



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

Prepared by the Food Law & Policy
Clinic of Harvard Law School for
Conservation Law Foundation



LEGAL SERVICES FOOD HUB

clf *A project of
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INTRODUCTION Agriculture in Massachusetts and throughout the United States is at a crossroads. As a result of growing concerns about the environmental, economic, and health impacts of our food system, there is rising consumer interest in purchasing from local producers. A diverse group of farmers and food entrepreneurs, including many young and beginning farmers, have nimbly adjusted to the rising demand for fresh, local, and sustainably produced food.¹ However, farmers and food producers face a variety of laws, regulations, and business challenges, and many new, primarily small-scale, farmers and food entrepreneurs cannot afford legal assistance at the rates usually charged in Massachusetts. In response, members of the legal community have expressed interest in providing much-needed counsel to local small-scale farmers, diversified farms, and food entrepreneurs.

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

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

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

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

¹ U.S. Dep't of Agric. Press Release, 2012 Ag Census Reveals New Trends in Farming, *available at* http://www.agcensus.usda.gov/Newsroom/2014/05_02_2014.php; U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE, DEMOGRAPHICS OVERVIEW, *available at*

http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demographics/demographics.pdf.

² See Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013), *available at* <http://vimeo.com/80411482>. See also Endres, A. Bryan, et.al., *The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey*, MONTANA L. REV. 71 (2010) (to better understand farmers' need for legal services and targeted educational programming, the authors, with the support of several cooperating organizations, conducted a family farm legal needs survey of Illinois farmers in 2007).

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

only \$5,093 (this includes all farms operating at a loss as well as those earning a profit).⁴ Agriculture is also an economically risky industry. Farmers make substantial financial investments whose returns depend on factors out of their control, such as the weather, natural disasters, and fluctuating local and global markets. This inherent vulnerability can have direct and often adverse effects on the income of small-scale farmers and food entrepreneurs. As a result, many farmers with businesses of the size and scale commonly found in Massachusetts are unable to afford legal assistance.⁵

ABOUT THE LEGAL SERVICES FOOD HUB Because of the lack of legal services for small-scale farmers and food entrepreneurs who participate in local and regional food systems, the Conservation Law Foundation (CLF) created the Legal Services Food Hub (LSFH).⁶ The LSFH brings together attorneys in Massachusetts who want to provide pro bono legal assistance to farmers, food entrepreneurs, and food-justice oriented community organizations. The LSFH not only serves to connect attorneys to clients, but through *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* also seeks to supply resources for attorneys as they provide legal counsel to this new group of clients. In order to be eligible for the pro bono services offered by the LSFH, a farm or food business's gross annual sales must not exceed \$75,000, and the applicant's household income must not exceed 400% of the Federal Poverty Level.

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

ABOUT THE HARVARD FOOD LAW AND POLICY CLINIC Established in 2010, the Harvard Food Law and Policy Clinic (FLPC) addresses the health, environmental, and economic consequences of the laws and policies that structure our food system. The FLPC utilizes substantive expertise in food law and policy and a robust policy skill set to assist non-profit and governmental clients in a variety of local, state, federal, and international settings in understanding and improving the laws

⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, TABLE 5. NET CASH FARM INCOME OF THE OPERATIONS AND OPERATORS: 2012 AND 2007, available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_004_005.pdf.

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

⁶ LEGAL SERVICES FOOD HUB, <http://www.legalservicesfoodhub.org>.

⁷ CONSERVATION LAW FOUNDATION, <http://www.clf.org>.

impacting the food system. As the oldest food law clinical program in the United States, the FLPC is also a pioneer in the field of food law and policy, and serves as a counselor and model for attorneys and law schools entering this field. The FLPC is a division of the Harvard Law School Center for Health Law and Policy Innovation. Law students enrolled in the FLPC get hands-on learning experience conducting legal and policy research for individuals, communities, and governments on a wide range of food law and policy issues. The FLPC has trained more than sixty clinical students at Harvard Law School, as well as dozens of interns, volunteers, and pro bono students from Harvard and other schools across the United States.

ABOUT THIS GUIDE The FLPC collaborated with CLF to create *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* to help attorneys build successful relationships with Massachusetts small-scale farmers and food entrepreneurs, as well as other food-related businesses, non-profit organizations, and community groups. *Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network* provides a vocabulary and working knowledge of common legal issues encountered by these participants in Massachusetts' local food economy.

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

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

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

- **Chapter I: Massachusetts Farming and Local Food Economy** This chapter provides the reader with demographic information about farmers and agriculture in Massachusetts. Based on the United States Department of Agriculture's recently released 2012 Census of Agriculture, this chapter helps attorneys understand the agricultural context in which they are working.
- **Chapter II: Business Structures** This chapter focuses on and evaluates the different business structures farmers may choose for their farm operations.
- **Chapter III: Food Safety** This chapter introduces the attorney to a few of the main food safety laws and standards governing the production and handling of produce in the United States.

Although LSFH attorneys will not be helping farmers with food safety compliance, the topic is on farmers' minds and attorneys need a working knowledge of the issues.

- **Chapter IV: Farm Transitions** This chapter discusses the farm transition process, which includes estate planning and farm transfer issues. This chapter highlights issues of concern common among farmers and provides solutions to address those concerns.

Small-scale farmers and food entrepreneurs in Massachusetts are part of a robust movement to enrich their local food economies as well as their communities. In order to do this, new relationships must be established. Attorneys in Massachusetts who wish to serve these clients can be part of this dynamic and truly home-grown initiative through the LSFH.

CHAPTER I: MASSACHUSETTS FARMING AND LOCAL FOOD ECONOMY

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

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

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

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

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

LOCATION, SIZE, AND ORGANIZATION OF MASSACHUSETTS FARMS

According to the 2012 Census of Agriculture, there are 7,755 farms in Massachusetts.² The land in farms³ accounts for 10-14% of total land in the state, or approximately 523,000 – 590,000 acres.⁴ The average farm is only 68 acres, much smaller than the national average of 434 acres.⁵ Massachusetts ranks 49th in

¹ The 2012 Census of Agriculture is the 28th Federal census of agriculture and the fourth conducted by the U.S. Department of Agriculture (USDA), National Agricultural Statistics Service (NASS). The results were published in February 2014 and are the most recent data available. For the full report, visit http://www.agcensus.usda.gov/Publications/2012/#full_report.

² “The census definition of a farm is any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. The definition has changed nine times since it was established in 1850. The current definition was first used for the 1974 Census of Agriculture and has been used in each subsequent agriculture census. This definition is consistent with the definition used for current USDA surveys.” U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, INTRODUCTION VIII (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usintro.pdf.

³ “The acreage designated as ‘land in farms’ consists primarily of agricultural land used for crops, pasture, or grazing.” U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, APPENDIX B B-13 (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf.

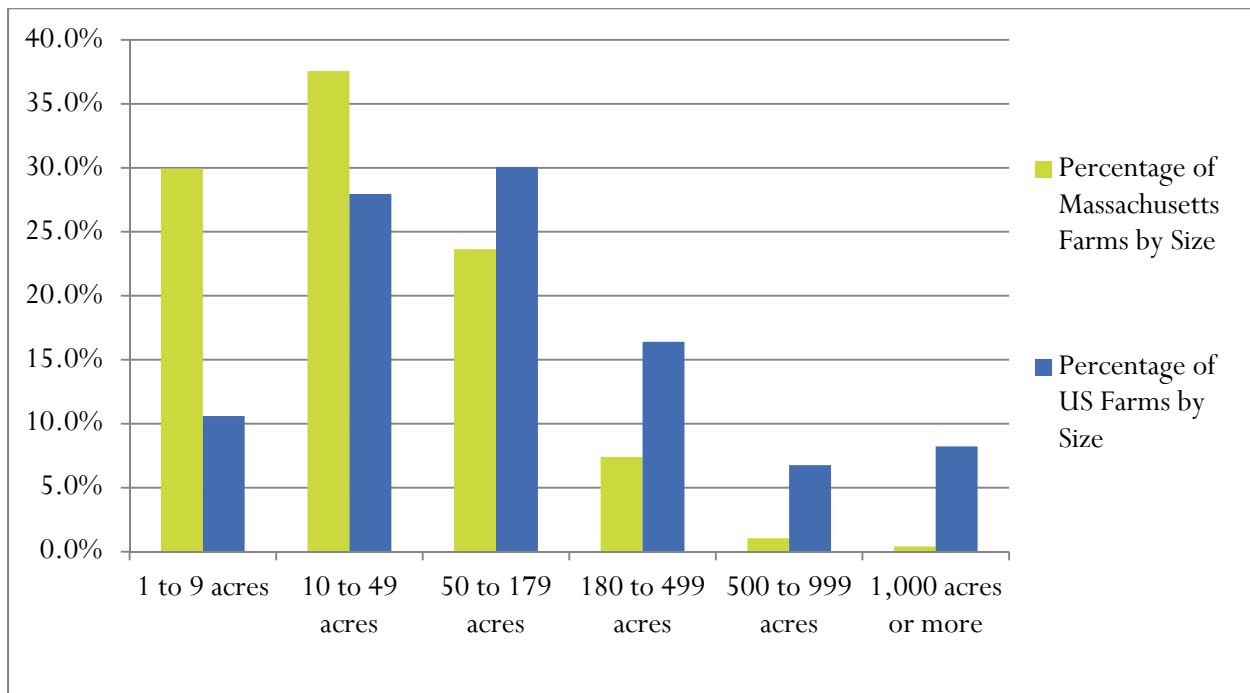
⁴ The exact acreage of farmland in Massachusetts varies slightly, depending on the source. *2012 Census of Agriculture: Massachusetts Highlights*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/docs/agr/news/census-ma-highlights.pdf> (last visited May 16, 2014); *Massachusetts Climate Change Adaptation Report*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS 90 (2011), *available at* <http://www.mass.gov/eea/docs/eea/energy/cca/eea-climate-adaptation-report.pdf>; *Massachusetts Facts*, MASSACHUSETTS SECRETARY OF STATE, <http://www.sec.state.ma.us/cis/cismaf/mf1c.htm> (last visited May 15, 2014).

⁵ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1: HISTORICAL HIGHLIGHTS 2012 AND EARLIER CENSUS YEARS 7 (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

average farm size; only Rhode Island has a smaller average acreage.⁶ Not surprisingly then, 95% of Massachusetts farms qualify as “small farms,”⁷ with less than \$250,000 of annual sales.⁸ The farmers who operate the smallest third of these farms, those whose gross annual sales do not exceed \$75,000 and whose household income does not exceed 400% of the Federal Poverty Level, are eligible to receive pro bono legal services through the Legal Services Food Hub (LSFH).

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



⁶ The average farm size in Rhode Island is 56 acres. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, RHODE ISLAND STATE DATA TABLE 1: STATE SUMMARY HIGHLIGHTS 251 (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

⁷ The USDA defines a small farms as “farms with less than \$250,000 gross receipts annually, on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets.” *Small Farms*, U.S. DEP’T OF AGRIC., NAT’L AGRIC. LIBRARY,

<http://agclass.nal.usda.gov/mtwdk.exe?k=glossary&l=60&w=8155&n=1&s=5&t=2>.

⁸ There are 6,168 Massachusetts farms whose legal status for tax purposes is “Family or individual.” U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, APPENDIX A A-20 (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf.

⁹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 64: SUMMARY BY SIZE OF FARM: 2012 54-55 (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_064_064.pdf; U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 64: SUMMARY BY SIZE OF FARM: 2012 66-67 (2014), *available at*

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_064_064.pdf.

Figure 2. Massachusetts Farms by Value of Sales, 2012¹⁰

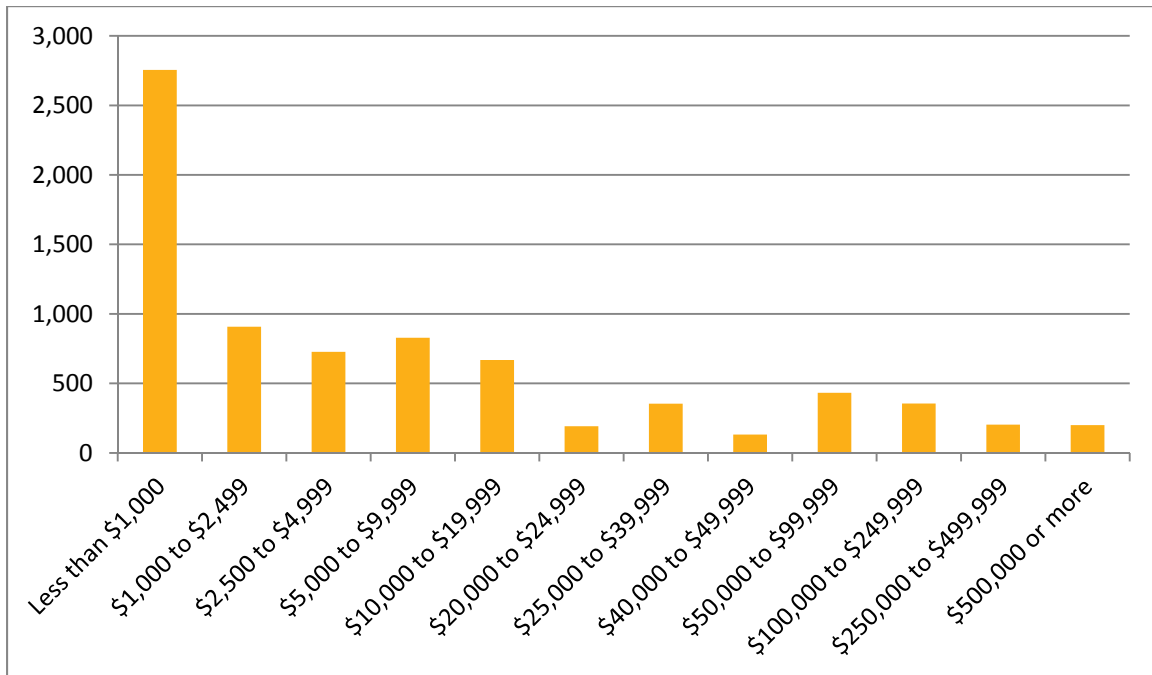
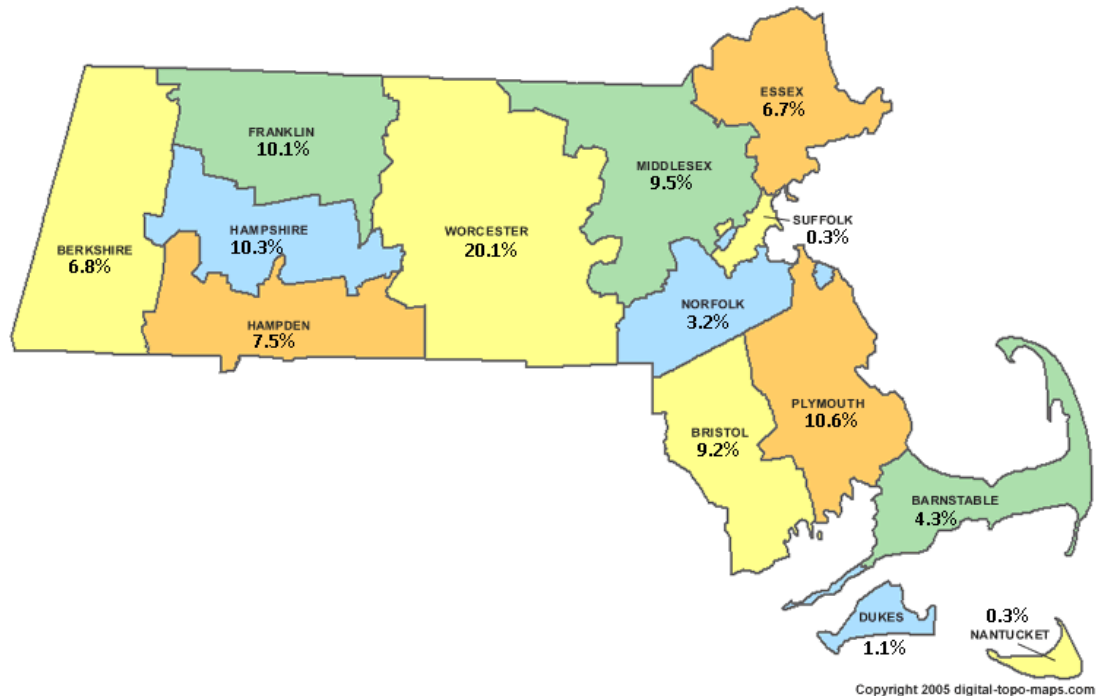


Figure 3. Percentage of Farms in Massachusetts by County, 2012¹¹



¹⁰ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA (2014),

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

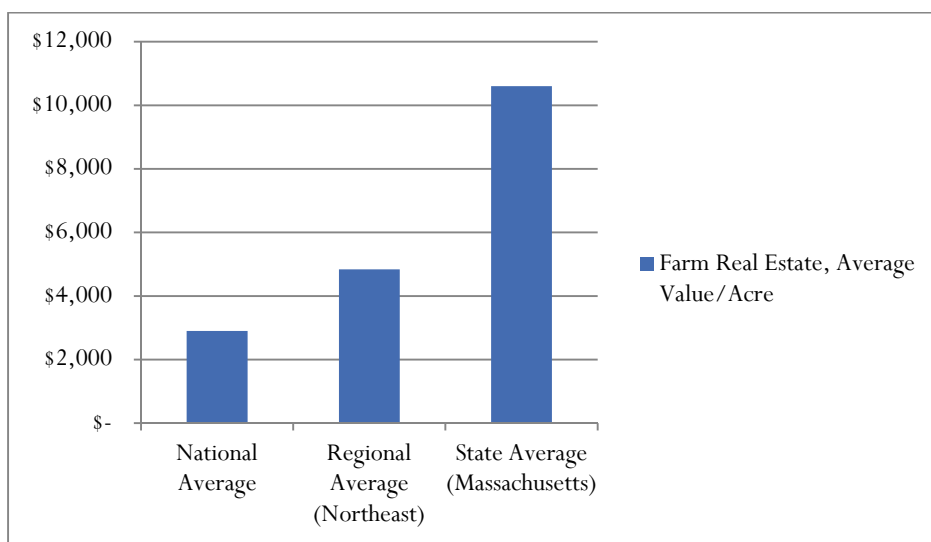
¹¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, COUNTY LEVEL DATA TABLE 1: COUNTY SUMMARY HIGHLIGHTS 224-225 (2014), available at

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Massachusetts/mav1.pdf.

