



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

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



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# TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>1</b>
<b>CHAPTER I: MASSACHUSETTS FARMING AND LOCAL FOOD ECONOMY .....</b>	<b>5</b>
<b>LOCATION, SIZE, DEMOGRAPHICS, AND ORGANIZATION OF MASSACHUSETTS FARMS .....</b>	<b>5</b>
<b>AGRICULTURAL PRODUCTS AND FARMING TECHNIQUES .....</b>	<b>10</b>
<b>MARKETING AND SELLING AGRICULTURAL PRODUCTS .....</b>	<b>12</b>
<b>CHAPTER II: BUSINESS STRUCTURES .....</b>	<b>15</b>
<b>OVERVIEW OF BUSINESS STRUCTURES .....</b>	<b>15</b>
<b>PREVALENCE OF FARM BUSINESS STRUCTURES IN MASSACHUSETTS AND THE UNITED STATES.....</b>	<b>17</b>
<b>GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE FARMER .....</b>	<b>18</b>
<b>MAJOR FACTORS IN EVALUATING DIFFERENT BUSINESS STRUCTURES .....</b>	<b>20</b>
<b>CHOOSING A BUSINESS STRUCTURE.....</b>	<b>21</b>
<b>CHAPTER III: FOOD SAFETY .....</b>	<b>39</b>
<b>OVERVIEW OF FOOD SAFETY .....</b>	<b>39</b>
<b>THE FOOD SAFETY MODERNIZATION ACT .....</b>	<b>40</b>
<b>OTHER FOOD SAFETY REGIMES .....</b>	<b>46</b>
<b>CHAPTER IV: FARM TRANSITIONS .....</b>	<b>49</b>
<b>FARM TRANSITION OVERVIEW .....</b>	<b>49</b>
<b>GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE FARMER AND COMMON CONCERNS .....</b>	<b>52</b>
<b>GOALS OF FARM TRANSITION .....</b>	<b>56</b>
<b>POTENTIAL SOLUTIONS FOR FARM TRANSITION GOALS.....</b>	<b>59</b>
<b>CHAPTER V: FARMLAND ACQUISITION .....</b>	<b>69</b>
<b>FARMLAND ACQUISITION OVERVIEW .....</b>	<b>69</b>
<b>EVALUATING FARMLAND ACQUISITION OPTIONS.....</b>	<b>70</b>
<b>CHOOSING TO LEASE FARMLAND.....</b>	<b>73</b>
<b>CHOOSING TO PURCHASE FARMLAND .....</b>	<b>77</b>
<b>CHAPTER VI: TAXES .....</b>	<b>91</b>
<b>OVERVIEW OF MASSACHUSETTS FARMS .....</b>	<b>91</b>
<b>GENERAL TAX ISSUES FOR FARMERS .....</b>	<b>92</b>
<b>FEDERAL TAX CONCERNS FOR FARMERS .....</b>	<b>100</b>
<b>MASSACHUSETTS TAX CONCERNS FOR FARMERS .....</b>	<b>110</b>

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

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

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

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

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

<sup>1</sup> U.S. Dep't of Agric. Press Release, 2012 Ag Census Reveals New Trends in Farming, *available at* [http://www.agcensus.usda.gov/Newsroom/2014/05\\_02\\_2014.php](http://www.agcensus.usda.gov/Newsroom/2014/05_02_2014.php); U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE, DEMOGRAPHICS OVERVIEW, *available at* [http://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Fact\\_Sheets/Demographics/demographics.pdf](http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demographics/demographics.pdf).

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

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

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

**ABOUT THE LEGAL FOOD HUB** Because of the lack of legal services for small-scale farmers and food entrepreneurs who participate in local and regional food systems, the Conservation Law Foundation (CLF) created the Legal Food Hub (LFH).<sup>6</sup> The LFH brings together attorneys in Massachusetts who want to provide pro bono legal assistance to farmers, food entrepreneurs, and food-justice oriented community organizations. The LFH not only serves to connect attorneys to clients, but through *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* also seeks to supply resources for attorneys as they provide legal counsel to this new group of clients. For up to date information on income eligibility for pro bono services offered by the LFH, visit [www.legalfoodhub.org](http://www.legalfoodhub.org).

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

**ABOUT THE HARVARD FOOD LAW AND POLICY CLINIC** Established in 2010, the Harvard Food Law and Policy Clinic (FLPC) addresses the health, environmental, and economic consequences of the laws and policies that structure our food system. The FLPC utilizes substantive expertise in food law and policy and a robust policy skill set to assist non-profit and governmental clients in a variety of local, state, federal, and international settings in understanding and improving the laws impacting the food system. As the oldest food law clinical program in the United States, the FLPC is also a pioneer in the field of food law and policy, and serves as a counselor and model for attorneys and law

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<sup>4</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, TABLE 5. NET CASH FARM INCOME OF THE OPERATIONS AND OPERATORS: 2012 AND 2007, *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_004\\_005.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_004_005.pdf).

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

<sup>6</sup> LEGAL FOOD HUB, <http://www.legalfoodhub.org>.

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



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

**ABOUT THE SECOND EDITION** The FLPC collaborated with CLF to create the first edition of *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* in 2014. Since its initial publication, the *Guide* has helped attorneys build successful relationships with Massachusetts small-scale farmers and food entrepreneurs—as well as other food-related businesses, non-profit organizations, and community groups—by providing a vocabulary and working knowledge of common legal issues encountered by these participants in Massachusetts’ local food economy.

This is the second edition of *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network*. The Second Edition expands on the first to address a wider scope of the legal needs of small-scale farmers, including two brand new chapters on farmland acquisition and taxation. These are complex topics where access to informed attorneys could make the difference between a small-scale farm failing and thriving. This guide continues to be a work in progress and will be updated to include new chapters and respond to the needs of LFH attorneys.

**Using this Guide** *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* is intended to serve as a reference for attorneys. Although *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* can be read in its entirety, each chapter is meant to be its own standalone document. Where appropriate, *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* directs the reader to other relevant chapters.

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

- **Chapter I: Massachusetts Farming and Local Food Economy** This chapter provides the reader with demographic information about farmers and agriculture in Massachusetts. Based on the United States Department of Agriculture’s recently released 2012 Census of Agriculture, this chapter helps attorneys understand the agricultural context in which they are working.
- **Chapter II: Business Structures** This chapter focuses on and evaluates the different business structures farmers may choose for their farm operations.
- **Chapter III: Food Safety** This chapter introduces the attorney to a few of the main food safety laws and standards governing the production and handling of produce in the United States. Although LFH attorneys will not be helping farmers with food safety compliance, the topic is on farmers’ minds and attorneys need a working knowledge of the issues.

- **Chapter IV: Farm Transitions** This chapter discusses the farm transition process, which includes estate planning and farm transfer issues. This chapter highlights issues of concern common among farmers and provides solutions to address those concerns.
- **Chapter V: Farmland Acquisition** This chapter outlines how attorneys volunteering with the Legal Food Hub (LFH) can help farmers to evaluate farmland acquisition options, as well as the advantages and disadvantages of different options.
- **Chapter VI: Taxes** This chapter highlights federal and state tax laws that apply uniquely or are especially relevant to farm businesses, and discusses some common topics in farm taxes.

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

## CHAPTER I: MASSACHUSETTS FARMING AND LOCAL FOOD ECONOMY

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

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

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

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

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

### LOCATION, SIZE, AND ORGANIZATION OF MASSACHUSETTS FARMS

According to the 2012 Census of Agriculture, there are 7,755 farms in Massachusetts.<sup>2</sup> The land in farms<sup>3</sup> accounts for 10-14% of total land in the state, or approximately 523,000 – 590,000 acres.<sup>4</sup> The average farm is only 68 acres, much smaller than the national average of 434 acres.<sup>5</sup> Massachusetts ranks 49th in

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

<sup>2</sup> “The census definition of a farm is any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. The definition has changed nine times since it was established in 1850. The current definition was first used for the 1974 Census of Agriculture and has been used in each subsequent agriculture census. This definition is consistent with the definition used for current USDA surveys.” U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, INTRODUCTION VIII (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usintro.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usintro.pdf).

<sup>3</sup> “The acreage designated as ‘land in farms’ consists primarily of agricultural land used for crops, pasture, or grazing.” U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, APPENDIX B B-13 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usappxb.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf).

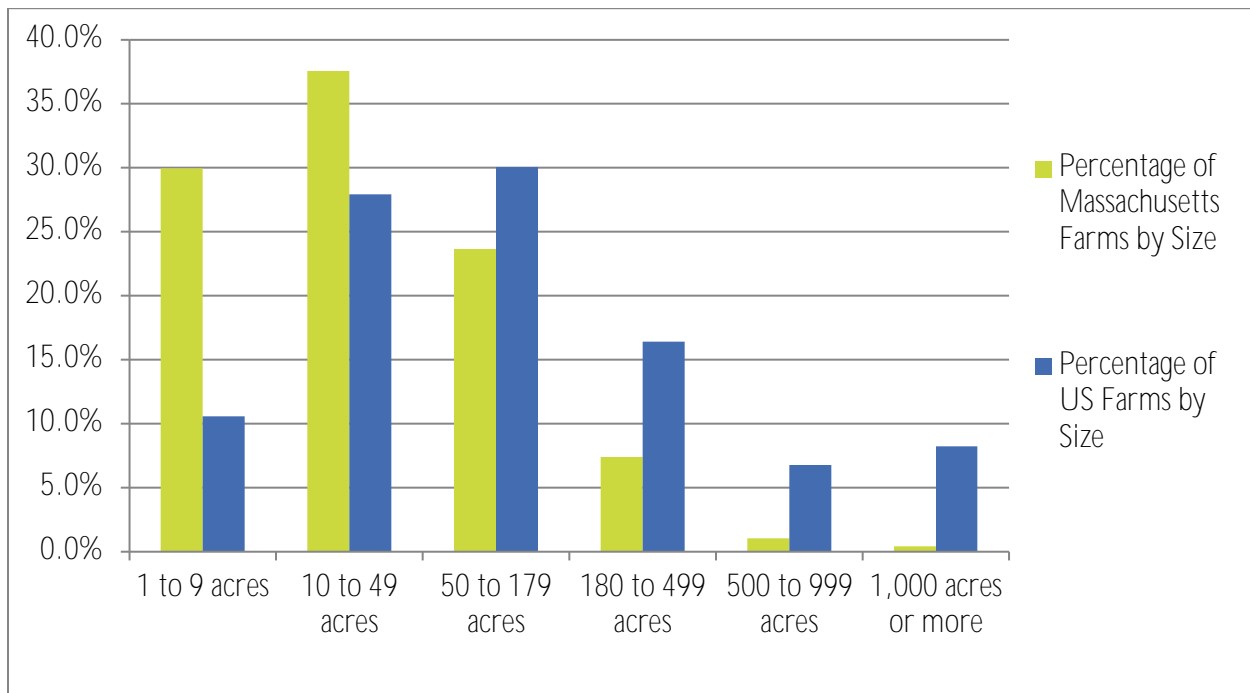
<sup>4</sup> The exact acreage of farmland in Massachusetts varies slightly, depending on the source. 2012 *Census of Agriculture: Massachusetts Highlights*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/docs/agr/news/census-ma-highlights.pdf> (last visited May 16, 2014); *Massachusetts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

<sup>5</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1: HISTORICAL HIGHLIGHTS 2012 AND EARLIER CENSUS YEARS 7 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf).



average farm size; only Rhode Island has a smaller average acreage.<sup>6</sup> Not surprisingly then, 95% of Massachusetts farms qualify as “small farms,”<sup>7</sup> with less than \$250,000 of annual sales.<sup>8</sup> Farmers are eligible to receive pro bono legal services through the Legal Food Hub (LSH) if the farm’s net annual income does not exceed \$30,000, the farm has an annual revenue of at least \$5,000, and the farmer’s household income does not exceed 400% of the Federal Poverty Level.

**Figure 1. Percentage of Farms by Size, Massachusetts and the United States, 2012<sup>9</sup>**



<sup>6</sup> The average farm size in Rhode Island is 56 acres. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, RHODE ISLAND STATE DATA TABLE 1: STATE SUMMARY HIGHLIGHTS 251 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf).

<sup>7</sup> The USDA defines a small farms as “farms with less than \$250,000 gross receipts annually, on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets.” *Small Farms*, U.S. DEP’T OF AGRIC., NAT’L AGRIC. LIBRARY, <http://agclass.nal.usda.gov/mtwdk.exe?k=glossary&l=60&w=8155&n=1&s=5&t=2>.

<sup>8</sup> There are 6,168 Massachusetts farms whose legal status for tax purposes is “Family or individual.” U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, APPENDIX A A-20 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>9</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 64: SUMMARY BY SIZE OF FARM: 2012 54-55 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_064\\_064.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_064_064.pdf); U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 64: SUMMARY BY SIZE OF FARM: 2012 66-67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_064\\_064.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_064_064.pdf).

Figure 2. Massachusetts Farms by Value of Sales, 2012<sup>10</sup>

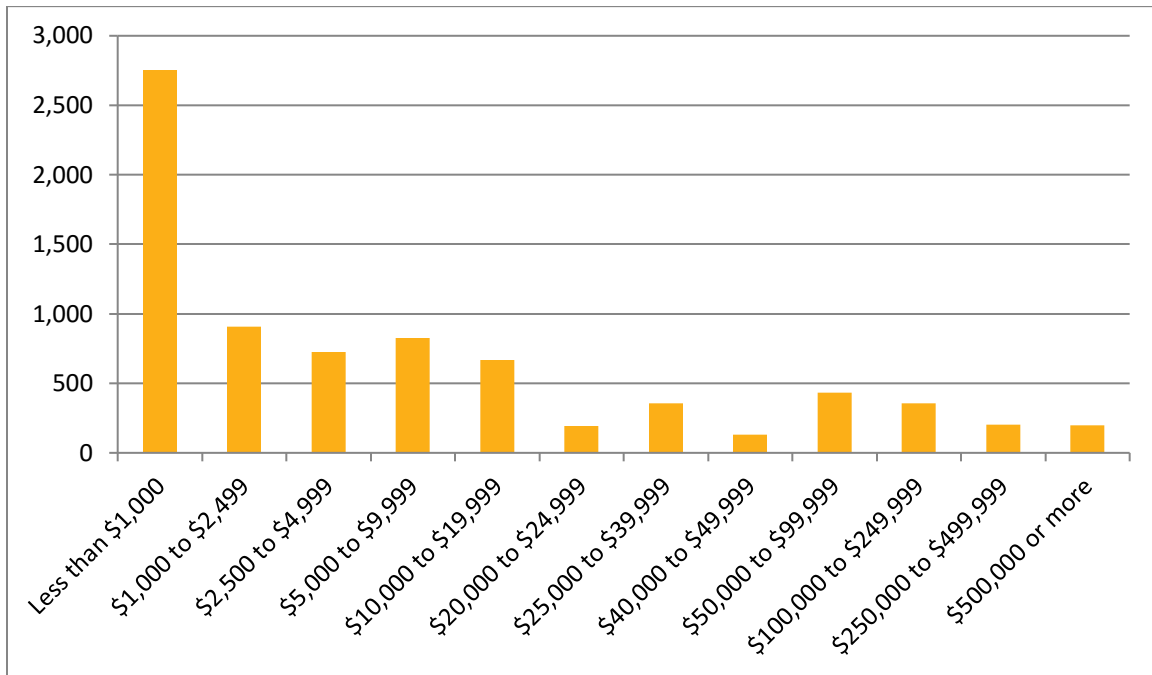
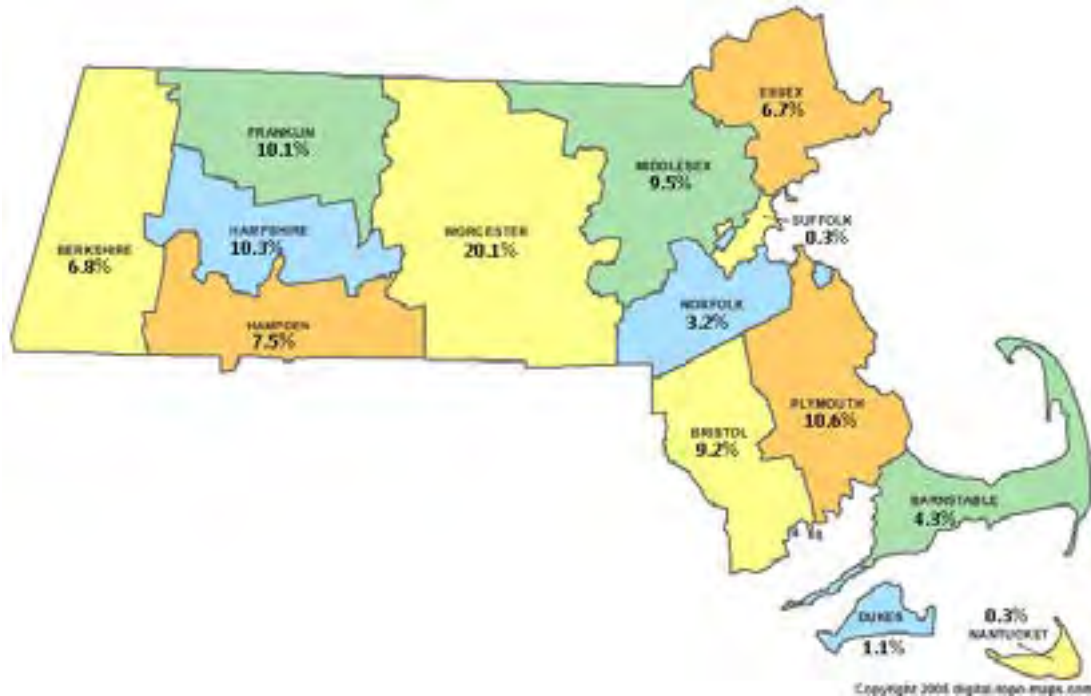


Figure 3. Percentage of Farms in Massachusetts by County, 2012<sup>11</sup>



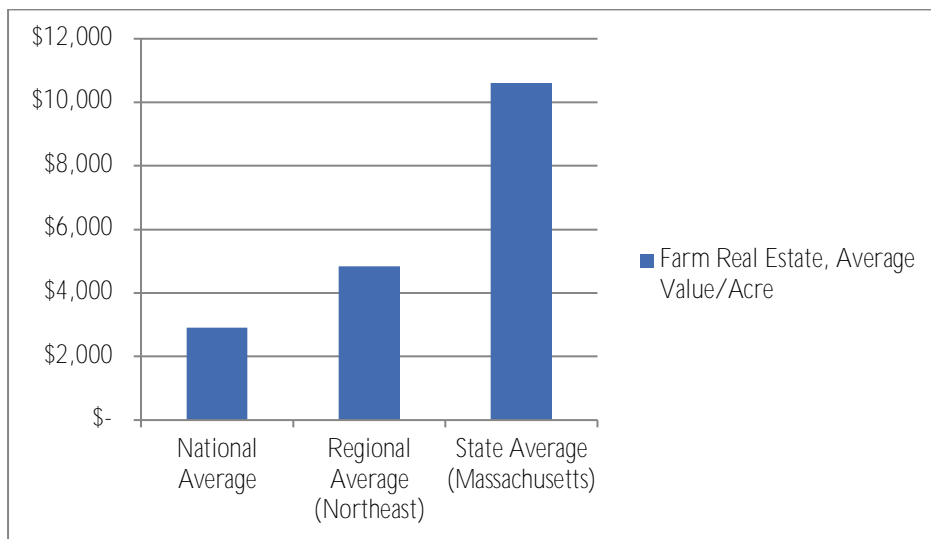
<sup>10</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA (2014), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/).

<sup>11</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, COUNTY LEVEL DATA TABLE 1: COUNTY SUMMARY HIGHLIGHTS 224-225 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_County\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Massachusetts/mav1.pdf).

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

Massachusetts farmland had an average real estate value<sup>13</sup> of \$10,600/acre in 2013, one of the highest in the nation.<sup>14</sup> Only New Jersey, Rhode Island, and Connecticut have higher averages, at \$12,700/acre, \$11,800/acre, and \$11,000/acre respectively.<sup>15</sup> Massachusetts farm real estate values are high compared to the Northeast<sup>16</sup> regional average, \$4,840/acre, and over three and a half times higher than the national average, \$2,900/acre.<sup>17</sup> Young and beginning farmers may find it nearly impossible to purchase land outright; and therefore, the premium price of farmland plays a significant role in shaping the future of Massachusetts agriculture. There is an acute need for sound farm transfer planning in order to preserve the agricultural production of farmland. This topic is discussed in more depth in Chapter IV of the Guide.

**Figure 4. Farm Real Estate Average Value per Acre, 2012<sup>18</sup>**



<sup>12</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, COUNTY LEVEL DATA TABLE 1: COUNTY SUMMARY HIGHLIGHTS 224-225 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_County\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Massachusetts/mav1.pdf).

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

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

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

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

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

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

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

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

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<sup>19</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 55 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_055\\_055.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_055_055.pdf).

<sup>20</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 60 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_060\\_060.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_060_060.pdf).

<sup>21</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE MASSACHUSETTS STATE DATA TABLE 69 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_069\\_069.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf).

<sup>22</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 55 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_055\\_055.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_055_055.pdf).

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

<sup>24</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 70 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_070\\_070.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_070_070.pdf).

