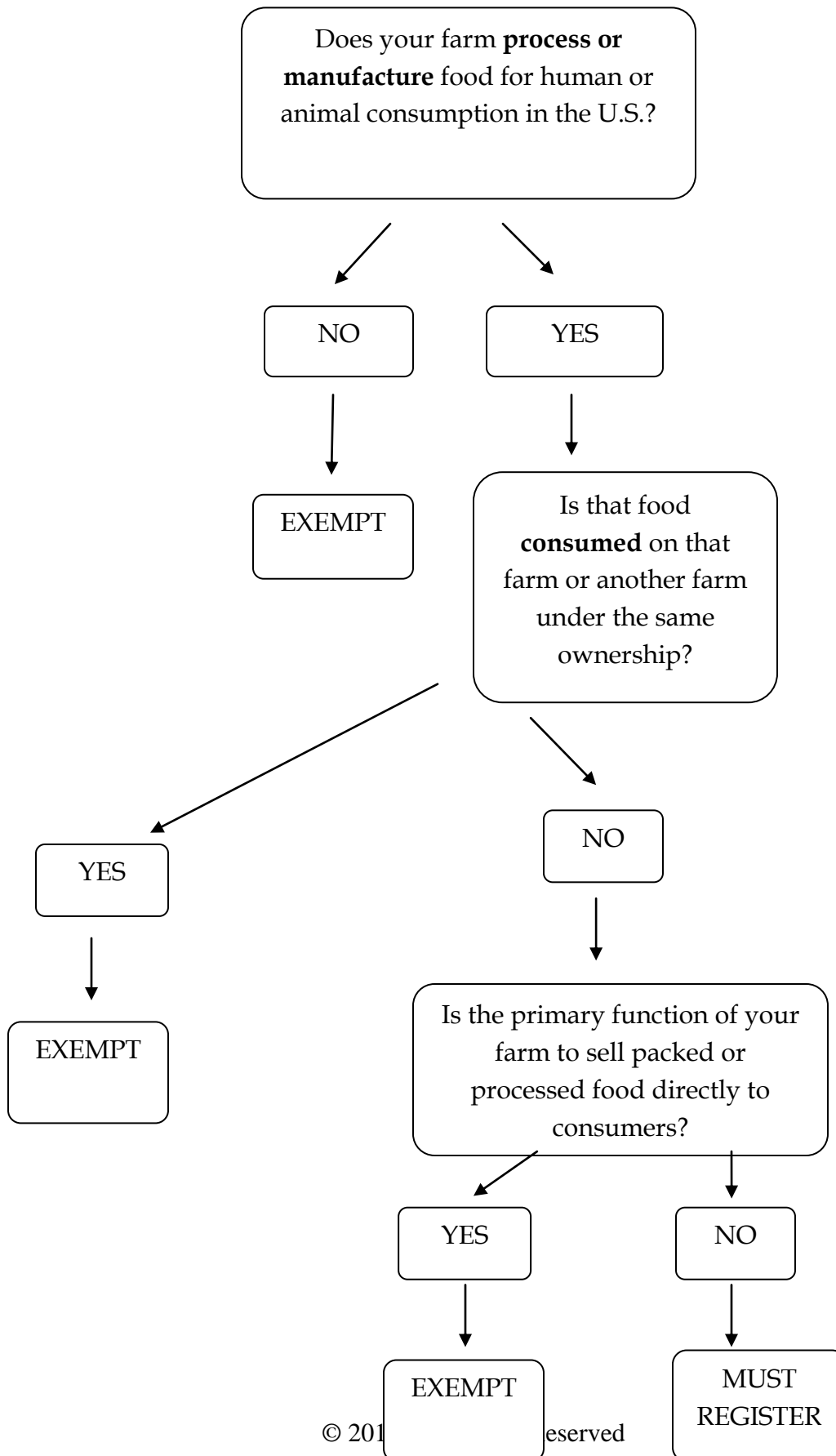
Ph: 1-800-216-7331 or 301-575-0156

##### **Texas Commission on Environmental Quality (wastewater treatment)**

<http://www.tceq.texas.gov/permitting/wastewater>

**DO I NEED TO REGISTER MY FARM WITH THE FDA?**





### Definitions

As used in this flowchart:

*Holding* means “storage of food. Holding facilities include warehouses, cold storage facilities, storage silos, grain elevators, and liquid storage tanks.” 21 C.F.R. § 1.227(b)(5).

*Manufacturing/processing* means “making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or ingredients. Examples of manufacturing/processing activities are cutting, peeling, trimming, washing, waxing, eviscerating, rendering, cooking, baking, freezing, cooling, pasteurizing, homogenizing, mixing, formulating, bottling, milling, grinding, extracting juice, distilling, labeling, or packaging.” 21 C.F.R. § 1.227(b)(6). For purposes of a farm facility, manufacturing/processing does *not* include “[w]ashing, trimming of outer leaves of, and cooling produce”. 21 C.F.R. § 1.227(b)(3).

*Packing* means “placing food into a container other than packaging the food.” 21 C.F.R. § 1.227(b)(9).

*Packaging*, when used as a verb, means “placing food into a container that directly contacts the food and that the consumer receives.” 21 C.F.R. § 1.227(b)(8).

*Selling food directly to consumers as a “primary function”*: A retail food establishment’s primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food product to all other buyers. 21 C.F.R. § 1.227(b)(11).

### **CHAPTER 3: MANAGING AND MARKETING THE DIRECT FARM BUSINESS**

There are many components to successfully managing a direct farm business. Taxes and employment encompass such significant portions of law that they merit their own chapters in this Guide. However, there are many other management details that this chapter will address. First and foremost, contracts are subject to a myriad of laws, many of which protect farmers from potential abuses. A direct farm business also needs to have effective marketing in order to reach potential customers and sell the product. This marketing plan may encompass many



facets, including Internet marketing, procurement contracts, and valid intellectual property rights. And when a sale is made, the direct farm business must accurately measure its products in order to comply with state law. Finally, a successful direct farm business should consider estate planning in order to ensure efficient transitions in the future.

#### **I. CONTRACTING**

Contracts are an integral part of every business. Contractual agreements can take many forms:

some are small cash transactions and others are detailed documents resulting from lengthy negotiations. Regardless of the type of direct farm business, there are basic contract principles that owners and managers should know to assist in running a smooth operation and for protecting business interests.

##### ***A. General Contract Law***

A contract is an agreement between two or more competent parties to do something in exchange for something of legal value. There are three basic elements of a valid contract: an offer, acceptance, and consideration. An offer is a committed and definite proposal that is sufficiently communicated to others. Acceptance is communicated when a party agrees to the exact proposal in the offer using clear and unequivocal terms. The final requirement, consideration, concerns the subject of the contract. Consideration is an explicitly bargained for benefit or detriment that has legal significance. This could be money, land, crops, or even a promise to provide products in the future.

*The Uniform Commercial Code (UCC) (V.T.C.A., Business and Commerce Code, 1.101 et seq.)* is a uniform set of laws adopted in every state in order to facilitate interstate commerce. The American Law Institute develops the UCC, and then each subsequently state adopts it with any minor variations the state deems necessary for its local needs. The UCC covers a broad array of commerce issues, such as the rights and duties of creditors and debtors, how loans can be

transferred between varying parties, and standards for forming and interpreting leases. Farmers need to be aware of the UCC, especially with regard to sale of goods, because it establishes unique rules for commercial transactions. Specifically, it defines when a contract is formed between two merchants, sets standards for how contract terms are interpreted, provides default terms to cover contractual omissions, and defines what remedies are available if the contract is breached. It is important to note, however, that these UCC rules are the default law that courts will apply if contracting parties do not come to an agreement or fail to include a term in their agreement. Contracting parties are always free to negotiate alternative terms for their contract. Relevant provisions of the UCC are covered in more detail in the following discussion. apply if contracting parties do not come to an agreement or fail to include a term in their agreement. However, businesses are free to negotiate alternative terms for their contract. The following discussion covers several relevant provisions of the UCC.

#### *Oral Contracts, Written Contracts – Which One?*

A contract does not necessarily have to be in writing in order to be binding and enforceable. In fact, many contracts are oral contracts, where no writing ever exists. Generally, creation of a contract requires an offer and an acceptance, and there must be performance in the form of mutual exchange of consideration. Small direct farm sales, for example most roadside stand cash transactions, are usually oral contracts. When a farmer sets up a stand and communicates the availability of his produce in some way at a certain price, he makes an *offer*. By agreeing to pay the purchase price, the consumer *accepts* the offer, forming an enforceable contract. The *consideration* is the produce the farmer provides and the money the customer pays. The contract is *performed* (and thus complete) when the farmer receives the money and the customer receives the produce. In most cases, oral contracts are binding and enforceable—just like a written contract. There are instances, however, where a contract must be in writing to be enforceable.

As early as the 1600s, people recognized that certain contracts are particularly susceptible to misrepresentation. Responding to this, the English Parliament adopted what is known as the “statute of frauds” to require that fraud-prone contracts must be in writing to be enforceable. Following this English tradition, every state in the Union has adopted a version of the statute of frauds. The Texas statute (V.T.C.A., Business and Commerce Code, 2.201) lists a number of circumstances specifically requiring a written contract, but the ones most relevant to farmers are contracts that will take more than one year to perform, including leases of land that will last more than a year, and sales of real property. Related to the Statute of Frauds, the UCC requires contracts for the sale of goods totaling \$500 or more to be in writing (V.T.C.A., Business and Commerce Code, 2.201).

Contracts lasting more than a year can present themselves in many different forms. For example, a contract to sell grain could have an execution date that is more than a year away, making it fall within this section of the statute. The statute only applies to contracts that one

cannot possibly perform within one year. The mere possibility that a contract will take longer than a year to perform does not force it into the statute of frauds. So, for example, a contract to sell the milk of an animal for the rest of its life would not fall within the statute because there is no guarantee that the animal will live longer than one year. Many community supported agriculture (CSA) contracts might fall within this provision of the statute of frauds. For example, an agreement to receive delivery on produce through the end of the next year may or may not fall within the provision, depending on the timing and terms of the contract. If the agreement requires taking delivery at a date that is more than one year away, it must be in writing to be enforceable in court. If the contract is set up in a way that could potentially last over a year but could also be completed within a year under certain circumstances, it does not fall within this provision of the statute of frauds.

The statute provides a slightly different rule for contracts between merchants. If both parties to a contract are merchants, an oral contract that would otherwise have to be in writing under the statute of frauds is binding if a confirmation of the oral contract is sent in writing within a reasonable time and neither party *objects* within ten days after the writing is received (V.T.C.A., Business and Commerce Code, 2.201(b)). Texas law defines a merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” (V.T.C.A., Business and Commerce Code, 2.104(a)). In Texas, whether a farmer is a merchant is a question of fact, surrounding the particular circumstances of the case. (*see Nelson v. Union Equity Co-op. Exchange*, 548 S.W.2d 352, 357 (Tex. 1977), (wheat farmer who kept up daily with the price of wheat, brought in one crop every year and sold it to a milling company, for five years in a row, was a merchant)).

It may also be useful to understand what constitutes a “writing.” To be enforceable, the written document must be signed by the party that has an obligation imposed upon them or by someone who is authorized to sign for them. The party seeking to enforce the contract does not necessarily have to have signed it: If a written document omits terms or includes a term that is different than what was actually agreed upon, the contract will usually still be binding. In fact, evidence of the oral agreement usually cannot be offered as evidence to show that the terms of the final written contract were supposed to be something else (V.T.C.A., Business and Commerce Code, 2.201(a)).

Although it may be difficult to understand when a written contract is technically required and when an oral contract will be enforceable, it is *always* a good business practice to put contracts in writing. Doing so protects legal interests and avoids potential disagreements that can lead to a negative business reputation and possible legal battles. When preparing a written contract, it is important to be thorough and accurate. At the bare minimum, the contract should contain

the identities of the parties, what item is being contracted for, including quantities and a clear description including quality standards, the negotiated price, and when performance is expected. It might also include ways the contract can be cancelled and what remedies each side will have if the other fails to perform. Contradictory oral statements made during negotiations will not override the terms contained in a written contract. Taking the time to prepare a well-crafted written document will increase the security of each side's interest in the contract, reduce the chance of unmet expectations due to ambiguity, and create a tangible record in case any problems do arise. Regardless of the dollar amount or the time involved in a contract, it is advisable to have an attorney at least review any important contract before signing it.

### *Excused Contract Performance*

Sometimes one or both parties break one of the requirements of a contract, but courts nonetheless refuse to impose liability for the breach of contract. Situations where a party might be excused from performing a contractual obligation fall into three broad categories. First, if circumstances create a situation where it is impossible to perform the contract, then a party may be released from their obligations. Second, if performance is technically possible but requiring a party to perform would be extremely unfair under the circumstances, then performance might be excused. Finally, a party might not be required to perform if the purpose for entering into the contract no longer exists or would no longer be furthered by performance of the contract.

Impossibility is an unforeseen, unexpected event occurring after creation of a contract but before performance that makes performance of the contract not possible. This could occur when a particular piece essential to the contract is destroyed or when a particular essential person to the contract dies or is otherwise incapacitated. The thing destroyed or the person incapacitated must be absolutely necessary to the contract in order to fall under the doctrine of impossibility. Destruction of a small non-essential element does not excuse performance for impossibility. For example, if a farmer has a contract to sell a particular animal, such as a prized boar, and the animal dies, then both parties would be excused from performing under the contract. However, if a farmer has a contract to sell ten healthy piglets, and the piglets become ill, performance is not excused for impossibility. Instead, the farmer must treat the illness.

Impossibility often does not allow termination of contractual obligations, even when unforeseen disasters make performance onerous. For example, if parties have a contract to sell 100 bushels of corn and, before delivering the harvest, a flood destroys the corn, impossibility does not excuse the farmer's performance. This is because the farmer could still purchase corn from another source and use it to fulfill the obligation. Unlike a deceased animal selected for particular breeding purposes, corn is a commodity that could be replaced. A contract becoming more difficult or more expensive to perform is not enough to make it impossible to perform.

Some courts may have sympathy for parties who find themselves in a position where their

performance, while not technically impossible, would be so difficult that requiring performance would be overly harsh. Courts have substantial discretion in deciding whether or not to excuse performance when performance may be impracticable or extremely unfair. For example, if a farmer contracts with a trucking company to deliver 100 truckloads of crops and all of the company's trucks are subsequently destroyed by fire, it would not be impossible for the trucker to perform, but it may be impractical. The company could purchase a new fleet of trucks and perform the contract, but a judge could find, at her discretion, that requiring performance under these circumstances is overly harsh and should be excused.

A third way that contract performance could be excused is frustration of purpose. This means that a contract was entered into for a particular underlying reason and that purpose no longer exists as it did at the time of contract formation. For example, if a farmer contracts to buy feed for his cattle and all the cattle die from disease, the purpose of the contract (feeding the cattle) has been frustrated. It is still possible for the farmer to buy the feed, but he entered into the contract specifically to feed animals that no longer need to be fed. When the reason for the contract no longer exists, the contract may be set aside because of frustration of purpose.

Whether or not a contract performance will be excused is a highly fact specific determination. As a practical matter, if problems arise that may lead to a breach or inability to perform the contract, one should first attempt to renegotiate the terms of the agreement with the other party. If negotiations fail, hiring an attorney is the best way to protect oneself and explore legal options.

### ***B. Contract Laws that Protect Farmers***

Although contracts are personal and can vary greatly from negotiation to negotiation, even between the same two parties, there are some restrictions, obligations and remedies that federal and Texas law impose upon particular agricultural contracts.

*The Packers and Stockyards Act (P&SA)* (7 U.S.C. §§ 181-229b) was enacted in 1921 to facilitate fair competition in livestock, meat, and poultry markets. The Act prohibits unfair, deceptive, unjustly discriminatory, fraudulent and anti-competitive practices. Livestock dealers are required to register and be bonded to protect producers. The P&SA will not apply to most direct farm businesses because farmers are not subject to the Act when buying livestock for their own purposes or when marketing their own livestock and livestock products. However, the Act's registration and bonding requirements may apply to agricultural cooperatives marketing livestock on their members' behalf. Furthermore, the Act provides several protections for farmers engaged in production contracts. The section on production contracts, below, discusses

these in more detail. The Grain Inspection, Packers, and Stockyards Administration (GIPSA), a sub-agency of the USDA, administers the P&SA. GIPSA has more information on its **website**.<sup>31</sup>

*The Perishable Agricultural Commodities Act (PACA)* (7 U.S.C. §§ 499 *et seq.*) seeks to ensure fair trading practices for fruits and vegetables by requiring farmers to deliver produce as promised and buyers to pay within a reasonable period of time of receipt. The law requires anyone buying or selling or brokering contracts for more than 2,000 lbs per day or selling more than \$230,000 worth of produce in a year to obtain a PACA license. Farmers who sell only their own produce are not subject to the Act, but cooperative marketing associations that market the qualifying quantities are subject to it. USDA's Agricultural Marketing Service (AMS) enforces the law. If anyone violates the fair marketing requirements of the Act, the other party to the

contract can file a complaint with AMS. More information on licensing and complaints is available through **AMS's website**.<sup>32</sup>

#### **ADDITIONAL RESOURCES: PACA'S PROVISIONS**

*Farmer's Legal Action Group Handout, available at*  
<http://www.flaginc.org/topics/pubs/arts/PACAhandout2007.pdf>

*National Agricultural Law Center's Overview, available at*  
<http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html>

The PACA also establishes a trust right to protect farmers who sell fruits and vegetables. If the farmer notifies a buyer that they intend to be covered by the trust, the buyer must hold the produce or any proceeds from the sale of it in trust for the farmer until the buyer has paid for the produce in full. The primary benefit of the trust is to make it easier for farmers to get paid when they file a court action. The trust also puts farmers ahead of other creditors if the buyer goes out of business or declares bankruptcy. Producers who are not subject to the Act can nonetheless get a PACA license in order to benefit from the PACA trust protections.

*The Agricultural Fair Practices Act* (7 U.S.C. §§ 2301-2306) was enacted in 1967 to protect farmers who belong to cooperatives from retaliation or coercion by handlers trying to limit producers capacity to market and bargain cooperatively. The Act defines handlers as anyone who acquires agricultural products from producers or associations of producers for processing or sale; or grades, packages, handles, stores, or processes agricultural products received from producers or associations of producers; or contracts or negotiates contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or acts as an agent or broker for a handler in the performance of any of the above functions (7 U.S.C. §2301(2)). The Act prohibits handlers from coercing or refusing to deal with

<sup>31</sup> <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=imp&topic=landing>

<sup>32</sup>

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACAClaimorApplyforaLicense&rightNav1=FileaPACAClaimorApplyforaLicense&topNav=&leftNav=CommodityAreas&page=PACA&resultType>

a producer for joining a cooperative, discriminating against a producer in price, quantity, quality or other terms due the producer's membership in a cooperative, attempting to bribe producers to quit or not join cooperatives, making false reports about the activities and finances of a cooperative, or conspiring with anyone else to do any of aforementioned (7 U.S.C. § 2303). If a producer feels a handler has violated the Act, they may bring a civil action in the courts for injuries done to themselves, or they may complain to the Secretary of Agriculture, who can then investigate and report the offender to the Attorney General for prosecution (7 U.S.C. § 2305). If a producer brings a civil action, the courts may award attorneys' fees to the prevailing party, so the loser may have to pay the winner's litigation costs. (*Id.*) But because the Act requires the USDA to refer enforcement actions to the Department of Justice rather than bringing them directly against violators, it is often not strongly enforced.

*Arbitration for Defective Seeds:* If a producer believes seeds failed to perform according to the standards promised by the dealer then they must follow the legal process as prescribed in Texas in Chapter 64 of the Texas Agriculture Code. (V.T.C.A., Agriculture Code, 64.001 *et seq.*). The State Seed and Plant Board (Arbitration Board) overlooks the arbitration. (V.T.C.A., Agriculture Code, 64.005). When a purchaser of seed designed for planting claims to have been damaged by the failure of the seed to produce or perform as represented by warranty or by the label required to be attached to the seed or as a result of negligence, the purchaser must submit the claim to arbitration not later than the 10th day after the date on which the purchaser discovered or reasonably should have discovered the defect. (V.T.C.A., Agriculture Code, 64.002(a)). A purchaser begins arbitration by submitting a sworn complaint along with the current filing fee. (V.T.C.A., Agriculture Code, 64.006(a)). The seller receives a copy of the complaint from the commissioner and must answer within fifteen days. (V.T.C.A., Agriculture Code, 64.006(b)). According to the Texas law "Under the seed laws of Texas, arbitration is required as a precondition of maintaining certain legal actions, counterclaims, or defenses against a seller of seed. Information about this requirement may be obtained from the state commissioner of agriculture." (V.T.C.A , Agriculture Code, 64.003). The court will likely give weight to the findings of the seed arbitration board, in an effort to successfully expedite the arbitration as well as in determination of damages and costs. (V.T.C.A., Agriculture Code, 64.004). "The court may also take into account any findings of the board of arbitration with respect to the failure of any party to cooperate in the arbitration proceedings, including the arbitration board's ability to determine the facts of the case." (*Id.*)

### ***C. Special Contracts***

#### *Production Contracts*

Production contracts are contracts where a company hires a farmer to raise animals or crops for the company, using seed or animals, feed, and other inputs that the company supplies or specifies. Texas law requires these contracts to be written in a readable form and contain a

disclosure statement on the material risk the farmer faces if entering into the contract. Some contracts contain non-disclosure provisions that restrict a farmer's ability to discuss the contract with other parties. The Act prohibits these clauses from restricting a farmer's right to discuss the terms of the contract with other farmers, immediate family members and professional advisors such as attorneys, financial advisors, and farm managers.

Texas law also requires the contracts to be negotiated, entered into and executed in an environment that is free from unfair or deceptive trade practices, such as failing to provide the poultry producer with the written contract until after the producer has obtained a construction loan and irretrievably committed themselves to the contract. Finally, the law prohibits mandatory arbitration clauses, although parties may submit a contract to arbitration if all parties agree to the arbitration. If any party objects, the contract would be disputed in the courts. In the event of a lawsuit, the Act authorizes the courts to award reasonable attorneys' fees and other expenses to the prevailing party. In other words, the losing party may have to pay the winner's legal costs. For more information contact the Texas Agriculture Department at (512) 463-7476.

Federal law provides several additional protections for poultry and swine producers entering into production contracts.<sup>33</sup> First, the Farm Security and Rural Investment Act of 2002, (the 2002 Farm Bill) (Pub. L. No. 107-171 § 10503, 116 Stat. 134, 510) also contains a provision that protects poultry and livestock producers from non-disclosure provisions in their production contract (codified at 7 U.S.C. § 229b). Second, the Packers and Stockyards Act (P&SA) generally prohibits poultry dealers and swine contractors from engaging in unfair, unjustly discriminatory or

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<sup>33</sup> Although much of the federal legislation covered in this Guide does not apply to purely intrastate commerce, the Packers and Stockyards Act likely does, due to the provision which states "for the purpose of this Act . . . a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries..." (7 U.S.C. § 183). In *Stafford v. Wallace*, 258 U.S. 495 (1922), the U.S. Supreme Court held that a wholly intrastate transaction at a stockyard was nonetheless part of the "current of commerce" and therefore fell within the purview of the P&SA. More recently, relying on the Supreme Court's decision in *Stafford v. Wallace*, the U.S. Court of Appeals for the D.C. Circuit interpreted a nearly identical provision in the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(b)(4), ruling that fruit shipped and delivered purely intrastate, but handled by a dealer who commonly ships fruit out of state, had entered the current of commerce. *The Produce Place v. U.S. Dept. of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996). In their analogy, the court stated:

[T]he current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown.

*Id.* at 175-176. Under such a standard, an Arkansas producer who contracts with an Arkansas poultry dealer to raise poultry to be sold exclusively to Arkansas consumers *may* not be subject to the Packers and Stockyards Act and GIPSA's regulations. However, given the broad sweep of jurisdiction courts have given the agencies, it would be more reasonable to tailor actions to the assumption that the rules do apply.

deceptive trade practices (7 U.S.C. 192). When hiring growers to perform production contracts, the P&SA requires the first page of the contracts to conspicuously disclose whether capital investments are necessary to perform the contract (7 U.S.C. § 197a(b)). The P&SA authorizes the Secretary of Agriculture, through GIPSA, to institute investigations and compel dealers and contractors to pay damages to injured parties for violations of the Act; producers may also petition GIPSA for an investigation and reparation (7 U.S.C. § 210). Alternatively, the producer may bring a lawsuit against the dealer or contractor in federal court (7 U.S.C. § 209).

GIPSA exercises its authority over swine contracts on a case by case basis; therefore, there are no regulations that specifically address what constitutes unfair, unjustly discriminatory, or deceptive trade practices for swine contracts. However, there are specific GIPSA regulations applicable to poultry production contracts. The rules require poultry dealers to provide the grower with the true written contract on the day they provide the grower with the poultry house specifications (9 C.F.R. § 201.100(a)). This is intended to guard against the practice of inducing producers to take out expensive loans to build production houses, then changing the terms of the promised contract after the producer is in a situation where rejecting the contract would put the farmer at risk of losing their business and their home. The contract terms must include the contract's duration and grounds for termination, all terms relating to the payment (including how feed costs and live weights and slaughter weights will be calculated), and whether a Performance Improvement Plan (a probationary program for growers who fail to meet minimum performance standards) exists and if so, the factors for its application (9 C.F.R. § 201.100(c)). The GIPSA regulation also expands the scope of the anti-non-disclosure rules to allow producers to consult with other producers who have contracts with the poultry dealer (9 C.F.R. § 201.100(b)).

### *Requirements and Output Contracts*

Requirements and output contracts are two types of agreements that can provide some security to producers as well as those who buy directly from farmers in bulk. The concept behind these agreements is simple: In a requirements contract, the buyer agrees to purchase all of a product that they may require or use from a certain party. Similarly, an output contract is an agreement by a purchaser to sell all of a product that they produce to a particular buyer. Direct farm businesses may find these types of contracts useful when dealing with institutional buyers or restaurants.

However, entering into a requirements or output contract is not a green light for producers to simply increase their production to dramatic levels, secure in knowing that a party is contractually bound to purchase everything that they can churn out. The UCC puts some restrictions on these types of contracts. Section 2-306 of the UCC imposes a duty of "good faith" on the parties to the contract (V.T.C.A., Business and Commerce Code, 1.304). This means that neither side can demand or produce a quantity that is unreasonably disproportionate to the

quantity estimated by the parties when striking their deal. If the parties failed to make any estimates at the inception of the contract, the UCC restricts quantities to “normal” or “comparable” quantities to what would ordinarily be required or produced, but does not specifically identify how those terms should be defined.

The specific language used in a requirements or output contract can be very important. The contract must use assertive language such as “require,” “need,” “can use,” and so on. Using equivocal language such as “might want to use” or “wish” does not create a binding requirements or output contract. While such language does not prohibit parties from agreeing to deal with one another, it is not sufficiently definite to impose an enforceable duty on the parties. When parties fail to use definite language but act as though they formed a valid requirements or output contract, they are really acting under a series of mini-contracts. While such ad-hoc mini-contracts may produce satisfactory results in the short term, producers should realize that indefinite contractual terms may, in the event of a dispute, result in a contract that fails to bind either party to its terms (and is thus unenforceable). However, when drafted carefully, requirements and output contracts can provide some security for parties. Farmers can produce at normal levels with confidence that all of their output will be purchased, and buyers are given some assurance that their needs will be filled. Because of the large volume typically associated with these types of arrangements, parties should be careful when agreeing to terms and should, at a minimum, have an attorney review these documents prior to agreeing to the terms to ensure that they fully understand the obligations and likely outcomes of the contract.

### *Procurement Contracts*

Procurement contracts can be another advantageous way for a direct farm business to make significant sales. The USDA purchases large quantities of commodities through various procurement programs in order to supply food for school lunch programs, prisons, international food aid and other programs. USDA’s programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive bidding process. Information for small businesses is compiled by the USDA and **available online**.<sup>34</sup> The Agricultural Marketing Service (a subsidiary of the USDA) also maintains commodity-specific information available on its **website**.<sup>35</sup>

Generally, to participate in these programs, producers will need to be capable of producing significant output and may need to comply with more rigorous food safety handling requirements, depending on the destination of the food. The Texas A & M AgriLife

<sup>34</sup> <http://www.dm.usda.gov/procurement/business/procedure.htm>

<sup>35</sup> <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateQ&navID=CommodityPurchasing&leftNav=CommodityPurchasing&page=CommodityPurchasing&acct=AMSPW>

Procurement and Contracts office offers assistance for procurement contracts for agricultural businesses in Texas on their website.<sup>36</sup>

## II. MARKETING

At its core, marketing is about informing consumers about the direct farm business's products and building an established reputation to ensure repeat business. There are many ways to engage in marketing, such as sales flyers, eye-catching posters at the farmers' market, roadside signs, and Internet marketing. This guide only addresses legal issues pertaining to labeling and advertising, a few specific issues related to the Internet, and basic intellectual property issues that may arise in the context of direct farm businesses.

### A. Labeling and Advertising

Labeling is regulated by the Food and Drug Administration (FDA) under the Food, Drug and Cosmetic Act (21 U.S.C. Chapter 9), which prohibits selling "adulterated" or "misbranded" food. The Federal Trade Commission (FTC) regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or

#### **ADDITIONAL RESOURCES:**

##### ***Food Labeling***

***The FDA's Food Labeling Guide details the intricacies of food claims.***

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/ucm064919.htm>

**The FTC generally uses the same guidelines for claims made in food advertising.**

<http://www.ftc.gov/bcp/policystmt/ad-food.shtm>

unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer's decision making process) and is likely to mislead consumers. A statement is unfair if it causes or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers. These laws have implications for several types of claims a direct farm business may wish to make about its products, whether on its labels or in its advertising: Health claims, structure/function claims, and nutrient content claims. Each will be briefly addressed below.