Farms are spread across Massachusetts, with the highest concentration in Worcester County (20.1%) and the lowest concentration in Suffolk and Nantucket Counties (0.3%).¹²

Massachusetts farmland had an average real estate value¹³ of \$10,600/acre in 2013, one of the highest in the nation.¹⁴ Only New Jersey, Rhode Island, and Connecticut have higher averages, at \$12,700/acre, \$11,800/acre, and \$11,000/acre respectively.¹⁵ Massachusetts farm real estate values are high compared to the Northeast¹⁶ regional average, \$4,840/acre, and over three and a half times higher than the national average, \$2,900/acre.¹⁷ Young and beginning farmers may find it nearly impossible to purchase land outright; and therefore, the premium price of farmland plays a significant role in shaping the future of Massachusetts agriculture. There is an acute need for sound farm transfer planning in order to preserve the agricultural production of farmland. This topic is discussed in more depth in Chapter IV of the Guide.

Figure 4. Farm Real Estate Average Value per Acre, 2012¹⁸



¹² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, COUNTY LEVEL DATA TABLE 1: COUNTY SUMMARY HIGHLIGHTS 224-225 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Massachusetts/mav1.pdf.

¹³ Farm Real Estate value is “a measurement of the value of all land and buildings on farms” *Land Values: 2013 Summary*, U.S. DEP'T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

¹⁴ *Land Values: 2013 Summary*, U.S. DEP'T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

¹⁵ *Land Values: 2013 Summary*, U.S. DEP'T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

¹⁶ The “Northeast” region includes Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. *Land Values: 2013 Summary*, U.S. DEP'T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

¹⁷ *Land Values: 2013 Summary*, U.S. DEP'T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

¹⁸ *Land Values: 2013 Summary*, U.S. DEP'T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

There are 12,275 farm operators in Massachusetts; roughly 60% of them are male (7,196), and 40% are female (5,096).¹⁹ The vast majority of the principle operators on farms in Massachusetts are white (97%),²⁰ and the average age of the principle operator is 57.8 years old.²¹ Most of these farmers have been on farms for more than ten years.²² However, a growing number of farmers in Massachusetts are classified by the United States Department of Agriculture (USDA) as “beginning” farmers, meaning that they have operated a farm for ten years or less either as a sole operator or with others who have operated a farm for ten years or less.²³ The 2012 Census of Agriculture reported that 1,954 Massachusetts farmers had been on the farm for less than ten years, meaning that a quarter of all farms in the state are operated by beginning farmers.²⁴

Most Massachusetts farms operate as sole proprietorships, owned by a family or an individual (80%).²⁵ A small proportion of farms are organized as corporations (9%)²⁶ or partnerships (7%).²⁷ Co-operatives, estates, trusts, and institutional farms represent only 4% of all farms.²⁸ This topic is discussed in more depth in Chapter II of the Guide.

¹⁹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 55 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_055_055.pdf.

²⁰ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 60 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_060_060.pdf.

²¹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE MASSACHUSETTS STATE DATA TABLE 69 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf.

²² U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 55 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_055_055.pdf.

²³ *Beginning Farmer*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib53.aspx#.U48lgvldWSo>.

²⁴ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 70 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_070_070.pdf.

²⁵ In Massachusetts, 6,168 farms have a legal status of “Family or individual” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

²⁶ In Massachusetts, 719 farms have a legal status of “Corporation” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

²⁷ In Massachusetts, 583 farms have a legal status of “Partnership” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

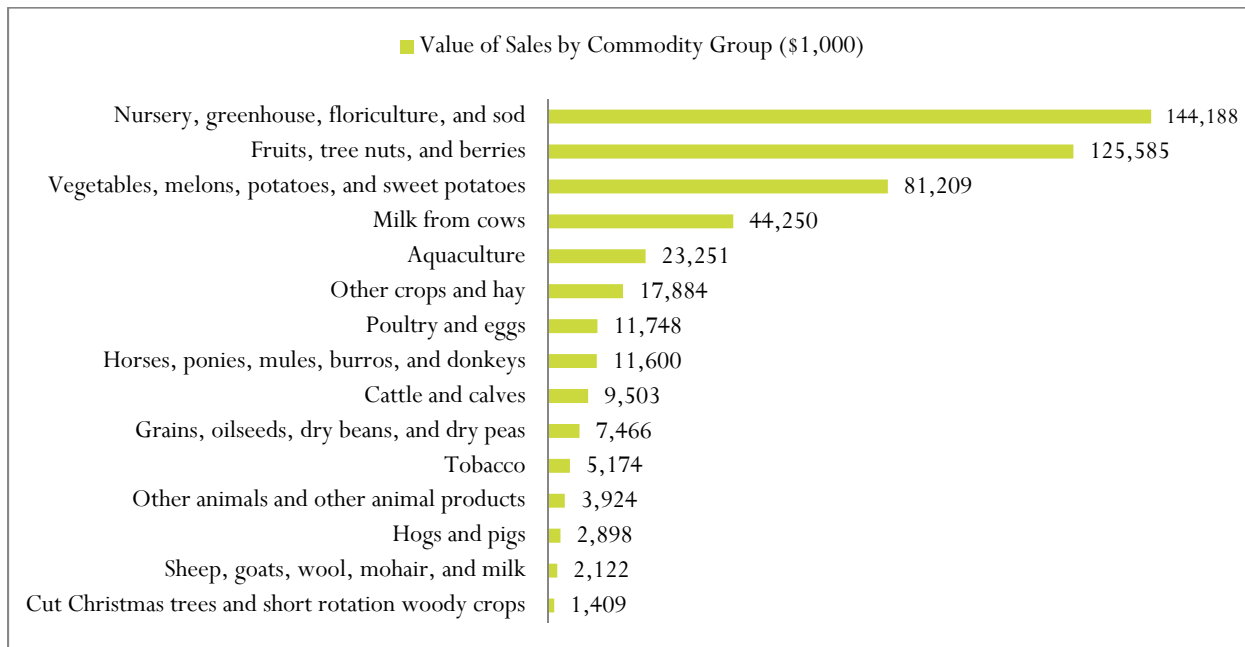
²⁸ In Massachusetts, 285 farms have a legal status of “Other – co-operative, estate or trust, institutional, etc.” for tax purposes. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

AGRICULTURAL PRODUCTS AND FARMING TECHNIQUES Diversity is a

defining characteristic of Massachusetts agriculture. Farms grow and sell a variety of products and small-scale farmers and food entrepreneurs engage in many different farming activities. The top five crop items that account for the largest amount of acreage are hay; vegetables; berries; cranberries; and corn for silage.²⁹ However, this does not mean that all of these products have the highest sales; for example, hay is grown on 28% of Massachusetts farms, making it the most commonly grown crop in the state.³⁰ It has a number of uses on the farm and needs much more acreage than other crops, but the market value of “other crops and hay” accounted for only 3.6% of the total market value of agricultural products sold.³¹

The top five crop items that account for the largest amount of sales are nursery, greenhouse, floriculture, and sod; fruits, tree nuts, and berries; vegetables, melons, potatoes, and sweet potatoes; milk from cows; and aquaculture.³²

Figure 5. Value of Sales by Commodity Group, 2012³³



²⁹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf.

³⁰ Hay is grown on 2,200 Massachusetts farms. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), available at

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf.

³¹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf.

³² U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf.

³³ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf.

Typical Massachusetts-grown foods include apples, cranberries, beans, butternut squash, cabbage, corn, dairy products, potatoes, and pumpkins, among others.³⁴ Farmers participating in the LSFH must be predominantly producing agricultural crops for human food production; this does not include hay or ornamental crops.

Massachusetts has a thriving organic farm sector that includes 198 farms with \$26 million in sales.³⁵ The production on 131 of these 198 farms is USDA National Organic Program (NOP) certified organic.³⁶ The NOP works to ensure the integrity of organic products in the U.S. and throughout the world.³⁷ The term “organic” is a marketing term used to describe production methods that “integrate cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity,”³⁸ such as composting, spreading manure, and utilizing cover crops that emphasize retaining farm fertility. The USDA national certification and inspection process also ensures that participating farms do not use particular chemical treatments. However, it can be both costly and time-consuming for producers to certify their operations to the USDA standards.³⁹ As such, many farmers use organic growing methods but choose not to get certified.

Farming and gardening in the city, commonly referred to as urban agriculture, is growing quickly in Massachusetts. In certain localities, urban agriculture operations may in fact operate contrary to local law. However, urban agriculture has recently enjoyed more legislative support in many cities, including Boston, and in the state as a whole. In December 2013, the Boston Zoning Commission adopted Article 89, a rezoning initiative that expanded opportunities for a variety of urban farming activities within Boston city limits.⁴⁰ This regulation allows for ground-level and roof-level farms, supports freight container farming as well as use of other farm structures, and provides permit conditions for those communities in Boston that allow residents to keep bees and hens.⁴¹ Urban farms in Boston already include hi-tech operations such as

³⁴ *Massachusetts Climate Change Adaptation Report*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS 90 (2011), available at <http://www.mass.gov/eea/docs/eea/energy/cca/eea-climate-adaptation-report.pdf>.

³⁵ *2012 Census of Agriculture: Massachusetts Highlights*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/docs/agr/news/census-ma-highlights.pdf> (last visited May 16, 2014).

³⁶ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 54 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_053_054.pdf

³⁷ *National Organic Program*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/nop>.

³⁸ *National Organic Program, Consumer Information*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateC&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPConsumers&description=Consumers&acct=nopgeninfo>.

³⁹ *National Organic Program, FAQ: Becoming a Certified Operation*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NOPFAQsHowCertified&topNav=&leftNav=NationalOrganicProgram&page=NOPFAQsHowCertified&description=FAQ:%20%20Becoming%20a%20Certified%20Operation&acct=nopgeninfo>.

⁴⁰ See Jared Bennett, *Boston Zoning Commission Approves Urban Farming Guidelines*, 90.9 WBUR.ORG (Dec. 18, 2013), available at <http://www.wbur.org/2013/12/18/boston-zoning-board-approves-guidelines-for-urban-farmers>.

⁴¹ *Article 89 Made Easy*, BOSTON REDEVELOPMENT AUTHORITY, <http://www.bostonredevelopmentauthority.org/getattachment/4b74929b-920e-4984-b1cd-500ea06f1bc0> (last visited May 29, 2014).

hydroponic farms growing produce in shipping containers, as well as rooftop greenhouses.⁴² Nearby cities, such as Somerville and Cambridge, have either passed or are considering amending their zoning codes to reduce barriers to urban farming as well.⁴³

MARKETING AND SELLING AGRICULTURAL PRODUCTS Massachusetts sells many farm products directly to consumers through farmers' markets, farm stands, community-supported agriculture operations (CSAs), and agri-tourism.⁴⁴ Unlike many other areas of the country, direct-to-consumer food marketing is a defining characteristic of agriculture in Massachusetts, and small-scale farmers and food entrepreneurs have had great success with these ventures. In 2012, Massachusetts had nearly \$48 million in direct sales of agricultural products, which amounts to a \$6 million increase from 2007.⁴⁵ Nationwide, Massachusetts ranked 9th in direct sales, behind states such as California, New York, and Pennsylvania.⁴⁶

Farmers' markets are central sites for farmers or their representatives to sell directly to consumers; they are usually organized by local governments, and sometimes by non-profits or for-profit entities. In Massachusetts, there is no regulatory definition for farmers' markets,⁴⁷ but the Massachusetts Department of Agricultural Resources defines them as: "public markets for the primary purpose of connecting and mutually benefiting Massachusetts farmers, communities, and shoppers while promoting and selling products grown and raised by participating farmers."⁴⁸ Fresh produce, honey, maple syrup, and eggs are examples of products commonly seen at Massachusetts farmers' markets. These markets are often set up to be community hubs and, depending on the market rules, may offer processed foods, such as jams, bread, or salsa, and even non-agricultural products like crafts and cooking gear, in addition to fresh and local produce.⁴⁹ Farmers' markets volunteer managers wishing to formalize the legal status of their market could be eligible to participate in the LSFH.

⁴² See Jared Bennett, *Boston Zoning Commission Approves Urban Farming Guidelines*, 90.9WBUR (Dec. 18, 2013), available at <http://www.wbur.org/2013/12/18/boston-zoning-board-approves-guidelines-for-urban-farmers>.

⁴³ See *Mayor's Urban Agriculture Initiative*, SOMERVILLE, MA, <http://www.somervillema.gov/departments/ospcd/parks-and-open-space/urban-agriculture-initiative> (last visited Jan. 24, 2014); Jamie Ducharme, *Boston to Expand Urban Farming Opportunities*, BOSTON MAGAZINE (June 4, 2013), available at <http://www.bostonmagazine.com/health/blog/2013/06/04/urban-farming-boston>.

⁴⁴ *Fingertip Facts*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/agencies/agr/statistics/fingertip-facts.html> (last visited May 16, 2014).

⁴⁵ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING LANDLORD'S SHARE AND DIRECT SALES: 2012-2007 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_002_002.pdf.

⁴⁶ *Agricultural Resources Facts and Statistics*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/agencies/agr/statistics/> (last visited Jan. 23, 2014).

⁴⁷ *Food Protection Program: Policies, Procedures and Guidelines*, MASS. DEP'T OF PUB. HEALTH, available at <http://www.mass.gov/eohhs/docs/dph/environmental/foodsafety/farmer-market-guidelines.pdf>.

⁴⁸ *Food Protection Program: Policies, Procedures and Guidelines*, MASS. DEP'T OF PUB. HEALTH, available at <http://www.mass.gov/eohhs/docs/dph/environmental/foodsafety/farmer-market-guidelines.pdf>.

⁴⁹ *Model Rules for Farmers' Markets*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/agencies/agr/markets/farmers-markets/farmers-market-model-rules-generic.html>.

Farm stands are on-farm or near-farm sale sites that are typically located along roads that border the farm. Nearby farmers may combine efforts in one farm stand, but generally one stand represents one farm. Like farmers' markets, farm stands eliminate the middle level distribution costs and give farmers an opportunity for higher profits.⁵⁰

CSA operations give the public an opportunity to invest in local agriculture by making a financial commitment to a farm in exchange for a share of the products that the farm produces.⁵¹ Typically, the farmer sells a share to a consumer before the season; in return, the consumer receives a set number of weekly boxes. These boxes can contain fresh produce, bread products (community supported bakery), meat, or fish (community supported fishery), depending on the agreement. CSAs provide farmers with necessary upfront capital and a reliable market. The content of the boxes varies based on what the farm harvests that week. Consumers get the satisfaction of supporting a local business and receiving the freshest possible food. CSAs may include a volunteer opportunity or even offer work shares to consumers. This allows consumers to provide in-kind farm help, but can potentially increase the farmer's liability, if something should go wrong on the farm.

Massachusetts has over 400 farm attractions open to the public.⁵² These on-farm activities are commonly referred to as agri-tourism. Agri-tourism generally involves on-farm entertainment, including activities like farm tours or vacations, festivals, hiking, picnics, or workshops. It also includes pick-your-own operations.⁵³ According to the 2012 Census of Agriculture, 287 Massachusetts farms participate in agri-tourism and recreational services, and the average number of sales from these activities totaled \$41,929.⁵⁴ See Figure 6 on the next page for more information on agri-tourism in Massachusetts.

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

⁵⁰ *Farm Stands and Farmers Market Resources*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, available at <http://www.mass.gov/eea/agencies/agr/markets/farm-stands/>.

⁵¹ *CSA (Community Supported Agriculture) Farms*, MASS. DEP'T OF AGRIC. RESOURCES, http://www.mass.gov/agr/massgrown/csa_farms.htm.

⁵² *Agri-Tourism Farms*, MASS. DEP'T OF AGRIC. RESOURCES, http://www.mass.gov/agr/massgrown/agritourism_farms.htm.

⁵³ MASS. DEP'T OF AGRIC. RESOURCES, *AGRI-TOURISM IN MASSACHUSETTS: ITS ROLE AS AN ECONOMIC DEVELOPMENT STRATEGY* (2008), <http://ag.umass.edu/sites/ag.umass.edu/files/interest-topic-pdfs/AgritourFinalREVforDistribut.pdf>.

⁵⁴ U.S. DEP'T OF AGRIC., *2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 7 (2014)*, available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf.

Figure 6. Description of Agri-tourism Activities in Massachusetts⁵⁵

Christmas Trees	Enjoy a fresh, fragrant Christmas Tree at one of the Massachusetts Choose-and-Cut tree farms. Tree farms offer handmade wreaths, holiday greens, hayrides, hot drinks, and local holiday items, plus the freshest trees available. Many farms also allow you to tag a tree prior to the season and come back to cut it in December.
Dairy Farms	Family-run dairy farms offer fresh retail milk in glass bottles, homemade ice cream, fresh cream, eggnog, flavored milks, cheeses, and other dairy products. Most dairy farms with retail facilities invite you to visit and tour the farm.
Equine/Fiber/Livestock	Massachusetts is home to a diverse number of horse, fiber, and livestock farms. Many showcase llamas, emus, ostriches, bison, and more. These farms offer a range of farm animals, wool products, quality meats, and gift items.
Farm Bed & Breakfasts	Enjoy a unique getaway at a farm bed & breakfast. Here you will find diverse farm accommodations while experiencing life on the family farm.
Farm Stands	Massachusetts farm stands offer shoppers a bounty of fresh-picked fruits and vegetables, along with a wide selection of Massachusetts produced specialty products, such as maple syrup, local honey, jams, jellies, cider, and cheeses. Many offer ice cream, delicatessens, and bakeries.
Greenhouses/Nurseries	Find a plethora of flower, vegetable, and herb plants, along with cut flowers, trees and shrubs for landscaping plantings, and other specialty crops. Tour these beautiful farm greenhouses, and enjoy classes and workshops to enhance your gardening success.
Maple Sugar Houses	Visit sugar houses in season to see maple sap boiled into Massachusetts' maple syrup. Sugarhouses are usually open for tours from late February to early April, but maple products can be purchased year round. Enjoy maple candies, maple cream, and maple breakfasts. Be sure to call ahead for hours.
Pick-Your-Own (PYO) Farms	To taste the freshest fruits and vegetables, visit a local farm to "Pick-Your-Own." Strawberries start the season in mid-June, followed by blueberries and raspberries throughout the summer. PYO days continue into fall with peaches, apples, and pumpkins for Halloween!
Wineries	Massachusetts has 27 wineries from Cape Cod to the Berkshires. Visit a Bay State winery and experience the quality and diversity of wine grown and produced throughout the Commonwealth. Most offer tastings and tours year round.
Aquaculture	Massachusetts aquaculture is a very diverse segment of the agricultural community, and includes commercial and municipal culture of numerous species of shellfish (oysters, littlenecks, steamers, mussels, and scallops) and finfish (trout, largemouth bass, tilapia, and barramundi). Be sure to call ahead, as many of these farms operate on a "tidal schedule."

RESOURCES

2012 Census of Agriculture, Massachusetts State Data

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

2012 Census of Agriculture, United States Data

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

⁵⁵ *Massachusetts Agriculture Tourism Map*, MASS. DEP'T OF AGRIC. RESOURCES, <http://www.mass.gov/agr/massgrown/docs/ag-tourism-map-2-side.pdf>.

