

Legal and Business Guide for Specialty Crop Producers

December 2010



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Authors acknowledge the Arkansas Agriculture Department for their assistance in developing this guide and their financial support through the Specialty Crop Block Grant Program.

Preface

The Specialty Crops Competitiveness Act of 2004 authorized the United States Department of Agriculture to make grants available to provide assistance for specialty crops, while the 2008 Farm Bill amended the act and authorized the USDA to provide grants to enhance the competitiveness of specialty crops. This book is the result of one of those grants and is meant to address a wide range of legal and business opportunities and challenges faced by specialty crop producers in the state of Arkansas. It includes chapters on contract laws, food safety, food labeling, agricultural labor, business organizations and the application of the Perishable Agricultural Commodities Act. In addition, since the industry is also confronted by other unique challenges that directly affect competitiveness, it also includes a chapter addressing the marketing of various types of specialty crops and one discussing the third-party audit system.

Coordinators on this project include the National Agricultural Law Center and the University of Arkansas Division of Agriculture. Other contributors and collaborators on this project include the Cooperative Extension Service, the University of Arkansas

Agricultural Economics and Agribusiness Department and the University of Arkansas Institute of Food Science and Engineering.

The information contained within this book is intended for use solely as an educational tool and research aid. It is not intended to be legal advice, nor is it intended to be a substitute for legal services from a competent professional. To obtain legal advice, please contact and consult with a licensed, practicing attorney. Further, the information provided in this publication is educational in nature and, as such, contains hypotheticals and other information for purely educational value that is fact-sensitive and results in different outcomes based on varying circumstances. Readers of this publication are encouraged to contact the authors for additional questions that may arise based on the educational content of this publication.

This book will also be available online in the National Agricultural Law Center Reading Room on Specialty Crops at www.nationalaglawcenter.org and on the eXtension Community of Practice for Agricultural Law at www.extension.org.

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Chapter 1

Marketing

We have witnessed the exploding momentum of advocates and supporters of local food systems over the past decade. Today, there exists a plethora of sources – books, movies, websites, organizations, etc. – that serve the increasing appetite of consumers, retailers and farmers interested in actively engaging and supporting “local” and direct marketing efforts. These locally based food systems promote many economic, social and even suggest nutritional benefits to members of their respective communities. The opportunities offered by these developing food systems present farmers with many new challenges and require a business skill set to successfully navigate the marketing expectations and regulatory environment.

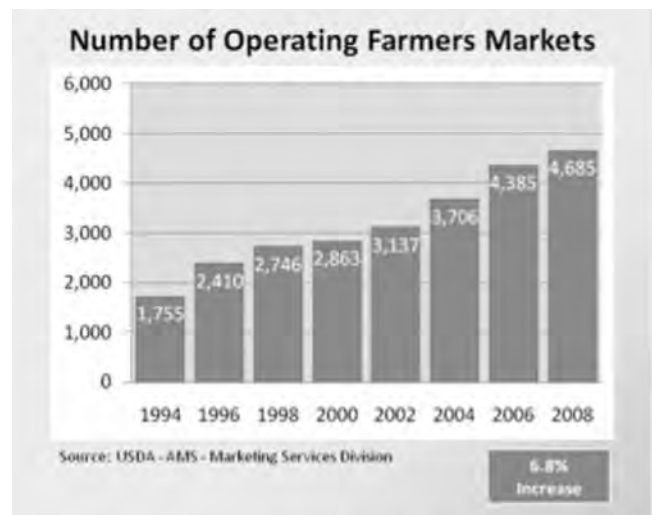
There is an ever-increasing myriad of marketing approaches, which are sometimes confusing, used to promote local food products and benefits of the systems. This chapter provides a brief overview of the development of “local” direct food systems. Also presented are some specific strategies that should aid growers in evaluating the viability of engaging this direct marketing channel.

Transformation of the Farmers’ Market

A farmers’ market is a form of direct marketing in which producers from preferably a local area gather for the purpose of selling their own produce directly to the consumer. Farmers’ markets are just one of many direct marketing outlets that also include U-pick operations, Internet sales, buyers’ groups, community-supported agriculture¹ and farm stands. The demand for local and regional sources of food has been an emerging niche market for a number of years, as is evidenced by the popularity and growth of farmers’ markets. Farmers’ markets have continued to grow in popularity over the

past decade due largely to the food consumer’s sense that the local farmer provides a tastier, healthier and more trusted source of food.

Since the U.S. Department of Agriculture started publishing the number of farmers’ markets in 1994, the reported numbers have consistently grown (see Figure 1). Data revealed 4,685 markets operating in 2008, which is an increase of almost 7 percent over the last two years. The strong upward trend in market numbers highlights the sustained growth in direct marketing opportunities and local food demand.



The recently released 2007 Census of Agriculture numbers reveal dramatic increases in direct sales of farm products from 2002 to 2007. Data released showed that direct agricultural product sales to consumers rose to \$1.2 billion for 2007. This estimate represents a 49 percent increase over the \$812 million estimate reported in 2002. For Arkansas, the 2007 report cited a sales figure of \$8.16 million. The growth in these numbers represents higher sales at farmers’

¹Community-supported agriculture (CSA) is a direct marketing program whereby a farmer offers a set number of “shares” for sale to the consuming public. The shares represent a predetermined amount of product (produce, meats, fish, etc.) at periodic intervals throughout the harvest season. This method is a popular way for consumers to purchase local agricultural products.

markets and other nontraditional outlets. The emergence of the Internet and online sales has not evaded farming operations. Farms are not only using the Internet to promote and sell their products but are also building relationships with customers highlighting their superior products and connecting with consumers.

By selling directly to consumers, producers are able to sell their products at the retail price level. Additionally, the direct to consumer social connections that are facilitated by farmers' markets allow producers and consumers to build relationships that are mutually beneficial to both in terms of understanding and satisfying each other's needs. Producers can interact with customers to understand specific customer needs or wants in the marketplace and/or changes in taste and preferences. On the other hand, consumers gain additional satisfaction from purchasing food produced locally and like knowing not only who produced their food but also the manner in which their food was produced. The local community and economy are the ultimate winners because of the enhanced multiplier effects as a relatively higher proportion of the dollars spent on local purchases recirculation in the local economy.

To further intensify discussion about the continued emergence of local food demand, there seems to be increased debate between local and organic brands. Research has shown that there are many product attributes that resonate with "organic consumers." These attributes or characteristics include perceptions of relatively higher trust, freshness and healthier products. Organic markets, which are largely influenced by produce sales, have maintained double-digit market growth over the last decade. Cary Silvers, director of Consumer Insights for Rodale, noted at the 2009 Food Marketing Institute show that shoppers' new interest in locally grown food reflects their strong desire to purchase fresh fruits and vegetables. During her comments at the show, she also noted that there was an emerging battle between organic and locally grown food items. She suggested that local was currently winning the battle because shoppers believed local growers deliver the freshest produce.

The U.S. fresh produce industry's distribution system has evolved over the previous decade as well. The transformation resulted in larger market share by larger retailers, increased marketing activities by mass merchants, consolidation of buyers and changing

purchasing strategies (Dimitri et al., 2003)². The system continues to move large blocks of food from farm to table with relatively greater efficiency. In recent years, however, circumstances such as fuel prices, growing consumer demand and the environmental challenges facing key food-producing regions have converged to make local and regional procurement systems higher priorities for even the largest companies in the food supply chain. Most food distribution/retail firms have developed or are in the process of developing sustainability strategies that target increased use of local food systems. Retailers, in some instances, have identified sustainable strategies highlighting local procurement as a business growth strategy.

Large retailer initial investments into sustainability strategies at first focused on reducing food miles. Food miles is the distance food travels from its initial production location to the retail store. The initial results of these strategies were transportation savings and a reduced carbon footprint. Although these savings alone and the reduced environmental impact justify these investments, retailers are realizing added gains that support further sustainability efforts. A recent personal communication with a national procurement firm demonstrates the changing paradigm. This firm focused on not only sourcing local produce but also tracking sales impacts in addition to transportation and logistics savings. To enhance their local procurement efforts, they worked with growers and retailers to promote products as local throughout the region. The firm's market research revealed an increase in monthly dollar sales of over 20 percent. Not only did units sold increase significantly, but sell-through – a measure of spoilage – showed strong improvement. The retailer-driven local strategy also resulted in lower markdowns to move the product off the shelves because of the increased consumer interest.

Marketing Strategies

The marketing strategy should be a comprehensive plan of how available resources will be best used to achieve the stated goals of the business. The strategies should be narrowed down to include only those that are legal, socially acceptable and offer the best opportunity for success while achieving a stated goal. An example of a marketing strategy is to develop a brochure highlighting the quality of your product or service including business' "satisfaction guaranteed" program. Another example is to market 20 percent of

²U.S. Fresh Produce Markets: Marketing Channels, Trade Practices and Retail Pricing Behavior. Economic Research Service, USDA. September 2003.

production volume directly to consumers through the newly developed business website or community-supported agriculture (CSA).

As business owners chart the direction of their trade or business, they have many alternatives to consider and evaluate. As the industry competition intensifies, a farmer's business analysis skills can be as important as his or her production skills. It has often been said that marketing plans should drive farmer planting decisions – for example, variety selection, planting dates, etc. – versus growing a crop to sell. Marketing success is influenced by many issues, including how to gain new customers, how to satisfy loyal existing customers, how to increase market share and how to expand profit margins. An integral part of developing marketing success is a comprehensive marketing strategy.

Developing a detailed marketing strategy or improving on an existing marketing strategy can assist the owner/manager in determining where the business currently is and/or what direction it will be heading in the future. Basic marketing focuses on a business understanding and developing a comprehensive plan to coordinate its product(s) and service(s) with pricing and promotion for a given market. A good marketing plan will help to plot the course of action needed to meet the goals of the business. A good plan also establishes guidelines that can be used to measure the success of the operation.

Although marketing plans will vary from company to company, there are five fundamental components that should be considered when developing a plan. These components include mission statement and goals, situation analysis, marketing objectives, marketing strategies and marketing programs that include timelines and budgets.

- **Mission Statement and Goals** – The mission statement is an opportunity to distinguish your company from others within the industry. The mission statement should not only describe the business but also the products and services the business offers. This statement should include the business' core beliefs and purpose for serving the market along with goals to drive the business. Your business' goals should consistently reflect the beliefs stated in the mission statement.
- **Situation Analysis** – The situation analysis is a determination of where your business is currently positioned in relation to your customer base, the trends of the marketplace

you operate, where you stand in relation to the competition and in what direction your business or industry is headed. A SWOT analysis can be a useful tool in assessing your situation. The SWOT analysis is used to identify **Strengths, Weaknesses, Opportunities and Threats** concerning your business.

- **Marketing Objectives** – The marketing objectives should consist of time-measured sub-goals that will enable the operation to reach its overall goals. Again, the emphasis is on time-specific and measurable goals. Simply stated, these objectives must be realized for the business to reach its final goals. Sample marketing objectives include increase sales volume by 10 percent over the previous year, increase profits by \$5,000 during the fourth quarter and expand the customer base by 200 clients. Marketing objectives should support the business' overall mission statement and should drive the day-to-day activities of the operation. Objectives will foster the development of specific goals in order to meet pre-determined "benchmarks." These objectives should be clearly defined providing ownership, management and employees the necessary guidance.
- **Marketing Strategies** – The marketing strategy should be a comprehensive plan of how available resources will be best used to achieve the stated goals of the business. Money, people, equipment, services and products are all defined as resources. Marketing strategies can originate from various sources, such as an innovative business owner, outside industry consultants, team brainstorming sessions or combinations of the aforementioned sources. The strategies should be narrowed down to include only those that are legal, socially acceptable and offer the best opportunity for success while achieving a stated goal. An example of a marketing strategy is to develop a brochure highlighting the quality of your product/service including business' "satisfaction guarantee" program. Another example is to market 20 percent of production volume directly to consumers through the newly developed business website.
- **Marketing Programs** – Marketing programs will consist of the action steps that will be used to implement the decided upon strategies and goals. Simply stated the marketing programs are the specific business tactic that will assist in the accomplishment of the business objectives. The marketing programs should outline in

detail specific tasks that must be done. These programs will be implemented into various aspects of the business, such as sales, pricing, product development, advertising, market penetration, etc. An example of a marketing program dealing with sales would be to develop a product catalogue with a price guide. Advertising, participation in industry/trade shows and product branding are also examples of different types of marketing programs.

Strategically Capturing Local Markets

Direct marketers and farmers should seize this market opportunity by developing relationships with their existing and potential customers – households, procurement specialists, buyers, retail management. Specific strategies should be identified to communicate with and target your segmented audience because today's marketplace is overwhelmed with marketing information. The following paragraphs outline three strategies designed to aid a grower in evaluating the potential marketing resources and designing a road map to capturing this emerging market: (1) connect with your customer, (2) use existing marketing resources and (3) expand your network.

1. Connect With Your Customer

It is important to know your typical customer and his/her motivations for making purchases and to connect with these clients. Innovation and differentiation are the key drivers in today's fast-paced marketing arena, but educating your customer is a critical piece to the puzzle. Local food consumers are motivated to shop by different factors. There are opportunities through local branding and promotional strategies to connect consumers to the various value-enhancing marketing components that highlight your products and service. Successful marketers weave these promotional pieces into a compelling story that highlights their farm and its history, the product offerings or unique selections and/or the firm's commitment to quality and integrity. If growers are successful in compiling a marketing program that effectively connects their farm's history/missions with its products and services, it enhances the ability to strengthen relationship marketing. Relationship marketing refers to the mutually beneficial arrangement wherein both the buyer and seller recognize the importance of interacting beyond the transaction. Growers and

direct marketers have a persuasive story to tell that not only highlights the economic benefit of supporting local growers/economies but also provides unique benefits to customers. Promotional efforts should not only discuss the solid business motivations for sourcing locally but also include that educational component that connects your clients to the product.