<sup>25</sup> **In Massachusetts, 6,168 farms have a legal status of “Family or individual” for tax purposes.** U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

<sup>26</sup> **In Massachusetts, 719 farms have a legal status of “Corporation” for tax purposes.** U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

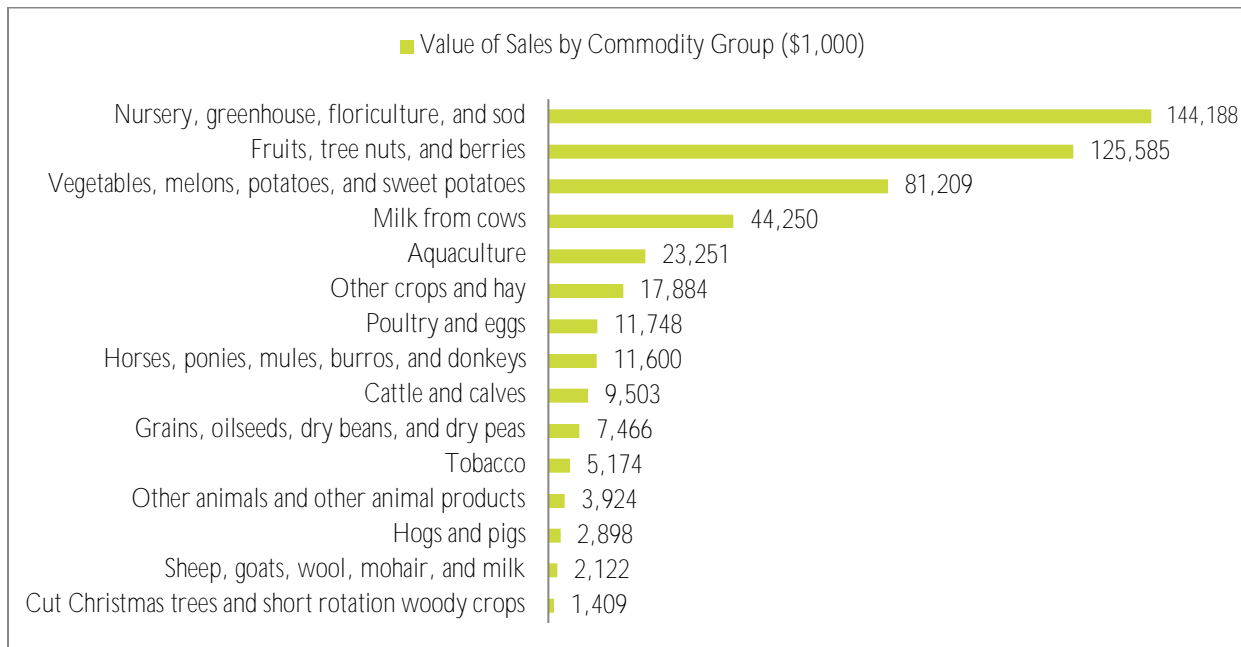
<sup>27</sup> **In Massachusetts, 583 farms have a legal status of “Partnership” for tax purposes.** U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

<sup>28</sup> **In Massachusetts, 285 farms have a legal status of “Other – co-operative, estate or trust, institutional, etc.” for tax purposes.** U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

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

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

**Figure 5. Value of Sales by Commodity Group, 2012<sup>33</sup>**



<sup>29</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/County\\_Profiles/Massachusetts/cp99025.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf).

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

[http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>31</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/County\\_Profiles/Massachusetts/cp99025.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf).

<sup>32</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/County\\_Profiles/Massachusetts/cp99025.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf).

<sup>33</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE PROFILE COUNTY DATA (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/County\\_Profiles/Massachusetts/cp99025.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Massachusetts/cp99025.pdf).

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

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

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

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

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

<sup>36</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 54 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_053\\_054.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_053_054.pdf)

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

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

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

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

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



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

**MARKETING AND SELLING AGRICULTURAL PRODUCTS** Massachusetts sells many farm products directly to consumers through farmers’ markets, farm stands, community-supported agriculture operations (CSAs), and agri-tourism.<sup>44</sup> Unlike many other areas of the country, direct-to-consumer food marketing is a defining characteristic of agriculture in Massachusetts, and small-scale farmers and food entrepreneurs have had great success with these ventures. In 2012, Massachusetts had nearly \$48 million in direct sales of agricultural products, which amounts to a \$6 million increase from 2007.<sup>45</sup> Nationwide, Massachusetts ranked 9th in direct sales, behind states such as California, New York, and Pennsylvania.<sup>46</sup>

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

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

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

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

<sup>45</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING LANDLORD’S SHARE AND DIRECT SALES: 2012-2007 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_002\\_002.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_002_002.pdf).

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

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

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

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

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

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

Massachusetts has over 400 farm attractions open to the public.<sup>52</sup> These on-farm activities are commonly referred to as agri-tourism. Agri-tourism generally involves on-farm entertainment, including activities like farm tours or vacations, festivals, hiking, picnics, or workshops. It also includes pick-your-own operations.<sup>53</sup> According to the 2012 Census of Agriculture, 287 Massachusetts farms participate in agri-tourism and recreational services, and the average number of sales from these activities totaled \$41,929.<sup>54</sup> See Figure 6 on the next page for more information on agri-tourism in Massachusetts.

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

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

<sup>51</sup> *CSA (Community Supported Agriculture) Farms*, MASS. DEP'T OF AGRIC. RESOURCES, [http://www.mass.gov/agr/massgrown/csa\\_farms.htm](http://www.mass.gov/agr/massgrown/csa_farms.htm).

<sup>52</sup> *Agri-Tourism Farms*, MASS. DEP'T OF AGRIC. RESOURCES, [http://www.mass.gov/agr/massgrown/agritourism\\_farms.htm](http://www.mass.gov/agr/massgrown/agritourism_farms.htm).

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

<sup>54</sup> U.S. DEP'T OF AGRIC., *2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 7 (2014)*, *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

**Figure 6. Description of Agri-tourism Activities in Massachusetts<sup>55</sup>**

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

## RESOURCES

### 2012 Census of Agriculture, Massachusetts State Data

[http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/)

### 2012 Census of Agriculture, United States Data

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

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

## CHAPTER II: BUSINESS STRUCTURES

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

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

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

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

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

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

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

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

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

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<sup>1</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf).

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

Additionally, the economic profile of farmers in the Legal Food Hub (LFH) **may not mirror the attorney's traditional** clients. Nearly 85% of Massachusetts farms had gross annual sales of less than \$50,000.<sup>4</sup> Only 2.6% of Massachusetts farms grossed more than \$500,000.<sup>5</sup> LFH limits eligibility to farms with less than \$30,000 in net annual income, and annual household income below 400% of the federal poverty line. Therefore, the risks and costs of various business structures may have a different weight for LFH farmers.

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

### **Risk Management on Farms**

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

Still, farmers have many reasons to formalize their business. First, formalized structures can help farmers transfer the farm to the next generation. For example, the business may be structured to allow multiple farm operators, which helps transfer knowledge and assets between generations. Also, if a farm has multiple

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<sup>2</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 69, 15 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_069\\_069.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf).

<sup>3</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 69, 15 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_069\\_069.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf).

<sup>4</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

<sup>5</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

<sup>6</sup> 11 U.S.C. § 1201 et seq. (2012).

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

## PREVALENCE OF FARM BUSINESS STRUCTURES IN MASSACHUSETTS

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

**Figure 1. United States Farms by Legal Status<sup>11</sup>**

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

<sup>7</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf).

<sup>8</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

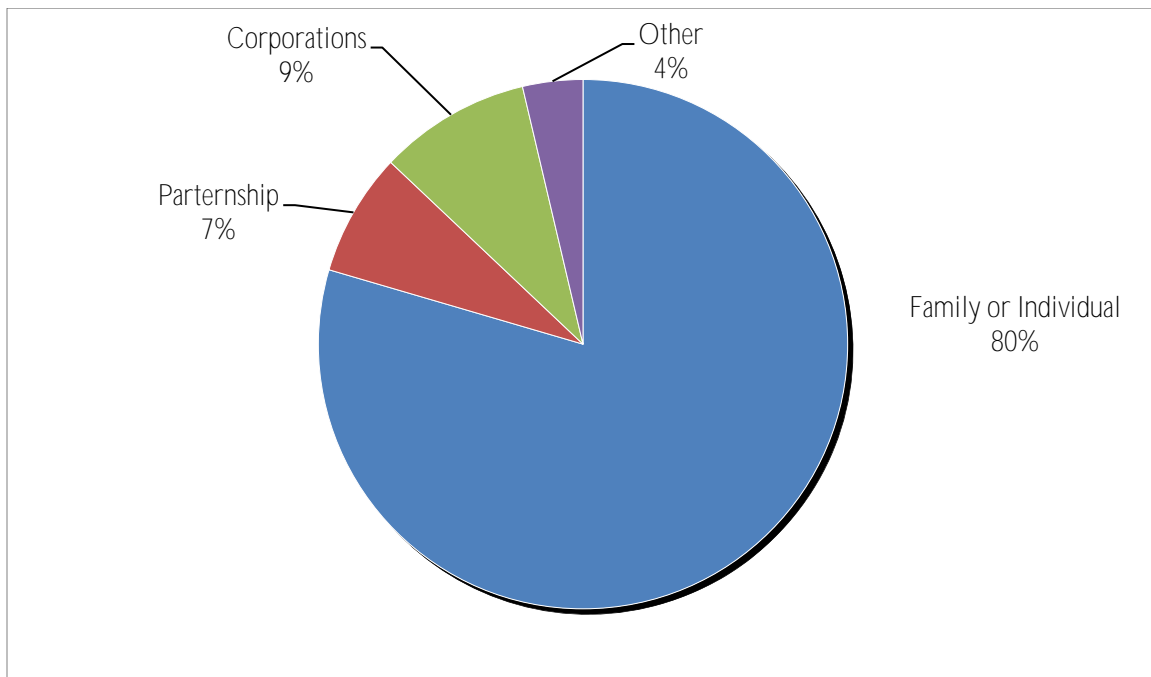
<sup>9</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE U.S. DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf); U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

<sup>10</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_067\\_067.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_067_067.pdf)

<sup>11</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf).



**Figure 2. Massachusetts Farms by Legal Status in 2012<sup>12</sup>**



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

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

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

<sup>12</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf).

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

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

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

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

## MAJOR FACTORS IN EVALUATING DIFFERENT BUSINESS STRUCTURES

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

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

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

Second, the attorney must consider how the entity will be **taxed**. Businesses can create or limit tax liability. A “pass-through” entity, such as a partnership or S-corporation, is not itself subject to taxation; instead, the **entity’s** owners are taxed on their share of the business income.<sup>16</sup> In contrast, “**double-taxation**” entities, mostly C-corporations, must pay taxes on the **business’s** profits, and then any profits distributed to owners are taxed as personal income.<sup>17</sup> Because farms in the LFH must have a net annual income of less than \$30,000, the formality costs may outweigh the corporate benefits.

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

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

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

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

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

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

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

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

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

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

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

**Percentage of Farms Operated as Sole Proprietorships**

Massachusetts: 79.5%

Nationally: 86.7%

Source: 2012 Census of Agriculture

<sup>18</sup> *Sole Proprietorship*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/sole-proprietorship-0> (last visited Jun. 17, 2014).

<sup>19</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_001_001.pdf). The 2012 U.S. Census of Agriculture categorizes the "family or individual" designation as sole proprietorship, and excludes partnerships and corporations.

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

#### Pros for Farmers:

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

#### Cons for Farmers:

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

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

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

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

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

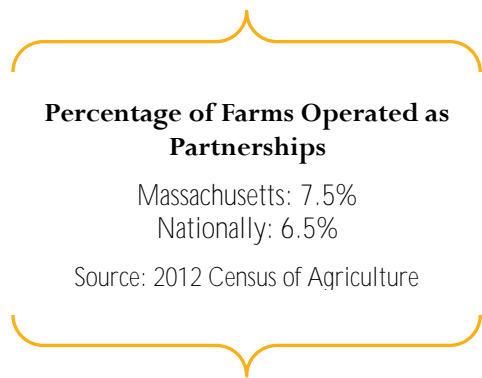
<sup>24</sup> *Sole Proprietorships*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/sole-proprietorships.html> (last visited Jun. 17, 2014).

<sup>25</sup> 1 *Advising Small Businesses* § 3:2 (2014).

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

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

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



### ***The General Partnership***

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

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

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

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

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

<sup>30</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_067\\_067.pdf/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/).

<sup>31</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_067\\_067.pdf/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/); MASS. GEN. LAWS ch. 108A, §§ 6, 45 (2014); MASS. GEN. LAWS ch. 109 (2014).

<sup>32</sup> MASS. GEN. LAWS ch. 108A § 6 (2014).

<sup>33</sup> MASS. GEN. LAWS ch. 108A, § 7 (2014).

<sup>34</sup> 1 Advising Small Businesses § 5:7 (2014).



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

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

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

### Gentleman's Agreements

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

#### Pros for Farmers:

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

<sup>35</sup> MASS. GEN. LAWS ch. 108A § 6 (2014).

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

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

### Cons for Farmers:

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

### ***The Limited Partnership***

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

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<sup>38</sup> MASS. GEN. LAWS ch. 108A, § 15 (2014).

<sup>39</sup> MASS. GEN. LAWS ch. 108A, § 28 (2014).

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

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

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

<sup>43</sup> MASS. GEN. LAWS ch. 109, § 1 (2014).

<sup>44</sup> MASS. GEN. LAWS ch. 109, § 1 (2014).

<sup>45</sup> MASS. GEN. LAWS ch. 109, § 24 (2014).

<sup>46</sup> MASS. GEN. LAWS ch. 109, § 19 (2014).

<sup>47</sup> MASS. GEN. LAWS ch. 109, § 8 (2014).

### Pros for Farmers:

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

### Cons for Farmers:

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

### ***The Limited Liability Partnership***

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

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

<sup>49</sup> MASS. GEN. LAWS ch. 109, § 19 (2014).

<sup>50</sup> MASS. GEN. LAWS ch. 109, § 16A (2014).

<sup>51</sup> MASS. GEN. LAWS ch. 109, § 40 (2014).

<sup>52</sup> MASS. GEN. LAWS ch. 109, § 44 (2014).

<sup>53</sup> MASS. GEN. LAWS ch. 109, § 19 (2014).

<sup>54</sup> MASS. GEN. LAWS ch. 109, § 24 (2014).

<sup>55</sup> MASS. GEN. LAWS ch. 108A, §15 (2014).

<sup>56</sup> MASS. GEN. LAWS ch. 108A, § 45 (2014).

<sup>57</sup> MASS. GEN. LAWS ch. 108A, § 45 (2014).

### Pros for Farmers:

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

### Cons for Farmers:

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

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

#### Percentage of Farms Operated as Limited Liability Companies

Massachusetts: 6.1%  
Nationally: 4.8%

Source: 2012 Census of Agriculture

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

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

<sup>60</sup> MASS. GEN. LAWS ch. 108A, § 45 (2014).

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

<sup>62</sup> 1 Advising Small Businesses § 7:1 (2014).

<sup>63</sup> MASS. GEN. LAWS ch. 156C, § 2 (2014).

<sup>64</sup> MASS. GEN. LAWS ch. 156C, § 24 (2014).

## Pros for Farmers:

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

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<sup>65</sup> MASS. GEN. LAWS ch. 156C, §12 (2014).

<sup>66</sup> 1 Advising Small Businesses § 7:15 (2014).

<sup>67</sup> 1 Advising Small Businesses § 7:5 (2014).

<sup>68</sup> 1 Advising Small Businesses § 7:35 (2014).

<sup>69</sup> 1 Advising Small Businesses § 7:15 (2014).

<sup>70</sup> MASS. GEN. LAWS ch. 156C, § 439 (2014).

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

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

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

Cons for Farmers:

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

**Percentage of Farms Operated as Corporations**

Massachusetts: 9.3%  
Nationally: 5%

Source: 2012 Census of Agriculture

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

<sup>73</sup> MASS. GEN. LAWS ch. 156C, § 43 (2014).

<sup>74</sup> MASS. GEN. LAWS ch. 156C, § 43 (2014).

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

<sup>76</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_067\\_067.pdf/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/).

<sup>77</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_067\\_067.pdf/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/).



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

### ***S- and C-Corporations***

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

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

#### Pros for Farmers:

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

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<sup>78</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 67 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_067\\_067.pdf/](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_067_067.pdf/).

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

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

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

<sup>82</sup> 26 U.S.C. § 1362 (2012).

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

<sup>84</sup> 26 U.S.C. § 1361 (2012).

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

<sup>86</sup> MASS. GEN. LAWS ch. 156D, § 6.27 (2014).

<sup>87</sup> 26 U.S.C. § 1362(d) (2012).

### Cons for Farmers:

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

### ***The B-Corporation***

Benefit corporations, or B-corporations, combine elements of for-profit and non-profit corporations. They have the public benefit focus of a non-profit, but are permitted to distribute profits to shareholders. B-corporations are relatively new to Massachusetts; corporations were able to elect benefit corporation status beginning in December 2012.<sup>92</sup>

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

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

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<sup>88</sup> MASS. GEN. LAWS ch. 156, § 21 (2014).

<sup>89</sup> MASS. GEN. LAWS ch. 156, § 7.01 (2014).

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

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

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

<sup>93</sup> MASS. GEN. LAWS ch. 156E, § 9 (2014).

<sup>94</sup> MASS. GEN. LAWS ch. 156E, § 9 (2014).

<sup>95</sup> MASS. GEN. LAWS ch. 156E, § 2 (2014).

<sup>96</sup> MASS. GEN. LAWS ch. 156E, § 2 (2014).

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

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

B-corporations are subject to the Massachusetts laws governing traditional corporations.<sup>98</sup> In addition to an annual report, B-corporations must pay a \$75 fee<sup>99</sup> and file an annual benefit report that assesses the **B-corporation's public benefit** accomplishments.<sup>100</sup>

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

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<sup>97</sup> MASS. GEN. LAWS ch. 156E, § 10 (2014).

<sup>98</sup> MASS. GEN. LAWS ch. 156A (2014); MASS. GEN. LAWS ch. 156D (2014).

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

<sup>100</sup> MASS. GEN. LAWS ch. 156E, § 15 (2014).

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

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

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

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

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

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

### Pros for Farmers:

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

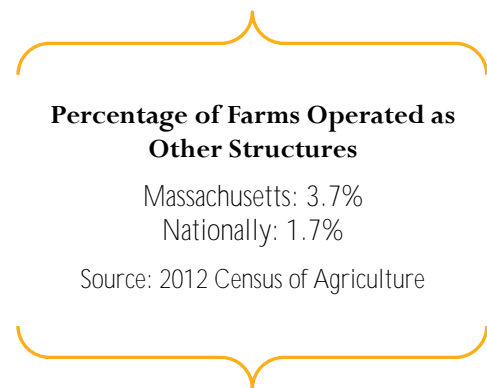
### Cons for Farmers:

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

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

#### **Non-Profits**

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



<sup>107</sup> MASS. GEN. LAWS ch. 156E, § 5 (2014).

<sup>108</sup> MASS. GEN. LAWS ch. 156E, § 11 (2014).

<sup>109</sup> 26 C.F.R. § 1.501(c)(3)-1(c)(1) (2014).

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

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

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

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

#### Pros for Farmers:

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

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

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

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

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

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

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

<sup>116</sup> 26 U.S.C. § 511(2012).

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

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

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

#### Cons for Farmers:

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

#### **Co-operatives**

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

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

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

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

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

<sup>121</sup> NEW ENGLAND FARMERS UNION, *GROWING A FOOD SYSTEM FOR THE FUTURE: A MANUAL FOR CO-OPERATIVE ENTERPRISE DEVELOPMENT 1* (2014), available at [http://www.newenglandfarmersunion.org/pdfs\\_docs/NEFU\\_Co-opManualFINALweb.pdf](http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf).

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

### Producer or Purchasing Co-operatives

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

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

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

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<sup>122</sup> MASS. GEN. LAWS ch. 157, § 8 (2014).

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

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

<sup>125</sup> MASS. GEN. LAWS ch. 157, § 3 (2014).

<sup>126</sup> MASS. GEN. LAWS ch. 157, § 3 (2014).

<sup>127</sup> MASS. GEN. LAWS ch. 157, § 4 (2014).

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

<sup>129</sup> MASS. GEN. LAWS ch. 157, §§ 7, 9 (2014).

<sup>130</sup> MASS. GEN. LAWS ch. 157, § 12 (2014).

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

<sup>132</sup> MASS. GEN. LAWS ch. 157, § 13 (2014).

<sup>133</sup> MASS. GEN. LAWS ch. 157, §§ 2, 6 (2014).

<sup>134</sup> MASS. GEN. LAWS ch. 157, §§ 2, 6 (2014).

### Pros for Farmers:

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

### Worker-Co-operatives

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

### Pros for Farmers:

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

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

<sup>136</sup> MASS. GEN. LAWS ch. 157A, § 3 (2014).

<sup>137</sup> MASS. GEN. LAWS ch. 157A (2014).

<sup>138</sup> MASS. GEN. LAWS ch. 157A, § 6(a) (2014).

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

<sup>140</sup> MASS. GEN. LAWS ch. 157A, § 7 (2014).

<sup>141</sup> MASS. GEN. LAWS ch. 157A, § 8 (2014).

<sup>142</sup> MASS. GEN. LAWS ch. 157A, § 11 (2014).

<sup>143</sup> MASS. GEN. LAWS ch. 157A, § 6(a) (2014).



### Cons for Farmers:

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

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

### **RESOURCES**

#### **New Entry Sustainable Farming Project**

A guide to farming in Massachusetts for entrepreneurs.