CHAPTER II: BUSINESS STRUCTURES

Although the overwhelming majority of farms in Massachusetts are sole proprietorships, farmers can benefit from a discussion about how different business structures may accomplish their goals. Depending on which business structure farmers choose, farmers may be able to limit their liability, reduce their tax burden, transfer the business to the next generation more easily, and increase their ability to access larger markets through co-operative practices.

OVERVIEW This chapter is meant to assist attorneys advising farmers with the business formation of their farms. It provides an overview of the different types of business structures and evaluates them from the perspective of a small-scale farm business.

1. Overview of Business Structures This section introduces the attorney to some of the main issues facing farmers with regard to formalizing their businesses, including a discussion of how certain issues that farmers face are different from those faced by clients in other businesses.

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

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

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

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

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

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

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

Massachusetts, 50% of principal farm operators' primary occupation is not farming.² Even for those Massachusetts operators who reported their primary occupation as farming, 42% worked at least one day off-farm and 19.5% worked more than 200 days off-farm.³

Additionally, the economic profile of farmers in the Legal Services Food Hub (LSFH) may not mirror the attorney's traditional clients. Nearly 85% of Massachusetts farms had gross annual sales of less than \$50,000.⁴ Only 2.6% of Massachusetts farms grossed more than \$500,000.⁵ LSFH limits eligibility to farms with less than \$75,000 in gross annual sales, and annual household income below 400% of the federal poverty line. Therefore, the risks and costs of various business structures may have a different weight for LSFH farmers.

Finally, certain farmers' personal assets may have more protection from business creditors than those of other clients. Farmers might have fewer purely personal assets since a farmer's personal assets, such vehicles and homes, may be used in the operation of the farm. To satisfy a farmer's creditors, a bankruptcy judge may avoid seizing those assets that the farmer needs in order to make a living. Furthermore, farmers have their own chapter of the bankruptcy code (Chapter 12, instead of Chapter 9 or Chapter 11), which provides farmers and their assets additional protection.⁶

Still, farmers have many reasons to formalize their business. First, formalized structures can help farmers transfer the farm to the next generation. For example, the business may be structured to allow multiple

Risk Management on Farms

Farmers have a variety of risk management tools to choose from, including certain formalized business structures. Commodity agricultural operations (those farms growing corn, soy, wheat, etc.) are eligible for an assortment of insurance options (often subsidized by the government), crop subsidies, and even disaster payments should the weather be especially bad in any given year. However, in Massachusetts, commodity crop operations are rare; less than 1% of farms report growing corn or wheat for grain. The majority of farms produce specialty crops (those growing fruits, vegetables, and nuts), and they largely do not have the same options available to them. There are some insurance programs for larger specialty crop operators; for the majority of smaller-scale specialty crop producers, however, government insurance, crop subsidies, and disaster payments are not tools they can use to manage their risk. Diversification of the farm operation (in terms of crops and market outlets) and smart business structure formation are important tools for these smaller-scale producers.

² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 69, 15 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf.

³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 69, 15 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf.

⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

⁵ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

⁶ 11 U.S.C. § 1201 et seq. (2012).

farm operators, which helps transfer knowledge and assets between generations. Also, if a farm has multiple operators, a formalized business structure can help order decision-making, compensation, and dissolution. Second, farmers may participate in a multi-farm endeavor and may wish to segregate various farms' assets. Third, farmers may use a variety of business structures to segregate assets within a single operation. For instance, farmers may be advised to hold land independently from the rest of their business. Additionally, farmers may engage in non-production activities, such as agri-tourism or processing, and may want to structure those higher-risk activities as separate businesses to limit tort liability.

PREVALENCE OF FARM BUSINESS STRUCTURES IN MASSACHUSETTS

AND THE UNITED STATES Although the number of formally structured farms increased between 2007 and 2012, the vast majority (86.7%) of farms in the United States still operate as sole proprietorships.⁷ Similarly, in Massachusetts 79.5% of farms operate as sole proprietorships.⁸ Since 2002, the total number of farms using corporations, limited liability companies, or other structures (cooperative, estate, or trust) increased alongside a decline in the number of farms organized as partnerships.⁹ Note, the 2012 Census of Agriculture categorized farms as individual, partnership, corporation, or other.¹⁰ The charts below reflect those categories, though the Guide covers a wider range of structures.

Figure 1. United States Farms by Legal Status¹¹

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

⁷ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.

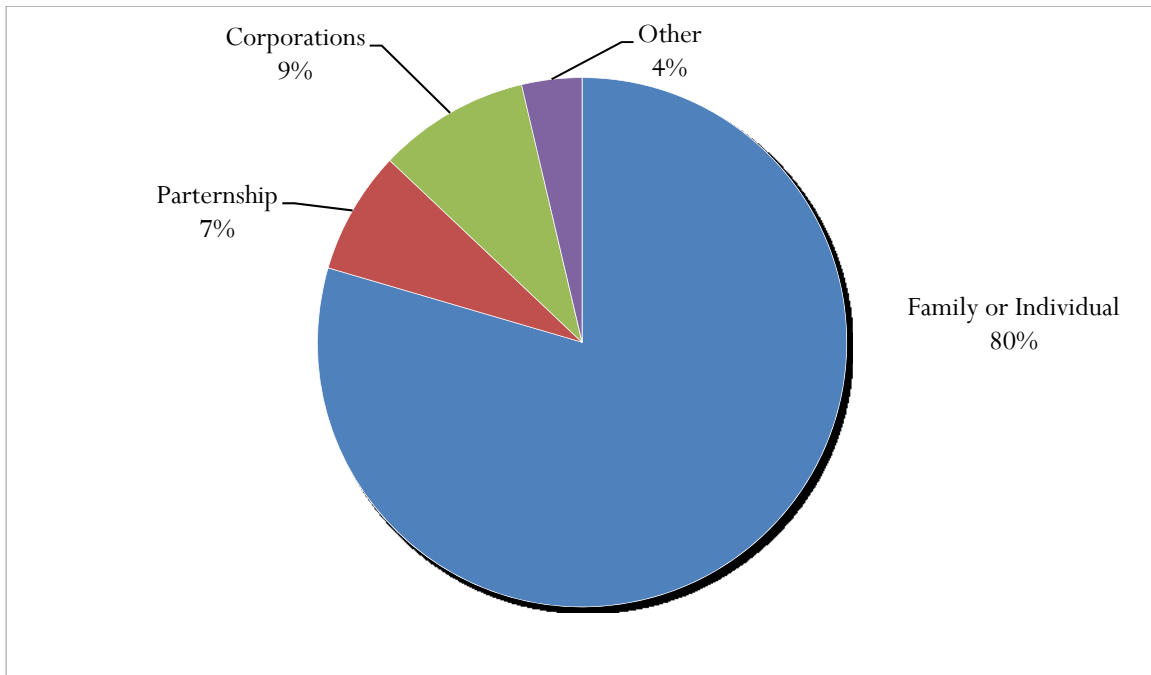
⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

⁹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE U.S. DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf; U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

¹⁰ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 67 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_067_067.pdf

¹¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.

Figure 2. Massachusetts Farms by Legal Status in 2012¹²



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

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

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

¹² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf.

- **Employees:** Does the farmer have any employees? How many? Are the employees family members of the farmer? Does the farmer consider any of the people working on the farm to be interns, volunteers, or independent contractors?
- **Collaborative Practices:** Does the farmer collaborate with other farmers? For example, does the farmer store other farmers' produce on her farm? Does the farmer share equipment with other farmers?
- **Roadside Markets and Farmstands:** Does the farmer have, or hope to have, a roadside market or farmstand? Is the roadside market or farmstand located on property owned or controlled by the farmer? Is the farmer selling any goods he or she did not produce?
- **Wholesale Markets:** Does the farmer sell, or hope to sell, to wholesalers?
- **Value-Added Products:** Will the farmer sell products other than raw agricultural commodities (i.e., will she process them in some way)?
- **Farmers' Markets:** Does the farmer sell, or want to sell, at a farmers' market? What requirements does the farmers' market set? For instance, does the farmers' market require particular insurance?
- **Community Supported Agriculture:** Does the farmer have, or want to have, a CSA? If so, will members of the CSA pick up their shares on the farm, or off the farm? Will the CSA members ever come on the farm for a tour, for a gathering, and/or to do work around the farm?
- **Direct Sales to Restaurants and other Institutions:** Does the farmer sell, or want to sell, directly to restaurants or other institutions? Does the restaurant or institution require a certain level of insurance? Does the restaurant or institution request or require compliance with food safety standards? Does the farmer do any processing (minimal or otherwise) to the product she sells to the restaurant or institution?
- **Agri-Tourism and Other Forms of On-Farm Recreation:** Does the farmer engage in, or want to engage in, agri-tourism activities or other forms of on-farm recreation?
- **Pick-Your-Own:** Does the farmer have, or want to have, a pick-your-own operation; i.e., does the public come on to the farmer's land to engage in agricultural activities?
- **Permits:** What permits, if any, does the farm operation require? For example, a farmer's permits might include a commercial fishing permit,¹³ or a milk dealer's license.¹⁴
- **Insurance:** What kind of insurance policy, if any, does the farmer hold? Does the insurance policy explicitly cover or exclude any activities that the farmer conducts (e.g., if the farmer allows members of the public to enter the farm)?
- **Other Professionals:** Does the farmer consult with any other business professionals, such as an accountant or tax preparer?

¹³ *Commercial Fishing Permit*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/data/license/fish-game/marine-fisheries/commercial-fishing-permit.html> (last visited Jun. 19, 2014).

¹⁴ *Milk Dealers License*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/data/license/agricultural-resources/milk-dealers-license.html> (last visited Jun. 19, 2014).

- **Financing:** How does the farmer fund the farm? Have they received any grants or loans? Is the farmer interested in modifying or finding additional grants or loans?

MAJOR FACTORS IN EVALUATING DIFFERENT BUSINESS STRUCTURES

Once the attorney has an idea of the goals and needs of the farmer, the attorney will be better able to assist the farmer in choosing the best business structure for the operation. When helping farmers decide which structure to choose, it is important to protect the farmer and her assets from unpredictable emergencies and unforeseen hardships.¹⁵ The following section will familiarize the attorney with some factors that might motivate farmers to choose one business structure over another. This section assumes a basic understanding of the various business formation options.

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

Massachusetts General Laws
Partnerships: Ch. 108A
Limited Liability Partnerships: Ch. 108A
Limited Partnerships: Ch. 109
Limited Liability Companies: Ch. 156C
Business Corporations: Ch. 156, 156B, 156D
“B” Corporations: Ch. 156E
Co-operatives: Ch. 157
Worker Co-operatives: Ch. 157A

Second, the attorney must consider how the entity will be **taxed**. Businesses can create or limit tax liability. A “pass-through” entity, such as a partnership or S-corporation, is not itself subject to taxation; instead, the entity’s owners are taxed on their share of the business income.¹⁶ In contrast, “double-taxation” entities, mostly C-corporations, must pay taxes on the business’s profits, and then any profits distributed to owners are taxed as personal income.¹⁷ Because farmers in the LSFH must have gross sales of less than \$75,000, the formality costs may outweigh the corporate benefits.

Additionally, attorneys should help the farmer consider how to **limit liability**. Certain business structures limit the liability of some or all of the business’s owners, while others provide no protection. As with other businesses, there are many ways a farmer can incur liability; for example, the farmer could default on a

¹⁵ See, e.g. *Natural Events and Disasters*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaagct/tmed.html> (last visited Jun. 17, 2014).

¹⁶ Annette M. Higby, *A Legal Guide to the Business of Farming in Vermont*, UNIVERSITY OF VERMONT EXTENSION (2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

¹⁷ Annette M. Higby, *A Legal Guide to the Business of Farming in Vermont*, UNIVERSITY OF VERMONT EXTENSION (2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

loan; an employee or visitor could be injured on the farm; or, a business partner could incur a debt tied to the farm business. The attorney should identify potential liabilities and assess whether to suggest a limited liability business structure. Other risk-management tools, such as insurance, may address the farmer's potential liabilities more cheaply. (See "Risk Management" text box).

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

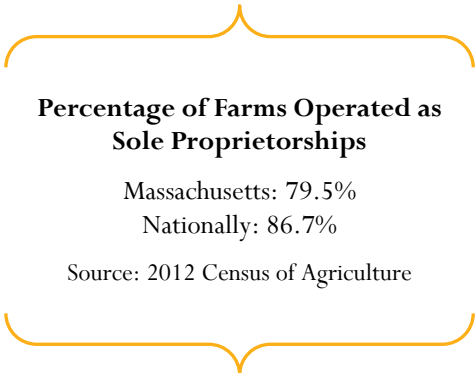
Similarly, the **life of the entity** is an important factor to consider when selecting a business structure. The attorney and farmer should discuss whether the farm business will terminate once she retires, or whether the farm operation will continue beyond this farmer's term. Chapter IV of this Guide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

Finally, the attorney should help assess the importance of **outside investment**. Certain business structures facilitate investment, while others do not. If the farmer hopes to have non-operators financially support the farm, she might consider a business structure that allows for outside investment. For example, if the farm operates as a non-profit, it may attract funding because their investors may be able to deduct contributions to the farm from their taxable income.

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

CHOOSING A BUSINESS STRUCTURE A farmer may choose from many structures when formalizing her business operation. This section discusses the main business structures available in Massachusetts that farmers would most likely utilize.

Sole Proprietorships A sole proprietorship is the simplest and most common business structure. It is an unincorporated business owned and run by one individual with no distinction between the business and the owner. The owner is entitled to all profits and is responsible for all the business's debts, losses, and liabilities.¹⁸ Most Massachusetts farms, 79.5%, are sole proprietorships;¹⁹ perhaps because sole proprietorships are the default business structure and do not require any legal filings.



Percentage of Farms Operated as Sole Proprietorships
Massachusetts: 79.5%
Nationally: 86.7%
Source: 2012 Census of Agriculture

¹⁸ *Sole Proprietorship*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/sole-proprietorship-0> (last visited Jun. 17, 2014).
¹⁹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf. The 2012 U.S. Census of Agriculture categorizes the "family or individual" designation as sole proprietorship, and excludes partnerships and corporations.

If the farmer wishes to avoid formal organization, attorneys should still advise their clients to choose a name for the business and register the farm business name with the Massachusetts Secretary of State.²⁰ This allows the farmer to ensure that the name is not already being used by another business and that other businesses cannot use the farm's name in the future.²¹ Note, that if the farmer uses a business name other than their own, they must file a Doing Business As (DBA) certificate.

Pros for Farmers:

- **Ease of Formation and Management:** Any person who starts a farming business without organizing or filing will be considered a sole proprietor.²² There are few legal filings the farmer must complete to begin operations, and there are no yearly filings or fee requirements.²³ The administration of a sole proprietorship requires very little time or effort from the farmer. Farmers may find this appealing because it allows them to focus on the activity of farming rather than business formalities.
- **Taxation:** The owner of a sole proprietorship reports the income from the business on her individual tax filings.²⁴ Because LSFH farmers must make less than 400% of the federal poverty level, their tax rate will likely be low.

Cons for Farmers:

- **Limiting Liability:** A sole proprietorships is not distinct from its owner, so this business structure does not limit the owner's liability. Generally, a creditor of the business can force the owner to sell personal assets in order to pay the debts and obligations of the business.²⁵ However, because the farmer's personal assets and the farm assets may be the same, those shared-use assets may be unavailable to satisfy creditors during bankruptcy proceedings.
- **Life of Entity:** A sole proprietorship terminates when the owner passes away or sells the business assets.²⁶ Therefore, sole proprietorships may be undesirable for a farmer who wishes to keep the farm business intact after she passes away, especially if the farmer has multiple heirs or complex succession needs.

²⁰ MASSACHUSETTS SECRETARY OF STATE, <http://www.sec.state.ma.us/>.

²¹ *How to Name a Business*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/how-name-business> (last visited Jun. 17, 2014).

²² LARRY D. SODERQUIST ET AL., *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS* 39 (6th ed. 2005) (“[T]he legal identity of the sole proprietorship and its owner are one and the same...”).

²³ *Sole Proprietorships*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/sole-proprietorships.html> (last visited Jun. 17, 2014).

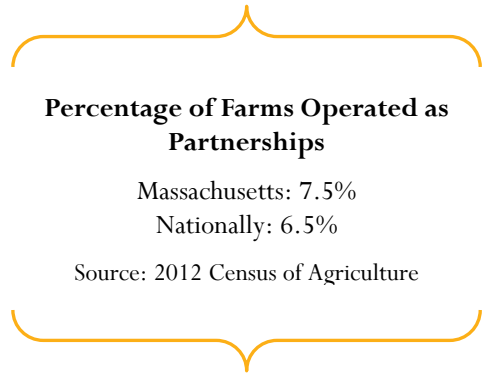
²⁴ *Sole Proprietorships*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/sole-proprietorships.html> (last visited Jun. 17, 2014).

²⁵ 1 *Advising Small Businesses* § 3:2 (2014).

²⁶ Harry J. Haynsworth, *Selecting the Form of a Small Business Entity* 3 (1985).

- **Outside Investment:** Sole proprietorships do not allow the business owner to raise capital by selling equity interests in the business.²⁷ Therefore, if the farmer is interested in obtaining outside investments, a sole proprietorship may not be the best option.
- **Ease of Transfer:** Because sole proprietors have total control over their farming operation, they will have full rights to transfer assets to another party.²⁸ However, a sole proprietorship, cannot, by definition, have more than one owner, a farm can only retain the sole proprietorship form if it is transferred to a single person. Additionally, because a sole proprietorship has no legal identity separate from its owner, it cannot be transferred as a business. Instead, each part of the farm business, such as land, structures, and equipment, must be conveyed. Transferring the business in this manner may increase the transaction costs, and limits the farmer’s ability to use creative methods of transfer, such as sharing between owner and successor.

Partnerships A partnership is a single business owned by two or more people. A partner’s contribution may consist of money, property, labor, and/or skill. In return for their contribution to the business, each partner shares in the profits and losses of the business.²⁹ About 7.5% of farms in Massachusetts are organized as partnerships.³⁰ Of the 563 farms that identify as partnerships, 388 (68.9%) are registered under Massachusetts law as limited partnerships and limited liability partnerships.³¹



The General Partnership

A general partnership is an association of two or more persons who combine their resources—money, labor, skills, and/or property—to conduct business for profit, expecting to share both profits and losses.³² Because of the informality of some arrangements, farmers may be unknowingly operating as a partnership and doing so without having any formal paperwork, such as a partnership agreement.³³

It is wise for farmers operating as a general partnership to write a partnership agreement.³⁴ The agreement should contain, at a minimum, the following:

²⁷ *Sole Proprietorship*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/sole-proprietorship-0> (last visited Apr. 23, 2014).

²⁸ *Transfer Ownership*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/transfer-ownership> (last visited Apr. 23, 2014).

²⁹ *Partnership*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/partnership> (last visited Jun. 19, 2014).

³⁰ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/.

³¹ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/; MASS. GEN. LAWS ch. 108A, §§ 6, 45 (2014); MASS. GEN. LAWS ch. 109 (2014).