Each generation has a unique set of cultural expectations and experiences that marketers must understand in order to make the right decisions – in order to remain relevant. Therefore, it is important to narrow down your focus to target your niche customer. For a quick overview of generational difference, the following categories detail the major players on the generational stage, beginning with those who emerged first.

- **Matures:** There are 57.8 million Matures, people born from 1912 through 1945. Matures made up about 20.5 percent of the population, according to 2000 Census figures. Some subdivide the Matures into the GI generation (born 1912-1921), the children of the Depression (born 1922-1927) and the Silents (born 1928-1945). The wealthiest generation, they have an immense economic impact: an estimated \$20 trillion.
- **Boomers:** They were the biggest generation the United States had ever seen. Numbering 82.8 million people born from 1946 through 1965, boomers represented 29.4 percent of the U.S. population in 2000, with estimated annual spending of \$900 billion.
- **Generation X:** A significantly smaller group, Gen Xers, with a population of 58.9 million in 2000 were born from 1966 through 1979. They made up 20.9 percent of the population and spend about \$125 billion per year.
- **Generation Y, also known as Echo Boomers, Millennials, Next Generation, Net Generation:** Members of Gen Y are the children of boomers and Gen Xers. They were born from 1980 through early 2000. Numbering about 80.5 million, or 28.6 percent of the population in 2000, they already represent considerable purchasing power: an estimated \$105 billion per year. As they come into their own, their impact will rival that of the boomers.

2. Use Existing Marketing Resources

There are a number of marketing programs operated by universities and state departments of agriculture that can enhance growers' marketing message and overall presence. State branding programs are typically coordinated by state departments of agriculture and are focused on market development and promotion of a state's agricultural commodities and/or industry. The market development programs include names such as "Arkansas Grown," "Made in Oklahoma," "Make Mine Mississippi" and "Pick Tennessee Products," to name a few. To use, growers simply need to sign up/register with the respective department and verify production of products. The programs are usually inexpensive and free in some states.

In addition to allowing growers to use the branded logo, the marketing programs typically have their own promotional campaigns that include a business listing in state marketing directories and potential participation in state/national trade shows and expositions. Additionally, the programs typically offer marketing assistance, training and workshops to participants. One example is a program that allows participation in an international trade show and exposition. Another example is a program that offers participants the opportunity to list their business profile on the state's online marketing directory.

In addition to the state branding programs, universities and industry trade associations also have resources to enhance business marketing efforts. The branding and marketing programs have emerged from purely promotion of a state's commodities to regional identity branding that is a component of but also a growing phenomenon distinct from local food systems. With this transformation, the state branding and marketing programs now signal specific attributes to consumers and, in the current marketplace, present a host of opportunities for growers/retailers to use these programs to enhance their "local" message.

The promotional programs allow consumers to easily identify state growers and understand that, at a minimum, the products were developed within the state's borders or a specific region. Research has detailed the added value consumers receive from consuming local

products and supporting area growers. This branding provides growers with an instant invitation to start building a relationship with new customers. These programs enhance the ability of a grower to highlight local products by providing a third party source verification program. This enhanced transparency improves the potential for relationship marketing synergies to develop. Both parties focus on value-enhancing activities that ultimately result in a more satisfying exchange.

Growers interested in communicating a consistent marketing message can build on the synergies offered by state branding and marketing programs to enhance their products in the marketplace. Three specific benefits growers can use by participation in a state branding program: 1) expanded marketing presence through agricultural department activities including online presence, 2) an opportunity to network and build relationships with outside expertise and training and 3) enhanced marketing avenues to communicate firm value and uniqueness to customers.

3. Expand Your Network

Within each grower's community, there is a collection of networks that includes fellow growers, consumers, procurement specialists, advocates, stakeholders, etc. These networks offer growers tremendous opportunities to enhance their marketing presence, understand the changing business landscape and enhance production and marketing expertise. Growers should become actively engaged within their local community, strategically thinking about ways to use the synergies of these networks to improve their marketing opportunity. The term **community** in this context means networking with your local food system partners including nonprofit organizations, academic institutions, civic groups and city/state agencies. Growers can enrich their marketing presence by being active within their local community and other industry organizations.

By building relationships through civic and networking endeavors, growers create opportunities to augment their business reputation, work ethic, standards, etc. These activities create a win-win for growers to expand their customer base and promote products.

Chapter 2

Contracts and Contracting

Contracts are everywhere and are an important legal consideration for specialty crop producers, as they exist to help people buy and sell goods, obtain and give loans, lease property or agree to perform a service. A **contract** is a legal document that represents an agreement between two or more parties and involves legally enforceable commitments or promises to do or not do something. It is important to understand that a contract is more than just a promise – it is a legally enforceable promise. This means the court can step in and enforce an agreement reached between parties. In general, contracts consist of four basic parts that are particularly relevant for specialty crop producers: the offer, acceptance of the offer, consideration for the contract and performance of the contract.

Parts of a Contract

A contract begins with an **offer**. In legal terms, an offer is a “communication by the offeror of an intent to enter a contract with the offeree with the stated terms.” In other words, it is not an invitation to bargain or negotiate – it expresses one party’s willingness (the **offeror**, the one making the offer) to be bound by the terms just set forth. An offer can be revoked before the **offeree** (the one the offer is made to) has accepted, but if the offeree accepts the offer before it is revoked, both parties are bound by the offer.

The next step in the life of a contract is **acceptance**. Acceptance is the “communication of assent or agreement by the offeree to the terms of the offer to the offeror.” This acceptance of the offer must be made in the manner required by the offer. For example, if you offer to sell a bushel of corn to your neighbor for \$15 as long as they call you this afternoon by 5 p.m., you have offered to make the sale. If your neighbor then shows up at your door at 4:30 p.m. to take you up on your offer, in general, you are not obligated to sell the produce because the terms of your offer required that he call you in order to accept the offer. Another

important point is that the offer can only be accepted by the offeree. To return to the earlier example, assume that you offered to sell the bushel of corn to your neighbor, but your coworker overheard you talking. Your coworker cannot accept the offer because he/she is not the offeree.

An offer must be accepted exactly as it is made without modifications. If the offer is changed, it is a **counter-offer**. Once a counter-offer is made, the original offer is gone and the counter-offer is in its place. This means that if the counter-offer is rejected, the original offer cannot be accepted. Instead, the process must begin again with a new offer. If your neighbor, in response to your offer to sell him produce, tells you that \$15 is too high but he’ll buy it for \$12, he has made a counter-offer. After he does that, you have the choice of accepting or rejecting his counter-offer, but he can no longer accept your original offer to sell for \$15.

Consideration is the third part of a contract and is defined as “the bargained exchange of something of value.” In other words, consideration is the “promise” part of the contract – it is what one party promises to do or exchange in return for the promised action from the other party. Further, consideration can take many forms – money, physical objects, services or promised actions. In our example, the consideration you offer to provide is the bushel of corn. If your neighbor accepts your offer, he promises to provide the consideration of \$15 in cash.

The final part of a contract is **performance**. Once the obligations contained in the contract are fulfilled by both parties, then full performance of the contract has occurred and the contract is complete. However, if full performance has not occurred, then the contract may have been “breached.” A **breach of contract** occurs when the contract terms were not met by at least one party. At this point, courts can step in to provide remedies for the breach.

Remedies

Money is usually the remedy used by the courts. The court may order one party to pay the other for expectation damages, reliance damages or restitution, or the contract may specify stipulated damages that are due.

- **Expectation damages** are what the party expected to gain from the bargained exchange in the contract. Expectation damages are “forward looking” and put the party in the position they would have been in if the contract had been fulfilled.
- **Reliance damages** compensate for the losses incurred in reasonable reliance on the contract that was breached. Reliance damages are “backward looking.” They put the party in the position they would have been in if the contract had never been entered into.
- **Restitution** is meant to prevent “unjust enrichment” by one party. In restitution damages, a court may require one party to return an unfair benefit received as a result of the contract. This remedy is usually ordered when there has been partial performance of the contractual obligations by one party which results in the other party’s benefit.
- **Stipulated damages** are usually a fixed sum of money or a formula for calculating the sum of money due if one of the parties breaches the contract in a certain way. Stipulated damages are actual terms of the contract – the parties to the contract agreed to those specific damages when they signed the contract.

The court may also order **specific performance of the contract**. Specific performance occurs when the court requires one party to complete their contractual obligations. This remedy is available primarily in situations where money damages are considered to be an inadequate remedy.

Statute of Frauds

The **statute of frauds** requires that certain contracts must be in writing and signed by the parties. The idea behind it is that a contract is not enforceable unless there is evidence that a contract existed, and the best evidence of that is a written contract containing the terms both parties agreed to. Contracts covered by the statute of frauds must also identify the parties and the essential terms and obligations of the agreement. Further, changes or additions to the contract should also be in writing and signed as well.

Here are a few of the types of contracts that are required to be in writing by the statute of frauds.

- Contracts that cannot be performed within one year
- Real estate sales
- Sale of goods over \$500
- Agreeing to become a *surety* (becoming responsible for another’s obligation or debt)

However, even if the statute of frauds does not *require* that a contract be in writing, it is always a good business practice to have all contracts in writing.

UCC: History and Scope

The **Uniform Commercial Code**, or **UCC**, is a set of standardized state laws that have been adopted, in some form, in all 50 states. It is designed to make doing business across state lines easier and more uniform by providing a common law to govern business transactions across the country. It was originally drafted by the National Conference of Commissioners on Uniform State Laws in the 1940s, was adopted in the 1950s by most states and has gone through several revisions since that time.

The UCC is divided into 11 sections called **articles**. Each article addresses a different type of business transaction. For example, Article 1 contains the general provisions of the code, including its scope, applicability and general definitions, while Article 2 covers the sale of goods. Article 3 applies to negotiable instruments, which are a special type of contract for the payment of money – usually checks, promissory notes and other commercial paper. Article 2, addressing contracts for the sale of goods, will be the focus of the remainder of this discussion, although any or all of the sections of the UCC may apply to your business transactions.

UCC Definitions

Before setting out requirements for contracts, it is important to determine exactly what contracts are covered by this article of the UCC. Here are some important definitions that do just that.

- **Goods:** UCC Article 2 covers all contracts for the sale of goods. A good includes all things that are moveable at the time of identification to a contract for sale. The definition includes specially manufactured goods, the unborn young of animals, growing crops and other identified things attached to realty or land.

- **Merchant:** A person who deals in goods of the kind or holds himself/herself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction.
- **Between Merchants:** Any transaction where both parties are charged with the knowledge or skill of a merchant.
 - Why does it matter if you are a “merchant”? It matters because Article 2 treats contracting between merchants differently than contracts between non-merchants (usually a consumer) and a merchant. This section will address contracts between merchants.

UCC Article 2: Contract Requirements

The basic requirements to form a contract under Article 2 are the same as any contract. There must be an offer, acceptance and consideration. When accepting an offer, an offeree can accept by either a return promise or by performance of the contract. For example, when an order or other offer is made to buy goods, the offer can be accepted by either a promise to ship the goods or actual shipment of the goods. Article 2 was written with transactions that take place multiple times in mind, and it makes it easy to accept an offer either by fulfilling the terms of the offer or by communicating that you will fulfill the terms.

The statute of frauds in the UCC also requires that all contracts for the sale of goods over \$500 must be in writing and signed to be enforceable. They must also contain the quantity of goods to be sold. However, the UCC outlines three exceptions to the statute of frauds. One exception is for the sale of specially manufactured goods. If the seller has already taken steps in the production of goods that are not marketable in the ordinary course of business, the court might excuse the absence of a written contract. Another exception is an admission by the offending party that a contract exists. This may happen in a pleading or in court testimony. The third exception occurs when acceptance of payment or of the goods is an objective indication that a contract existed. In this case, the absence of a written contract may be excused when one party accepts payment or the goods and then denies that a contract was in place.

UCC Article 2: Terms of Contract

The terms of a contract may be established in a number of ways. First of all, they can be included explicitly within the contract – these are **express terms**. However, often the terms of a contract are not clear, so the court will use the performance during the life of the contract – this is called the **course of performance** of the parties. Another way the terms may be determined is if the parties have contracted often and for the same things. In this situation, the parties may develop a customary relationship from which terms of the contract can be implied. These are called **course of dealing** terms. Finally, within certain industries, there are customs and expectations that are traditionally in place. These implied terms are called **usage of trade** terms. When a court is considering exactly what the parties meant when they signed the contract, it will look first at the express terms and then at the course of performance between the parties. If those don't establish the meaning, the court will turn to the course of dealing between the parties and, as a last resort, to the usage of trade.

Additionally, the UCC outlines specific gap fillers for contracts it governs. A **gap filler** is a solution to places in the contract in which the parties did not agree upon or include a specific express term. Typical gap fillers include:

- **Price:** When forming a contract, the parties may agree to set a price at a later time, to have a third party set the price or simply leave the price out of the contract. If this happens, as long as there was intent to enter into a contract, the contract is still valid. The gap filler a court will insert is that the price is a reasonable price at the time of delivery. Once that happens, the parties will both be allowed to present evidence as to the market value at the time the delivery is made, and the judge will set the reasonable price.
- **Delivery:** If there is no express agreement as to delivery, Article 2 provides for the manner, place and time of delivery. Unless agreed otherwise, tender of the goods is required in a single delivery and payment is due only upon receipt of the goods. The place of the delivery, if none is provided in the agreement, is the seller's place of business – meaning the buyer will pick up the goods from the seller. Finally, if no time is mentioned in the contract, delivery must be made in a reasonable time.