[http://nesfp.org/sites/default/files/resources/an\\_entrepreneurs\\_guide\\_to\\_farming\\_ma\\_0.pdf](http://nesfp.org/sites/default/files/resources/an_entrepreneurs_guide_to_farming_ma_0.pdf)

#### **Farm Commons**

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

<http://farmcommons.org/>

#### **Sustainable Agriculture and Research Education Program**

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

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

#### **New England Farmers Union**

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

[http://www.newenglandfarmersunion.org/pdfs\\_docs/NEFU\\_Co-opManualFINALweb.pdf](http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf).

## CHAPTER III: FOOD SAFETY

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

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

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

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

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

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

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

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

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

**THE FOOD SAFETY MODERNIZATION ACT** FSMA was signed into law in January 2011.<sup>3</sup> FSMA was the largest overhaul of the nation's food safety system in over seventy years.<sup>4</sup> Among other issues, this extensive legislation gives the FDA new authority to issue mandatory recalls of food;<sup>5</sup> broadens the FDA's authority to withdraw a food facility's registration (registration is required to introduce goods into commerce);<sup>6</sup> and directs the FDA to establish new food safety requirements for food facilities and farms.<sup>7</sup> Although prior to the passage of FSMA the FDA regulated food facilities, the FDA had never regulated farms.

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

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<sup>2</sup> RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER (2014), [http://digital.library.unt.edu/ark:/67531/metadc276872/m1/1/high\\_res\\_d/RS22600\\_2014Jan17.pdf](http://digital.library.unt.edu/ark:/67531/metadc276872/m1/1/high_res_d/RS22600_2014Jan17.pdf).

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

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

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

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

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

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

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

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

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

#### **“Covered Produce” under the PSR**

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

Source: 78 Fed. Reg. 3504, 3629.

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

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

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

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

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

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

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

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

The PSR breaks down into four main categories:

➤ **Farms that are Not Covered:**

- Non-Produce Farms: Farms that do not grow covered produce.
- Extremely Small Farms: Farms whose annual average food sales are less than \$25,000.<sup>17</sup>

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

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

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

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

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

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

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

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

<sup>19</sup> PSR, 78 Fed. Reg. at 3642 (Subpart O).

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

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

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

➤ **Farms that are Covered:**

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

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

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

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

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

<sup>23</sup> PSR, 78 Fed. Reg. at 3644 (Subpart R).

<sup>24</sup> PSR, 78 Fed. Reg. at 3644 (Subpart R).

<sup>25</sup> See list in text box for more information.

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

<sup>27</sup> PSR, 78 Fed. Reg. at 3634 – 36 (Subpart E).

<sup>28</sup> PSR, 78 Fed. Reg. at 3636 – 38 (Subpart F).

<sup>29</sup> PSR, 78 Fed. Reg. at 3638 (Subpart I).

<sup>30</sup> PSR, 78 Fed. Reg. at 3638 – 40 (Subpart L).

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

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

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

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

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

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

The PCR breaks down into three categories:

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

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

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

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

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

both be a small or very small business<sup>34</sup> and must conduct only low-risk activities on the farm.<sup>35</sup> These low-risk activities are listed in the proposed rule and include chopping peanuts, making maple syrup, and waxing intact produce.<sup>36</sup>

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

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

➤ **Facilities that are Covered:**

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

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

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

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

<sup>37</sup> PCR, 78 Fed. Reg. at 3799 – 3800 (Subpart A).

<sup>38</sup> PCR, 78 Fed. Reg. at 3802 – 05 (Subpart B).

<sup>39</sup> PCR, 78 Fed. Reg. at 3808 (Subpart D, § 117.201).

<sup>40</sup> PCR, 78 Fed. Reg. at 3809 – 10 (Subpart E).

<sup>41</sup> 21 U.S.C. § 350d(a)(1) (2012).

<sup>42</sup> PCR, 78 Fed. Reg. at 3802 – 05 (Subpart B).



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

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

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

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

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

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<sup>43</sup> PCR, 78 Fed. Reg. at 3805 – 08 (Subpart C).

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

<sup>45</sup> *Fresh Fruit and Vegetable Audit Programs*, U.S. DEP'T OF AGRIC. AGRIC. MKTG. SER., [http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram#P25\\_1498](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram#P25_1498) (last visited May 25, 2012).

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

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

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

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

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

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

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

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

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

## **RESOURCES**

**National Sustainable Agriculture Coalition, Food Safety Modernization Act**

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

**United States Food and Drug Administration, Food Safety Modernization Act**

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

## CHAPTER IV: FARM TRANSITIONS

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

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

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

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

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

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

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

### *Farm Transition Planning*

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

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

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

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

### Farmers in Massachusetts by Age

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

Source: U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA TABLE 69 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_069\\_069.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_069_069.pdf).

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

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

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

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

<sup>3</sup> *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; Kevin Spafford, *How to Grow Into a Leader*, FARM JOURNAL'S LEGACY PROJECT, [http://www.agweb.com/legacyproject/article/leave\\_a\\_legacy\\_how\\_to\\_grow\\_into\\_a\\_leader\\_NAA\\_Kevin\\_Spafford/](http://www.agweb.com/legacyproject/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/); *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), [http://www.practicalplanner.com/financial\\_articles/9\\_Biz\\_Succession\\_Mistakes\\_Avoid.pdf](http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf).

<sup>4</sup> *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; Kevin Spafford, *How to Grow Into a Leader*, FARM JOURNAL'S LEGACY PROJECT, [http://www.agweb.com/legacyproject/article/leave\\_a\\_legacy\\_how\\_to\\_grow\\_into\\_a\\_leader\\_NAA\\_Kevin\\_Spafford/](http://www.agweb.com/legacyproject/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/); *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), [http://www.practicalplanner.com/financial\\_articles/9\\_Biz\\_Succession\\_Mistakes\\_Avoid.pdf](http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf).

will change hands over the next twenty years.<sup>5</sup> This is due, in part, to the relatively old average age of Massachusetts farmers. Data from the 2012 Census of Agriculture shows that Massachusetts farmers average 57.8 years old.<sup>6</sup> Furthermore, the number of farmers aged 55 years and older grew between 2007 and 2012.<sup>7</sup> However, the number of farmers in Massachusetts 34 years and younger also grew from 2007 to 2012.<sup>8</sup> Additionally, the number of farmers in Massachusetts who are classified by the United States Department of Agriculture (USDA) as “beginning” farmers is on the rise. To qualify as a “beginning farmer,” the farmer must have operated a farm for ten years or less.<sup>9</sup> The 2012 Census of Agriculture reported that 1,954 Massachusetts farmers fit this definition, meaning beginning farmers operate a quarter of all farms in the state.<sup>10</sup> These numbers indicate that although many farmers are likely to retire in the coming years, a growing pool of young farmers may be interested in taking their place.

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

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

<sup>6</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Preliminary\\_Report/Full\\_Report.pdf](http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf).

<sup>7</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Preliminary\\_Report/Full\\_Report.pdf](http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf).

<sup>8</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE: PRELIMINARY REPORT 8 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Preliminary\\_Report/Full\\_Report.pdf](http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Full_Report.pdf).

<sup>9</sup> *Beginning Farmers and Ranchers*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib53.aspx#.U48lgvldWSo>.

<sup>10</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE MASSACHUSETTS STATE DATA TABLE 70 (2014), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/st25\\_1\\_070\\_070.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_070_070.pdf).

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

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

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

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

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

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

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

### Goals for the Transfer

#### Profits

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

#### Public Benefits

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

#### Private Benefits of Others

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

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

[http://www.farmlandinfo.org/sites/default/files/FT9\\_NJSADC\\_Transferring%20the%20Family%20Farm.pdf](http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf).

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

<sup>15</sup> There are a number of questionnaires available online for this purpose. FARM JOURNAL LEGACY PROJECT, LEGACY WORKBOOK 13, *available at* [http://www.agweb.com/assets/1/6/LegacyWorkbook\\_9-13.pdf](http://www.agweb.com/assets/1/6/LegacyWorkbook_9-13.pdf); LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 2, *available at* <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>; LAND FOR GOOD, TRANSFERRING THE FARM: WHERE DO I START? 4-5, *available at* <http://landforgood.org/wp-content/uploads/LFG-Transferring-The-Farm-Guide.pdf>; *Preparing to Transfer the Farm Business*, UNIVERSITY OF MINNESOTA EXTENSION, <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/preparing-to-transfer-the-farm-business/#goals>.

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

#### **Social Goals**

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

#### **Speed of Transfer**

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

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

### **The Future of the Farm**

#### **Vision for the Land**

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

#### **Vision for the Management and Control**

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

#### **Vision for the Operation**

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

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



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

### The Future of the Family (Legacy)

#### Family Ownership

- Does the farmer own her land, or share ownership with family members? Do any non-family members own the land?
- Does the family wish to keep the land that they own?
- If the farmer were to die or retire, would the farmer's family have enough financial resources to keep the land together or continue to farm?

#### Family Management

- Does a family member wish to manage the farm?
- Which family members want a say in farm management?
- Do those family members have the personal capacity to manage the farm?

#### Family Wealth

- Will the farmer's spouse be able to live comfortably after the death of the farmer?

#### Family Dynamics

- Has the farmer spoken with family members about her desires?
- Do family members have opinions about the farm transfer process?
- Who should care for the farmer's minor children or aging parents?
- Does a family member expect to take over the family business?
- Are family members apprehensive about losing their say in the business?

### Effects of the Transition on Other Stakeholders

#### Current Dependents

- Who does the current business support?
- Does the current business need to continue to support those people?

#### Current Customer Base

- Who are the farm's current customers?
- Do future customer opinions matter to the farmer?
- Does the farmer participate in a CSA operation? Is that a useful consideration for the future? (e.g., is this good for the future?)

#### Business Relationships

- Does the farm participate in farmers' markets or farm stands?
- Does the farm have contracts with other businesses?
- Does the farmer have crop insurance and/or USDA Farm Service Agency (FSA) loans?

### **Employees and Tenants**

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

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

### **Evaluating the Farmer's Assets**

#### **Viability of the Farm**

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

#### **Multiple Types of Assets**

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

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

#### **Common concerns among farmers:**

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

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

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

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

Additionally, Massachusetts farms are extremely vulnerable to development. This is in large part because land prices are high, so the farmland is likely to be more valuable if used for suburban housing or retail rather than agriculture. In the last thirty years, Massachusetts lost 18% of farmland to development.<sup>20</sup> As more land shifted away from agriculture, land values increased. Massachusetts farmland had an average real estate value<sup>21</sup> of \$10,600 per acre in 2013, one of the highest in the nation.<sup>22</sup> Massachusetts farm real estate

<sup>17</sup> David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>; Jeanne Bernick, *Trust Worthy*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), [http://www.agweb.com/legacyproject/article/legacy2012\\_trust\\_worthy/](http://www.agweb.com/legacyproject/article/legacy2012_trust_worthy/).

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

<sup>19</sup> David Kohl & Alex White, *The Challenge of Family Business Transition*, HORIZONS, September/October 2001, at 1-2, available at <http://www.reap.vt.edu/publications/horizons/hor13-5.pdf>; Jeanne Bernick, *Trust Worthy*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), [http://www.agweb.com/legacyproject/article/legacy2012\\_trust\\_worthy/](http://www.agweb.com/legacyproject/article/legacy2012_trust_worthy/).

<sup>20</sup> NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM B1 (2014), available at [http://www.clf.org/wp-content/uploads/2014/03/1.New\\_England\\_Food\\_Policy\\_FULL.pdf](http://www.clf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULL.pdf).

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

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

values are high even compared to the Northeast<sup>23</sup> regional average of \$4,840/acre, and over three and a half times higher than the national average of \$2,900/acre.<sup>24</sup> In addition to pressure from developers, it may be difficult to keep the farm together if the farmer has many heirs. In some cases, the desire to farm can conflict with the interests of non-farming dependents, who may want to maximize the transfer value by selling farmland to the highest bidder.

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

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

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

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

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

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

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

<sup>27</sup> *Farmland Transfer Webinar*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/programs/protection/Farmland-Advisors-Farmland-Transfer.asp>; Kevin Spafford, *How to Grow Into a Leader*, FARM JOURNAL LEGACY PROJECT, [http://www.agweb.com/legacyproject/article/leave\\_a\\_legacy\\_how\\_to\\_grow\\_into\\_a\\_leader\\_NAA\\_Kevin\\_Spafford/](http://www.agweb.com/legacyproject/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford/); *Nine Business Succession-Planning Mistakes to Avoid*, FINANCIAL PLANNING ASSOCIATION (Oct. 2003), [http://www.practicalplanner.com/financial\\_articles/9\\_Biz\\_Succession\\_Mistakes\\_Avoid.pdf](http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf).

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

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

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

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

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

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

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

### Gentlemen's Agreements

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

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

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

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

<sup>32</sup> Sara Schafer, *Matters of the Estate*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), [http://www.agweb.com/legacyproject/article/legacy2012\\_matters\\_of\\_the\\_estate/](http://www.agweb.com/legacyproject/article/legacy2012_matters_of_the_estate/).

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

<sup>34</sup> Sara Schafer, *Matters of the Estate*, FARM JOURNAL LEGACY PROJECT (June 30, 2012), [http://www.agweb.com/legacyproject/article/legacy2012\\_matters\\_of\\_the\\_estate/](http://www.agweb.com/legacyproject/article/legacy2012_matters_of_the_estate/).

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

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

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

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

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

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

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

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

<sup>39</sup> NEW JERSEY FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11, *available at* [http://www.farmlandinfo.org/sites/default/files/FT9\\_NJSADC\\_Transferring%20the%20Family%20Farm.pdf](http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf).

<sup>40</sup> NEW JERSEY FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 10-11, *available at* [http://www.farmlandinfo.org/sites/default/files/FT9\\_NJSADC\\_Transferring%20the%20Family%20Farm.pdf](http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf).

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

➤ Preserving Agricultural Land and Production

- Benefits:
  - If the family is unwilling or unable to continue the farm, sales may be an effective way to transfer the farm to a person outside the family who shares the **farmer's values**.
- Drawback:
  - Absent specific conditions, pure sales do not provide **control over the farm's** future uses.

➤ Transferring Management and Control over the Operation

- Benefits:
  - As a seller, the farmer freely controls to whom she ultimately sells the farm.
  - Sale-leasebacks may be used to transfer land ownership into a lease. These can raise capital, while allowing the farmer to retain managerial control.
- Drawbacks:
  - With most sales, the farmer cannot direct the **purchaser's** management of the farm.
  - Outright sales may not allow gradual transfer of ownership and management.

➤ Protecting People

- Benefits:
  - Outright sales usually produce liquid capital, which is easily distributed between the farmer and other stakeholders.
- Drawbacks:
  - Because farm assets are often held for a very long time, the farmer likely has a low tax basis; however, if sold, the farmer may be able to take advantage of the lower rate on long-term capital gains.<sup>41</sup>
  - Buyers may not be able to afford the outright purchase of land and assets.

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

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

➤ Preserving Agricultural Land and Production

○ Benefits:

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

○ Drawbacks:

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

➤ Transferring Management and Control over the Operation

○ Benefits:

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

➤ Protecting People

○ Benefits:

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

○ Drawbacks:

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

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

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

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



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

➤ Preserving Agricultural Land and Production

○ Benefits:

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

○ Drawbacks:

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

➤ Transferring Management and Control over the Operation

○ Benefits:

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

○ Drawbacks:

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

➤ Protecting People

○ Benefits:

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

○ Drawbacks:

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

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

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

#### **Agricultural Preservation Restriction (APR) Program**

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

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

Source: *Agricultural Preservation Restriction Program*, MASS. DEP'T OF AGRIC. RESOURCES,  
<http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html>.

#### ➤ Preserving Agricultural Land and Production

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

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

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

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

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

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

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

➤ Transferring Management and Control over the Operation

○ Drawbacks:

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

➤ Protecting People

○ Benefits:

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

○ Drawbacks:

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

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

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

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

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

➤ Preserving Agricultural Land and Production

○ Benefits:

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

○ Drawbacks:

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

➤ Transferring Management and Control over the Operation

○ Benefits:

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

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

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

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

- Drawbacks:
  - Without clear documents dividing roles, multiple operators can create confusion and conflicts.
- Protecting People
  - Benefits:
    - Formal business structures may be used to limit estate tax liability.
    - These structures can be organized so the successor gains ownerships with sweat equity, or pays more slowly over time.
    - Limited liability business structures can be used to protect family assets, and non-managing participants.
    - Formal business structures can help divide assets among many dependents.
  - Drawbacks:
    - Depending on the structure, formation and formality costs may outweigh the above benefits.
    - A formal business structure may overly limit other **stakeholders'** ability to protect or influence the farm.

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

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

### *Real Estate Agents*

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

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

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

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

Land-linking programs also provide additional services such as free technical assistance forming tenure agreements.<sup>57</sup> Additionally, programs may facilitate farm transfers by providing educational support, property assessment, business planning services, and suggested matches.<sup>58</sup> In some cases, land-linking programs may also include services to help communities by identifying unused, viable farmland and encouraging landowners to lease their land to a farmer in order to increase active agriculture in the community.<sup>59</sup> New England Landlink<sup>60</sup> and New England Farmland Finder<sup>61</sup> list available Massachusetts farmland for would-be farmers.

➤ Preserving Agricultural Land and Production

○ Benefits:

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

○ Drawbacks:

- Land-linking programs cannot legally guarantee future farming.

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

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

<sup>56</sup> *New England Landlink*, NEW ENGLAND SMALL FARM INSTITUTE, [http://www.smallfarm.org/main/for\\_new\\_farmers/new\\_england\\_landlink/](http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/) (last visited Apr. 12, 2014).

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

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

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

<sup>60</sup> NEW ENGLAND LANDLINK, [http://www.smallfarm.org/main/for\\_new\\_farmers/new\\_england\\_landlink/](http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/).

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

## RESOURCES

### **American Farmland Trust**

Information for Farmland Advisors on Farm Transfer

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

### **California Farmlink**

Farm Succession Guidebook

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

### **Land for Good**

Handbook for Farmers without Identified Successors

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

Handbook on Farm Succession and Transfer Strategies for the Junior Farmer

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

### **New England Landlink**

[http://www.smallfarm.org/main/for\\_new\\_farmers/new\\_england\\_landlink/massachusetts/](http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/massachusetts/)

### **Tufts University New Entry Sustainable Farming Project**

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

### **New England Farmland Finder**

<http://newenglandfarmlandfinder.org/>

## CHAPTER V: FARMLAND ACQUISITION

*A critical prerequisite to beginning, expanding or relocating a farm is securing land.<sup>1</sup> Because securing land for the purpose of farming differs from securing land for other business purposes, there are a number of considerations and options specific to farming that a farmer and his/her attorney should consider. This chapter of the Farm and Food Law Guide is designed to introduce various methods of leasing or purchasing farmland and to identify the advantages and disadvantages of each of these methods.*

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**OVERVIEW** Farmers may seek advice from an attorney when securing land. This chapter outlines how attorneys volunteering with the Legal Food Hub (LFH) can help farmers to evaluate farmland acquisition options, as well as the advantages and disadvantages of different options.

- 1. Farmland Acquisition Overview** This section provides general information on farms in Massachusetts and farmland acquisition.
- 2. Evaluating Farmland Acquisition Options** This section identifies questions that the attorney should ask the farmer about her goals and limitations regarding farmland acquisition in order to evaluate possible acquisition options.
- 3. Choosing to Lease Farmland** This section identifies different methods of leasing farmland, listing the advantages and disadvantages of each method. It also includes an overview of lease formation and important lease provisions.
- 4. Choosing to Purchase Farmland** This section identifies different methods of purchasing farmland, listing the advantages and disadvantages of each method.

**FARMLAND ACQUISITION OVERVIEW** Before helping a farmer make decisions about farmland acquisition, an attorney may find it useful to have some background information on the changing methods of farmland acquisition. The general information on farmland in Massachusetts found in *Chapter I: Massachusetts Farming and Local Food Economy* may be helpful to attorneys to give a picture of the unique farming landscape in Massachusetts.

Traditionally, farmers transitioned farms to the next generation in their family through inheritance.<sup>2</sup> However, passing on a farm from one generation to the next within the same family through inheritance is not as prevalent as it once was. One Iowa study discovered that farm acquisition by inheritance accounted for 35% of farmland transfers in 1997 and only 23% in 2007; acquisition by purchase increased by 11% during the same period.<sup>3</sup> In Massachusetts, the per-acre price of the land is \$10,430, greatly exceeding the national average of \$2,481 per acre.<sup>4</sup> Surprisingly, even with these high prices, 83% of the farmland in the

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<sup>1</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 2 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>2</sup> Steve Schwartz, et al., *Farmland Conservation 2.0*, NAT'L YOUNG FARMERS COALITION 9-10 (Sept. 2013), <http://www.youngfarmers.org/reports/conservation2.0.pdf>; Robert Parsons, FarmLASTS Project, et al., *Research Report and Recommendations from the FarmLASTS Project*, THE FARMLASTS PROJECT 10 (Apr. 2010), <http://www.uvm.edu/farmlasts/FarmLASTSResearchReport.pdf>. (For more information on farm transitions, refer to *Chapter IV: Farm Transitions*.)

<sup>3</sup> Robert Parsons, FarmLASTS Project, et al., *Research Report and Recommendations from the FarmLASTS Project*, THE FARMLASTS PROJECT 10 (Apr. 2010), <http://www.uvm.edu/farmlasts/FarmLASTSResearchReport.pdf>.

