LEGAL CONSIDERATIONS IN DIRECT FARM MARKETING:

A SUMMARY

Legal Aid of Nebraska, Farm Law Project
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Legal Aid of Nebraska

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The material in this brochure is primarily taken from the following sources, to which readers are referred for a highly useful and detailed discussion of the subjects summarized in this brochure:

The Legal Guide for Direct Farm Marketing, Neil D. Hamilton, Drake University Agricultural Law Center, June, 1999.

The Farmers Legal Guide to Producer Marketing Associations, Doug O'Brian, Neil D. Hamilton, and Robert Luedeman, Drake University Agricultural Law Center, September 2005.

These works and additional information are available through:

Drake University Agricultural Law center
2507 University Avenue
Des Moines, Iowa 50311
(515) 271-4956
http://www.law.drake.edu/academics/agLaw/?pageID=agPublications

For additional information, feel free also to contact the Nebraska Rural Response Hotline at 1-800-464-0258.

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I. NONTRADITIONAL APPROACHES TO AGRICULTURAL PRODUCTION

A. Producer Marketing Associations

- Association of farmers dedicated to the selling, marketing, processing, promoting, or certifying for the group.

    - Farmer collective bargaining organizations
    - Growers' networks
    - Community-supported agricultural enterprises
    - Vertical coordination and integration models
    - Marketing organizations

- Can be formed as a cooperative, limited liability company, or limited partnership, or even an informal network of neighbors working toward a common goal or certifying for the group.

- Benefits
    - Counterbalance to vertical integration of commodity markets
    - Level the playing field by increasing the collective bargaining capability of producers
    - Better prices
    - Improved Access to Markets, Expertise and Capital
    - Price and market stability by becoming certified supplier to brokers providing organic produce and other such products to retail establishments
- Examples:
    - Iowa Turkey Growers Cooperative
        - Vertical integration model – producers acquire and operate processing plant formerly owned and managed by Oscar Meyer. West Liberty Foods, LLC, has become one of the nation's largest turkey processors.
    - Red Tomato
        - Massachusetts marketing organization -- nonprofit corporation that markets and distributes organic produce grown under certain protocols, including integrated pest management practices and other "certified organic" procedures. Maintains a "dignity price" to ensure sustainability of production effort.
    - Niman Ranch Pork Company, LLC
        - Iowa subsidiary to Niman Ranch, Inc. Parent entity markets beef, pork and lamb raised under humane and traditional conditions, on all-natural feeds, and without accelerating maturation process.

B. Direct Farm Marketing

- Farm-stand or roadside market

  - Most Common Legal Issues
    - Zoning
      - “Farming” versus “Business Pursuit”
      - Nonconforming Use
      - Nuisance
    - Signage
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      - Operators typically place burden of identifying and acquiring necessary permits and licenses on producers
      - Contractual and Legal Dispute Resolution Mechanisms
      - Rules and contracts tend to become more complex as markets move closer to consumers populating Wall Street as opposed to Main Street
    - Statutory Protections and Liability Insurance
    - Federal Assistance Programs (Food Stamps and WIC)
    - Potential food safety liability
    - Collection of State and Local Sales Taxes
- Pick Your Own” (“PYO”) Operation
  - Most Common Legal Issues
    - Commonly used for fruits and berries, but in decline
    - Premises Liability and removal of hazardous conditions
    - Insurance
    - Waivers and Releases
- Community supported Agriculture (“CSA”)
  - Customers pay an annual fee for a share – or subscription – of the farm’s produce; customers often required to assist in production activities
  - Customers acquire ownership interests in crop and/or livestock

- Most common legal issues
  - Contracts and payment
  - Legal status of on-site customer workers
  - Licensing requirements
  - Insurance and worker's Compensation Issues
  - Membership agreements and expanding regulation.
- Example:
  - Rolling Prairie Farmer's Alliance in northern Kansas. Eight farms selling produce on a subscription basis.