#### *Health Claims*

Health claims describe a relationship between the food (or a component of it) and reducing the risk of a disease or health-related condition. For instance, a label might claim "low fat diets

rich in fiber-containing grain products, fruits, and vegetables may reduce the risk of some types of cancer, a disease associated with many factors." Producers who wish to place a health claim

<sup>36</sup> <http://agrilifeas.tamu.edu/fiscal/purchasing/index.php>

on a label must first have that claim approved by the FDA. Approved health claims are listed in Appendix C of FDA's food labeling guide. If a claim is not approved, a food producer can petition the FDA to approve the claim, and must support the petition with sufficient scientific evidence. A label may also contain a *qualified health claim*, which is a health claim supported by emerging scientific evidence which suggests that the claim may be valid but that is not strong enough to meet the standard necessary to be a health claim. Like with health claims, qualified health claims must be preapproved by the FDA through a petition. Failure to obtain pre-approval causes the food to be "misbranded" and therefore subject to FDA enforcement.

*Structure/Function Claims* describe the role of a nutrient in affecting normal structure or function in humans. For instance, "calcium helps build strong bones." These types of claims are not preapproved by the FDA, but must be truthful and not misleading. For more information on these types of claims, see the FDA's **Small Entity Compliance Guide on Structure/Function Claims**.<sup>37</sup>

Nutrient content claims characterize the level of a nutrient in a food, such "high in vitamin A;" they also encompass claims such as "low fat" and "light" foods. The FDA prohibits these claims unless specifically approved in FDA's regulations (21 C.F.R. § 101.13 and subpart D). Raw fruits and vegetables and fish are not required to contain nutritional content labels, but the FDA provides posters for voluntary labeling of their nutritional content.

## **B. Internet Marketing**

Many small businesses consider an Internet presence an essential part of their business strategy. The Internet and other forms of electronic communication (e.g. email or social networking sites such as Facebook) can open doors to a direct farm business for customers otherwise unable to visit the retail operation due to distance, time, or other factors. USDA's Agriculture and Marketing Service (AMS) has published an informative brochure, **How To Direct-Market Farm Products on the Internet**,<sup>38</sup> that explains many issues related to Internet marketing of farm products. The brochure encourages farm businesses to identify Internet marketing goals (save time, save labor, increase market access, provide customers information) and to research the potential market before setting up a website. Other things to consider are the cost and feasibility of shipping products and loss of personal interaction (which may be precisely what customers are looking for in a direct farm business).

In addition to setting up a webpage or sending customers email, a direct farm business may wish to list itself on some local or national online farm business directories such as

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<sup>37</sup> Available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/DietarySupplements/ucm103340.htm>

<sup>38</sup> Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3101222>

<http://www.twc.state.tx.us/svcs/agri/directory.pdf> (a Texas-wide directory). Such directories help farmers disseminate information on their products and reach consumers as well as commercial retailers or businesses such as restaurants. Although the Internet's flexibility as a marketing tool makes it an attractive option for direct farm businesses, farmers should be aware of several important legal issues that may arise in the context of doing business on the Internet.

### *Shipping Products*

If the farm's products are capable of shipping via mail, a website that allows customers to place orders online can be an important aspect of the direct farm business. Sending perishable goods through the mail, however, can be costly and requires careful packaging. If food needs to be shipped cold, the USDA recommends shipping with dry ice, foam coolers, and polyethylene film to provide additional insulation. The package should contain clear labels that say "contains dry ice" and "keep refrigerated," and it should be shipped by the fastest means possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. The USDA also provides a helpful **guide of safe handling times**<sup>39</sup> for a large variety of mail-order foods. Also, keep in mind that shipping food out of state can subject the business to federal laws the operation may not otherwise have to comply with. In addition, shipping food out of state may subject the business to federal laws the operation may not otherwise have to comply with.

The Federal Trade Commission's (FTC) Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435) applies to sales made over the Internet. The Rule regulates shipment promises, unexpected delivery delays and customer refunds. To comply with the Rule, a seller must have a reasonable basis for promising shipment within a certain time frame. If online advertising does not specify the shipment period, the seller must have a reasonable basis for believing that they can ship within 30 days. If shipment cannot be made within the promised time period, then the seller must notify the customer of the delay and provide the customer with the option of cancelling the order and receiving a full refund. If a seller cannot fill an order, then they have the right to cancel it but must notify the customer of the cancellation and refund payment to the customer in full.

### *Protecting Customers' Personal Information*

If a business allows consumers to enter personal information into its website, the FTC requires that the business have a plan to safeguard that information. There are no specific requirements that a business information security plan must follow. Adequate safeguard measures depend on various factors, such as the size and nature of the business and the amount and type of

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<sup>39</sup> Available at [http://www.fsis.usda.gov/Factsheets/Mail\\_Order\\_Food\\_Safety\\_Table/index.asp](http://www.fsis.usda.gov/Factsheets/Mail_Order_Food_Safety_Table/index.asp)

information collected on the Internet. The FTC maintains a **website**<sup>40</sup> to assist businesses in complying with consumer protection requirements.

### *Email Marketing*

Emailing a weekly, monthly or annual newsletter requires little time or money, and avoids the costs and hassle of printing and sending documents via mail. Short email updates concerning revised hours of operation or seasonality may be a convenient method of communication between the direct farm business and its customers. All commercial email from a business to a consumer is regulated by the FTC's CAN-SPAM Act (15 U.S.C. § 7701 *et seq.*). When sending commercial emails, the "from" and "to" lines and routing information must be accurate and identify who initiated the email, and may not contain deceptive subject lines. The email must give the recipient an opt-out method if they do not wish to receive any more commercial emails from the business. The email must also be identified as an advertisement and include the sender's valid physical postal address. As a general rule, emails concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of the rules in this Act can result in significant fines.

### *Taxation of Internet Sales*

If the direct farm business sells over the Internet, determining what taxes are owed can be complex. For the most part, A seller who uses catalogs or the Internet to sell goods is treated the same as any other seller of taxable items. If you purchase merchandise through a catalog or the Internet from a seller located in Texas, you owe Texas sales tax on the purchase. If you purchase merchandise through a catalog or the Internet from a seller located outside of Texas and use the taxable item in Texas, then you owe Texas use tax on the purchase. An out-of-state mail-order company or an Internet company may hold a Texas Sales and Use tax permit and collect Texas tax. If the out-of-state seller does not have a Texas permit or does not collect Texas use tax, the use tax is due and payable by the purchaser. If a Texas retailer ships merchandise out of Texas, a U.S. Supreme Court decision prohibits states from requiring out of state retailers to collect and remit the sales tax for the state where the product is delivered *if the retailer has no physical presence in the state* (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state.

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<sup>40</sup> <http://www.ftc.gov/infosecurity/>

### III. INTELLECTUAL PROPERTY

Marketing a business often involves developing and protecting intellectual property (IP). Intellectual property is basically creations of the mind: inventions, literary and artistic works, as well as symbols, names, images, and designs used in commerce. Specific forms of IP include trademarks, patents, copyrights, and trade secrets. Each may be important to the direct farm business in that ownership gives the right to *prevent others* from doing certain activities without permission. These rights are important because they protect the investment the owner has made in developing the IP. Understanding IP will also help the direct farm business avoid having any actions for violations of IP rights brought against them.

#### A. Trademarks and Trade Names

Trademarks may be the most useful form of IP for the direct farm business. A trademark is used to distinguish *goods and services* from those manufactured or sold by others – it is the symbol that customers use to identify a product by and equate with goodwill. A trademark can be a name, symbol, sound, or color. It is also possible to register the design, packaging, or other element of appearance so long as the element is both nonfunctional and distinctive. This is known as "trade dress." By contrast, trade names are used to identify a person's *business or vocation*. While there may be some overlap between trade names and trademarks, if a name is used only as a trade name it may not be registered with the USPTO. Courts have held, however, that a trade name may have trademark protection if the business adopts a stylized font and other design features that would set the name apart from regular text (*Book Craft, Inc. v. BookCrafters USA, Inc.*, 222 USPQ 724, 727 (TTAB 1984)).

#### *Registration of Trademarks and Trade Names*

Mere use of the mark makes it a trademark – the mark does not need to be registered in order to establish rights. However, rights may be limited to the narrow geographic region where the unregistered mark has been used if another business subsequently registers an infringing mark. The older, unregistered mark owner will have superior rights in the region where the mark was being used, and the newly registered mark owner will have superior rights in the rest of the state or country. Therefore, registration is beneficial because it gives notice of the claim of ownership throughout the state or nation, so that the owner can challenge someone else's use of the mark anywhere, even if the owner is not currently marketing any products in the region. The symbol for trademark, TM, may be used whenever rights are asserted, but the use of the federal registration symbol, ®, may only be used after a mark is registered with the USPTO (not while the application is pending).

Trademark registration is available at both the state and federal level. To be valid, the trademark needs to appear on the goods, their container, or on the displays associated with the

goods. Federal registration of a trademark is through the United States Patent and Trademark Office (USPTO). Federal registration can be costly: \$275-325 per mark per class of product (for instance, a sheep farmer wishing to trademark their wool yarn and their cheese would have to file two applications because yarns and cheeses are in different classes). The USPTO also recommends hiring an attorney who is familiar with trademark law, because applicants are expected to comply with all the procedural and substantive rules. Despite its cost and complexity, federal registration has several benefits: First, it allows the trademark owner to bring suit in federal court (rather than state court) and to register with the United States Customs and Border Protection (CBP) in order to stop the importation of infringing goods into the United States. Second, federal registration has the added benefit of protecting and ensuring the legitimacy of the trademark throughout the country. For more information, including a link the USPTO's searchable trademark database, visit the **USPTO's trademark website**.<sup>41</sup>

State registration is much less expensive and cumbersome than the federal system, but it only provides protection within Texas. Application forms can be found online at the **Secretary of State's website**.<sup>42</sup> A searchable database of trademarks currently registered in Texas is available through the same website. Federal trademark registration last ten years, state registration lasts five years, and both can be renewed so long as the mark is being used in commerce.

In order to be registered and enforceable, trademarks may not be generic or highly descriptive terms and cannot infringe on an existing trademark. A phrase or slogan commonly used to refer to a category of product or that merely describes or praises the product is incapable of being distinctive enough to be used as a trademark. For example, an attempt to register the phrase "the best beer in America" as a trademark for Sam Adams Beer was rejected by the USPTO as too descriptive. Similarly, a court rejected the trademark "Beef Stick" because the term merely described the kind of good and did not distinguish the manufacturer (*Hickory Farms v. Snackmasters*, 509 F. Supp. 2d 716 (N.D. Ill. 2007)). The USPTO will use the "likelihood of confusion test" to determine whether an applicant's mark infringes on an already registered mark. The examiner looks at the similarity of the two marks and the commercial relationship of the products to assess whether consumers are likely to be confused about who/what company is the source of the product. If the USPTO finds likelihood of confusion, it rejects the application. Courts use the same likelihood of confusion test when a trademark owner brings a suit asserting trademark infringement against another's use of a particular mark.

Registering a trademark has two primary advantages. First, as a direct farm business builds a reputation with customers, registration guards against others who might wish to capitalize on the business's success by using or closely mimicking the trademark. Secondly, registration

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<sup>41</sup> <http://www.uspto.gov/trademarks/index.jsp>

<sup>42</sup> <http://www.sos.state.tx.us/corp/trademark.shtml>

protects the business from infringing upon already-existing registered trademarks. If a business is found to be infringing on another's trademark, it will have to stop using the mark, which could confuse customers. It may also have to pay fines, disgorge profits made from use of the infringing mark, and pay the other side's attorney's fees - all of which could be very costly.

### ***B. Patents***

A patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years. In the United States, a patent is issued by the USPTO. To obtain a patent, an invention must be *new* - meaning that it was not known or used by others in the United States or "patented or described in a printed publication in a foreign country" - and it cannot be *obvious*. There are different kinds of patents, but the most common patents relating to farms are plant patents and patents on genetically modified plants. Plant patents are also available to one who has invented or discovered and asexually reproduced a distinct and new variety of plant, other than a tuber propagated plant or a plant found in an uncultivated state. A plant patent precludes others from asexually reproducing or selling or using the patented plant for 20 years from the filing of the patent application. Plant protection certificates, which are not patents but provide patent-like protection for sexually reproduced seeds and tubers, are available for newly developed plant cultivars. The Plant Variety Protection Office of the USDA's Agricultural Marketing Service issues plant protection certificates. If a direct farm business has a license to use a patented product, such as genetically modified seed, it should be rigorous in complying with the licensing agreement. Some companies are very aggressive about enforcing their contracts.

If a direct farm business believes it has a new and non-obvious process or device, they should contact a patent attorney for assistance in obtaining a patent. The inventor should keep in mind that obtaining a patent can be very costly and time consuming, and the potential profitability of the device may not justify pursuing a patent. General information on patents and resources for finding a patent attorney are available on the **USPTO's website**.<sup>43</sup>

### ***C. Copyrights***

A copyright protects "original works of authorship fixed in any tangible medium of expression." Although literary works come easily to mind as examples of copyrighted material, in the direct farm business context, copyright protection could extend to categories such as pictures and graphics, sound recordings, movies, and other information related to the direct farm business operation. A copyright does not protect the actual ideas or methods, but rather it gives the owner certain exclusive rights to the way the copyrighted work is *used*. For example, in many

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<sup>43</sup> <http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent>

circumstances a copyright owner has the exclusive right to reproduce the work, to make derivative works, and to display the work publicly. The owner also has the exclusive right to authorize others to do the same. Pictures of growing crops or a farmers market used on the direct farm business website or promotional material would qualify for copyright protection. On the other hand, unpermitted use of another's pictures (perhaps copied from the Internet) could constitute infringement upon the copyrights of another.

A work does not have to be published or even registered with the Copyright Office to gain protection. Copyrights attach once a work is "created" - that is, once it has been fixed in a tangible medium of expression such as a copy or recording. Even so, registration is important for providing a public record of the copyright claim. Registration also provides significant advantages regarding the enforcement of rights in courts and with Customs and Border Protection. Other information on copyrights, including a searchable database of registrations and up-to-date fee information, can be found at the United States Copyright Office's **website**.<sup>44</sup> The webpage also contains a link to step-by-step instructions on obtaining a copyright.

#### ***D. Trade Secrets***

A trade secret is information companies make an effort to keep secret in order to give them an advantage over their competitors. Unlike other forms of intellectual property, there is no federal regulation of trade secrets. Although most states have adopted their versions of the UTSA Texas has not adopted the UTSA, and instead relies solely on the "common law" prior court decisions in the state. Under Texas law, misappropriation of a trade secret consists of use or disclosure of a trade secret that was acquired through a relationship of trust, or through fraud or other improper means. Texas courts can issue an injunction and order a defendant to pay economic damages if a plaintiff is successful in litigation. Texas also allows for criminal penalties for theft of a trade secret, which is considered a third degree felony. (V.T.C.A., Penal Code, 12.34). In order to determine if a trade secret exists, Texas courts weigh six non-exclusive factors: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. (*In re Bass*, 113 S.W.3d 735, 739 (2003)).

### **IV. WEIGHTS AND MEASURES**

The Texas Weights and Measures Act (V.T.C.A., Agriculture Code, 13.001 *et seq.*) applies to all sales of commodities and commercial goods within the state. The statute ensures accurate measurement and delivery of wholesale and retail commodities by establishing standards for

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<sup>44</sup> <http://www.copyright.gov/>

how commodities can be measured or weighed and requiring certification of the accuracy of scales. . Generally, the law requires weighing and measuring devices and packaging labels to comply with the National Institute of Standards and Technology (NIST) technical standards and uniform laws and regulations," which are available through **NIST's weights and measures website**.<sup>45</sup> Texas adopts the legal standard for weight and measure of a commodity from the federal standards unless such a standard is not specified by the U.S. government, in which case Texas statutes provide a method of measurement for that commodity. (V.T.C.A., Agriculture Code, 13.021). The legal standard for length, as defined by the Texas Agriculture Code, is the yard, which is divided into three feet of twelve inches each, and is the source for all measures of extension, including lineal, superficial, and solid measures. (V.T.C.A., Agriculture Code, 13.022). The standard in Texas for the weight of a commodity with no federal measurement specification is the avoirdupois and troy weights. (V.T.C.A., Agriculture Code, 13.023(a)). In grain measurement, the avoirdupois pound is 7,000 grains, to the troy's 5,760 grains. (V.T.C.A., Agriculture Code, 13.023(b)). The avoirdupois pound is made up of 16 ounces, whereas the troy pound consists of twelve troy ounces. (V.T.C.A., Agriculture Code, 13.023 (b-d)). For liquids, the standard unit of measure is the gallon. (V.T.C.A., Agriculture Code 13.024(a)). A barrel consists of 31 ½ gallons, and a hogshead is two of these barrels. (V.T.C.A., Agriculture Code, 13.024(b)). Finally, the standard of measure for a solid commodity is by the half-bushel, which contains approximately 1,075 cubic inches. (V.T.C.A., Agriculture Code, 13.025(a,c)).

## V. LOOKING TO THE FUTURE: ESTATE PLANNING

Estate planning may not seem like an important component of managing a direct farm business, but it is critical for farmers who wish to keep the farm in the family for future generations. The USDA estimates that 80% of farmers do not have estate plans in place. Without an estate plan, the estate will have to go through probate court, which means that it may take years to settle the distribution of land and assets among heirs and creditors. Meanwhile, younger generations may not be able to make business decisions or plant the crops necessary to continue the operation. The probate court also applies a set of default rules for distribution that may not be beneficial for the business or the family's wishes: For instance, if the farm has been used to secure equipment, land may be sold off to pay debtors instead of passed down to children, even though there may be other ways to satisfy the debts. Estate planning is highly personal because it involves decisions concerning family and wealth distribution. This guide cannot provide comprehensive information on estate planning; rather, business owners are strongly encouraged to contact an attorney to develop an estate plan.

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<sup>45</sup> <http://ts.nist.gov/WeightsAndMeasures/index.cfm>

## VI. CHECKLIST

*Have you...*

- Addressed contractual issues for your operations? This requires:
  - Understanding terms and consequences of any contracts you have agreed to, both oral and written.
  - Knowing when the law requires you to have a written contract in order to enforce it against the other party.
  - Complying with the formal requirements for the creation of production contracts and requirements/output contracts, if used.
- Developed a marketing plan?
  - Do your current practices comply with FDA and FTC law? Are any methods you are considering likely to create legal problems?
    - Are your products properly labeled?
    - Is your Internet business in compliance with all requirements for shipping products, protecting personal information, email marketing, and taxation of goods?
  - Do you have intellectual property you want to protect? Are you infringing on someone else's intellectual property?
- Arranged for state inspection and approval of your scales and measuring devices?
- Considered estate planning for your farm?

### KEY CONTACT INFORMATION

#### **U.S. Department of Agriculture's Agricultural Marketing Service (Farmers' Markets and Local Food Marketing Program)**

Ph: (202) 720-8317

#### **U.S. Patent and Trademark Office (Customer Support Center for patents & trademarks)**

Ph: 1-800-786-9199

#### **U.S. Copyright Office (general questions)**

Ph: (202) 707-5959 or 1-877-476-0778 (toll free)

## CHAPTER 4 - TAXATION

Farm taxation rules are detailed, complex and subject to frequent change. The following generalized information is not a substitute for consulting with a qualified attorney and/or accountant. The information provided herein is for general information purposes only.

This chapter is organized by the type of tax for which the direct farm business may be liable, such as income, self-employment and employment, sales, excise, and property taxes. Because the uniqueness of each direct farm business requires particularized tax analysis, a thorough discussion of tax liability is beyond the scope of this Guide. The sections in this chapter provide basic information on types of taxes, forms and sources of additional information, but it is important to contact a professional for more detailed guidance.

An excellent place to start any research is *Publication 225: Farmer's Tax Guide*. The guide, published by the IRS, is available through the IRS **Agricultural Tax Center website**.<sup>46</sup> The guide covers tax issues specific to farming, including records, accounting methods, income and expenses, expenses associated with soil and water conservation, asset basis, depreciation/depletion/amortization, gains and losses, disposition of property, installment sales, casualties/theft/condemnation, self-employment tax, employment tax, excise tax, estimated taxes, filing a return, and where to get help. In addition, the website **www.ruraltax.org** covers a wide range of tax issues relevant to farmers and direct farm businesses, including who is a "farmer" for tax purposes, filing dates and estimated tax payments, self-employment taxes, and others.

The IRS also maintains a **website of resources**<sup>47</sup> for small businesses and self-employed individuals. The website contains IRS publications for small businesses as well as links to workshops, educational videos, resources provided by state and other federal agencies and other relevant information.

### I. REGISTRATION REQUIREMENTS

#### A. Federal registration requirements

A direct farm business may need to obtain a federal employer identification number (EIN) to identify the business entity. If the answer to any of the following questions is yes,<sup>48</sup> the operation needs an EIN:

- Does the business have employees?

<sup>46</sup> <http://www.irs.gov/businesses/small/industries/article/0,,id=201608,00.html>

<sup>47</sup> <http://www.irs.gov/businesses/small/index.html>

<sup>48</sup> These questions are also on the IRS's website: <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html>

- Is the business operated as a corporation or a partnership?
- Does the business file any of these tax returns: Employment, Excise, or Alcohol, Tobacco and Firearms?
- Does the business withhold taxes on income, other than wages, paid to a non-resident alien?
- Does the business have a Keogh plan?
- Is the business involved with any of the following types of organizations?
  - Trusts, except certain grantor-owned revocable trusts, IRAs, Exempt Organization Business Income Tax Returns
  - Estates
  - Real estate mortgage investment conduits
  - Non-profit organizations
  - Farmers' cooperatives
  - Plan administrators

### ***B. Texas Registration Requirements***

**Anyone** transacting business in Texas must obtain a sales tax permit from the Texas Comptroller of Public Accounts before starting business. (V.T.C.A., Tax Code, 151.201). The permit must be displayed so as to be easily seen at the place of business. (V.T.C.A., Tax Code, 151.201(b)). The permit can be cancelled if the business owner reports no activity over the course of twelve (12) months. (V.T.C.A., Tax Code, 151.202(a)). Business owners will want to mind the rules associated with these permits, which is beyond the scope of this guide, but includes things such as how the permit is to be displayed, because the comptroller has the ultimate say on whether a person whose former permit has been revoked will have one reissued. (V.T.C.A., Tax Code, 151.204). The Texas Comptroller of Public Accounts maintains a website to assist businesses in proper permitting.<sup>49</sup> Business may also call the office at 800-252-5555.

## **II. TAXATION OF BUSINESS INCOME**

### ***A. Federal Taxation (26 U.S.C. Subtitle A)***

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<sup>49</sup> [http://www.window.state.tx.us/taxinfo/sales/new\\_business.html](http://www.window.state.tx.us/taxinfo/sales/new_business.html)

As noted above, a thorough discussion of the intricacies of business tax is beyond the scope of this guide. This is particularly true of business income taxes, where complex rules specific to each type of entity, base income and any deductions and/or credits are highly dependent on the operations of the particular business.

#### **ADDITIONAL RESOURCES: Federal Taxation**

##### **Partnerships**

***IRS Publication 541 provides a more detailed overview of federal taxation of partnerships.***

<http://www.irs.gov/pub/irs-pdf/p541.pdf>

##### **Corporations**

***IRS Publication 542 outlines some of the basic tax considerations relevant to corporations.***

<http://www.irs.gov/pub/irs-pdf/p542.pdf>

##### **Investment Income**

***Taxation of investment income is covered in IRS Publication 550.***

<http://www.irs.gov/pub/irs-pdf/p550.pdf>

To obtain further information and publications on the taxation of each type of business entity, as well as necessary forms, go to the online **IRS A-Z Index for Businesses**.<sup>50</sup>

##### *Sole Proprietorships*

Sole proprietorships file taxes along with the owners' income tax using Form 1040. The IRS considers a sole proprietor as self-employed, and also liable for self-employment tax, estimated taxes, social security and Medicare taxes, income tax withholding (if the business has employees), and federal unemployment tax (FUTA). These taxes are imposed on all employers and discussed in detail in Section 4, below.

##### *Partnerships*

Partnerships file Form 1065 to report earnings, but do not pay taxes. Rather, the tax liability "passes through," meaning that each partner pays taxes on her share of the partnership's earnings as part of her personal income taxes. Accordingly, a partner who owns a 70% share in the business would pay taxes on 70% of the partnership's earnings. Each partner must pay taxes on the partnership's earnings, even if no distribution is made. For instance, if the partnership reinvests all of the earnings in expanding the business, partners would still pay taxes on their share of the undistributed earnings. Similarly, partnership losses pass through to individuals and are deductible by the individual

up to the partner's basis<sup>51</sup> in the partnership.

##### *Corporations*

<sup>50</sup> <http://www.irs.gov/businesses/small/article/0,,id=154770,00.html>

<sup>51</sup> Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

Corporations pay taxes on their profits (and can deduct a certain amount of their losses). Generally, the corporation must make estimated tax payments throughout the year (using form 1120-W). At the end of the year it makes a final calculation and reports its taxes using Form 1120.

As noted in the introduction, shareholders must pay taxes on the corporate profits distributed to shareholders. Corporations may distribute profits in several ways, such as dividend payments, increased stock ownership, changes in types of stock, etc. The IRS considers all of these distributions to be taxable income. If shareholders work for the corporation, a common situation in small corporations, the shareholder/employee also must pay individual income taxes on their wages or salary.

### *S-corporations*

S-corporations, except in limited circumstances, do not pay taxes. Instead, earnings and losses pass through to the shareholders, who pay taxes on these earnings based on their individual income level. The earnings are allocated on a per share, per day basis, with shareholders liable for taxes on these earnings even if there is no cash distribution. An S-corporation reports earnings and losses on Form 1120S.

### *Limited Liability Company (LLC)*

The IRS may classify an LLC as a sole proprietorship (as an entity to be disregarded as separate from its owner, or "disregarded entity"), partnership, or corporation. If the LLC has one owner, the IRS automatically will treat the LLC as a sole proprietorship unless the LLC elects treatment as a corporation. Similarly, if the LLC has two or more owners, the IRS automatically will treat the LLC as a partnership unless it elects otherwise. The LLC may elect corporate status using Form 8832. Sole proprietorships or partnerships do not have to file Form 8832 unless they wish to be treated as a corporation.

Single-member/owner sole proprietorship LLCs file an individual tax return (1040, Schedule C, E or F). Multiple-member/owner LLCs file a partnership return (Form 1065). LLCs electing corporate treatment file a corporate return (1120 or 1120S).

### *Cooperatives*

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative, as a non-profit, typically is not taxed, as any earnings pass through to individual patrons of the cooperative. The cooperative reports profits on Form 1120-C and patrons report income on form 1099-patr. As simple a concept as this may seem, certain applications of the code are complex. For a primer on the federal taxation of cooperatives, the USDA Rural

Development maintains a **website**<sup>52</sup> that contains many publications related to the taxation of cooperatives, including *Cooperative Information Report 23, The Tax Treatment of Cooperatives*, published by the USDA Rural Development program. *IRS Publication 225: Farm Income* also touches on cooperative reporting of taxes.

### III. EMPLOYMENT AND SELF EMPLOYMENT TAXES

This section provides brief summaries of the taxes employers must withhold. For more comprehensive information, see *IRS Publication 15: Employers Tax Guide*, which contains instructions on the intricacies of withholding federal taxes from employee wages. *Publication 51: The Agricultural Employer's Tax Guide* covers common issues that arise in the agricultural context such as social security numbers (SSN) (which prove an employee is authorized to work in the United States) versus individual taxpayer identification numbers (which look similar to SSNs, but are given to aliens who *are not* authorized to work in United States). If readers wish to conduct further research on a particular employment tax topic, federal laws governing employment taxation are in Subtitle C of Title 26 of the U.S. Code, with implementing regulations in Part 31 of Title 26 of the Code of Federal Regulations.

#### A. *If the Direct Farm Business Has Employees*

Employers are responsible for withholding and submitting federal and state employment taxes on behalf of their employees. Federal employment taxes to be withheld include the Federal Income Tax and Social Security/Medicare (FICA) taxes.

##### *Employee Income Taxes*

Withholding federal income taxes from employees entails obtaining a W-4 form from each employee that indicates what withholding allowances they qualify for and what class (e.g. single or married) they fall into. The employer uses this information to calculate the employee's tax rate using the IRS's withholding tables, which are available in IRS publication 15-T. The IRS bases withholdings on base pay, as well as supplemental wages (such as overtime pay) and fringe benefits (for instance, providing employees produce to satisfy their weekly needs). The IRS excludes some fringe benefits, such as the *de minimis* exception that covers small benefits for which it would be inconvenient and unreasonable to have to keep an accounting of (for instance, allowing employees to occasionally take home small quantities of produce). If an employee is a non-resident alien, the employee must register as single (even if married) and the employer must adjust the calculation of the taxable income for each pay period. Some

<sup>52</sup> <http://www.rurdev.usda.gov/rbs/pub/legal.htm>

employees may qualify for an exemption from income tax withholding if they did not owe taxes in the previous year and do not expect to owe taxes the next year. Such employees should indicate this on their W-4.

Employers must deposit taxes with an authorized repository either bi-weekly or monthly, depending on tax liabilities during the lookback period, which is two years preceding the current calendar years. For instance, the lookback period for 2009 is 2007. Employers who reported \$50,000 or less of Form 943 taxes during the lookback period are monthly filers; employers who reported more than \$50,000 are semi-weekly depositors.

Employers must file quarterly or annual tax returns. Agricultural employers use Form 943 to report all taxes on agricultural employee income. If employing farm workers and non-farm workers, employers must treat the farm workers and non-farm workers taxes separately. Employers use Form 941, the quarterly tax return, to file returns on the non-farm workers' income. Employers who receive written notice from the IRS that they qualify to file annually must use Form 944.

...

(C) the provisions of subparagraph (A) ... shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution or consumption (26 U.S.C. § 3121(g)).

Activities that would traditionally be "agricultural" are clearly covered, as well as some additional activities. As indicated by section (4), processing and delivering crops to market fall under the agricultural labor exemption. However, the bulk of the commodity that the employee processes or delivers must come from the employer's farm. Commercial canning and freezing are excluded to prevent commercial processors from claiming they employ agricultural laborers. The exclusion of services performed "after [] delivery to a terminal market for distribution or consumption" means that performing sales, such as at a farmers market, may not qualify as agricultural labor.