³² MASS. GEN. LAWS ch. 108A § 6 (2014).

³³ MASS. GEN. LAWS ch. 108A, § 7 (2014).

³⁴ 1 Advising Small Businesses § 5:7 (2014).

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

If no partnership agreement is written, then equal ownership and liability will be assumed.³⁵ Additionally, without a partnership agreement it will be difficult to wind down and terminate the partnership effectively.

When drawing up a partnership agreement, it is important to note that farms in the LSFH network are unlikely to have high profit margins. This means that while it is important to decide how to divide profits, the attorney should focus more attention on the other sections of the partnership agreement, such as the contributions of each partner to the partnership, the division of responsibility for potential risks, the authority of the partners to act on behalf of the partnership, the division of management duties, and the resolution process for disputes.

Gentleman’s Agreements

Sometimes farmers enter into “gentleman’s agreements” with neighbors or relatives to share in the profits from crops or to share some of the labor. Make sure to talk with the farmer about any gentleman’s agreements the farmer may have made to see if the farmer has unintentionally formed a partnership.

Pros for Farmers:

- **Ease of Formation and Management:** If there are two farmers operating one farm, chances are high that they are a general partnership. The ease of formation and maintenance of the business structure can be a positive for farmers.
- **Taxation:** Like a sole proprietorship, partnerships receive “pass-through” tax treatment.³⁶
- **Raising Capital:** General partnerships allow for outside investments, because there is no limit on the number of partners. Outside individuals can simply invest and become a partner.³⁷ Note: this may require modifying the partnership agreement.

³⁵ MASS. GEN. LAWS ch. 108A § 6 (2014).

³⁶ *Partnerships*, MASS. DEP’T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/partnerships.html> (last visited Jun. 17, 2014).

³⁷ FOLEY HOAG LLP, *DOING BUSINESS IN MASSACHUSETTS 5* (Lex Mundi 2011), available at www.lexmundi.com/Document.asp?DocID=3607.

Cons for Farmers:

- **Limited Liability:** General partnerships expose partners to both upside and downside risk. In other words, partners share in all business profits, but are also exposed individually to liability for business losses. All general partners are jointly and severally liable for all business obligations.³⁸ Creditors, and others, may sue any or all partners and recover from their personal assets.³⁹
- **Ease of Transfer:** In Massachusetts, partnerships do not automatically terminate when a partner exits.⁴⁰ Absent a provision in the partnership agreement to the contrary, or without the consent of the other partners, partners can only grant an assignee their share of profits, and not the right to control or inspect the partnership.⁴¹ Therefore, if the farmer plans on transferring control of the farm to relatives or another party, the farmer either should ensure that the partnership agreement clearly provides for transfer of control or should choose a different business structure.
- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time.
- **Raising Capital:** Joint and several liability may deter outside investment, because all investors will be exposed to the business's risks.⁴² Additionally, farmers may not wish to use general partnerships to raise funds, because outside investors would gain the right to influence farm management.

The Limited Partnership

The limited partnership (LP) is similar to the general partnership in that there must be at least two owners.⁴³ In an LP, at least one of the owners must be a “general” partner and while the others may be “limited” partners.⁴⁴ The general partners control business management and operation and remain liable for all business obligations.⁴⁵ The limited partners, on the other hand, enjoy a limitation on liability but may not participate in the management or operation of the LP.⁴⁶ An LP must file a certificate of limited partnership with the state.⁴⁷ As with a general partnership, farmers in an LP should also draft a partnership agreement addressing the issues discussed above.

³⁸ MASS. GEN. LAWS ch. 108A, § 15 (2014).

³⁹ MASS. GEN. LAWS ch. 108A, § 28 (2014).

⁴⁰ “A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership.” MASS. GEN. LAWS ch. 108A, § 27 (2014).

⁴¹ “[I]t merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.” MASS. GEN. LAWS ch. 108A, § 27 (2014).

⁴² See Annette M. Higby, *A Legal Guide to the Business of Farming in Vermont*, UNIVERSITY OF VERMONT EXTENSION (2006), available at <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

⁴³ MASS. GEN. LAWS ch. 109, § 1 (2014).

⁴⁴ MASS. GEN. LAWS ch. 109, § 1 (2014).

⁴⁵ MASS. GEN. LAWS ch. 109, § 24 (2014).

⁴⁶ MASS. GEN. LAWS ch. 109, § 19 (2014).

⁴⁷ MASS. GEN. LAWS ch. 109, § 8 (2014).

Pros for Farmers:

- **Taxation:** Partners pay income tax on any profits received from the limited partnership.⁴⁸ However, partnerships may elect to not distribute excess cash to the partners and instead reinvest those profits in the business.
- **Limited Liability:** LPs protect limited partners' personal assets from business liabilities, but prohibit them from managing the day-to-day business operations.⁴⁹ This could be a benefit for a farmer who wants multiple investors, but wants to retain management and control over the farm for herself.
- **Ease of Transfer:** Unless otherwise provided in the partnership agreement, an LP can be consolidated or merged with another business entity as long as all general and limited partners approve.⁵⁰ Additionally, individual partnership interests may be transferred subject to limitations in the partnership agreement.⁵¹
- **Life of Entity:** Farmers can have substantial control over the LP's end by including termination conditions in the partnership agreement.⁵²
- **Raising Capital:** Unlike general partnerships, investors can provide capital without incurring any liability by becoming limited partners.⁵³ This is good for investors who do not wish to manage the farm and want limited liability.

Cons for Farmers:

- **Limited Liability:** General partners remain personally liable for any and all actions the partnership takes.⁵⁴

The Limited Liability Partnership

The limited liability partnership (LLP) limits the personal liabilities of the entity's partners, which minimizes the risks to partners' personal assets.⁵⁵ To form an LLP, the partnership must file documents with the state and pay an initial fee.⁵⁶ LLPs must also file annual reports and pay an annual fee.⁵⁷

⁴⁸ *Partnerships*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/partnerships.html> (last visited Jun. 17, 2014).

⁴⁹ MASS. GEN. LAWS ch. 109, § 19 (2014).

⁵⁰ MASS. GEN. LAWS ch. 109, § 16A (2014).

⁵¹ MASS. GEN. LAWS ch. 109, § 40 (2014).

⁵² MASS. GEN. LAWS ch. 109, § 44 (2014).

⁵³ MASS. GEN. LAWS ch. 109, § 19 (2014).

⁵⁴ MASS. GEN. LAWS ch. 109, § 24 (2014).

⁵⁵ MASS. GEN. LAWS ch. 108A, §15 (2014).

⁵⁶ MASS. GEN. LAWS ch. 108A, § 45 (2014).

⁵⁷ MASS. GEN. LAWS ch. 108A, § 45 (2014).

Pros for Farmers:

- **Taxation:** An LLP with at least two members will be treated as either a partnership or corporation for Massachusetts income tax purposes, depending on the entity's federal treatment.⁵⁸ Partners report income from the LLP on their personal income taxes.
- **Limited Liability:** All of the partners are protected from the LLP's liabilities, except in the case of a partner's own negligence.⁵⁹ This protection extends to all partners, even those involved in farm management.
- **Raising Capital:** LLPs are able to accept investments from outside investors. As in a general partnership, any persons carrying on a business and sharing in the profits and losses will be considered partners. Thus, upon investment, the investor becomes a partner. In an LLP, the investor becomes a partner with authority over the management of the farm. The LLP could be attractive to investors who are interested in farm management and want limited liability.
- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time.

Cons for Farmers:

- **Ease of Formation and Management:** There are several formal steps and fees required to form and maintain an LLP.⁶⁰ These requirements may deter a farmer from choosing to form an LLP.

Limited Liability Companies A limited liability company (LLC) is a hybrid type of legal structure that provides the limited liability features of a corporation and operational flexibility of a partnership.⁶¹ LLCs are popular business structures among farmers because they do not require as many formal requirements as certain other business entities and are very flexible.⁶² By default LLCs are owned by members; members also act as managers of the LLC.⁶³ The operating agreement may establish one or more managers, in which case some members may not have a role in managing the LLC.⁶⁴

Percentage of Farms Operated as Limited Liability Companies

Massachusetts: 6.1%
Nationally: 4.8%

Source: 2012 Census of Agriculture

⁵⁸ *Limited Liability Companies and Limited Liability Partnerships*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/limited-liability-companies-and-limited.html> (last visited June 19, 2014).

⁵⁹ *Limited Liability Companies and Limited Liability Partnerships*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/limited-liability-companies-and-limited.html> (last visited June 19, 2014).

⁶⁰ MASS. GEN. LAWS ch. 108A, § 45 (2014).

⁶¹ *Limited Liability Company*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/limited-liability-company-llc> (last visited Jun. 14, 2014).

⁶² 1 *Advising Small Businesses* § 7:1 (2014).

⁶³ MASS. GEN. LAWS ch. 156C, § 2 (2014).

⁶⁴ MASS. GEN. LAWS ch. 156C, § 24 (2014).

Pros for Farmers:

- **Ease of Formation and Management:** Although there are some steps a farmer must take to maintain an LLC, they are less onerous than other business structure filing requirements, notably those for corporations. To form an LLC, the farmer must file a certificate of organization with the state.⁶⁵ The farmer should also create an operating agreement, which details how the LLC is to be governed and provides other organizational detail.⁶⁶
- **Taxation:** LLCs may elect pass-through or double taxation. This customization allows members to select an optimal tax treatment. However, for those LLCs with a single member, the member must account for all profits and losses on his or her individual income taxes.⁶⁷ For LLCs with multiple members, the profits and losses are generally allocated based on proportional ownership, but may be allocated differently.⁶⁸
- **Limited Liability:** Provided that the separateness and formalities of the LLC are respected, LLCs provide a limitation on liability for all members with respect to the debts and liabilities of the LLC.⁶⁹ This can be attractive to farmers who want to be able to exercise control over the management of the farm as well as protect themselves from liability.
- **Ease of Transfer:** LLCs allow for the transfer of interests in the LLC to other parties, including the assignment of a member or manager's interests to another party, unless otherwise provided in the operating agreement.⁷⁰ LLCs are good for farmers who want to transfer the farm business between generations or between owners, because LLCs allow for flexible operating agreements to accommodate various transfer situations.
- **Raising Capital:** LLCs are a good type of business entity if the farmer is interested in obtaining outside investments since there can be a number of different classes of members or managers.⁷¹ By using an LLC rather than a corporation, a farm business can more flexibly structure investor relationships.⁷²
- **Other:**
 - **Multiple Business Ventures:** LLCs are good for farmers forming a multi-farm CSA because it allows multiple partners to share farm management and limit their liability. Similarly, an LLC may be a good option for farmers who have different business ventures and want to keep them separate. For example, if the farmer hosts a fall festival that includes hayrides, the farmer may want to use an LLC for the agricultural operation and a separate LLC for the festival operation.

⁶⁵ MASS. GEN. LAWS ch. 156C, §12 (2014).

⁶⁶ 1 Advising Small Businesses § 7:15 (2014).

⁶⁷ 1 Advising Small Businesses § 7:5 (2014).

⁶⁸ 1 Advising Small Businesses § 7:35 (2014)

⁶⁹ 1 Advising Small Businesses § 7:15 (2014).

⁷⁰ MASS. GEN. LAWS ch. 156C, § 439 (2014).

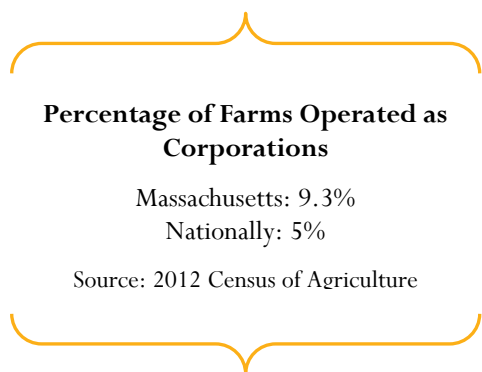
⁷¹ FOLEY HOAG LLP, DOING BUSINESS IN MASSACHUSETTS 8 (Lex Mundi 2011), *available at* www.lexmundi.com/Document.asp?DocID=3607.

⁷² FOLEY HOAG LLP, DOING BUSINESS IN MASSACHUSETTS 8 (Lex Mundi 2011), *available at* www.lexmundi.com/Document.asp?DocID=3607.

- **Higher-Risk Activities:** Farms that engage in higher-risk activities, such as fermenters, value-added operations, and agri-tourism, can separate LLCs for those operations to protect the rest of their operation.
- **Weighted Voting:** LLCs may be customized for farmers who want to use the “one member, one vote” co-operative principle, while encouraging investments from members and managers. However, this does not make the LLC a formal co-operative, which are described more below. LLCs allow farmers to assign weight to votes differently on various topics, for example, using “one member, one vote” for operational decisions, and votes weighted by investment for any land sale.

Cons for Farmers:

- **Life of Entity:** Termination of an LLC can sometimes be difficult depending on the language contained in the operating agreement.⁷³ Therefore, the LLC operating agreement should specify a time or an event that will trigger dissolution.⁷⁴
- **Other:**
 - **Fees:** Flat fees may be problematic for LSFH farmers with low gross income.
 - **Paperwork:** An LLC is also not a good option for farmers who prefer not to bear any paperwork or reporting burdens. One downside to the flexibility of the LLC is that the operating agreement tends to be more complex than the organizational documentation for a corporation.
 - **Personal Guarantee:** Some creditors may require farmers to personally guarantee their debts, regardless of the structure of their business, nullifying protection from liability.



Corporations A corporation is an independent legal entity owned by shareholders. This means that the corporation itself, not the shareholders that own it, is legally responsible for the actions of the business and debts it incurs.⁷⁵ There are 719 farms in Massachusetts that identify as corporations.⁷⁶ Of those corporate farms, 578 identify as being family held (over 98% of which have ten or less stockholders).⁷⁷ Nearly all of the farms that are not family-held corporate farms also have ten or fewer

⁷³ MASS. GEN. LAWS ch. 156C, § 43 (2014).

⁷⁴ MASS. GEN. LAWS ch. 156C, § 43 (2014).

⁷⁵ *S-Corporation*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/s-corporation> (last visited Jun. 19, 2014).

⁷⁶ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/.

⁷⁷ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/.

stockholders.⁷⁸ In Massachusetts, a farm can organize as a C-corporation, an S-corporation, or a B-corporation. This section only provides a very basic overview of S- and C-corporations, because participating attorneys are likely familiar with corporate law and LSFH farmers are unlikely to form as a corporation.

S- and C-Corporations

The S-corporation is more commonly used among farmers in the Midwest.⁷⁹ Farmers used S-corporations to limit liability and transfer the farm between generations before LLCs were available.⁸⁰ S-corporations are used by farmers more often than C-corporations, perhaps because of their pass-through tax status.

To form a corporation in Massachusetts the farm must prepare and file Articles of Organization.⁸¹ Then the shareholders must elect to become an S- or C-corporation.⁸² In Massachusetts, all S-corporations must pay an initial filing fee and annual fee and, as of the publication of this guide, a minimum of \$456 in corporate tax, regardless of the business' profitability.⁸³ Additionally, in an S-corporation all shareholders must be natural persons and citizens of the United States.⁸⁴

Pros for Farmers:

- **Limited Liability:** Shareholders are protected from the liabilities and debts of the corporation, so long as the corporation maintains business formalities such as periodic meetings of the board of directors and careful recordkeeping.⁸⁵
- **Ease of Transfer:** Corporations can be transferred to other owners if the Articles of Organization and bylaws allow.⁸⁶
- **Life of Entity:** Corporations can survive beyond the life of the shareholders; a corporation is terminated by shareholder vote or judicial action.⁸⁷
- **Raising Capital:** Corporations are useful tools for raising funds because they may receive outside investment in exchange for equity or debt.

⁷⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/.

⁷⁹ Phone Interview with Rachel Armstrong, Executive Director, Farm Commons, May 27, 2014 (on file with author).

⁸⁰ Phone Interview with Rachel Armstrong, Executive Director, Farm Commons, May 27, 2014 (on file with author).

⁸¹ *S-Corporation*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/s-corporation> (last visited Jun. 19, 2014)

⁸² 26 U.S.C. § 1362 (2012).

⁸³ *S Corporations*, MASS DEP'T. OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/corporations/s-corporations.html> (last visited Jun. 17, 2014).

⁸⁴ 26 U.S.C. § 1361 (2012).

⁸⁵ *S-Corporation*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/s-corporation> (last visited Jun. 19, 2014).

⁸⁶ MASS. GEN. LAWS ch. 156D, § 6.27 (2014).

⁸⁷ 26 U.S.C. § 1362(d) (2012).

Cons for Farmers:

- **Ease of Formation and Management:** There are numerous formalities required to form an corporation. For example, the S-corporation must have a board of directors,⁸⁸ hold at least one annual shareholder meeting,⁸⁹ and keep a distinct business bank account.⁹⁰ Other restrictions apply to corporations, including detailed recordkeeping requirements. These corporate formalities may differ from the farmer's current practices, and the costs of compliance will differ based on the farmer's needs, preferences, and business administration skills.
- **Taxation:** In Massachusetts, as of the publication of this guide, S-corporations owe a minimum of \$456 in corporate taxes each year regardless of their profitability, which may be too high a fee for farmers participating in the LSFH.⁹¹

The B-Corporation

Benefit corporations, or B-corporations, combine elements of for-profit and non-profit corporations. They have the public benefit focus of a non-profit, but are permitted to distribute profits to shareholders. B-corporations are relatively new to Massachusetts; corporations were able to elect benefit corporation status beginning in December 2012.⁹²

Unlike S- and C- corporations B-corporations are not required to focus solely on maximizing profits. Instead, a B-corporation may pursue general or specific public benefits.⁹³ In Massachusetts, a “general public benefit” materially and positively impacts society and the environment.⁹⁴ This standard takes the corporate actions as a whole and uses a neutral, third-party standard to evaluate the business and operations of a benefit corporation.⁹⁵ A “specific public benefit” includes any particular benefit on society or the environment including:

- providing low-income or underserved individuals and communities with beneficial products or services;
- promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- promoting the preservation and conservation of the environment; and,
- improving human health.⁹⁶

⁸⁸ MASS. GEN. LAWS ch. 156, § 21 (2014).

⁸⁹ MASS. GEN. LAWS ch. 156, § 7.01 (2014).

⁹⁰ *Corporation Basics*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/corporation-basics-29867.html>.

⁹¹ *S Corporations*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/corporations/s-corporations.html> (last visited Apr. 25, 2014).

⁹² Sharon C. Lincoln & Adrienne M. Ellman, *Benefit Corporations Have Arrived in Massachusetts*, BOSTON BAR ASSOCIATION, Jan. 11, 2013, available at <http://www.bostonbar.org/sections/business-transactions/business-transactions-newsletter/2013/01/11/benefit-corporations-have-arrived-in-massachusetts>.

⁹³ MASS. GEN. LAWS ch. 156E, § 9 (2014).