<sup>4</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., U.S. DATA 7 tbl.1 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf); U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA, 18 tbl.11 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).



state is owned, not rented.<sup>5</sup> However, the high and rising price of land may deter some Massachusetts farmers from considering purchasing land. Consequently, farmers often must rely on methods other than inheritance, such as purchasing or gifting, to acquire farmland. This chapter provides attorneys with information on farmland acquisition considerations, focusing on two broad methods of farmland acquisition: leasing and purchasing.

## EVALUATING FARMLAND ACQUISITION OPTIONS

This section provides a cursory overview of some of the factors a farmer would consider in making farmland acquisition decisions. Typically, a farmer will have made this decision prior to forming a relationship with an attorney who would aid in the acquisition. However, understanding these factors can help an attorney to begin to better understand the farmer's goals and limitations in undertaking the land acquisition, gauge the farmer's financial situation, and determine the impact of business structure on the farmland acquisition decision.

### Getting Context: Initial Questions to Ask the Farmer

It is crucial that the farmer and attorney fully understand the farmer's limitations and needs in the farmland acquisition decision. There are a number of factors that farmers consider when selecting pieces of land for their operation and determining whether to buy or lease farmland.<sup>6</sup> An attorney giving counsel on land acquisition options should be familiar with key factors that may affect the farmer's decision such as:

- **The farmer's financial position.**<sup>7</sup> How much financing can the farmer secure from lenders? Does she qualify for government financial assistance?<sup>8</sup> Will the farmer partner with farmland investors, such as Iroquois Valley Farms<sup>9</sup> or Dirt Capital Partners?<sup>10</sup>

### Considerations for Land Selection

In most cases, before seeking counsel from the LFH, the farmer will have selected the land they are interested in acquiring. However, in the event that the farmer has not yet selected land, there are several legal considerations you should ask the farmer to consider in her selection.

- *Existing restrictions on land.* Are there restrictions in place on land use such as covenants, zoning codes, easements, or encumbrances?
- *Surrounding land.* Are there nuisances from surrounding land that could impact the desirability? How supportive of the farming operation would neighbors and the community be? Without supportive neighbors, a farmer may be subject to nuisance suits for issues such as noise, odor, and fumes.
- *Environmental concerns.* Is the land subject to environmental regulations (e.g., past hazardous use)?
- *Legal advantages.* Is the land located in a municipality with favorable regulations (e.g. simple permitting processes)? Does the municipality have right-to-farm bylaws to encourage farming? More than 160 towns in Massachusetts have adopted right-to-farm bylaws.
- *Presence of Agricultural Commissions ("AgComs").* Does the municipality have an AgCom presence? These organizations are increasingly common in Massachusetts and are established to preserve farmland and promote the local agricultural sector. They may help launch farmland preservation efforts, enact right-to-farm laws (see above), review local regulatory proposals, help farmers with marketing products, mediate disputes between farmers and neighbors, establish farmers markets, host farming educational workshops, and raise money for these efforts.

**Sources:** *Right to Farm By-Law*, MASS. DEP'T OF AGRIC. RES., <http://www.mass.gov/eea/agencies/agr/land-use/right-to-farm-by-law.html> (last visited Oct. 11, 2014); *About AgComs: Overview*, MASS. ASS'N OF AGRIC. COMM'NS,

<sup>5</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 7 tbl.1(2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>6</sup> Melissa Matthewson, *Top Ten Things I Learned from Buying a Small Farm*, OREGON SMALL FARM NEWS 3-4, [http://smallfarms.oregonstate.edu/sites/default/files/Small\\_Farm\\_News\\_Nov22\\_0.pdf](http://smallfarms.oregonstate.edu/sites/default/files/Small_Farm_News_Nov22_0.pdf). (last visited January 21, 2016); *Owning and Leasing Agricultural Real Estate*, PENN ST. C. OF AGRIC. SCI., <http://extension.psu.edu/business/ag-alternatives/farm-management/owning-and-leasing-agricultural-real-estate> (last visited Jan. 12, 2016).

<sup>7</sup> See *Acquiring Your Farm: Financial Assessment*, LAND FOR GOOD, <http://newsite.landforgood.org/index.php/financial-assessment.html> (last visited Aug. 30, 2015).

- ***The farmer's experience level.*** Is the farmer an experienced or a first-time farmer? She may qualify for certain federal loans, depending on the number of years she has operated a farm.<sup>11</sup>
- *Willingness and ability to make needed maintenance or improvements.* Over the lifetime of a farm operation, maintenance or improvements to structures such as irrigation systems, barns, or storage facilities will be necessary. Is the farmer willing to invest in repairing these facilities if she does not own the land? If not, how can the responsibility to maintain and improve these facilities be clearly delegated to the landlord in the written arrangement to avoid future conflict?
- *Amount of land needed.* **What amount of land will be needed for the farmer's operations?**<sup>12</sup> Does the land need to be contiguous?
- *Non-agricultural uses.* Will the land be used for any non-agricultural purposes such as weddings or agritourism?<sup>13</sup> Will the public be invited onto the land, potentially requiring different permits? Is the land all or partially zoned exclusively for agricultural use?<sup>14</sup>
- *Potential tax credits.*<sup>15</sup> Is the land eligible for any of the tax credits and tax advantages that may apply to certain forms of agricultural land? For instance, in Massachusetts, land of five acres or more that is actively devoted to agricultural use (and has been for at least the two previous years) may qualify for a lower state property tax rate **based on the land's agricultural value.**<sup>16</sup>
- *Potential grants.* Does the farmer qualify for state or federal grant programs to encourage farming? For example, the Massachusetts Department of Agricultural Resources offers a variety of grants for farmers, such as grants to improve conservation practices and increase farm viability.<sup>17</sup> Various federal grants are available as well.<sup>18</sup>
- *Potential legal exemptions.* Does the land qualify for any legal exemptions from local or state requirements? For example, Massachusetts law provides broad exemptions from local zoning requirements for agricultural uses on farms of five acres or more generally, or two acres or more if

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<sup>8</sup> *Credit and Capital*, NAT'L YOUNG FARMERS COALITION, <http://www.youngfarmers.org/credit-and-capital/#stateresources> (last visited June 30, 2015). (Note that socially disadvantaged groups include American Indians, Alaskan Natives, Asian Americans, African Americans, Native Hawaiians or other Pacific Islanders, Hispanics, and women. For conservation programs, socially disadvantaged producers do not include women.)

<sup>9</sup> IROQUOIS VALLEY FARMS, <http://iroquoisvalleyfarms.com/> (last visited Aug. 30, 2015).

<sup>10</sup> DIRT CAPITAL PARTNERS, <http://www.dirtpartners.com/> (last visited Aug. 30, 2015).

<sup>11</sup> See, e.g., *Beginning Farmers and Ranchers Loans*, U.S. DEP'T OF AGRIC., <http://www.fsa.usda.gov/programs-and-services/farm-loan-programs/beginning-farmers-and-ranchers-loans/index> (last visited June 30, 2015) (defining a "beginning farmer," who may qualify for such loans, as a farmer who has not operated a farm or ranch for more than 10 years, in addition to other factors).

<sup>12</sup> *Farmland Assessment Checklist*, PENN ST. C. OF AGRIC. SCI., <http://extension.psu.edu/business/start-farming/land-equipment/land/farmland-assessment-checklist> (last visited January 12, 2016).

<sup>13</sup> See, e.g., General Legislation of the Town of Groton, MA, § 137, available at <http://ecode360.com/9077856>.

<sup>14</sup> See, e.g., General Legislation of the Town of Groton, MA, § 137, available at <http://ecode360.com/9077856>.

<sup>15</sup> For more information on taxation issues for farmers generally, refer to *Chapter VI: Taxes*.

<sup>16</sup> See MASS. GEN. LAWS ANN. ch. 61A, § 4 (West 2014).

<sup>17</sup> See *Grants and Funding Programs*, MASS. DEP'T OF AGRIC. RES., <http://www.mass.gov/eea/agencies/agr/about/divisions/dacta-grants-lc.html> (last visited July 1, 2015).

<sup>18</sup> *Where Can I Find Agricultural Funding Resources?*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. LIB., <http://afsic.nal.usda.gov/where-can-i-find-agricultural-funding-resources> (last visited January 12, 2016).

the sale of agricultural products from the land generates at least \$1,000 per acre.<sup>19</sup> Additionally, as discussed later, the Massachusetts Wetlands Protection Act includes an agricultural exemption.<sup>20</sup>

- *Other reasons.* People make land acquisition decisions for a variety of personal and professional reasons, and all of these come into play in the decision about acquiring farmland as well. Considerations could be based on knowledge of certain local markets or business opportunities, or on proximity to family or friends.

**Considering the Impacts of Business Structure**<sup>21</sup> Nearly 80% of farms in Massachusetts operate as sole proprietorships, meaning the farmer retains a complete ownership interest.<sup>22</sup> There are, however, a number of alternative business structures used by farm operations.<sup>23</sup> The primary ones used are: legal partnerships, limited liability companies, and corporations, each of which comprises 5-7% of farms in Massachusetts.<sup>24</sup> It is important for the attorney assisting with farmland acquisition to understand the farmer's current or potential future business structure.

In some situations, a farmer may not yet have chosen a business structure. In these cases, the farmland acquisition decision may dictate what business structure makes the most sense for the farmer. For example, some business structures more easily allow children of a farmer to acquire the farmer's farmland. A family limited partnership model allows an existing landowner, typically a farmer-parent, to transfer the property to the family partnership in exchange for a certain number of units in the partnership.<sup>25</sup> Through a limited partnership agreement, the farmer-parent becomes a general partner and the children become limited partners. The farmer-parent executes a deed conveying the farm to herself and gradually transfers increasing interest in the limited partnership, and accordingly the farmland, to the limited partners.<sup>26</sup> Depending on the terms of the limited partnership agreement, the farmer-parent can retain management control over the farm even if she maintains only a minimal equity interest.<sup>27</sup> Making her children limited partners means that they may be held liable to creditors for all of the debts, such as mortgage loans, from the land acquisition.<sup>28</sup>

Another circumstance in which business structure can affect land acquisition is when multiple farmers are engaged in cooperative farming. If, for example, a group of farmers wants to purchase land and decides not

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<sup>19</sup> See MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 2014).

<sup>20</sup> *Farming in Wetland Resource Areas*, MASS. DEP'T OF ENV. PROTECTION 2-1 (1996), <http://www.mass.gov/eea/docs/dep/water/laws/a-thru-h/farman.pdf>.

<sup>21</sup> For more information on shared models for farmland and farm business ownership, see *Chapter II: Business Structures*.

<sup>22</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 7 tbl.1 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>23</sup> See *supra* Chapter II.

<sup>24</sup> U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 7 tbl.1 (2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf); Rachel Armstrong, *Business Organization Comparison Chart*, WISCONSIN FARM COMMONS 2-3, [www.farmcommons.org/resources/business-entityorganization-comparison-chart](http://www.farmcommons.org/resources/business-entityorganization-comparison-chart) (last visited July 2, 2015).

<sup>25</sup> *Forms of Business Organization*, THE AMERICAN COLLEGE 1.21-22, <https://www.theamericancollege.edu/assets/pdfs/fa251-class1.pdf> (last visited July 2, 2015).

<sup>26</sup> *Forms of Business Organization*, THE AMERICAN COLLEGE 1.20, <https://www.theamericancollege.edu/assets/pdfs/fa251-class1.pdf> (last visited July 2, 2015).

<sup>27</sup> *Forms of Business Organization*, THE AMERICAN COLLEGE 1.21, <https://www.theamericancollege.edu/assets/pdfs/fa251-class1.pdf> (last visited July 2, 2015).

<sup>28</sup> *Forms of Business Organization*, THE AMERICAN COLLEGE 1.20-22, <https://www.theamericancollege.edu/assets/pdfs/fa251-class1.pdf> (last visited July 2, 2015).

to form a business entity, then the farmers will be tenants in common.<sup>29</sup> Each farmer will own a fraction of the property and enjoy the right to the possession and use of the entire property. If that group of farmers instead forms a LLC to own the land, then each farmer can have unequal interest depending on her contribution.<sup>30</sup> In creating a separate business entity to own the land, the farmers also have better liability protection because the land cannot be seized if the business fails. If that group of farmers decides to lease land, each farmer could have a lease with the landowner or the group of farmers could form a legal entity and lease land together. The Cooperative Farmland Holding chapter of the *Cooperative Farming* publication provides more information on farm cooperatives and land acquisition options.<sup>31</sup>

When helping farmers with farmland acquisition, attorneys should research the advantages and disadvantages of different formal business structure options. *Chapter II: Business Structures* is a helpful place to start.

**CHOOSING TO PURCHASE FARMLAND** Once the farmer and attorney understand the farmer's financial limitations and the scope of the prospective project, they can evaluate farmland acquisition options. One major early decision is whether to purchase or lease farmland. Purchasing farmland in Massachusetts can be very expensive. Farmland values in Massachusetts average \$10,400 per acre, the fourth highest rate in the United States.<sup>32</sup> Additionally, if the land is located in an area with a lot of development, the market price of land may be more expensive than its agricultural value.<sup>33</sup>

In Massachusetts, an unrecorded deed is valid and enforceable between the parties to the deed (the landowner and the farmer), their heirs and assigns, and any person having actual knowledge of the deed, even if neither the deed nor a notice of the deed is recorded.<sup>34</sup> Although it is very common for farmers to rely on oral or handshake commitments, attorneys should promote written agreements and can aid farmers in drafting a purchase agreement, negotiating terms, or reviewing the final document before executing the contract. In Massachusetts, actions related to agreements concerning an interest in land and agreements that will not be completely performed within one year cannot be brought **unless the agreement is in "writing and signed by the party to be charged therewith."**<sup>35</sup> Additionally, in Massachusetts, attorneys are required to be involved in the closing or settlement of real property conveyances.<sup>36</sup>

**Types of Purchase** For those farmers who have the financial ability, experience, and willingness to purchase farmland, this section discusses several purchasing options.

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<sup>29</sup> Faith Gilbert, *Cooperative Farming*, GREENHORNS 37, [http://www.thegreenhorns.net/wp-content/files\\_mf/1393438767FINAL\\_greenhorns\\_guidebook\\_PK2.pdf](http://www.thegreenhorns.net/wp-content/files_mf/1393438767FINAL_greenhorns_guidebook_PK2.pdf) (last visited January 21, 2016).

<sup>30</sup> Faith Gilbert, *Cooperative Farming*, GREENHORNS 34, [http://www.thegreenhorns.net/wp-content/files\\_mf/1393438767FINAL\\_greenhorns\\_guidebook\\_PK2.pdf](http://www.thegreenhorns.net/wp-content/files_mf/1393438767FINAL_greenhorns_guidebook_PK2.pdf) (last visited January 21, 2016).

<sup>31</sup> Faith Gilbert, *Cooperative Farming*, GREENHORNS 34, [http://www.thegreenhorns.net/wp-content/files\\_mf/1393438767FINAL\\_greenhorns\\_guidebook\\_PK2.pdf](http://www.thegreenhorns.net/wp-content/files_mf/1393438767FINAL_greenhorns_guidebook_PK2.pdf) (last visited January 21, 2016).

<sup>32</sup> U.S. DEP'T OF AGRIC. NAT'L AGRIC. SERV. STATISTICS, LAND VALUES 2014 SUMMARY 8 (Aug. 2015), *available at* <http://www.usda.gov/nass/PUBS/TODAYRPT/land0815.pdf>.

<sup>33</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 7 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

<sup>34</sup> MASS. GEN. LAWS ANN. ch. 183, § 4 (West 2014).

<sup>35</sup> MASS. GEN. LAWS ANN. ch. 259 § 1 (West 2014).

<sup>36</sup> *Real Estate Bar Ass'n of Mass. v. Nat'l Real Estate Info. Services*, 459 Mass. 512, 532 (Mass. 2011).

- **Fee Simple Purchase with Conventional Financing:** This method of land acquisition is the standard means of purchasing a farm.<sup>37</sup> A farmer finds property, makes a written offer with a mortgage contingency, and purchases the land with a mortgage from a conventional lender, such as a bank.

A fee simple purchase may couple conventional financing with sweat equity. Sweat equity for a farmer is roughly defined as an ownership stake in farmland or a farm business that is gifted or acquired by negotiation with the senior farmer through hard work or “sweat.”<sup>38</sup> As a customized version of a fee simple purchase, this agreement involves the buyer paying off all or a portion of the agreed upon cost of the land or business through labor.<sup>39</sup> This option may fit well with aspiring young farmers (including family beneficiaries) who are not able to purchase farmland completely through conventional financing.<sup>40</sup> For the many retiring farmers who are land-rich but have limited cash assets, sweat equity agreements benefit the retiring farmer who is able to credit work done on the farm without having to pay scarce cash for that labor.<sup>41</sup>

- **Advantages:** Since the farmer would acquire and hold title to the land, traditional ownership provides the greatest flexibility in terms of what the owner can do with the land.
  - **Disadvantages:** Traditional purchasing often does not make sense for first-time or inexperienced farmers. Lenders typically require a demonstrated track record of both successful farm business management and a credible cash-flow projection in determining whether to provide financing.<sup>42</sup> Small-scale farmers may also find it difficult to secure conventional financing because lenders may not be familiar with the business models of small diversified farming operations, in contrast to large-scale commodity operations, so they would be less likely to lend money to these operations.<sup>43</sup>
- **Fee Simple Purchase with Seller Financing:** In a fee simple purchase with seller financing (also called a “land contract sale”), the buyer and seller agree to a purchase price and terms for the land, after which the buyer takes title to the land and makes payments directly to the seller.<sup>44</sup>
    - **Advantages:** Due to lower transaction costs and flexible payment structures, this arrangement may work well for a beginning farmer who cannot obtain financing through conventional sources, but may be able to obtain financing from the seller by virtue of the

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<sup>37</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>38</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>39</sup> See *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>40</sup> Kristen Loria et al., *Affording OURLAND*, GREENHORNS 20-21 (2013), <http://agrariantrust.org/resources/affording-ourland-financial-literacy-for-young-farmers/>.

<sup>41</sup> Kristen Loria et al., *Affording OURLAND*, GREENHORNS 20-21 (2013), <http://agrariantrust.org/resources/affording-ourland-financial-literacy-for-young-farmers/>.

<sup>42</sup> See *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf)

<sup>43</sup> *Getting Banks to “Yes” with Small, Diversified Farms*, NATIONAL GOOD FOOD NETWORK (Dec. 16, 2010), <http://www.ngfn.org/resources/ngfn-cluster-calls/getting-banks-to-yes-with-small-diversified-farms>.

<sup>44</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 8 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

**farmer's character or reputation.**<sup>45</sup> Typically, this form of land acquisition is optimal for farmers who have an established, good relationship with the seller.<sup>46</sup> Additionally, the seller may benefit by limiting capital gains and income tax liability.<sup>47</sup> This benefit occurs because in a seller-financed arrangement the seller pays capital gains on the principal and income tax on the interest over time as the seller receives annual installment payments, rather than having to pay all state and federal taxes at once in the year of the closing, as in the case of a traditional sale.<sup>48</sup> Both parties should obtain independent qualified tax advice from an accountant or a tax law attorney to fully understand the tax implications of a seller financed transaction.

- **Disadvantages:** Sellers bear a large portion of the risk that the buyer cannot keep up with payments.<sup>49</sup> However, if buyers are not able to keep up with payments and their agreement, the seller then has the right to foreclose and repossess the property according to state and federal laws.<sup>50</sup>
- **Fee Simple Purchase with Conservation Agricultural Easements:** This option is the same as the fee simple purchases described above, except that the buyer purchases land that is already restricted by an easement that limits the use of the land to agricultural-related uses for some future period.<sup>51</sup> The land's development rights have been sold or donated to a trust or government agency in the form of an agricultural conservation easement.<sup>52</sup>
  - **Advantages:** Because such land cannot be further developed, the land's value (referred to as the "easement encumbered value") falls, making it a more affordable option than purchasing land without an easement.<sup>53</sup> Land with conservation easements may have decreased property and inheritance tax burdens because of the lower property value; this option also benefits the community by preserving agricultural lands.<sup>54</sup>
  - **Disadvantages:** Even with the reduction in value, land with conservation easements often remains unaffordable for the farmers that would be willing to farm on such land, creating a

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<sup>45</sup> *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf> (last visited June 29, 2015).

<sup>46</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 8 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

<sup>47</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>48</sup> Anthony Iarrapino & Elizabeth Spellman, *Owner-Financed Sales and Land Contracts* in *Guide to Financing the Community Supported Farm*, U. OF VT. CTR. FOR SUSTAINABLE AGRIC. 11 (2012), [http://www.uvm.edu/newfarmer/business/finance-guide/Guide%20to%20Financing%20the%20Community%20Supported%20Farm\\_March2012.pdf](http://www.uvm.edu/newfarmer/business/finance-guide/Guide%20to%20Financing%20the%20Community%20Supported%20Farm_March2012.pdf).

<sup>49</sup> Ben Waterman, *A Primer on the Owner-Financed Farm Sale*, UVM EXTENSION NEW FARMER PROJECT (May 25, 2011), <http://newfarmerproject.wordpress.com/2011/05/25/a-primer-on-the-owner-financed-farm-sale/>.