### *Social Security and Medicare Taxes*

Social Security and Medicare taxes pay for benefits that employees receive upon retirement. These taxes are known collectively as Federal Insurance Contributions Act taxes, or "FICA" taxes. Social Security and Medicare taxes have different rates and must be reported separately. In both cases, the employer withholds the appropriate tax amount from the employee's wages and the employer pays a matching contribution. The Social Security Tax in 2013 is 12.4% total – the employees pays 6.2% and the employer pays 6.2%. There is a maximum limit on the wages

subject to the Social Security tax, known as a wage base cap. In 2013, the cap is \$113,700. The Medicare tax is 2.9% total, with the employer and employee each paying half. Medicare has no wage base cap. Employers should use form 943, the same form used for income taxes, to file FICA taxes withheld for farm workers.

### ***B. Farmers Who Are Self-Employed***

The self-employment tax is the Social Security and Medicare tax paid by persons who work for themselves. Individuals carrying on the direct farm business as a sole proprietor or as a member of a partnership, or who are otherwise in business for themselves, are "self-employed" and must pay self-employment tax on earnings of \$400 or more. The self-employment tax rate for 2013 is 15.3% on the first \$113,700, and 2.9% on any further income. Income subject to the Social Security Tax is capped, and 50% of the self-employment tax due is deductible from total income on Form 1040. Individuals must report self-employment taxes on Schedule SE. The IRS's *Farmer's Tax Guide* provides additional details regarding the self-employment tax rules.



Direct farm businesses that sell food and/or other goods to customers are responsible for collecting state and local sales and services taxes. Direct farm businesses that purchase goods may be responsible for paying sales tax, but in some instances the purchases will be exempt.

### ***A. Texas Agricultural Taxation***

Unlike the vast majority of states, Texas Law does not call for income taxes on individuals or businesses. The two main areas of taxation by the state, rather, are the sales and use tax and the property tax, which are arguably the two main areas of taxation on which a direct farm producer should focus. Texas has laws and regulations for sales and property taxes for all forms of businesses. This guide will address those areas of taxation that are specific to the farming industry.

First and foremost, the Texas Constitution contains at least a few articles which are pertinent to the direct-farm producer. The Constitution provides a system for analyzing the agricultural nature of land, in order to determine how it may be affected by taxes. In Texas, "agricultural use" means the "raising of livestock or growing of crop, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary

occupation and source of income of the owner. (*TX Const., Article VIII, Sec. 1-d(a)*). In order to remain qualified for an agricultural tax exemption under this provision the owner must annually file a sworn statement to the local tax assessor, which describes the use of the land. (*TX Const., Article VIII, Sec. 1-d(b)*). Furthermore, the land in question must have been in its agricultural use for a minimum of three (3) years preceding the application for the exemption. (*TX. Const., Article VIII, Sec. 1-d(d)*). The local tax assessor has the ultimate say in whether or not the land is truly meeting the qualifications of “agricultural use.” (*TX Const., Article VIII, Sec. 1-d(c)*).

In addition to exemptions specified for so-called “agricultural use,” there also exists an exemption in the Texas Constitution, which reads as follows: “Farm products, livestock, and poultry in the hands of the producer, and family supplies for home or farm use, are exempt from all taxation.” (*TX Const., Article VIII, Sec. 19*). (This particular aforementioned article provides a provision that allows the Texas Legislature to begin taxing farmers of this type with a two-thirds (2/3) vote of both the State Senate and House of Representatives). Furthermore, implements for husbandry that are utilized for farm production or ranch production are exempt from *ad valorem* (property) tax. (*TX Const., Article VIII, Sec. 19(a)*).

Different than the sweeping language of the property taxes, and unlike many other states, Texas farms and ranches are not automatically exempt from sales tax for farm purchases. In 2012, the Texas House Bill 268 went into effect. HB 268 requires producers that are seeking sales tax exemptions for the purchase of certain agricultural products to provide a specified registration number. The exemption in large part applies to motor fuel taxation, certain agricultural items, and agricultural aircraft operation. The registration number is issued by the Texas State Comptroller of Public Accounts and applications for the registration number are available on the comptroller’s website.<sup>53</sup> (Producers also have the option of simply calling the comptroller’s office at 800-252-5555). Producers should be careful not to use Form 01-339 as it applies to the general sales and use tax and is not applicable to agricultural operations.

The following is a limited list of items that apply to the producer-purchaser, for which the registration number is required: fertilizers, fungicides, insecticides, herbicides, defoliants and desiccants used exclusively in the production of food or other agricultural products for sale; machinery and equipment (including component parts) used exclusively in the production of food or other agricultural products for sale or the building or maintaining of roads and water supplies; tangible personal property incorporated into a structure used for poultry carcass disposal; components of irrigation systems used in the production of food; electricity used in agriculture; and farm vehicles. While this list seems extensive there exist certain items that are naturally exempt from the sales and use tax, for the purchaser, under Texas law. These includes things such as work animal, horses and mules, that are commonly used in agricultural operations, animal life that constitutes food for human consumption, animal feed, seeds and

<sup>53</sup> <http://www.window.state.tx.us/taxinfo/taxforms/ap-228.pdf>

plants recognized as food for animal or human consumption, and ice (for example, on a fishing boat). The Texas State Comptroller of Public Accounts provides a full list of the items and products that aren't covered by the agricultural tax exemption, available on their website.<sup>54</sup> (V.T.C.A., Tax Code, 151.001 *et seq.*).

In addition to the sales and use tax for purchases of tangible items, there are also certain taxes on agricultural services. Although many exemptions exist across the board in terms of taxation on agricultural endeavors several routine farm business practices are still taxable. Services such as data processing, waste collection, and pesticide control do not qualify for any of the above stated agricultural exemptions. Therefore, the practice of even fumigating a silo or barn is taxable under Texas law. However, exemptions do apply to many different types of agricultural machinery, which like the other exemptions, must be registered for, at which point it becomes "tangible personal property." Producers should keep in mind, however, that expenses for repair of such property are still taxable. (V.T.C.A., Tax Code, 151.316).

#### IV. EXCISE TAXES

An excise tax is a tax levied on the purchase of a specific good. The most common excise tax that a direct farm business may encounter is the motor fuel excise tax. Under federal statutes, certain uses of fuel, such as farm use, are nontaxable. The user, therefore, may be able to seek a credit or refund of the excise tax paid for fuel. Credits or refunds are available for many types of fuel.

##### A. Federal Fuel Excise Taxes

The Internal Revenue Code (26 U.S.C. §§ 4081 and 4041) and regulations (26 C.F.R. §§ 48.6420-1 and 48.4041-9) govern federal fuel taxation. *IRS Publication 510: Excise Taxes* and *IRS Publication 225: Farmer's Tax Guide* explain fuel excise taxes as well as what uses of fuel qualify for tax credits and refunds. Federal excise taxes on fuels range from 18.3 to 24.3 cents per gallon. Fuel used on a farm for farming purposes and fuel used for off-highway business purposes are exempt from excise taxes. One may claim the tax as a credit at the end of the year or obtain quarterly refunds of the tax, depending on the fuel's use. To substantiate claims, the IRS requires businesses to keep certain records, such as the name and address of the person who sold the fuel.

The term "farm" includes operations such as livestock, dairy, fish, poultry, fruit, fur-bearing animals, and truck farms, orchards, plantations, ranches, nurseries, ranges, and feed yards, as well as greenhouses used primarily for the raising of agricultural or horticultural commodities.

<sup>54</sup> [http://www.window.states.tx.us/taxinfo/taxpubs/tx96\\_1112.pdf](http://www.window.states.tx.us/taxinfo/taxpubs/tx96_1112.pdf)

"Farming purposes" include cultivating crops, raising livestock or other animals, operating and maintaining the farm and its equipment, handling and storing raw commodities, and caring for trees if they are a minor part of the overall farm operation. Fuel used for aerial spraying also qualifies for an exemption, including fuel used to travel from the airfield to the farm. Non-farm uses that *are subject to the excise tax* include fuel used off the farm such as on the highway for transportation of livestock, feed, crops or equipment; in processing, packaging, freezing, or canning operations; and in processing crude maple sap for syrup or sugar. Farmers can recoup excise taxes paid on fuel used on the farm for a farming purpose by using form 4136 to claim a credit on their business income taxes at the end of the year.

The IRS also exempts fuel used off-highway in a trade, business or income producing activity. This exemption does not apply to fuel used in a highway vehicle registered or required to be registered for use on public highways, including boats. Nontaxable uses in this category include fuels used in stationary machines such as generators, compressors, power saws and similar equipment; fuels used for cleaning purposes; and fuel for forklift trucks, bulldozers, and earthmovers. Some fuels that would not qualify for the farming exemption may qualify for this exemption, for instance fuel used to boil sap into syrup. A business can recoup excise taxes on fuel used off highway for business purposes either by claiming a credit (using Form 4136) or a refund. Taxpayers use Form 8849 and Schedule 1 (which details the federal excise tax rates) to claim a refund of excise taxes paid on fuel used off-highway for business purposes. Taxpayers that pay over \$750 in excise taxes in one quarter can claim a refund at the end of a quarter rather than waiting until the end of the year. Claims not exceeding \$750 in one quarter can carry over to the next quarter.

## ***B. Texas Motor Fuel Tax Laws***

Motor Fuel taxation under Chapter 162 of the Vernon's Texas Code Annotated governs fuel taxation in Texas. The laws specifically define agricultural purposes as being associated with the following activities: (1) cultivating the soil; (2) producing crops for human food, animal feed, or planting seed or for the production of fibers; (3) floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers and nonsoil media; (4) raising, feeding, or keeping livestock or other animals for the production of food or fiber, leather, pelts, or other tangible products having a commercial value; (5) wildlife management; and (6) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure. (V.T.C.A. 162.001(a)). The majority of motor fuel taxes under this chapter concern transportation of fuel, which may not be the main concern of one interested in the direct farm businesses. However, there are motor vehicle sales and use taxes for which there may be agricultural exemptions for agricultural production machines.

In 2011, House Bill 268 passed in the Texas Legislature, and it requires that a person claiming an exemption from sales tax on the purchase of certain items used in the production of agricultural and timber products must provide a registration number issued by the Comptroller of Public Accounts on the exemption certificate issued to the seller. Necessary forms for motor vehicle taxes can be found at the website for the Texas Comptroller of Public Accounts.<sup>55</sup> Another area of taxation that Texas utilizes in compensating for the state's lack of income tax revenue applies to fuel used for vehicles, both on and off the farm. As of HB 268's passage, farm machines, trailers and semitrailers used primarily for farming and ranching, including machines and trailers used primarily in poultry operations and on feedlots, qualify for exemption from the Texas motor vehicle tax. (V.T.C.A., Tax Code, 162.102). That being said, producers should contact the Texas Comptroller of Public Accounts to register for the exemption and determine how to properly be exempt as the tax is accounted for at the pump. (i.e. your farm vehicle will still be paying motor fuel taxes if you simply go fill up at the gas station without registering for the exemption). In general, Texas imposes a tax of twenty (20) cents per gallon. Furthermore, dyed diesel used exclusively to power non-highway agricultural equipment, such as a tractor or combine, on a farm or ranch can be purchased tax-free. Unlike the sales and use tax, agricultural use for purposes of the fuel tax exemption also includes those types of equipment used in timber operations or for wildlife management. (see V.T.C.A., Property Tax Code, 23.51(7)).

## V. TEXAS FRANCHISE AND PROPERTY TAXES

Direct farm businesses must pay local property taxes each year on real property owned by the business. If a farmer leases land from an owner who is otherwise exempt from paying property taxes (e.g., a governmental entity), the farmer most likely must nonetheless pay property taxes on the rented land. Agricultural land and pasture land are valued based on numerous factors, including, but not limited to, its productivity, which depends on the land's location, soil fertility, and the crop planted (V.T.C.A. 23.51). To value the land, an appraiser will determine the soil type and crop planted and then assesses the land using charts. Agricultural land owners should reference Chapter 23 of the Texas Tax Code for more specific information.

Franchise taxes apply to different form of business entities such as partnerships, corporations, LLCs, business trusts, joint ventures, etc. A full discussion of the franchise tax is beyond the

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<sup>55</sup> <http://www.window.state.tx.us/taxinfo/taxforms/14-forms.html>

scope of this business guide, but the Texas Comptroller of Public Accounts provides helpful resources through its website.<sup>56</sup>

Finally, unlike the sales and use tax and the franchise tax, property taxation in Texas is, at least in most cases, imposed by local governments and taxing entities, rather than the State Comptroller of Public Accounts. Most often counties have appraisal districts used in determining the value of a certain piece of property. Land that qualifies for an agricultural appraisal has a lower taxable value for property tax purposes. Qualified agricultural lands are based on the land's capacity to produce agricultural products, rather than its fair market value. Agricultural appraisal varies from county to county, but the state of Texas provides useful information for surveys as well as the appropriate forms for those producers wishing to gain more knowledge about the property taxes in certain areas of the state.<sup>57</sup> (V.T.C.A., Tax Code, 23.41-57).

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<sup>56</sup> <http://www.window.state.tx.us/taxinfo/franchise/>

<sup>57</sup> <http://www.window.state.tx.us/taxinfo/proptax/agland/index.html>

## VI. CHECKLIST

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Obtained the necessary forms and established proper taxing procedures for your business entity?
- Obtained the appropriate forms and established good record keeping procedures for:
  - income, Medicare and social security tax withholdings?
  - collection and remission? Don't forget about local sales taxes on top of the state's!
  - fuel excise tax reimbursements and credits?
- Looked up your land's assessed value and calculated your current property taxes and how changed land uses could alter the tax value?

## KEY CONTACT INFORMATION

### U.S. Internal Revenue Service (general help)

Ph: 1-800-829-1040 (assistance for individuals)

Ph: 1-800-829-4933 (assistance for businesses)

### IRS – Local Texas Offices

<http://www.irs.gov/uac/Contact-My-Local-Office-in-Texas>

## CHAPTER 5: LABOR AND EMPLOYMENT

Several federal and Texas laws address labor and employment issues in the agricultural context. This labor and employment chapter is meant to provide an overview of fair labor standards, migrant and seasonal workers protections, occupational health and safety, workers compensation, and employee liability. These are only some of the employment issues a direct farm business might encounter. The chapter should not be understood as all-inclusive, and in all situations an attorney should be consulted regarding compliance with labor and employment laws applicable to a specific operation.

### **I. FAIR LABOR STANDARDS**

#### ***A. The Fair Labor Standards Act***

The Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) is the federal law that establishes minimum wages (currently \$7.25) and maximum hours (forty hours, over which amount employees must be paid time and a half), and prohibits employment discrimination and child labor (29 U.S.C. §§ 206; 207; 206; 212, respectively).

However, *there are exceptions to these laws for agricultural employees* (29 U.S.C. § 213; 29 C.F.R Part 780). To qualify for the exceptions, the employee's activity must fall under the Act's definition of agriculture, which is "farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities. . . the raising of livestock, bees, fur-bearing animals, or poultry, or any practices (including forestry or lumbering operations) performed by a farmer or on a farm *as incident to or in conjunction with* such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" (29 U.S.C. § 203(f), emphasis added).

The Department of Labor divides the definition into two branches: primary agriculture and secondary agriculture (29 C.F.R. § 780.105). The primary definition includes farming in all its branches and the specific farming operations enumerated in the above definition (*Id.*) These activities always qualify for the agricultural exemption, regardless of the employer's purpose in performing the activities (for instance, a factory owner operates a farm for experimental purposes for the factory) (29 C.F.R. § 780.106). The secondary meaning of "agriculture," which encompasses operations that do not fall within the primary meaning of the term, requires that work be " . . . performed by a farmer or on a farm as an incident to or in conjunction with such [primary agriculture] farming operations . . ." (*Id.*) Analysis of whether the work is performed "by a farmer" (29 C.F.R. §§ 780.130-780.133) or "on a farm" (29 C.F.R. §§ 780.134-136) and is "incidental to or in conjunction with" the primary agricultural farming operations (29 C.F.R.

§§780.137-780.157) is complex and highly fact specific. If employees are doing work that may be “incidental or in conjunction with” the primary farming activity, or doing work off the farm, or performing work on other farmer’s products, the DFB should consult an attorney or contact the local U.S. Department of Labor’s Wages & Hours division before relying on the agriculture exemption. Contact information is available **online**.<sup>58</sup> For more information, the U.S. Department of Labor maintains an **agriculturally oriented compliance webpage**.<sup>59</sup>

#### *Minimum Wage & Overtime Exceptions*

Agricultural employees always are exempt from federal *overtime* requirements (29 U.S.C. § 213(b)(12)). The agricultural exemption applies on a workweek basis. An employee who performs any activities that do not qualify under the definition of agriculture would not be exempt from FLSA rules (under the Agricultural Labor Exemption) for that workweek (29 C.F.R. § 780.10). The Act also exempts from the overtime requirements a significant number of agricultural-related activities, including (1) drivers or driver's helpers making local deliveries if the employee is compensated on a per trip basis; (2) agricultural employees who are also employed in affiliated livestock auctioning; (3) employees involved in the processing of maple sap into sugar or syrup; (4) employees engaged in the transportation of fruits or vegetables from the farm to the place of first processing or first marketing within the same state; and (5) employees that transport other employees to any point within the same state for the purpose of harvesting fruits or vegetables (29 U.S.C. §§ 213(b)(11), (13),(15), & (16)).

Agricultural employees (as well as fishing and fish farming employees) are exempt from *both the federal minimum wage and overtime* requirements if any of the following apply (29 U.S.C. § 213(a)):

- the employer did not use more than 500 man days of labor during any quarter of the preceding year. A man day is defined as any day where any employee performs agricultural work for at least one hour;
- the employee is an immediate family member;
- the employee is a hand laborer that is paid on a piece rate basis who commutes from his/her home each day and was not employed in agriculture more than 13 weeks in the preceding year;
- the employee is a family member under the age of 16 working on the same farm as the parent or surrogate parent that is paid on a piece rate basis and is paid at the same rate as those over 16; OR
- the employee is principally engaged in the production of range livestock.

<sup>58</sup> <http://www.dol.gov/compliance/>

<sup>59</sup> <http://www.dol.gov/compliance/topics/wages-agricultural.htm>.

### *B. Federal Child Labor Laws*

Generally, children must be at least 16 to work on a farm during school hours (29 C.F.R. § 570.2). During non-school hours, children who are 14 can work on a farm, and 12 and 13 year-olds may work on a farm with parental consent or when working on the farm with the parent. Children under 12 may only work on their family's farm or on a farm that is exempt under 29 U.S.C. § 213(a)(6) (29 U.S.C. § 213(c)(1)). Children under the age of 16 cannot work in agriculture in a particularly hazardous position, except when employed by their parents on a farm owned or operated by the parents (29 U.S.C. § 213(c)(2)). Hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous farm chemicals. The full list is available at 29 C.F.R. § 570.71.



Under very limited circumstances, ten to twelve year olds can be employed off of the family farm for hand harvesting, but an employer must apply for the waiver and demonstrate that the industry seeking to employ the children will suffer severe disruption without the child labor (29 U.S.C. § 213(c)(4); 29 C.F.R. §§ 575.1-575.9). However, as noted below, the Texas child labor laws place additional restrictions on employers.

### *C. Texas Minimum Wage and Overtime Laws*

The Texas Minimum Wage Act is found in Chapter 62 of the Texas Labor Code. (V.T.C.A., Labor Code, 62.001 *et seq.*). It requires employers to give each employee a written earnings statement at the end of every pay period. (V.T.C.A., Labor Code, 62.003). ("An employer shall pay to each employee the federal minimum wage under Section 6, Fair Labor Standards Act of 1938 (29 U.S.C. Section 206)." (V.T.C.A., Labor Code, 62.051)). The Texas minimum wage is the same as the federal minimum wage, which now sits at \$7.25/hour. However, the Act does not impair the ability the ability for employees to collectively bargain for a wage higher than \$7.25. (V.T.C.A., Labor Code, 62.005). Certain exemptions exist for employment of specific types of people. Employers should contact the Texas Workforce Commission if they are curious, but one example pertains to employment of family members. "An employer is exempt with respect to employment of the employer's brother, sister, brother-in-law, sister-in-law, child, spouse, parent, son-in-law, daughter-in-law, ward, or person in loco parentis to the employee." (V.T.C.A., Labor Code, 62.157).

As discussed in the introductory chapter, Congress has authority to regulate activities that *affect* interstate commerce. The FLSA fully exercises this authority and covers nearly every activity an employee may engage in, such that it is very rare for the FLSA to be inapplicable.

The FLSA covers employees who “in any workweek [engage] in commerce or in the production of goods for commerce, or [work for] an enterprise engaged in commerce or in the production of goods for commerce” (29 U.S.C. § 206(a)). Under the FLSA, “commerce means trade, commerce, transportation, transmission, or communication among the several States” (29 U.S.C. § 203(b)).

Thus, the FLSA applies to an employee engaged in commerce or production of goods for commerce. According to DOL regulations, an employee engages in commerce if goods arrive from out of state for production, such as seed, fertilizer, or equipment, and the employee regularly unloads these goods (29 C.F.R. § 779.103). If a buyer incorporates the goods into another product that then leaves the state, the goods were produced for commerce, and the employee that produced or handled the goods engaged in commerce (29 C.F.R. § 779.104). Although this may seem to limit the Act so that it does not apply to Texas farmers who sell their goods only in Texas, that is likely not the case. Courts have expansively applied the definition of “commerce” to cover every enterprise possible, and the federal Department of Labor generally considers most agricultural production to be part of interstate commerce.

The second situation where the FLSA applies is when an enterprise engages in commerce or production of goods for commerce. In this situation, the FLSA entitles all employees of the enterprise to the minimum wage, regardless of whether they themselves engage in commerce or production of goods for commerce. An enterprise engages in commerce or the production of goods for commerce if the gross volume of sales made or business done exceeds \$500,000 *and* any employee engages in commerce, or the production of goods for commerce, or handles, sells, or otherwise works on goods or materials that moved in or were produced for commerce (29 U.S.C. § 203(s)(1)). The expansive application of the terms “engages in commerce” and “production for commerce” makes it extremely difficult for a business to be exempt.

Finally, although it is extremely rare, it is theoretically possible for an employer to be outside the scope of the FLSA and thus responsible for paying the Texas minimum wage rate. Businesses believing the FLSA does not cover their activity should consult with an attorney specializing in labor law or department of labor official, preferably from the Texas district office.

### ***D. State Child Labor Laws***

#### *Texas Child Labor Laws*

Texas laws concerning child labor contain many prohibitions similar to that of the FLSA and are governed under Chapter 51, within the Texas Labor Code, which are administered by the Texas Workforce Commission. (V.T.C.A., Labor Code, 51.001 *et seq.*). Similar to the FLSA, the purpose of Texas' child labor laws is to ensure that no child is employed in an occupation or manner, which would be detrimental to the child's safety, health, or well-being. (V.T.C.A., Labor Code, 51.001). Certain occupations, many agricultural in nature, are exempt from the laws governing child labor. Some of the following exemptions are applicable for purposes of this section: The chapter does not apply to (1) children employed in agriculture during a period when the child is not legally required to be attending school (V.T.C.A., Labor Code, 51.003(a)(4)); children employed in agriculture, cultivating and tilling the soil (V.T.C.A., Labor Code, 51.003(b)(1)); children employed in agriculture, producing, cultivating, growing, and harvesting an agricultural or horticultural commodity (V.T.C.A., Labor Code, 51.003(b)(2)); children employed in dairying (V.T.C.A., Labor Code, 51.003(b)(3)); and children employed in agriculture, raising livestock, bees, fur-bearing animals, or poultry. (V.T.C.A., Labor Code, 51.003(b)(4)).

Except as otherwise provided, an employer commits an offense if they hire anyone under the age of fourteen (14). (V.T.C.A., Labor Code, 51.011). For children aged fourteen and fifteen, it is an offense for the employer to require the child to work more than eight (8) hours a day, or forty-eight (48) hours a week. (V.T.C.A., Labor Code, 51.013(a)). Furthermore, an employer commits an offense if employing a child, aged fourteen or fifteen, if the child works between 10:00 p.m. and 5:00 a.m. on days followed by school days or between midnight and 5:00 a.m. if the day is not followed by a school day. (V.T.C.A., Labor Code, 51.013(b)). The Texas Workforce Commission, or an inspector selected by the commission, is authorized to inspect any facility, during normal business hours, where the commission has reason to believe there exists child labor. (V.T.C.A., Labor Code, 51.021). If any of these provisions are violated by an employer, the commission is authorized to assess a penalty, no more than \$10,000, to be based on the seriousness of the violation, the history of previous violations, the amount necessary to deter future violations, efforts to correct the violation, and other matter that justice may require. (V.T.C.A., Labor Code, 51.033 (c)).

## **II. OCCUPATIONAL SAFETY AND HEALTH**

### ***A. The Occupational Safety and Health Act***

The federal Occupational Safety and Health Act (OSHA) (29 U.S.C. Chapter 15) and implementing regulations (29 C.F.R. Parts 1900-2009) establish safety and health standards for agricultural employees. The Act does not cover self-employed persons or farms that employ only the farmer's immediate relatives. Additionally, the funding appropriations bill for 2009 (as well those of the previous thirty years) prohibits the Occupational Safety and Health Administration (OSHA) from spending any funds on enforcement against farms that have fewer than ten employees and have not had a temporary labor camp in the previous twelve months (Fiscal Year 2009 Omnibus, P.L. 111-8 (3/11/09)). This means that, technically, the law and regulations apply to small farms, but functionally, OSHA cannot take actions against small farmers that fail to comply with the rules.

The OSHA regulations for farms are mostly in 29 C.F.R. Part 1928. The regulations require roll-over protective structures for tractors, protective frames and enclosures for wheel-type agricultural tractors, safety mechanisms for farming equipment and provision of bathrooms and hand washing facilities for field sanitation (29 C.F.R. §§ 1928.51, 1928.52-.53, 1928.57, and 1928.110, respectively). Part 1928 incorporates some regulations from Part 1910, including requiring employers to maintain minimum standards at temporary labor camps, communicate information to employees on hazardous chemicals (discussed in more detail below), retain DOT markings, placards and labels, store and handle anhydrous ammonia safely, TSD Here to safety standards in logging operations, attach a "slow moving vehicle" sign on any equipment that travels at less than 25 miles per hour on public roads, and institute monitoring of and controls for employee's exposure to cadmium (29 C.F.R. §§ 1910.142, 1910.1200, 1910.1201, 1910.111(a)&(b), 1910.266, 1910.145, and 1910.1027, respectively). *Agricultural operations are exempted from all the other provisions of Part 1910, which establishes operational safety standards* (29 C.F.R. § 1928.21(b)).

Although exempt from many of the operational standards, agricultural employers are still subject to several other important OSHA provisions and regulations pertaining to signs, record keeping, injury reporting, and first aid training. Employers must post signs in the workplace notifying employees of the protections OSHA provides (29 C.F.R. § 1903.2). Employers must keep records of all work related injuries that are a new case and qualify as reportable (29 C.F.R. § 1904.4). An injury qualifies as reportable if it causes death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness or if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional (29 C.F.R. § 1904.7). Employers who never employ more than 10 employees at any given time do not need to keep OSHA injury and illness records, unless OSHA informs them in writing that they must keep such records (29 C.F.R. § 1904.1). However, these employers must still report any fatalities and any hospitalizations of three or more employees. (*Id.*) If an incident kills an employee or hospitalizes more than three employees, employers must report the incident to OSHA within eight hours (29 C.F.R. § 1094.39). The employer can report orally

by phone by calling their area OSHA office or by calling OSHA's central line at 1-800-321-OSHA (1-800-321-6742). (*Id.*) At the end of every year, employers must review their log of injuries, ensure and certify its accuracy, and provide a report to OSHA (29 C.F.R. § 1904.32). Employers must keep these records for five years (29 C.F.R. § 1904.33). Lastly, OSHA's hazard communication regulations require employers to maintain information on how to handle and detect dangerous chemicals in the workplace, as well as provide training and information to employees (29 C.F.R. § 1910.1200). The regulations do not apply to toxic substances regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Instead, FIFRA requirements for labeling/posting apply.

The Occupational Safety and Health Consultation (OSHCON) program is a free service available to private Texas employers through the Texas Department of Insurance, Division of Workers' Compensation, and their website is a helpful resource for employers seeking such consultation.<sup>60</sup>

### ***B. Federal Insecticide, Fungicide and Rodenticide Act***

The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Chapter 6) requires the U.S. Environmental Protection Agency (EPA) to regulate the production and use of farm chemicals. Pursuant to FIFRA, the EPA has promulgated a Worker Protection Standard (WPS) for agricultural pesticides. The standard requires employers to provide safety training and access to information on pesticides used on the farm. Employers must protect workers from exposure during pesticide mixing and application, as well as notify workers and restrict entry to sites after application. Finally, employers must provide adequate soap and water for clean up, and emergency assistance if a worker is injured by a pesticide. The EPA has a manual for employers on how to comply with the WPS, which is available **online**.<sup>61</sup>

## **III. MIGRANT AND SEASONAL WORKERS**

### ***A. The Migrant and Seasonal Worker Protection Act***

The Migrant and Seasonal Worker Protection Act (MSWPA) (29 U.S.C. Chapter 20) and its regulations (29 C.F.R. Part 500) establish standards for the employment of migrant and seasonal agricultural workers. It also requires employers to make certain disclosures and keep employment records.

#### *Hiring*

<sup>60</sup> <http://www.tdi.texas.gov/oshcon/>

<sup>61</sup> <http://www.epa.gov/oecaagct/htc.html>

Some direct farm business may choose to use a Farm Labor Contractor (FLC) to obtain migrant or seasonal workers. FLCs recruit, pay, and transport workers to the needed locations. In return, the direct farm business pays the FLC a fee. FLCs must register and obtain a Certificate of Registration with the U.S. Department of Labor pursuant to the MSWPA (29 C.F.R. § 500.1(c)). An employee of a registered farm labor contractor must obtain a Farm Labor Contractor Employee Certificate of Registration (29 C.F.R. § 500.40). The direct farm business should ensure that it deals only with a registered FLC.