- **Payment:** Unless there are other terms in the contract between the parties that specify otherwise, payment is generally due at the point of receipt to allow the buyer an opportunity to inspect the goods. Even when goods are considered “delivered” upon shipment by the seller, the buyer need not pay until the goods are received.

There is no gap filler for the quantity involved in the contract. While the other gap fillers can be determined based on the market or the typical relationship in similar transactions, there is no way to know what the parties were thinking when it comes to the quantity of goods at issue. The quantity must be specified in the contract.

On the other hand, sometimes there are too many terms, or conflicting terms, included in a contract. Typically, this happens when businesses have standard forms used for contracts, and those forms have different terms included than those included on the forms of the other parties to the contract. These differing terms are typically on the subject of warranties, remedies or disclaimers. In this case, the court must determine which party's terms make up the enforceable contract. The UCC has a specific provision that governs this situation, which is called the **battle of the forms**. The provision states that when two merchants are contracting with each other, additional terms will become part of the contract unless 1) the offer forbids alteration; 2) the new terms in the acceptance materially alter the agreement; or 3) one of the merchants objects to the terms added by the other merchant. It's important to note, however, that most contracts are executed without a problem, and these issues only arise when there has been a breach of the terms by one party.

UCC Article 2: Performance and Breach of Contract

When you agree to a contract, you promise to fulfill your specific part of the contract. Failure to do so is a breach of the contract, and the other parties to the contract can sue for legal remedies. Article 2 contract breaches typically fall into one of three categories:

- If the seller delivers the goods according to the terms and the buyer rejects them, the buyer has breached.
- If the goods do not meet the terms of the contract and the buyer rejects them, the seller has breached.

- If the goods do not meet the terms of the contract, the buyer can either accept or reject the goods.

The first two categories are pretty straightforward. However, in the last category, it can get a little tricky. There are special rules for both the acceptance and rejection of goods that do not meet the terms of the contract, and it's important to remember that even if the buyer accepts the goods, the seller has breached the contract and the buyer can seek remedies.

Goods that do not meet the terms of the contract are **nonconforming goods**. The buyer has the right to reject nonconforming goods under the **perfect tender rule**, as long as the rejection is in good faith and in a timely manner. For example, if you contracted to sell 100 zucchini to the neighborhood grocery store but only delivered 95 zucchini, they could be considered nonconforming goods because they did not meet the terms of the contract. The grocery store would have the right to reject the 95 zucchini, as long as they did so in a timely manner. This means the grocer probably could not keep the vegetables for a week before they were rejected.

However, sellers who deliver nonconforming goods have the right to fix the problem or **cure the breach**, in some situations. First, the seller may cure the breach if the time for performance has not expired and the seller can substitute conforming goods within the contract time. To return to the example above, assume that you agreed to deliver the zucchini by June 12. On June 11, you delivered 95 zucchini to the grocery store and the store refused them. If you then add 5 zucchini to the order and can deliver the complete order to the store by June 12, then you have cured your breach.

The other way in which a seller can cure the breach is when the time for performance has expired but the seller had reasonable grounds to believe the goods would have been accepted. In this situation, the seller has a reasonable amount of time to cure the breach. Typically, in this case, the circumstances usually show that the seller was unaware of the nonconformity. Again, assume that you delivered 95 zucchini to the store and that you did so on June 12, the date specified in the contract. When you delivered them, you thought you had 100 of them in the crates. Because you had reasonable grounds to believe the goods would have been accepted (because it was reasonable to mistake 95 zucchini for 100), you have a reasonable amount of time to bring the other five zucchini that will cure the

breach. However, if you only brought 10 zucchini to the store on the June 12, you probably wouldn't be able to fix the breach, because it would be obvious to anyone that the goods were nonconforming. It's also important to note that the seller must notify the buyer of its intent to cure the situation in a timely manner. As a result, you would have to notify the grocery store that you planned to bring the remaining product to them and to cure the breach.

After the buyer accepts the goods, it is difficult to return them. In fact, a buyer may only **revoke acceptance**, or return the product, if "the nonconformity of the goods substantially impairs the value of the goods." Further, the buyer has a couple of other requirements that must be met. Either the original acceptance must have been based on a reasonable assumption that the nonconformity would be cured or the buyer must not have known about the defects at the time of acceptance. In other words, either the buyer accepted the goods thinking the seller would cure the problem or the buyer did not know the goods were flawed. This is a rare situation. If you are the buyer, the goods should always be inspected before acceptance to avoid the complications of revoking the acceptance.

UCC Article 2: Anticipatory Repudiation

Very rarely, parties engage in anticipatory repudiation of a contract. **Anticipatory repudiation** occurs when one party notifies the other before the time of performance or delivery that he does not intend to follow through with the contract. To continue with our example from above, you contract with a grocery store to sell them 100 zucchini by June 12. On June 11, you notify the store that you will not be delivering the produce. Alternately, on June 11, the store notifies you that they do not need your zucchini and they will not accept if you deliver. Either one of those situations would be an anticipatory repudiation of the contract. If you are involved in a contract in which the other party engages in anticipatory repudiation, your response should be to stop your own performance under the contract, limiting your damages. In the situation above, once the store notified you that your produce would not be accepted, you should stop your performance of the contract and not deliver the produce. The next step is to wait for performance for a "reasonable time," and finally, to resort to remedies for breach of contract. In the example, this would probably involve waiting until June 12 to see if the grocery store

notifies you that they will accept the produce and, if not, filing suit in court for the breach of contract.

Warranties in the UCC

A **warranty** is a legally enforceable promise by one party to another that certain facts or conditions are true or will happen. Once a warranty is made, the other party is permitted to rely on that promise and seek a legal remedy if it is not true or does not take place. The UCC recognizes two types of warranties – express warranties and implied warranties. An **express warranty** arises from the seller's affirmative actions. In other words, an express warranty is based on something the seller did or said in order to get the buyer to commit. On the other hand, an **implied warranty** is based on protections that are offered through the law and are not based on anything the seller specifically did or said.

Express warranties generally concern characteristics of the item for sale such as its potential uses, its description and the use of samples or models in negotiating that create expectations of how the final product will look. However, it is important to distinguish warranties, where a promise about the product is made, from **puffery**, where a general statement that exaggerates the attributes of the product is made. For example, the statement that "this tomato is the best tasting one you'll ever eat" would probably be considered puffery, while the statement that a specific packet of seeds has a 94 percent germination rate would be a warranty.

Implied warranties relate to the condition of the goods. For most sellers of specialty crops, the three implied warranties that will be most important are the warranty of merchantability, the warranty of fitness for a particular purpose and the warranty of title.

The **implied warranty of merchantability** is based on the unstated and reasonable expectations of the buyer about the quality of the goods. It guarantees that a good purchased from a merchant is a merchantable good and meets a certain minimum level of quality. A **merchantable good** is one that falls within the quality range normally associated with the good by those in the trade. This warranty does not apply to goods sold by non-merchants, and it cannot be disclaimed unless expressly disclaimed by name.

The **warranty of fitness** for a particular purpose is implied when a buyer relies on the seller's judgment or skill when buying goods for a particular purpose. It is based on the idea that if a seller has knowledge of the

buyer's needs and knowledge that the buyer is relying upon the seller to furnish suitable goods, that seller has a responsibility to furnish suitable goods. For this warranty to apply, the seller does not have to be a merchant. The buyer must prove that the seller knew of the use for which the goods were purchased and must also prove actual reliance on the seller's assurances.

The **warranty of title** is an implied promise that the seller has title to, or owns, the goods and has the right to sell them and that the title the seller is passing to the buyer is a good title, free from security interests, liens and encumbrances (except for those the buyer is made aware of).

Common Sense Contracting

Before agreeing to a contract, it is important to consider who will be the parties to the contract. You should know who you are becoming legally obligated with. Is it an individual or a business? Are they in good financial standing? Do they have a good reputation in the industry? Your answer to these questions might determine whether it is a good idea on your part to enter into the contract.

Additionally, some businesses will ask that you meet certain requirements before they will contract with you. You should know what these requirements are and ensure that you and your business will be able to meet them. They might include licensing, bonding or insurance requirements.

- **Business licenses** may be required at the local or state level depending on the type of business you operate. In some cases, farmers are exempt from the licensing requirements. However, even if you are a producer, you should check with the proper offices to be sure you meet the business requirements. If you are a direct marketer, a license may still be required.
- **Bonding, or surety bonds**, are agreements by a third party promising to pay or have the work completed if a vendor does not fulfill his or her obligations under a contract. A bond is not an insurance policy. It does not cover loss due to personal injury or property damage; it only provides assurance that the work contracted is satisfactorily complete. Banking institutions, surety bond companies and even the Small Business Administration (SBA) offer bonding services.

- **Liability insurance** may be required if you are selling at a farmers' market. For more information, talk to your insurance agent. Additionally, don't be afraid to talk to other insurance agents as well, and get several different quotes. Different companies have different options and different prices. It's important to know what options are available so you can make the best choice.

Neil D. Hamilton, Ellis and Nelle Levitt Distinguished Professor of Law, and Director of the Agricultural Law Center at Drake University Law School, has written "10 Rules of Contracting" for producers to consider. They are published in his book *A Farmer's Legal Guide to Production Contracts*.³ As stated in the text of that publication, the "10 Rules of Contracting" include the following:

1. *The parties who wrote the contract took care of themselves first.*

This means there is no reason to assume a contract you are asked to sign is fair or balanced or that it protects your interests. In fact, it is probably safer to assume the opposite. This does not mean the party on the other side is evil, instead it just reflects the fact that most contracts are arm's length business transactions in which both sides try to maximize their advantage.

2. *Read and understand (at least try to) any contract before signing.*

Signing a contract creates a binding legal obligation. It is in your best interest to understand what you are agreeing to do and what the other party's obligations are as well. Ask questions until you understand and are comfortable with the terms of the contract.

3. *Complying with the terms of a contract will be required before you are considered to have satisfied the agreement.*

Contracts usually offer an economic incentive. But don't expect to take advantage of it until you have fulfilled your obligations under the contract – including quantity, quality and delivery terms. For example, if a contract to provide a local store with vegetables requires you to meet the quality standards of the buyer, you should not expect to be paid if what you deliver does not meet those standards.

³Available on the National Agricultural Law Center's website at http://www.nationalaglawcenter.org/assets/articles/hamilton_productioncontracts.pdf.

4. *Never assume your failure to meet the terms of the agreement will be excused.*

Every provision of a contract has some legal effect. Failure to meet any terms is considered a breach of the contract. While the party on the other side of an agreement may excuse your failure to perform in one situation, such as not delivering the quantity you promised, this may not always be the case. In some situations, like a crop failure due to weather, the law may provide you with an excuse; but in other situations where the failure to perform was due to your actions, the other party might choose to enforce the contract. If you believe you will not be able to perform a contract as agreed, it is a good idea to notify the other side and alert them to your situation. Then you can attempt to negotiate a resolution.

5. *If the contract calls for you to be paid by another party, know their financial situation.*

Take precautions to limit the risk that you will not be paid. This can be done by learning more about their financial situation, by requesting financial guarantees and by selling crops or livestock only to businesses covered by the public laws designed to ensure that farmers get paid.

6. *Remember that proposed contracts are always negotiable.*

Even though many contracts are on printed forms, it does not mean they cannot be changed, if the parties agree to it. A good rule to keep in mind is that you will never have more bargaining power in a contraction relation than just before you sign. The reverse is also true – once you have signed a contract, it will be difficult to alter it.

7. *Make sure any changes to a contract are in writing.*

Just as the statute of frauds dictates that certain contracts must be in writing, the amendments should also be in writing. Have the other party sign or initial the written changes. Be sure the person you are dealing with has the proper authority to make changes to the contract, especially if they represent a larger business.

8. *Do not rely on oral communications to amend the terms of an agreement.*

Just because you believe the written contract was amended by your discussions doesn't make it true. In fact, most written contracts include provisions that state only the written terms are binding. It is also important to keep copies of any letters or other documents that might help show what was agreed.

9. *Keep good records of your performance under the contract.*

This includes any records or documentation concerning the quantity you delivered and any payments made. It may also be helpful if you keep notes on any communications you have with the other party. If a dispute should arise about your performance, your records may help provide the answers needed to sort out the situation.

10. *Stay in touch with the other party to the contract.*

Communication between the parties can be important in resolving uncertainties and in preventing misunderstandings. Do not hesitate to ask questions if you don't understand what is happening, such as why your payment is late. It may be that the other side is unaware of the situation.

Contracts are an important legal consideration for specialty crop producers who desire to sell their produce. The information provided in this chapter is instructive but does not address all of the various considerations and possibilities that may arise for a particular producer.

For more information on contracts, please visit the National Agricultural Law Center's Reading Room on Commercial Transactions that is available at <http://www.nationalaglawcenter.org/readingrooms/commercial/>. Also, please feel free to contact the National Agricultural Law Center should you have any further questions regarding any aspect of contract law and principles.

Chapter 3

Perishable Agricultural Commodities Act

The **Perishable Agricultural Commodities Act (PACA)** was enacted in 1930 to regulate the marketing of perishable agricultural commodities in interstate and foreign commerce. The primary purposes of the PACA are to prevent unfair and fraudulent conduct in the marketing and selling of perishable agricultural commodities and to facilitate the orderly flow of perishable agricultural commodities in interstate and foreign commerce. In short, PACA is widely viewed as a statute designed to promote fair trade in the fruit and vegetable industry. It also provides important protections to sellers of “perishable agricultural commodities” that are relevant to many specialty crop producers.