- Direct delivery (restaurants, grocery stores, other retail outlets, and home delivery routes)
  - Most common legal issues
    - Potential food processor license requirements
    - Payment issues
    - Certification of foodstuffs

II. BENEFITS, RESPONSIBILITIES AND RISKS OF DIRECT FARM MARKETING

A. Benefits

- Higher prices
- Higher net income
- More stable and dependable customer base
- Increased marketing opportunities
- Ability to marketing higher value products, such as meat and processed foods
- Agricultural tourism
- Reducing farm operating costs

B. Responsibilities

- Choosing a product and preparing it in a form that can be sold
- Finding consumers
- Choosing a location
- Advertising, labeling and pricing
- Dealing with the general public versus a sole purchaser
- Customer satisfaction and business reputation

C. Risks

- Risk occurs when there is the possibility of loss or injury. Four types of risk generally associated with direct farm marketing ("DFM")
  - Production Risk

        - Crop loss
        - Livestock loss
        - Risk management solutions
            - ❖ Product diversification
            - ❖ Insurance
    - Marketing Risk
        - Nonexistence of market
        - Steep price declines
        - Risk management solutions
            - ❖ Pre-crop marketing plan
            - ❖ Forward contracts
            - ❖ Futures contracts
            - ❖ Crop insurance products
    - Financial Risk
        - Interest rate changes
        - Unexpected liquidity needs
        - Risk management solutions
            - ❖ Avoid variable rate loans
            - ❖ Maintain adequate cash reserves
    - Regulatory Risk
        - Changes in federal and state regulations
        - Changes in private-sector certification requirements
        - Risk management solution
            - ❖ Monitor market for prospective regulatory changes

III. <u>FINANCING</u>

A. The paradox of capital – those who need it most have the hardest time obtaining it

- The five C's of Credit
    - Capacity to repay – cash flow
    - Capital already invested
    - Collateral or other security interests available to prospective financiers
    - Conditions of loan
        - Purpose of loan: working capital, equipment, inventory
        - Local market conditions
    - Character of management team

B. Two basic sources of capital

- ***Equity Financing*** (sale/acquisition of ownership interests in operating entities, such as a corporation, limited partnership, and limited liability company)

- Benefits
  - Repayment requirements generally more flexible than bank loans
  - Investors tend to be experienced in the field
  - Investors do not need to be repaid in the event of business failure
- Detriments
  - Equity financiers tend to take larger share of profits
  - Equity financiers tend to exercise/assert greater control and influence

- ***Debt Financing***
  - Benefits
    - Lender has limited involvement in management and daily operations
    - Lender's profit limited to interest on loan
    - Loans from those close to the business tend to have flexible repayment terms
  - Detriments
    - Loan repayments may come due when your need for cash is greatest
    - Personal guarantees or collateral often required, thereby reducing the benefits associated with fictitious forms of business, i.e. corporations, LLCs, and other entities.

C. Key Questions When Considering Infusion of Capital

- Purpose of Financing
  - Start-up costs
  - Expansion
  - Risk management
- Degree of Risk
- Alternatives to Financing
  - Better cash management
  - Cost-savings
- Status of product's market
- Cyclical or seasonal nature of business
- Strength of management team
- Relationship between financing and business plan

- Securities law issues

D. Sources of Financing

- Private-sector lenders and venture capitalists
- Private-sector grants
- Farm Credit System
- Acquisition or merger involving established entity
- State and local economic development programs
- Small Business Administration loans
    - Basic 7(a) Loan Guaranty
        - SBA's primary business loan program. Guarantees loans made by commercial institutions.
    - 504 Loan Program
        - Provides long-term, fixed-rate financing to small businesses to acquire real estate, machinery or equipment
    - Microloan or 7(m) Program
        - Provides loans up to $35,000.00 to small business for working capital or purchase of inventory, supplies, furniture, equipment, fixtures, or machinery. Cannot be used to retire existing debt.
    - Small Business Investment Companies (SBIC's)
        - Licensed by SBA to finance companies in particular areas.
        - Provide equity capital, long-term loans, and expert advice
        - Independent loan capabilities
- USDA Rural Development office
    - Business and Industry Guaranteed Loans
        - USDA guarantees up to 80% of traditional private-sector loan
        - Applicant must be located in rural area
        - Maximum limit: $10,000,000.00
    - Intermediary Relending Program
        - Establish new businesses, expand existing businesses, create employment opportunities or assist in community development projects
        - Cannot be used for agricultural production.
        - Maximum limit: $250,000.00
    - Value-Added Producer Grants