<sup>50</sup> Ben Waterman, *A Primer on the Owner-Financed Farm Sale*, UVM EXTENSION NEW FARMER PROJECT (May 25, 2011), <http://newfarmerproject.wordpress.com/2011/05/25/a-primer-on-the-owner-financed-farm-sale/>.

<sup>51</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>52</sup> *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf> (last visited July 2, 2015).

<sup>53</sup> See *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf> (last visited July 2, 2015).

<sup>54</sup> *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf> (last visited July 2, 2015).

market gap.<sup>55</sup> It is also possible that the land trust currently holding title to the easement will close during a farmer's tenancy and stewardship will be given to a new organization with its own guidelines, so attorneys should review the easement for provisions that relate to such a transition.<sup>56</sup>

- **Note on the Massachusetts Agricultural Preservation Restriction (APR) Program:** The Massachusetts Department of Agricultural Resources (MDAR) has created the primary network of farmland with agricultural easements through the Agricultural Preservation Restriction (APR) program.<sup>57</sup> The program works by paying farmland owners the difference between the “fair market value” and the “agricultural value” of their farmland. In return, the landowners give the state a permanent deed restriction prohibiting any use of the property that could negatively impact its potential agricultural use.<sup>58</sup> Since the early 1990s, the Massachusetts APR Program has used an “affirmative covenant” in all of its APRs, which requires that the protected farmland remain in active, commercial agricultural use.<sup>59</sup>
- **Variation on Fee Simple Purchase For Small Acreage:** This form of fee simple purchase is similar to the traditional form of purchase, except in terms of financing. Under this model, the farmer seeks financing from a conventional lender as a single-family residence.<sup>60</sup> If the farmer can demonstrate sufficient income from off-farm sources based on a track record of maintaining an off-farm job, the farmer may qualify for a home loan that can be used to purchase a small amount of acreage (typically 2-15 acres).<sup>61</sup>
  - **Advantages:** Prospective farmers may be precluded from traditional financing because of lack of prior experience in the field. Farmers purchasing small acreage can circumvent that issue by securing a traditional home loan.<sup>62</sup>
  - **Disadvantages:** Because local zoning laws may not permit agricultural use in residential zones, the farmer should first determine whether zoning restrictions apply.<sup>63</sup> In addition, if the farmer lives in a residential development, the farmer should investigate whether restrictive covenants apply, since these covenants may hinder certain farming practices

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<sup>55</sup> Kristen Loria et al., *Affording OURLAND*, GREENHORNS 24-27 (2013), <http://agrariantrust.org/resources/affording-ourland-financial-literacy-for-young-farmers/>.

<sup>56</sup> See Kristen Loria et al., *Affording OURLAND*, GREENHORNS 24-27 (2013), <http://agrariantrust.org/resources/affording-ourland-financial-literacy-for-young-farmers/>

<sup>57</sup> See Chapter X of this guide for more information on APRs.

<sup>58</sup> *Agricultural Preservation Restriction Program*, MASS. DEP'T OF AGRIC. RES., <http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html> (last visited July 2, 2015); see also Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 8 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

<sup>59</sup> Email Interview with Carol A. Szocik, Paralegal, MASS. DEP'T OF AGRIC. RES., (Apr. 11, 2014) (on file with author); see also 330 MASS. CODE REGS. 22.08 (2014) (stating that the “APR Restriction” may include an “affirmative duty to farm”).

<sup>60</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>61</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>62</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008), [http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>63</sup> See *Planning and Zoning*, URBANAGLAW.ORG, <http://www.urbanaglaw.org/planning-and-zoning/> (last visited July 2, 2015).

(such as maintaining livestock).<sup>64</sup> Lastly, farmers looking to purchase large amounts of acreage would be unable to use this purchasing method.

**CHOOSING TO LEASE FARMLAND** An attorney helping a farmer to lease farmland should encourage the farmer to consider various issues related to the term of the lease, the land being leased, and the methods for addressing conflicts. Much of the information in this section is based on *A Landowner's Guide to Leasing Land for Farming*, by Land for Good,<sup>65</sup> which is an essential guide to this topic. There are three initial issues that should be considered, and which are discussed in more detail in the following sections:

- *Term Length.* Farm leases exist in many different forms with varying term lengths. Some are year-to-year leases and require annual renegotiation.<sup>66</sup> Others are structured as multi-year leases that may or may not include rent adjustments.<sup>67</sup> Farm leases for new farmers can often be designed with a certain amount of flexibility and contingency so that the parties can modify the arrangement over time to benefit both of them.<sup>68</sup> Longer-term leases often provide farmers with incentives to invest in soil quality improvements and good stewardship practices, as they will be on the land long enough to personally benefit from the improvements.<sup>69</sup>
- *Payment Structure.* Farm leases vary according to the type and frequency of rent payments. The most common forms of payment are: (i) *cash rent*, in which the tenant pays rent on a fixed basis (such as monthly or annually); (ii) *sliding pay scale*, in which the tenant pays a greater amount of money over time; and (iii) *crop- or livestock-share rent*, in which the tenant splits production costs and livestock or crop profits with the landowner in an agreed upon proportion.<sup>70</sup> Other types of rent payments include in-kind rent and flexible (adjustable) cash leases.<sup>71</sup>
- *Restricted land.* As discussed above in *Choosing to Purchase Farmland*, farmland may be restricted by **local land trusts or through enrollment in programs such as MDAR's Agricultural Preservation Restriction Program.**<sup>72</sup> Restricted farmland is typically less expensive than unrestricted farmland; however, restrictions on the land provide less flexibility, particularly with respect to future

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<sup>64</sup> Preserving Agricultural Land and Farming Opportunities, [http://www.mass.gov/envir/smart\\_growth\\_toolkit/pages/mod-ag.html](http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-ag.html) (last visited June 29, 2015); Email Interview with Ed Cox, Staff Attorney, AGRIC. LAW CENTER, DRAKE U., (Apr. 23, 2014) (on file with author).

<sup>65</sup> See *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>66</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 18 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>67</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 18-19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>68</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 3 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>69</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 18-19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>70</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 21 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>71</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 21 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>72</sup> *Agricultural Preservation Restriction Program (APR)*, MASS. DEP'T OF AGRIC. RES., <http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html> (last visited Aug. 19, 2015).



development rights.<sup>73</sup> Attorneys assisting farmers with farmland leases should make sure farmers understand any restrictions on the land and how those restrictions will limit lease uses and building opportunities.

**Types of Leases** This section identifies different types of leases, varying in term length and payment structure. These types of leases may be combined depending on the goals of the landowner and tenant.

- *Short-Term Leases.* Most farmland leases are short-term, lasting from one to three years.<sup>74</sup> Often these leases are year-to-year leases that can be renewed annually.<sup>75</sup> These leases are common because both parties understand the inherent flexibility in the short-term lease agreement.<sup>76</sup>
  - **Advantages:** Short-term leases are often flexible and therefore can be ideal for beginning farmers seeking a trial period for farming operations or for experienced farmers who hope to experiment in a new enterprise while minimizing their financial risk.<sup>77</sup> Farmers in short-term lease arrangements may also benefit from tax deductions.<sup>78</sup>
  - **Disadvantages:** Short-term leases can present difficulties in long-term business planning and in securing financing for farm assets.<sup>79</sup> Short-term leases are not conducive to long-term planning because one could lose investments in infrastructure upon termination and there is little incentive to engage in conservation activities.<sup>80</sup> Further, it is often more difficult to get creditor lending with short-term leases.<sup>81</sup>
- *Long-Term Leases.* Long-term leases can last for a period of five to ninety-nine years.<sup>82</sup> Because of the higher commitment required, they are not as common as short-term leases.<sup>83</sup> However, parties can retain flexibility by drafting the lease to allow for simple and efficient termination.<sup>84</sup>

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<sup>73</sup> See *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf> (last visited July 2, 2015).

<sup>74</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 18 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>75</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 18 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>76</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>77</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>78</sup> *Advantages and Disadvantages of Leasing*, LAND FOR GOOD, [http://newsite.landforgood.org/tl\\_files/v1/05%20%20-%20Leasing/leasing\\_advantages\\_2.pdf](http://newsite.landforgood.org/tl_files/v1/05%20%20-%20Leasing/leasing_advantages_2.pdf) (last visited July 2, 2015). *Understanding Your Federal Farm Income Taxes*, PENN ST. C. OF AGRIC. SCI., <http://extension.psu.edu/business/ag-alternatives/farm-management/understanding-your-federal-farm-income-taxes> (last visited July 1, 2015).

<sup>79</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>80</sup> *Advantages and Disadvantages of Leasing*, LAND FOR GOOD, [http://newsite.landforgood.org/tl\\_files/v1/05%20%20-%20Leasing/leasing\\_advantages\\_2.pdf](http://newsite.landforgood.org/tl_files/v1/05%20%20-%20Leasing/leasing_advantages_2.pdf) (last visited July 2, 2015).

<sup>81</sup> *Advantages and Disadvantages of Leasing*, LAND FOR GOOD, [http://newsite.landforgood.org/tl\\_files/v1/05%20%20-%20Leasing/leasing\\_advantages\\_2.pdf](http://newsite.landforgood.org/tl_files/v1/05%20%20-%20Leasing/leasing_advantages_2.pdf) (last visited July 2, 2015).

<sup>82</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>83</sup> *Leasing Land to Farmers: A Handbook for New England Land Trusts, Municipalities, and Institutions*, LAND FOR GOOD 14 (2012), [http://www.thegreenhorns.net/wp-content/files\\_mf/1344531550landaccess.pdf](http://www.thegreenhorns.net/wp-content/files_mf/1344531550landaccess.pdf); *A Landowner's Guide to Leasing Land for Farming*,

- **Advantages:** Long-term leases encourage farmers to invest in beneficial long-term habits. For instance, long-term leases may encourage the farmer to adopt conservation practices that improve soil quality, and can provide the farmer with time to build a business track record to gain eligibility for conventional loans to purchase land.<sup>85</sup> Sometimes cities or land trusts will choose a long-term lease to incentivize farmers to make sustainable improvements to the land by guaranteeing them the potential for life tenure.<sup>86</sup>
- **Disadvantages:** Long-term leases have considerably less flexibility because they bind the parties to the lease for a longer period of time, although the impacts of this commitment can be mitigated by including provisions allowing for periodic modification of the lease terms.<sup>87</sup> In contrast to purchasing land, the long-term lease reduces net income without building wealth, because the farmer is making payments without contributing to long-term accumulation of wealth in property. She thus cannot derive any benefit from land value appreciation. Additionally, loans may be difficult to get if a farmer rents land long-term, rather than owning it, because she cannot use land as loan security.<sup>88</sup>

### Massachusetts Public Land Leases

An interesting alternative for farmers looking to lease is a public land lease. A public land lease limits the use of the land, but unlike an easement or covenant, the land is owned by the State. Massachusetts state law provides for the leasing of unused public lands for farming, gardening, or arbor purposes. Interested prospective tenants can apply for a permit and must agree to a number of conditions, including indemnification of the state against claims of liability arising out of the use of vacant land.

- *Rolling Leases.* Rolling leases renew automatically each year for term of the lease.<sup>89</sup> For example, a two-year rolling lease for 2015-16 will automatically renew at the end of 2015 for another two-year term from 2016-17, unless the landowner or farmer communicates her intent to stop the lease at the end of

LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>84</sup> *Advantages and Disadvantages of Leasing*, LAND FOR GOOD, [http://newsite.landforgood.org/tl\\_files/v1/05%20%20-%20Leasing/leasing\\_advantages\\_2.pdf](http://newsite.landforgood.org/tl_files/v1/05%20%20-%20Leasing/leasing_advantages_2.pdf) (last visited July 2, 2015).

<sup>85</sup> *Advantages and Disadvantages of Leasing*, LAND FOR GOOD, [http://newsite.landforgood.org/tl\\_files/v1/05%20%20-%20Leasing/leasing\\_advantages\\_2.pdf](http://newsite.landforgood.org/tl_files/v1/05%20%20-%20Leasing/leasing_advantages_2.pdf) (last visited July 2, 2015); *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>86</sup> *Finding Land to Farm: Six Ways to Secure Farmland*, ATTRA—NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2 (2009), <https://attra.ncat.org/attra-pub/summaries/summary.php?pub=174>.

<sup>87</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>; *Leasing Land to Farmers: A Handbook for New England Land Trusts, Municipalities, and Institutions*, LAND FOR GOOD 14, [http://www.thegreenhorns.net/wp-content/files\\_mf/1344531550landaccess.pdf](http://www.thegreenhorns.net/wp-content/files_mf/1344531550landaccess.pdf) (last visited July 2, 2015).

<sup>88</sup> *Advantages and Disadvantages of Leasing*, LAND FOR GOOD, [http://newsite.landforgood.org/tl\\_files/v1/05%20%20-%20Leasing/leasing\\_advantages\\_2.pdf](http://newsite.landforgood.org/tl_files/v1/05%20%20-%20Leasing/leasing_advantages_2.pdf) (last visited July 2, 2015).

<sup>89</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

the remaining term. In contrast, a seven-year rolling lease renews each year for a new seven-year term, which means that a farmer will always have at least six years notice before the lease expires.

- **Advantages:** Rolling leases can provide tenants with a longer-term commitment to the land than a short-term lease, and give tenants the stability to make investments in the land. At the same time, the rolling lease still allows the parties to exit the agreement with proper notice.<sup>90</sup>
  - **Disadvantages:** A longer-term (e.g. seven-year) rolling lease will share the same disadvantages as a long-term lease, while a shorter-term (two-year) rolling lease will resemble a standard short-term lease.
- *Fixed Cash Lease.* A fixed cash lease allows a landowner and a farmer to establish a set amount of cash rent that will be paid by a certain date, typically each month or year.<sup>91</sup>
- **Advantages:** The landowner receives a predictable rent check and the farmer knows exactly how much it will cost to lease the farmland at the outset of every season.<sup>92</sup>
  - **Disadvantages:** Fixed cash leases place all the risk associated with farming, including variability in yield and price, on the farmer.<sup>93</sup>
- *Flexible Cash Lease.* Under a flexible cash lease, the rent paid by the farmer to the landowner is determined after the crop is harvested and varies based on the crop yield, the selling prices, or both.<sup>94</sup> Under one type of flexible cash lease, the landowner receives a specified share of the gross revenue of the crop.<sup>95</sup> Under another type of flexible cash lease, the landowner receives a combination of a base cash rent and a share of the revenue. In latter model, landowner and the farmer agree on a cash “base” rent that is lower than rent under a fixed cash lease.<sup>96</sup> The landowner is then guaranteed to receive the base rent and, depending on the crop yield and selling prices, a certain share of gross revenue of the crop.<sup>97</sup>

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<sup>90</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>91</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited June 29, 2015); *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 21 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>92</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited June 29, 2015).

<sup>93</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 21 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>94</sup> E. G. Stoneberg & Kelvin Leibold ed., *Improving Your Farm Lease Contract*, IOWA STATE UNIV. EXTENSION & OUTREACH (last updated July 2014), <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-01.html>.

<sup>95</sup> E. G. Stoneberg & Kelvin Leibold ed., *Improving Your Farm Lease Contract*, IOWA STATE UNIV. EXTENSION & OUTREACH (last updated July 2014), <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-01.html>.

<sup>96</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 22 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>97</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 22 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

- **Advantages:** A flexible cash lease allows the landowner and farmer to share in the risks and benefits of agricultural production, removing some of the farmer's risk associated with a bad year and rewarding the landowner for a good year.<sup>98</sup>
  - **Disadvantages:** Due to the variability based on crop yield and selling prices at the time of harvesting, farmers may have difficulty calculating their cost of production or breakeven costs before harvesting.<sup>99</sup> This can be problematic for a farmer because she has no guarantee that her expenses will be lower than her profit. The landowner and farmer may consider setting a maximum rent as a safeguard for the farmer.<sup>100</sup>
- *Crop-share Lease.* Under this model, the farmer uses the land and, in exchange, the landowner receives a percentage of the crop yield.<sup>101</sup> Unlike a flexible cash lease, a crop-share lease provides landowners with the actual crop, rather than cash from the sale of crops. This type of lease may suit landowners that own livestock and need the crop to use as feed, but do not have the time or equipment necessary to farm their land. Crop-share leases are flexible instruments that vary significantly depending on the needs and resources of the farmer and landowner. For example, landowners may negotiate a larger crop share in exchange for leasing more valuable land, since the crop share stands in for rent. The crop share paid to the landowner may also vary depending on access to outbuildings or equipment on the property or any cost-share payments made by the landlord at the beginning of the season.<sup>102</sup>
- **Advantages:** This is a good option to spread the risk and benefit among the landowner and farmer.<sup>103</sup> Because the farmer can pay the landowner with crops, this option is especially beneficial to beginning farmers who do not have a lot of startup capital.<sup>104</sup>
  - **Disadvantages:** Due to the significant variability in crop yield and price, crop-share leases may include maximum and minimum limits on how much income the landowner can receive, to protect both the farmer and the landowner.<sup>105</sup>
- *Ground Leases.* Ground leases allow the tenant to lease the real property, while owning the physical structures and improvements located on the land.<sup>106</sup> For this reason, ground leases are

<sup>98</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 22 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>99</sup> Steven Johnson, *Flexible cash farm lease considerations*, IOWA STATE UNIV. EXTENSION & OUTREACH (Mar. 2009), <https://www.extension.iastate.edu/agdm/articles/others/JohMar09.html>.

<sup>100</sup> Steven Johnson, *Flexible cash farm lease considerations*, IOWA STATE UNIV. EXTENSION & OUTREACH (Mar. 2009), <https://www.extension.iastate.edu/agdm/articles/others/JohMar09.html>.

<sup>101</sup> E. G. Stoneberg & Kelvin Leibold ed., *Improving Your Farm Lease Contract*, IOWA STATE UNIV. EXTENSION & OUTREACH (last updated July 2014), <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-01.html>.

<sup>102</sup> E. G. Stoneberg & Kelvin Leibold ed., *Improving Your Farm Lease Contract*, IOWA STATE UNIV. EXTENSION & OUTREACH (last updated July 2014), <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-01.html>.

<sup>103</sup> Becca Weaver, New Entry, et al., *Finding, Assessing and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 10 (May 2012), [http://www.farmlandinfo.org/sites/default/files/NESFP\\_guide%20to%20securing%20farmland\\_2012.pdf](http://www.farmlandinfo.org/sites/default/files/NESFP_guide%20to%20securing%20farmland_2012.pdf).

<sup>104</sup> Becca Weaver, New Entry, et al., *Finding, Assessing and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 10 (May 2012), [http://www.farmlandinfo.org/sites/default/files/NESFP\\_guide%20to%20securing%20farmland\\_2012.pdf](http://www.farmlandinfo.org/sites/default/files/NESFP_guide%20to%20securing%20farmland_2012.pdf).

<sup>105</sup> Kendra Johnson, Rex Dufour and Marisa Alcorta, *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L CTR. FOR APPROPRIATE TECH. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf> (last visited June 29, 2015).

<sup>106</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited July 2, 2015).

typically long term leases. A ground lease often has a term that is at least ten years longer than a long-term mortgage, so these leases typically range from forty to ninety-nine years.<sup>107</sup> At termination, the tenant can reclaim her equity by selling the structures or improvements to the next tenant or to the landlord, often with a ceiling to the resale value.<sup>108</sup>

- **Advantages:** Farmers can engage in long-term business planning due to the security of the lease.<sup>109</sup> Additionally, farmers are able to get back a significant portion of their equity investment through the eventual sale of assets. Because farmers are making the improvements over time, there is less upfront capital cost for the acquisition as compared to other leases.
  - **Disadvantages:** The terms of such a lease are often complex and difficult to negotiate.<sup>110</sup> Even after negotiation, the rights and responsibilities of each party may remain unclear.<sup>111</sup> The ground lease may restrict a **tenant’s flexibility over the development, use, and operation of the property.**<sup>112</sup> The lease may also be subject to a perpetual affordability clause that places restrictions on **the sale of the tenant’s improvements or structures,** keeping them within a price range that will be affordable to the next tenant.<sup>113</sup>
- *Leases with Option to Purchase.* Leases sometimes grant the tenant the right to purchase the land upon a triggering event – **either the passage of a certain period of time (“straight option”), or the landlord wishing to sell the property (“right of first refusal”).**<sup>114</sup> For a straight option, the lease indicates a period of time that the right to purchase can be exercised, allowing the tenant to compel sale at a fixed or determinable price.<sup>115</sup> In a right of first refusal, the owner cannot sell the property to a third property “without first offering it to the tenant, usually at the same price a third party has offered.”<sup>116</sup> The option to purchase must be clearly stated in the lease agreement in order to be valid. By default, the option is valid for the duration of the lease and any extensions to it unless a specific time period is set during which the option can be exercised.<sup>117</sup>

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<sup>107</sup> *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CALIFORNIA FARMLINK (2008),

[http://www.farmlandinfo.org/sites/default/files/FA8\\_CA%20Farmlink\\_15%20ways%20to%20secure%20land.pdf](http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf).

<sup>108</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>109</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited July 2, 2015).

<sup>110</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited July 2, 2015).

<sup>111</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited July 2, 2015).

<sup>112</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited July 2, 2015).

<sup>113</sup> Bob Bernstein, Land for Good, et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf> (last visited July 2, 2015).