⁹⁴ MASS. GEN. LAWS ch. 156E, § 9 (2014).

⁹⁵ MASS. GEN. LAWS ch. 156E, § 2 (2014).

⁹⁶ MASS. GEN. LAWS ch. 156E, § 2 (2014).

When making a decision for the B-corporation, the directors of a B-corporation must consider the decision's effect on

- shareholders;
- employees and workforce;
- customers and clients;
- society and the local community;
- the local, regional, and global environment;
- the short- and long-term interests of the B-corporation; and,
- the B-corporation's general or specific public benefit purpose.⁹⁷

B-corporations are subject to the Massachusetts laws governing traditional corporations.⁹⁸ In addition to an annual report, B-corporations must pay a \$75 fee⁹⁹ and file an annual benefit report that assesses the B-corporation's public benefit accomplishments.¹⁰⁰

This business structure may be appealing to certain farmers who wish to ensure long-term accountability for a social or environmental mission. For example, Cabot Creamery Cooperative in Vermont operates as a B-corporation.¹⁰¹ Twelve-hundred farmers own Cabot, and almost half are located in low-income communities.¹⁰² They fill over half of their open positions through internal promotions, and offer health, wellness, and counseling services to their employees.¹⁰³ Finally, Cabot sets specific energy reduction targets and studies the life cycle impacts of well over half of its products.¹⁰⁴ Cabot is not the only B-corporation farm; Epiphany Farms Enterprise Inc. (EFE) in Bloomington, Illinois also operates as a B-corporation.¹⁰⁵ EFE uses harvested rainwater to irrigate crops, donates to charity, and purchases many supplies from local businesses.¹⁰⁶ Although there are not yet any B-corporation farms in Massachusetts, this is an option that attorneys may want to discuss with the farmer.

⁹⁷ MASS. GEN. LAWS ch. 156E, § 10 (2014).

⁹⁸ MASS. GEN. LAWS ch. 156A (2014); MASS. GEN. LAWS ch. 156D (2014).

⁹⁹ Massachusetts Secretary of State, Memorandum: New Legislation, Massachusetts General Laws Chapter 156E, Effective December 1, 2012, <http://www.sec.state.ma.us/cor/corpdf/Notice%20regarding%20Benefit%20Corporations.pdf>.

¹⁰⁰ MASS. GEN. LAWS ch. 156E, § 15 (2014).

¹⁰¹ *Cabot Creamery Cooperative*, CERTIFIED B CORPORATION, <http://www.bcorporation.net/community/cabot-creamery-cooperative>.

¹⁰² *Cabot Creamery Cooperative*, CERTIFIED B CORPORATION, <http://www.bcorporation.net/community/cabot-creamery-cooperative>.

¹⁰³ *Cabot Creamery Cooperative*, CERTIFIED B CORPORATION, <http://www.bcorporation.net/community/cabot-creamery-cooperative>.

¹⁰⁴ *Cabot Creamery Cooperative*, CERTIFIED B CORPORATION, <http://www.bcorporation.net/community/cabot-creamery-cooperative>.

¹⁰⁵ *Epiphany Farms Enterprise Inc.*, CERTIFIED B CORPORATION, <http://www.bcorporation.net/community/epiphany-farms-enterprise-inc>.

¹⁰⁶ *Epiphany Farms Enterprise Inc.*, CERTIFIED B CORPORATION, <http://www.bcorporation.net/community/epiphany-farms-enterprise-inc>.

Pros for Farmers:

- **Taxation:** B-corporations are organized as corporations, and are taxed as such. B-corporations can elect to be taxed as S-corporations to receive the pass-through benefits of S-corporations.
- **Limited Liability:** Shareholders are protected from liability in a B-corporation as they would be in a traditional corporation.
- **Ease of Transfer:** Management and ownership of the B-corporation is easily transferred, as with traditional corporations.
- **Life of Entity:** A B-corporation can survive beyond the life of the shareholders; a B-corporation is terminated by shareholder vote or judicial action.
- **Raising Capital:** B-corporations are subject to the same laws as traditional corporations, and so may receive similar kinds of outside investment.
- **Other:** B-corporation status helps farmers raise capital while maintaining environmental or social purposes. Additionally B-corporations may provide a marketing benefit as the distinction creates credibility for consumers.

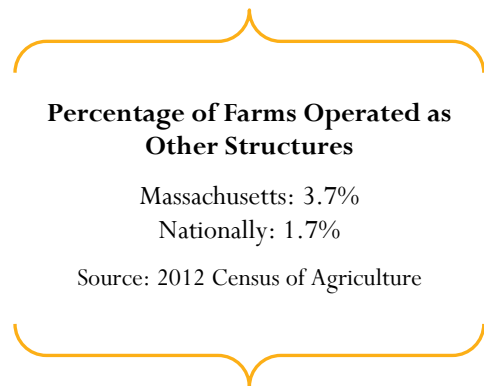
Cons for Farmers:

- **Ease of Formation and Management:** As with other corporate structures, this structure may impose too high costs on the farmer. There are numerous filings and administrative requirements associated with B-corporation status. An existing corporation may elect to become a B-corporation by amending the corporation’s Articles of Organization.¹⁰⁷ In addition to the requirements for traditional corporations, B-corporations must file an annual benefit report, with a \$75 fee, and must select a “benefit director” to prepare an annual shareholders report focused on the B-corporation’s progress on its public benefit purpose.¹⁰⁸

Other Types of Business Structures Farms may also seek non-profit or co-operative status. Each of these is described below.

Non-Profits

Some farmers may consider pursuing non-profit status. Non-profit status can provide some major benefits to farmers, including tax-exemption and the ability to receive charitable donations. However, it may be difficult for farmers to qualify as a non-profit. To qualify as a non-profit, the farm’s primary purpose must be educational or charitable.¹⁰⁹ The Internal Revenue Service (IRS) requires that organizing documents, such as Articles of Incorporation, articulate the organization’s exempt purpose and



¹⁰⁷ MASS. GEN. LAWS ch. 156E, § 5 (2014).

¹⁰⁸ MASS. GEN. LAWS ch. 156E, § 11 (2014).

¹⁰⁹ 26 C.F.R. § 1.501(C)(3)–1(C)(1) (2014).

permanently dedicate the organization's assets to the exempt purpose.¹¹⁰ The organization must petition the IRS and, as of Jan. 3, 2010, pay an \$850 fee for 501(c)(3) status.¹¹¹

The Food Project is an example of a non-profit farm that operates in Boston. The mission of The Food Project is

...to create a thoughtful and productive community of youth and adults from diverse backgrounds who work together to build a sustainable food system. Our community produces healthy food for residents of the city and suburbs, provides youth leadership opportunities, and inspires and supports others to create change in their own communities.¹¹²

The Food Project has over forty acres of farmland in greater Boston and on the North Shore; they donate their produce to hunger relief organizations and sell their produce at farmers markets and through a CSA.¹¹³ Although The Food Project grows and sells produce, their mission is educational; they work with teenagers and other volunteers to teach them about farming and the food system.¹¹⁴ Because The Food Project produces food primarily to educate and end hunger, rather than to provide shareholders with profits, non-profit status makes sense. However, non-profit status is not appropriate for farms organized to produce profits.

Pros for Farmers:

- **Taxation:** All non-profits must file IRS Form 990, but are not usually required to pay federal income tax.¹¹⁵ Officers must still pay personal income tax on their salaries, and the business must pay taxes on profits from non-exempt activities.¹¹⁶
- **Raising Capital:** Non-profits are permitted to receive tax-deductible charitable donations.¹¹⁷ Further, operating under 501(c)(3) status allows a non-profit to apply for grants or receive funding from foundations or other grant-making institutions, as well as state and federal funding.¹¹⁸
- **Life of Entity:** Non-profit status will continue as long as organization pursues exempt purposes and follows formal reporting requirements, or until it formally notifies the IRS.

¹¹⁰ Form 1023, INTERNAL REVENUE SERVICE, available at <http://www.irs.gov/pub/irs-pdf/f1023.pdf>.

¹¹¹ Form 1023, INTERNAL REVENUE SERVICE, available at <http://www.irs.gov/pub/irs-pdf/f1023.pdf> (note: the fee is only \$400 if the organization's gross receipts did not exceed \$10,000 over the past four years).

¹¹² *Mission and Vision*, THE FOOD PROJECT, <http://thefoodproject.org/mission-and-vision>.

¹¹³ *Our Farms*, THE FOOD PROJECT, <http://thefoodproject.org/our-farms>.

¹¹⁴ *What We Do*, THE FOOD PROJECT, <http://thefoodproject.org/what-we-do>.

¹¹⁵ INTERNAL REVENUE SERVICE, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 2 (n.d.), available at <http://www.irs.gov/pub/irs-pdf/p4220.pdf>.

¹¹⁶ 26 U.S.C. § 511(2012).

¹¹⁷ INTERNAL REVENUE SERVICE, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 2 (n.d.), available at <http://www.irs.gov/pub/irs-pdf/p4220.pdf>.

¹¹⁸ INTERNAL REVENUE SERVICE, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 2 (n.d.), available at <http://www.irs.gov/pub/irs-pdf/p4220.pdf>.

- **Ease of Transfer:** Once the non-profit is formed, it can be easily transferred from one operator to another. The farmer could be the executive director, or could be on staff as the farm manager.

Cons for Farmers:

- **Ease of Formation and Management:** There are a number of requirements to form and maintain a non-profit. The farmer must prove to the IRS that the farm operation satisfies the criteria for a 501(c)(3), must refrain from certain prohibited activities (particularly political or lobbying activities, and operating for the benefit of private interests), and must comply with recordkeeping, annual filing, and other disclosure requirements.¹¹⁹
- **Limit on Profit:** If a farmer wants to operate as a non-profit, the farm cannot be operated for the benefit of private interests (such as the founder or shareholders); instead, all profits and assets must be permanently dedicated to the exempt purposes and mission of the organization.¹²⁰

Co-operatives

Co-operatives are an increasingly popular form of business structure among farmers and food producers in the local and regional food economy. Unlike a corporation, co-operatives must further members' goals and meet their needs.¹²¹ These needs and goals depend on the type of member; in the agricultural sector, members can be producers, purchasers, or workers. A producer co-operative might use the co-operative to market and distribute the members' produce. For example, co-operation might help small farmers that want to sell to larger institutions, but cannot meet the demand alone. Similarly, dairy co-operatives help farmers share otherwise prohibitively expensive equipment, marketing, and distribution costs. This kind of purchasing co-operative allows farmers to purchase supplies or equipment together, which can lead to bulk discounts or useful sharing. In a worker co-operative, employees own and govern the business together, This might be a good option for a farmer that wants to give her employees an incentive to stay working on that particular farm, retaining their skills and experience over time. Producer and purchasing co-operatives are similar to one another in formation and structure. Worker co-operatives operate under a distinct set of laws. For this reason, the rest of the section is divided into two subparts addressing the two categories of co-operatives.

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

Source: New England Farmers Union, *Growing A Food System for the Future: A Manual for Co-operative Enterprise Development 2* (2014).

¹¹⁹ INTERNAL REVENUE SERVICE, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS (n.d.), available at <http://www.irs.gov/pub/irs-pdf/p4220.pdf>.

¹²⁰ INTERNAL REVENUE SERVICE, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 3 (n.d.), available at <http://www.irs.gov/pub/irs-pdf/p4220.pdf>.

¹²¹ NEW ENGLAND FARMERS UNION, *GROWING A FOOD SYSTEM FOR THE FUTURE: A MANUAL FOR CO-OPERATIVE ENTERPRISE DEVELOPMENT 1* (2014), available at http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf.

Note that although some of the benefits of co-operatives can be achieved through other business structures, such as LLCs or non-profits, co-operatives are unique structures. If a client calls her organization a co-operative, it must follow the co-operative statute, or risk a \$10 daily fine.¹²² As interest in co-operatives has grown, there is more focus on protecting the term “co-operative” and ensuring that only co-operatives organized as such use the name.¹²³

Producer or Purchasing Co-operatives

Under Massachusetts law, co-operatives are organized under traditional state corporation laws.¹²⁴ Seven or more members are required to form an agricultural co-operative.¹²⁵ All of these members must be Massachusetts residents.¹²⁶ Generally, co-operative members purchase common stock to raise capital.¹²⁷ However, Massachusetts does not require agricultural co-operatives to have capital stock.¹²⁸

In order to be an agricultural co-operative, the organization must file Articles of Organization with the Massachusetts Secretary of State and pay a filing fee.¹²⁹ Within six months of filing, a co-operative must have its first meeting and must select a board of directors.¹³⁰ The agricultural co-operative’s by-laws must specify how voting will occur, and usually co-operatives give each member one vote.¹³¹ However, in Massachusetts, voting power may be allocated based on the amount of land leased or used by the members for production for the co-operative, or by the proportion of product produced by each member in the preceding year.¹³²

The co-operative must distribute earnings and profits to its members at least once a year.¹³³ However, in Massachusetts, a co-operative must reserve 10% of profits until the reserve fund equals 30% of the issued and outstanding capital stock.¹³⁴

¹²² MASS. GEN. LAWS ch. 157, § 8 (2014).

¹²³ Email from Erbin Crowell, Executive Director, Neighboring Food Co-op Association (June 9, 2014) (on file with author).

¹²⁴ MASS. GEN. LAWS ch. 157, § 1 (2014) (indicating co-operatives are organized under Chapter 156B of the Massachusetts General Laws).

¹²⁵ MASS. GEN. LAWS ch. 157, § 3 (2014).

¹²⁶ MASS. GEN. LAWS ch. 157, § 3 (2014).

¹²⁷ MASS. GEN. LAWS ch. 157, § 4 (2014).

¹²⁸ “Agricultural and horticultural association engaged in any branch of agriculture, horticulture, viticulture, forestry, dairying, the raising of livestock or poultry and any other farming activity or business, if instituted for the mutual benefit of their members and formed for the purpose of doing business without profit to the association itself may be incorporated without capital stock.” MASS. GEN. LAWS ch. 157, § 10 (2014).

¹²⁹ MASS. GEN. LAWS ch. 157, §§ 7, 9 (2014).

¹³⁰ MASS. GEN. LAWS ch. 157, § 12 (2014).

¹³¹ MASS. GEN. LAWS ch. 157, § 2 (2014); NEW ENGLAND FARMERS UNION, GROWING A FOOD SYSTEM FOR THE FUTURE: A MANUAL FOR CO-OPERATIVE ENTERPRISE DEVELOPMENT 1 (2014), *available at* http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf.

¹³² MASS. GEN. LAWS ch. 157, § 13 (2014).

¹³³ MASS. GEN. LAWS ch. 157, §§ 2, 6 (2014).

¹³⁴ MASS. GEN. LAWS ch. 157, §§ 2, 6 (2014).

Pros for Farmers:

- **Control of Own Operation:** Farmers that are members of producer or purchaser co-operatives retain ownership over their own operations while also being members of the co-operative. In fact, most agricultural co-operatives are made up of sole proprietorships.¹³⁵
- **Access to Services and Reduced Risk:** Co-operatives allow members to access business services without assuming all the risks and expenses themselves. For example, a dairy-processing co-operative allows members to spread the costs of expensive cheese making equipment.
- **Increased Competition:** By pooling their resources and production, farmers benefit from economies of scale while retaining their small size and local control.

Worker-Co-operatives

Like the producer and purchasing co-operatives, worker co-operatives are organized under state corporation law.¹³⁶ A separate chapter of the Massachusetts General Laws sets out specific requirements for worker co-operatives.¹³⁷ In a worker co-operative, all members must be employed by the co-operative.¹³⁸ Each member must own exactly one voting share, called a membership share.¹³⁹ Chapter 157A gives workers significant authority; for example, only workers can vote to amend or repeal the co-operative's by-laws.¹⁴⁰ Any earnings from the worker-co-operative are distributed according to the amount of work each individual contributed to the co-operative.¹⁴¹ Worker-co-operatives may only merge with other worker-co-operatives.¹⁴²

Pros for Farmers:

- **Limited Liability:** Because worker-co-operatives are organized under Massachusetts corporate laws, the members are protected from liability as they would under a traditional corporate structure.
- **Shared Ownership:** Farmers that want to operate a business collaboratively with other farmers could benefit from a worker-co-operative. Worker-co-operatives allow farmers to share ownership and control over a business, as well as share the operation's risks.
- **Ease of Transfer:** A worker-co-operative's Articles of Organization or by-laws determine the process for accepting and terminating members.¹⁴³ Depending on how these documents are worded, worker-co-operatives can make it easy or difficult for changes in membership. Transitioning to a worker-co-operative could be used to give ownership to employees over time.

¹³⁵ Phone Interview with Erbin Crowell, Executive Director, Neighboring Food Co-op Association (June 9, 2014) (on file with author).

¹³⁶ MASS. GEN. LAWS ch. 157A, § 3 (2014).

¹³⁷ MASS. GEN. LAWS ch. 157A (2014).

¹³⁸ MASS. GEN. LAWS ch. 157A, § 6(a) (2014).

¹³⁹ MASS. GEN. LAWS ch. 157A, § 6(b) – (c) (2014).

¹⁴⁰ MASS. GEN. LAWS ch. 157A, § 7 (2014).

¹⁴¹ MASS. GEN. LAWS ch. 157A, § 8 (2014).

¹⁴² MASS. GEN. LAWS ch. 157A, § 11 (2014).

¹⁴³ MASS. GEN. LAWS ch. 157A, § 6(a) (2014).

Cons for Farmers:

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

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

RESOURCES

New Entry Sustainable Farming Project

A guide to farming in Massachusetts for entrepreneurs.

http://nesfp.org/sites/default/files/resources/an_entrepreneurs_guide_to_farming_ma_0.pdf

Farm Commons

Resources for farmers and attorneys to identify legal issues and sustainable farm law.

<http://farmcommons.org/>

Sustainable Agriculture and Research Education Program

Guide to developing a business plan for farms and rural businesses.

<http://www.sare.org/Learning-Center/Books/Building-a-Sustainable-Business>

New England Farmers Union

Growing A Food System for the Future: A Manual for Co-operative Enterprise Development

http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf.

CHAPTER III: FOOD SAFETY

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

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

1. Overview of Food Safety This section introduces the framework in which food safety issues are addressed and practices are standardized and regulated in the United States, as well as the reasoning for why attorneys must be familiar with food safety regimes to effectively advise small-scale farmers and food entrepreneurs in the LSFH.

2. The Food Safety Modernization Act This section provides a description of the Food Safety Modernization Act and a discussion of the proposed Produce Safety Rule and Preventive Controls Rule, as well as a description of the kinds of farm businesses that may be impacted by these regulations.

3. Other Food Safety Regimes This section discusses additional food safety standards and certifications that small-scale farmers and food entrepreneurs in the LSFH may encounter, including Good Agricultural Practices and Good Handling Practices, as well as the Massachusetts Commonwealth Quality Seal Program.