        - $500,000.00 limit
        - Funds must be used for planning purposes or working capital.
        - Can provide start-up funds for legal assistance and expert assistance with feasibility studies and business plans, purchasing inventory, and making payroll.

IV. LEGAL CONSIDERATIONS

A. Market entry considerations

- Product plays a key role in assessing prospective legal environment:
    - Least regulated: fresh fruits and vegetables
        - Caveat: farm labor and safety rules
        - Worker's Compensation Insurance issues
    - Intermediate regulation: processed foods
        - Licensure and food safety concerns
    - Most regulated: meat, dairy and eggs
        - Special licensing requirements
        - Special inspection requirements
- Federal law and regulations
    - FDA labeling requirements
    - "locally grown" requirements under WIC (Women, Infants & Children) program
    - Adulterated food restrictions under the federal Food, Drug and Cosmetic Act
        - Imprisonment and other criminal penalties for selling adulterated honey at farmer's markets
    - Federal Meat Inspection Act
        - Imprisonment and other criminal penalties for selling non-lean beef misbranded as "lean" beef
    - Nutritional Labeling and Education Act
        - "Small business" exception – total sales of items (food and nonfood) less than $500,000.00; if total sales exceed $500,000.00, food comprises $50,000.00 or less
    - Perishable Agricultural Commodities Act
    - Packers and Stockyards Act
- Local regulatory environment varies from state to state
    - Strongest legislative efforts to promote – and regulate – DFM:
        - California
            - California Food and Agricultural Code §§ 47000 *et seq.*
        - New York

            - New York Stat. Chap. 69 Art. 23 §§ 280 *et seq.*
    - Key regulatory issues
        - Licensure
        - Food safety/processing
        - Food certification
- General observation: the bigger you become, or the more complex your undertaking, the greater the likelihood of encountering regulatory obligations and liability
    - The less you look like a farm, the more likely your encounter with local, state and federal regulations
        - "Haunted hayrides" constitute a commercial operation, not farming. *See* <u>*Columbia Township Board of Zoning Appeals v. Otis*</u>, 663 N.E.2d 377 (Ohio App. 9 Dist. 1995) (zoning violation subject to injunction)

B. Operational Considerations

- Like fences, good contracts make good relations
- Eight common mistakes
    - Selling more products at roadside stands produced by others than yourself
    - Not carrying sufficient liability insurance
    - Failing to comply with labor laws
    - Zoning violation (conducting a "commercial" business where none is allowed)
    - Allowing unsafe conditions to exist when providing visitors with access to the farm
    - Selling processed foods prepared at an unlicensed facility
    - Failing to abide by farmer's markets' rules intended to protect to the quality or safety of food
    - Not complying with recordkeeping and paperwork rules for tax or labor laws
- Six Key Phone Calls
    - Local land use planning authorities
    - Insurance agent
    - State food inspection and licensing officials
    - State department of agriculture's marketing and diversification office
    - Attorney

V. BUSINESS CONSIDERATIONS

A. Determine the existence of economic need/niche and potential of your business to fulfill demands of marketplace.

- The more novel the business approach, the more important the role of business fundamentals. Risk historically increases as parties depart from traditional market approaches and mechanisms.
    - Example: Producing winter wheat for sale on the commodity market as compared to organic wheat for a specialty brewer. Financiers and suppliers extending credit will seek proof of input/production capability and existence of market demand.