The PACA is administered and regulated by the Agricultural Marketing Service (AMS), an agency within the United States Department of Agriculture. Thus, AMS is the agency that develops the regulations that implement PACA, including enhanced definitions of terms such as “perishable agricultural commodity” and certain other key aspects of PACA. In fact, AMS provides information on PACA on its website, <http://www.ams.usda.gov>, and according to its website, receives “hundreds of telephone calls each week” from stakeholders in the fruit and vegetable industry.

PACA is important for many specialty crop producers because it governs important aspects of transactions between sellers and buyers of fresh and frozen fruits and vegetables. In particular, the unfair conduct and the statutory trust provisions are particularly significant.

Key Definitions

As noted, PACA applies to certain type of buyers and sellers of “perishable agricultural commodities.” Under PACA, a **perishable agricultural commodity** is any fresh fruit or vegetable, whether or not frozen or packed in ice, including cherries in brine, as defined by the USDA Secretary. The PACA regulations include within the definition of fresh fruits and vegetables

“all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage,... [except] those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character.”

PACA also applies to “dealers,” “commission merchants” and “brokers.” In general, a **dealer** is “any person engaged in the business of buying or selling in wholesale or jobbing quantities...any perishable agricultural commodity” that has an invoice value in any calendar year in excess of \$230,000. There are some exceptions to this definition that could become applicable under certain situations, but the general definition provided here is very instructive. A **commission merchant** is “any person engaged in the business of receiving...any perishable agricultural commodity for sale, on commission, or for or on behalf of another.” Finally, a **broker** is a person engaged in the business of negotiating sales and purchases of perishable agricultural commodities either for or on behalf of the seller or buyer. A person who is “an independent agent negotiating sales for or on behalf of the vendor” is not considered to be a broker, however, if “sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of \$230,000 in any calendar year.”

Under the PACA, the term **person** is broadly defined to include individuals, partnerships, corporations and associations.

Unfair Conduct

As noted, PACA prohibits certain types of conduct on the part of buyers and sellers, though issues arising in this arena commonly focus on the alleged conduct of commission merchants, dealers and brokers. For example, it is unlawful for a commission merchant, dealer or broker “to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in

connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped or handled....” It is also unlawful for a commission merchant, dealer or broker to do any of the following:

- “to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity”;
- “to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction”; and
- “to fail or refuse truly and correctly to account and make full payment promptly” with respect to any transaction.

PACA provides that a commission merchant, dealer or broker that violates any of the unfair conduct provisions “shall be liable to the person or persons injured thereby for the full amount of damages... sustained in consequence of such violation.” The injured person or persons may enforce such liability by bringing an action in federal district court or by filing a reparations proceeding against the commission merchant, dealer or broker. Reparations proceedings are discussed below.

Licensing

The PACA requires that all commission merchants, dealers and brokers obtain a valid and effective license from the USDA Secretary. PACA does not require growers who sell perishable agricultural commodities they have grown to obtain a license, though sellers commonly choose to apply for a PACA license. From the grower’s perspective, the license demonstrates that the buyer is a legitimate business person or business entity who can be trusted to honor contractual terms and PACA requirements.

The requirement of a PACA license by a commission merchant, dealer or broker is akin to the requirement of a driver obtaining a driver’s license. A commission merchant, dealer or broker that fails to obtain a valid and effective license shall be subject to monetary penalties, though some leniency may be provided if the failure to obtain the license was not willful. Importantly, if a commission merchant, dealer or broker has violated any of the unfair conduct provisions, that person’s PACA license may be suspended or possibly revoked, which effectively negates their ability

to engage in the fruit and vegetable industry. A person who knowingly operates without a PACA license may be fined up to \$1,200 for each violation and up to \$350 for each day the violation continues.

It should be noted that the PACA license is the only license required under PACA. It is possible that a state or local government could require additional licenses. A grower should at a minimum check with the appropriate state or local government entities in his or her jurisdiction to determine whether an additional license is required. In addition, growers with any questions regarding PACA licenses can contact AMS toll free at 800-495-7222.

Statutory Trust

For specialty crop producers, the statutory trust is a very important aspect of PACA since it is specifically designed to protect sellers of perishable agricultural commodities in the event a buyer becomes insolvent or otherwise refuses to pay for produce. The **statutory trust** provision under PACA specifically provides the following (emphasis added):

[p]erishable agricultural commodities received by a commission merchant, dealer or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, **shall be held** by such commission merchant, dealer, or broker **in trust for the benefit of all unpaid suppliers or sellers** of such commodities or agents involved in the transaction, **until full payment of the sums owing in connection with such transactions has been received** by such unpaid suppliers, sellers or agents.

In other words, the buyer is required to maintain a statutory trust relative to fruits and vegetables received but not yet paid for. If a buyer becomes insolvent or declares bankruptcy, the statutory trust provides priority status to the unpaid seller against all other creditors in the world.

Consequently, the PACA statutory trust is often referred to as a “floating trust.” Thus, a PACA trust beneficiary is not obligated to trace the assets to which the beneficiary’s trust applies. When a controversy arises as to which assets are part of the PACA trust, the buyer has the burden of establishing which assets, if any, are not subject to the PACA trust. The PACA

beneficiary only has the burden of proving the amount of its claim and that a floating pool of assets exists into which the produce-related assets have been commingled.

If a buyer files for bankruptcy, the trust assets do not become **property of the estate** because the buyer-debtor does not have an equitable interest in the trust assets. Rather, the buyer holds those assets for the benefit of the seller. Thus, a beneficiary of the PACA trust has priority over all other creditors with respect to the assets of the PACA trust.

However, the seller must take certain steps in order to protect his or her rights in the statutory trust. One method of preserving rights to the statutory trust is by simply including the following exact language on the face of the invoice:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

It should be noted that this method is available only to those sellers who are licensed under PACA. Hence, many sellers will elect to be licensed so they can preserve their statutory trust rights in this manner.

Unlicensed sellers (or licensed sellers who do not want to include the foregoing language on their invoices) may preserve their statutory trust rights through a different method. This method requires that the seller provide written notice that specifies it is a **notice of intent to preserve trust benefits**. In addition, the written notice must include the name(s) and address(es) of the seller, commission merchant or agent and the debtor as well as the date of the transaction. The written notice must also identify the commodity at issue, the invoice price, payment terms and the amount owed.

This written notice must be given within 30 calendar days:

- after expiration of the time prescribed by which payment must be made, as set forth in the regulations issued by the Secretary;

- after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction; or
- after the time the supplier, seller or agent has received notice that the payment instrument promptly presented for payment has been dishonored.

If the payment terms extend beyond 30 days, the seller will lose his or her rights to the statutory trust.

PACA also provides that if the parties to the transaction “expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment must be disclosed” on the documents relating to the transaction. But, as noted, if this agreement extends the time for payment for more than 30 days, however, the seller cannot qualify for coverage under the trust.

Reparations Proceedings

Any person complaining that a commission merchant, dealer or broker has violated any of PACA’s unfair conduct provisions may commence a reparations proceeding by filing an informal complaint with the Secretary. **Reparations proceedings** provide a remedy in addition to remedies available under applicable state laws or common law and are governed by the PACA Rules of Practice for Reparation Proceedings.

The **informal complaint** must provide a brief statement of the facts supporting the allegations against the commission merchant, dealer or broker and must be filed within nine months from the date the violation occurred. After receiving all information and supporting evidence provided by the person filing the informal complaint, the Secretary must conduct an investigation. If the informal complaint and the investigation seem to warrant such action, subject to certain exceptions, the Secretary “shall give written notice to the person complained against of the facts or conduct concerning which complaint is made, and shall afford such person an opportunity, within a reasonable time..., to demonstrate or achieve compliance with the applicable requirements of the Act and regulations promulgated thereunder.”

If an amicable or informal settlement is not reached, the complaining party may file a formal complaint. The **formal complaint** must contain the

information required for filing an informal complaint and a statement of the damages claimed. After the parties have properly responded to all claims and counterclaims, if any, the matter is assigned a docket number and scheduled for a hearing.

If a complaint claims less than \$30,000 in damages, “a hearing need not be held and proof in support of the complaint and in support of the respondent’s answer may be supplied in the form of depositions or verified statements of facts.” If a complaint claims damages in excess of \$30,000, a hearing must be provided, unless waived by the parties. The Secretary must then determine whether the commission merchant, dealer or broker has violated any of the PACA’s unfair conduct provisions. If the Secretary determines that a violation has occurred, it must determine the amount of damages owed and enter an order stating the date by which the offender must pay those damages.

Either party may appeal a reparation order to the district court in which the hearing was held within 30 days from the date the order was entered. If, however, the matter was handled without a hearing because the claim for damages was less than \$30,000 or because the parties agreed to waive the hearing, appeal must be made to the district court in which the commission merchant, dealer or broker is located.

Disciplinary Proceedings

A **disciplinary proceeding** is any proceeding, other than a reparations proceeding, arising out of any violation of the PACA. Disciplinary proceedings are governed by the USDA’s Uniform Rules of Practice for Disciplinary Proceedings that apply not only to certain PACA violations, but violations under a multitude of other statutes as well. Disciplinary proceedings under the PACA differ from reparations proceedings in that private parties do not bring disciplinary proceedings. Rather, “[a]ny officer or agency of any State or Territory having jurisdiction over commission merchants, dealers or brokers in such State or Territory and any

other interested persons (other than an employee of an agency of the Department of Agriculture administering this Act) may file” an informal complaint with the Secretary concerning any alleged violation of the PACA by any commission merchant, dealer or broker.

Thus, it is possible for a reparations proceeding to be brought by a private party, have a reparations order issued against a commission merchant, dealer or broker for a violation of any of the unfair conduct provisions as a result of that reparations proceeding and to then have a disciplinary action filed by “any officer or agency... and any other interested person” as a result of the filing of a reparations proceeding.

Disciplinary proceedings are commenced, similar to reparations proceedings, by the filing of an informal complaint. With respect to disciplinary proceedings, however, the informal complaint may be brought any time within two years after the violation occurred, as long as the complaint does not allege “flagrant or repeated violations.”

For more information, please refer to the National Agricultural Law Center’s Reading Room on PACA that is available at <http://www.nationalaglawcenter.org/readingrooms/perishablecommodities/>.

Prompt Payment

PACA requires produce buyers to make full payment promptly, and the regulations implementing PACA expound on PACA. While there are additional rules embedded in the regulations, the most common payment requirement is that payment be made 10 days from date of acceptance of the goods for purchase.

For more information, please refer to the National Agricultural Law Center’s Reading Room on PACA available at <http://www.nationalaglawcenter.org/readingrooms/perishablecommodities/> or contact the National Agricultural Law Center.

Chapter 4

Business Organizations

Business organization options have existed for years for various commercial enterprises, including agriculture. For specialty crop producers, these business organization options are very important to consider and understand because, among other factors, they have significant civil and tax liability implications.

From the simplest sole proprietorship to the most complex multinational corporation, the various business structures have evolved to meet people's needs. Determining what business organization structure to choose requires understanding the basics of the available options as well as the goals one may have for their operation. The many types of business structures offer the flexibility required to fit the different requirements of agricultural operations today. Every farming operation that is operated for profit is recognized as being in one business structure or another, whether or not the operator realizes it.

Business organizations provide stability and protection to investors and officers while establishing guidelines within the organization and under the state(s) laws where they do business. Within the U.S. over the past century, there have been numerous changes in state laws, creating new business structures and modifying old ones in an effort to induce businesses to locate within their borders. States such as Delaware have written their statutes in such a way as to create an almost ideal environment for businesses in order to attract both old and new entities into the state. Competition between the states has arisen to attract business organizations, which in turn have resulted in rapid changes in laws affecting businesses ranging from taxes and liability to the composition of the business itself.

Laws surrounding business organizations concern almost every aspect of business, including those tied directly to agriculture. Because of this, it is important to know the benefits and consequences of creating any business entity. These benefits and consequences can

include liability issues, tax implications, payment limitation issues, corporate farming statutes and bankruptcy, among others. The benefits and consequences are primarily determined by the type of business organization that is selected – usually a sole proprietorship, general partnership, limited liability partnership, limited liability company or a corporation (whether “C” or “S”).

Important Issues

Liability Issues

One of the most fundamental reasons to create a business entity is to protect owners and investors from the legal liability of actions performed on behalf of the business. As a result of this need, legislators organized business entity statutes to provide a “veil” of protection, depending on the type of business structure and the actions of the parties and the organization.

On the end of the spectrum with the least protection, sole proprietorships and general partnerships provide no liability protection to the owners. General partnerships will, in fact, often expose all partners to joint and several liability as a result of the actions of a single partner. In the middle of the spectrum lies the limited liability partnership, or “LLP,” which provides partial protection to the partners. Typically, these ventures have at least one general partner who is personally liable for the actions and debts of the partnership and one or more limited partners who are protected by the limited partnership so long as they remain passive in the running of the business. On the most protective end of the spectrum are organizations such as limited liability companies – “LLCs” – and corporations that provide the most protection to the shareholders and officers of the businesses by shielding all parties from the actions and debts of the business so long as certain business boundaries are respected.