If, instead of contracting with an FLC, the owner or an employee of the business does the recruiting of the workers, the business need not register as a farm labor contractor if it qualifies as a family business or as a small business (29 C.F.R. § 500.30). If the owner of the farm or their immediate family member does the labor contracting, the business qualifies for the family business exception (29 C.F.R. § 500.20(a)). If the business used less than 500 man-days of seasonal or migrant labor during every quarter of the preceding year, it qualifies for the small business exception (29 C.F.R. § 500.30(b)). The regulation defines a man-day as any day where an employee performs agricultural labor for at least an hour. The small business exception does not apply to businesses that solely are agricultural labor contractors.

### *Wages*

Employers must pay migrant and seasonal workers when wages are due, which must be at least every two weeks (29 C.F.R. § 500.81)

### *Disclosures*

FLCs and employers not exempt from the Act must disclose certain information to the employee at the time of recruitment, including (1) the location of the work, wage rates, the type of work involved; (2) the period of employment; (3) any transportation or housing to be provided and how much this will cost the employee; (4) whether workers' compensation or unemployment benefits are provided, and if so, disclosure of the insurance company's information; (5) whether the operation is the target of a strike; and (6) any arrangement whereby the employer is to receive a commission from another establishment for sales made to workers (29 U.S.C. § 1821(a); 29 C.F.R. § 500.75(b)). The employer must display and maintain a poster provided by the Department of Labor outlining employee rights under the MSWPA (29 U.S.C. § 1821(b); 29 C.F.R. § 500.75(c)). The employer must provide the terms of employment in writing (29 C.F.R. § 500.75(d)).

Information must be provided to the worker in his/her own language, where necessary and reasonable (29 U.S.C. § 1821(g); 29 C.F.R. 500.78).

### *Providing Housing or Transportation*

If the employer provides housing, the employer must disclose in writing, or post in a conspicuous place, the terms of such housing (29 U.S.C. § 1821(c); 29 C.F.R. § 500.75(c)). A state or local health authority (or other appropriate entity) must certify that any housing the employer provides complies with federal health and safety standards (29 C.F.R. §§ 500.130, 500.135). Likewise, the employer must insure any transportation the employer provides and it must comply with vehicle safety standards (29 C.F.R. §§ 500.100, 500.121).

### *Recordkeeping*

Employers must keep individual employees records for the following: (1) the basis on which wages are paid; (2) the number of piecework units earned, if paid on a piecework basis; (3) number of hours worked; (4) total pay period earnings; (5) specific sums withheld and the purpose of each sum withheld; and (6) net pay. Employers must keep the records for three years and *provide all the information to the employee no less often than every two weeks* (29 U.S.C. § 1821(d); 29 C.F.R. § 500.80).

### *Prohibitions*

The MSWPA prohibits employers from requiring that migrant or seasonal workers purchase goods or services solely from their employer (29 U.S.C. § 1829(b); 29 C.F.R. § 500.73).

### *H-2A Visas*

If there is a seasonal shortage of domestic agricultural workers, a direct farm business may be able to recruit foreign agricultural workers under the H-2A visa program of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(H)(ii)(a)) and its accompanying regulations (8 C.F.R. § 214.2(h)(5) (INA regulations) and 20 C.F.R. §§ 655.90-655.215 (Department of Labor Regulations)). The employer must petition for certification to recruit foreigner workers and demonstrate a shortage of domestic workers. If certified, the employer must comply with several requirements, including ongoing recruiting of domestic workers and providing housing, meals and transportation to foreign recruited workers. The MSWPA does not apply to workers employed under the H-2A visa program, but H-2A employers must comply with all other federal laws such as the FLSA and OHSA.

The Department of Labor maintains a **website**<sup>62</sup> that provides step-by-step instructions on how the H-2A program works, including links to forms.

### ***B. Unpaid Interns***

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<sup>62</sup> <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>

For many small farms, hiring unpaid interns is a common practice. They provide much needed labor, and the intern benefits by receiving valuable mentoring and experience. However, if the intern is doing work on the farm that contributes to the farm's profitability, he or she is an employee and the farm business must take care to comply with applicable employment laws. If a farm qualifies for the minimum wage exception delineated above (employing fewer than 500 man days per quarter), federal and Texas rules set no minimum wage, thus allowing employers to not pay interns. This is somewhat unusual – many states have minimum wages, even for agricultural employees, and there are numerous instances of the government assessing small farms large fines for violating minimum wage rules. If interns are not receiving pay, the farm should nonetheless have them clock in and out as if they were paid employees and keep meticulous records of who worked for them, for how long, and when. If there ever is a problem in which a disgruntled intern complains to the Department of Labor, and the farm becomes the subject of an investigation, it is important to have a paper trail documenting the farm's compliance with the laws. Even if an internship is exempt from the minimum wage requirements, the farm is not exempt from complying with the other employment laws – for instance, OSHA and FIFRA rules still apply, housing and transportation must meet minimum standards, and workers' compensation (see discussion below) is necessary if the farm employs more than 400 man days per quarter. Farms employing paid and unpaid employees must count the unpaid employees' man-days towards the 400 for workers compensation.

Federal law authorizes employers to employ student-learners at less than minimum wage. Likewise, federal and state laws authorize apprenticeship programs to provide on-the-job training. In all cases, the employer must obtain certification or a permit from the Department of Labor, and the programs generally need to be affiliated with an accredited educational program. Although employers may pay a reduced wage for a limited period of time, these savings on cost of labor may not be worth the added burden of governmental bureaucracy and collaborating with accredited educational programs.

Making an internship a positive experience for the farmer and the intern requires investing much more effort than simply expecting the intern to show up and work. It requires carefully recruiting and selecting interns mentally and physically prepared for the nature of the work and developing a realistic plan for what and how they will learn. The New England Small Farms Institute publishes two guides that can assist in hiring interns and ensuring positive experience. *Cultivating a New Crop of Farmers – Is On-Farm Mentoring Right for You and Your Farm? A Decision Making Workbook*, for \$20, contains worksheets covering all aspects of mentoring. *The On-Farm Mentor's Guide – Practical Approaches to Teaching on the Farm*, for \$35, provides more detailed guidance. Although they require an investment of some money, both are valuable resources for

ensuring both sides get the most out of the internship experience. The publications are available through NESFI's website.<sup>63</sup>

One of the best ways to ensure a positive experience is to develop an internship agreement, outlining the hours and work expected, the housing provided (if any), food and fresh produce arrangements, and what mentoring the farmer will provide. Both the farmer and the intern should sign the agreement. Clearly defined expectations at the outset will help prevent conflicts, or worse yet, an intern that abandons the farm mid-season. It will also be beneficial to the farmer to have a clearly delineated agreement in case of a Department of Labor audit or inspection.

#### IV. EMPLOYER LIABILITY

Many injuries can occur on a farm. If a farming operation hires employees, the owner must take into consideration the attendant risk that an employee may be injured. An employer should (and must in circumstances governed by OSHA) take affirmative measures to ensure a safe workplace. When prevention fails, employers may be liable for an employee's injury, or when an employee commits a tort (an injury or wrong) against a fellow employee or third party. This section discusses the employer's liability exposure from an injured employee and the employer's potential liability arising from a situation in which an employee injures a third party.

If an employee of a direct farm business is injured, the injured employee can seek compensation in *one of two ways*-- a claim under the Texas Workers' Compensation Act or a common law action for tort. An employee may only seek damages through tort if they elect not to receive workers' compensation and in some cases the availability of compensation will mean that damages through tort are wholly unavailable. (*Medina v. Herrera*, 927 S.W.2d 597(1996)).

##### A. Workers' Compensation

The goals of *The Texas Workers' Compensation Act* (V.T.C.A., Labor Code, 401.001 *et seq.*) generally require employers to pay compensation to their employees for injuries or deaths sustained on the job, and guarantee that the employees are treated with dignity and respect by the employer (V.T.C.A., Labor Code, 402.021). Except for public employers and as otherwise provided by law, an employer may elect to obtain workers' compensation insurance coverage. (V.T.C.A., Labor Code, 406.002). Therefore, if the employer can prove to the Workers' Compensation Commission that they have sufficient capital to pay for workers injuries, they may self insure. Payments under the workers compensation law are an injured employee's exclusive rights and remedies – they may not file a separate lawsuit for their injuries (V.T.C.A.,

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<sup>63</sup> <http://www.smallfarm.org/main/bookstore/publications/>

Labor Code, 408.001). This protects employers from unpredictable jury awards as well as the costs of litigation.

The Texas Workers' Compensation Act defines "agricultural labor" as the planting, cultivating, or harvesting of an agricultural or horticultural commodity in its unmanufactured state. (V.T.C.A., Labor Code, 406.161). For agricultural purposes the Act is intended to provide a remedy for personal injuries for migrant workers and seasonal workers. (V.T.C.A., Labor Code, 406.162(a)(1,2)). The Act is more specific about employees other than migrant and seasonal workers, which for claims subsequent to 1991, applies to employers with a gross annual payroll of \$25,000 or more, as well as employers with three or more non-migrant/seasonal employees. (V.T.C.A., Labor Code, 406.162(a)(3)(B)). Because many farms, particularly smaller level farms in the direct farm business, employ family members, it is important to know what is meant by the gross annual payroll. The gross annual payroll of a person includes any amount paid by the person to a labor agent for the agent's services and for the services of migrant or seasonal workers but does not include wages paid to the person or member of the person's family if a sole proprietorship, a partner in a partnership (including a member of the partner's family), or a shareholder of a corporation when the shareholders are family members. (V.T.C.A., Labor Code, 406.162(c)).

Texas has placed particular focus on migrant and seasonal workers, because they often make up a large part of the agricultural labor in the state. As a medium to help these workers as well as employers seeking labor there exist labor agents. A labor agent is a person who is either a person who is a farm labor contractor for purposes of the Migrant and Seasonal Agricultural Worker Protection Act, or who otherwise recruits, solicits, hires, employs, furnishes, or transports these workers who work for the benefit of the third party employer. (V.T.C.A., Labor Code, 406.161(3)). If the labor agent does not have workers' compensation insurance coverage, the employer working with the labor agent is jointly and severally liable with the labor agent in an action to recover damages for personal injuries or death suffered by the migrant or seasonal worker. (V.T.C.A., Labor Code, 406.163(b)).

### ***B. Employer Liability When Exempt from Workers' Compensation Requirements***

In cases where employers are exempt from mandatory workers' compensation insurance coverage, Texas common law tort principles will determine an employer's liability for an employee's on-the-job injuries. A tort is an injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit. Torts are part of the *common law*, which is the body of laws and rules that courts create as they issue decisions.<sup>64</sup> The legislature can modify the common law by passing legislation. In several instances, the Texas legislature has

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<sup>64</sup> For this reason, many of the cites given are for cases that describe the rule, rather than for a codified law.

modified traditional common law rules and created special rules for tort liability within the employer-employee context.

Although there are many legally recognized harms, the most common claim is for negligence. Whether a person was negligent and caused an injury is a highly fact specific issue which courts must decide on a case-by-case basis. To avoid being negligent, an employer must use the standard of care to protect his/her employees from workplace injury that an ordinary, prudent and reasonable person would under the circumstances. The standard of care obligates an employer to protect against reasonably foreseeable injuries, not every injury that may occur. An employer is liable for defects or dangers that he/she reasonably should have had knowledge of and must warn employees of workplace hazards the employers knows of, or should know of. "Knows or should know of" requires that an employer must also act prudently and reasonably in discovering workplace dangers.

#### *Contributory Negligence of the Employee*

The doctrine of *contributory negligence* is a defense that bars an injured claimant from recovering any damages if they were primarily responsible for their own injury. Although the doctrine applies to injuries outside of an employer-employee relationship (discussed below), Texas legislation prohibits contributory negligence completely barring an employee's recovery. (V.T.C.A., Labor Code, 406.033(a)(1)). Rather, the award amount is reduced in proportion to the employee's contribution to their own injury. However, courts will look to see if an employee's injury was due to an employer's violation of a worker safety law, in which case the likelihood of any sort of contributory negligence defense is wholly void.

#### *Assumption of the Risk*

Assumption of the risk, like contributory negligence, is a defense that an employer can raise to completely bar an employee from recovering for workplace injuries. The defense is an implied or express agreement between the employer and employee that the employee assumes the risk of injury that is inherent to performing the tasks necessary to accomplish the job. Also similar to contributory negligence, Texas law does not allow the total defense of assumption of the risk in the employee-employer relationship. (V.T.C.A., Labor Code, 406.033(a)(2)). The employee assumes all the risks which he knows to exist and all those which are open and obvious. (*Louisiana Ry. & Nav. Co. of Texas, v. Disheroon*, 295 S.W. 250 (1927)). An employee only may assume known risks, and such risks do not include the risk of the employer's or co-employee's negligence. That is, the employer still has the duty to reasonably maintain a safe workplace. For instance, an employee helping with cattle assumes the risk of getting kicked and could not hold the employer responsible for any injuries resulting from a kick from a steer, but an employee helping harvest apples probably does not assume the risk of being knocked off a ladder by an errant cow in the orchard.

Traditionally in common law, if the court found an employee assumed the risk of the injury they suffered, the employee could not recover any damages from their employer. However, Texas legislation adopts the doctrine of comparative fault, in which defendants are only liable for the proportionate amount of damages they caused (V.T.C.A., Civil Practice and Remedies Code, 33.001 *et seq.*). Because Texas is a comparative fault state, assumption of risk is not a complete bar to recovery, but is simply a matter to be considered in deciding fault (*Price v. Consumers' Cotton Oil Co.*, 41 Tex.Civ.App. 47 (1905)).

#### *Employer Responsibility for Employees Injuring Others*

As noted in the previous section, many injuries can occur on a farm. This section discusses the employer's potential liability when an employee injures a third party (whether on or off-farm) or a fellow employee.

#### *Employees Injuring Third Parties*

Employers are not responsible for all wrongs their employees commit. Rather, under the doctrine of *respondeat superior*, an employer may be vicariously liable for the tortious conduct of an employee if the conduct was within the scope of employment (*Baptist Memorial Hosp. System v. Sampson*, 969 S.W.2d 945 (1998)).

For the employer to be liable, there must have been an employer-employee relationship, rather than that of an independent contractor. Generally, an employer cannot be held liable for the tortious acts of an independent contractor (*Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778 (2001)). Differentiating between an employee and an independent contractor depends on the facts of each individual case. A number of evidentiary factors may be taken into account, including the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and who provides the tools, materials, or equipment (*Baptist Memorial Hosp. System v. Sampson*, 969 S.W.2d 945, 947 (1998)). Of these, the right to control (not actual control) is the most important. (*Id.*) Although a written contract may establish an employer-independent contractor relationship, the relationship can be destroyed (converted into an employer-employee) relationship through the actions of the parties.

If the injury is determined to be caused by an employee, an employer is not liable if the employee was engaged in an activity outside the scope of employment (*Zarzana v. Ashley*, 218 S.W.3d 152 (2007)). An activity is outside the scope of employment if it occurs without the employer's direction or acquiescence. The primary test for determining whether an employee is acting within the course and scope of employment, for purposes of a claim of the employer's vicarious liability for an employee's tortious acts, is whether the employer has the right to direct and control the employee's performance at the time of the alleged negligent act. (*Arbaleaz v. Just*

*Brakes Corp.*, 149 S.W.3d 717 (2004); citing *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 542 (Tex. 2003). A common example is the employee that causes a traffic accident while making a delivery of farm produce to the market. If the accident occurred on the way to/from the market, the activity would be within the scope of employment. On the other hand, if the employee was on personal detour to another town for personal reasons unrelated to employer's business, the accident would be "outside the scope of employment," and the employer would not be liable. Of course, in either case, the employee would be personally liable for their negligence.

Employers may also be liable for their employees' tortious conduct under the theory of negligent hiring or retention. In these cases, if an employer knew or should have known that the employee was likely to harm someone, the employer is directly liable for their own negligence. In order to impose liability upon an employer under the doctrine of negligent hiring, there must be evidence that plaintiff's injuries were brought about by reason of employment of the incompetent servant and be, in some manner, job related. (*Dieter v. Baker Service Tools, A Div. of Baker Intern. Inc.*, 739 S.W.2d 405 (1987)). In Texas, liability for negligent hiring is not dependent on a finding that the employee was acting within the course and scope of his employment. (see *Salinas v. Fort Worth Cab. and Baggage Co.*, 725 S.W.2d 701 (Tex. 1987)).

If an employer is responsible for an employee injuring a third party, the allocation of damages is slightly different than in the employer-employee context. As discussed above, a claimant who contributes to their own injury will have their award reduced in proportion to the extent that their own negligence contributed to their injury (V.T.C.A., Civil Practice and Remedies Code, 33.001 *et seq.*). However, the law bars any recovery if a claimant contributed to their own injury in equal or greater degree than the defendant. (*Id.*) If multiple defendants may be liable for an injury (for instance, the retailer and manufacturer may be held liable in a products liability case), it used to be the case that each potential defendant could be liable for the full cost of the plaintiff's damages. This rule is known as joint and several liability. (V.T.C.A., Civil Practice and Remedies Code, 33.013(b)).

#### *Employees Injuring Other Employees*

Generally, an employer is not liable for the negligent actions of one employee against another employee. Rather, the injured party, at least in Texas, may bring suit against his/her fellow employee. (*Ward v. Wright*, 490 S.W.2d 223 (Tex. 1973)). However, there are several situations where the employer can be liable. Under the doctrine of negligent hiring or retention, if the employer knew, or had reason to know, that the negligent employee should not have been hired or should not have remained in his/her employ, the employer may be liable (*Dieter v. Baker Service Tools, A Div. of Baker Intern. Inc.*, 739 S.W.2d 405 (1987)). An employer has certain nondelegable and continuous duties to his employees, including the duties to furnish a reasonably safe place to work, warn employees of the hazards of employment, supervise

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**ADDITIONAL RESOURCES: Labor and Employment Law**

*The USDA's 63-page Summary of Federal Laws Affecting Agricultural Employees is a good primer on the federal labor and employment laws that are explained in the previous pages, and includes discussion of some federal laws not covered in this guide.*

<http://www.ers.usda.gov/Publications/AH719/>

*The U.S. Department of Labor (DOL) Compliance Assistance Guide has a subsection specifically directed to agricultural employers.*

<http://www.dol.gov/compliance/guide/>

*DOL also has a compliance assistance website that provides information on all of the major DOL laws regarding employment.*

<http://www.dol.gov/compliance/laws/main.htm>

employees' activities, and furnish reasonably safe instrumentalities with which to work; an employer must exercise ordinary care, based on standard negligence principles, in carrying out these duties. (*Coronado v. Schoenmann Produce Co.*, 99 S.W.3d 741 (Tex. 2003)). This means the employer can be held responsible for the supervisor's actions as if the employer had done the act.

These potential liabilities are one of many reasons it is important for farmers to have insurance that covers tort liability and the cost of defending a lawsuit. Although a general farm liability policy may cover some bodily injuries that could occur on the farm, such as injuries to trespassers, it likely does not cover everything. In particular, as discussed above, workers' compensation insurance may be necessary to cover injuries to employees. Therefore it is imperative that businesses discuss and verify liability coverage with their insurance agent.

## V. CHECKLIST

- Have you read and understood the agricultural exceptions to the FLSA and Texas minimum wage law? If you intend to take advantage of the exceptions, have you verified that employees' activities qualify?
- If you intend to employ minors, do you understand the restrictions on the hours and activities they may be employed in? Have you obtained necessary certificates for each minor?
- Have you obtained equipment and developed operational procedures necessary to comply with OSHA, FIFRA and other employee-protection laws?
- Have you complied with any necessary paperwork and disclosure requirements for migrant workers you may employ?
- If employing unpaid interns, have you established reasonable recordkeeping for ensuring and verifying compliance with all minimum wage, hours and worker safety laws? have you developed a plan for ensuring the experience meets yours and the intern's expectations?
- Have you discussed workers' compensation insurance, and any other employee liabilities, with your insurer or an attorney?

## KEY CONTACT INFORMATION

### U.S. Department of Labor, Wage and Hour Division (compliance assistance)

Ph: 1-866-4USWAGE (1-866-487-9243)

Houston District Office (1-713-339-5500)

### Texas Workforce Commission (general contact information)

<http://www.twc.state.tx.us/>

SECTION II – REGULATION BY PRODUCT



## 1 - DAIRY

Food safety authorities impose more regulations on dairy than almost any other food product. Multiple and intertwined federal and state laws and regulations impose very high standards on anyone handling dairy. Consequently, dairy farmers must work closely with regulators to ensure compliance with the complex regulations. Establishing a successful dairy takes significant effort, time, and money. This chapter will attempt to provide an overview of the various regulatory entities and dairy specific legal issues, but it cannot serve as a substitute for contacting the milk and dairy division of the Texas Department of State Health Services *before starting*.

### I. FEDERAL REGULATION

Federal law technically applies only to dairy operations engaged in interstate commerce. However, Texas law replicates many of the federal regulations. Furthermore, various federal services, such as the USDA grading system, are available to dairy farmers regardless of whether they sell products across state lines.

#### A. *The Food and Drug Administration*

The Food and Drug Administration (FDA), under the Federal Food, Drug, and Cosmetic Act provision prohibiting adulterated or misbranded food entering interstate commerce (21 U.S.C. § 331), generally requires all milk and milk products shipped across state lines to undergo pasteurization. All milk and milk products must comply with FDA's standards of identity (21 C.F.R. § 1240.61; parts 131; 133).<sup>65</sup> Further, all milk and milk products must also adhere to the Grade A Pasteurized Milk Ordinance (PMO), which is available on the **FDA's website**.<sup>66</sup>

The PMO is a 300-page model regulation published by the FDA. Many states, including Texas, apply the same standards as the PMO to sanitation of all milk products. (25 T.A.C. 217.29), whether the products are shipped in-state or out-of-state. Producers who are interested in starting a dairy direct farm business, including processing or production of milk products (cheese, ice cream, etc.), should read the PMO carefully. If a dairy wants to be on the Interstate Milk Shippers list, the National Conference of Interstate Milk Shippers requires the State Milk Sanitation Rating Authorities to certify that the dairy attains the milk sanitation compliance and

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<sup>65</sup> 21 C.F.R. § 1240.61 exempts certain cheeses from pasteurization if they are subject to alternative pasteurization procedures that are defined in the cheese's standard of identity, for instance aged for at least 60 days (21 C.F.R. part 133).

<sup>66</sup> <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSMModelDocuments/PasteurizedMilkOrdinance2007/default.htm>

enforcement ratings in the PMO. More information about inclusion on the IMS list is available on the **FDA's website**.<sup>67</sup>

The PMO prohibits the misbranding and adulteration of milk and milk products, requires permits and inspection of milk production and processing (including transportation), and prescribes labeling rules. The PMO also sets forth specific standards for production and processing. Grocery stores, restaurants, and other similar establishments that sell milk and milk products at retail are exempt from PMO requirements as long as no processing occurs and a permitted establishment supplies the milk. Brokers, agents, and distributors that purchase milk and milk products from permitted establishments are also exempt from permitting requirements. Because the Texas Department of Health (TSDH) oversees the permitting, the general obligations the PMO imposes on producers and processors are discussed in more detail in the section on Texas' laws and regulations.

### ***B. United States Department of Agriculture***

The USDA administers a variety of programs to promote dairy and benefit producers. A full listing of USDA dairy programs can be found online on the **AMS website**.<sup>68</sup> This section will only address grading and standards, milk marketing orders, and mandatory reporting.

#### *Grading and Standards*

The USDA provides grading and standards services to certify that products are of a certain quality (7 C.F.R. Part 58). To qualify for the grading and standards service, the USDA must first inspect a dairy plant and approve it as in compliance with USDA's sanitary standards. A producer can then request grading services. Using the program is voluntary, but it is important for producers who want to market to schools and institutions that require foods to meet certain standards. Because the program is voluntary, federal funds cannot cover grading services and producers requesting grading services must therefore pay for them. For more information on the benefits of the grading and standards program, as well as information on how to apply for inspection and certification, visit the **USDA's website**.<sup>69</sup>

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<sup>67</sup> <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/FederalStatePrograms/InterstateMilkShippersList/default.htm#rules>

<sup>68</sup> <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy>

<sup>69</sup> <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=DairyGrading&description=Dairy+Grading>

*Federal Milk Marketing Orders*

Milk marketing orders (7 C.F.R. Parts 1000-1170) are the USDA's means of stabilizing supply for consumers and providing uniform prices for producers. The Agricultural Marketing Service (AMS, a department of the USDA) uses the orders to set the minimum price dairy farmers must receive for fluid milk sold within a given geographic area (7 U.S.C. § 608c(5)). The orders apply to "handlers" (7 C.F.R. §§ 1030.30, 1032.30), which are anyone operating pool or non-pool plants, anyone receiving milk for processing and redistribution, or anyone brokering milk for processing (7 C.F.R. § 1000.9). AMS also considers cooperatives to be handlers, although they have a slightly different structure for determining payment amounts to their producers. (*Id.*) Most direct-to-consumer dairies are producer-handlers, which are producers who also process and distribute their own milk (7 C.F.R. §§ 1030.10; 1032.10). In order to be a producer-handler, a producer must be able to demonstrate that they own the animals and control their care, that they own the production and processing equipment, and that the operation is entirely at the owner's risk (7 C.F.R. §§ 1030.10(e); 1032.10(e)).

Prior to June 1, 2010, producer-handlers were not subject to the minimum price orders. However, on April 23, 2010, the USDA issued a final rule that subjects producer-handlers who distribute over 3 million pounds a month to the marketing orders (75 Fed. Reg. 21157). The effect of this new rule is that exceptionally large dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.<sup>70</sup>

There are currently 11 Federal Milk Marketing Order Areas. Texas is in the Southwest Order (7 C.F.R. Part 1007; <http://www.fmmatlanta.com/>). Each Order sets the minimum price a fluid milk handler must pay producers in that region. The intended use of the milk determines the "class," which in turn determines the price. (7 C.F.R. § 1000.40). Class I, which covers milk intended for consumption as milk, is the most valuable. Class II includes, but is not limited to, milk that will be cottage cheese, frozen desserts, sour cream, custards, pancake mixes, and buttermilk biscuits. Class III is milk for things such as cream cheese and cheeses that may be grated, shredded or crumbled. Class IV, the least valuable, is milk for butter, sweetened condensed milk and dried milk. Each month, the Milk Market Administrator will issue adjusted price orders based on the value of the components of the milk (butterfat, protein and other solids) and the price differential for the county where the product is delivered. The calculations are somewhat confusing, although the AMS attempts to explain the method on **its website**.<sup>71</sup>

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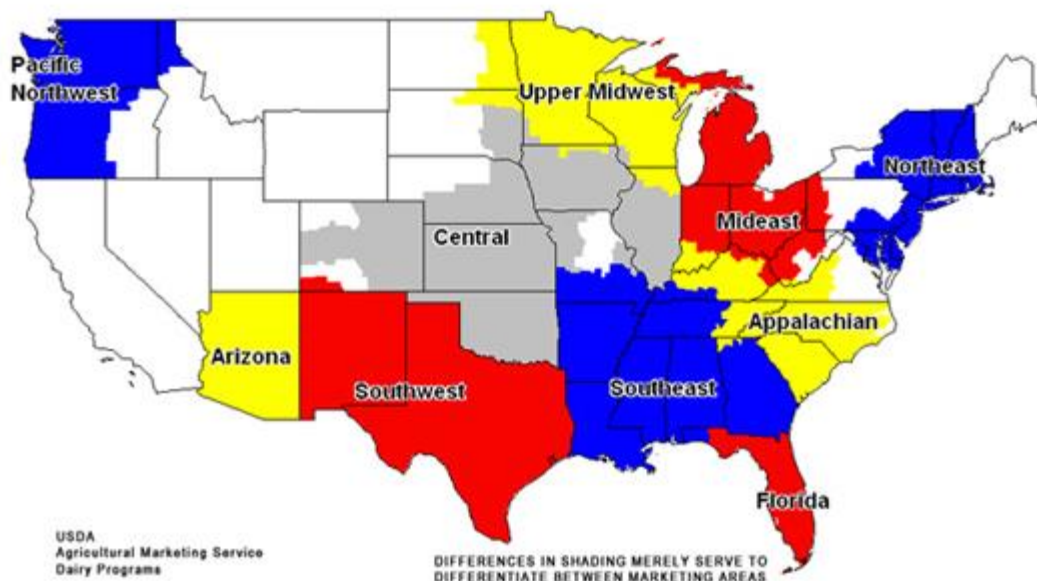
<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateO&navID=prodhandlerHearingFederalMilkMarketingOrders&rightNav1=prodhandlerHearingFederalMilkMarketingOrders&topNav=&leftNav=CommodityAreas&page=FMMOrder21&resultType=&acct=dgeninfo>

<sup>71</sup>

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateD&navID=IndustryMarketingan>

Dairy farmers who believe that their handler is not paying the mandated minimum price for milk should contact the director of the applicable Milk Marketing Order region.

## Federal Milk Marketing Order Areas



### *Mandatory Price and Storage Reporting*

Mandatory price and storage reporting requirements are authorized by amendments to the Agricultural Marketing Act (7 U.S.C. § 1637b). Mandatory reporting provides reliable information to calculate the pricing factors used in the Milk Marketing Order formulas. Even if a producer-handler is not subject to the Milk Marketing Order, they are likely still subject to some reporting requirements.