<sup>114</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19-20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>115</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19-20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>116</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19-20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>117</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19-20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

- **Advantages:** The transition during the eventual sale of land may be easier than with an outside buyer because the farmer has already been leasing the property. In particular, the straight option with a fixed price can potentially give the tenant a purchasing advantage if the market value of the property becomes higher than the fixed price. Additionally, lease provisions can indicate that a portion of the payments made on the lease will convert to a credit on the purchase price of the land, making the purchase more affordable for the farmer.<sup>118</sup>
- **Disadvantages:** Giving the tenant the ability to purchase the land may cause the landowner to charge higher rent or constrict the lease length.<sup>119</sup> Property values also may fluctuate over the lease term.<sup>120</sup>

**Forming a Lease** Many farm lease arrangements take the form of oral agreements (sometimes called “handshake” or “gentleman’s” agreements)<sup>121</sup> because many landowners and tenant farmers are uncomfortable with, or unaccustomed to, using a written lease.<sup>122</sup> In many cases, even those who do use written agreements only use brief letters of agreement or understanding.<sup>123</sup>

In Massachusetts, a lease must be in writing and signed by the lessor and the lessee to satisfy the Statute of Frauds.<sup>124</sup> Massachusetts will recognize an unrecorded lease of less than seven years as valid and enforceable between the parties to the lease (the landowner and the farmer), their heirs and assigns, and any person having actual knowledge of the lease, even if neither the lease nor a notice of the lease is recorded.<sup>125</sup>

It is critical that the attorney and farmer work to negotiate a well-written lease. A well-written lease agreement will make the lease terms clear and leave less opportunity for misunderstanding.<sup>126</sup> Further, in the case of a long-term lease, having this clarity can benefit a farmer’s or landlord’s heirs because the terms of succession have already been laid out, making it less likely that an heir will need to renegotiate terms.<sup>127</sup> A written agreement can also provide documentation for banking or IRS audits.<sup>128</sup>

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<sup>118</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 19-20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>119</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>120</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 20 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>121</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>122</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>123</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 12 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>124</sup> MASS. GEN. LAWS ANN. ch. 259, § 1 (West 2014).

<sup>125</sup> See MASS. GEN. LAWS ANN. ch. 183, § 4 (West 2014).

<sup>126</sup> Roger McEowen, Ag Decision Maker, *Lease Termination and Other Legal Considerations for Lease Contracts*, IOWA STATE UNIV. EXTENSION AND OUTREACH 1 (Aug. 2007), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-06.pdf>.

<sup>127</sup> Roger McEowen, Ag Decision Maker, *Lease Termination and Other Legal Considerations for Lease Contracts*, IOWA STATE UNIV. EXTENSION AND OUTREACH 1 (Aug. 2007), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-06.pdf>.

<sup>128</sup> See Roger McEowen, Ag Decision Maker, *Lease Termination and Other Legal Considerations for Lease Contracts*, IOWA STATE UNIV. EXTENSION AND OUTREACH 1 (Aug. 2007), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-06.pdf>.

Farmers who hesitate to use a written lease may explain their reticence with one of the reasons listed below:<sup>129</sup>

- ***“We’ve always used an oral agreement and a handshake.”***<sup>130</sup> For farmers who have always used an oral agreement, particularly on a long-term basis, the transition to a written agreement may seem unnecessary and fraught with awkwardness.<sup>131</sup> An advising attorney can address the awkwardness of introducing the change by explaining the advantages of a written agreement and facilitating discussion of terms impartially.
- ***“We don’t want everyone to know the terms of our lease.”***<sup>132</sup> Recording a lease is intended to protect the lessee by giving notice to the world of the lease agreement. Landowners and tenants may express concern that a written lease would reveal the private terms of the agreement, such as price. However, the parties may record a **“notice of lease.”**<sup>133</sup> A notice of lease is a shortened version of the lease that must include only **the date of the agreement’s execution, the description of the premises used in the lease, and the duration of the lease.**<sup>134</sup> With a notice of lease, there is still public notice that the lease exists, but key terms remain confidential.<sup>135</sup> The parties can include a term in the lease verifying their agreement to execute and record a notice of lease rather than the entire lease.<sup>136</sup>
- ***“A written lease is too much of a hassle or requires too much detail.”***<sup>137</sup> Farm lease agreements can be lengthy and detailed, and may be daunting to farmers with little experience with

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<sup>129</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation* OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>130</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation* OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>131</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation* OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>132</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation* OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>133</sup> See e.g. MASS. GEN. LAWS ANN. ch. 183, § 4 (West 2014).

<sup>134</sup> See e.g. MASS. GEN. LAWS ANN. ch. 183, § 4 (West 2014).

<sup>135</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/> (In Ohio, this document defined as a **“memorandum of lease”** under Ohio Revised Code section 5301.251. While many jurisdictions require similar content, the reader should ensure a notice or memorandum of lease conforms to their state’s requirements).

<sup>136</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>137</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation* OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

formal legal arrangements.<sup>138</sup> One way to overcome this concern is to make a gradual transition using a simple lease that outlines key obligations and resolutions if problems arise in the future.<sup>139</sup> As the parties become more accustomed to the written lease, the lease can be adapted to include more detail.<sup>140</sup> The lease should include a clause requiring that further agreements or modifications be made in writing.

- **“We already put our agreement in writing, even if it *isn’t* a detailed lease agreement.”** Farmers may attempt to draft their own letters of agreement in an effort to avoid attorney’s fees and to structure a more simple agreement.<sup>141</sup> However, the farmer should be advised to make sure that she completes a well-written lease agreement.<sup>142</sup> Otherwise, all of the protections that she will need are not likely to be spelled out in the lease, and the agreement that she drafts may not be enforceable in court should a dispute arise.<sup>143</sup>

Once the farmer and attorney have agreed to the use of the written lease, the next step is to draft the document. Agricultural lease agreements vary in size and design, but there are common farming practices, business arrangements, and general provisions that should be considered when drafting any lease for farmland. These agriculture-specific considerations include:

- *Description of the Property.* This should include an address and a description of current conditions of the property, any existing infrastructure (e.g., barns, storage structures, residences, equipment), and should also incorporate maps or an accurately drawn plan based on a survey.<sup>144</sup>
- *Rent Payments.* Payments may include a fixed amount, or a fixed amount plus a percentage of the profit, or a non-cash agreement such as a share of crops or livestock (more examples included above).<sup>145</sup> Note that if a farmer pays rent in crop shares, she cannot then deduct both the value of the crops made as rental payment *and* the farm expenses associated with raising the crops on her Schedule F.<sup>146</sup>

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<sup>138</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>139</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>140</sup> Peggy Kirk, Ohio State Univ. Extension Agric. & Resource Law Program, *Protecting Interests in a Verbal Farm Lease Situation*, OHIO AGRICULTURAL LAW BLOG (Mar. 4, 2013, 6:19 PM), <http://ohioaglaw.wordpress.com/2013/03/04/protecting-interests-in-a-verbal-farm-lease-situation/>.

<sup>141</sup> Debra Heleba et al., *Keeping Farmland Working in Vermont: A Lease Agreements Guide for Landowners and Farmers*, LAND LINK VERMONT 5 (Feb. 2002), <http://www.uvm.edu/~susagctr/Documents/leaseagreementguide.pdf>.

<sup>142</sup> Debra Heleba et al., *Keeping Farmland Working in Vermont: A Lease Agreements Guide for Landowners and Farmers*, LAND LINK VERMONT 3 (Feb. 2002), <http://www.uvm.edu/~susagctr/Documents/leaseagreementguide.pdf>.

<sup>143</sup> See Debra Heleba et al., *Keeping Farmland Working in Vermont: A Lease Agreements Guide for Landowners and Farmers*, LAND LINK VERMONT 3 (Feb. 2002), <http://www.uvm.edu/~susagctr/Documents/leaseagreementguide.pdf>.

<sup>144</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 13 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>145</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 13 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>146</sup> *Farmer’s Tax Guide*, INTERNAL REVENUE SERVICE 21 (Oct. 20, 2014), <http://www.irs.gov/pub/irs-pdf/p225.pdf>.



- *Farm Equipment.* If the landowner grants the farmer permission to use farm equipment, this should be included within the lease. Details outlining where and how the equipment should be stored, and whether the farmer is allowed to bring in outside equipment should be included as well.<sup>147</sup>
- *Housing.* If there is a farmhouse on the property, the lease should include a provision stating whether housing is included.<sup>148</sup> The lease should also state whether the farmer may build houses or other structures on the property.<sup>149</sup> Farmhouse leases are sometimes drafted as separate agreements.<sup>150</sup>
- *Permitted Uses of Land and Property.* The lease should specify allowable and prohibited uses of the real and personal property, including a description of what the landowner considers appropriate “**agricultural uses**” of the land.<sup>151</sup> This description should include types of allowable farming operations (e.g., animal production, vegetable production, pasture), and may include non-traditional types of farming, such as aquaculture.<sup>152</sup> The provision should also include types of stewardship practices allowed or expected (e.g., organic) and the types of marketing, agritourism, and farm-related recreational or educational activities allowed (e.g., corn mazes, pick-your-own vegetable programs, community supported agriculture (CSA), farm stands, etc.).<sup>153</sup> The lease should state whether the public is allowed on the property.<sup>154</sup> The lease should also take into account sensitive or unique areas of the property, and define permitted uses for those portions.<sup>155</sup>

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<sup>147</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 4 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>148</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 4 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>149</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 4 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>150</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 32 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

<sup>151</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 32 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf). Agricultural use may be defined narrowly by the landowner, but the codified definition in Massachusetts may provide some guidance. Land in Massachusetts is considered in “**agricultural use**” when “**primarily and directly used in raising animals, including, but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals, for the purpose of selling such animals or a product derived from such animals in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market.**” MASS. GEN. LAWS ANN. ch. 61A, § 1 (West 2014). Land is in “**horticultural use**” when “**primarily and directly used in raising fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling these products in the regular course of business; or when primarily and directly used in raising forest products under a certified forest management plan, approved by and subject to procedures established by the state forester, designed to improve the quantity and quality of a continuous crop for the purpose of selling these products in the regular course of business; or when primarily and directly used in a related manner which is incidental to those uses and represents a customary and necessary use in raising these products and preparing them for market.**” MASS. GEN. LAWS ANN. ch. 61A, § 2 (West 2014).

<sup>152</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>153</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>154</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>155</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 4 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

For example, in highly erodible sections of land, the landowner could prohibit row crop production or tree removal, accompanied by a map of the restricted land.<sup>156</sup>

- *Communication.* Some leases may include provisions for frequency of communication; for example, the provision might require communication at regular intervals such as before each planting season or after each harvest.<sup>157</sup> Some leases require the tenant to report on conservation practices or nutrient management practices.<sup>158</sup>
- *Maintenance and Repairs on Land and Infrastructure.* Under Massachusetts landlord-tenant law, if a tenant provides written notice of an unsafe condition not caused by the tenant, the landlord of any real estate has an obligation to correct the unsafe conditions.<sup>159</sup> A provision in a lease cannot waive this obligation.<sup>160</sup>
- *Land Stewardship and Conservation Practices.* Farmers may improve the long-term quality of the land by engaging in conservation and soil management practices.<sup>161</sup> To incentivize these investments in environmental quality, the lease could include financial considerations for these practices, and may even include a “good stewardship” clause, requiring tenants to use good stewardship practices to promote the long-term quality of the land.<sup>162</sup> The lease could specify that the tenant receive organic certification or engage in biodynamic management.<sup>163</sup> For organic certification, the lease may provide that costs of certification be shared between the parties for everything from initial research costs to completing necessary paperwork.<sup>164</sup> The lease may also include restrictions on the timing or frequency of pesticide or herbicide applications, the number of livestock allowed on the property, or a prohibition on the planting of certain invasive crops.<sup>165</sup>
- *Lease Termination.* To account for possible premature terminations, the lease should specify how the parties will handle unharvested crops if the lease is terminated prior to the term date.<sup>166</sup> The tenant farmer can either be compensated for the value of the crops from the landowner, or the tenant farmer could sell the crop directly to the next tenant.<sup>167</sup> Under Massachusetts common law,

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<sup>156</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>157</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 11 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>158</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 11 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>159</sup> MASS. GEN. LAWS ANN. ch. 186 § 19 (West 2014).

<sup>160</sup> MASS. GEN. LAWS ANN. ch. 186 § 19 (West 2014).

<sup>161</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 17 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>162</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 17 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>163</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 32 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>164</sup> Ed Cox, Drake University Agricultural Law Center, *Organic Certification on Leased Farmland*, SUSTAINABLE AGRICULTURAL LAND TENURE INITIATIVE (Nov. 4, 2010), <http://sustainablefarmlease.org/2010/11/assisting-with-organic-certification/>.

<sup>165</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 17 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>166</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>167</sup> *A Landowner’s Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

tenants are entitled to harvest the crops they have grown, even after the termination of the lease.<sup>168</sup> Special provisions should be made for perennial crops and orchard fruits.<sup>169</sup>

- *Liability and Insurance Requirements.* Some landowners or other stakeholders (such as retail purchasers) may require that the landowner or farmer hold insurance.<sup>170</sup> In order to minimize confusion after a liability event, the landowner may want to include a provision in the lease stating the types of insurance required (e.g., liability, crop, flood, etc.), and identifying the party responsible for obtaining and paying for coverage.<sup>171</sup> The parties may need the expertise of an insurance agent to make sure that there is adequate coverage for the operation.
- *Potential Hazards, Emergencies, Condemnation and Casualty Provisions.* To the greatest extent feasible, both parties should agree upon and specify what will happen in case of emergency, such as condemnation of the land, natural disaster, fire, escape or death of animals, or other potential hazards such as electric fences or chemical contamination.<sup>172</sup>

In addition to the agriculture-specific topics mentioned above, the parties should consider and include mention of the following standard lease provisions:

- Term of the Lease
- Modification of the Lease
- Landlord Right of Entry
- Tenant Access to the Property
- Investments in Capital Improvements
- Default Provisions
- Subletting
- Security Deposit
- Dispute Resolution
- Taxes
- Utilities

**CONCLUSION** Deciding on a method of farmland acquisition involves many considerations, including the farmer's financial limitations, experience level, intended purposes for the farm operation, and willingness to make improvements on the land. This chapter identifies questions that the attorney should ask the farmer to better understand the farmer's limitations and the full scope of what the farmer intends to do with the land. After the farmer and attorney come to an understanding on these issues, this chapter helps to identify the types of purchase and lease options available, as well as key provisions that should be

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<sup>168</sup> *Com. v. Galatta*, 228 Mass. 308, 311 (Mass. 1917).

<sup>169</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 14 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>170</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 33 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

<sup>171</sup> *A Landowner's Guide to Leasing Land for Farming*, LAND FOR GOOD 18 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

<sup>172</sup> Becca Weaver, New Entry, et al., *Finding, Assessing, and Securing Farmland*, NEW ENTRY SUSTAINABLE FARMING PROJECT 33 (May 2012), [http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf).

considered when preparing a lease agreement. By discussing these factors, the attorney and farmer can work together to ensure that the farmland acquisition meets **the farmer's goals**.

## RESOURCES

### **Land for Good**

Numerous resources on farm land acquisition  
<http://landforgood.org/>

### **Farm Commons**

Legal resources for sustainable farmers  
<https://farmcommons.org/>

### **University of Vermont Extension**

Farm Rental Assessment Checklist  
[www.uvm.edu/newfarmer/land/checklist.pdf](http://www.uvm.edu/newfarmer/land/checklist.pdf)

### **New England Small Farm Institute**

Holding Ground: A Guide to Northeast Farmland Tenure and Stewardship  
[www.smallfarm.org/main/bookstore/publications](http://www.smallfarm.org/main/bookstore/publications)

### **Farmers' Legal Action Group (FLAG)**

FLAG is a nonprofit law center dedicated to providing legal services to family farmers and rural communities.  
[www.flaginc.org](http://www.flaginc.org)

### **New England Farm Transfer Network**

The New England Farm Transfer Network includes a list of many lawyers who advise on farm-related land transfer and other farm succession legal issues.  
[www.farmtransfernewengland.net/providers/mass.htm](http://www.farmtransfernewengland.net/providers/mass.htm)

### **Drake Agricultural Law Center**

Sustainable Agricultural Land Tenure Initiative  
The Initiative provides assistance in developing farm lease arrangements.  
[www.sustainablefarmlease.org](http://www.sustainablefarmlease.org)

### **US Farm Lease**

US Farm Lease has many different types of sample leases.  
[www.usfarmlease.com/asp/General/Documents.aspx?t=1](http://www.usfarmlease.com/asp/General/Documents.aspx?t=1)

### **New Entry Sustainable Farming Project**

Guide on Finding, Assessing and Securing Farmland  
[http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl\\_farmland.pdf](http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf)

### **Ag Lease 101**

Ag Lease 101 provides lease publications and sample leases.

<http://www.aglease101.org>

**California FarmLink**

Elements of a Good Lease

<http://www.californiafarmlink.org/find-land/elements-of-a-good-lease>

**Vermont Land Link**

Resources for farm seekers and landowners

<http://vermontlandlink.org/>

## CHAPTER VI: TAXES

Farmers, like everyone else, are subject to federal, state, and local taxes. Although a good deal of the tax law that governs all businesses also governs farm businesses, there are many provisions in the federal tax code and some Massachusetts tax laws that apply uniquely to farm businesses. Attorneys must consider all of these special rules and exceptions to effectively advise a farmer on tax issues. This chapter highlights tax provisions that specifically apply to farmers, and describes tax laws that are especially relevant in the farm context.<sup>1</sup>

**OVERVIEW** Attorneys serving farmers in Massachusetts may need to advise their clients on tax issues. This chapter highlights federal and state tax laws that apply uniquely or are especially relevant to farm businesses, and discusses some common topics in farm taxes.

1. **Overview of Massachusetts Farms** This section orients the attorney to the features of Massachusetts farms that may be relevant to tax planning.
2. **General Tax Issues for Farmers** This section provides a list of tax challenges and choices farmers may face, and proposes ways that attorneys can help farmers minimize tax liability.
3. **Federal Tax Concerns for Farmers** This section details federal tax provisions unique to farm businesses or highly relevant to farmers, including features of income and employment taxes.
4. **Massachusetts Tax Concerns for Farmers** This section covers Massachusetts state tax laws that pertain to farmers.

**OVERVIEW OF MASSACHUSETTS FARMS** Farmers, like all business owners, are subject to federal and state tax liability. However, the Internal Revenue Code (IRC) contains a large number of provisions unique to farming businesses. In fact, the IRC provides farmers with a different schedule to report income: *Schedule F (Form 1040): Profit or Loss from Farming* (Schedule F).<sup>2</sup>

There are characteristics of Massachusetts farms that have a large bearing on tax consequences, especially for farmers qualifying for Legal Food Hub (LFH) assistance. Some of these characteristics are:

- *Over half of farmers also have non-farm income.* According to the most recent Census of Agriculture, the majority of Massachusetts farmers (64%) support themselves on both farm and non-farm income, and 40% work 200 days or more off the farm each year.<sup>3</sup> Only half of farmers consider farming their primary occupation.<sup>4</sup>

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<sup>1</sup> This summary is based upon provisions of the Internal Revenue Code of 1986, as amended, applicable U.S. Treasury regulations promulgated thereunder, published rulings and judicial decisions, Massachusetts General Laws and administrative interpretations thereof, all as in effect as of the date of publication. Those authorities may be changed, perhaps retroactively, or may be subject to differing interpretations, which could result in federal and state income tax consequences different from those discussed below. This summary does not address all aspects of federal or Massachusetts state income taxation and does not deal with all tax considerations that may be relevant to farmers in light of their personal circumstances.

<sup>2</sup> INTERNAL REVENUE SERVICE, SCHEDULE F (FORM 1040): PROFIT OR LOSS FROM FARMING (2013), available at <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

<sup>3</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 7 (May 2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>4</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 7 (May 2014), available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

- *Farm incomes and expenses are small.* The majority of Massachusetts farms are small by measures of revenue. Nearly half of farms have sales of less than \$2,500 per year, and two-thirds of farms have sales of less than \$10,000 per year.<sup>5</sup> Similarly, expenses tend to be low. Approximately 40% of farmers in Massachusetts have expenses of \$10,000 or less per year, and 65% have expenses of \$25,000 or less per year.<sup>6</sup>
- *Most farms have net losses.* Two-thirds of Massachusetts farms had net operating losses in 2012, meaning their farm expenses exceeded their farm income; nearly as many had net losses in 2007.<sup>7</sup>
- *Most farms do not grow commodity crops or receive many subsidies.* Fewer than 200 farms in Massachusetts derive income from the sale of commodity crops, such as corn and soybeans.<sup>8</sup> In 2012, only about 10% of Massachusetts farmers received any form of payment from the federal government, such as subsidies or conservation payments,<sup>9</sup> although this may increase as USDA rolls out new options for whole farm revenue protection for diversified farms.<sup>10</sup>

Thus, Massachusetts farmers face a different tax landscape than large commodity crop farmers common in the Midwest. **Often, a farmer's tax decisions may have more to do with simplifying** administration than minimizing income tax, as the farmer may not owe any income tax. Tax concerns often arise in moments of change, especially during the purchase, sale or inheritance of a farm. For this reason, this chapter is meant to complement the other chapters of this guide that discuss those transactions in more detail.

The remainder of this chapter begins with a survey of common tax issues faced by farmers and proposes **strategies for minimizing a client's tax burden.** Next, it describes how federal income taxes for farmers differ from those of other businesses. Finally, it covers Massachusetts state tax provisions specific to farmers.

**GENERAL TAX ISSUES FOR FARMERS** Farmers face a variety of complex tax decisions whether they are just starting out or running a sophisticated farm business. This section discusses some of the general tax issues commonly faced by farmers, and offers some suggestions to the attorney about how to frame their analysis.