Asset protection is a very important aspect for many farming and agribusiness operations. Growers of specialty crops always face the risk of serious legal consequences because of foodborne illnesses, Perishable Agricultural Commodities Act (PACA) violations, negligence lawsuits and a host of other potential issues. As a result, arranging the ownership of assets through business entities is a frequent method used to help limit exposure to events such as civil liability from lawsuits and financial liability from unpaid or delinquent loans.

Tax Implications

Changes in business organization statutes in all 50 states have had direct consequences on income taxes and indirect consequences on estate taxes. Earlier in the 20th century, before the advent of many of the limited liability organizations, businesses were taxed according to what structure they operated under. Sole proprietorships and general partnerships were not (and still are not) taxed directly. Instead, the income is imputed directly to the owner/partners with no mention of a business entity, which is another reason why farmers are considered to be in a business structure at all times.

Corporations are subject to the so-called **double taxation** rule – the corporation is held liable for taxes on its earned income and the dividends paid out to the shareholders are also subject to taxation. For a time, the Internal Revenue Service (IRS) tried to determine whether new business entities being created across the country should be classified as a form of corporation. However, this approach has been abandoned since it was overly complex and states and new businesses were purposefully creating convoluted business structures to avoid classification as a corporation. Instead, since 1997 the IRS has used the “check the box” rule under which a business may elect for the “flow-through status” of a partnership even though the business may more closely resemble a corporation. This has greatly enhanced the popularity and flexibility of this newer generation of business entities, since limiting the taxes paid by the business is no longer of great concern.

The use of business structures added a very useful tool for the purposes of estate planning in the form of discounts. A farmer who is concerned about paying estate taxes may create one or more business entities to hold his/her assets while gifting shares of those business entities to the heirs, which may allow them to

discount the value of the business. These types of considerations highlight the importance of obtaining competent legal counsel as well as consultation with an accountant or someone with a background in estate planning and taxation.

Business Structures

Sole Proprietorship

One of the simplest forms of business, the **sole proprietorship**, is effective without any legal filing. Many businesses throughout the country function under this structure even if they are completely unaware that their operation does in fact have a business structure. Any individual who starts a business or farming operation without further organization and filing is generally considered to be a **sole proprietor**. One of the most important characteristics of the sole proprietorship is that the owner will be held personally liable for the actions, taxes and debts of the business. For example:

A tomato grower operates his farm as a sole proprietorship part time and also works in town to supplement his income. The farm experiences a bad year and is unable to pay the bank with the proceeds from the crops. In this case the bank can garnish the grower's wages from his job in town, foreclose on his farm if they have a mortgage, or reach almost any other asset that the farmer owns. The farmer is responsible for the debts of the farm and this responsibility even extends to non-farm assets.

This virtually limitless potential exposure to liability often leads to the sole proprietor either shutting down the business or shifting to another form of business organization. It is also not the most stable form of business because, like with its creation, the termination can occur without the sole proprietor ever being aware that it has happened. The death of the owner, the selling of assets, bringing in of one or more partners to help run the farm or creating a more formal business structure can all result in the termination of a sole proprietorship.

The sole proprietorship is essentially a fictitious entity. The profits, assets, debts, responsibilities and liabilities of the business rest solely on the individual owner. Unlike other business structures, such as corporations or limited liability companies, there is no legal

entity that is created to bear the responsibility and risk of operating the farming operation. The ultimate responsibility rests entirely on the owner alone. There is nothing in place to shield the owner from the financial and legal consequences of operating the farm nor to protect the assets of the business if the individual owner suffers from financial or legal problems. The survival of both the farm and the individual are so closely intertwined, in many instances, that a setback for one can be seriously detrimental to the livelihood of the other.

General Partnership

The general partnership is similar to the sole proprietorship in that this form of business structure does not require any legal documents to be filed in order to create it. The basic definition of a **general partnership** is that it occurs when two or more individuals come together with each person contributing money, labor, property or skill and each expecting to share in both the profits and losses of the business. Evidence of two or more individuals involved in a common enterprise and sharing the profits is often enough for courts to find that a partnership exists even without the agreement being formalized either verbally or in writing.

The liability that a partner in a general partnership is exposed to is very similar to the personal liability that a sole proprietor suffers (being held personally responsible for the actions and debts of the business); however, it also includes an added element of risk. In a general partnership, the actions of one partner are imputable to the other partners through joint and several liability. Each general partner is treated like an agent of the rest of the partners. Essentially, this means that the actions and mistakes of one of the partners may become the responsibility of the rest of the partners. Depending upon the number and experience of the partners involved in farming operation, the risk increases substantially with each additional partner. For example:

Suppose that an older farmer wishes to bring his children in on the family orchard. The children will help with labor, marketing and management and intend to split the profits with the farmer at the end of the year (if there are any). While taking fruit to the farmers' market, one of the children is involved in a serious car accident that injures another

individual. It is plausible that a court could determine that a general partnership exists between the family members. If this plausible outcome occurred, it is possible that the farmer's assets, including the farm, could be reached by the victim of the car wreck because of the general partnership that exists between the farmer and his children.

Another critical problem of the general partnership is the ease at which it can be terminated. This business structure, unless there is a written agreement to the contrary, is terminated by the creation of another business structure or by the addition or loss of any partner. The inability to add or remove partners without terminating the business can create serious problems, especially as the number of partners in the business increase. A binding partnership agreement can successfully modify most of the problems that occur when entering into a general partnership; however, many partnerships are created and operated by verbal agreements or even accidentally through the actions of the partners. The almost limitless potential liability coupled with the ease in which the business can be dissolved make the general partnership a risky business structure for a specialty crop farming operation to use without some form of modification or formalization in place to mitigate these inherent weaknesses.

Limited Partnership

The **limited partnership** structure is created when two or more people or businesses file the proper paperwork with the state where the partnership will be formed. Unlike the sole proprietorship and the general partnership, this business form cannot be formed accidentally or automatically. There must be at least one general partner that is personally liable for the actions of the partnership and will typically run the farming operation. There will also be one or more limited partners that are only liable up to the amount they have invested in the partnership. These members typically have little or no control over the farming operation and remain as passive investors.

The two partnership statuses differentiate this partnership business structure from the general partnership since personal liability rests almost solely on the general partner(s). It is important to note, however, that the more involved a limited partner becomes with the business, the more likely it is that a court will find them to be a general partner and subject them to

general liability. This ability to protect some, but not all, of the partners is a unique trait of the limited partnership and is the primary reason why this form of business structure is not as popular as the limited liability company or corporation, both of which potentially offer protection to all of their owners.

Regardless of the problems that face the partners of a limited partnership, there are some benefits that the structure provides, which is why this model remains to this day.

Corporations

The **corporate business structure** is one of the oldest options for organizing a business or farming operation. It was established to provide liability protection; however, along with that liability protection came a disadvantageous tax situation known as **double taxation**. In this situation, the income generated by the corporation is taxed first at the corporate level and then again when the profits are distributed to shareholders in the form of a dividend. There are two types of corporations to consider: “C” corporations and “S” corporations.

The **“C” corporation** must have a board of directors, corporate bylaws and stock certificates for the initial owners of the corporation. It must also file formal paperwork or **articles of incorporation** in the state where it incorporates. Once incorporated, the “C” corporation must exercise nominal formalities, such as periodic meetings of the board of directors and record retention in order to maintain the protection provided by the corporate status if legal trouble arises in the future. Because of the complexity of the “C” corporation, the interests of many smaller farming operations may be better served by organizing under a different business structure.

The “S” corporation is very similar to the “C” corporation, but with some unique differences. The “S” corporation provides the liability protection of a “C” corporation, but it allows the corporation’s shareholders to elect against double taxation. Instead, the “S” corporation may choose to use flow-through taxation, where the profits are only taxed at the individual level.

The **“S” corporation** has the same initial formation requirements as a “C” corporation, but it requires some additional steps. In order for a business to incorporate as a “S” corporation, it must be a domestic corporation with only one class of stock, it may not have more than 100 shareholders, all of whom must be U.S. citizens or

resident, and profits and losses must be allocated to shareholders proportionately to each one’s interest in the business. If these requirements are met, the corporation may file the proper paperwork with the IRS to avoid the issue of double taxation entirely.

The last hurdle many smaller business operations face with the corporate business structure is exercising the required corporate formalities throughout the year and keeping accurate records to show they are keeping the corporate business separate from their personal business. Over a period of time, small corporations may not be as diligent in keeping their personal business from intermingling with the corporate business, which may result in the corporate business structure being ignored and subjecting the owners to personal liability, just as with a sole proprietorship or a general partnership. For this reason, many new businesses are using the limited liability company structure because it provides the protection of the corporation without the hassle of maintaining rigid corporate formalities.

Limited Liability Company

A newer business structure, and currently one of the most popular for farms and other businesses, is the **limited liability company (“LLC”)**. An LLC is a hybrid structure that basically offers the limited liability of a corporation with the flow-through taxation of a partnership. It is similar to the “S” corporation but without many of the corporate formality requirements.

In an LLC, the owners are referred to as **members** and LLCs can be either member-managed or manager-managed. A member-managed LLC may be governed by a single class of members (similar to a partnership) or by multiple classes of members (similar to a limited partnership). The LLCs operating agreement sets out the management structure to be used in the business.

To form an LLC, members must choose a business name that conforms to their state’s LLC rules and file formal paperwork (usually called articles of organization) with the state, along with the payment of a filing fee. Many states also require that the name must end with an LLC designator, such as “Limited Liability Company” or “Limited Company” or an abbreviation of one of these phrases (such as “LLC,” “L.L.C.” or “Ltd. Liability Co.”). While the benefits – including flow-through taxation, limited liability and relaxed corporate formalities – that come with forming an LLC are significant, there are also some drawbacks to organizing in this way.

One problem with the LLC is caused by its relative newness. The first LLC act was passed in Wyoming in 1977, and all other states have since followed suit. As a result, the law in this area is not fully developed and can cause some uncertainty if litigation ensues.

Another problem that occurs because of the evolving nature of this new form is the inconsistency of the vocabulary that describes members' duties. This can lead to confusion and potential problems in determining which individuals have authority to write checks, request credit or bind the LLC to contracts. State statutes that govern LLCs also differ substantially; however, this problem is not quite as relevant in agriculture because so many operations are located solely within one state.

Business organizations are creations of state governments and can differ somewhat from one state to another. Also, some states provide for business

organization options that may not be available in other states. Each form of organization offers advantages and disadvantages, which must be considered when determining what business entity to operate a farm business.

As agriculture has become more commercialized, the importance of business organizations has risen as well. For specialty crop producers, issues such as tax liability, business planning, estate planning, marketing and civil liability are important factors in determining under what business organization option the agricultural operation should operate.

For more information on the topic, please refer to the National Agricultural Law Center's Reading Room on Business Organizations located at <http://www.nationalaglawcenter.org/readingrooms/businessorganizations/>.

Chapter 5

Agricultural Labor

Farming is a labor-intensive operation, particularly for those specialty crop producers who harvest their crops manually. Labor is the largest variable expense for U.S. producers of specialty crops. As a result, another important area of law for specialty crop growers concerns employment and labor law. There are many state and federal laws in place regulating many varied aspects of employment, including wages, working conditions, immigration and employment opportunities.

Application of these laws to agricultural employees is often more complicated because special exemptions and exceptions are provided for their employers. As a result of these complications, agricultural employers must employ special vigilance to maintain compliance with the myriad of requirements. While some of the most important ones will be discussed – the Migrant and Seasonal Agricultural Worker Protection Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Federal Insecticide, the Fungicide, and Rodenticide Act, the Immigration Reform and Control Act and the National Labor Relations Act – there are also others that affect specialty crop employers and will be discussed more generally.

Migrant and Seasonal Agricultural Worker Protection Act

The **Migrant and Seasonal Agricultural Worker Protection Act of 1983 (MSPA)**, 29 U.S.C. §§ 1801-1872, was enacted to protect migrant and seasonal workers and is one of the most important agricultural labor statutes. The MSPA establishes, in part, wage and working condition requirements and requires the registration of farm labor contractors. **Farm labor contractors** are defined by the statute as any person other than agricultural employers, their employees or agricultural associations that recruit, solicit, hire, employ, furnish or transport any migrant or seasonal agricultural worker for money or other valuable

consideration. The only workers covered by MSPA are persons engaged in seasonal or temporary agricultural employment. The Act also distinguishes between workers who are away from home overnight and those who live near the work site.

Farm labor contractors are required to register with the United States Department of Labor before performing any labor contracting activities. If the labor contractor provides transportation for the workers, proof of vehicle safety and adequate insurance are also required. The contractor must also verify that the workers' housing meets safety and health standards for occupation. Employers who use the services of a farm labor contractor must take reasonable steps to determine that the contractor has a valid certificate of registration. This information may be verified by calling the U.S. Department of Labor's toll-free number at 1-866-487-9243.

Workers must be provided with written information about wages, hours, workers' compensation, working conditions and housing. This information must be supplied by the labor contractor or the employer at the time the workers are recruited. Payroll records must be kept by the contractor and agricultural employer, and a written earnings statement must be given to each employee.

The statute and regulations also allow the creation of **joint employment**. Joint employment makes employers liable for violations of MSPA even when the employees are hired through an independent farm labor contractor. The creation of joint employment is determined by a set of criteria that evaluate the relationship between the employer and the workers for evidence of control. The more control that an employer exerts over the farm labor contractor's workers, the more likely it will be determined that a joint employment situation has been created. Factors include such things as the power to hire or fire, wage determination, permanency of the work, the skill required to perform work and the location of the work.

The MSPA is enforced by the Department of Labor and includes both criminal and civil sanctions. However, it also creates a private right of action. The private action allows an aggrieved party to file suit in any federal district court with jurisdiction over the parties, regardless of the amount in controversy, citizenship of the parties or whether the parties have exhausted their administrative remedies.