*Price reporting* requires manufacturers of cheddar cheese, butter, nonfat dry milk, and dry whey to submit weekly reports including the price, quantity, and moisture content, where applicable (7 C.F.R. §§ 1170.7, 1170.8). Manufacturers that process and market less than 1 million pounds of dairy *products* (cheese, butter and other items that are not fluid milk) per year are exempt (7 C.F.R. § 1170.9). Dairy products with a higher value than the basic commodity (for instance, kosher butter produced with a rabbi on site or organic milks) are also exempt from price reporting requirements (7 C.F.R. § 1170.8). It is the obligation of the producer to track annual production and report if they exceed the 1 million pound exemption. Reports must include the “name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the

applicable products, and the moisture content, where applicable.” (7 U.S.C. § 1170.4(a)). A weekly price report must be submitted to the National Agricultural Statistics Service (NASS) by noon every Wednesday using the appropriate form. The forms are available on the **NASS website**.<sup>72</sup>

*Storage reporting* requires those who store butter, anhydrous milk fat (AMF), butter oil, and natural cheeses to submit monthly reports on quantities in storage (7 C.F.R. §§ 1170.7(b), 1170.10)). There is no exemption based on quantity for the storage report requirement. Manufacturing plants must make monthly storage reports of the dairy products that they have on hand (7 C.F.R. § 1170.7(b)). Dairy products are those that are used to set prices for Class III and Class IV milk under the Milk Marketing Orders (7 C.F.R. § 1170.4). This includes cream cheese, cheeses that can be shredded, grated or crumbled, butter, evaporated and sweetened condensed milk, and any dried form of milk (7 C.F.R. § 1000.40). The report must indicate the name, address, and stocks on hand at the end of the month for each storage location.

The reporting requirement applies to “all warehouses or facilities, artificially cooled to a temperature of 50 degrees Fahrenheit or lower, where dairy products generally are placed and held for 30 days or more.” (7 C.F.R. § 1170.10(a)(1)). Stocks in refrigerated space maintained by wholesalers, jobbers, distributors, and chain stores are exempt, but a direct farm business maintaining stocks of its own products would not be exempt from reporting. Reportable products include salted and unsalted butter, anhydrous milk fat (AMF), butter oil, and natural cheese including: barrel and cheese to be processed; American type cheeses, (cheddar, Monterey, Colby, etc.); Swiss, and other natural cheese types (brick, mozzarella, Muenster, Parmesan, etc.). Processed cheese is excluded (7 C.F.R. § 1170.10(a)(2)(i)). All manufacturers of non fat dry milk and dry whey must report all stocks on hand (7 C.F.R. § 1170.10(b)). NASS mails the monthly reporting forms to producers (73 Fed. Reg. 34175, 34176 (June 17, 2008)).

## II. STATE REGULATION

It is *imperative* that producers contact the Texas State Department of Health (TSDH) as early as possible in the planning stages of a dairy operation, because requirements are complex and exacting. TSDH will work with the dairy to ensure the operation is clean and safe. However, this may require investing in costly equipment, especially if making farmstead cheeses, and will likely require rigorous processing standards and frequent testing to ensure safety.

### A. Inspections & Permitting

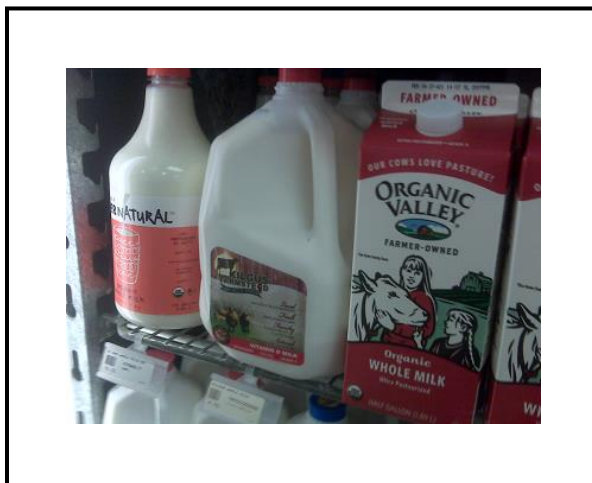
The Texas Food, Drug, and Cosmetic Act (TXFDCA) (V.T.C.A., Health and Safety Code, 431.001 et seq.) and Chapter 435 of the Texas Health and Safety Food Code govern dairy producers in Texas. Both sets of law authorize the TSDH to regulate, inspect and permit dairies and food

<sup>72</sup> [http://www.nass.usda.gov/Data\\_and\\_Statistics/Dairy\\_Products\\_Mandatory\\_Program/index.asp](http://www.nass.usda.gov/Data_and_Statistics/Dairy_Products_Mandatory_Program/index.asp)

processing facilities. Regulations for licensing and subsequent inspection of dairy farms and dairy plants are found in several places: Grade “A” Milk and Milk Products regulations (25 T.A.C. 217.21), selling of raw milk to the consumer (25 T.A.C. 217.32), Texas’ adoption of the Grade A Pasteurized Milk Ordinance (25 T.A.C. 217.2), and inspection of dairy farms (25 T.A.C. 217.26). There is also a regulation pertaining to frozen desserts, such as ice cream and frozen yogurt, which imposes many of the same construction, processing, inspection and permitting requirements. Combined, these regulations are Texas’ adoption of the FDA’s PMO; TSDH incorporates changes to the PMO periodically when FDA updates it.

#### *The Texas Food, Drug, and Cosmetic Act*

The TXFDCA (V.T.C.A., Health and Safety Code, 431.001 et seq.) is similar to the Federal FDCA in that it prohibits misbranded or adulterated food from entering the marketplace (V.T.C.A., Health and Safety Code 431.021). The general prohibition against misbranding and adulteration give TSDH much of its authority to regulate dairies. The regulations implementing the Act (discussed in more detail below) clarify the steps producers must take to prevent food adulteration or misbranding.



#### *Texas Milk and Dairy Laws*

Any person wishing to offer milk or milk products for sale in Texas must first be issued a permit by the Texas Board of Health (TBH). (V.T.C.A. Health and Safety Code, 435.006 (a)). The type of permit received is reliant on the grade of milk to be sold by the producer, and the TBH will maintain records of all permit holders based on the grade. (V.T.C.A., Health and Safety Code, 435.006 (c)). In areas infected or found by the Board to have a high risk for bovine tuberculosis, producers are less likely to receive a permit. (V.T.C.A., Health and Safety Code, 435.006 (d)). Permit holders processing, producing, bottling, receiving, transferring, or transporting Grade “A” milk are not required to hold a license as a food manufacturer or food wholesaler. (V.T.C.A., Health and Safety Code, 431.010 (c)).

The Texas Milk Grading and Labeling law (V.T.C.A., Health and Safety Code, 435.001 et seq.) regulate construction and operation of dairies and dairy handlers to ensure cleanliness and safe manufacturing practices. The law directs the Department of Health to adopt the federal standards of identity and definitions for milk, milk products, cheeses, and frozen desserts found at 21 C.F.R., Parts 131, 133, and 135.

Before beginning construction of a dairy operation, operators must ensure that the operation will meet the requirements outlined by the state. (25 T.A.C. 217.29 (b)). Floors where the milking occurs must be concrete or a similar impervious material, graded to drain. It also must have walls that are smooth and easily cleanable. There must be separate stall or sections for non-lactating animals. The structure should be well lit, well ventilated, and not overcrowded.

Very generally, facilities must allow for adequate cleaning, provide good lighting, and protect the milk from any type of contamination. This often means that the floor must be made of concrete (or other impervious material) graded to drain and/or prevent pooling of liquid and drains must carry liquid far enough away from the facility to prevent contamination. Ceilings and walls must be made of smooth, painted materials in good repair or otherwise capable of cleaning. Insects, rodents, fowl, swine and any other creatures capable of contaminating the milk must be kept out. Doors must be self closing and all openings must have screens. Bulk milk tanks must meet 3-A Sanitary Standards for dairy equipment, and must be leveled and permanently anchored by concrete or other permanent methods to insure proper weights from the calibration charts. They must also be at least six inches off the floor to allow for adequate cleaning underneath and cannot be located over a floor drain. Lighting, which sometimes must consist of 15-20% natural lighting, must be adequate for cleaning and may not be mounted above storage tanks. Water supplies must be safe, clean, protected and in ample supply; it must also be capable of being heated for steam cleaning if necessary.

All animals in the herd must be healthy and from areas or herds accredited free of Tuberculosis and Brucellosis or test negative for the diseases. Cows should be cleaned prior to milking, especially udders and flanks, and wiped dry. Cows with mastitis or other prohibited substances or diseases must be milked on separate equipment or milked last. Within two hours of milking, the milk must cool to 50 degrees Fahrenheit if in cans and 45 degrees Fahrenheit in bulk tanks. (25 T.A.C. 217.28). Equipment should be cleaned immediately and must be sanitized prior to the next use, then stored in a sanitary manner. Manure in milking barns must be removed daily. The regulations prohibit any other activity from occurring in the same room or vicinity as the milking.

Unlike most states, in Texas consumers are allowed to buy raw milk on pasture-based farms. Otherwise the sale of the milk is illegal if unpasteurized. The Texas Department of Health also regulates the sale of raw milk. The TSDH's current regulations allow for Grade A raw milk to be sold at the "point of production" (i.e. at the farm). (25 T.A.C. 217.32). Despite these rules there is currently House Bill 46 in the Texas legislature, which would allow farmers to sell milk off the farm at places such as farmers' markets. A copy of HB 46 is available on the legislature's website.<sup>73</sup>

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<sup>73</sup> <http://www.legis.state.tx.us/tlodocs/83R/billtext/html/HB00046I.htm>

Under Texas law, every manufacturer of dairy products located within the state must obtain a Milk Plant Permit and farmers producing that milk for the manufacturer must obtain a producer dairy farm permit. (25 T.A.C. 217.71) Obtaining the permits requires an inspection by TSDH to verify that the facility meets sanitary standards. The cost of the permit depends on the type of facility and quantity of production.

Permits are generally valid for one year, although facilities are subject to additional ongoing inspections. Dairy farms must undergo re-inspection at least once every six months, and dairy plants must undergo inspections at least every three months (25 T.A.C. 217.26). Additionally, TSDH oversees sampling of raw milk for pasteurization, pasteurized milk, and each milk product every six weeks. These samples are used to test for bacteriological counts, somatic cell counts, solids-not-fat, coliform levels, and antibiotics (25 T.A.C. 217.27). Failed tests will require corrective action; repeated failure may result in loss of the permit.

### ***B. Organic Milk***

Farmers interested in producing and marketing certified organic milk must follow USDA's Agricultural Marketing Service (AMS) organic standards (7 CFR Part 205). The regulations generally require the dairy to manage the animals according to certain standards and obtain certification from an accredited certifying entity. For more information on organic management and certification, see the "Organic Marketing" chapter of this Guide.

The National Dairy Board, created by the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, requires all milk producers to pay a fee, known as a checkoff, of 15 cents per hundredweight for national milk promotion programs. The rates are authorized by Section 1150.152 of the Dairy Promotion Order promulgated pursuant to the Act, which is available on the **AMS website**.<sup>74</sup> Generally, the first purchaser of milk (the cooperative or processor) collects checkoff contributions from the dairy farm operator. This fee is mandatory for all producers of Grade A and Grade B milk, whether they are selling it as fluid milk or processing it into dairy products for direct sale to consumers. Dairy farmers that produce and distribute their own dairy products must submit the checkoffs directly. Dairy producers have a strong culture of enforcement of the checkoff program, and the National Dairy Board audits co-ops and other producers to ensure compliance with the act. More information on activities of the National Dairy Council is available on the **Dairy Checkoff website**.<sup>75</sup>

## **III. HORMONE FREE LABELING**

Recombinant Bovine Growth Hormone (rBGH, commercially sold as Posilac, but also known as recombinant Bovine Somatotropin (rBST)) is an artificial hormone that increases milk

<sup>74</sup> <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004583>

<sup>75</sup> <http://www.dairycheckoff.com/DairyCheckoff>

production by dairy cattle. Although the FDA takes the position that there is no difference between milk from cows treated with rBGH and those not treated with it, many consumers prefer milk from untreated dairy herds. To address this consumer demand, some milk producers wish to label their milk as “rBGH free”, “rBST free” and “hormone free.” Texas does not impose any standards for the labeling of milk, other than the general prohibition against misleading labels. In part, this is because no producers in the state widely market their milk as rBGH free.

The Food and Drug Administration (FDA) guidance on Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine Somatotropin, available **online**,<sup>76</sup> outlines marketing terms the FDA considers acceptable. Texas bases many of its regulatory decisions and interpretations on the FDA’s standards; therefore, statements in compliance with FDA standards are more likely to receive approval in the event of an TSDH examination of labeling claims.

The FDA considers labels proclaiming the milk “hormone free” to be misleading because all milk contains hormones. Instead, the FDA allows statements such as “from cows not treated with rBGH.” The agency considers these statements potentially misleading if not placed in the proper context through additional statements such as “No significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows.” The FDA requires these qualifying phrases because they do not want consumers to believe milk from cows not treated with rBGH is superior to milk from cows treated with the artificial hormone. Nonetheless, many consumers are wary of rBGH and wish to avoid it, and many large retailers and dairy co-ops are increasingly disclaiming their use of the hormone. Although these actions reduce the uniqueness of a product, it may be worth distinguishing milk from cows not receiving rBGH injections as long as Posilac is commercially available.

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<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm059036.htm>

#### IV. CHECKLIST

Have you...?

- Contacted the milk and dairy division of the Texas State Department of Health Services (TSDH) to discuss what is necessary to produce the product you wish to sell?
- Researched and identified suppliers that can provide the equipment necessary to satisfy TSDH requirements?
- Chosen a record keeping system for tracking, reporting and remitting fees for the price and storage reporting and milk checkoff program?
- Developed labeling and marketing strategies?

#### KEY CONTACT INFORMATION

##### Texas State Department of Health Services

Milk group:

Ph: (512) 834-6758

<http://www.dshs.state.tx.us/milk/>

## 2- EGGS

Several laws and agencies regulate egg sales. At the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) share regulatory authority.

### I. FEDERAL OVERSIGHT OF EGGS

As mentioned above, there are two primary federal agencies that regulate eggs, the USDA and the FDA. The Egg Products Inspection Act (EPIA) (21 U.S.C. Chapter 15) authorizes the USDA to inspect eggs and egg products and establish standards for uniformity of eggs. The EPIA

applies to eggs shipped in interstate and intrastate commerce, but has exemptions for small producers. The Food and Drug Administration (FDA), under the authority of the Federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C. § 341), issues and enforces standards of identity for egg products and requires shell egg producers to implement measures to prevent *Salmonella Enteritidis* (SE). The FDCA only applies to eggs shipped in interstate commerce. Many direct farm businesses selling their eggs will not be subject to the federal rules, but determining the applicability of the federal law to a specific operation can be difficult. A brief discussion follows.



#### *USDA's Oversight of Eggs*

Within USDA, the Agricultural Marketing Service (AMS) and Food Safety and Inspection Service (FSIS) administer programs relevant to egg producers.

#### *AMS Requirements*

AMS prohibits buying, selling, or transporting or offering to buy, sell, or transport restricted eggs, unless exemptions apply (7 C.F.R. § 57.700). Exemptions are discussed in the next section. Restricted eggs are eggs that are checks, dirties, incubator rejects, inedible, leakers or loss (unfit for human food) (7 C.F.R. § 57.1). Restricted eggs must be sent to a processing facility (overseen by FSIS, discussed below), destroyed, or processed into animal food (7 C.F.R. § 57.720). AMS enforces the prohibition through periodic inspections of business premises, facilities, transport vehicles, and records of anyone transporting, shipping, or receiving eggs (7 C.F.R. § 57.28). The EPIA requires AMS to inspect handlers packing shell eggs for sale to the end-consumer at least once per calendar quarter, unless exempt (21 U.S.C. § 1034). The term handler means any person who engages in buying or selling any eggs or processing any egg product for human

food; the term includes poultry producers (21 U.S.C. § 1033(e)). Inspector may be federal employees or employees of cooperating state agencies (7 C.F.R. § 110).

AMS also provides voluntary grading services for class, quality, quantity, or condition and any combination thereof (7 C.F.R. Part 56). Inspection by federal or authorized state graders must be requested, and will cost a fee. More information on requesting egg grading services, as well as the form to do so, is available through AMS's grading **website**.<sup>77</sup> AMS's official standards, grades and weight classes are available **here**.<sup>78</sup>

#### *AMS's Exemptions*

AMS exempts egg producers from the restrictions and inspections if they sell eggs from their own flocks directly to consumers via door-to-door sales or at a place of business away from the site of production *so long as* they sell fewer than 30 dozen eggs per sale (7 C.F.R. § 57.100(c)). The producer must own and operate the business and transport the eggs him or herself, and the eggs must meet the standards for U.S. Consumer Grade B shell eggs. (*Id.*) Producers with fewer than 3,000 hens, producers selling directly to household consumers, and egg packers selling on site directly to consumers are also exempt from AMS's regulations (7 C.F.R. § 57.100(d)-(f)).

#### *Processing Subject to FSIS*

The EPIA requires USDA to continuously inspect plants processing eggs into egg products (21 U.S.C. § 1034). The Act defines egg products as "any dried, frozen or liquid eggs, with or without added ingredients" (21 U.S.C. 1052(f)). All egg products must undergo pasteurization (21 U.S.C. § 1036). FSIS oversees the inspection of egg processing plants (9 C.F.R. § 590.24). The procedures and standards for inspections are in 9 C.F.R. Part 590. Producers who process their own eggs and sell directly to consumers are exempt from continuous inspection under the FSIS regulations (9 C.F.R. § 590.100(e)). However, they must apply for an exemption and their facility and operating procedures must meet all otherwise applicable standards. Although not subject to continuous inspection, exempted facilities must undergo periodic FSIS inspections (9 C.F.R. § 590.600-650).

#### *FDA's Oversight of Eggs*

In addition to USDA's regulation under the EIPA, the FDA regulates eggs under the FDCA. FDA specifies standards of identity for egg products, including dried and frozen eggs (21 C.F.R. Part 160). If a food does not meet the standard of identity, it is misbranded according to the FDCA (21 U.S.C. § 343(g)).

<sup>77</sup> <http://www.ams.usda.gov/AMSV1.0/Grading>

<sup>78</sup> <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376>

Furthermore, some shell egg producers must adhere to FDA's Salmonella testing, handling and treatment standards. Producers with 3,000 or more laying hens at a particular farm that produce shell eggs for the table market, and do not sell all of their eggs directly to consumers, are subject to the additional handling requirements for Salmonella prevention (21 C.F.R Part 118).<sup>79</sup> The regulations require covered producers to (1) develop a written *Salmonella Enteritidis* (SE) prevention plan that involves procuring SE monitored pullets, (2) use a bio-security program limiting visitors and controlling cross contamination between houses, (3) control rodents, flies and pests, and (4) clean poultry houses between flocks in the event of a positive SE test (21 C.F.R. § 118.4). Producers must perform environmental testing for SE when laying hens are 40 to 45 weeks old and 4 to 6 weeks after molt; if an environmental test is positive for SE the producer must conduct shell egg testing (21 C.F.R. §§ 118.5 and 118.6). Producers must maintain a written SE prevention plan as well as records to verify compliance, which they must provide to the agency within twenty four hours of receipt of an official request (21 C.F.R. § 118.10). Shell eggs must be held or transported in refrigeration at or below 45 degrees Fahrenheit ambient temperature within 36 hours after laying (21 C.F.R. § 118.4). This refrigeration requirement applies to shell egg producers as well as individuals transporting or holding shell eggs (21 C.F.R. § 118.1).

Regardless of whether eggs are sold interstate or intrastate, the FDA requires all shell eggs for distribution to the consumer to have a safe handling label or undergo treatment to kill SE (21 C.F.R. § 101.17(h)). If untreated, the safe handling label must read: **"SAFE HANDLING INSTRUCTIONS:** To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly." The statement must appear on the label prominently, conspicuously, and in a type size no smaller than one-sixteenth of one inch. The statement must appear in a hairline box and the words "safe handling instructions" must appear in bold capital letters.

## II. TEXAS REGULATION OF EGGS

### *Egg Marketing*

Chapter 132 of the Texas Agriculture Code imposes permitting, handling, and labeling requirements on most individuals handling and selling eggs. Generally, the Act prohibits the sale of eggs unfit for human consumption (V.T.C.A., Agriculture Code, 132.045). Eggs may be unfit for consumption if they are black rots, white rots, mixed rots or addled eggs, sour eggs, eggs with green whites, eggs with stuck yolks, moldy eggs, musty eggs, eggs showing blood rings, eggs containing embryo chicks at or beyond the blood ring stage, and any eggs that are adulterated as that term is defined in the Federal Food, Drug, and Cosmetic Act. The Act

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<sup>79</sup> The inverse of this is that producers who have fewer than 3,000 hens and sell all of their eggs directly to consumers are exempt. Producers who process their eggs into egg product are also exempt, but may be subject to FSIS's egg processing oversight.

incorporates the USDA's grading and quality standards as well as the regulations of the Federal Food and Drug Administration. (V.T.C.A., Agriculture Code, 132.004).

Eggs sold for human consumption at retail or wholesale require containers, which identify the size and grade of the eggs in the container, and the address and license number of the person who sized and graded the eggs. (V.T.C.A., Agriculture Code, 132.044).

Additionally, labeling requirements for egg cartons include the following: (1) the size, grade, and quantity of the eggs, which must be printed on the top main display table; (2) the Texas egg license number of the licensee; (3) the post office, street address, or route number, and city and state of the Texas licensed facility where the eggs were actually graded, labeled, and/or packed. (4 T.A.C. 15.8(a)). Egg cartons cannot be reused except by the original packer. (4 T.A.C. 15.8(f)). It is a violation of the regulations for an egg container to be false or deceptive. Egg containers are considered false or deceptive if the eggs are not of the quality and size indicated, if the label bears any false or misleading statement, if the eggs are described in print as "fresh," when they are neither Grade A or AA, etc. (4 T.A.C. 15.12).

Under Texas regulations, a license from the Department of Agriculture is mandatory for any person who buys or sales eggs in Texas for the purpose of resale, for any facility where eggs are graded, stored, packed or processed, any person who first established the grade and size of the eggs, and any egg broker. (4 T.A.C. 15.2(a)). Exempt from these licenses are producers of eggs who sell only the production of their own flocks without claiming any egg grade or size, and without engaging in any of the aforementioned egg marketing, which requires a license. (4 T.A.C. 15.2 (b)(1)). Also exempt are retailers who sell eggs directly to the consumer. (4 T.A.C. 15.2 (b)(6)).

Licenses applications made be obtained from the Department, for both initiating a new business and renewal. (4 T.A.C. 15.3). Fees for initiating a new business depend on the size of the business. Producers of larger quantities of eggs will have to pay more than a small farmer with only a few hens. Producers should contact the Department to determine the exact amount of their application fee. The regulations further adopt the FDA's and USDA's standards for shell quality, grading, and sizing. (4 T.A.C. 15.6).

Facilities that store eggs also are regulated through Texas Administrative Code to prevent deterioration and spoiling of the eggs. All packed eggs are to be stored at a temperature below 45 degrees Fahrenheit and are to be transported only in sanitary conditions. (4 T.A.C. 15.7(a)).

### *Egg Processing*

Some eggs that are not suitable for the shell egg market may be sent to “egg-breaking” facilities for processing eggs into egg products. The Texas State Department of Health regulates these facilities, which are also required to have an egg license. (4 T.A.C. 15.2 (b)(4)). The requirements for egg processing facilities are generally the same as for any food processing facility, with the additional requirement of specified temperatures and holding time for pasteurization procedures. This guide limits its discussion of egg processing requirements under the assumption that most direct farm businesses are not processing their eggs into products.

### III. CHECKLIST

If you're going to sell eggs, make sure you have answered the following questions:

- How many chickens to you have?
- Who are your customers (end user, institutions, processors)?
- Where will your sales take place (on or off the premises)?
  - o On farm sales have fewer regulations, but limit available customers.
  - o Flock size can impact which regulations apply.
- If you plan to sell off the farm:
  - o Do you have the capacity to grade, candle, and inspect your eggs?
  - o Have you figured out how to package and transport the eggs?
  - o Are you responsible for keeping track of and remitting any fees? If so, what is your record keeping system?
- Have you obtained the appropriate licenses? You may want to check with local health departments in addition to ALPC to see if they require other licenses, such as retailers' license.

#### KEY CONTACT INFORMATION

##### **USDA's Agricultural Marketing Service, Poultry Programs, Shell Eggs (egg grading and certification)**

- Ph: (202) 720-3271

##### **Texas Animal Health Commission**

- Ph: (512)-719-0700

### 3 - FISH, SHELLFISH AND OTHER AQUATICS

Aquaculture production encompasses a broad array of goods: popular items such as catfish and shrimp, traditional foods such as frog legs, and novel products such as alligator's skins or meat. While some of these industries are very successful in Texas, it remains to be seen whether others can operate profitably in the state. Competition with inexpensive imported foreign products creates particular difficulty for many producers. Direct-to-consumer and specialty niche market sales may be one means of helping a business succeed.

Aquaculture represents an important component of agriculture and producers in Texas have access to extensive technical resources. The Southern Regional Aquaculture Center, has a variety of useful fact sheets on its **website**<sup>80</sup> that cover topics such as establishing aquaculture production and small scale marketing, as well as species-specific information on animal care and production. The Texas Aquaculture Cooperative, through the Agricultural Marketing Resource Center, provides helpful assistance to any Texas producer who wished to become involved in aquaculture marketing. Their website is available at [http://www.agmrc.org/business\\_development/strategy\\_and\\_analysis/analysis/texas-aquaculture-cooperative/](http://www.agmrc.org/business_development/strategy_and_analysis/analysis/texas-aquaculture-cooperative/).

#### **I. PRODUCTION**

Aquaculture production is subject to regulation by the Texas Department of Agriculture and the Texas Parks and Wildlife Commission. (V.T.C.A., Agriculture Code, 134.005). The Department may promote aquaculture products, provide technical assistance to aquaculturists, provide coordinated support through colleges and universities, and develop and expand Texas' aquaculture industry. (V.T.C.A., Agriculture Code, 134.002). As defined by the statute, "Aquaculture or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Furthermore, than the provision designates aquaculture as an "agricultural activity." (V.T.C.A., Agriculture Code, 134.001(4)). A "cultured species" refers to aquatic animals raised under conditions where at least a portion of their life cycle is controlled by an aquaculturist, (V.T.C.A., Agriculture Code, 134.001(1)), which is any person engaged in the business of fish farming. (V.T.C.A., Agriculture Code, 134.001(3)).

In order to legally establish an aquaculture facility one must first obtain an aquaculture license from the Department of Agriculture. (V.T.C.A., Agriculture Code, 134.011(a)). Upon application, the Department will in turn provide a copy of the license application to the Texas

<sup>80</sup> <http://www.msstate.edu/dept/srac/>

Parks and Wildlife Department and the Texas Natural Resource Conservation. (V.T.C.A., Agriculture Code, 134.011(c)). The Department will not issue a license for a new aquaculture facility unless the facility has been authorized by the Texas Natural Resource Conservation Commission to dispose of wastewater or the facility will not dispose of wastewater within the waters of Texas. (V.T.C.A., Agriculture Code, 134.011(d)).

The aquaculture license is to be on a numbered form provided by the Department of Agriculture. (V.T.C.A., Agriculture Code, 134.015(a)). The duration of the license is two years and may be renewed with a completed application and a renewal fee. (V.T.C.A., Agriculture Code, 134.015(b)). The holder of the license is required by statute to maintain a record of sales of cultured species for a period of time not less than one year and such record is open for inspection by the Texas Department of Parks and Wildlife as well as the Department of Agriculture during normal business hours. (V.T.C.A., Agriculture Code, 134.016(a)). A record of sale for commercially protected finfish under Section 66.020 of the Vernon's Texas Code Annotated, at the minimum requires the invoice number, the date of shipment, the name and address of the shipper, the name and address of the receiver, and the number and weight of whole fish or fillets, by species, within the shipment. (V.T.C.A., Agriculture Code, 134.016(b)).

There are certain fishes, the sale of which do not require an aquaculture license. Licenses are not required for sale of fish (1) for fish that are not on the Department of Parks and Wildlife's list of exotic fish, shellfish, and aquatic plants; (2) collected from a private facility on private land by a person who holds an aquaculture license; (3) by the owner of the private facility from which the fish were collected; (4) to manage the fish population in a private facility; or (5) to a person who holds an aquaculture license. (V.T.C.A., Agriculture Code, 134.018 (a)). However, no later than 30 days from the purchase, the buyer/holder of the aquaculture license is required to submit a copy of the invoice for the sale to the Department of Parks and Wildlife, and the seller and buyer should maintain a record of the sale for at least one year, containing at a minimum, the invoice number, the date of sale, the name and address of the seller, the physical location of the facility from which the fish were collected, the name, address and aquaculture license number of the buyer, and the number of fish sold. (V.T.C.A., Agriculture Code, 134.018(b)).

Stated directly from Title 6 of the Agriculture Code, "Cultured species of any kind, size, or number may be raised, possessed, transported, and sold anywhere, at any time, to any person, for any purpose by the holder of an aquaculture license unless prohibited by Parks and Wildlife Code or regulation." (V.T.C.A., Agriculture Code, 134.017).

#### *Fish Farm Vehicle License*

If a vehicle is used to transport cultured species from a private facility and the cultured species are sold from the vehicle, the vehicle is required to have a fish farm vehicle license. (V.T.C.A.,

Agriculture Code, 134.012(a)). However, if the owner and operator of the fish farm vehicle is the holder of an aquaculture license, then such a license is not required, but a copy of the aquaculture license must remain in the vehicle during transportation. (V.T.C.A., Agriculture Code, 134.012 (b-c)).

#### *Shrimp Production within the Coastal Zone*

The Agriculture Code defines a “commercial aquaculture facility” as a facility designed primarily for the production of cultured species for the purpose of sale, barter or exchange, (V.T.C.A., Agriculture Code, 134.001(7)), and the “coastal zone” is the coastal area prescribed by the Natural Resources Commission according to the Coastal Zone Management Act of 1972. (V.T.C.A., Agriculture Code, 134.001(9); V.T.C.A. 33.053(a)). Additional requirements exist for the production of shrimp at these facilities in these zones. (V.T.C.A., Agriculture Code, 134.013(a)). First, the facility must obtain a site-specific wastewater discharge permit from the Texas Natural Resource Conservation Commission before the facility may discharge wastewater. (V.T.C.A., Agriculture Code, 134.013 (a)(1))). If the facility is a new aquaculture facility as defined in section 134.001 then the Department of Agriculture will require the applicant to provide a report describing the existing environmental conditions at the proposed site, including the aquatic habitat and the conditions of the waters in the state into which the discharge will occur. The report should provide an assessment of any potential impacts of wastewater discharges on sensitive aquatic habitats, in construction and operation of the facility, as well as proposals for mitigation of these impacts. (V.T.C.A., Agriculture Code, 134.013(b)).