B. Step One: Conduct initial exploratory meeting

C. Step Two: Select steering committee to oversee business planning effort

- Feasibility Study
- Business Plan

D. Step Three: Prepare Feasibility Study

- Market issues. Projected demand for product, location of market, and potential for competition.
- Organizational and technical issues
    - Type of business structure
    - Identity of corporate leadership
    - Qualifications for leadership positions
    - Type and availability of equipment and other inputs
- Financial issues. Estimates of start-up costs, operating costs, revenue projections, sources of financing, and potential profits.

E. Step Four: Prepare Business Plan

- Introduction: Provide summary of business explanation of operations.
- Project/Business: Describe in detail the mission, the business and legal structure.
- Management: Identify prospective leadership and qualifications.
- External environment: Analyze the broader economic, social and business environment and potential competition.
- Markets: Identify prospective buyers and explain how you will reach them, and forecasts of sales.
- Operations: Provide detailed explanation of labor and technical inputs and their sources.
- Finances: Generate budget, sources of capital, projected financial performance, economic variability, risk management, and contingency plans.
- Implementation: Explain how plan will be implemented, with milestones and timelines.

- Core variables to success: professional management, adequate volume to do business efficiently and cost-effective operations.
    - Farmers cannot be expected to be experts in the world of food marketing and processing.

- Honest accounting.
- Do not rely on grants. Tend to be one-time infusions of capital.
- Follow the rules – maintain brand integrity/credibility.
- Do not underestimate importance of price and customer convenience.
- Beware seasonality

- For farmers contemplating nontraditional markets, marketing is the most important part of the business plan.
  - Use a particular production technique, such as meeting organic production or meeting animal welfare standard certified by third party.
  - Grow or raise a unique variety or breed with special characteristics.
    - Differentiation in terms of freshness, flavor and purity.
  - Identity preservation.
  - Labeling.
  - Only be as different as you can afford to be.

F. Second exploratory meeting

G. Draft entity formation documents

H. Review, execute and file entity formation documents

I. Conduct first annual meeting

VI. MARKETING HIGH VALUE PRODUCTS AND PROCESSED FOODS: INSPECTION, LICENSING AND FOOD SAFETY

A. Sale of raw fruits and vegetables generally subject to least regulation.

B. State and federal regulation becomes more extensive as DFM shifts to processing of food, or the DFM involves the sale of meat, poultry, eggs and dairy products. Regulatory subjects, standards and requirements vary from state to state. **Most important piece of advice**: contact state or local officials if you have questions.

C. Seven questions to ask state and local food officials:

- Do I need a state license or permit to produce and sell products in question?
- Do the local health officials – such as city or county inspectors – have their own set of rules for food processing and marketing?
- If I am presently marketing "processed foods" which require a state or local license what is the procedure for obtaining the license and what is the penalty for failing to have one?
- What types of home-produced foods can I sell without having to be licensed or inspected?
- What type of kitchen or food-processing facility will require me to obtain a food-processing license?
- Does the state license or approve "community" or "shared use" kitchens and are there any licensed facilities in my area I might be able to use?

- Does the state provide assistance to producers who want to develop food processing and manufacturing businesses?

D. Beef, Poultry, Eggs and Dairy Products

- Three options for direct farm marketing of meat products
  - Livestock slaughtered and/or processed at federally inspected facility may be sold in interstate commerce
  - Livestock slaughtered and/or processed at a state-inspected facility may be sold intra-state
    - Intrastate license not available in all fifty states
  - Custom processing by local meat lockers
    - Animals not subject to state inspection before or after slaughter
    - Processed meat must be packaged and stamped "not for resale"
    - **<u>DFM opportunity</u>**: pre-sell portions of live animals to other consumers before they are processed into meat.
      - ❖ "Freezer meat" sales are subject to important restrictions that vary from state to state.
        - ➢ restrictions on pricing methodology; some states require a "live weight" price as opposed to a price per pound for cut of meat.
        - ➢ some states require the customer rather than the producer to pay processing fees
        - ➢ some states limit the custom processing exemption to the producer's family and friends
- Marketing meat at roadside stands, farmers' markets, or to retail outlets, restaurants, or institutional buyers requires compliance with state or federal meat inspection requirements.
- Poultry production subject to federal and state regulation, but there are major exemptions that apply to DFM activities.
  - 1000-bird exemption under 9 CFR 381.10(c) available to single producers
  - 20,000 bird exemption for small-scale poultry processors subject to further delineation by the courts and competing views among state inspectors. Nor is it available in all states.
  - Custom processing exemption may enable producers to pre-sell live birds to customers. Again, this varies from state to state.