Fair Labor Standards Act

The **Fair Labor Standards Act of 1938 (FLSA)**, 29 U.S.C. §§ 201-219, is a sweeping federal statute that sets minimum wages, requires overtime wages, restricts child labor and mandates some record keeping by employers. The FLSA covers employees of employers engaged in interstate commerce directly or engaged in the production of goods and services for interstate commerce.

Agricultural employers are exempt from certain requirements of the FLSA. Under FLSA agriculture is defined as farming and all its branches, raising live-stock or poultry, and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. Regulations and case law further define agricultural employees as persons employed in farming, by a farmer, or on a farm. The exemptions for agricultural employers are different for each broad coverage area of the FLSA.

Minimum wage requirements do not apply to employers that did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year. A **man-day** is any day during which an employee performs at least one hour of agricultural labor. Immediate family members of the agricultural employer, certain hand harvesters paid on a piece rate and employees primarily engaged in range production of livestock are not covered by the minimum wage requirements.

Generally, all persons employees employed in agriculture are exempt from the overtime wage requirements. Packers and processors of produce who work with multiple farms' crops are not covered by this exemption.

For those employers who are subject to the minimum wage or overtime pay provisions, the following information must be recorded:

- Personal information, including employee's name, home address, occupation, sex and birthday if under 19 years of age

- The hour and day on which the workweek begins
- Total hours worked each workday and each workweek
- Total daily or weekly straight-time earnings
- Regular hourly pay for any week when overtime is worked
- Total overtime pay for the workweek
- Deductions from or additions to wages
- Total wages paid each pay period
- Date of payment and pay period covered

Agricultural employers are allowed to hire children for agricultural labor below the general legal minimum age applicable to other industries. Outside of school hours, children 14 and older may be hired, 12- and 13-year-old children may be hired with parental permission and children under 12 may be hired on their parents' farm or with parental permission on a farm that falls below the 500 man-day employment requirement.

The FLSA provides the minimum standards that apply to employers. However, the statute requires compliance with other laws that allow for enforcement of state and local laws that may provide greater protections for agricultural workers than are contained in the FLSA.

Occupational Safety and Health Act

The **Occupational Safety and Health Act of 1970 (OSHA)**, 29 U.S.C. §§ 651-678, assures safe and healthy working conditions through the enforcement of workplace standards, provision of research and information in the field of occupational safety and health and aid to state programs that assure safe and healthful working conditions. Generally, employers must furnish employees with employment and workplaces free from recognized hazards that could cause death or serious injury and follow legal standards of occupational safety and health, and employees must follow all rules and regulations that apply to that employee's conduct.

Agriculture is covered under the OSHA in areas of temporary labor camps, tractor roll-over protection, guarding of farm field equipment, storage of anhydrous ammonia, field sanitation, hazard communication, cadmium usage and logging operations. Two exemptions are available for agricultural employers to remove the majority of employers from coverage under the

Act. First, immediate family members of the farm employer are not considered employees and thus are not covered. Second, Congress has repeatedly included language in Department of Labor appropriations bills to exclude agricultural workers in operations that have had ten or fewer non-family employees within the last 12 months unless a temporary labor camp was maintained during the same time period. Thus, OSHA regulations apply to less than 10 percent of farm employers and about half of the hired farm workers.

Temporary labor camps, for example, must meet OSHA standards that have been developed for the site, shelters, the water supply, toilet facilities, lighting, insect and rodent control, refuse disposal, first aid and the reporting of communicable disease violations, as well as for the construction and operation of kitchens, dining hall and feeding facilities.

OSHA is authorized to conduct workplace inspections to ensure compliance of covered workplaces. These inspections are given without advance notice but must take place at a “reasonable time.” Penalties are proposed based on the severity of conditions, the good-faith effort of the employer to remedy problems, the employer’s size and the firm’s history of OSHA violations.

Federal Insecticide, Fungicide, and Rodenticide Act

The **Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (FIFRA)**, 7 U.S.C. §§ 136-136y, is a broad statute regulating the use of pesticides through a risk-benefit analysis. It mandates that pesticides be registered and labeled before use. When used according to its label instructions, the pesticide must perform its intended function while not causing unreasonable risk to human health or the environment. The Environmental Protection Agency (EPA) regulates the registration and labeling of pesticides.

As part of its regulation, the EPA has issued a Worker Protection Standard (WPS) and a Certification of Pesticide Applicators Standard (CAS) in order to protect the safety of workers potentially exposed to pesticides. The WPS has a broad application and covers most agricultural employers, including owners or managers of operations that produce agricultural plants, operators who hire workers for operations that produce agricultural plants, businesses that apply pesticides for operations that produce agricultural plants

and crop advisor businesses. The WPS includes the following worker requirements:

- Only appropriately trained and equipped workers are allowed in the area during pesticide application.
- Workers may enter a treated area before the restricted entry interval has expired only if the worker will have no contact with pesticide residue, will not be performing hand labor or is entering for a short term, emergency or specifically exempted task.
- Workers must be provided with protective equipment in proper working order.
- Workers must be notified of pesticide applications, treated areas must be posted and/or oral warnings must be given to workers as directed by labeling.
- Workers must have received safety training during the past five years before being allowed to enter a treated area during a restricted entry interval.
- Pesticide safety poster must be on display in a central location.
- Decontamination site must be provided and maintained if workers are required to enter treated area during restricted entry area and following 30 days.
- Emergency assistance must be provided to any worker when there is reason to believe the worker was poisoned or injured by pesticides.

Further, it contains several pesticide handler requirements as well.

- Handler must provide information to handler employer prior to applying any pesticide.
- Only appropriately trained and equipped handlers allowed in area being treated.
- Handler employee must have knowledge of label, safe use of equipment and posted information before starting handling activity.
- Handler fumigating in a greenhouse must be in continuous voice or visual contact with another handler.
- Handlers must use protective equipment specified on the label for use with the product.
- Handlers must be provided with a decontamination site.
- Emergency assistance must be provided to any worker when there is reason to believe the worker was poisoned or injured by pesticides.

Retaliation against workers who attempt to comply with the safety requirements is also prohibited.

The CAS requires that workers must be certified before they may apply or supervise the application of restricted-use pesticides. Restricted-use pesticides are identified by the EPA. The certification programs are carried out by state agencies, but the programs must meet EPA approval.

The WPS covers all pesticide use unless a specific exception or exemption exists. These include exceptions for certain government pest control, application on livestock or in livestock areas, application on noncommercial plants, and exemptions for farm owners and their family of some entry restrictions, certain notice and information requirements, and emergency assistance provisions.

States generally enforce the safety requirements and licensing programs if they have met EPA approval. State laws may also provide more stringent protections for workers.

Immigration Reform and Control Act

The **Immigration Reform and Control Act of 1986 (IRCA)**, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending various sections of 8 U.S.C.), limits unauthorized immigration into the United States. The statute creates employer sanctions for the employment of unauthorized aliens. All employers are required to verify the employment eligibility status of employees. Employers must examine approved documents to determine if the potential employee is properly identified and authorized to work in the United States. Once verified as eligible, employers may not discriminate against employees based on citizenship or national origin.

The Immigration and Nationality Act as amended by IRCA also creates the current H-2A program. This program allows agricultural employers that have a shortage of qualified domestic workers to import nonimmigrant aliens into the United States. These workers are permitted to remain only temporarily for the purpose of seasonal agricultural work.

National Labor Relations Act

The **National Labor Relations Act of 1935 (NLRA)**, 29 U.S.C. §§ 151-169, protects the rights of workers to participate or not participate in organizations that

attempt to collectively bargain for the mutual aid and protection of workers. The impact of this statute on agricultural labor is through a broad exclusion – agricultural laborers are specifically excluded from the definition of covered employees. There is no federal protection for agricultural laborers to form organizations in an effort to promote their interests; however, state laws may confer such a right to farm workers.

Other State and Federal Statutes

Many other state and federal labor statutes apply generally to all employers, most of whom provide agricultural employers no special exemptions and, therefore, affect agricultural employers in a manner similar to other employers.

Workers' compensation laws are designed to provide employees with immediate benefits in the case of an accident or work-related illness and to limit employer liability from negligence lawsuits. These laws are unique to each state, and each state's coverage of agricultural workers may be voluntary or mandatory and may or may not have some exemptions for certain employers.

The **Personal Responsibility and Work Opportunity Reconciliation Act of 1996** requires states to compile directories of new hires in order to facilitate the collection of delinquent child support.

The **Family and Medical Leave Act of 1993** allows employees to take a certain amount of unpaid leave from work for covered family or medical reasons. Generally, employers must continue health insurance coverage during the leave, and upon return the employee must be given the original or an equivalent job. The law only applies to employers with 50 or more employees during 20 or more weeks in the current or previous year.

State and federal equal employment opportunity statutes both prohibit discrimination by employers against employees for such things as gender, race, color, religion, national origin, age or disability. The federal statutes generally apply only to larger employers.

The major federal employment tax laws – **Federal Insurance Contributions Act, Federal Unemployment Tax Act** and **Federal Income Tax Codes** – generally apply to all employers. These tax laws require employers

to withhold wages from employees, match certain funds withheld from employee wages and forward these withheld and matching funds to the United States Treasury. Certain information collection and notification are also required of employers. Agricultural employers may have special rules regarding their duties under these laws based on the type of agricultural work performed, the amount of wages paid or the number of employees.

For more information on federal labor laws and regulations, the Economic Research Service has released a publication titled *Summary of Federal Laws and Regulations Affecting Agricultural Employers, 2000*. It is available at <http://www.ers.usda.gov/publications/ah719/>. Additionally, more information is available at the National Agricultural Law Center's Reading Room on Labor Law at <http://www.nationalaglawcenter.org/readingrooms/labor/>.

Chapter 6

Food Safety and Specialty Crops

The Necessity of Food Safety Regulation

The United States is generally regarded as having one of the safest food supplies in the world because safety improvements such as pasteurization, sterilization and proper canning have curtailed many problems inherent in the food supply of previous generations. However, foodborne illness is still a serious public health problem. Advances in technology allow us to detect different pathogens at much smaller levels than ever before, and when coupled with ever-evolving diseases, the Centers for Disease Control and Prevention (CDC) estimates there are more than 250 different foodborne diseases caused by a variety of bacteria, viruses and parasites. These diseases translate into a monetary cost to the United States, according to CDC estimates, of over \$23 billion a year and a human cost of 76 million illnesses, 300,000 hospitalizations and approximately 5,000 deaths annually.

Foodborne illness outbreaks are becoming increasingly much more difficult to track because of national and international food systems Americans enjoy. An outbreak of foodborne illness that occurred years ago was typically confined to a small community because food was grown, stored, prepared and consumed within that area. Since fewer companies produce more food, the impact of a single contamination event can ripple across the country – or even the world – as food is shipped out. Another possible reason for the rise in foodborne illness is the medical and technological advances that have been made within the last 25 years. These advances have made the detection of foodborne illness much simpler, so illness caused by contaminated food was often written off as a stomachache and nothing more.

Specialty crops are uniquely susceptible to the presence of foodborne diseases for several reasons. Many specialty crops are eaten uncooked or with

minimal processing. Further, it is often difficult to remove pathogens once they attach to surfaces, since infiltration and internalization of pathogens is well documented for a variety of produce. Finally, the highly perishable nature of many specialty crops make the sources of outbreaks harder to investigate. As a specialty crop producer, it is important to know the laws that have the potential to affect your operation so the risks of consequences resulting from foodborne illnesses are minimized.

The Federal Agencies That Regulate Food Safety

Food safety laws and regulations have traditionally been implemented in an unorganized manner, typically in response to food-related emergencies. As a result, the federal food safety structure consists of numerous federal agencies with authority to enforce some, but not all, of the many different food regulations.

Although there are over 10 different federal agencies that maintain regulatory control over different aspects of food safety within the United States, two of them clearly stand out as the most important. The Food and Drug Administration (FDA) and the Food Safety and Inspection Service (FSIS) within the Department of Agriculture enforce the vast majority of food safety statutes and regulations between them. The general rule of thumb is that the FSIS regulates meat and poultry products, while the FDA handles the remaining food groups.

However, there is a significant “gray area” where multiple agencies are responsible for food safety at some point in the food production process or several agencies may have joint jurisdiction over the food. For example, consider a can of soup. The FDA has regulatory control over the vegetables in the soup as well as the factory where it was canned. But if the soup contains meat, FSIS is involved in the inspection of the

meat. Finally, if the animal that provided the meat was given antibiotics or growth hormones before it was slaughtered, the FDA has regulatory authority over those drugs and their usage.

While FDA and FSIS regulate most food safety issues, the means by which they do it differ significantly. Meat products, which fall under FSIS jurisdiction, are inspected prior to the food being sold for consumption. USDA meat inspectors are sent to every meat packing plant where they are required to be on duty both before and after slaughter. FDA regulates a much wider array of food products under a smaller federal appropriation. For example, the FDA currently has oversight of more than 44,000 U.S. food manufacturers as well as over 100,000 additional registered food facilities, including warehouses and grain elevators. Because of this, the FDA uses prior approval of foods and additives as well as inspections of food preparation facilities to better leverage its resources.

Enforcing Food Safety Regulations on Specialty Crops

For the purposes of specialty crops, the most relevant actors will often be the FDA and the state government organizations they work with. Under the federal **Food, Drug, and Cosmetic Act** and the **Public Health Service Act**, the FDA is granted broad power to “provide for such inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings[.]” What this means is that the FDA may have the authority to regulate on-farm activities as well as the food processing plants where they have traditionally spent most of their time and resources. However, outbreaks of foodborne diseases, such as the salmonella found in peppers that infected more than 1,300 people in 43 states, have caused Congress to look more closely at food safety standards for farms. This, in turn, may lead to more FDA inspections on the farm level.