Furthermore, the operator of the facility must obtain an amendment to its site-specific discharge permit before the facility may increase the amount of discharge or change the nature of the discharge levels. (V.T.C.A., Agriculture Code, 134.013(a)(3))).

Farmers who need to order fish or eggs to stock the farm may be subject to Texas Animal Health Commission and Texas Department of Parks and Wildlife provisions that restrict the importation of live fish and fertilized eggs from outside of Texas due to the potential presence of Viral Hemorrhagic Septicemia Virus (VHSV) or other diseases. Producers should contact the Commission and/or Department before attempting to import fish into Texas, to ensure that potential for disease spread is minimal. An invoice or bill of lading describing the origin of fish or eggs must accompany all shipments of live fish or eggs entering Texas. Fish or eggs from a VHSV-positive state must have a Fish Farm Health Inspection Permit. The U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS) currently considers Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, Ontario, and Quebec

to be infected or at risk of infection. APHIS maintains a **website**<sup>81</sup> with more information on aquaculture diseases.

### *Alligators*

Alligator hunting and farming is feasible in many counties in Texas. The open season for hunting alligators is from September 10 to September 30 each year in the following counties: Angelina, Brazoria, Calhoun, Chambers, Galveston, Hardin, Jackson, Jasper, Jefferson, Liberty, Matagorda, Nacogdoches, Newton, Orange, Polk, Refugio, Sabine, San Augustine, San Jacinto, Trinity, Tyler and Victoria. These counties are known as “core” counties for purposes of alligator regulations. This guide briefly outlines the regulations unique to alligator farming.

The most general provisions concerning alligators in Texas include: (1) no person may possess an untagged alligator or alligator hide; (2) no person may hunt an alligator without a valid alligator hunting license; (3) no person may hunt an alligator in a “core” county without an unused alligator hide tag to use for the taking device; (4) in other counties no person shall hunt alligators unless on private property, with consent of the property owner; and (5) all other alligator hunting (outside of core counties) allows for only one taking device, and hence, one alligator per season. For more information access the Texas Parks and Wildlife Department’s website at [txgator.info@tpwd.state.tx.us](mailto:txgator.info@tpwd.state.tx.us).

Texas alligator farming and marketing is governed by regulation in Title 31, Chapter 65 of the Texas Administrative Code. (31 T.A.C. 65 *et seq.*). The regulations govern the taking, possession, propagation, transportation, exportation, importation, and sale of alligators in Texas. (31 T.A.C. 65.351). Generally, and unless otherwise provided, no person may possess and alligator hide or alligator part, and no person may possess a live alligator without a valid alligator farming permit. (31 T.A.C. 65.353(a,b)). Furthermore, Any person transporting live alligators shall take reasonable precautions to maximize the humane treatment of and minimize stress to the alligators being transported. (31 T.A.C. 353 (d)).

A control hunter, or an alligator hunter authorized by the department to hunt to nuisance alligators, may possess a dead alligator indefinitely, but may sell the alligator only to a farmer or wholesale dealer. While in possession of a dead alligator taken under a control contract, a control hunter shall maintain possession of the contract under which the alligator was taken and a copy of the Nuisance Alligator Hide Tag Report (PWD 305). (31 T.A.C. 65.357 (a)(1)). Furthermore, control hunters are allowed to possess live alligator, but only for a period of two weeks, before they are compelled to sell the nuisance alligator to a licensed and permitted alligator farm. (31 T.A.C. 65.357 (a)(2)). Retail dealers may only purchase alligators from wholesale dealer or a lawful out of state source. (31 T.A.C. 65.357(b)). Furthermore, a person

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<sup>81</sup> [http://www.aphis.usda.gov/animal\\_health/animal\\_dis\\_spec/aquaculture/](http://www.aphis.usda.gov/animal_health/animal_dis_spec/aquaculture/)

possessing a valid retail dealer permit may sell processed and documented alligator only to consumers, (31 T.A.C. 65.357(b)(5)), and as such are required, they must be at the location of every place of business, mobile or permanent. (31 T.A.C. 65.357(b)(6)).

The laws are a bit less regulated for alligator farmers wishing to purchase as well as sell alligators. A farmer may purchase live or dead alligators from a farmer, retail dealer, wholesale dealer, hunter, or control hunter. (31 T.A.C. 65.357(d)(1)). A farmer, in turn, may sell live alligators to another farmer or to the holder of a permit issued under Parks and Wildlife Code. (31 T.A.C. 65.357(d)(2)). It is illegal for any alligator farmer to transport or receive a live alligator unless a game warden at both the point of origin as well as destination is notified within 24 hours. (31 T.A.C. 65.357 (d)(3)).

Additional regulations, typical of farms and agricultural facilities, govern alligator farms. A first time alligator farm permit applicant must show the following before issuance of the permit: (1) adequate barriers to prevent escape or entry by alligators or other animals; (2) a reliable source of clean and fresh water; (3) provision for the protection from the cold for the alligators; and (4) pooled water to allow for the alligators' complete submersion under water. (31 T.A.C. 65.361(a)). The farmer must also maintain complete written records for the alligator stock including such information as invoices and shipping tickets, etc. (31 T.A.C. 65.361(c)).

## II. TEXAS MARKETING REQUIREMENTS

Like any other retail food business, typically fishermen and women rather than fisheries in the small producer context, are required to have a license. No person may engage in business as a retail fish dealer without a Retail Fish Dealer's license, which is accompanied by a license fee of wither \$30 or a slightly higher amount set by the Commission. (V.T.C.A., Parks and Wildlife Code 47.011 (a, b)). Different types of licenses for retail fish dealers are available on the Park and Wildlife Department's website.<sup>82</sup> Those persons with aquaculture licenses will not need one of these licenses if their business activities involve aquatic products raised at that person's aquaculture facility. (V.T.C.A., Parks and Wildlife Code, 47.011 (c)). For those who wish to sell non-game fish either from fisheries or public fresh waters, there are additional regulations. Annual reports must be received by the Parks and Wildlife Department before December 10<sup>th</sup>, annually, including the following information: (1) the species name; (2) the number of individuals; (3) the number of pounds; (4) the way the fish was caught; (5) the specific body of water from which the fish came; and (6) the price received of each species sold, per pound. (31 T.A.C. 57.382 (1,2)).

## III. FEDERAL RULES

<sup>82</sup> [http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd\\_345\\_a0900\\_application\\_for\\_dealer\\_license.pdf](http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_345_a0900_application_for_dealer_license.pdf)

*Fish Processing*

Pursuant to the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Chapter 9), the Federal Food and Drug Administration requires fish processors to use Hazard, Analysis, and Critical Control Point Plans (HACCP, pronounced ha-sip) (21 C.F.R. § 123.6). “Fish” means “fresh or saltwater finfish, crustaceans, other forms of aquatic animal life (including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, where such animal life is intended for human consumption” (21 C.F.R. § 123.3). “Processing” means freezing, changing into different market forms, manufacturing, preserving, packing, labeling, dockside unloading, or holding. (*Id.*) The regulations do not apply to (1) harvesting or transporting fish or fishery products, without otherwise engaging in processing; (2) practices such as heading, eviscerating, or freezing intended solely to prepare a fish for holding on board a harvest vessel; or (3) the operation of a retail establishment.

As with most other FDA rules, the HACCP requirements only apply to food moving in interstate commerce. Therefore, fish and shellfish producers raising and direct marketing their goods wholly within Texas are not subject to the HACCP rules. If the producer or processor sells to a wholesaler and has good reason to believe the product may be sold across state lines, then they must comply with HACCP. And because the local public health inspector may require standards for processing of seafood that approach HACCP-level standards, producers who are exempt from the federal HACCP requirements should nonetheless study and understand the requirements and consider developing an internal HACCP plan.

Implementing HACCP requires identifying chemical, biological and physical hazards that are reasonably likely to occur and the critical control points where the hazard is likely to occur, establishing limits for the hazard at each critical control point, and implementing procedures for testing for limits and verifying effectiveness of the plan (21 C.F.R. § 123.6). The processor must also have a record keeping system to document the monitoring of the critical control point systems. (*Id.*) HACCP plans must be in writing and signed by the most responsible individual on site or a higher-level official within the company. An individual trained in the application of HACCP principles to fish and fisheries products must develop the HACCP plan (21 C.F.R. § 123.10). This individual can be a trained employee or an outside contractor.

More information on applying HACCP principles to seafood is available in FDA’s *Fish and Fisheries Products Hazard Control Guidance*, available **online**.<sup>83</sup>

*Emerging USDA Food Safety Regulations for Catfish*


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<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Seafood/FishandFisheriesProductsHazardsandControlsGuide/default.htm>

Title XI, Section 11016 of the Food, Conservation and Energy Act of 2008 (The 2008 Farm Bill) (Pub. L. 6124) amended the Meat Products Inspection Act to subject catfish (as defined by the Secretary of Agriculture) to mandatory inspection by the United States Department of Agriculture Food Safety Inspection Service (21 U.S.C. § 601(w)(2)). The law's purpose is to impose higher inspection standards on imported catfish, but it will likely have an impact on domestic processors as well. As of the writing of this guide, USDA has not issued proposed rules. Catfish producers should subscribe to industry publications for up-to-date information on this emerging issue.

#### IV. CHECKLIST

Have you...?

- Identified realistic market demands for your product?
- Obtained any necessary permits from the AGFC?
- Planned how to process your product by?
  - o Contracting with a third party or building your own processing facility?
  - o If building your own facility, obtained pre-construction approval from TSDH and looked into HACCP rules?

#### 4- FRUITS AND VEGETABLES



Health regulators generally have a more permissive approach to raw fruits and vegetables relative to other products direct farm businesses might sell. However, if a direct farm business (DFB) sells value added products, such as canned goods and juices, it is a different story. Because these items have a long and sordid history of harboring dangerous bacteria, Texas State Department of Health (TSDH) has significant concerns about safety in production. Consequently, all processed products must be

prepared in approved facilities and most processes will have to receive pre-market approval.

Before covering the regulations that pertain to each group, it is important to understand the difference between raw and processed foods. Generally, raw produce is exempt from food regulations. However, as soon as it is processed, it is subject to TSDH regulation. “Processing” includes Including, but not limited, to the preparing, blending, filtering, preserving, treating, changing into different market forms, manufacturing, packing, repacking, or labeling of food ingredients and or products. (25 T.A.C. 229.211 (16)). An example of the distinction is raw versus processed lettuce – a washed head of lettuce is raw, while bagged salad mix is processed. A good rule of thumb is that produce sold in any form other than how it came off the plant or out of the ground may be “processed” and subject to additional regulations.

##### **I. UNPROCESSED FRUITS AND VEGETABLES**

Probably the most common way to sell fruits and vegetables is as raw, unprocessed commodities. Direct farm businesses that sell raw, unprocessed fruits and vegetables should limit pesticide residues by thoroughly washing produce and avoid selling rotten or filthy food.

The Federal Food, Drug, and Cosmetic Act (F-FDCA) (21 U.S.C. § 346a) authorizes the Federal Environmental Protection Agency (EPA) to set tolerance levels for pesticides on and in foods.

Although testing is unlikely, this guide nonetheless mentions the rules for producers who may wish to look up the tolerance levels for pesticides they use.

The EPA bases the tolerance level for each pesticide on the potential risks to human health posed by the pesticide. Tolerances are usually in the parts per billion, making it difficult to test for levels as a regular business practice. EPA lists tolerance levels for over 1,000 pesticides, so it is impossible for this guide to cover all the standards. However, there are several ways farmers can determine the tolerance levels for pesticides they are using. One method is to look up the pesticide in the Code of Federal Regulations (CFR) (40 C.F.R. Part 180). EPA maintains a **website**<sup>84</sup> that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**<sup>85</sup> contains general information on pesticides by family, commodity type, and crop type. The site also has a database to look up tolerance levels for particular pesticides, which users can search using pesticides' common names. Finally, the tolerance information sometimes is available on the pesticide's label.

If a food consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, it bears or contains any poisonous or deleterious substance which may render it injurious to health, or if it is otherwise unfit for food, it is "adulterated" under the Texas FDCA (V.T.C.A. Health and Safety Code, 431.081 (a)(1)). This legal distinction, in general terms, means food should not be rotten or contaminated with feces. As many direct farm businesses build their customer base through delivery of superior products and rely on reputation, common business sense would eliminate many of these potential violations. Nonetheless, it merits mentioning because this legal standard applies to both raw and processed foods.

## II. PROCESSED FRUITS AND VEGETABLES

As discussed above, the difference between raw and processed food is slight. Beyond washing and packing, there are several popular processing methods a direct farm business may employ to create "value-added" products, such as drying, canning, jarring, and pressing into a juice or other beverage. TSDH strictly regulates these activities for consumer safety. Texas uses the Federal Food and Drug Administration's (FDA) Food Code, which establishes standards for safety of food products and processing equipment. In addition to the Food Code, the FDA publishes numerous guidance documents on interpreting and applying the Food Code, which are also available to the TSDH. Local departments and individual regulators often must make judgment calls during the permitting process, depending on the particular food and conditions, so "safe practice" could mean different things between different regulators and different regions. Moreover, standards, and therefore processing requirements, could change as regulators come and go. The bottom line is that careful cooperation is required between the DFB

<sup>84</sup> <http://www.epa.gov/opp00001/food/viewtols.htm>

<sup>85</sup> <http://www.epa.gov/opp00001/regulating/part-180.html>

and local public health inspectors during the approval process and subsequent periodic inspections.

In addition to inspection and permitting, many processed foods must have labels containing particular information. For the most part, Texas law and regulations conform to the Code of Federal Regulations. For instance, processed foods must conform to their standards of identity (if any) and bear labels giving the common name of the food. Product labels also must list all ingredients. Packaged foods must have labels identifying the manufacturer, packer or distributor and an accurate accounting of the quantity of the contents. In addition, federal regulations require foods processed with sulfites to disclose the presence of a sulfating agent (21 C.F.R. § 130.9).

### *Dried Fruit*

Drying fruit may be the simplest means of processing produce into a value added product. To dry fruits and mix them into value-added products such as trail mixes, TSDH must inspect and permit the facility. During the permitting process, TSDH will require information on the intended production process and any processing agents to be used. In addition to the usual concerns regarding microbiological contamination, the agent may express concern regarding sulfites. It is possible that the agent will require the producer to obtain a variance or submit their processing plans to an expert to verify their safety.

One such expert is Steven C. Seideman, Extension Food Processing Specialist at the Institute of Food Science & Engineering at the University of Arkansas. Dr. Seideman's *Food Processing Guide*, available **online**,<sup>86</sup> discusses many details important to product development and food safety. In addition to Dr. Seideman's guide, the Institute provides a wealth of resources through its Food Processing Assistance Program. Their **website**<sup>87</sup> contains information on the services they provide, such as pH testing, product development, tasting panels, and food safety and development workshops.

### *Canning, Jarring, Pickling*

Another popular way to create value added products for fruits and vegetables is jellies, jams, fruit butters, pickles and salsas. These methods, which can create anaerobic conditions conducive to the growth of dangerous microbes such as botulism, represent a significant public health concern. To make any of these products a producer will have to have, at minimum, a certified commercial kitchen and pre-approval from TSDH of specific recipes and production processes.

### *Juice & Cider*

<sup>86</sup> [http://www.uark.edu/ua/foodpro/Food\\_Processing\\_Guide/Processing\\_Guide.pdf](http://www.uark.edu/ua/foodpro/Food_Processing_Guide/Processing_Guide.pdf)

<sup>87</sup> <http://www.uark.edu/ua/foodpro/index.html>

Like all foods, juice and cider processing facilities must undergo inspection and approval by TSDH. However, rather than TSDH pre-approval of production processes, juice processors must comply with federally mandated Hazard Analysis and Critical Control Point (HACCP) procedures, even if the product is being sold solely intrastate (21 C.F.R. Part 120).<sup>88</sup> The HACCP rules require producers to develop a written analysis that identifies points in the production process where microbial, toxic, chemical, physical or other hazards may contaminate the juice, and a written plan for preventing hazards reasonably likely to occur (21 C.F.R. §§ 120.7 and 8). The developer of the written analysis and plan must have specialized HACCP training (21 C.F.R. § 120.13). For more information on the juice HACCP, the FDA has issued *Guidance for Industry: Juice HACCP; Small Industry Compliance Guide*, which is available **online**.<sup>89</sup>

Processors who sell their own produce as juice directly to consumers do not have to comply with the HACCP rule, so long as they store, prepare, package, serve, and vend their product exclusively and directly to consumers (21 C.F.R. § 120.3(j)). Producers who sell to other retailers (even if retailing their product directly as well) or who have anyone else store, prepare or package their juice must comply with HACCP.

Producers exempt from the HACCP requirements must still comply with all TSDH and FDA food safety requirements, such as facility certification and potentially pre-approval of the production process. FDA proscribes standards of identity for many juices by establishing minimum contents and allowable other ingredients for canned fruit juices and vegetable juices (21 C.F.R. Parts 146 and 156). Additionally, FDA's labeling rule (21 C.F.R. § 101.17(g)) requires a warning label for juices that have not been pasteurized or otherwise treated to kill pathogens. The statement must read:

**WARNING:** This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems.

### *Wine, Beer and Spirits*

Once an operation begins pressing juice, it may be a natural progression to begin fermenting wine, beer or spirits. Like all other foods, these products fall under the jurisdiction of the TSDH, which must inspect and permit their operation for safety. However, these operations *also* are subject to oversight by the Federal Alcohol and Tobacco Trade and Tax Bureau (TTB) (27 U.S.C.

<sup>88</sup> The FDA's authority over food is generally limited to foods shipped in interstate commerce (21 U.S.C. § 331). However, FDA asserts authority to enforce the HACCP rules under the Public Health Services Act (21 U.S.C. §§ 241, 242l, 254) because juice is a vehicle for transmitting food borne illnesses (see 66 Fed. Reg. 6137, 6148, 6158-6160 (Jan. 19, 2001)).

<sup>89</sup>

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Juice/ucm072637.htm>

§§ 201 *et seq.*; C.F.R. Title 27) and the Texas Alcohol Beverage Control Commission (TABC) (V.T.C.A. Title 2, Chapter 5). Additionally, production and sales of alcohol may be completely prohibited if a producer is located in a “dry” county, although there are limited exceptions for private clubs.

At the federal level, TTB requires producers to obtain several permits prior to commencing operations and submit annual forms and taxes. Forms are available through TTB’s **website**<sup>90</sup> or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**<sup>91</sup> tailored to particular manufacturers. Federal rules apply to all alcohol production, whether for sale in intrastate or interstate commerce.

Under Title 3, Chapter 11 of Vernon’s Texas Codes Annotated, permits and their requirements are available for nearly all instances for producers of wine, beer, and spirits. These permits include, but are not limited to, brewer’s permits, distiller’s permits, winery permits, storage permits, wholesales permits, etc. However, there are some exceptions that allow producers to sell directly to consumers in limited instances. For instance, a winery may be eligible for Small Farm Wine Manufacturer for Sale Permits, which would allow the winery to sell wine to consumers on the premises of the winery. There are a number of factors that determine whether the TABC issues a permit, including, but not limited to, the number of permits already issued in the county, whether the county or township permits alcohol sales, and the residency status of owners or partners. Businesses interested in initiating production of alcoholic beverages should contact the TABC for further information on whether their intended activity is permissible at their location, what permits are necessary, and how to apply. The TABC’s website is <https://www.tabc.state.tx.us/>.

#### *Other Considerations for Fruits and Vegetables*

Other sections of this Guide cover several additional issues that might arise when a direct farm business chooses to grow and sell fruits and vegetables. First, producers may wish to make certain health or nutrient claims when marketing their goods. These statements are regulated by the FDA and are discussed further in the “Marketing and Managing” chapter. Second, organic production and marketing must follow additional rules, which are outlined in the “Organic Marketing” chapter. Finally, the “Weights & Measures” section of the “Marketing and Managing” chapter covers additional marketing rules applicable to direct farm businesses.

<sup>90</sup> <http://www.ttb.gov/forms/index.shtml>

<sup>91</sup> <http://www.ttb.gov/applications/index.shtml#Manufacturers>

### III. CHECKLIST

Have you...?

- Determined what the residue limits are for any pesticides on the product?
- If you are processing raw fruits and vegetables, obtained an TSDH inspection and permit for your processing facility? Do you need pre-approval of recipes or processes?
- Are you pressing juice? If so, you need to undergo HACCP training and develop a written HACCP plan or hire a trained professional to do so for you.
- Thinking about selling alcohol...
  - o Determined whether alcohol production and/or sales are permissible in your county and township?
  - o Looked into the all the permits you need to get from federal, state and local agencies, and determined their costs?
  - o Will you be able to sell directly or need to contract with a distributor?

#### KEY CONTACT INFORMATION

- **U.S. Environmental Protection Agency's National Pesticide Information Center**
- Ph: 1-800-858-7378

#### U.S. Dept. of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB)

- Ph: 877-882-3277 (general info)

#### Texas Alcoholic Beverage Control Commission

- [http://www.tabc.state.tx.us/contact\\_us/headquarters.asp](http://www.tabc.state.tx.us/contact_us/headquarters.asp)

(List of contacts by issue available at above website)

## 5 - GRAINS AND CEREALS

Normally, marketing grain is a complex business requiring decisions on when to sell, what type of contract to use, proper storage, and many other factors. Although selling directly means the business may not be selling on the volatile open market that most grain growers are accustomed to, many of these decisions are still pertinent to the business. There are additional considerations for a direct farm business such as whether and where to have the grain milled and how and where to store the grain.



Although there are extensive resources for assisting conventional farmers in marketing their grain, there is limited information available for direct-to-consumer marketers. Most producers who are not selling through the traditional commodities markets have made their business planning choices using their personal judgment and experience and little else. An important resource to keep in mind is **MarketMaker**,<sup>92</sup> which allows producers to list their business in a searchable database as well as search for processors and potential

institutional customers. Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's *Grain Processing: Adding Value to Farm Products*.<sup>93</sup> The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. Finally, although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.<sup>94</sup>

### I. GRAIN INSPECTION STANDARDS

The *Federal Grain Standards Act* (7 U.S.C. § 71 et seq.) authorizes the Department of Agriculture to establish standards and procedures for the inspection of grain shipped in interstate commerce and out of the country (7 U.S.C. §§ 76, 77). The Grain Standards Act is administered by USDA's Grain Inspection, Packers & Stockyards Administration (GIPSA). Inspection of grain shipped domestically (within the United States) is voluntary, and performed upon request

<sup>92</sup> <http://www.marketmaker.uiuc.edu/>

<sup>93</sup> <http://www.attra.org/attra-pub/summaries/grainpro.html>

<sup>94</sup> <http://www.tritrainingcenter.org/course/>

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***Additional Resources: Grain Inspection***

***GIPSA maintains general information about grain and rice inspection on its website:***

*<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=grpi&topic=landing>*

***A list of official service providers that inspect or weigh grain is available on GIPSA's website:***

*<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&t>*

by GIPSA-authorized state agencies and private firms (7 U.S.C. § 79(b)). The regulations concerning inspection procedures and establishing standards are in 7 C.F.R. Parts 800, 801, 802 and 810. Very generally, inspectors rate grains on their moisture content, levels of contaminants such as insects or gravel, toxins caused by mildews or pesticide residues, and amount of crushed or broken grains.

## II. LICENSING OF WAREHOUSES

The United States Warehouse Act (USWA) (7 U.S.C. §§ 241-273) authorizes USDA to license warehouse operators that meet the standards established by the USWA and its regulations (7 U.S.C. § 242(j), 7 C.F.R. Part 735). Being federally licensed is voluntary, but licensees must post bonds (or other financial assurance) (7 U.S.C. § 245) and comply with record keeping,

contracting, and inspection requirements (7 U.S.C. §§ 246, 7 C.F.R. Part 735).

Texas public grain warehouse operation laws are covered under Title 2, Chapter 14 of the Texas Agriculture Code. (V.T.C.A., Agriculture Code, 14.001 *et seq.*) These laws, as well as certain regulations, govern the storage of grain in Texas and are overseen by the Texas Department of Agriculture. In order to operate a public grain warehouse in Texas the operator must first obtain a license from the Department, in the person's name. (V.T.C.A., Agriculture Code, 14.021). If an operator has multiple warehouses, located in close proximity, he/she needs only one license if the following is true: (1) the warehouses are covered under the same records; (2) a single and unique set of numbered recipients, without the name of specific warehouses, are covered under the combination name<sup>95</sup>; (3) "for each scale operated by the warehouse operator, the warehouse operator issues and maintains a single, unique set of sequentially numbered scale weight tickets containing all information required by department rule and bearing the name of the license holder and a unique name identifying the facility where the scale is located;" (4) a single daily position report for all the warehouses, limited to those in the combination, reports the storage obligations for the storage operation; (5) all warehouse operating records are maintained at a single location; and (6) a single unique bond or bond substitute covers the operation. (V.T.C.A., Agriculture Code, 14.022(b)).

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<sup>95</sup> "Combination" means a group of two or more public grain warehouses or facilities operated under a single set of complete records. For purposes of this chapter, a combination is treated as if it were a single public grain warehouse. (V.T.C.A., Agriculture Code, 14.022(a)(1)).

Not always will a grain warehouse have the opportunity to conduct, personally, all of the financial and permitting obligations set forth by the Department of Agriculture. Those employees who have the ability to act on behalf of the warehouse operator include a sole proprietor in the business, a general or managing partner, the chief financial officer, the chief operating officer, as well as the vast majority of upper level partners in the business. At a minimum the person must have the authority to sign warehouse receipts or to negotiate or sign contracts with the producers of commodities. (4 T.A.C. 13.2(2)). License holders are required to notify the Department, within ten (10) days, of a change in the billing address, agent address, managers, personnel signing warehouse receipts, or ownership. (4 T.A.C. 13.2 (3)).

Additional regulations require grain warehouses to be maintained in such a manner as to prevent loss and lessen the risk of disease. Grain warehouses used to store, ship, and handle grain must conform to the following specifications in order to be considered “suitable” for their process, by the state: (1) warehouses must be weather tight in order to protect the grain from rain, snow, etc. at all times; (2) warehouses must keep separate open storage grain from non-public storage facilities (this can be accomplished by smaller producers by building a wall within a warehouse, which separates the two); (3) warehouses must be structurally sound (enough to handle the vast weight of grain storage); and (4) warehouses must include a safe and adequate means of entry and exit. (4 T.A.C. 13.2 (4)).

Smaller producers also will want to focus on regulations enforced by the Texas Commission on Environmental Quality (TCEQ). This, in many ways, will come down to commercial and noncommercial grain facilities. Noncommercial use facilities are used to handle, dry, and/or store grain, produced by the owner of the warehouse. The storage capacity of a noncommercial warehouse cannot exceed 750,000 bushels or handle more than 4,000 bushels per hour. (30 T.A.C. 106.283(1)(A, B)). Furthermore, the warehouse cannot be within five hundred (500) feet from any recreational area, residence, or business, which is not that of the owner. (30 T.A.C. 106.283 (1)(C)).

Producers should also be aware of the FDA’s Defect Action Levels, which are maximum allowable levels of natural or unavoidable defects in foods that present no health hazard (21 C.F.R. § 110.110). Common defects with specific action levels include molds, insect parts, and excrements. More guidance on the action levels is available on the FDA’s **website**.<sup>96</sup> Texas law also explicitly authorizes the Texas Feed and Fertilizer Control Service to set limits for levels of and test for aflatoxin for retail sale or animal feed. Aflatoxin is a mold commonly found on grains, but it is unclear to what extent the agency exercises this authority (V.T.C.A., Agriculture Code, 141.007).

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<http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/sanitation/ucm056174.htm#intro>

### III. CHECKLIST

Have you?

- Come up with a marketing and business plan? What type of growth do you envision and when? Given the rarity of direct marketing grain, this may be a particularly difficult step that is especially important for establishing a successful business.
- Do you want to have your grain inspected and graded?
- Will you need to use a warehouse, or do you have on-farm storage capacity? If necessary, have you identified a warehouse that will store your grain?
- Will you be processing your grain, or selling it as harvested? If you are processing, do you have the necessary facilities and permits, or do you need to access a commercial, certified kitchen?

### KEY CONTACT INFORMATION

#### U.S. Grain Inspection, Packers & Stockyards Administration

- Ph: (202) 720-0219 (main)
- For a list of official GIPSA service providers, visit  
<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&topic=fsp>

## 7 - HONEY & MAPLE SYRUP

This chapter summarizes the basics of Texas laws pertaining to beekeepers involved in honey production. This section concludes with a brief discussion of rules for maple syrup production, which are similar to those for honey.

### **I. BEE KEEPING**

This section discusses state, but not local, regulations on beekeeping. Some counties and municipalities may limit where, how, or how many bees can be raised in an area. Therefore, beekeepers should contact their local authorities. For more information on technical aspects of beekeeping, local beekeepers' associations hold regular meetings to educate and inform fellow beekeepers. A list of local beekeeping clubs is available through the Texas Beekeepers' Association website.<sup>97</sup>

Domesticated honeybees play an integral role in agricultural sectors needing pollinators. Diseases and pests affecting honeybees can cause significant economic damage. Texas' laws and regulations relating to beekeeping can be found in Chapter 131 of the Texas Agriculture Code, and Title 4, Chapter 71 of the Texas Administrative Code, which establish registration and inspection requirements to facilitate protection of the health of Texas' bee colonies.

Producers who wish to have an inspection for a queen apiary will have to file a written request with the state entomologist before the first day of the year in which they wish to have the inspection (4 T.A.C. 71.21), at which time they will be charged an inspection fee. The inspector will certify that the bees, honey, pollen, and equipment are free from diseases. (V.T.C.A., Agriculture Code, 131.044). Such payments should be made to the "Apiary Inspection Service," and delinquency of such payments may result in a suit to collect a delinquent fee, revocation of the permit, or penalty fees. (4 T.A.C. 71.22).