VII. <u>PICKING AN APPROPRIATE FORM OF BUSINESS</u>

A. Sole proprietorship

- Fictitious name statute

B. Corporations

- Liability avoidance – shareholder's exposure limited to cash contribution

  - Lenders and creditors typically require personal guarantees on start-ups
  - "Piercing the corporate veil"
- "Double taxation" and the Subchapter S solution
- Outside investors and securities law
- Officers, directors and shareholders

C. Limited liability companies

- Liability avoidance – similar to corporations
- Generally taxed as partnerships unless they become very large (in excess of 500 members)
- Securities status of member's limited share varies with management structure and member's level of participation
- Members and managers

D. General partnerships

- Unrestricted personal liability and shared/equal control and ownership (unless partnership agreement says otherwise)
- Partnership income not taxed to partnership

E. Limited partnerships

- General partner exercises control; interest not deemed a security
- Liability of limited partners limited to contribution; have very little say in limited partnership's affairs
- Limited partnership interests are securities; key question is whether a statutory exemption applies

F. Traditional Cooperatives

- Provides members with limited liability
- Generally taxed like a partnership
- Section 521 coops
  - Substantially all stock must be held by producer-members
  - Exempt from securities law
- Right to bargain collectively
  - Coops generally exempt from Capper-Volsted Act, which prohibits individuals who compete against each other from agreeing on or fixing prices.
- Right to join a cooperative
  - Federal Agricultural Fair Practices Act prohibits processors from intimidating or discriminating against producers who seek to join or

belong to a cooperative. This ban weakened by statutory “disclaimer” clause, which allows processors to refuse to deal with producers for any reason other than potential or actual membership in a cooperative.

G. Value-Added Cooperatives

- Producer cooperatives become processors (vertical integration)
- Provide limited liability
- Taxes may be imposed at both entity and personal levels
- Applicability of securities law an increasingly complex question. The more membership interests look like investment vehicles, the more likely the application of federal securities law.

H. Eight Questions to Consider When Selecting a Form of Business

- How large is the business (or large do you hope it will become) in terms of sales, employees, and capital needs?
- How many people are involved in the ownership and management of the business?
- What is the relation of the people involved, are they family, unrelated business partners, or employees?
- Do you intend to sell or transfer part of the business to family members or employees?
- Do you intend to be liable for the debts and obligations of the other owners or do you want to limit each party’s risks?
- Do you have the time and money to spend on legal paperwork and recordkeeping which some forms of business require?
- What are the potential risks or liabilities associated with the business and how serious might they be?
- Do you have other businesses or do you have other personal assets you do not want to place at risk?

VIII. INSURANCE

A. Comprehensive Farm Liability Policy (“CFL”)

- Covers Producer’s liability to general public
    - Customers
    - PYO (“pick your own”) visitors
        - Potential state law statutory protections
        - Traditional common law negligence principles in the absence of statutory protections
    - Agricultural tourists
        - Potential state law statutory protections