OVERVIEW OF FOOD SAFETY Food safety is a hot topic among farmers and other food entrepreneurs. Recent nationwide food-borne illness outbreaks have been linked to foods that had rarely been implicated in prior outbreaks—for example, peppers, spinach, tomatoes, peanut butter, cookie dough, cantaloupes, and organic frozen berries.¹ In response to these outbreaks, Congress passed sweeping legislation that for the first time incorporated produce safety into the country's federal food safety regime.

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

Historically, the United States Department of Agriculture (USDA) regulated the safety of meat, poultry, and some egg products, and the United States Food and Drug Administration (FDA) regulated the safety of other food products such as prepared foods.² However, until the passage of the Food Safety Modernization Act (FSMA) in 2010, food safety practices on farms were largely unregulated by the federal government and nearly all of the states. Additionally, federal and state governments, along with private groups, set up optional food safety standards for farmers. Although compliance was not mandated by governments, most retailers required compliance with some form of food safety standard. Now, under FSMA, compliance with the federal food safety standards is mandatory, unless the operation falls under an exemption (discussed more below).

A chapter on food safety is included in the Guide to give attorneys context about the types of issues farmers and food entrepreneurs may face and to help attorneys understand how food safety concerns play into farmers' decisions. Farmers will expect that attorneys be familiar with these food safety regimes. Food safety, particularly FSMA, is on farmers' minds and farmers may ask attorneys questions about some of the food safety requirements they must meet. Since attorneys in the LSFH will only take cases that are transactional nature, any questions about FSMA will be peripheral to the main representation. However, attorneys should still have a baseline understanding of these food safety topics and how they might impact the farmer's operation.

THE FOOD SAFETY MODERNIZATION ACT FSMA was signed into law in January 2011.³ FSMA was the largest overhaul of the nation's food safety system in over seventy years.⁴ Among other issues, this extensive legislation gives the FDA new authority to issue mandatory recalls of food;⁵ broadens the FDA's authority to withdraw a food facility's registration (registration is required to introduce goods into commerce);⁶ and directs the FDA to establish new food safety requirements for food facilities and farms.⁷ Although prior to the passage of FSMA the FDA regulated food facilities, the FDA had never regulated farms.

FSMA instructed the FDA to promulgate various regulations filling in the details of this new food safety regime within eighteen months of passage of the Act; however, none of those deadlines were met.⁸ After some litigation, the FDA proposed many new regulations, some of which are now in the finalization

² RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER (2014), http://digital.library.unt.edu/ark:/67531/metadc276872/m1/1/high_res_d/RS22600_2014Jan17.pdf.

³ Food Safety Modernization Act, Pub. L. No. 111-353 (2011).

⁴ Molly Peterson, *U.S. Senate Approves Biggest Food-Safety Overhaul in 70 Years*, BLOOMBERG, Nov. 30, 2010, <http://www.bloomberg.com/news/2010-11-30/broadest-food-safety-overhaul-in-70-years-approved-by-senate-in-73-25-vote.html> (last visited June 3, 2014).

⁵ Food Safety Modernization Act, Pub. L. No. 111-353, § 206 (2011).

⁶ Food Safety Modernization Act, Pub. L. No. 111-353, § 102 (2011).

⁷ Food Safety Modernization Act, Pub. L. No. 111-353, §§ 103, 105 (2011).

⁸ Helena Bottemiller, *Obama Administration Sued for Delay of FSMA Implementation*, FOOD SAFETY NEWS, Aug. 31, 2012, <http://www.foodsafetynews.com/2012/08/obama-administration-sued-for-delay-on-fsma-implementation/#.U3DaMIFdV8E> (last visited May 12, 2014).

process.⁹ However, as of the time of this writing, many of the elements regulated under FSMA have not yet been finalized.

The Produce Safety Rule (PSR)¹⁰ and the Preventive Controls Rule (PCR) are two of the most impactful regulations for farmers and food entrepreneurs.¹¹ These proposed regulations were published in January 2013; the FDA closed the comment period in mid-November 2013 after three extensions and is now in the process of incorporating comments into the final rules.¹² In December 2013, the FDA published a press release indicating that, based on comments received in November, it would issue revised language for certain parts of the PSR and PCR as an interim proposed rule open to comments again before finalizing the rules.¹³

The regulations thus are not yet final, and even once they are, the compliance period will give at least very small farm operations and food facility operations years to comply.¹⁴ States will likely play a key role in implementing and ensuring compliance with the standards. Despite this uncertainty and lengthy compliance period, attorneys working with small-scale farmers and food entrepreneurs in the LSFH should start learning the basics of these two proposed rules. In fact, the food industry is already

“Covered Produce” under the PSR

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

Source: 78 Fed. Reg. 3504, 3629.

⁹ Lydia Zuraw, *FSMA Gets New Deadlines for Final Rules*, FOOD SAFETY NEWS, Feb. 21, 2014, <http://www.foodsafetynews.com/2014/02/fsma-gets-new-deadlines-for-final-rules/#.U3DbT0FdV8E> (last visited May 12, 2014).

¹⁰ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pts. 16, 112), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00123.pdf> (hereinafter PSR).

¹¹ Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 78 Fed. Reg. 3646 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pts. 1, 16, 106, 110, 114, 117, 120, 123, 129, 179, and 211), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00125.pdf> (hereinafter PCR).

¹² Constituent Update, FDA Extends Public Comment Period 60 Days for Proposed Rules on Preventive Controls for Human Food, Produce Safety (Aug. 8, 2013), <http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm364189.htm?source=govdelivery> (last visited June 20, 2014); Dan Flynn, *Pushback Begins Against FSMA On-the-Farm Rules*, FOOD SAFETY NEWS, Nov. 15, 2013, <http://www.foodsafetynews.com/2013/11/pushback-begins-against-fsma-on-the-farm-rules/#.U3DedYFdV8E> (last visited June 20, 2014).

¹³ Press Release, Statement from FDA Deputy Commissioner for Foods and Veterinary Medicine, Michael Taylor, on Key Provisions of the Proposed FSMA Rules Affecting Farmers (Dec. 19, 2014), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm379397.htm> (last visited June 20, 2014).

¹⁴ More information on the Produce Safety Rule compliance period can be found at 78 Fed. Reg. at 3533 – 34; more information on the Preventive Controls Rule compliance period can be found at 78 Fed. Reg. at 3673 – 74.

beginning to shift its food safety requirements based on the new food safety standards. By learning the basics of FSMA, attorneys will be able to speak to clients about possible business implications of the two rules. Please note that the summaries below are based on the proposed rules that were published in January 2013 and may change in the coming months or years.

Produce Safety Rule (PSR) The proposed PSR establishes on-farm food safety requirements for farms that are conducting covered activities (growing, harvesting, packing, or holding) to covered produce (mainly fruits and vegetables that are generally consumed raw).¹⁵ The PSR applies only when the farm is doing those activities to that farm’s *own* covered produce; as soon as a farm harvests, packs, or holds *another farm’s* raw agricultural commodities, the acting farm becomes a “farm mixed-type facility” and is required to additionally comply with the PCR (see below).¹⁶

The PSR breaks down into four main categories:

➤ **Farms that are Not Covered:**

- Non-Produce Farms: Farms that do not grow covered produce.
- Extremely Small Farms: Farms whose annual average food sales are less than \$25,000.¹⁷

➤ **Farms that are Covered but Subject to Modified Requirements:**

- Produce that is Further Processed: Farms whose covered produce undergoes further processing that subjects the produce to a kill-step that “adequately reduces the presence of microorganisms of public health significance.”¹⁸
- Requirements: A farm that is subject to modified requirements must still comply with the recordkeeping requirements in accordance with the PSR.¹⁹

➤ **Farms that are Covered but Subject to a Qualified Exemption:**

- Local and Regional Market Participants: Farms that are a certain size and sell primarily to local and regional markets.
 - Farms whose annual average sales of food are less than \$500,000, and which make more than half of their sales to “qualified end users,” are subject to a different set of modified requirements, called a “qualified exemption.”²⁰
 - Qualified end-users are consumers and restaurants and retail food establishments within the same state or 275 miles from the farm selling the produce.²¹
- Requirements: A farm that is subject to a qualified exemption must comply with the following modified requirements:

¹⁵ PSR, 78 Fed. Reg. at 3630 (Subpart A, §§ 112.1, 112.2, 112.3).

¹⁶ PSR, 78 Fed. Reg. at 3630 – 31 (Subpart A, § 112.3) (definitions of covered activity, harvesting, holding, and packing).

¹⁷ This exclusion was created through the regulations, not through the statute. PSR, 78 Fed. Reg. at 3632 (Subpart A, § 112.4).

¹⁸ PSR, 78 Fed. Reg. at 3630 (Subpart A, § 112.2(b)).

¹⁹ PSR, 78 Fed. Reg. at 3642 (Subpart O).

²⁰ PSR, 78 Fed. Reg. at 3630 – 32 (Subpart A, §§ 112.3, 112.5, 112.6).

²¹ PSR, 78 Fed. Reg. at 3632 (Subpart A, § 112.3) (definition of qualified end-user).

- name and complete business address displayed on food package label or at point of purchase;²² and,
- exemption withdrawal proceedings, if applicable.²³ If the FDA withdraws a farm's qualified exemption, the farm must come into compliance with all provisions of the PSR within sixty days of the withdrawal order, or before the next growing season if operations have ceased.²⁴

➤ **Farms that are Covered:**

- Farms that Grow Produce: Farms that grow, harvest, pack, or hold produce that is generally consumed raw.²⁵
- Requirements: A farm covered by the PSR must comply with requirements in the following categories:
 - worker training and health and hygiene;²⁶
 - agricultural water;²⁷
 - biological soil amendments;²⁸
 - wild and domesticated animals;²⁹ and,
 - equipment, tools, and buildings.³⁰

The PSR is on farmers' minds for several reasons. It is the first time the federal government has stepped in to regulate on-farm practices regarding produce safety. The increased role of government in the daily practices of farms is a big shift for many farmers.

The PSR is also confusing. Although many farmers in Massachusetts will fall within the qualified exemption, questions remain about exactly how the FDA will calculate the exemption threshold and under what circumstances FDA would withdraw an exemption. Currently the exemption is calculated by sales of *all* food, not just produce. This means that farms with other agricultural operations (such as dairy) and a small enough produce operation may be subject to the entire PSR even though the PSR would exclude a stand-alone produce operation of that size.

The FDA's process for withdrawing an exemption also causes confusion and frustration among farmers. The PSR as it is currently written does not provide for any warnings before withdrawing an exemption, nor

²² PSR, 78 Fed. Reg. at 3632 – 33 (Subpart A, § 112.6).

²³ PSR, 78 Fed. Reg. at 3644 (Subpart R).

²⁴ PSR, 78 Fed. Reg. at 3644 (Subpart R).

²⁵ See list in text box for more information.

²⁶ PSR, 78 Fed. Reg. at 3633 – 34 (Subparts C and D).

²⁷ PSR, 78 Fed. Reg. at 3634 – 36 (Subpart E).

²⁸ PSR, 78 Fed. Reg. at 3636 – 38 (Subpart F).

²⁹ PSR, 78 Fed. Reg. at 3638 (Subpart I).

³⁰ PSR, 78 Fed. Reg. at 3638 – 40 (Subpart L).

does it allow a farm to regain its qualified exempt status if the alleged problem is resolved. This uncertainty makes it difficult for farmers to anticipate how the PSR will impact their farm operations.

The water testing and biological soil amendment standards caused the most concern among farmers during the comment period. Farmers in New England argued that the standards were made for larger operations, and would be too costly and unworkable for smaller-scale farmers.

Finally, as discussed more below, certain farm operations will be subject to both the PSR and the PCR. Farms throughout Massachusetts conduct some of the activities that turn a farm into a “farm mixed-type facility,” such as packing and holding the produce of another farm.

Farmers may raise other concerns about the PSR and its effects on the farmer’s business. Attorneys can look to this Guide and to publications from farm advocacy organizations in Massachusetts and nationally that helped farmers understand and comment on the proposed regulations. The Resources section, below, lists some of those resources for attorneys’ reference.

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

The proposed PCR establishes food safety requirements for food facilities that manufacture, process, pack, or hold food for consumption in the United States.³¹ Prior to FSMA, all facilities were required to comply with current good manufacturing practices (c-GMPs). In addition, certain higher-risk facilities (e.g., juice and seafood facilities) were required to create food safety plans (called hazard analysis and critical control point (HACCP) plans). Post-FSMA, facilities must comply with updated c-GMPs, and all facilities must now create food safety plans (called hazard analysis and risk-based preventive controls (HARP-C)).³²

The PCR breaks down into three categories:

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

- Farms: Operations that only grow, harvest, pack, and hold the operation’s own produce (because they are subject to the PSR). The PCR exempts these operations from the c-GMPs, as well.
- Small and Very Small Farm Mixed-Type Facilities that Conduct Certain Activities On the Farm: The FDA proposed to exempt from the HARP-C requirements low-risk facility activities that occur on small and very small farms.³³ The farm mixed-type facility must

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

³² PCR, 78 Fed. Reg. at 3802 – 08 (Subparts B and C).

³³ PCR, 78 Fed. Reg. at 3801 – 01 (Subpart A, § 117.5(g), (h)).

both be a small or very small business³⁴ and must conduct only low-risk activities on the farm.³⁵ These low-risk activities are listed in the proposed rule and include chopping peanuts, making maple syrup, and waxing intact produce.³⁶

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

- Local and Regional Market Participants: Facilities that are a certain size and sell primarily to local and regional markets are called “qualified facilities.”
 - To be a “qualified facility,” the facility must have less than \$500,000 in average annual sales of food over the past three years and more than half of those sales must be to qualified end-users (using the same definition as the PSR).³⁷
- Requirements: Qualified facilities must comply with the following requirements:
 - updated c-GMPs;³⁸
 - less onerous HARP-C standards, which include either a modified food safety plan or compliance with non-federal food safety standards;³⁹ and
 - exemption withdrawal proceedings, if applicable. The FDA can withdraw this qualified exemption; if this happens, the facility must come into compliance with all the applicable provisions of the PCR within sixty days of the withdrawal order.⁴⁰

➤ **Facilities that are Covered:**

- Facilities: Establishments that manufacture, process, pack, or hold food for consumption in the United States.⁴¹
- Farm Mixed-Type Facilities: Farm mixed-type facilities are farms that do facility activities, such as manufacture or process food (e.g., make salsa), and harvest, hold, or pack another farmer’s raw agricultural commodities. The PCR covers only the *facility* activities of a farm mixed-type facility, not the *farm* activities.
- Requirements: Covered facilities are required to comply with the following requirements:
 - updated c-GMPs;⁴² and,
 - HARP-C standards, which include identifying manufacturing and processing activities that might pose a food safety risk, creating a plan to prevent those risks,

³⁴ “Small business” is defined as a business with less than 500 employees. The FDA sought comment on the definition of “very small business”—whether “very small business” should be defined as one with average annual sales of \$250k, \$500k, or \$1 million. 78 Fed. Reg. at 3800 (Subpart A, § 117.3).

³⁵ PCR, 78 Fed. Reg. 3800 – 02 (Subpart A, § 117.5).

³⁶ PCR, 78 Fed. Reg. 3800 – 02 (Subpart A, § 117.5).

³⁷ PCR, 78 Fed. Reg. at 3799 – 3800 (Subpart A).

³⁸ PCR, 78 Fed. Reg. at 3802 – 05 (Subpart B).

³⁹ PCR, 78 Fed. Reg. at 3808 (Subpart D, § 117.201).

⁴⁰ PCR, 78 Fed. Reg. at 3809 – 10 (Subpart E).

⁴¹ 21 U.S.C. § 350d(a)(1) (2012).

⁴² PCR, 78 Fed. Reg. at 3802 – 05 (Subpart B).

monitoring the processes, fixing any problems, and keeping records of their manufacturing and processing activities.⁴³

The PCR is also on farmers' minds for a few reasons. The FDA proposes to classify as "facility activities" certain activities conducted by small- and mid-sized farms, such as holding and packing another farm's produce (e.g., a multi-farm community supported agriculture operation). This would significantly increase the requirements with which those farms must comply, particularly with regard to low-risk activities like holding another farm's produce. The concerns that apply to the qualified exemption provisions in the PSR apply to the PCR as well. As currently written, the PCR does not completely exempt very small facilities as the PSR does. Unless subject to another exemption, this means that any farm mixed-type facility will have to comply with the PCR no matter how small the facility activity is.

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

OTHER FOOD SAFETY REGIMES Beyond the FDA's regulation of food safety, farmers may participate in or wish to understand other food safety standards and checklists. The USDA created the Good Agricultural Practices (GAP) and Good Handling Practices (GHP) quality certification programs to allow farmers to demonstrate compliance with strong food safety practices.⁴⁴ Massachusetts has its own state-level food safety standards, called the Commonwealth Quality Seal Program (CQ). There are other private marketing labels and audits that exist to address food safety concerns. The following section introduces the USDA and Massachusetts food safety regimes, but does not discuss other food safety programs.

Good Agricultural Practices/Good Handling Practices (GAP/GHP) The USDA created the GAP/GHP quality certification as one option for farmers who want to show that they are growing and/or processing food safely.⁴⁵ GAP/GHP audits are voluntary certifications that focus on best agricultural practices to verify that fruits and vegetables are produced, packed, handled, and stored in a manner that minimizes risks of microbial food safety hazards. The audit evaluates food safety practices throughout the supply chain from the harvesting to packaging to transporting. The program provides verification that certified farmers are following generally recognized industry best practices to reduce the risk of contamination. A GAP/GHP audit requires that someone from the USDA visit the farm to assess the farm's practices. The primary challenge with using GAP/GHP certification is that, depending on the size of the farm and the potential sales earnings, the certification process may be quite expensive. The USDA may

⁴³ PCR, 78 Fed. Reg. at 3805 – 08 (Subpart C).

⁴⁴ *Fresh Fruit and Vegetable Audit Programs*, U.S. DEP'T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/gapghp> (last visited June 4, 2014).

⁴⁵ *Fresh Fruit and Vegetable Audit Programs*, U.S. DEP'T OF AGRIC. AGRIC. MKTG. SER., http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram#P25_1498 (last visited May 25, 2012).

require growers to make costly upgrades to their farms, such as constructing fences around the perimeter of the farm for keeping out livestock and wildlife, or building restrooms for employees.⁴⁶ In addition to these changes, the certification must be renewed annually (or multiple times per year if different crops are grown in different seasons), and paying for the USDA certifier to come to the farm for each of these certifications is costly.

GAP/GHP certification is not a legal requirement, though it is preferred or required by many larger or institutional purchasers, such as grocery stores or schools. If the farmer is selling at a farmers' market or roadside stand, there would be no need for GAP/GHP certification.