The Texas Agriculture Code defines an apiary as a place where "six(6) or more colonies of bees or bee nuclei are kept," and therefore many casual beekeepers, for whom beekeeping is solely a hobby, are not necessarily covered under Chapter 131. (T.C.A., Agriculture Code, 131.001). However, the definitions also include that of a beekeeper, which means any person actively producing a single bee colony, so this acts to include more operations and not just those of large-scale beekeepers. Chapter 131 also authorizes the authority of the Chief Apiary Inspector, formerly, but also known as the state entomologist. The Inspector carries out publishes information about methods and directions to deal with infectious diseases related to honey bees. The Inspector is authorized to require a sign to require a sign at a producer's place of

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<sup>97</sup> <http://www.texasbeekeepers.org/clubs/>

business, which will have to be prominently displayed. (V.T.C.A., Agriculture Code, 131.007(c)(2)).

One of the primary roles of the Inspector is to prevent the spread of disease. Therefore, he/she may adopt rules and act in necessity to eliminate the existence and spread of such diseases. (V.T.C.A., Agriculture Code, 131.021). If any properties, whether equipment or actual bees, are determined to be infected with disease then the Inspector has the authority to order their destruction, and it is therefore very necessary to maintain annual inspections and insure positive health matters on one's bee production. (V.T.C.A., Agriculture Code, 131.021(b)).



## II. SELLING HONEY

Products sold in Texas as “honey” or “imitation honey” must be pure honey (V.T.C.A. Agriculture Code, 131.081, 131.083). The penalty for violating these labeling provisions is a Class B Misdemeanor. (V.T.C.A., Agriculture Code, 131.123).

Unless honey is sold as sliced comb, it must undergo some processing to remove it from the comb and bottle it. Honey is naturally anti-microbial because of its high sugar content, making it a relatively low risk food. Therefore, many states allow producers to sell their honey without first pasteurizing it. However, local inspectors determine what is adequately safe within their community and may nonetheless require processing in an inspected and certified facility (and possibly pasteurization as well). Regardless of any requirements, a producer might choose to pasteurize honey because pasteurization delays crystallization and makes the product free-flowing, thereby destroying osmophilic yeast (i.e., prevents molding).

Some consumers seek out local raw honey because they believe it helps alleviate allergies. Due to U.S. Food and Drug Administration regulation of health claims, producers should not include this claim on their labels or in their advertising. FDA must specifically approve all health claims prior to use (21 C.F.R. § 101.14),<sup>98</sup> but it has never approved the claim linking

<sup>98</sup> The Nutrition Education and Labeling Act of 1990 prohibits states from establishing any labeling requirements for food in interstate commerce that are not identical to FDA labeling regulations (21 USC § 343-1). Consequently, Illinois has not promulgated regulations on labeling. It is unclear whether FDA's labeling requirements apply to purely intrastate food, but it is likely they do.

honey and allergies (21 C.F.R. §§ 101.70-.83). Therefore, labels and advertisements *should not* include any health claims connecting raw honey to allergy relief.

### *Organic Honey*

To market honey as organic, the bees and processing plant must be certified organic according to USDA's National Organic Program. Although the regulatory definition of livestock specifically excludes bees (7 C.F.R. § 205.2), **USDA guidance documents**<sup>99</sup> direct certifiers to use the livestock standards for certification of bees. The livestock regulations generally require the producer to handle the livestock organically from the day of birth, use 100% organic feed, avoid most synthetic chemicals, and refrain from use of antibiotics and certain other medical treatments. For bees, this may mean things like locating the hive to prevent foraging at non-organic flowers, building the hive out of particular materials, or treating hive diseases in a manner that would comply with standards set out by the certifier. The chapter on organics covers the livestock regulations in more detail, as well as information on the certification process, record keeping requirements, labeling rules, and processing of organic foods. Given the special nature of bees, it is best to contact an accredited certifying agent that certifies bees to discuss specific organic certification requirements.

## III. MAPLE SYRUP

Much like honey, maple sap is a naturally occurring product extracted by producers. However, to make it into a saleable commodity, sugar makers must boil it down into syrup. This is considered to processing, and public health officials therefore may restrict maple syrup production only to facilities inspected and licensed by Texas State Department of Health. Like all other food processing facilities, the maple syrup facility will need to be clean and sanitary, have adequate and appropriate supplies, and be capable of keeping vermin, insects, and other contaminants away from the food.

### *Organic Maple Syrup*

Maple syrup may also be marketed as organic if certified by an accredited certifying agent. The National Organic Plan (NOP) generally requires a three year transition period where prohibited substances are not used on land, and the use of untreated, organic seedlings. For more information on the NOP and organic certification, see the "Organic Marketing" section of this guide. Maple trees are a somewhat unique crop because of their long life, so some standards may apply differently. Contact a certifying agent that specializes in maple production for specific information pertaining to maple trees.

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<sup>99</sup> Available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5069312&acct=AQSS>

#### IV. CHECKLIST

Have you...?

- Registered your bee colony with the Texas Apiary Inspection Service and obtained any necessary permits? Checked with local authorities for other restrictions?
- Contacted the Texas State Department of Health to learn if an inspection and permit is necessary for processing?
- If you intend to market your honey or maple syrup as organic, read the chapter on Organics and contacted an accredited certifying agent that has experience certifying honey or maple syrup?

## 8 - MEAT AND POULTRY

In the recent past, most farm operations included at least minimal animal production. Declining livestock auction markets and vertical integration in the livestock and poultry industries has limited marketing opportunities for small scale livestock and poultry farmers. However, selling direct to consumers is one means of retaining a presence in this potentially lucrative and rewarding business. Ongoing consumer concerns regarding food safety and the increasing interest in animal welfare should increase demand for direct farm sales of meat and poultry products. Moreover, in a 2004 study of restaurant and commercial food buyers, the most important factor in selecting a new supplier was obtaining the highest quality available--a characteristic that provides an opportunity for local, direct-to-market farm operations.

In order to participate in this market, however, producers must navigate a series of state and federal regulations relating to the production, slaughter and processing of meat and poultry products. This chapter will address legal issues relating to raising, slaughtering and processing requirements. The facility may also be subject to environmental regulations, discussed in the chapter on setting up the direct farm business.

For a potentially useful resource on other issues that may arise in marketing livestock and poultry, producers may want to read through Cornell's Small Farms Livestock Program's Resource Guide to Direct Marketing Livestock and Poultry, which is available **online**.<sup>100</sup> Though the guide's discussion of laws is New-York-specific and therefore not particularly reliable for Texas producers, it does also addresses many other issues critical to a successful business, such as effectively building relationships with buyers, identifying age and grading meat, the cuts of meat that each animal produces, and the kind of weight-to-yield ratios to expect.

### **I. RAISING AND CARING FOR ANIMALS**

#### *Animal Welfare Laws*

The Texas Penal Code provides statutory authority to prevent cruelty to animals, and for livestock animals in particular. The penal code states that a person commits an offense if they intentionally or knowingly torture a livestock animal, fail unreasonably to provide food, water, or water for the animal, abandons a livestock animal, transports



<sup>100</sup> <http://www.smallfarms.cornell.edu/pages/projects/workteams/LP/livestock.cfm>

in a cruel and unusual manner, overworks the livestock animal, etc. (V.T.C.A., Penal Code, 42.09).

Another criminal provision relevant to farms protects animal facilities from vandalism and intentional interference with the facility's production. The provision makes it a crime to enter property without permission or deprive an owner of the use of their animals or their facility with the intent of disrupting or damaging the enterprise (V.T.C.A., Penal Code, 28.03).

Depending on the level of property damage the violation can result in anything from a Class C Misdemeanor, if the damage is less than \$50, to a First Degree Felony, if the damage exceeds \$200,000. (*Id.*)

#### *Texas' Brands and Marks Law*

Texas laws concerning brand and marks requires each person who owns cattle, hogs, sheep, and/or goats to mark or brand their livestock with one or more earmarks, brands, tattoos, or electronic devices, differing from their neighbor's marks and brands. (V.T.C.A., Agriculture Code, 144.001). Horse owners are allowed to mark their horses by the same methods. (V.T.C.A., Agriculture Code, 144.001(b)). These marks for cattle are to be made on or before the cow's first birthday, and for hogs, sheep, and goats, the mark must be made by the age of six (6) months. (V.T.C.A., Agriculture Code, 144.003). A record must also be kept of the livestock's marks and brands, by the owner, and filed with the county clerk in the county in which the animals are located. (V.T.C.A., Agriculture Code, 144.041(a)). The county clerk, in recording the mark, notes the date of recording as well as the owner's specified location on the body of the animal for such a mark. (V.T.C.A., Agriculture Code, 144.042). Any dispute about an earmark or brand will be decided according to the records of the county clerk and the mark with the oldest date will prevail. (V.T.C.A., Agriculture Code, 144.043).

#### *Diseased Animals and Dead Animal Disposal*

The Texas Animal Health Commission's (TAHC) original and primary purpose is to control, suppress and eradicate livestock and poultry diseases and pests. Texas' pertinent law on the control of spreading contagious and infectious diseases of livestock (Title 6, Chapter 161, Texas Agriculture Code) directs the TAHC to investigate outbreaks, establish rules for isolating, quarantining, disinfecting, or (if necessary) destroying infected animals, and prevent the spread of disease borne by milk and dairy products (V.T.C.A., Agriculture Code, 161.041). The commission may also prepare and plan for, respond to, and aid in the recovery from disaster events that may affect livestock, exotic livestock, domestic fowl, or exotic fowl, including disease outbreaks, hurricanes, floods, tornadoes, wildfires, and acts of terrorism. (V.T.C.A., Agriculture Code, 161.0416).

*Inspections and Controls on Animal Movement*

The Texas Animal Health Commission (TAHC) has numerous programs for the control of brucellosis, trichomoniasis, tuberculosis, scrapies, hog cholera, avian influenza and other diseases. Explaining the details of these rules is beyond the scope of this guide. However, the regulations are available through the TAHC's website.<sup>101</sup> Programs range from the inspection of virtually all herds of cattle and swine to surveillance of auction barns, livestock dealers and garbage feeding establishments. The agency currently places a primary emphasis on controlling and eradicating brucellosis in Texas.

Although details depend on the disease and animal type, the regulations are capable of some generalizations. Bringing animals into Texas from out of state usually requires a certificate of health proving the animal tested negative for common diseases within 30 or 90 days of entry, or come from herds or areas certified free of the disease. In some instances, animals may enter Texas without this certificate if transported directly to slaughter. Animals moving within the state or undergoing ownership transfer are subject to many similar restrictions, with additional testing sometimes possible at major points of sales (such as auctions and feedlots). Owners should contact the TAHC for specific information on the type of animal they wish to transport before importing or moving animals within the state.

In many cases, animals that have diseases or may have been exposed to a disease are subject to quarantine and possible destruction. (V.T.C.A., Agriculture Code, 161.0415). The TAHC has authority to compensate owners for disinfection or destruction of animals and equipment, if funds are available (V.T.C.A., Agriculture Code, 161.058). If the TAHC wishes to destroy a diseased poultry flock, the agency may attempt first to negotiate to buy the flock at reasonable market value.

To enforce the laws, inspectors and veterinarians have authority to enter property and premises to examine or inspect any animals they have reason to believe may be affected with a contagious or infectious disease and simply to ensure enforcement of the policies of the TAHC. (V.T.C.A., Agriculture Code, 161.047). TAHC livestock inspectors and employees also have authority to stop vehicles transporting livestock to examine the livestock, the sanitary conditions of the vehicles, to ensure that the shipment is in compliance with the disease control rules, etc. (V.T.C.A., Agriculture Code, 161.048).

In addition to inspections by the TAHC to control diseases, Texas law imposes an affirmative duty on animal owners and caretakers to report potential and suspected infections to the TAHC (V.T.C.A., Agriculture Code, 161.101). The TAHC maintains a list of reportable diseases, which includes the following: anthrax, avian infectious laryngotracheitis, avian influenza, avian tuberculosis, bovine trichomoniasis, chronic wasting disease, duck virus enteritis, duck virus

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<sup>101</sup> <http://www.tahc.state.tx.us/regs/code.html>

hepatitis, equine encephalomyelitis, equine herpes virus-1, equine infectious anemia, equine viral arthritis, infectious encephalomyelitis in poultry or other fowl, ornithosis, paramyxovirus infection in poultry or other fowl, and scabies in sheep or cattle. (*Id.*) If a producer discovers, suspects or has reason to believe an animal has any of these listed diseases, he or she *must* report it to the TAHC.

#### *Feeding Garbage to Swine*

It is unlawful for a person to feed “restricted” garbage to swine or to provide another with “restricted” garbage for feeding swine. (V.T.C.A., Agriculture Code, 165.026(a)). A person may feed unrestricted garbage to swine if a person first registers with and secures a permit from the Texas Animal Health Commission. (V.T.C.A., Agriculture Code, 165.026(b)). The commission will provide a person with the proper forms upon request and will likely require a permit fee, not to exceed \$25. (V.T.C.A., Agriculture Code, 165.026(c)). “Restricted” garbage includes: (1) animal refuse matter and the putrescible animal waste resulting from handling, preparing, cooking, or consuming food containing all or part of an animal carcass; (2) animal waste material by-products or commingled animal and vegetable waste material by-products of a restaurant, kitchen, cookery, or slaughterhouse; and (3) refuse accumulations of animal matter or commingled animal and vegetable matter, liquid or otherwise. (V.T.C.A., Agriculture Code, 165.026(h)(1)). “Unrestricted” garbage includes the vegetable, fruit, dairy, or baked goods refuse matter and vegetable waste and refuse accumulations resulting from handling, preparing, cooking, or consuming food containing only vegetable matter. (V.T.C.A., Agriculture Code, 165.026(h)(2)).

#### *Dead Animal Disposal*

In the optimal situation, Texas law would have it that dead animals, especially those known to have diseases should be cremated or incinerated. However, there exist several appropriate disposal methods for those animals with diseases listed under 161.041 of the Agriculture Code. Rendering is a possibility if a licensed and approved rendering facility accepts the dead animal. (4 T.A.C. 59.12(e)(1)). Burial may also be utilized, but no part of the animal is allowed to be nearer than three feet from the surface of the ground. (4 T.A.C. 59.12(e)(2)). Disposal in approved sanitary landfills must be worked out between the producer and the local or state government responsible for the landfill. (4 T.A.C. 59.12(e)(3)). Composting must be accomplished in a manner authorized by the TAHC. (4 T.A.C. 59.12(e)(4)). Incineration of animals must be accomplished in an approved incineration facility and is the preferred method for dead animal disposal. (4 T.A.C. 59.12(e)(6)). The disposal operation generally must be odorless, completely eliminate pathogens (often by reaching a certain internal temperature for a minimum time period), and reduce the animals to ash or bone and feathers. Some disposal methods require permits from the TAHC or the U.S. Department of Agriculture Animal Plant Health Inspection Service (APHIS). Transportation of animals to facilities for disposal should be

in sealed containers and/or sealed vehicles that prevent drainage or leakage. The TAHC allows use of several of these methods for on-farm disposal, but owners should consult with the TAHC to ensure their intended disposal method will meet the agency's standards.

## II. SLAUGHTERING & PROCESSING

### A. Humane Slaughter

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#### **ADDITIONAL INFORMATION: Animal Processing Licenses**

**More information on obtaining federal animal processing licenses is available on the FSIS website:**

[http://www.fsis.usda.gov/regulations\\_policies/Grant\\_of\\_Inspection\\_Guideline/index.asp](http://www.fsis.usda.gov/regulations_policies/Grant_of_Inspection_Guideline/index.asp)

**The USDA recently launched a toll-free help desk for small meat and poultry processing plants. Staff specialists can answer questions or direct callers to appropriate assistance. Contact:**

**1-877-FSISHelp (1-877-374-7435)**

**[infosource@fsis.usda.gov](mailto:infosource@fsis.usda.gov)**

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*The Federal Humane Slaughter Act (7 USC 1901) requires humane slaughter of animals. Approved humane methods either render the animal unconscious quickly or comply with Jewish or other religious methods that quickly cause unconsciousness due to anemia from a cut to the carotid artery (7 USC § 1902).*

Although most farmers do not slaughter their own animals, the laws pertaining to the humane slaughter of animals are worth noting. For one thing, if part of the retail marketing of the meat entails advertising humane treatment, slaughtering methods matter as much as raising and care. The laws are also relevant because a slaughterhouse that fails to comply with these rules may also fail to comply with other rules pertaining to food safety, which could damage a producer's reputation and increase exposure to legal liability.

### B. Processing Meat and Poultry Products

Meat and poultry processors are subject to federal or state laws and regulations regarding licensure and inspection. The USDA's Food Safety and Inspection Service (FSIS) oversees meat and poultry processing facilities in Texas. FSIS sub-contracts with the Texas State Department of Health (TSDH) to provide inspections according to the federal standards.

As a general rule, each facility engaging in processing must have an inspection and license from the FSIS. For instance, in sausage production, the facility that slaughters the animal must have a permit and the facility that processes the sausage, if it is a separate facility, also must have a permit. In rare circumstances,

producers can slaughter and process their own poultry. Although most slaughtering and processing operations occur at slaughterhouses, mobile processing units – which are often more accommodating to small-scale producers – may be available in certain areas.<sup>102</sup>

### *Meat*

The Federal Meat Inspection Act (21 U.S.C. §§ 601-695) and accompanying regulations (9 C.F.R. Parts 300-599) govern facilities that slaughter or process meat. Some states also administer state meat inspection programs. Although policy in Texas authorizes a state meat program (V.T.C.A. 433.001 et seq.), all facilities in Texas qualify as federal because the FSIS contracts with Texas Department of Health to have their agents inspect and certify according to the federal standards.

The FSIS has stringent standards for the construction of slaughterhouses and meat processing facilities, generally requiring enclosed facilities that separate live animals from slaughtering and butchering operations in order to prevent contamination. Facilities must be well lit with easily cleanable equipment and washable, nonporous walls and ceilings. Facilities must have potable water for cleaning and sufficient septic and/or sewage service. Rail heights must be appropriate to the animals intended for slaughter and all equipment – including coolers, rails, drains and hooks – must be appropriate and well running.

In addition to meeting construction and equipment requirements, slaughtering and processing facilities must have a sanitary Standard Operating Procedure (SOP) (9 C.F.R. § 304.3) and a written Hazard Analysis and Critical Control Point (HACCP) plan (9 C.F.R. § 304.3). HACCP is a science based program that requires identifying critical points in the production processes where biological, physical and chemical hazards can contaminate food, developing plans for the prevention of the hazard, and implementing testing to verify control of the hazards (9 C.F.R. Part 417). Producers considering establishing their own processing facility will need to familiarize themselves with HACCP requirements and possibly obtain HACCP training and certification. More information on HACCP and links to further resources are available on the **FSIS website**.<sup>103</sup>

A slaughterhouse must apply for a grant of inspection for each type of animal it will slaughter. Therefore, not all slaughterhouses may slaughter all animals. Producers should determine the capacity of nearby slaughterhouses, or how far they will need to transport their animals for slaughter, before beginning operations.

<sup>102</sup> These units are still relatively uncommon, but USDA is increasing efforts to disseminate information and improve availability. For instance, in January and February 2010, the agency held a series of webinars to educate producers on special issues relating to mobile processing units. [http://origin-www.fsis.usda.gov/News\\_&\\_Events/Regulatory\\_Web\\_Seminars/index.asp](http://origin-www.fsis.usda.gov/News_&_Events/Regulatory_Web_Seminars/index.asp)

<sup>103</sup> [http://www.fsis.usda.gov/Science/Resources\\_&\\_Information/index.asp](http://www.fsis.usda.gov/Science/Resources_&_Information/index.asp)

All animals at USDA slaughterhouses must undergo pre- and post-slaughter inspections for health and soundness (21 U.S.C. § 603; 9 C.F.R. Parts 301 and 302). If the animal is fit for human consumption, the inspector places an “inspected and passed” stamp on the meat, using food-grade ink (21 U.S.C. § 606). The mark is put on carcasses and major cuts, but might not appear on retail cuts such as roasts and steaks.

Whereas an inspection qualifies the meat for sale to consumers, grading certifies that the meat is of a particular quality. Producers may request that USDA grade their meat (7 C.F.R. Parts 53 and 54). Mandatory USDA inspections are free of charge, but producers must pay for grading services (7 C.F.R. §§ 53.18, 54.28). For more information on how inspections and grading differ, visit the **FSIS website**.<sup>104</sup> To transport meat across state lines, the packer must affix a federally pre-approved label in order to transport meat across state lines (9 C.F.R. § 317.1). More information on the approval process for labels is available on the **FSIS website**.<sup>105</sup>

A good source for guidance on marketing meat is *How to Direct Market Your Beef*.<sup>106</sup> The guide is written by Jan Holder, a rancher who successfully direct markets beef with a "grass-fed" claim. The Sustainable Agriculture Network (an arm of the USDA's Sustainable Agriculture Research and Education (SARE) program) funded publication of the guide. In the guide, Mrs. Holder discusses her experience in complying with laws governing the slaughter, processing, and marketing of their beef.

Another means of selling meat is to sell the live animal to a customer for processing at a custom slaughter facility. Federal rules allow facilities to slaughter and process an owner's animal for their own consumption without undergoing continuous inspection (9 C.F.R. § 303.1). The facilities must still comply with all the sanitary and HACCP requirements and remain subject to periodic inspection. If farmers sell live animals for custom slaughter, the customer can take ownership over the phone and allow the farmer to deliver the animal to the slaughtering facility or the customer may come to the farm, choose the animal themselves, and deliver it to the processing facility.

### *Poultry*

The *Federal Poultry and Poultry Products Inspection Act* (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R. Part 381) apply to all



<sup>104</sup> [http://www.fsis.usda.gov/factsheets/inspection\\_&\\_grading/index.asp](http://www.fsis.usda.gov/factsheets/inspection_&_grading/index.asp)

<sup>105</sup> [http://www.fsis.usda.gov/regulations\\_&\\_policies/Labeling\\_Procedures/index.asp](http://www.fsis.usda.gov/regulations_&_policies/Labeling_Procedures/index.asp)

<sup>106</sup> <http://www.sare.org/publications/beef/beef.pdf>

poultry moving in *or affecting* interstate commerce. Therefore, the Act applies to all poultry processing, whether the producer sells the product in state or out of state. Although the Act authorizes states to implement their own programs (21 U.S.C. § 454), Texas has not done so. Consequently, the only agency conducting poultry inspections in Texas is the USDA's FSIS.

The Act mandates all poultry slaughtering and/or processing of poultry products undergo inspection (21 U.S.C. § 455). The construction requirements for federal inspection of poultry facilities are generally quite similar to those for meat processing (9 C.F.R. § 381). Likewise, slaughtering and processing facilities must have a sanitary SOP and HACCP plan (9 C.F.R. § 381.22). Some operations, however, are exempt from inspection.

#### *Federal Inspection Exceptions for Poultry*

Direct farm businesses meeting certain criteria listed below may sell poultry products directly to consumers without undergoing PPIA's otherwise mandatory inspection requirements (21 U.S.C. § 464; 9 C.F.R. § 381.10). In general, all exempt facilities must slaughter healthy chickens in a sanitary manner, and ensure that they handle the birds properly. (*Id.*) On a basic level, slaughtering is exempt when it is done by:

- the producer for personal use;
- a slaughterer who provides a service to an owner of live chickens and *is not* selling poultry to any consumers;
- a producer-grower who slaughters and sells the poultry they themselves have raised (1,000 bird limit, or 20,000 limit as long as only distributed intrastate);
- a producer-grower that sells directly to consumers;
- slaughterers who purchased live poultry specifically to sell direct to consumers;
- small businesses that process less than 20,000 birds annually *and* the processing only goes as far as cutting up the birds; and
- retail business that merely cut up birds for the store.

The intricacies of whether a producer or slaughterer qualifies for the exemption, and which sales are exempt, are more complex and nuanced than the list above. Therefore, producers should contact an FSIS district office for an individualized analysis before proceeding without obtaining an inspection and license. FSIS has published *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry*

*Products Inspection Act*, which is available **online**.<sup>107</sup> The guidance document contains a helpful decision flowchart (page 5) and a table (page 21) to determine whether the operation is exempt from the PPIA.

Regardless of the exemption, processors are never exempt from the PPIA's prohibitions against misbranding and adulteration (injurious to health, or held, packed or produced under unsanitary conditions). Attachment 2 to the *Guidance for Determining Whether...Exempt* (linked above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416) and the *FSIS Sanitation Performance Compliance Guide*, which is available on the **FSIS website**.<sup>108</sup>

### *Exotic Animals*

In addition to the meat and poultry commonly consumed by Americans, there are many animals that sell well to specialty markets. Farm raised game animals, such as venison or pheasant, may be attractive to some restaurateurs. Less traditional meats, such as bison or ostrich, are gaining popularity with consumers because they provide the taste and nutritional benefits of red meat, but are lower in fat and cholesterol. Marketing these meats will require additional effort because consumers are less familiar with the benefits and cooking methods.

Although the laws do not explicitly cover many of these specialty animals, they most likely must undergo slaughter and processing at inspected facilities since all food sold at retail must come from an approved source. Federal regulations include ratites (emus and ostriches, for example) in the definition of poultry subject to mandatory federal inspection under the Poultry Products Inspection Act (9 C.F.R. 381.1). Since these inspections are mandatory, the federal government pays for the cost of inspection and the producer is not responsible for paying the inspector. Most other animals, such as rabbits (9 C.F.R. Part 354), game birds (including but not limited to pheasants, quail, and mallard ducks) (9 C.F.R. Part 362), and exotic game such as deer, reindeer, elk and bison (9 C.F.R. Part 352) may undergo voluntary USDA inspection. Producers must pay for voluntary inspections.

Before beginning a specialty meat operation, a producer should thoroughly research potential markets and processing operations. To find nearby slaughterhouses, FSIS provides a listing of all licensed slaughterhouses in the U.S., available on the **FSIS website**.<sup>109</sup> The list, updated monthly, is organized alphabetically or by facility registration number.

<sup>107</sup> [http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry\\_Slaughter\\_Exemption\\_0406.pdf](http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf)

<sup>108</sup> [http://www.fsis.usda.gov/Regulations\\_&Policies/Sanitation\\_Performance\\_Standards/index.asp](http://www.fsis.usda.gov/Regulations_&Policies/Sanitation_Performance_Standards/index.asp)

<sup>109</sup> [http://www.fsis.usda.gov/regulations\\_&policies/Meat\\_Poultry\\_Egg\\_Inspection\\_Directory/index.asp](http://www.fsis.usda.gov/regulations_&policies/Meat_Poultry_Egg_Inspection_Directory/index.asp)

Another resource for finding nearby slaughter facilities is the University of Illinois **MarketMaker site**.<sup>110</sup> From the search page, select “processor” as the business type and “meat products” as the line of business, which will generate a page for searching by facility type (state or federal) and by geographic region (city, county, state, multi state, or zip code radius).

### III. MARKETING MEAT & POULTRY PRODUCTS

#### A. *Labeling Meat and Poultry Products*

FSIS regulates meat and poultry product labeling under the FMIA and the PPIA. These laws explicitly preempt any state law that adds to or is different than these federal laws (21 U.S.C. § 678; 21 U.S.C. § 467(e)). The FDA also establishes labeling requirements for “food products” under the Federal Food, Drug, and Cosmetic Act. Depending on the product, the agencies’ jurisdictions may overlap or become very unclear. To resolve this potential for jurisdictional overlap, USDA exempts foods containing less than certain quantities of poultry or poultry products from the PPIA (although they must still be inspected) so long as the producer does not represent the item as a poultry product (9 C.F.R. § 381.15). The standards are:

- 3 percent or less raw meat or less than 2 percent cooked meat; or
- Less than 2 percent cooked poultry meat and less than 10 percent cooked poultry skins, giblet, or fat when measured separately; and less than 10 percent cooked poultry skins, giblets, fat and meat when measured in combination
- Bouillon cubes, poultry broths, gravies, sauces, seasonings, and flavorings

USDA does not have a comparable regulation for meat, but has applied the same standards for several decades. Which agency is exercising jurisdiction matters because FDA requirements differ from FSIS requirements in some respects. For example, the FSIS requires pre-market label approval for meat and poultry (9 C.F.R. §§ 317.4 (meat), 381.132 (poultry)), while the FDA does not.<sup>111</sup>

A producer can obtain pre-market approval by submitting a sketch for premarket approval (9 C.F.R. §§ 317.4, 381.132) or by using a pre-approved generic label (9 C.F.R. §§ 317.5, 381.133). Generically approved labels cannot contain special claims, including quality claims, nutrient

<sup>110</sup> [www.ar.MarketMaker.uiuc.edu](http://www.ar.MarketMaker.uiuc.edu).

<sup>111</sup> Point of purchase materials (such as signs displayed near the product and stickers on the shelves) do not require pre-approval, but if the point of purchase materials ship with the meat, they must have pre-market approval. (*Id.*) FSIS also requires preapproval of labels or stickers applied at the point of purchase that make animal production claims (e.g. grass fed).

content or health claims, negative claims, geographical claims, or guarantees. (*Id.*) These restrictions limit the usefulness of general labels for most direct to consumer producers.