        - Traditional common law negligence principles in the absence of statutory protections
        - Possible use of waivers and waivers to shift risk of injury to agricultural tourists and PYO visitors
        - Cannot shift risk of injury caused by producer's own negligence
- Covers Medical payments to general public
- CFL Policies typically provide liability coverage with respect to farm worker injuries
    - Coverage generally covers friends, relatives and even farmhands
    - Warning: Worker's compensation exclusion
        - CFL policies typically include exclusion that precludes coverage of injured workers if producer is subject to statutory obligation to obtain worker's compensation insurance under state law.
- CFL coverage of DFM activities depends upon policy's definition of "farming" and the terms used in the policy's "business pursuits" exclusion
    - "Roadside stands" to sell farm's produce typically encompassed by definition of farming.
        - Products liability coverage typically not provided; CFL typically does not cover food-borne illnesses
    - Coverage of off-farm sales activities become a definitional issue, particularly with respect to the "business pursuits" exclusion; open question as to how courts will handle the dispute. In short, liability arising from DFM activities may not be covered by traditional CFL policy, and may require a commercial policy.
- Bottom line: May need separate commercial policy to cover DFM activities.

B. Homeowner's Liability Policy with Excess Liability Coverage

- May be possible to obtain coverage for what is known as "incidental farming liability." Typically involves optional coverage where sales are less than $5000.00 per year and business is secondary source of income.

C. Ten Questions for Insurance Agent

- Does CFL policy cover DFM activities, or is a separate commercial liability policy required?
- Restrictions on amount/type of direct farm sales to qualify as "incidental farming?"
- Even if CFL covers DFM activities, would separate commercial policy be more prudent/advantageous?
- Does CFL cover famer's market or direct retail sales?

- If CFL does not provide coverage, what kind of policy should the producer obtain? Is product liability insurance available or necessary?
- Are agricultural tourists and "pick your own" visitors covered by the CFL?
- Does producer's automobile insurance policy cover use of vehicles when used for produce deliveries?
- When buying insurance for buildings and equipment, should I set the value at "replacement cost value" or "depreciated value?"
- Is my CFL a "claims and occurrences" policy? What is my coverage period and when must I make a claim to trigger coverage?
- Are you a general agent working for one company or an independent agent?

D. Crop Insurance

- Traditional crop insurance programs available through USDA'S Risk Management Agency and Federal Crop Insurance Corporation based upon lost yield or lost revenue.
    - Common crop policy (or actual production history policy). Covers catastrophic loss (at least 50% crop loss).
    - Group risk plan.
    - Crop Revenue Coverage policy.
    - Income Protection and Revenue Assurance policies.
    - Livestock Risk Protection policy
- Special federal emphasis on insuring some sixty specialty crops, such as maple syrup, fruits, nuts, nursery plants, and Christmas trees; does not cover wheat, feed grains, oilseeds, rice, peanuts or tobacco.
    - Adjusted Gross Revenue – Lite Program
        - Unique tax filing and income restrictions

E. Non-Insured Crop Disaster Assistance Program

- Available in the absence of traditional catastrophic loss coverage. Administered by USDA's Farm Services Agency.

IX. <u>CONTRACT LAW</u>

A. Twelve important rules of contracting for DFM participants:

- Parties draft contracts to protect their interests, not those of others. Protect your own interests.
- Read and understand the contract before signing it.
- Weigh the trade-off between better payment terms and the burdens and costs imposed by other parts of the contract.
- You must generally comply with all of a contract's terms to discharge your obligations.
- Never assume your failure to comply with the terms of an agreement will be waived or excused.

- Know the other party's payment history and capability, if the contract calls for you to be paid by the other party
- Remember that proposed contracts are subject to negotiation
- Document any changes to the contract in writing
- Do not rely on oral terms to amend a written contract; and do not rely on pre-signature statements and understandings to control what is written.
- Keep good records of contract performance.
- Stay in touch with the other contracting party.
- Do not be afraid to ask questions or seek clarifications when negotiating a contract.