Commonwealth Quality Seal Program Some states, such as Massachusetts, have recognized that many small-scale farmers and food entrepreneurs may lack the resources necessary to pursue a GAP/GHP certification, but still wish to demonstrate a commitment to best agricultural practices. Because a GAP/GHP certification often can be unrealistic for small-scale farmers, some states have developed alternative certification systems tailored to small and medium-sized farms. The Massachusetts Department of Agricultural Resources created the Commonwealth Quality Seal Program (CQ), which provides a lower cost option for food safety certification for products grown within the state.⁴⁷ The CQ program provides training that, when complete, allows vendors to use a special seal. This seal allows consumers (and food management companies) to “identify locally sourced products that are grown, harvested and processed . . . in Massachusetts using practices that are safe, sustainable and don't harm the environment.”⁴⁸ The CQ program is unique in that it requires participants to adhere to certain sustainable and environmentally safe farming practices, including consideration of nutrient management, soil erosion, winter protection for specific crops, pesticide use, irrigation practices, and insect pest management.⁴⁹

CONCLUSION Food safety is on the minds of many farmers and food entrepreneurs. Although the federal food safety regulations are still in the process of being finalized, attorneys assisting small-scale farmers and food entrepreneurs will likely be asked questions about FSMA and how it applies to a farm's operation. Even if the client's farm operation falls under one of the exemptions, it is critical that the attorney be familiar with the overarching topics and issues that FSMA presents. Food safety concerns may play into other decisions the farmer has to make more generally. For example, if the farmer's operation is a

⁴⁶ According to Ebay.com, a porta john costs approximately \$875 with shipping before the fee for set-up (Ebay search on Nov. 21, 2013) (on file with authors). University of Florida researchers found that the average cost of materials for constructing 14 miles of field fence was approximately \$1250 (including materials). Derek L. Barber, Estimated Livestock Fencing Costs for the Small-Farm Owner, UNIV. OF FLA. INST. OF FOOD & AGRIC. EXTENSION (2012), available at <http://edis.ifas.ufl.edu/an258>.

⁴⁷ *Commonwealth Quality*, MASS. DEP'T OF AGRIC. RESOURCES, <http://www.mass.gov/agr/cqp/index.htm> (last visited June 19, 2014).

⁴⁸ HARVARD FOOD LAW & POLICY CLINIC, INCREASING LOCAL FOOD PROCUREMENT BY MASSACHUSETTS STATE COLLEGES & UNIVERSITIES 21 (Oct. 2012), <http://www.chlpi.org/wp-content/uploads/2013/12/Increasing-Local-Food-Procurement-by-Mass-State-Colleges-FINAL2.pdf>.

⁴⁹ *Sustainable Farming*, MASSACHUSETTS COMMONWEALTH QUALITY, http://thecqp.com/produce_sustainable_farming.html (last visited June 19, 2014); *Exhibit A, Massachusetts Commonwealth Quality Program, Program/Product Registration Form*, MASSACHUSETTS COMMONWEALTH QUALITY, <http://thecqp.com/images/produce/Application%20Package%20-%20Produce.pdf>.

farm mixed-type facility, with both produce farming and processing, the farmer may want to choose a business structure that allows the farmer to have two separate businesses that each limit the farmer's liability. Food safety concerns may also affect what types of markets the farmer may pursue, for example farmers' markets, institutional sales, and community supported agriculture. Attorneys should be prepared to discuss these concerns with the farmer, and to consider how food safety issues play in to the farm business.

RESOURCES

National Sustainable Agriculture Coalition, Food Safety Modernization Act

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

United States Food and Drug Administration, Food Safety Modernization Act

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

CHAPTER IV: FARM TRANSITIONS

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

OVERVIEW Attorneys serving farmers in Massachusetts will likely need to advise their clients on farm transition issues. This section gives an overview of the farm transition process; suggests a framework for identifying farm transition goals and stakeholder concerns; discusses frequently encountered topics in farm transitions; and identifies potential solutions to accomplish the transition goals.

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

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

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

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

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

Farm Transition Planning

“A process of decision making that protects your land’s agricultural and forest production while preserving family relationships and enhancing community development.”

Source: Robert Andrew Brannan, “Planning the Future of Your Farm, A Workbook Supporting Farm Transfer Decisions”

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

farmers may wish to ensure that their land remains in agricultural production or that only certain farming practices are used.²

Farmers in Massachusetts by Age

- 61.1% are over 55 years old;
- 24.8% are between 45 – 54 years old;
- 8.3% are between 35 – 44 years old; and
- 5.8% are 34 years and younger.

Source: U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 69 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf.

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

Farm transition planning is a growing need in Massachusetts. A 2010 report projects that seventy percent of agricultural land

¹ David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>; PENNSYLVANIA FARMLINK, PLANNING THE FUTURE OF YOUR FARM 11 (2013), available at <http://www.pafarmlink.org/succession-transition.html>.

² David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>; PENNSYLVANIA FARMLINK, PLANNING THE FUTURE OF YOUR FARM 11 (2013), available at <http://www.pafarmlink.org/succession-transition.html>.

³ *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; Kevin Spafford, *How to Grow Into a Leader*, FARM JOURNAL'S LEGACY PROJECT, http://www.agweb.com/legacyproject/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/; *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

⁴ *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; Kevin Spafford, *How to Grow Into a Leader*, FARM JOURNAL'S LEGACY PROJECT, http://www.agweb.com/legacyproject/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/; *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

will change hands over the next twenty years.⁵ This is due, in part, to the relatively old average age of Massachusetts farmers. Data from the 2012 Census of Agriculture shows that Massachusetts farmers average 57.8 years old.⁶ Furthermore, the number of farmers aged 55 years and older grew between 2007 and 2012.⁷ However, the number of farmers in Massachusetts 34 years and younger also grew from 2007 to 2012.⁸ Additionally, the number of farmers in Massachusetts who are classified by the United States Department of Agriculture (USDA) as “beginning” farmers is on the rise. To qualify as a “beginning farmer,” the farmer must have operated a farm for ten years or less.⁹ The 2012 Census of Agriculture reported that 1,954 Massachusetts farmers fit this definition, meaning beginning farmers operate a quarter of all farms in the state.¹⁰ These numbers indicate that although many farmers are likely to retire in the coming years, a growing pool of young farmers may be interested in taking their place.

Historically farms were kept in the family; however, farm successors increasingly come from outside the family and even from non-farming backgrounds.¹¹ Across the United States in 2010, only half of farmland transfers happened within families.¹² Farm transfers to a successor within the family or outside of the family present many of the same issues. For this reason, this chapter focuses on general themes and issues of concern for any farmer transitioning the farm to someone new. While the content of this chapter is largely geared toward attorneys who are advising farmers who own their farming operations, many of the same basic principles may apply to farm clients who share ownership of their businesses.

⁵ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP EXECUTIVE SUMMARY i (2010), available at <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

⁶ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), available at http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf.

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

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

⁹ *Beginning Farmers and Ranchers*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib53.aspx#.U48IgvldWSo>.

¹⁰ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE MASSACHUSETTS STATE DATA TABLE 70 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_070_070.pdf.

¹¹ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP EXECUTIVE SUMMARY 1 (2010), available at <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

¹² THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP EXECUTIVE SUMMARY 1 (2010), available at <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

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

All farm clients need to consider transition issues. If the farmer waits until a major event to begin her planning process, the event may significantly limit her transition choices or rush decision-making. Without a plan in place, the farmer's assets will be divided evenly among farming and non-farming family members, and the farm business will be less likely to remain intact.¹³

Farm clients have unique needs. Accordingly, attorneys should be careful to gather farm-specific information along with their usual questions. Additionally, attorneys should encourage the farm owner and family members to have open and frequent conversations about the transition plans. The importance of conversations of this nature cannot be overstated; however, these conversations are often postponed or avoided altogether because they are difficult for families to have. Attorneys should carefully consider their legal obligations before participating directly in these family discussions.¹⁴ It is important that an attorney equip her client with the resources to conduct these meetings and reach consensus with the family about how to proceed. Otherwise, the attorney's work may create contention.

The following section provides some suggested preliminary questions to frame discussions about farm transition plans between attorneys and farmers.

Identifying Individual Goals for the Transition Attorneys should first work with farmers to identify their personal goals with respect to the farm business.¹⁵

Goals for the Transfer

Profits

- Does the farmer want to maximize profits in the short- or long-term?
- Does the farmer want to sell the land?

Public Benefits

- Does the farmer want to donate the land to a non-profit entity or land trust?

Private Benefits of Others

- Does the farmer want to contribute to someone else's private benefit, such as a family member, friend, or beginning farmer?
- Does the farmer want to provide financial security for her surviving spouse?

¹³ NEW JERSEY FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11, *available at*

http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

¹⁴ Email from Kevin Spafford, Succession Planning Expert, Farm Journal Legacy Project, to author (Mar. 17, 2014).

¹⁵ There are a number of questionnaires available online for this purpose. FARM JOURNAL LEGACY PROJECT, LEGACY WORKBOOK 13, *available at* http://www.agweb.com/assets/1/6/LegacyWorkbook_9-13.pdf; LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 2, *available at* <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>; LAND FOR GOOD, TRANSFERRING THE FARM: WHERE DO I START? 4-5, *available at* <http://landforgood.org/wp-content/uploads/LFG-Transferring-The-Farm-Guide.pdf>; *Preparing to Transfer the Farm Business*, UNIVERSITY OF MINNESOTA EXTENSION, <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/preparing-to-transfer-the-farm-business/#goals>.

- Does the farmer want to minimize taxes?
- Does the farmer want to transfer as much wealth as possible to someone else?
- Does the farmer want to provide equitable treatment to family members?

Social Goals

- Does the farmer have environmental goals?
- Does the farmer have any community development goals, such as educational or public health initiatives, infrastructure investment plans, or partnerships with local non-profit entities?

Speed of Transfer

- How quickly does the farmer need money?
- Can the farmer afford to use a long-term or other gradual transfer?

Discussing the Future of the Farm Farmers often have specific ideas for the future uses of their farms. Attorneys should work with farmers to identify their visions for the future of the farm with respect to land use, management and control, and any additional farm operations.

The Future of the Farm

Vision for the Land

- Should the land continue to be used for agricultural purposes?
- Should the successor use similar farming practices, such as sustainable methods?
- Must the successor share the farmer’s values?
- Must the successor maintain the farm’s natural resources?
- Can a certain percentage of the land be preserved for habitat or part of a set-aside program like the Conservation Reserve Program (CRP)?¹⁶
- Does the farmer want to continue to live on the land after the transfer?
- Where does the farmer anticipate that the successor will live after the transfer?
- Does the farmer have a specific timeline for the transition in mind? When will it occur?

Vision for the Management and Control

- Will the farm transfer be within the family or outside the family?
- Will the transfer support a beginning farmer?
- Is the farmer interested in or able to mentor her successor?
- Will full management and ownership be relinquished immediately or gradually?

Vision for the Operation

- Does the farm business have an educational mission, such as training the next generation of farmers?
- Will the farm business incorporate a social mission, such as donating produce?
- Does the business engage in activities other than production, such as running a farm stand or inviting tour groups?
- Will the farm business engage in processing or value-added activities?

¹⁶ *Conservation Reserve Program*, U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp>.

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

The Future of the Family (Legacy)
<p>Family Ownership</p> <ul style="list-style-type: none"> ➤ Does the farmer own her land, or share ownership with family members? Do any non-family members own the land? ➤ Does the family wish to keep the land that they own? ➤ If the farmer were to die or retire, would the farmer’s family have enough financial resources to keep the land together or continue to farm?
<p>Family Management</p> <ul style="list-style-type: none"> ➤ Does a family member wish to manage the farm? ➤ Which family members want a say in farm management? ➤ Do those family members have the personal capacity to manage the farm?
<p>Family Wealth</p> <ul style="list-style-type: none"> ➤ Will the farmer’s spouse be able to live comfortably after the death of the farmer?
<p>Family Dynamics</p> <ul style="list-style-type: none"> ➤ Has the farmer spoken with family members about her desires? ➤ Do family members have opinions about the farm transfer process? ➤ Who should care for the farmer’s minor children or aging parents? ➤ Does a family member expect to take over the family business? ➤ Are family members apprehensive about losing their say in the business?

Effects of the Transition on Other Stakeholders
<p>Current Dependents</p> <ul style="list-style-type: none"> ➤ Who does the current business support? ➤ Does the current business need to continue to support those people?
<p>Current Customer Base</p> <ul style="list-style-type: none"> ➤ Who are the farm’s current customers? ➤ Do future customer opinions matter to the farmer? ➤ Does the farmer participate in a CSA operation? Is that a useful consideration for the future? (e.g., is this good for the future?)
<p>Business Relationships</p> <ul style="list-style-type: none"> ➤ Does the farm participate in farmers’ markets or farm stands? ➤ Does the farm have contracts with other businesses? ➤ Does the farmer have crop insurance and/or USDA Farm Service Agency (FSA) loans?

Employees and Tenants

- Does the farm have employees or tenants?
- How will the transfer impact farm employees or tenants?
- What is the quantity and quality of the employees or tenants?

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

Evaluating the Farmer's Assets

Viability of the Farm

- Is the farm currently financially viable?
- Are there current threats to the farm's viability?
- Does the farmer own or lease the land?

Multiple Types of Assets

- What are the farmer's land assets?
- What is the quality of the land?
- What are the farm's ecological resources (e.g., water, soil, drainage)?
- What is the quality of the farm's ecological resources?
- What are the farmer's non-land farm assets?
- Does the farmer have a house on the farm?
- Does the farmer have a barn or other farm structure used for farming purposes?
- Does the farmer have any equipment, such as a tractor or tiller?
- What is the condition of these assets?
- Does the farmer want to transfer those assets as well?
- What are the farmer's intangible farm assets (e.g., goodwill, customer base, spot at local farmers' market, and relationships with other farmers, purchasers, restaurants, or institutions)?
- What are the farmer's non-farm personal assets (e.g., off-farm house)?

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

Common concerns among farmers:

- Finding a successor
- Effect of land prices on the farm's transfer
- Keeping the farm together
- Preserving the land for agriculture instead of for development

- Transferring managerial control over the farm, including potential reluctance to relinquish control
- Lack of liquidity for farmer and potential purchasers
- Treating family fairly
- Having adequate resources to retire comfortably

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

Preserving Agricultural Land and Production Farmers often have significant interest in what happens to their farms after they are gone.¹⁷ Frequently, farmers care deeply about whether the farmland will continue to be used for agricultural purposes and, if so, what types of farming practices will be used.¹⁸ For instance, a farmer who has carefully conserved soil may wish to ensure her successor uses the same, or better, techniques, so the farmland is protected from erosion. Historically, farmers protected their farm legacy by passing the farm to family with shared values. However, today, farmers often transfer their farms outside the family. Whether the transfer is to family or outsiders, the farmer’s preferences may conflict with those of the successor.¹⁹ Legal tools can help farmers share their values with the next generation, and hold successors accountable to the transferring farmer’s broader goals.

Additionally, Massachusetts farms are extremely vulnerable to development. This is in large part because land prices are high, so the farmland is likely to be more valuable if used for suburban housing or retail rather than agriculture. In the last thirty years, Massachusetts lost 18% of farmland to development.²⁰ As more land shifted away from agriculture, land values increased. Massachusetts farmland had an average real estate value²¹ of \$10,600 per acre in 2013, one of the highest in the nation.²² Massachusetts farm real estate

¹⁷ David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>; Jeanne Bernick, *Trust Worthy*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), http://www.agweb.com/legacyproject/article/legacy2012_trust_worthy/.

¹⁸ David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>.

¹⁹ David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>; Jeanne Bernick, *Trust Worthy*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), http://www.agweb.com/legacyproject/article/legacy2012_trust_worthy/.

²⁰ NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM B1 (2014), available at http://www.cdf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULLL.pdf.

²¹ Farm Real Estate value is “a measurement of the value of all land and buildings on farms” *Land Values: 2013 Summary*, U.S. DEP’T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

²² *Land Values: 2013 Summary*, U.S. DEP’T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

values are high even compared to the Northeast²³ regional average of \$4,840/acre, and over three and a half times higher than the national average of \$2,900/acre.²⁴ In addition to pressure from developers, it may be difficult to keep the farm together if the farmer has many heirs. In some cases, the desire to farm can conflict with the interests of non-farming dependents, who may want to maximize the transfer value by selling farmland to the highest bidder.

Transferring Management and Control over the Operation In many cases, to ensure a successful farm transition the successor needs an opportunity to develop experience managing the farm business.²⁵ Because farmers are so deeply connected to their farms they may struggle to relinquish control over farm operations.²⁶ As a result, successors may not be given a sufficient opportunity to develop management skills prior to taking control of the farm.²⁷ A plan that provides for gradual transition over a period of several years can help both the farmer and her successor develop a trusting relationship.²⁸ The successor gains experience managing the farm, and the farmer provides mentorship. Gradual transitions can be accomplished by creating an employer-employee relationship between the current owner and successor before the transition. Such a relationship can help each party develop a sense of whether the transition will be successful.

Transition plans can help farmers maintain their quality of life. For instance, a gradual transition plan could allow the farmer to continue to live on the farm during retirement.²⁹ A gradual transition may help the farmer address any concerns about the future of the farm by allowing the farmer to reduce involvement in the farm operation over a longer period of time.

Even if a farmer plans to transfer the land to multiple children or other family members, the attorney should advise the farmer to consider how best to transfer management over the farm. Passing the farm to multiple heirs can create tenuous joint farming situations, which can be difficult to maintain over the long-term. Breaking up the farm to satisfy multiple heirs can destroy the farm operation. In particular, if one heir

²³ The “Northeast” region includes Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. *Land Values: 2013 Summary*, U.S. DEP’T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

²⁴ *Land Values: 2013 Summary*, U.S. DEP’T OF AGRIC., <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-02-2013.pdf>.

²⁵ Email from Kevin Spafford, Succession Planning Expert, Farm Journal Legacy Project, to author (Mar. 17, 2014).

²⁶ *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

²⁷ *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; Kevin Spafford, *How to Grow Into a Leader*, FARM JOURNAL LEGACY PROJECT, http://www.agweb.com/legacyproject/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/; *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

²⁸ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP EXECUTIVE SUMMARY 4 (2010), available at <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

²⁹ *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.

does not wish to farm, that heir must be either bought out or can sue for partition. Therefore, considering the compensation of non-farming family members is also an important element of transferring control.

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

First, the farm transition needs to address the farmer's own monetary needs. Farm transitions are unique, in part because the farmer's assets are largely illiquid; tractors, harvesters, other equipment, and land may be essential for farm operation and hold most of the farmer's wealth. Therefore, farmers may struggle to balance retirement needs and farm solvency.³⁰ Gifting these assets to the next generation may be necessary for a successful farm operation, but may leave the older generation with very little retirement income.³¹

Second, the farm transition needs to take into consideration the successor's financial ability to take over the farm operation. Successors may not have enough capital to purchase ownership of the farm's assets.³² Gathering sufficient capital to obtain the farm assets can be even more difficult for farming families if the older generation suddenly passes away and the assets are distributed equally among the farmer's family.³³

Third, the farm transition may need to take into account the impact of the transition on the farmer's family. When the farmer wants to transfer the farm business to a single child or family member, it can be difficult to compensate the other, non-farming family in the estate settlement process.³⁴ Keeping the farm in the family traditionally involved transferring control over all the farm's assets to a single member of the

Gentlemen's Agreements

Although handshake agreements may be common for transfers between family members, all transfers will benefit from formal, written documents. Handshake agreements should not be encouraged. In particular, because farm transitions can be emotionally charged and contingent on many factors, the parties should explicitly determine what to do in the case of breach. For example, if a successor works for the farmer in return for the future transfer of the farm, how can that individual be compensated if the transfer never goes through?