**Choice of Business Entity** A farmer may choose to operate her business as a sole proprietorship, a limited or general partnership, an LLC, an S-Corporation, or a C-Corporation.<sup>11</sup> C-Corporations are

<sup>5</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 3, 7 (May 2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>6</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 11 (May 2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>7</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 14 (May 2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>8</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 9 (May 2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>9</sup> See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 10 (May 2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>10</sup> See NAT'L SUSTAINABLE AGRIC. COAL., WHOLE FARM REVENUE PROTECTION FOR DIVERSIFIED FARMS (April 2015), <http://sustainableagriculture.net/publications/grassrootsguide/credit-crop-insurance/whole-farm-revenue-protection-for-diversified-farms/>.

<sup>11</sup> An LLC or state-law partnership may elect to be treated as a sole proprietorship (if it has only one owner), a partnership (if it has multiple owners), an S-Corporation (if its owners meet the requirements for being shareholders of an S-Corporation), or a C-Corporation for tax purposes. Treas. Reg. §301.7701-3. See INTERNAL REVENUE SERVICE, PUBLICATION 3402, TAXATION OF LIMITED LIABILITY COMPANIES (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p3402.pdf>. In the discussion that follows, any mention

subject to “double taxation”: the business must pay corporate income tax on net earnings, in addition to the owners paying individual taxes on their incomes.<sup>12</sup> Sole proprietorships, partnerships, and S-Corporations,<sup>13</sup> on the other hand, are all taxed similarly to each other: the entity itself does not pay tax, but income and losses are “passed through” to the owners and taxed at the owners’ individual income tax rates and subject to the self-employment tax.<sup>14</sup> The amount of tax paid under any of the three is generally similar, although there are important differences among these structures, both for tax purposes but also general administrative rules mostly set out under state law. For more information on choice of business structure, see *Chapter II: Business Structures*.

Businesses that file as S-Corporations (including LLCs that elect S-Corporation tax treatment) may enable the owners to pay less in income and self-employment taxes by using dividends.<sup>15</sup> Owners of sole proprietorships and partnerships must pay self-employment taxes, in addition to the income tax, on the net income earned from the business at a rate of 15.3% (as of 2015).<sup>16</sup> S-Corporations can transfer profits to their owners using dividends, which are *not* subject to self-employment taxes and which may be subject to a lower income tax rate than wages.<sup>17</sup> Thus, a farmer who earns \$75,000 from a sole proprietorship will pay \$11,475 in self-employment taxes; but a farmer who receives a salary of \$50,000 and a dividend of \$25,000 will only incur \$7,650 in employment taxes (paid in part by the corporation and in part by the farmer as employee)—a savings of \$3,825.<sup>18</sup> Note, however, that the IRS mandates that owners of S-Corporations pay themselves a “reasonable salary” (what other businesses pay for similar services), and the IRS heavily scrutinizes dividend payments that suggest tax avoidance.<sup>19</sup>

Administrative burden. Although the taxes paid will generally not vary significantly (with the exception of C-Corporations) between business entities, farmers should consider that the administrative burden (paperwork) required to prepare taxes varies across different types of business entities. The complexity of filing as a partnership or an S-Corporation far exceeds that of filing as a sole proprietorship. Note that spouses who operate a partnership and file taxes jointly may avoid filing a partnership return by electing to

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of partnership includes LLCs and partnerships electing to be taxed as partnerships and any mention of corporations includes LLCs and partnerships electing to be taxed as corporations. Since any corporation that meets the eligibility criteria can elect to be an S-Corporation, an LLC or partnership that has elected to be taxed as a corporation may make a further election to be an S-Corporation. I.R.C. §1361; I.R.C. §1362.

<sup>12</sup> I.R.C. §1; I.R.C. §11.

<sup>13</sup> S-Corporations may have to pay corporate-level tax in certain limited circumstances. See, e.g., I.R.C. §1374.

<sup>14</sup> I.R.C. §1363 (S-Corps generally not subject to corporate level tax); I.R.C. §701 (entities taxed as partnerships not subject to entity-level tax). I.R.C. §1402 (partner’s share of partnership income is included in “net earnings from self-employment” and so subject to self-employment tax). See Beth Laurence, *Choosing the Best Ownership Structure for Your Business*, NOLO, <http://www.nolo.com/legal-encyclopedia/business-ownership-structure-choose-best-29618.html> (last visited July 2, 2015).

<sup>15</sup> See Stephen Fishman, *Why You Might Choose S Corp Taxation for Your LLC*, NOLO, <http://www.nolo.com/legal-encyclopedia/why-you-might-choose-s-corp-taxation-your-llc.html> (last visited July 2, 2015).

<sup>16</sup> I.R.C. §1402; I.R.C. §1401. Note that certain employment taxes apply to wages paid by S-corporations and C-corporations to their employees, although these employment taxes are generally lower than self-employment taxes (although the corporation must pay its share of payroll taxes as well). See Employment Taxes, *infra*.

<sup>17</sup> I.R.C. §1(h)(11) (applying the lower capital gains rates to qualified dividend income). See Stephen Fishman, *Why You Might Choose S Corp Taxation for Your LLC*, NOLO, <http://www.nolo.com/legal-encyclopedia/why-you-might-choose-s-corp-taxation-your-llc.html> (last visited July 2, 2015).

<sup>18</sup> 15.3% of \$75,000 = \$11,475, while 15.3% of \$50,000 = \$7,650. See I.R.C. §1402(a)(2) (dividends not subject to self-employment tax). See Stephen Fishman, *Why You Might Choose S Corp Taxation for Your LLC*, NOLO, <http://www.nolo.com/legal-encyclopedia/why-you-might-choose-s-corp-taxation-your-llc.html> (last visited July 2, 2015).

<sup>19</sup> See Stephen Fishman, *Why You Might Choose S Corp Taxation for Your LLC*, NOLO, <http://www.nolo.com/legal-encyclopedia/why-you-might-choose-s-corp-taxation-your-llc.html> (last visited July 2, 2015).



be treated as a “qualified joint venture” for tax purposes.<sup>20</sup> Essentially, this means each spouse can file as if he or she were a sole proprietor. This will generally not affect the amount of tax owed, but it allows each spouse to get credit for social security earnings and Medicare coverage without having to file a partnership return.<sup>21</sup>

**“Hobby” or For Profit?** The tax rules for farms discussed in this chapter only apply to farmers engaged in farming *for profit*. If one is not engaged in farming for profit, but rather as a “hobby” (to use the IRS term), then the farmer’s ability to deduct expenses will be limited under various provisions of the IRC that limit non-business deductions. The “hobby” farmer can only deduct their hobby-related expenses from the income the hobby generates, and cannot carry over losses into profitable years.<sup>22</sup> As farm business profitability can fluctuate from year to year, and in many years expenses may exceed income, it is very important for a farm to be classified as for-profit in order to maximize the deductibility of farming expenses. However, the deductibility of net losses from a for-profit farming business may still be limited under other provisions of the IRC, such as the “at-risk limitation”<sup>23</sup> and the “passive activity rule.”<sup>24</sup>

To determine whether a farm qualifies for “for-profit” status, the IRS begins with a review of farm profitability over the preceding five years, and uses a more nuanced nine-factor test in cases where a farm would not otherwise qualify based on a profitable track record.

**Three-of-Five Presumption.** A farm need not be profitable to be considered an activity “engaged in for profit.” In fact, a business can incur losses for years and still receive for-profit status from the IRS. That said, the IRS presumes that a business is run for profit if gross income derived from the activity exceeds deductions attributable to activities in at least three of the five consecutive tax years ending with the tax year for which the determination is being made.<sup>25</sup> New farmers cannot rely on this presumption because their farms do not have a tax history.

**Nine factor test.** If the Three-of-Five Presumption does not apply, the IRS will apply a nine-factor, fact-sensitive test to determine when a business is operating for profit.<sup>26</sup> In the context of farming, these factors are: (1) the manner in which farming is carried out; (2) the expertise of the farmer or her advisors; (3) the time and effort expended on farming; (4) the expectation that assets may appreciate in value; (5) the success of the farmer in carrying on other similar or dissimilar activities; (6) the farmer's history of income or loss

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<sup>20</sup> I.R.C. §761(f). See INTERNAL REVENUE SERVICE, PUBLICATION 225, FARMER’S TAX GUIDE 71 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>21</sup> INTERNAL REVENUE SERVICE, ELECTION FOR HUSBAND AND WIFE UNINCORPORATED BUSINESS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Election-for-Husband-and-Wife-Unincorporated-Businesses> (Sept. 4, 2015); INTERNAL REVENUE SERVICE, INSTRUCTION TO FORM 1040 SCHEDULE SE (2015), <http://www.irs.gov/pub/irs-pdf/i1040sse.pdf>.

<sup>22</sup> I.R.C. §183.

<sup>23</sup> The “at-risk rules” limit losses from most activities to the amount invested or put “at risk” in the activity. See INTERNAL REVENUE SERVICE, PUBLICATION 925, PASSIVE ACTIVITY AND AT-RISK RULES 12 (2014), available at <http://www.irs.gov/pub/irs-pdf/p925.pdf>.

<sup>24</sup> “Passive Activity Loss” rules prevent the taxpayer from taking a loss on a passive activity. See INTERNAL REVENUE SERVICE, PUBLICATION 925: PASSIVE ACTIVITY AND AT-RISK RULES 2 (2014), available at <http://www.irs.gov/pub/irs-pdf/p925.pdf>.

<sup>25</sup> I.R.C. 183(d).

<sup>26</sup> Treas. Reg. 1.183-2.

in the activity; (7) the amount of occasional profits earned; (8) the financial status of the farmer; and (9) elements of personal pleasure or recreation involved in farming.<sup>27</sup>

In summary, the IRS will consider a farm to be for-profit if the farmer is clearly taking it seriously as a business, and there is reason to believe that the farmer will in some years make a profit.<sup>28</sup> There is no requirement that the farm be well established and robust. In fact, the regulations note that losses during the initial startup phase are expected.<sup>29</sup>

Postponing the determination. A new farm business (other than a C-Corporation) can delay the time when the IRS can apply the Three-of-Five Presumption test by filing IRS Form 5213.<sup>30</sup> If Form 5213 is filed, **the IRS will not question the filer's status as a for-profit farm** until its fifth year of operation. If the taxpayer satisfies the Three-of-Five Presumption at that time, it will be treated as having satisfied it for the entire five-year period. At that time the farm will have enough of a history to apply the Three-of-Five Presumption fully. Farmers may file the Form 5213 any time within three years after the due date of the tax return for the first year of the farming business, or within 60 days of being informed that the IRS intends to challenge the for-profit status of the farm, whichever comes first. By filing the Form, the farmer agrees to extend the statute of limitations for the relevant tax years. If the IRS determines, at the end of the five years, that the farm was not being carried on for profit then it can go back and **recalculate the farmer's taxes appropriately.**

**Choice of Accounting Method** There are two primary methods, along with a number of secondary methods, to account for farm income. Those main methods are the cash method and the accrual method (see sidebar).<sup>31</sup> All farms with gross receipts of under \$1,000,000 per year may freely choose between the cash and accrual methods, regardless of the type of business entity.<sup>32</sup> The

### Tax Accounting Methods

Cash method: income is not counted until the payment is received, and expenses are not counted until the payments are made.

Accrual method: income is counted when the sale occurs, and expenses are counted upon receipt of the goods or services; requires the taxpayer to keep an inventory.

Source: NOLO, *Cash v. Accrual Accounting*, <http://www.nolo.com/legal-encyclopedia/cash-vs->

<sup>27</sup> Treas. Reg. 1.183-2.

<sup>28</sup> The expectation of eventual profit need not be reasonable as long as the taxpayer has a bona fide intention of making a profit. Treas. Reg. 1.183-2(a).

<sup>29</sup> Treas. Reg. 1.183-2(b)(6) (even though "taxpayer's history of income or losses" is one of the nine factors, "a series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit.").

<sup>30</sup> I.R.C. §183(e); INTERNAL REVENUE SERVICE, FORM 5213: ELECTION TO POSTPONE DETERMINATION AS TO WHETHER THE PRESUMPTION APPLIES THAT AN ACTIVITY IS ENGAGED IN FOR PROFIT (Feb. 2006), available at <http://www.irs.gov/pub/irs-pdf/f5213.pdf>.

<sup>31</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 5 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. See PUBLICATION 225 at 7 for a discussion of special hybrid methods for farmers, such as the crop method.

<sup>32</sup> I.R.C. § 448(b). Farms required to use accrual accounting are family corporations that had over \$25,000,000 in gross receipts in any tax year after 1985, and partnerships and corporations (other than family corporations) with over \$1,000,000 in gross receipts in any tax year after 1975; INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 6-7 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

official election is made when the farmer files her first tax return that includes Schedule F.<sup>33</sup>

The cash method and the accrual method have distinct advantages. For clients starting a new farm, the following should be carefully considered. Because it is burdensome and can be expensive to change accounting methods, a farmer who has already made her election of accounting method should only change it when there is a very compelling reason to do so.<sup>34</sup> (The following lists of advantages are adapted from Neil Harl's treatise, *Agricultural Law*.<sup>35</sup>)

Advantages of the Cash Method. Most farmers use the cash method of accounting.<sup>36</sup> There are many advantages to using the cash method, including the following:

- *Deferral of Income.* A cash method farmer only recognizes income once she has actually been paid, which is sometimes later than the farmer would have recognized the income under the accrual method. That may mean that the tax on the income is due in a later year. Due to the time-value of money (by which a dollar today is worth more than a dollar a year from now), later recognition of income is beneficial to the taxpayer.<sup>37</sup>
- *Simpler bookkeeping.* The cash method does not require the farmer to keep an inventory (a detailed, itemized record of all farm products to be sold).<sup>38</sup> Therefore, bookkeeping will generally be simpler than under the accrual method, which does require the farmer to keep an inventory.<sup>39</sup>
- *Liquidity.* Because income is only counted once the farmer has actually received payment under the cash method, the farmer will not owe taxes on money that he or she does not yet have. This makes it more likely that the farmer will have cash on hand to pay taxes.<sup>40</sup>
- *Livestock tax advantage.* For farmers that raise livestock and have income from the sale of livestock for draft, breeding, or dairy purposes, there is a significant tax advantage to using the cash method. Under the cash method, the cost of raising livestock may be fully deducted each year; and the income from the eventual sale of the livestock is considered a capital gain, and taxed at favorable capital gains rates.<sup>41</sup> Farmers using the accrual method, on the other hand, must include the livestock in their inventory, capitalize and depreciate the costs of raising it, and treat some of the gain from sale as ordinary income due to recovery rules.<sup>42</sup> Thus, farmers with livestock may take

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<sup>33</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 5 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>34</sup> The farmer must seek IRS approval to change his accounting method by filling Form 3115, and may be required to pay a fee. See IRS FORM 3115; Treas. Reg. 1.446-1; INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 7 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>35</sup> NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

<sup>36</sup> See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 5 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. One CPA specializing in work for farmers estimates 90% of farms use basic cash accounting. See Paul Neiffer, *The Three Levels of Crop Accounting* (July 14, 2011), <http://www.farmcpatoday.com/2011/07/14/the-three-levels-of-farm-accounting/>.

<sup>37</sup> However, the farmer cannot defer income by electing to defer receipt of payment. Under the constructive receipt principles, the farmer is treated as receiving the income that is made available to her without restriction even if the farmer is not in possession of the income.

<sup>38</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

<sup>39</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

<sup>40</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

<sup>41</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05; I.R.C. §1231. See Section 1231 Gains, *infra*.

<sup>42</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

earlier deductions on their costs and be taxed at lower rates on their gains when they choose the cash method over the accrual method.<sup>43</sup>

**Advantages of the Accrual Method.** The accrual method has advantages as well—some of which may be especially relevant to start-up farmers. The accrual method more accurately reflects income and expenses than the cash method for purposes of business reporting, because payments are often not made or received in a timely fashion.<sup>44</sup> For example, if a farmer made sales throughout the year but many of the payments do not come in until December, then on paper the farm may appear unprofitable for much of the year if it uses the cash method. Because the accrual method may get more income on the books sooner, it may also enable a new farmer to take greater advantage of deductions.<sup>45</sup>

**Alternative Accounting Methods.** There are some special accounting methods and inventory valuation methods available only to farmers. These are generally variations on the accrual method that provide special rules for certain farm-specific situations. As these are unlikely to be used by LFH clients (they are mainly used by large livestock and commodity crop enterprises), they are only briefly described here; for more information, see IRS Publication 225.<sup>46</sup> Most notably, farmers may elect to use the “crop method” of accounting for crops that are sold in a different year than that in which they were planted.<sup>47</sup> The cost of producing the crop is deducted the year in which the crop is sold and the income realized, instead of the year in which the cost is incurred.<sup>48</sup> This can be advantageous because losses are preserved until there is income to offset.

In addition, for farmers that use the accrual method, there are some special inventory valuation methods allowed, such as the farm-price method and unit-livestock-price method. Under the farm-price method, each item of inventory is valued at its market price less the direct costs associated with disposition.<sup>49</sup> Under the unit-livestock-price method, farmers may use a standard price that approximates the normal costs incurred in raising each class of animal that the farmer raises.<sup>50</sup>

**Business vs. Personal Expenses** Although businesses may deduct all “ordinary and necessary” business expenses from gross income, they may not deduct personal expenses.<sup>51</sup> Farmers must allocate these expenses between their business and personal uses, and *only* deduct the proportion that is used for

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<sup>43</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

<sup>44</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05.

<sup>45</sup> See NEIL HARL, 4-25 AGRICULTURAL LAW § 25.05. However, if insufficient deductions are available to offset all the income, this could result in higher taxes in early years with no cash to pay them.

<sup>46</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 5-7 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>47</sup> Treas. Reg. 1.61-4(c). The prior permission of the IRS is required in order to use the crop method.

<sup>48</sup> Treas. Reg. 1.61-4(c). Note that Farmers must receive approval from the IRS before using the crop method. INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 8 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>49</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 7 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>50</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 7 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>51</sup> I.R.C. § 162(a). Personal expenses are not “ordinary and necessary” business expenses.

business.<sup>52</sup> Sometimes, the difference can be difficult to distinguish, especially when the farmer lives on her farm. Examples of such expenses include:

- A farmer may not deduct the expense of food grown or raised for the **farmer's personal** consumption, even if the food is grown alongside farm product that the farmer will sell for profit.<sup>53</sup>
- A farmer may deduct the proportionate part of heating and electricity costs for farm property that includes **the farmer's home**. The farmer must do her best to estimate the deductible proportion used by the farm.<sup>54</sup>
- A farmer may deduct expenses such as rent, electricity, and maintenance for a room or part of a home used *exclusively* for business purposes, such as an office (but expenses for parts of the home not exclusively used for business—such as a kitchen used for home cooking and to make fruit preserves that the farmer sells—cannot be deducted at all).<sup>55</sup>
- A farmer may deduct a proportionate part of the cost of vehicles used for both business and personal use.<sup>56</sup>
- A farmer may not deduct the cost of domestic or household labor, even if performed by a farm employee.<sup>57</sup>

Fortunately, the IRS allows estimates of deductible expenses.<sup>58</sup> Any “reasonable allocation” under the circumstances is acceptable.<sup>59</sup> Attorneys should encourage farmers to keep careful records of personal expenses to help them comply.

Safe Harbor for Residential Deductions. Because the process of keeping track of all business expenses in the home can be difficult, the IRS recently created a safe harbor provision for residential deductions.<sup>60</sup> To use the safe harbor provision, the farmer takes the square footage of the part of the home used for business purposes and multiplies it by a prescribed rate, taking the product as an itemized deduction.<sup>61</sup> If the farmer elects to use the safe harbor provision, she may not deduct any itemized business expenses relating to the use of the home for that year.<sup>62</sup>

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<sup>52</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 19 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>53</sup> See CARLA NEILY FREITAG, BNA U.S. INCOME TAX PORTFOLIO 607-3<sup>RD</sup>: FARM AND RANCH EXPENSES AND CREDITS §IV.A. 1; Robert L. Nowland, TC Memo 1956-72 (1956) (aff'd sub nom. Nowland v. Commissioner, 244 F.2d 450 (4th Cir. 1957)).

<sup>54</sup> See CARLA NEILY FREITAG, BNA U.S. INCOME TAX PORTFOLIO 607-3<sup>RD</sup>: FARM AND RANCH EXPENSES AND CREDITS §IV.A. 2; INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 19 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>55</sup> See NEIL HARL, 4-28 AGRICULTURAL LAW § 28.02.

<sup>56</sup> See NEIL HARL, 4-28 AGRICULTURAL LAW § 28.02.

<sup>57</sup> See NEIL HARL, 4-28 AGRICULTURAL LAW § 28.02.

<sup>58</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 20 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>59</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 20 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>60</sup> Rev. Proc. 2013-13, 2013-1 CB 478.

<sup>61</sup> Rev. Proc. 2013-13, 2013-1 CB 478.

<sup>62</sup> Rev. Proc. 2013-13, 2013-1 CB 479.

**Percentage of Income from Farming** A majority of Massachusetts farmers work off of the farm some days of the year, and 40% of them work 200 days or more off the farm each year.<sup>63</sup> Thus, most farmers have some non-farm income that they will need to report. Note that income from a sub-enterprise, such as a farm gift shop or a bed and breakfast, is non-farm income, even if it operates on the farm premises.<sup>64</sup> See the definition of what constitutes a “farming business” at the beginning of the next section.