The FDA does release **good agricultural practices**, which provide guidance but not binding regulation, to reduce certain risks before a crop is actually harvested. Further, the 111th Congress has several bills before it that could create on-farm safety standards specifically geared towards fruits and vegetables. The bills before Congress all delegate more regulatory authority to various federal agencies (primarily the FDA and the

USDA), but the bills leave the specific regulations up to the agencies. For example, Senate Bill 510 requires that the FDA set forth “practices as the Secretary determines to be reasonably necessary to prevent the introduction of known or reasonably foreseeable biological, chemical, and physical hazards, including hazards that occur naturally, may be unintentionally introduced, or may be intentionally introduced, including by acts of terrorism, into fruits and vegetables that are raw agricultural commodities and to provide reasonable assurances that the produce is not adulterated.” Many bills would also require the farmer to keep detailed records so that outbreaks of foodborne diseases could be traced back to the farm or facility where the contamination occurred. Concerns by small producers have been voiced citing that record keeping requirements and proposed food safety regulations may be overly burdensome on smaller producers; however, none of the bills currently before Congress address this issue.

Current Liability Issues Facing Specialty Crop Growers

While federal regulations may be passed in the near future that will affect the production of specialty crops, there are legal liability issues that confront growers now. Specialty crop growers are under the same general civil liabilities that everyone within the United States faces. People who consume the farmer’s products and are made ill because of them may have the ability to recover damages from the farmer through a civil lawsuit. The three major theories that expose a farmer to civil liability are negligence, strict product liability and warranty theory.

Negligence liability is caused by the failure of a person to exercise reasonable care and, as a result of that failure, another individual was injured. The theory is applied broadly, and many, if not most, civil suits across the country are brought under this theory.

For example, a farmer fertilizes his vegetables with animal manure that contains *E. coli*. A consumer becomes ill as a result of eating the vegetables. Would a person exercising reasonable care have applied animal manure to the vegetables? Would a reasonable person have taken steps to wash or sterilize the vegetables before distributing them? Did the farmer take reasonable steps to prevent the spread of foodborne diseases?

These questions and many more could be evaluated by a court to determine whether the farmer was negligent. There are steps farmers can take to reduce the likelihood of civil liability. Using good agricultural practices and documenting the steps taken to ensure food sold is wholesome are relatively easy steps many farmers can take. However, the issue of liability in negligence cases often hinges on what the court finds a person exercising reasonable care would do in a like situation.

Another legal theory that specialty crop producers may be subject to is **strict liability**. Typically, this cause of action is used when an individual introduces an unreasonably dangerous product into the stream of commerce. Under strict liability, there is no “reasonable care” standard because the action or product is recognized as being hazardous or inherently dangerous. If an injury is caused while performing the inherently dangerous activity or selling a hazardous product, then civil penalties should be assessed. For example, the application of pesticide onto a field of vegetables may be considered as an inherently dangerous activity, especially if the applicator does not follow the instructions for application. Although it is possible for strict liability to be used in some instances while growing or selling specialty crops, it is not as likely to occur as an action in negligence.

A third legal theory that may expose specialty crop growers and sellers to civil liability is under warranty theory. There is an **implied warranty of merchantability** most states include in their commercial code that deals with the buying and selling of goods. This theory, in its simplest interpretation, states that if a merchant (someone who is in the business of selling a particular product) sells a good then they are guaranteeing it to be fit for the ordinary purpose for which it was sold. In other words, a farmer who grows and sells specialty crops guarantees that the fruit and vegetables he or she

is selling are generally fit for human consumption. The reason why this theory is mentioned last is that it applies to **merchants**, and traditionally, courts have been very reluctant to find that farmers are merchants. However, it is worth mentioning because the traditional views courts and the general public ascribe to farmers have changed in recent years and will undoubtedly continue changing into the future.

The rise in detected foodborne illnesses across the country has increased the pressure on federal and state governments to take actions to ensure the safety of our food supply. Many past outbreaks were attributed to contaminated meats; however, nationwide outbreaks traced back to spinach, tomatoes and peppers have shown that specialty crops are also potential safety risks. The producer’s ability to mitigate this risk through the exercise of proper food safety practices will be a necessary skill if the producer wants to maintain or expand the business. The technology for identifying and tracing foodborne pathogens has made rapid advancements in the not too distant past, and nothing indicates that such progress will halt in the future. This means that, even in the absence of comprehensive federal and state food safety regulation reform for specialty crops, the ability of consumers to trace back foodborne pathogens to their source can enable them to bring civil suits against the grower. When the increased traceability is combined with the strong likelihood of some form of state and federal food safety regulation for specialty crops, the need for proper food handling processes and good record keeping becomes critical for any grower to prosper.

For more information on the topic, please see the National Agricultural Law Center’s Reading Room on Food Safety at <http://www.nationalaglawcenter.org/readingrooms/foodsafety/>.

Chapter 7

Third-Party Audits of Specialty Crop Operations

Recent outbreaks of foodborne illnesses associated with fresh produce have led consumers to question the safety of the food products – fruits, vegetables, meats, processed, etc. – they consume. We have recently witnessed the intense, around the clock television coverage of spinach with *E. coli* 0157:H7 (September – October 2006) and peanut products contaminated with salmonella (2008-2009), to name a few. We also heard the negative publicity all summer falsely implicating tomatoes with salmonella (Summer 2008), when in reality the contamination was from jalapeno peppers. The level of coverage on these and other incidents along with the sometimes conflicting or erroneous reporting have raised consumer concerns and awareness of the safety of their food.

People involved in food safety on a daily basis know that a 100 percent totally safe food is economically impossible, but we need to strive to reduce the probability to as low as realistically possible. One avenue to alleviate consumer concerns and to protect growers and retailers from liability is third-party audits of production and processing facilities. A **third-party audit** is when a totally independent party to the business visits the farm/business production and/or processing area and evaluates the field and/or facility in terms of its ability to produce safe, quality foods. These audits assess business standard practices and procedures. This chapter provides a brief introduction to food safety audits along with resources to assist businesses in understanding the sometimes challenging landscape of food safety.

To a large degree, these large publicized food recalls are in general erroneously believed to be the result of large corporate farming practices. As a result, an increasing number of consumers are buying locally grown produce. They feel good about buying home-grown produce at farmers' markets, roadside stands and neighborhood markets, since this allows them to buy directly from people they know and trust. This

buying trend has opened new markets to small- and medium-sized farms that sell at these local outlets. To maintain and protect these emerging markets, it is more important than ever for growers and food businesses to ensure they have appropriate processes in place to reduce the likelihood of food safety incidents. These very markets could be ignored by consumers if there were only a few instances of foodborne illnesses associated with "local" food products. Since consumers are feeling good about "buying local," grocery stores, restaurants and other retailers are increasing the level of locally grown products. A few instances of foodborne illness would undoubtedly greatly impact not only the retail buyer's level of interest but also the supplier requirements.

Historical Perspective

Up into the 1980s, most people believed that almost all foodborne illnesses were the result of eating meat and meat-related products. This was mainly because most analyses methods were not as good as they are today and pathogens or food poisoning microorganisms were looked for primarily in meat products. Another issue that has changed over time is the relatively low level of consumer awareness and concern for foodborne illnesses and the reporting of such instances. Most foodborne illnesses are not reported since most people think they have the flu or some other type of illness. They are even more convinced of the flu when the whole family suffers the contagious nature of the perceived flu when, in fact, the whole family got foodborne illness from eating the same contaminated food.

Over the last decade, there has been a sharp increase in the number of food illness reports. This increase is the result of several factors including changes to the dietary guidelines, consolidation of food industry and advances in technology and/or equipment. The 2005 Dietary Guidelines for Americans recommended

eating at least 4½ cups (9 servings) of fruits and vegetables per day. This increased consumption of fruits and vegetables resulted in more foodborne illnesses from fruits and vegetables than from meat and meat-type products.

Another more recent technological change in the food chain is the long distribution time. Several decades ago, it was very difficult to ship fruits and vegetables long distances without spoilage. In today's world, food is often shipped across the country or even imported from foreign countries. This has resulted from the development of more resilient species of fruits and vegetables, better shipping conditions (i.e., gas ripening, refrigeration) and faster distribution times. However, with the increased distance traveled, there are more times when things can go bad (refrigeration problems, dock labor strikes, storms at sea) and increased time for bacterial growth and increased cost of shipping. For these reasons, some people want to buy locally in addition to keeping the money local.

Hazards in Foods

Growers and handlers of fresh produce must carefully control the factors that can affect the safety of their produce. There are basically three types of hazards that can affect produce – biological, chemical and physical. A **biological hazard** results from bacteria, viruses and molds (fungi) that produce toxins or, when ingested, multiply and cause foodborne illness. These microorganisms can contaminate produce or proliferate at any time – from when it is in the field up to the time it is eaten. **Chemical hazards** are those that arise when food is contaminated with harmful chemicals to include fertilizers, pesticides, herbicides and chemicals contained in runoff water. **Physical hazards** are those materials that are not supposed to be in the product – stones, sticks or other foreign material like glass, metal objects, etc.

These hazards are present in both the production and processing phase for most food products. Careful evaluation of the critical points in the food products development phases is vital to understanding the potential for the presence of these hazards. By inserting some simple reporting and tracking processes, growers can make huge strides in not only understanding the potential presence of hazards but also implementing strategies to reduce and/or eliminate the hazard.

Good Agricultural Practices (GAP)

GAP is short for “Good Agricultural Practices.” **Good Agricultural Practices** are recommended procedures producers should use to minimize the risk of produce contamination. The procedures are a scientifically based protocol, developed by Food and Drug Administration (FDA) in collaboration with U. S. Department of Agriculture (USDA), to establish standard operating guidelines for businesses to follow. These wide-ranging standards include testing for the presence of certain bacteria that are of serious health concern and other environmental hazards, such as hazardous chemicals and physical hazards like stones and glass fragments. The extended offshoot of GAP is GMPs or GHPs, which are “Good Manufacturing or Handling Practices.” These are recommended procedures to follow after harvesting produce that reduce the probability of produce becoming a potential hazard. In many cases, the term GAP applies to both GAP and GMPs/GHPs.

Good Agricultural Practices started in 1997-1998 with the booklet entitled *Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables*, which was more of a guidance document versus a regulation or law. Several years later, *Food Safety Begins on the Farm: Good Agricultural Practices for Fresh Fruits and Vegetables; A Growers Guide* was published as a followup to the previous booklet. Both of these booklets are in the references section and make excellent reading for businesses interested in understanding the comprehensive nature of food safety.

The goal of the GAP program was the fact that prevention of contamination is much more effective than corrective actions after contamination has already occurred. Good Agricultural Practices are scientifically based guidelines to reduce or eliminate microbial contamination of fresh produce in the field and in packing houses.

Potential Sources of On-Farm Contamination

There are many possible ways for produce to become contaminated by harmful microorganisms during production, harvest and handling. While contamination can occur anywhere in the flow of food from farm to fork, our focus begins on the farm. Of

particular concern are manure management, water use and farm worker health and hygiene. Sources of potential on-farm contamination include:

- Soil
- Irrigation water
- Animal manure
- Inadequately composted manure
- Wild and domestic animals
- Inadequate field worker hygiene
- Harvesting equipment
- Transport containers (field to packing facility)
- Wash and rinse water
- Unsanitary handling during sorting and packaging, in packing facilities, in wholesale or retail operations and at home
- Equipment used to soak, pack or cut produce
- Ice
- Cooling units (hydrocoolers)
- Transport vehicles
- Improper storage conditions (temperature)
- Improper packaging
- Cross-contamination in storage, display and preparation

These are the critical areas for growers/processors to consider as they evaluate their food safety program. A few simple steps to monitor or evaluate each of the above areas can greatly reduce the likelihood of product contamination.

Third-Party Audits

Almost every major food company requires that their suppliers be inspected or audited on a regular basis. The audits can be in different forms – survey or physical – and may vary in required re-certification, although most audits are conducted on an annual basis. A **survey audit** is used by a company to gain some information from the supplying company without physically visiting the supplier. During **physical audits**, the purchasing company physically visits the premises of the supplier. Most audits are a blend of both survey and physical audits. The auditing firm will probably want to see records and documents related to your pest control program, if required; a list of training of your employees; a HACCP plan, if you have one; and any type of record-keeping control program they think is important to the safety of your product.

In more recent years, major food companies are requiring **third-party audits**. These are survey and physical audits where an independent third party

audits your organization or farm for the major food company. Depending on the size of your operation and the information needed by the food company, these audits can last one-half to three days. They are generally very thorough and quite complete. The audits are designed to effectively determine if your operation is maintaining an adequate food safety program that provides evidence to minimize the probability of a recall or, worse yet, a foodborne outbreak.

There are currently several auditing programs, most of which are private. The USDA currently has a program known as the “Fresh Produce Audit Verification Program.” The information on the program can be found at <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram>.