Labels must appear directly on the immediate packaging (9 C.F.R. §§ 317.1, 381.116), unless it meets special circumstances. For instance, poultry packages destined for institutional customers can have the label on the outside package (rather than each immediate package) as long as the label states “for institutional use” and the customer must not offer the unlabeled product in the container for retail sale (9 C.F.R. §§381.115). FSIS also requires the principal display label to contain the name of the product, net quantity of contents, the official inspection legend, number of the official establishment, and, if necessary, a handling statement (9 C.F.R. §§ 317.2(d), 381.116(b)). Information panels (contiguous to principal display panel) may contain an ingredients statement, name and address of the manufacturer or distributor, and nutrition labeling, if required (9 C.F.R. §§ 317.2(m), 381.116(c)). Safe handling instructions may be placed anywhere on the label. (*Id.*) Further regulations dictate product names, the prominence of the statement of identity, country of origin labeling, net quantity, and many other provisions. USDA’s *Guide to Federal Food Labeling Requirements for Meat and Poultry Products* provides more detailed information on these labeling requirements, which is available **online**.<sup>112</sup>

USDA regulates many terms that direct producers may wish to use on their products. Their **meat and poultry labeling website**<sup>113</sup> explains what USDA requires of specialty product labels. As noted above, many of these labels require pre-approval and many involve inspections and certification fees. Separate agency regulations outline the specific requirements for each claim. Some of the terms are:

- Natural: A product containing no artificial ingredient or added color and is only minimally processed.
- Organic: product was raised in compliance with USDA’s National Organics Program standards.
- Antibiotic free: allowed on red meat and poultry if supported by sufficient documentation.
- Hormone Free: The claim “no hormones added” may be approved for labeling beef products if the producer provides sufficient documentation to the USDA showing that no hormones have been used in raising the cattle. The claim “no hormones added” cannot be used on pork or poultry products unless it is followed by a statement that says “Federal regulations prohibit the use of hormones.”

<sup>112</sup> [http://www.fsis.usda.gov/PDF/Labeling\\_Requirements\\_Guide.pdf](http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf)

<sup>113</sup> [http://www.fsis.usda.gov/Fact\\_Sheets/Meat\\_&\\_Poultry\\_Labeling\\_Terms/index.asp](http://www.fsis.usda.gov/Fact_Sheets/Meat_&_Poultry_Labeling_Terms/index.asp)

- Grass fed: Grass and forage must be the feed for the lifetime of the animal, with the exception of milk consumed prior to weaning. The diet must be derived solely from forage consisting of grass (annual and perennial), forbs (e.g., legumes, *Brassica*), browse, or cereal grain crops in the vegetative (pre-grain) state. Animals cannot be fed grain or grain byproducts and must have continuous access to pasture during the growing season.
- Free range: allowed if producer can demonstrate to USDA that the poultry has had access to the outdoors.
- Fresh: Poultry may be labeled as “fresh” if its internal temperature has never been below 26° Fahrenheit.

## ***B. Specialty Products***

### *Organic Meat*

The USDA Agricultural Marketing Service administers organic production and labeling standards through the National Organic Program (NOP) (7 C.F.R. Part 205). Generally, NOP requires that animals receive all organic feed and minimum access to the outdoors and prohibits use of hormones to promote growth or antibiotics for any reason. To label the meat or poultry as organic, an accredited organization must certify the production and processing practices, in which case the product can bear the USDA Organic logo. For more information on the organic standards, see the “Organic Marketing” chapter of this Guide.

### *Kosher*

Marketing meat as kosher is another way to distinguish products and access a niche market. “Kosher” is the term for foods that comply with Jewish dietary laws. A very oversimplified explanation of kosher is that it prohibits consuming certain animals, most notably pork and shellfish, and requires meticulous separation of meat and dairy production and consumption. The dietary laws are complex, and certified kosher can sell at a premium price.

**FSIS’s policy book**<sup>114</sup> requires rabbinical supervision of meat processing before meat can be sold as kosher. FSIS does not certify to kosher preparation of products, but rather accepts the statements and markings of the rabbinical authority. Producers must provide the identity of the rabbinical authority upon request from the agency. The FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable rabbinical supervision.

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<sup>114</sup> <http://www.fsis.usda.gov/oppde/larc/Policies/PolicyBook.pdf>

Certification requires meticulous standards of health for the animals when presented for slaughter and entails ritual cleaning of all equipment, ritual slaughter by a sochet in a humane fashion, removal of all blood, and restrictions on which parts can be sold as kosher.

If a person sells both kosher meat and nonkosher meat in the same retail store, the person shall clearly label each portion of kosher meat with the word “kosher.” If unwrapped or unpackaged meat products are displayed for sale, the display case or container in which the meat is displayed must be clearly labeled with the word “kosher” or “nonkosher,” as applicable. (V.T.C.A. 17.822).

Other marketing issues related to kosher foods are important to consider. First, according to one kosher certification agency, the kosher poultry market is largely saturated. Second, although some cattle cooperatives have successfully established kosher slaughterhouses in order to market directly to consumers, doing so requires consistently processing enough cattle to justify the cost of certification and operation. Many kosher slaughterhouses largely process meat from industrial cattle yards and may be unwilling to separate meat for the direct farm business. As of this writing (2010), given that the market for pasture fed and organic meats is not fully saturated, it may not be worth the cost and extra effort to move into the kosher niche market, even if there is some demand.

### *Halal*

“Halal” is the term in Islam for something that is lawful or acceptable. Although it most commonly refers to foods, it in fact means anything permitted under Islamic law. Halal meat can only come from certain animals (pork and meat from carnivores is banned), must be raised according to certain standards (humanely and vegetarian, most notably) and slaughtered according to the ritual Zibaha (humane, swift cut to the throat of a healthy animal by a Muslim as he/she states a prayer over the animal, which must be facing Mecca).

Like kosher meat, halal meat commands a premium price. Moreover, some consumers will seek out halal meat because of concerns over mad cow disease (bovine spongiform encephalopathy – BSE). However, although there are similarities between halal and kosher meat, they *are not* interchangeable because the religions impose different requirements. For instance, both Judaism and Islam require the meat be slaughtered by someone of their religion. As another example, Islam prohibits the use of any alcohol to clean the carcass, whereas Judaism allows kosher wine.

Federal policy on halal labeling is identical to the policy for kosher labeling. The same policy book used for kosher foods requires handling according to Islamic law and oversight by an appropriate authority. FSIS does not certify to Halal preparation of products, but rather accepts the statements and markings of the Islamic authority. The producer must provide the identity of the Islamic authority upon request from agency official. The FSIS does not maintain a listing or

any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision.

Finally, if a slaughterhouse processes pigs in the same facility (which many certifying entities prohibit completely), the slaughterhouse must take steps to ensure they are kept separate from the halal meat, such as using different equipment, cleaning (to a level acceptable to the certifying entity), slaughtering on a separate day, and storing and processing in separate rooms. Halal rules require the slaughterer or processor to completely drain the carcass of its blood, prohibit cleaning or processing with alcohol or any other intoxicating food, and they must prevent processing or contamination with any non-halal food.

#### IV. CHECKLIST

Have you...?

- Confirmed that you have the time, resources and facilities to provide the standard of care required for your animals? If they become ill, do you have the resources to address the disease? Do you have a disposal plan for dead animals?
- Obtained any necessary permits for transporting your animals?
- Chosen a slaughterhouse that meets your needs? Is it adequately licensed?
- Do you need to have your labels approved? Have you done so?
- Developed a marketing strategy that realistically assesses your production capability and potential demand? If meat will need to be stored, do you have a plan for where, how long, and what it will cost you?
  - o For niche markets, have you researched the market demand for your product and assessed your ability and willingness to undertake the work necessary to meet that demand?
- Read the chapter on setting up a direct farm business and done research on any additional siting, construction or environmental permits you might need?

#### KEY CONTACT INFORMATION

##### U.S. Department of Agriculture, Food Safety & Inspection Service

Dallas, TX Regional Office 214-767-1253

## 9 - ORGANIC MARKETING

Organic production is an ecologically oriented process of growing crops or raising animals that encompasses a variety of social, environmental and ethical principles, including soil fertility, biological diversity and minimization of risks to human and animal health and natural resources." In the early 1970s, farmers started using the term "organic" to attract consumers interested in agriculture that was more environmentally and socially responsible than "conventional" agriculture. As the term caught on, allegations quickly emerged that some producers were selling non-organically produced food under an "organic" claim. As a result, several states (e.g, Oregon, California, Montana, North Dakota, and Virginia) passed organic certification laws.

In 1990, the U.S. Congress passed the Organic Foods Production Act (OFPA) (7 U.S.C. § 6501 to 6522 (1990)) to reconcile inconsistent state standards and prohibit fraudulent labeling. The statute seeks to provide "national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper."

The USDA's Agricultural Marketing Service (AMS) created the National Organic Program (NOP) to implement the statute (i.e., set the specific requirements for using the "organic" label). The National Organic Standards Board (NOSB) advises the USDA on the development and implementation of the NOP. (7 U.S.C. § 6518). The NOSB is a 15 member board comprised of four farmers/growers, two handlers/processors, one retailer, one scientist, three consumer/public interest advocates, three environmentalists, and one USDA accredited certifying agent. (*Id.*)

The NOP has three components important to direct farm businesses considering marketing their products as organic. First, the rules regulate the use of the term "organic" in labeling and marketing. Generally, producers using the term must obtain certification. Second, the NOP incorporates a comprehensive organic certification process which involves transitioning the farm and undergoing inspections. Finally, the rules require particular production practices for various types of operations and the processing/handling of goods.

## I. LABELING AND MARKETING

The most important thing to know about labeling and marketing organic products is that goods cannot be marketed as “organic” unless they have been produced in compliance with USDA’s organic production standards (7 C.F.R. §§ 205.100 and 205.101). Moreover, producers who sell more than \$5,000 in goods must have an accredited certifying agent certify their production practices. (*Id.*) The certification process is covered in Section 2.

Organic labeling and marketing is relatively straightforward. A producer can label or advertise goods as “100 % organic” if the product consists entirely of organic ingredients (7 C.F.R. § 205.301). Raw fruits and vegetables and meat grown or raised according to USDA’s organic standards satisfy this labeling requirement. The ingredients in processed items, such as jams, jellies and sausages, must be entirely certified organic. Another option is to label food simply as “organic”, in which case at least 95% of the ingredients must be organic, and the remaining 5% of ingredients must be on the list of approved organic processing substances, or, if they are agricultural products, commercially unavailable in organic form. (*Id.* and 7 C.F.R. §§ 205.605 and 205.606) Products at both the 100% and 95% level may use the USDA organic seal (7 C.F.R. § 205.311). If a product is made from 70 to 95% organic ingredients, it may be labeled as “made with organic [specified ingredient]” but it may not use the official USDA organic seal (7 C.F.R. §§ 205.301 and 205.311). If a product is less than 70% organic, only the ingredient list may identify individual organic ingredients (7 C.F.R. § 205.305).



## II. CERTIFICATION PROCESS

Before seeking organic certification, a producer should become as knowledgeable as possible about the benefits and costs of organic production. *How to go Organic*, a website sponsored by the Organic Trade Association, maintains an **online listing**<sup>115</sup> of resources for organic producers in the South.

The first step to becoming certified organic is to begin transitioning land (i.e. production practices) from conventional to organic methods. This process may take at least three years. Producers may not apply prohibited substances<sup>116</sup> for 36 months prior to certification. Eliminating certain conventional inputs often requires implementing new, unfamiliar practices, which is why education before starting transition is critical.

<sup>115</sup> <http://www.howtogoorganic.com/index.php?page=south-central>

<sup>116</sup> The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 601 & 602.

The second step to certification is selecting and contacting a certifying agent. The National Sustainable Agriculture Information Service (also known as ATTRA) has a **website**<sup>117</sup> that lists certifying agents operating in Texas. In selecting an agent, ASAP's guide suggests considering the entity's experience certifying the particular type of operation, their willingness to answer questions about the certification program, and their stability as a business.

The certification process can take several months. Certifying agencies typically require an application and development and implementation of a farm management plan that complies with NOP, using only approved substances and practices (7 C.F.R. § 205.401). The agency will also inspect records or other documentation proving organic management of the land and animals for the requisite transition time.

The last step to certification is an on-site inspection to verify compliance with the Organic System Plan (OSP) (7 C.F.R. § 205.403). Only after a successful inspection will the agency grant certification (7 C.F.R. § 205.404).

According to estimates by the Midwest Organic and Sustainable Education Service, certification will likely cost between \$400 and \$1000 per year for non-livestock operations. Livestock operations may cost more.

### III. PRODUCTION REQUIREMENTS

Organic systems plans vary by production activity. This section will provide a brief overview of the major requirements for organic production. For detailed explanations of each component of the program, see Harrison Pittman's *Legal Guide to the National Organic Program*, which is available **online**.<sup>118</sup>

Regardless of the end product, organic farmers must have an organic system plan (OSP) to submit to their certifying entity (7 C.F.R. § 205.201). The OSP should include written plans concerning all aspects of production, including practices and procedures to be performed, monitoring practices and procedures, record keeping systems, management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation, and any other additional information the certifying agent deems necessary (7 C.F.R. § 205.201).

#### A. Crops

Organic crop production has several components. The first pertains to how land is managed. The farmer may not apply prohibited substances to the land, and must stop applying these substances three years prior to certification (7 C.F.R. § 205.202). The land must have buffer

<sup>117</sup> <http://attra.ncat.org/sorg/certifying.html>

<sup>118</sup> [http://www.nationalaglawcenter.org/assets/articles/pittman\\_organicprogram.pdf](http://www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf)

zones and boundaries to prevent runoff and contamination from neighboring, non-organically managed fields. (*Id.*) The land must also be managed according to soil fertility and crop nutrient management practice standards, which require producers to “select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of the soil and minimize soil erosion” (7 C.F.R. § 205.203). Management methods include crop rotations, use of cover crops, and application of plant and animal materials. Requirements for the use of plant and animal materials include, but are not limited to, composting of raw animal manure (unless it meets exceptions), use of materials that have a carbon to nitrogen ratio of 25:1 to 40:1, and a prohibition on compost from plants that had prohibited substances applied to them or ash that was produced using burning as a method of disposal for crop residues. (*Id.*) Many of these practices contribute to another requirement, which is maintaining management practices that manage crop pests, weeds, and disease (7 C.F.R. § 205.206). These practices are generally natural, such as mulching to control weeds or developing habitat to support natural enemies of pests. Producers may also use non-synthetic substances, but must ensure they are not on the list of prohibited non-synthetic substances (7 C.F.R. § 205.602). If these do not work, producers may use synthetic substances on the list of allowed synthetic substances. The OSP must detail when and how synthetic substances may be used (7 C.F.R. §205.206).

The regulations generally require all seeds and planting stock to be organically grown. However, there are five exceptions to this rule (7 C.F.R. § 205.204):

- (1) when an equivalent organically produced variety is commercially unavailable, a producer may use non-organically produced, untreated seeds and planting stocks.
- (2) when organically produced equivalents and untreated, non-organically produced equivalents are not commercially available, a producer may use a non-organically produced crop that has been treated with a synthetic substance included in the list of permitted substances.
- (3) A producer may use non-organic annual seedlings if USDA grants a temporary variance.
- (4) A producer can use non-organic planting stock to produce an organic crop after maintaining the planting stock under a system of organic management for at least one year.
- (5) when Federal or State phytosanitary regulations require application of a prohibited substance, a producer may use treated seeds, annual seedlings, and planting stock.

The NOP defines “commercially available” as “the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling *as determined by the certifying agent* in the course of reviewing the organic plan” (7 C.F.R. § 205.2). Producers who believe a seed or planting stock is commercially unavailable should consult their certifying agent to determine what documentation the agent

will require for the producer to prove they diligently sought an organic source and it is truly commercially unavailable.

### ***B. Livestock and Poultry***

The NOP rule defines “livestock” as

[a]ny cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products (7 C.F.R. § 205.2).

To market livestock products as organic, they must be under “continuous organic management from the last third of gestation or hatching” through slaughter (7 C.F.R. § 205.236). Farmer may raise poultry as organic from the second day of life. Farmers must organically manage dairy cattle for at least a year prior to marketing milk as organic. They can market the meat from the cows’ calves as organic if they managed the cows organically for the last third of gestation. For future calves to be organic, the cow must remain under continuous organic management. This prevents producers from gaming the system by managing cows as organic only during the last third of gestation, and otherwise caring for them conventionally.

“Organically managed” means feeding animals 100% organic feed for their entire lives (and the last third of their gestation); avoiding prohibited substances such as growth promoters, plastic feed pellets, formulas containing urea or manure, and mammalian or poultry slaughter by-products; and providing living conditions that accommodate health and natural behaviors, such as allowing access to fresh air, outdoors, exercise, clean and dry bedding and access to pasture for ruminants (7 C.F.R. § 205.239). Revisions to this rule, effective June 17, 2011 for currently certified organic farms and June 17, 2010 for operations that obtain certification by June 17, 2010, will require producers to provide year-round access for all animals to the outdoors, recognize pasture as a crop, establish a functioning management plan for pasture, incorporate the pasture management plan into their organic system plan (OSP), provide ruminants with pasture throughout the grazing season for their geographical location and ensure ruminants derive not less than an average of 30 percent of their dry matter intake requirement from pasture grazed over the course of the grazing season (75 Fed. Reg. 7154 (Feb. 17, 2010) to be codified at 7 C.F.R. §§ 205.102, 205.237, 205.239 and 205.240). If need be, synthetic and non-synthetic substances that are listed on the national list of permitted substances may be used as supplements or additives (7 C.F.R. § 205.237, the list of permitted substances is in 7 C.F.R. § 205.603). It is important to note that the USDA does not issue variances or exemptions when there is an organic feed shortage.

Preventing illness and caring for sick animal is a point of concern for some organic producers (and consumers). Many modern medicines are synthetic, which is contrary to the principles of organics, but allowing animals to suffer in the name of avoiding synthetic chemicals is also contrary to ethical concerns. As much as possible, producers must care for animals in a manner that prevents disease by doing things such as selecting animals appropriate for the environment and the site, providing feed that satisfies nutritional needs, and establishing housing, pasture conditions, and sanitation practices that minimize the spread of disease and reduce stress. However, livestock can be given vaccines to prevent disease and other “veterinary biologics” (products of biological origin) when needed. When these are insufficient, farmers may use synthetic medications that are listed on the National List of allowed substances (7 C.F.R. § 205.238). The NOP prohibits all antibiotics, but it also prohibits denying an animal medical treatment with the intention of preserving the animal’s organic status. This is a careful balancing act, as farmers cannot market meat as organic if the animal received any antibiotics. Dairy products, however, can be organic if the farmer manages the cow organically for a year after she received antibiotics.

### *C. Handling and Processing*

In addition to certification of the production process, the NOP requires processing and handling facilities to obtain organic certification (7 C.F.R. § 205.100). “Handling” means to “sell, process, or package agricultural products” (7 C.F.R. § 205.2). If a facility handles organic and non-organic agricultural products, only the portion that handles the organic product needs certification (7 C.F.R. § 205.100). However, the facility must implement practices to prevent the comingling of organic and non-organic agricultural products (7 C.F.R. § 205.272), including not using storage containers that have been treated with prohibited substances or have held products that were treated with prohibited substances. For a handling facility to receive certification, it must have an organic handling plan (7 C.F.R. § 205.201), only use allowed substances, avoid the prohibited substances listed in sections 205.602 through 205.606 (7 C.F.R. §§ 205.105 and 205.270) and maintain appropriate records (7 C.F.R. § 205.103). As far as actual process methods are concerned, the NOP generally allows any mechanical or biological process, including cooking, curing or fermenting, packaging, canning and jarring (7 C.F.R. § 205.270).

For direct farm businesses seeking to both grow and process organic products, it is critical to work carefully with the certifying agent to design a compliant processing method to maintain the “organic” status of the final product.

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**Further Resources – Organic  
Marketing**

**National Organic Program (NOP)**

1. For more information on the USDA's organics program, including a list of banned and allowed substances, visit their **website**:

**<http://www.ams.usda.gov/AMSv1.0/nop>.**

2. The National Sustainable Agriculture Research and Education program (SARE, which is a branch of the USDA) has published a guide, **Transitioning to Organic Production**, which addresses some of the difficulties a farmer can encounter and lists resources for assistance.

**<http://www.sare.org/publications/organic/organic.pdf>**

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Retail food establishments who receive and sell products labeled as organic are usually exempt from certification, but they must nonetheless maintain proper records and comply with the requirements for the prevention of comingling (7 C.F.R. § 205.101).

#### IV. CHECKLIST

If want to go organic, you will need to:

- Research, study, and learn as much as you can about organic practices. Switching to organic takes time and requires considerable labor investments – you do not want to make a mistake that costs you money, or worse yet, prevents certification.
  - Talk to other producers in your area to learn about your local market and what grows well in your area.
  - Attend conferences, workshops, and training sessions on growing and marketing organic
- Develop an Organic System Plan, a record keeping system, and a business and marketing plan. Make sure your plans are consistent with each other.
- Research and choose an organic certifying entity. Make sure the certifier has experience certifying your type of production, then obtain their information on what you need to do.
- Start transitioning crops and animals to organic production practices. Keep good records!
- Contact your chosen certifying agent, obtain certification, and start marketing.

### GLOSSARY OF TERMS

**Adulterated:** The full legal concept of adulteration is complex, but essentially, a food is “adulterated” if it contains any poisonous or added deleterious substance which may render it injurious to health or if it consists of or has been exposed to a diseased, contaminated, filthy, putrid, or decomposed substance during production, preparation, or packaging, or if held under unsanitary conditions.

**Agency (agent):** A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

**Agricultural Enterprise:** Agriculturally-related activities performed by any person(s) for a common business purpose. This includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units. This could include a leasing of a department of another establishment.

**Agronomic Rate:** A specific rate of application that provides the precise amount of water and nutrient loading, which selected grasses/crops require without having any excess water or nutrient percolate beyond the root zone.

**Amortization:** The paying off of debt in regular installments over time; the deduction of capital expenses over a specific period of time.

**Annex:** To incorporate territory into the domain of a city, county, or state.

**Articles of Incorporation:** A document that dictates the management of the affairs of a corporation, including the purpose and duration of the corporation and the number and classes of shares to be issued by the corporation.

**Assumed Name:** (also known as "doing business as" or "d/b/a"): The name under which a business operates or by which it is commonly known.

**Assumption of the Risk:** A legal concept in negligence (tort) law wherein an individual knows of or is otherwise aware of a risk posed by a particular activity and nonetheless engages in the activity. The doctrine thus limits that individual's right to hold others liable for injuries incurred as a result of engaging in the activity. Assumption of the risk most commonly arises in the context of employer-employee relationships and agri-tourism.

**Business Plan:** The business plan helps guide the business owner through a proposed business' goals, objectives, and marketing and financial strategies. It also may serve as an introduction to potential investors if outside financing is required.

**Candling (egg):** The use of a bright light source behind the egg to show details of the embryo through the shell.

**Case Study:** An intensive analysis of an individual unit (such as a person, business, or community) that stresses developmental factors in relation to environment.

**Checkoff:** A mandatory fee for all producers of a particular commodity that is used to fund commodity-specific research or marketing.

**Commercially Available:** Under the National Organic Program, the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

**Commodity:** A tangible item that may be bought or sold; something produced for commerce.

**Commodity Agriculture:** The agricultural production of commodities with the primary objective of farming being to produce as much food/fiber as possible for the least cost. It is driven by the twin goals of productivity and efficiency.

**Common Law:** The body of laws and rules that courts create as they issue decisions.

**Consideration:** A vital element in contract law, consideration is something (i.e., an act, forbearance, or return promise) bargained for and received by a promisor from a promisee. It is typically the underlying purpose for entering into a contract.

**Contract:** A legally enforceable agreement between two or more persons involving an offer, acceptance, and consideration. It may be oral or written.

**Cooperative:** A user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage.

**Copyright:** (1) The right to copy a work, specifically an original work of authorship (including a literary, dramatic or other work) fixed in any tangible meaning of expression, giving the holder exclusive right to reproduce, distribute, perform, or otherwise control the work. (2) The body of law related to such works.

**Corporation:** a separate legal entity in which the owners (shareholders) are not personally responsible for the liability of business.

- **S-corporations** elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation.
- **C-corporations** are separate taxpaying entities that conduct business, realize net income or loss, pay taxes, and distribute profits to shareholders.

**Cow-share Program:** A program in which consumers sign a contract to purchase a “share” in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives the milk from “their” cow without technically “purchasing” the milk.

**De Minimis:** something so small that it would be inconvenient and unreasonable to keep an account of; the impact is insubstantial.

**Depreciation:** A decline in an asset's value due to use, wear, obsolescence, or age.

**Double Taxation:** The government taxes the corporation on its profits and the owners/shareholders also pay individual income tax on profits distributed as dividends from the same corporation.

**Estate Plan:** The preparation of a plan to carry out an individual's wishes as to the administration and disposition of his/her property before or after death.

**Excise Tax:** A tax levied on the purchase of a specific good as opposed to a tax that generally applies to the sale of all goods.

**Farm Labor Contractor (FLC):** Any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other consideration, performs recruiting, soliciting, hiring, employing, furnishing, or transporting of any migrant or seasonal agricultural worker.

**Feasibility Study:** a process used to analyze an existing business opportunity or new venture. The questions on a feasibility checklist concentrate on areas one must seriously consider to determine if an idea represents a real business opportunity.

**Good Faith:** Acting honestly, fairly, and with a lawful purpose without malice or any intent to defraud or take unfair advantage. Whether a party has acted in good faith is often an issue that the court or the jury has to decide in a lawsuit.

**Grading:** USDA certification that a product is of a particular quality.

**Grandfather Clause:** A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

**Gross receipts:** All considerations received by the seller, except trades in personal property.

**Halal:** an Islamic term that refers to something lawful or acceptable.

**Hazardous Positions:** In the employment context, hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous chemicals.

**Health Claim:** a health claim describes a relationship between the food (or component of it) and the reduction of the risk of a disease or health-related condition.

**Hold Harmless:** A provision in an agreement under which one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability.

**Injunction (prohibitory):** An order of a court commanding a person, corporation, or government entity to stop doing something and/or refrain from doing such actions in the future.

**Intellectual Property:** Creations of the mind; inventions, literary and artistic works, and symbols, names, images, and designs used in commerce, as well as the body of law (trademark, patent, copyright, trade secret) used to protect such works.

**Interstate Commerce:** the buying and selling of products and services between people and entities located in different states or territories.

**Intrastate Commerce:** The buying and selling of products and services within a single state.

**Joint and Several Liability:** A legal obligation under which a party may be liable for the payment of the total judgment and costs that are associated with that judgment, even if that party is only partially responsible for losses inflicted.

**Karst Area:** area(s) where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater

**Kosher:** The term for foods that comply with Jewish dietary laws.

**Livestock Management Facility:** Any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area.

**Man-day:** Any day where an employee performs agricultural labor for at least one hour.

**Material Representation:** A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion.

**Migrant Agricultural Worker:** An individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

**Misbranding:** The label, brand, tag or notice under which a product is sold is false or misleading in any particular as to the kind, grade or quality or composition.

**Negligence:** a tort law concept; the failure to exercise the standard of care that an ordinary, prudent and reasonable person would exercise under the circumstances.

**Notice-and-Comment Rulemaking:** A rulemaking process by which government agencies provide the public with an opportunity to participate in the interpretation of laws by giving feedback on draft regulations.

**Nuisance:** A substantial interference, either by act or omission, with a person's right to use and enjoy their property.

- **Public Nuisance:** An interference or invasion that affects a substantial number of people, or an entire neighborhood or community
- **Private Nuisance:** An interference or invasion that affects a single party, or a definite, small number of individuals in the use or enjoyment of private rights.

**Nutrient Content Claims:** These claims characterize the level of a nutrient in a food; they must be approved by FDA.

**Organic:** A system of food production that is managed in accordance with the Organic Foods Production Act of 1990 to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that promote biodiversity and ecological balance. Organic certification is managed by the Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture.

**Output Contract:** A written agreement in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output.

**Partnership:** A partnership (also known as general partnership) is an association of two or more persons who combine their labor, skill, and/or property to carry on as co-owners of a business for profit.

**Patent:** a patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years.

**Piecework:** Work completed and paid for by the piece.

**Prima-facie:** (Latin for "at first sight"): An evidentiary standard that presumes particular evidence proves a particular fact; however, the fact may be disproven by providing contradictory evidence.

**Processing:** The manufacturing, compounding, intermixing, or preparing food products for sale or for customer service.

**Procurement Contract:** A term that refers to contracts used by governments and institutions to acquire products.

**Properly Implemented:** An administrative law concept that requires agencies to issue rules according to state or federal administrative procedure.

**Qualified Health Claim:** A health claim where emerging scientific evidence suggests the claim may be valid, but the evidence is not strong enough to meet the standard necessary to be a health claim; must be pre-approved by FDA.

**Raw Agricultural Commodity:** Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form before marketing.

**Real Property:** Land and anything growing on, attached to, or erected upon it, excluding anything that may be severed without injury to the land.

**Requirements Contract:** A contract in which buyer promises to buy and a seller promises to supply all the goods or services that a buyer needs during a specified period. The quantity term is measured by the buyer's requirements.

**Respondeat Superior:** In tort law, the doctrine holding an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

**Retailers' Occupation Tax:** A tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption.

**Sales Tax:** A combination of occupation taxes (imposed on a business' receipts from the sale of goods used or consumed) and use taxes (imposed on consumers that purchase items for personal use or consumption from a business).

**Seasonal Agricultural Worker:** An individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence-

1. When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or
2. when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

**Setback:** The distance a facility must be from property lines or neighboring residences.

**Sole Proprietorship:** A business owned and operated by one individual.

**Statute:** a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." Regulations, rulings, opinions, executive orders and proclamations are not statutes.

**Tangible Personal Property:** A term describing personal property that can be physically relocated. The opposite of real property, in a sense, as real property is immovable.

**Technical Bulletins:** Non-binding guidance documents published by agencies that facilitate consistent interpretation and application of the regulations issued by the agency.

**Three-Tier Distribution System:** In the alcohol supply chain, a system that requires manufacturers to sell with distributors, who sell with retailers, who then may sell the product to the end consumer.

**Tort:** An injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit.

**Trade Dress:** A design, packaging, or other element of appearance that is both nonfunctional and distinctive.

**Trademark:** An identification used to distinguish goods and services from those manufactured or sold by others – it is the symbol that customers use to identify a product and equate with goodwill.

**Trade Name:** A name used to identify a person's business or vocation (see also ASSUMED NAME).

**Trade Secret:** Information companies make an effort to keep secret in order to give them an economic advantage over their competitors

**Use Tax:** A privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer.

**Veterinary Biologics:** Products of biological origin that are used to diagnose and treat animal diseases.