B. Ten questions to ask and answer before entering into a contract:
  - Do you understand what is you are promising to do?
  - What price will you be paid and how is it determined?
  - When will you be paid, or when will you need to pay if you are buying something?
  - Who will decide whether you have satisfied the terms of the contract?
  - What will happen if a dispute arises, will it go to court or some other means of dispute resolution, such as mediation or arbitration?
  - If there is a dispute, where will it be heard and which state's laws will be applied?
  - How long will the agreement run and how can it be terminated or extended?
  - Can the agreement be modified once it is signed, and if so, how?
  - Are you considered a merchant under the agreement, or a farmer?
    - Whether a farmer is a "merchant" for purposes of the Uniform Commercial Code is subject to a split of authority among the states and requires a fact-specific inquiry. *See* <u>*Colorado-Kansa Grain Co. v. Reifdchneider*</u>, 817 P.2d 637, 640 (Colo. Ct. App. 1991).
  - Can the contract be assigned to another, or is it personal to you?

C. U.C.C. Implied Warranties
  - Implied warranty of merchantability, or fitness for ordinary purposes
    - Applies to food sold for consumption, on and off premises
  - Implied warranty of fitness for a particular purpose
    - Applies where seller has knowledge of buyer's unique needs and requirements for product

D. Payment Issues
  - When you deliver produce to a buyer, title and ownership typically passes at that time, and producer becomes unsecured creditor.
  - Cannot recover goods; can only bring contract action for payment

- Food stamps and WIC may be accepted at roadside stands and farmer's markets, provided the producer becomes a qualified vendor. The shift to the electronic benefits system (credit card) is diminishing that portion of market.
- Generally, CSA members may not use food stamps or WIC. However, it appears possible to construct the CSA customer relationship to permit the use of food stamps, by eliminating any risk to the customer with guaranteed amounts of food.

E. Collection of State Sales Tax
- Many if not most states exempt the sale of food from state and local sales tax.

F. Business Occupation Licenses and Taxes
- Agricultural exemptions exist, but must be evaluated on a state-by-state basis

G. Tax Status of Property
- "Farming" is subject to special federal tax definition that tends to exclude DFM activities, such as agricultural tourism and processing operations

H. Payment of Wages to Children and Spouse
- Can deduct for federal income tax purposes if *bona fide* employee relationship exists

X. <u>MARKETING DFM PRODUCTS</u>

A. Advertising and labeling of produce may prove pivotal in success of DFM activity.

B. Restrictions on product descriptions emanate from multiple sources:
- FDA
- USDA
- State law and regulations
- Private certification organizations and entities

C. Restrictions on eco-labeling tend to emanate from private-sector actors; no direct federal regulation of eco-labeling claims

D. Practically speaking, few restrictions on marketing at roadside stands

E. Use of such terms as "locally grown," "native produce" and "home grown" generally not regulated, but certain states such as Vermont and Maine regulate the use of such terms, as does the USDA for purposes of the WIC program

F. Use of the term "organic" is often regulated by the operators of farmer's markets, and typically entails proof of third-party certification from producers.

G. Terms such as "free-range" and "all natural" subject to federal regulation

H. Eight steps to consider when making special DFM claims:
- Identify the unique traits of your products or production practices for which consumers might pay more
- Select terms or descriptive names that will reflect those traits.
- Determine whether any state or federal regulations control or prohibit the use of the terms you identify.

- Determine if any private certification system or other form of trademark claim might limit your ability to use these names.
- Identify the minimum labeling terms or information required under federal and/or state law.
- Consider whether any certification or eco-labeling programs exist for your products and determine if your operation is eligible.
- Include the labels or descriptive terms you claim in all your marketing and promotion efforts.
- Maintain records and other evidence that document your compliance with the claims being made for the food product, *i.e.*, “home grown” or “chemical free.”

I. Eight legal steps in developing and protecting special marketing and labeling claims:
- File or claim trademark protection for the unique names or labels you choose for your farm or food products.
- When processing or marketing products, comply with applicable federal and state laws concerning the information required on food labels or packaging.
- Develop signs and other point of purchase information that use the names you claim and which provide consumers on the unique aspects of your operation.
- Take advantage of state programs to promote direct marketing of food products, such as state purchasing and locally grown initiatives.
- Explore participating in various private market promotion programs, such as private certification or eco-labeling, which provide opportunities for your products.
- Be sure your production and processing methods comply with the claims being made for your food products and educate all employees and family members about these claims.
- Document your compliance with such claims and maintain records of such compliance.
- Be willing to take action against anyone infringing upon the labels or names you select or which unfairly mislead buyers.