Further, gentlemen's agreements are not desirable because conditions can change down the road in ways that cannot be predicted at the time of the agreement. What if family members stop getting along and people renege on their informal commitments?

³⁰ Annette Higby, *Farm Transfer and Estate Planning*, in A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT, UNIVERSITY OF VERMONT, at 34, available at <http://www.uvm.edu/farmtransfer/LegalGuideII.pdf>.

³¹ Annette Higby, *Farm Transfer and Estate Planning*, in A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT, UNIVERSITY OF VERMONT, at 34, available at <http://www.uvm.edu/farmtransfer/LegalGuideII.pdf>.

³² Sara Schafer, *Matters of the Estate*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), http://www.agweb.com/legacyproject/article/legacy2012_matters_of_the_estate/.

³³ Email from Kevin Spafford, Succession Planning Expert, Farm Journal Legacy Project, to author (Mar. 17, 2014).

³⁴ Sara Schafer, *Matters of the Estate*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), http://www.agweb.com/legacyproject/article/legacy2012_matters_of_the_estate/.

younger generation.³⁵ However, this can exclude non-farming family from their portion of the estate. Therefore, finding alternative means to compensate non-farming family members, such as through life insurance policies, discussed in the next section, is a key part of a farm transition. Further, treating each family member fairly during the farm transition process may require distributing assets unequally.³⁶ For instance, the farmer's family members may have contributed unequally to the farm's growth over the years.³⁷ Family members who worked on the farm, or have invested in the farm's development may deserve a larger share of the farm portion of the estate.³⁸ The apparent disparity in treatment, however, could produce resentment and the farmer will likely want to ensure that her family members feel that the farm transition process is fair.

A common farm transition mistake is moving forward on a plan that only reflects the interests of some stakeholders.³⁹ Similar to transfers for non-farming clients, this can lead to prolonged battles between affected parties.⁴⁰ Unless every family member is given the opportunity to express his or her opinions about the future of the farm, it is likely impossible to devise a farm transition plan that works for everyone.

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

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

³⁵ *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>.

³⁶ UNIVERSITY OF MINNESOTA EXTENSION, PUTTING A VALUE ON SWEAT EQUITY, *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/umn-ext-putting-a-value-on-sweat-equity.pdf>.

³⁷ UNIVERSITY OF MINNESOTA EXTENSION, PUTTING A VALUE ON SWEAT EQUITY, *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/umn-ext-putting-a-value-on-sweat-equity.pdf>.

³⁸ UNIVERSITY OF MINNESOTA EXTENSION, PUTTING A VALUE ON SWEAT EQUITY, *available at* <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/umn-ext-putting-a-value-on-sweat-equity.pdf>.

³⁹ NEW JERSEY FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11, *available at* http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

⁴⁰ NEW JERSEY FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11, *available at* http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

Outright Sales Farmers can transfer their farmland and assets to the next generation through an outright sale. Outright sales are simple, and primarily protect the farmer and his or her estate.

➤ Preserving Agricultural Land and Production

○ Benefits:

- If the family is unwilling or unable to continue the farm, sales may be an effective way to transfer the farm to a person outside the family who shares the farmer's values.

○ Drawback:

- Absent specific conditions, pure sales do not provide control over the farm's future uses.

➤ Transferring Management and Control over the Operation

○ Benefits:

- As a seller, the farmer freely controls to whom she ultimately sells the farm.
- Sale-leasebacks may be used to transfer land ownership into a lease. These can raise capital, while allowing the farmer to retain managerial control.

○ Drawbacks:

- With most sales, the farmer cannot direct the purchaser's management of the farm.
- Outright sales may not allow gradual transfer of ownership and management.

➤ Protecting People

○ Benefits:

- Outright sales usually produce liquid capital, which is easily distributed between the farmer and other stakeholders.

○ Drawbacks:

- Because farm assets are often held for a very long time, the farmer likely has a low tax basis; however, if sold, the farmer may be able to take advantage of the lower rate on long-term capital gains.⁴¹
- Buyers may not be able to afford the outright purchase of land and assets.

⁴¹ See *Capital Gains Taxes*, AMERICAN FARM BUREAU FEDERATION, <http://www.fb.org/issues/docs/taxes-capgains13.pdf> (last visited June 1, 2014); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMERS TAX GUIDE: CHAPTER 8 (2013), available at <http://www.irs.gov/publications/p225/ch08.html> (last visited June 1, 2014).

Tailored Sales More uniquely constructed sale arrangements can give sellers and purchasers more control over the transition process. For instance, the farmer may grant the purchaser an option on the farm, i.e., the right to purchase assets at a later date for a specified price.⁴² Alternatively, the farm can be sold over time through an installment contract.

➤ Preserving Agricultural Land and Production

○ Benefits:

- The length of the contract allows farmers to include conditions to ensure the purchaser acts in accordance with the values set out in the contract.

○ Drawbacks:

- Unless included in the contract, the farmer has no control over the land's future use.

➤ Transferring Management and Control over the Operation

○ Benefits:

- The farmer and purchaser have the opportunity to develop a co-operative working and mentorship relationship for gradually transferring ownership of the farm.
- Sales can be structured to allow farm purchasers to gain ownership of the farm assets incrementally over time.⁴³
- Gradual sales and seller financing can help beginning farmers slowly take over the management and assets of a farm operation.⁴⁴

➤ Protecting People

○ Benefits:

- Tailored sales can increase affordability and financial security for both farmers and successors.

○ Drawbacks:

- Long-term transitions create more opportunities for either the seller or purchaser to breach the contract and terminate the sale.
- Gradual sales delay the farmer's receipt of sale funds.

⁴² Gary A. Hachfeld, David B. Bau, & C. Robert Holcomb, *Treatment of Heirs in the Transfer Process*, UNIVERSITY OF MINNESOTA EXTENSION, <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/treatment-of-heirs-in-the-transfer-process/>.

⁴³ Gary A. Hachfeld, David B. Bau, & C. Robert Holcomb, *Treatment of Heirs in the Transfer Process*, UNIVERSITY OF MINNESOTA EXTENSION, <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/treatment-of-heirs-in-the-transfer-process/>.

⁴⁴ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP EXECUTIVE SUMMARY 1 – 2, 4 (2010), available at <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

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

➤ Preserving Agricultural Land and Production

○ Benefits:

- Trusts can be particularly helpful when dealing with farmers who have strong convictions about how the farm business should be managed after they are gone. Farmers can require their trustees to ensure that their vision for the farm's future will be carried out by the farm successor.
- Trust documents can establish conditions for use of the land, which can be used to promote any of the farmer's goals.
- The farmer controls how long the trust will last, facilitating transfer to future generations.

○ Drawbacks:

- Overly restrictive trust provisions may limit the future operator's flexibility in responding to social or environmental changes.

➤ Transferring Management and Control over the Operation

○ Benefits:

- By delaying the transfer of assets, trusts can provide the farmer and purchaser an opportunity to develop a working relationship.
- The trust allows the farmer to separate management from benefit. Therefore, the farmer can designate individual leadership and multiple beneficiaries.

○ Drawbacks:

- Trusts invest trustees with a great deal of power, which may impinge on the successor's autonomy.

➤ Protecting People

○ Benefits:

- Trusts can divide the returns on essential farm assets, without forcing a sale or dividing control. In this way, they can fairly distribute assets among many beneficiaries.
- Trusts may be transferred before death, which can reduce estate tax liability.

○ Drawbacks:

- A trustee may act contrary to trust documents. This could lead to conflict, and beneficiaries might have to bring legal action to protect themselves. Therefore, it is important to choose the trustee wisely.

Conservation Easements A conservation easement is a deed restriction voluntarily placed on a landowner's property that inhibits future owners from using the land for non-farm development.⁴⁵ Conservation easements can be a great tool for ensuring that farmland remains in agricultural production while simultaneously securing liquid capital for farm investment or to create an estate for non-farming heirs. The easement can be tailored to match the farmer's exact specifications for how the farmland will be used in the future.⁴⁶ The farmer maintains most management and ownership control, but she and future owners are restricted from developing in perpetuity. The farmer may still receive all the benefits of farming, such as selling crops; however, she may have limited rights to build on the land.

Conservation easements can be sold or given in the same manner as any other property interest. Typically, however, conservation easements are donated or sold to a government agency or a non-profit land trust.⁴⁷ These non-profit land trusts, scattered throughout Massachusetts, often purchase and manage conservation easements on farmland. The Massachusetts Land Trust Coalition website has contact information for most of these land trusts.⁴⁸

Agricultural Preservation Restriction (APR) Program

In Massachusetts, the state Department of Agricultural Resources oversees the nation's longest-running Agricultural Preservation Restriction (APR) Program. APR purchases conservation easements on "prime" and "state important" farmland, to preserve and protect agricultural land from being built upon for non-agricultural purposes or used for any activity that "will have a negative impact on its agricultural viability."

Since the program's creation in 1979, it has secured permanent conservation restrictions on over 800 farms, covering over 68,000 acres of the nearly 518,000 acres of farmland in Massachusetts.

Source: *Agricultural Preservation Restriction Program*, MASS. DEP'T OF AGRIC. RESOURCES,

<http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html>.

➤ Preserving Agricultural Land and Production

- Benefits:
 - Conservation easements protect land for agricultural production in perpetuity.
 - By preventing development, easements can make the land more affordable for beginning farmers. They also dramatically reduce incentives to sell for non-agricultural uses.
- Drawbacks:
 - By eliminating the development value, farmers who preserved land as their source of retirement funds may receive less than the maximum amount

⁴⁵ AMERICAN FARMLAND TRUST: FARMLAND INFORMATION CENTER, FACT SHEET: AGRICULTURAL CONSERVATION EASEMENTS (2008), available at <http://www.massland.org/files/ACE062008.pdf>.

⁴⁶ AMERICAN FARMLAND TRUST: FARMLAND INFORMATION CENTER, FACT SHEET: AGRICULTURAL CONSERVATION EASEMENTS (2008), available at <http://www.massland.org/files/ACE062008.pdf>.

⁴⁷ AMERICAN FARMLAND TRUST: FARMLAND INFORMATION CENTER, FACT SHEET: AGRICULTURAL CONSERVATION EASEMENTS (2008), available at <http://www.massland.org/files/ACE062008.pdf>.

⁴⁸ *Locate a Land Trust or Service Provider*, MASSACHUSETTS LAND TRUST COALITION, <http://massland.org/locate-land-trust>.

possible, which could in turn adversely affect their ability to retire or their financial security in retirement.

- Depending on how the contract is written, the conservation requirements may overly restrict farming practices, resulting in unforeseen negative environmental effects in the future.

➤ Transferring Management and Control over the Operation

○ Drawbacks:

- Conservation easements do not require farming mentorship or business training, which may be a drawback for farmers that want to provide mentorship and training to their successors.
- Easement sales transfer some oversight and control to the easement owner, namely the government or land trust.

➤ Protecting People

○ Benefits:

- The sale of a conservation easement may lead to a large cash payment, which can be used to satisfy the financial needs of non-farming heirs.
- By restricting use of all future owners, easements may lower property values and therefore reduce property, estate, and other taxes.
- If the farmer donates part or all of the easement to a non-profit land trust, the donated value may be deductible under Section § 170(f) of the Internal Revenue Code.

○ Drawbacks:

- Easements prevent sales for purposes other than agriculture or conservation, potentially negatively affecting the financial benefits for farmer's heirs.

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

A formal business structure can ensure that the farmer and her heirs are compensated even if the successor takes over all management responsibilities.⁴⁹ These parties can become partners or members in the farm

⁴⁹ LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 11, *available at* <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>.

business, while the farm successor becomes the sole manager.⁵⁰ Each heir collects a portion of the farm profits, but the successor retains exclusive managerial control.⁵¹ If the successor is interested in eventually assuming full ownership, a purchase agreement can allow the successor to obtain others' ownership interests over time.⁵²

➤ Preserving Agricultural Land and Production

○ Benefits:

- Specific agricultural goals can be included in the articles of incorporation, and other organizational documents. These goals will bind future officers of the farm organization, and ensure the farmer's values continue. In particular, B-corporations must pursue social goals, and so confer additional accountability.

○ Drawbacks:

- As with trusts and easements, narrow language in corporate documents can limit flexibility or inappropriately bind future farmers. Though this is less of a worry because future members or boards may amend those documents.
- Because corporations must usually maximize shareholder value, organizing as a traditional corporation might create a fiduciary duty contrary to agricultural purposes. For instance, with high land prices a farmer who wishes to continue to farm and who serves as the chief executive of the farm corporation might be compelled by the shareholders to sell the farm.

➤ Transferring Management and Control over the Operation

○ Benefits:

- Farm organizations may be structured to allow both the farmer and successor to operate the farm simultaneously. Organizational documents can establish specific roles and duties, as well as clear decision-making processes, which can stabilize complicated farming relationships.
- Organizational structures can divide roles and responsibilities between multiple successors with different competencies and interests.
- Formal organization hedges against the sudden death or disability of the farmer by ensuring that the farm will continue to be owned by a single entity.
- Formal organizing documents allow the farmer to explicitly control the transition process and, in particular, allow gradual management transfers.

⁵⁰ LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 11, available at <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>.

⁵¹ *Limited Partnership and Family Limited Partnerships*, IOWA STATE UNIVERSITY EXTENSION (2009), <https://www.extension.iastate.edu/agdm/wholefarm/pdf/BFC13LimitedPartner.pdf>.

⁵² Gary A. Hachfeld, David B. Bau, & C. Robert Holcomb, *Treatment of Heirs in the Transfer Process*, UNIVERSITY OF MINNESOTA EXTENSION, <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/treatment-of-heirs-in-the-transfer-process/>.

- Drawbacks:
 - Without clear documents dividing roles, multiple operators can create confusion and conflicts.

➤ Protecting People

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

Life Insurance Life insurance can be used to compensate non-farming family members in the estate settlement process without granting them an ownership interest in the farm business. The farmer's life insurance plan can go exclusively to the non-farming family members.⁵³ This enables the older generation to transfer all of the farm assets to the successor without excluding the non-farming family members from their fair share of the estate.

Land-linking Programs For farmers whose family members are not interested in taking over the farming business, land-linking programs can help to identify possible farm successors from outside the family. Land-linking programs are designed to connect retiring farmers who want to see their farm businesses continue into the future with aspiring farmers who are looking to secure farmland.⁵⁴ Land-linking programs maintain a database of available farmland and farmers looking

Real Estate Agents

Real estate agents are an alternative to land-linking services. Most active farms are considered commercial property and can be listed by real estate agents specializing in farm transactions. Additionally, some conventional real estate brokers list farms. This may be an attractive option for farmers who are more comfortable with a hands-off approach. Real estate agents can be quite knowledgeable about farmland rentals or sales, and can save the farmer considerable time.

⁵³ Gary A. Hachfeld, David B. Bau, & C. Robert Holcomb, *Treatment of Heirs in the Transfer Process*, UNIVERSITY OF MINNESOTA EXTENSION, <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

⁵⁴ Kat Shiffler, *What is Land Link?*, CENTER FOR RURAL AFFAIRS, <http://www.cfra.org/news/121211/what-land-link>.

for land; they facilitate matches by acting as liaisons between the farmer and landowner.⁵⁵ Tenure arrangements offered through land-linking programs may include sale, rent, lease, farmer manager, or other options.⁵⁶

Land-linking programs also provide additional services such as free technical assistance forming tenure agreements.⁵⁷ Additionally, programs may facilitate farm transfers by providing educational support, property assessment, business planning services, and suggested matches.⁵⁸ In some cases, land-linking programs may also include services to help communities by identifying unused, viable farmland and encouraging landowners to lease their land to a farmer in order to increase active agriculture in the community.⁵⁹ New England Landlink⁶⁰ and New England Farmland Finder⁶¹ list available Massachusetts farmland for would-be farmers.

➤ Preserving Agricultural Land and Production

○ Benefits:

- Land-linking programs help the farmer find a successor who wants to farm. By drawing from a larger pool, land-linking programs can help the farmer find a successor with shared values.
- Use of the land-linking programs help support the community of beginning farmers.

○ Drawbacks:

- Land-linking programs cannot legally guarantee future farming.

CONCLUSION Every farm family is different, and every family requires a different farm transition plan to satisfy their needs. Any attempt to take a one-size-fits-all approach with farmers is bound to fail. Therefore, it is important to solicit client-specific information and facilitate constructive family conversations. Attorneys must help clients and their families, or other successors, settle on a collective vision for the farm. Only then can the attorney assisting with the farm transfer process begin to assess the potential legal options and piece together a plan that is likely to satisfy everyone.

⁵⁵ *How the Farmland Matching Service Works*, NEW ENTRY SUSTAINABLE FARMING PROJECT, <http://nesfp.nutrition.tufts.edu/farmland/how-farmland-matching-service-works> (last visited Apr. 12, 2014).

⁵⁶ *New England Landlink*, NEW ENGLAND SMALL FARM INSTITUTE, http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/ (last visited Apr. 12, 2014).

⁵⁷ *How the Farmland Matching Service Works*, NEW ENTRY SUSTAINABLE FARMING PROJECT, <http://nesfp.nutrition.tufts.edu/farmland/how-farmland-matching-service-works> (last visited Apr. 12, 2014).

⁵⁸ See KATHY RUHF & JON JAFFE, LAND FOR GOOD, SUCCESSFUL FARM TRANSFER PLANNING FOR FARMERS WITHOUT AN IDENTIFIED SUCCESSOR 13 (2012), available at <http://landforgood.org/wp-content/uploads/LFG-Farm-Transfer-Planning-Without-An-Identified-Successor-Handbook.pdf>.

⁵⁹ See *Resources on Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT, <http://nesfp.nutrition.tufts.edu/farmland> (last visited Apr. 12, 2014).

⁶⁰ NEW ENGLAND LANDLINK, http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/.

⁶¹ NEW ENGLAND FARMLAND FINDER, <http://newenglandfarmlandfinder.org/>.

RESOURCES

American Farmland Trust

Information for Farmland Advisors on Farm Transfer

<http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>

California Farmlink

Farm Succession Guidebook

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

Land for Good

Handbook for Farmers without Identified Successors

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

Handbook on Farm Succession and Transfer Strategies for the Junior Farmer

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

New England Landlink

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

Tufts University New Entry Sustainable Farming Project

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

New England Farmland Finder

<http://newenglandfarmlandfinder.org/>