The items audited include the following categories:

- **General Questions** – Asks if operation has a food safety program and about worker health and hygiene.
- **Part 1. Farm Review** – Reviews the farm operations per source of water, sewage treatment, animals and livestock, manure usage and soil history.
- **Part 2. Field Harvest and Field Packing Activities** – Reviews field sanitation and hygiene and harvesting and transportation operations.
- **Part 3. House Packing Facility** – Reviews receiving operations, washing and packing line, packing house worker hygiene, packing house general housekeeping.
- **Part 4. Storage and Transportation** – Reviews product, containers and pallets, pest control, ice, storage and temperature control.
- **Part 5. Traceback** – Reviews if a traceback program is established and specifics about such a program.
- **Part 6. Wholesale Distribution Center/Terminal Warehouses** – Reviews the distribution center/warehouse relative to operations such as receiving, sanitation and temperature control, pest control, repacking or reconditioning, shipping/transportation.
- **Part 6A. Traceback for Wholesale Distribution Center/Terminal Warehouse** – Reviews the distribution center/warehouse traceback program.

- **Part 7. Preventive Food Security Procedures** – Reviews the programs used to secure employees/visitors procedures, secure facility procedures.

Most of the above parts are self-explanatory except the terms *traceback* and *food security*. **Traceback** refers to your methods of identifying your containers and retrieving them from the marketplace so they can be effectively recalled if the need should arise. The term **food security procedures** refers to your methods of preventing “intentional contamination” such as a bioterrorism attempt or the actions of a disgruntled employee finding a way of getting even. These procedures include using a visitor log-in sheet, perimeter security such as a fence, limiting employee access, deliveries and similar procedures.

Operations that have gone through the USDA audit can be listed on the USDA’s website, and the checklist of what items the USDA audit will cover is available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5050869>.

For a list of GAP/GHP Certified Farms in Arkansas, see <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5080707>.

If you live in Arkansas and are interested in scheduling a third-party audit, check with David Fort at the Arkansas State Plant Board (501-837-8402; david.fort@ASPB@ar.gov).

There are also several private companies that conduct these audits. A popular private company within the Arkansas region that conducts many food safety audits is Primus. The URL lists their products: http://www.aragriculture.org/marketing/ag_handling_presentations/Primuslabs.pdf.

Most of the private companies offering audits will look at similar areas as the USDA audit examines, but they may differ slightly. It is important to remember when researching potential audit firms that your business is purchasing a service. Therefore, it is important to note the company’s reputation, level of service and ability to serve your needs. It is also important to note whether or not the audit firm’s results will be acceptable to the respective retailers. A number of retailers will only accept audits from certain firms, so make sure you are dealing with an approved firm that will meet

your needs. If you are working with a specific retailer, it is a good idea to identify their pre-approved audit firms or check to see if their certification will be accepted.

The Future

Although the above may sound quite complex, it is just the basics and a start to developing newer programs that focus on food product safety with increased accountability and verification. There are numerous comprehensive programs already in existence to guide your efforts. For example, SQF (Safe Quality Foods) uses HACCP methodology to address both food safety and food quality issues. The FSSC 22000 Food Safety Certification Standard is a program approved by the Global Food Safety Initiative (GFSI) that is accepted globally as a food safety program and has numerous levels of food safety protocols. These programs, like the USDA procedure, help to ensure food safety but go one step further to ensure the food quality as well.

Selected Readings

1. Washington State Department of Agriculture. *USDA Good Agricultural and Good Handling Practices: An Audit Verification Program for the Fresh Fruit and Vegetable Industry*. http://www.agr.wa.gov/Inspection/FVInspection/docs/GHP_GAP_Presentation.pdf
2. *Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables*. <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/ucm064574.htm>
3. *Food Safety Begins on the Farm. A Grower’s Guide*. http://wcmorris.com/gap/files/cornell_guide.pdf
4. Brady, P.L., and J.R. Morris. 2005. *Production and Handling Practices for Safe Produce*. <http://arkansasagnews.uark.edu/978.pdf>
5. Cornell University has an excellent website with numerous GAP materials <http://www.gaps.cornell.edu/indexhighspeed.html>

Chapter 8

Food Labeling

The requirements and restrictions on food labels are an important part of the food safety and regulation system in the United States. The topic of **food labeling**, however, is very broad, encompassing several specific areas of the law that may affect specialty crop producers. These areas include nutritional labeling, country of origin or “COOL” labeling, descriptive claims, organic labeling and irradiation labeling.

In the United States, these areas are generally regulated by the USDA and the FDA. Regulation based on food labeling began in 1938, when the **Food, Drug, and Cosmetic Act (FDCA)** was passed. The FDCA focused on the issues of food misbranding and adulteration and serves as the basic framework for food regulation by the FDA and the USDA. It created food standards, authorized inspections of factories and provided for court injunctions as remedy for violations, in addition to the already existing seizure and prosecution remedies. The FDCA has been amended a number of times since 1938, and related laws have been enacted.

Nutrition Labeling

In 1990, Congress passed the **Nutrition Labeling and Education Act (NLEA)**, which required uniform nutrition labeling. These standards focus on the relationship between food contents and healthy diets, and they are meant to provide adequate information to consumers regarding the content of food, including a disclosure of the food’s nutritional properties and added nutrients. As a result of these statutes, food labeling addresses nutritional information and is required for most prepared foods, such as breads, cereals, snacks, desserts and drinks. Food items, including specialty crops that have been canned or frozen, are also required to contain nutrition information. However, nutrition labeling for raw produce (fruits and vegetables) and fish remains voluntary.

Nutrition labeling, as a result of NLEA, has become widely standardized and defined. For foods that must be labeled (and those that choose to be), the label must feature a prominent **product identity statement**, ensuring that consumers are able to identify the product and obtain important information about the type and form of food contained in the package. Other labeling requirements ensure that the **net quantity of contents**, or package amount, is listed on the package, as well as a list of all ingredients listed in descending order of predominance and in specifically defined wording. Other regulations require specific wording, type size and placement of the labeling information.

In order to ensure consistency, both FDA and USDA regulations are very explicit about the layout of the Nutrition Facts panel, detailing the type of information that may be included as well as the format and order. Nutrition labels are required to provide information on 14 nutrients, which must appear in a specific order on the label. However, in addition to information on the nutrient by measure of weight (gram or milligram), the **percent daily value** must also be declared. This serves to standardize food labeling so people who are unfamiliar with the recommended daily value to measure and evaluate foods based on their nutrient contents.

Finally, food labels must also outline the serving size, which is the amount of food upon which the nutrient content is based. In order to ensure consistent serving sizes between similar products, NLEA defines **serving size** as the amount of food customarily eaten at one time. While, the serving size included on the Nutrition Facts panel may vary slightly between similar products, it is based on the Reference Amounts Customarily Consumed Per Eating Occasion (RACC), as established by the FDA. The serving size is the household measure (e.g., cups, tablespoon, piece, slice, fraction or container) closest to the RACC.

While raw fruits, vegetables and fish are not required to label their products with nutrition information, in order to encourage retail stores that sell those products to participate in the voluntary labeling program, the FDA has created downloadable posters for printing. The posters show nutrition information for the 20 most frequently consumed raw fruits, vegetables and fish in the United States, and stores are encouraged to download the posters, print, display and/or distribute them to consumers in close proximity to the relevant foods in the stores. The posters are available at <http://www.fda.gov/Food/LabelingNutrition/FoodLabelingGuidanceRegulatoryInformation/InformationforRestaurantsRetailEstablishments/ucm063367.htm>.

For more information, please refer to the National Agricultural Law Center's Reading Room on Food Labeling available at <http://www.nationalaglawcenter.org/readingrooms/foodlabeling/>.

COOL Labeling

In the 2002 and 2008 Farm Bills, Congress included language to require **Country of Origin Labeling** or **COOL**, which mandated that retailers notify their customers of the country of origin of muscle cuts and ground beef (including veal), lamb, pork, chicken, goat; wild and farm-raised fish and shellfish; perishable agricultural commodities; peanuts; pecans; ginseng; and macadamia nuts. Specialty crop producers should be aware of this labeling concern because the definition of **perishable agricultural commodities** includes "fresh fruits and fresh vegetables of every kind and character." However, it is important to note that retailers who sell less than \$230,000 of fresh fruits and vegetables in any calendar year are not required to furnish COOL labeling on their products.

It is the retailer, rather than the producer, who has the primary burden of providing labeling to consumers under the COOL statute. COOL information must be provided on a clear and visible sign on the commodity itself, the package, the display or the holding bin at the final point of sale to consumers. Retailers may also be required under the law to maintain records sufficient to enable an auditor to determine compliance with the law, while suppliers to the final retailers are required to provide necessary country of origin information to the retailer to ensure compliance with the law.

Because country of origin labeling is only required for larger retail facilities and because the responsibility to ensure compliance rests with the retailer rather than with the producer, COOL is something that should be considered, but it is not necessarily an integral part of every specialty crop operation.

For more information, please refer to the National Agricultural Law Center's Reading Room on COOL, available at <http://www.nationalaglawcenter.org/readingrooms/cool/>.

Descriptive Labeling

Another labeling issue that affects specialty crop producers occurs when engaging in descriptive labeling of their product for the purpose of marketing their crop. Commonly used words such as **fresh** or **natural** have specific meaning.

The word "fresh" has a precise regulatory meaning, specifically that "the food is in its raw state and has not been frozen or subjected to any form of thermal processing or any other form of preservation." However, the term "fresh frozen" or "frozen fresh" can be used as long as the food was quickly frozen while still fresh, and those terms can still be used if food is simply blanched before being frozen. Food that is refrigerated, treated with approved waxes or coatings, treated post-harvest with approved pesticides or cleaned with a mild chlorine wash or mild acid wash may also use the word "fresh" in labeling the product.

The word "natural," on the other hand, is not so clearly defined. Instead, both FDA and USDA have policies regarding natural food labeling. They both provide that natural means that no artificial or synthetic ingredients have been added. USDA specifically prohibits artificial flavor, coloring ingredients or chemical preservatives but allows minimal processing, specifying that such processing is limited to traditional processes used to make food safe for human consumption, ones that preserve it and those that do not alter the raw product. On the other hand, FDA allows a limited group of chemical reactions such as roasting, heating and enzymolysis that can be used to produce natural flavors.

For more information, please refer to the National Agricultural Law Center's Reading Room on Food Labeling available at <http://www.nationalaglawcenter.org/readingrooms/foodlabeling/>.

Organic Labeling

When and if to label a product **organic** is another potential concern for specialty crop producers. For foods to be labeled and sold as “organic,” they must be produced and processed according to the National Organic Program standards. The farm where organic food is grown, as well as the companies that handle or process the organic food, must meet the USDA organic standards.

There are four approved organic labeling claims based on four distinctions of organic content. To label a product **100 percent organic**, the product must be composed of wholly organic ingredients and must not have any nonorganic ingredients or additives. To label a product **organic**, the product must contain at least 95 percent of organically produced ingredients. To label a product **made with organic ingredients**, the product must contain 70 percent organic ingredients. Other products with **less than 70 percent organic** ingredients can only specify the organic ingredient(s) in the ingredients statement. The USDA seal can be placed only on foods that qualify as “100 percent organic” and “organic.” However, it is important to note that operations with a gross annual income from sales of organic products totaling \$5,000 or less are not required to obtain NOP certification.

For those operations that exceed the \$5,000 threshold and must obtain NOP certification in order to sell their products as “organic,” NOP outlines production and handling standards, which set forth requirements for land management; soil fertility and crop nutrient management practices; seeds and planting stock use; crop rotation; crop pest, weed, and disease management; and the harvesting of “wild crops.”

Potential organic producers must set forth an **organic system plan**, which is “[a] plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes a written plan concerning all aspects of agricultural production or handling...” It must describe the practices and procedures that the producer or handler will implement and maintain in its operation and explain how often these practices and procedures will be performed. Further, it must describe the record keeping system that a

producer or handler will use in its operation to ensure compliance with the record keeping requirements for certified operations.

An organic system plan is submitted to a certifying agent. After review and approval of the plan and an on-site investigation, the agent decides whether the operation has met the requirements and can be certified organic. The certification is then subject to periodic review and reevaluation.

For more information, please refer to the National Agricultural Law Center’s Reading Room on the Organic Program at <http://www.nationalaglawcenter.org/readingrooms/organicprogram/>.

Irradiation Labeling

In response to the 2006 *E. coli* outbreak, on August 22, 2008, the FDA published a final rule allowing the use of irradiation of fresh iceberg lettuce and fresh spinach in order to control harmful bacteria and other microorganisms and keep longer without spoiling. The products that may be irradiated include loose, fresh iceberg lettuce and fresh spinach as well as bagged iceberg lettuce and spinach. However, the FDA requires that foods which have been irradiated bear the **radura** logo along with the statement **treated with radiation** or **treated by irradiation**. Additionally, leafy greens that have been treated with irradiation are not prohibited from using the word “fresh” as part of their labeling and marketing scheme.

Because of the extensive range of food labeling requirements, it encompasses several specific areas of law. As a specialty crop producer, it is important to be familiar with all of those areas. The requirements and restrictions on food labels are an important part of the food safety and regulation system in the United States. The topic of **food labeling**, however, is very broad, encompassing several specific areas of the law that may affect specialty crop producers. These areas include nutritional labeling, COOL labeling, descriptive claims, organic labeling and irradiation labeling.

For more information, please refer to the National Agricultural Law Center’s Reading Room on Food Labeling available at <http://www.nationalaglawcenter.org/readingrooms/foodlabeling/>.



Grant funding for this book was made available through the USDA-AMS Specialty Crop Block Grant Program – Farm Bill (SCBGP-FB). Section 101 of the Specialty Crops Competitiveness Act of 2004 authorizes funding for the SCBGP. Section 10109 of the Food, Conservation, and Energy Act of 2008 (Farm Bill) amends the above Act and establishes the Specialty Crop Block Grant Program – Farm Bill (SCBGP-FB).

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