J. Certified Organic Producer Status
- Such status conferred by state agency or private third-party that verifies the producer’s methods and operations comply with certain requirements.
- Typically involves an application process initiated by the producer, who submits a plan that is later the subject of on-site inspection.

K. Special Value Claims:
    - USDA prohibits meat products from being described as:
        - Drug Free
        - No Drugs
        - Antibiotic Free

            - No Steroids
            - Steroid Free
            - No Hormones
            - Hormone Free
        - However, producers may use such terms to describe the manner in which the animals were raised.
        - To describe meat as "natural," USDA requires that there be no artificial ingredients, no artificial flavor or flavoring, no coloring ingredients, and no chemical preservatives; and minimal processing.
        - "Negative" labeling claims such as no antibiotics must be truthful and apply to the lifespan of the animal, unless the negative labeling is more specific as to time frame
        - "Organic" meat subject to specific labeling, documentation and third-party certification requirements by USDA
        - "Free Range" description of chickens and eggs subject to regulation in only one state ("North Carolina") – check with local officials to determine whether the description has become subject to regulation
        - Eggs are subject to substantial regulation as to grading and inspection, but most states have exceptions permitting direct sale of eggs to consumers. Sales typically limited to those produced on-site.
        - Sales of unpasteurized milk heavily regulated and forbidden in some states, including Iowa. Minnesota and Nebraska, conversely, allow on-farm sales. Need to check with state and local health inspection officials to determine with such sales are allowed, and if so, under what conditions.

XI. <u>FEDERAL REGULATORY LAWS</u>

A. Packers and Stockyards Act (PSA)

- Protects livestock producers, contract poultry growers and swine production contract growers
- Regulates packers, dealers, live poultry dealers, and market agencies
    - A small-scale farmer organization that gathers animals, contracts for slaughter and markets the meat qualifies as a packer. May be exempt from statutory trust and bonding requirements if annual purchases for slaughter are less than $500,000.00
    - Market agency is anyone who buys and sells livestock on commission.
- Prohibits unfair, unjustly discriminatory or deceptive trade practices by packers, live poultry dealers, market agencies and dealers.
- Prohibits undue or unreasonable preferences given to any seller, apportioning the supply of animals if it creates a monopoly, and price manipulation.

        - Violations include paying with bad check, failure to pay promptly, and short-weighing.
        - Certain entities must be bonded.
        - Trust fund to protect cash sellers.
            - All sellers are "cash sellers" unless the statutory trust provisions are waived contractually.
            - Packers can buy on credit if trust fund procedures waived.
        - Only regulates certain kinds of animals; exotics generally excluded.
        - Requires careful recordkeeping.

B. Perishable Agricultural Commodities Act (PACA)

- Intended to promote fair trading practice in fruit and vegetable industries (fresh and frozen)
- Operates by licensing certain actors and requiring them to abide by certain trade practices.
    - $1000.00 fine for each offense, and $250.00 per day fine for operating without a license.
    - Stringent recordkeeping requirements.
- Persons required to have a PACA license
    - Persons who buy or sell more than 2000 pounds of fresh or frozen fruits and vegetables a day; includes wholesalers, processors and food service firms
    - Brokers or commission agents, handling sales in excess of $230,000.00 per year.
    - Food retailers who purchase at least $230,000.00 in fruits and vegetable per year.
        - Joint producer operations purchasing fruits and vegetables from their members may need a PACA license, if they meet the volume requirements.
- Provides financial protection to sellers of fruits and vegetable by way of a statutory trust.
- Many joint producer operations that buy fruits and vegetables from members or negotiate sales on behalf will need to licensed
- Sellers must generally be paid in 10 days; may bring claim on statutory trust for payment; must give notice within 30 days
- USDA may bring disciplinary action against buyers who repeatedly and flagrantly violate PACA