An attorney needs to be aware of what percent of the farmer’s income is derived from farming and what percent is not, because it affects the farmer’s eligibility for certain tax allowances and deductions. For example, note the farm income requirements for the following options, which are discussed in more detail in later sections:

- Income averaging is only available for farmers who make at least 66.7% of their income from farming.<sup>65</sup>
- The relaxed estimated tax reporting requirements are only available to farmers who make at least 66.7% of gross income from farming.<sup>66</sup>
- The discharge of qualified farm debt income exception requires that at least 50% of the farmer’s gross revenue over the past three years be from farming.<sup>67</sup>
- The qualified conservation contribution deduction applies differently to people who receive 50% or more of their income from farming.<sup>68</sup>
- Farming loss deductions are limited to the lesser of (i) net operating losses from the farm business and (ii) total net operating losses.<sup>69</sup> Note that these deductions are only relevant for purposes of the 5-year carryback.
- Deferring income from crop insurance, federal disaster payments, or the sale of livestock due to extreme weather conditions is only allowed when farming is the individual’s primary business.<sup>70</sup>

**Capitalization vs. Deduction** There are a number of special rules regarding how farmers treat certain expenditures: instead of capitalizing and depreciating these expenses over time, farmers may deduct them up front, as discussed in the next section. However, although it is often tax advantageous to deduct instead of capitalize, it is not always the case.<sup>71</sup> When advising a farmer on whether to elect to deduct an expense that may otherwise be capitalized, the attorney should keep the following questions in mind: *Does the farmer have any income to offset? And, will later depreciation deductions be advantageous?*

Especially in the start-up years of a new farm, there may be little or no income to deduct against. Even if there is some income, the early deduction may not be advantageous given the progressive income tax

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<sup>63</sup> See U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 7 (May 2014); available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>64</sup> Jennifer Hashley et al., *An Entrepreneur’s Guide to Farming in Massachusetts*, NEW ENTRY SUSTAINABLE FARMING PROJECT 58 (2013), [http://nesfp.org/sites/default/files/resources/an\\_entrepreneurs\\_guide\\_to\\_farming\\_ma\\_0.pdf](http://nesfp.org/sites/default/files/resources/an_entrepreneurs_guide_to_farming_ma_0.pdf).

<sup>65</sup> I.R.C. § 1301(b)(1)(A)(i).

<sup>66</sup> I.R.C. § 6654(i).

<sup>67</sup> I.R.C. § 108(g)(3).

<sup>68</sup> I.R.C. § 170(b)(1)(e).

<sup>69</sup> I.R.C. § 172(h).

<sup>70</sup> See I.R.C. § 451(d) (2014); Treas. Reg. § 1.451-6(a)(1).

<sup>71</sup> See NEIL HARL, 4-28 AGRICULTURAL LAW § 28.10. Due to the time-value of money, a deduction now is better than a deduction later if the applicable tax rates are constant.

rates.<sup>72</sup> Net operating losses can be carried forward to future tax years if not used, so a farmer will usually not completely lose the benefit of his or her deductions if there is not enough taxable income in the year in which the deductions arise. However, net operating losses cannot be carried forward more than 20 years, and certain other restrictions apply.<sup>73</sup> If the farmer expects to have more income in subsequent years, it may be better to capitalize. This is because current deductions may exceed current income and have no impact on taxes paid, whereas depreciation deductions applied against future income may generate a tax savings down the road as the business (hopefully) prospers.<sup>74</sup>

In sum, whether deduction or capitalization is more favorable depends on when the farmer expects to have taxable income and other facts and circumstances affecting **the farmer's ability to utilize the deduction**. Despite the opportunity to deduct expenses up-front, it is possible that capitalization will allow a farmer—particularly a new farmer—to more fully take advantage of deductions, reducing her overall tax bill.

**FEDERAL TAXES CONCERNS FOR FARMERS** Although in many ways federal taxes for farms look much like the taxes of any other business, the IRC contains many special provisions that only apply to farming businesses. The following section details many of these provisions, highlighting those that will be most relevant to farmers eligible for the LFH.

*What is a “farming business”?* The IRS defines the business of farming in multiple ways at different points in the IRC, but it generally aligns with the intuitive understanding of farming. According to the IRS, “[y]ou are in the business of farming if you cultivate, operate, or manage a farm for profit, either as owner or tenant. A farm includes livestock, dairy, poultry, fish, fruit, and truck<sup>75</sup> farms. It also includes plantations, ranches, ranges and orchards.”<sup>76</sup> In other words, the IRS considers the production of farm goods – plants and livestock – for profit to be the business of farming. Sometimes, depending on the specific provision in the IRC, the definition is more expansive and may include nurseries or tree farms.<sup>77</sup> If a **farmer's** activities fall outside the definition of farming quoted above, the attorney should take care to check how the relevant section of the IRC defines “farming business” to ensure it applies.

**Income Taxes: Income** The income of a farm business in many ways mirrors that of any other business. However, some forms of income are unique to farmers or uncommon outside of a farm business. Attorneys should also be aware of some exceptions and special rules for farm income.

**Ordinary Income.** For federal tax purposes, farm business income operates much like that of any other business: they must report all business income, from all sources, to the IRS.<sup>78</sup> The majority of a **farmer's** ordinary income comes from the sale of farm products, such as crops and livestock, and possibly from agritourism or special events held at the farm. However, there are some less obvious sources of income that are unique to farmers or uncommon outside of the farm business but nonetheless must be reported:

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<sup>72</sup> See NEIL HARL, 4-28 AGRICULTURAL LAW § 28.10.

<sup>73</sup> I.R.C. § 172(b)(1)(A).

<sup>74</sup> See NEIL HARL, 4-28 AGRICULTURAL LAW § 28.10.

<sup>75</sup> A farm that produces vegetables for sale at market.

<sup>76</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 1 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. See also Treas. Reg. §§ 1.61-4(d), 1.175-3.

<sup>77</sup> See, e.g., I.R.C. § 448(d)(1)(B).

<sup>78</sup> I.R.C. § 61.

- *In Kind Payments.* Farmers may sometimes accept in-kind payments of goods and services in lieu of money. Any in-kind payments must be included in **the farmer's** income at its fair market value.<sup>79</sup>
- *Government Payments.* Most government payments to farmers through agricultural or conservation programs must be included as income.<sup>80</sup>
- *Crop Insurance and Federal Disaster Payments.* Unlike many other types of indemnity, crop insurance payments and federal disaster payments must be reported as income.<sup>81</sup>

Capital Gains. A farmer's capital assets are determined similarly to non-farmers and include assets held by the farmer other than, among others, (i) inventory or assets held for sale to customers in the ordinary course of a trade or business and (ii) real estate and depreciable personal property used in a trade or business.<sup>82</sup> These may **include the farmer's personal residence, personal vehicles, and investment** assets.<sup>83</sup> Gains from the sale of these capital assets held for more than one year are taxed at more favorable capital gains rates, although the deductibility of capital losses may be subject to limitations.<sup>84</sup>

Section 1231 gains. Under Section 1231 of the IRC, net gains from the sale of certain business assets held for the required holding period ("**Section 1231 property**") are taxed at favorable capital gains rates but net losses from the sale of these assets are deductible as ordinary losses.<sup>85</sup> *This is highly favorable tax treatment.* This treatment applies to real estate sales, casualty or theft losses, and loss due to condemnation.<sup>86</sup> Farmers can also get 1231 treatment for any *unharvested crops* sold along with their land.<sup>87</sup>

The IRC also expressly includes certain *livestock* as Section 1231 property, with some special rules and restrictions:<sup>88</sup>

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<sup>79</sup> I.R.C. § 61; *see also* Treas. Reg. 1.61-1; Treas. Reg. 1.61-4.

<sup>80</sup> Treas. Reg. § 1.61-4. Certain portions of government payments for specific conservation programs are not included in gross income, however. *See* I.R.C. § 126 (2014). Although only 10% of Massachusetts farms receive government payments, the majority of farms that receive such payments have gross receipts of under \$10,000 per year, so this may be relevant to some clients of the LFH. *See* 2012 CENSUS OF AGRICULTURE: MASSACHUSETTS STATE AND COUNTY DATA, VOL. 1, GEOGRAPHIC AREA SERIES, PART 21, 15 (May 2014); *available at*

[http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>81</sup> I.R.C. § 451(d). Fewer than 10% of Massachusetts farmers have crop insurance (due to the lack of commodity crops grown in the state), but it still may come up in discussions with LFH clients. *See* U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRIC., MASS. STATE AND COUNTY DATA 16 (May 2014), *available at*

[http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

<sup>82</sup> I.R.C. § 1221.

<sup>83</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE, 49 (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>84</sup> I.R.C. § 1221, §1(h); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE, 49 (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>85</sup> I.R.C. § 1231; INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE, 55 (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>86</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE, 55 (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>87</sup> I.R.C. § 1231(b)(4).

<sup>88</sup> Unfortunately, the line between livestock held for draft, breeding, dairy, or sporting purposes and livestock held for resale is often blurry, unless the farmer takes care to establish the distinction. Agricultural law scholar Neil Harl has the following suggestions: avoid physically mixing cattle held for resale and for Section 1231 purposes; avoid making all livestock available for sale, even if only a percentage is to be sold; and exercise caution in advertising the sale of Section 1231 animals. *See* NEIL HARL, 4- 27 AGRICULTURAL LAW § 27.05.



- Cattle and horses held for draft, breeding, dairy, or sporting purposes must be held for *twenty-four months* or more to be treated as Section 1231 property.<sup>89</sup>
- All “other” livestock held for draft, breeding, dairy, or sporting purposes must be held for only *twelve months* to receive Section 1231 treatment.<sup>90</sup>
- Poultry is excluded, and cannot receive Section 1231 treatment.<sup>91</sup> In general non-mammals (birds, reptiles, etc.) also do not get Section 1231 treatment.<sup>92</sup>

In addition to this favorable tax treatment upon sale of livestock, farmers who use the cash method of accounting may also deduct rather than capitalize the cost of raising certain animals.<sup>93</sup>

Deferral of disaster income. The IRS allows cash method farmers the option to defer the inclusion of some types of income that are tied to extreme weather conditions, such as a flood or extreme temperatures.<sup>94</sup> Crop insurance payments and federal disaster payments to cover lost crops may be deferred to the next tax year.<sup>95</sup> This is an either/or election: the farmer cannot split the income from the insurance payments between the current year and the next year.<sup>96</sup>

Income from the sale of livestock due to extreme weather conditions may also be deferred to the following tax year, but the law is much more stringent about what qualifies for the deferral.<sup>97</sup> Primarily, the geographic area must be designated for deferral assistance by the government;<sup>98</sup> the farmer must prove that the livestock would not have been sold “but for” the extreme weather;<sup>99</sup> and the amount of income deferred is limited to sales in excess of “usual business practice.”<sup>100</sup>

Exclusion and non-recognition of income. Farmers can exclude certain income and gains from gross income:

- *Commodities consumed by the farmer.* Any crops or livestock raised for consumption by the farmer and her household should not be included in gross income.<sup>101</sup> (The flipside of this is that the costs associated with this production may not be deducted, as discussed above.)
- *Discharge of qualified farm debt.* If qualified farm debt is discharged, the income from the discharge is not included in a farmer’s gross income, subject to limitations.<sup>102</sup>

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<sup>89</sup> I.R.C. § 1231(a)(1).

<sup>90</sup> I.R.C. § 1231(a)(1).

<sup>91</sup> I.R.C. § 1231(a)(3).

<sup>92</sup> I.R.C. §1231(a)(3); *See also* NEIL HARL, 4-27 AGRICULTURAL LAW § 27.05 (“A line, then, seems to be drawn between mammals and nonmammals”).

<sup>93</sup> *See* Advantages of the Cash Method, *supra*.

<sup>94</sup> *See* NEIL HARL, 4-27 AGRICULTURAL LAW § 27.03.

<sup>95</sup> I.R.C. § 451(d); Treas. Reg. § 1.451-6(a)(1).

<sup>96</sup> Revenue Ruling 74-145, 1974-1 CB 113.

<sup>97</sup> I.R.C. § 451(e).

<sup>98</sup> Treas. Reg. § 1.451-7(a).

<sup>99</sup> Treas. Reg. § 1.451-7(b).

<sup>100</sup> Treas. Reg. § 1.451-7(a).

<sup>101</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 25 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>102</sup> I.R.C. §§ 108(a)(1)(C), 108(g). Qualified farm debt is debt incurred directly in operating a farming business and owed to a qualified person, which includes the government or government agencies, such as USDA. Only farmers who have made at least 50% of their gross income from farming over the past three years are eligible for the qualified farm debt exemption.

- *Portions of conservation payments.* Some federal conservation programs have excludable portions that are not included in gross income.<sup>103</sup>
- *Like-kind exchanges.* Like-kind exchanges of business property are not recognized as income under Section 1031.<sup>104</sup> For example, if a farmer exchanges a truck with his neighbor, even if her neighbor’s truck is worth more, the IRS does not recognize any income to the farmer. But be wary: whether property is “like-kind” is not always obvious. Attorneys should be especially careful of the rules surrounding like-kind exchanges of livestock. For example, farm animals of different sexes are not considered like-kind for the purposes of the statute;<sup>105</sup> neither are beef and dairy cows.<sup>106</sup>

**Income Taxes: Expenses** Farmers may deduct all “ordinary and necessary” business expenses from their income each year.<sup>107</sup> A list of common deductible farm expenses is included in Schedule F, Part II.<sup>108</sup> Farmers are generally required to capitalize and depreciate expenditures on “wasting assets” (assets whose economic value tends to decrease over time) of one year or more.<sup>109</sup> However, there are many exceptions to capitalization for farmers. This section focuses on special rules that pertain to farming businesses.

**Capital Expenses and Depreciation.** Under the uniform capitalization rules of Section 263A, farmers must generally capitalize all expenses relating to wasting assets with a useful life of one year or more, subject to some significant exceptions discussed in the next subsection.<sup>110</sup> The most common expenses that farmers must capitalize are the costs of acquiring buildings, vehicles, machinery, and equipment, and the cost of improvements to land and buildings.<sup>111</sup> Plants with a pre-productive period of more than two years are also usually capitalized.<sup>112</sup> Common Massachusetts crops with multi-year pre-productive periods include apples, blueberries, and peaches.<sup>113</sup>

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<sup>103</sup> See I.R.C. § 126.

<sup>104</sup> I.R.C. § 1031.

<sup>105</sup> I.R.C. § 1031(e).

<sup>106</sup> NEIL HARL, 4-27 AGRICULTURAL LAW § 27.04. For a much more thorough look at like-kind exchanges, see NEIL HARL, 4-27 AGRICULTURAL LAW § 27.04.

<sup>107</sup> I.R.C. § 162(a).

<sup>108</sup> INTERNAL REVENUE SERVICE, SCHEDULE F (FORM 1040): PROFIT OR LOSS FROM FARMING (2013), available at <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

<sup>109</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 35 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>110</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 35 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>111</sup> See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, CHAPTER 7, 35-44 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>112</sup> I.R.C. § 263A(d)(1); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 31 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. Farmers may elect to deduct these expenses instead, with some consequences, discussed in the next section. I.R.C. § 263A(d).

<sup>113</sup> See *Massachusetts-Grown Produce Availability Calendar*, MASS. DEP’T OF AGRIC. RES., <http://www.mass.gov/agr/massgrown/docs/availability-chart.pdf>. The IRS provides a full list of such crops in PUBLICATION 225. See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 33 (2013), 31, Table 6-1, available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

Farmers use the Modified Accelerated Cost Recovery System (MACRS) to determine depreciation deductions for most property. A table of common farm property recovery periods may be found in Publication 225.<sup>114</sup> However, there are a few notable restrictions and exceptions for farmers:

- *Restriction to 150% declining balance depreciation.* Most business property with a useful life of ten years or less may be depreciated under the 200% “double declining balance” method.<sup>115</sup> However, farm property may only be depreciated using the 150% declining balance method over the General Depreciation System (GDS) recovery period, or one of the two straight-line methods, under either the GDS or the Alternative Depreciation System (ADS).<sup>116</sup>
- *Listed property exception for farm vehicles.* Most vehicles are considered *listed property* by the IRS.<sup>117</sup> Listed property that is used 50% or less for a business purpose must be depreciated under ADS.<sup>118</sup> Tractors and other special purpose farm vehicles are exempted from listed property.<sup>119</sup>

Depreciation usually begins when the property is “placed in service.”<sup>120</sup> For plants, depreciation begins when the plants reach the *income-producing stage*.<sup>121</sup> For example, an apple tree may be depreciated when it bears fruit. For livestock, depreciation begins when it reaches the age of maturity; for example, a milk cow can be depreciated when it can be milked.<sup>122</sup>

Special Deductions for Farmers. The IRC contains a number of deductions specific to farmers, including some significant exceptions to the uniform capitalization rules of Section 263A.<sup>123</sup> These provisions allow farmers to elect to immediately deduct expenses that would generally require capitalization and depreciated over a number of years. Taken together, these provisions present many farmers with the opportunity for substantial tax savings.<sup>124</sup>

For farmers that use the cash method of accounting (the vast majority of farmers do<sup>125</sup>), there are some major exceptions to Section 263A that allow costs to be deducted instead of depreciated over time:

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<sup>114</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 42 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>115</sup> I.R.C. §168(b); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 43 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>116</sup> I.R.C. §168(b); I.R.C. §167; INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 43 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>117</sup> Treas. Reg. 1.280F-6(b); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 44 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>118</sup> I.R.C. §280F(b); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 41 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>119</sup> INTERNAL REVENUE SERVICE, ANNOUNCEMENT 85-15 (1985); INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 44 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>120</sup> Treas. Reg. 1.167(a)-10(b).

<sup>121</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 36 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>122</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 36 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>123</sup> I.R.C. § 263A(d-e).

<sup>124</sup> *But see* Capitalization v. Deduction, *supra* (discussing cases in which capitalization is preferable to immediate deduction).

<sup>125</sup> *But see* Choice of Accounting Method, *supra*.

- *Animals.* Farmers may deduct the costs of raising animals.<sup>126</sup> All associated costs may be immediately deducted, such as the **animal’s purchase price**, feed, veterinary treatment, pasture maintenance, and repair of buildings and equipment used to care for the animals.<sup>127</sup>
- *Plants with pre-productive period of two years or less.*<sup>128</sup> Farmers may deduct the costs of growing plants with a pre-productive period of two years or less.<sup>129</sup> The pre-productive period for a plant is based on the nationwide weighted average for that plant, which the IRS provides.<sup>130</sup> All costs associated with growing these crops—such as the seed purchases, irrigation, harvesting, and storage and handling—may be deducted immediately.<sup>131</sup>
- *Plants with a pre-productive period of more than two years.*<sup>132</sup> Farmers may also elect to deduct the costs of plants with a pre-productive period of more than two years. However, unlike the above, a farmer who makes this election *must use the Alternative Depreciation System (ADS)* (the straight-line method) for all other farm business property.<sup>133</sup> This is a less advantageous method of depreciation than the 150% declining balance method that farmers who have not made this election may use. So, the farmer should carefully analyze whether the benefits of immediately deducting the preproduction plant costs are outweighed by the less-favorable depreciation treatment of her other assets.

All farmers, regardless of accounting method, qualify for the following deductions:

- *Fertilizer and other land-enrichment supplies.* Farmers may elect to deduct expenses for land-enrichment supplies—such as fertilizer, lime, ground limestone and marl.<sup>134</sup>
- *Prepaid farming supplies.* Farmers may deduct the cost of prepaid farming supplies, such as seeds and fertilizer—and, somewhat surprisingly, some poultry—not used or divested within the year they are purchased.<sup>135</sup> These deductions may be limited to 50% of all the farmer’s other deductible expenses for the year **if the farmer uses the cash method of accounting and is not a “qualified farm-related taxpayer”**.<sup>136</sup>
- *Replanting costs for plant casualties.* A farmer who loses plants as a result of extreme weather conditions, disease, pests, or casualty can deduct the replanting costs instead of capitalizing them.<sup>137</sup> The farmer must replant the same type of crop that was lost, but the replanting need not be on the same parcel of land.<sup>138</sup>

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<sup>126</sup> I.R.C. § 263A(d)(1)(A).

<sup>127</sup> See 26 C.F.R. § 1.263A-4(b)(ii) for a more complete description.

<sup>128</sup> I.R.C. § 263A(d)(1)(A).

<sup>129</sup> I.R.C. § 263A(d)(1)(A).

<sup>130</sup> I.R.C. § 263A(e)(3).

<sup>131</sup> See Treas. Reg. § 1.263A-4(b)(i) for a more complete description.

<sup>132</sup> I.R.C. § 263A(d)(3); Reg. § 1.263A-4(d).

<sup>133</sup> I.R.C. § 263A(e)(2).

<sup>134</sup> I.R.C. § 180(a).

<sup>135</sup> See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 45-46 (2014), 119, available at

<http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>136</sup> I.R.C. § 464(d); see INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 19 (2014), available at

<http://www.irs.gov/pub/irs-pdf/p225.pdf>; CARLA NEILY FREITAG, BNA U.S. INCOME TAX PORTFOLIO 607-3<sup>RD</sup>: FARM AND RANCH EXPENSES AND CREDITS §IV.B.2.C.3.

<sup>137</sup> I.R.C. § 263A(d)(2).

<sup>138</sup> I.R.C. § 263A(d)(2).

- *Conservation expenses.* Farmers may take a deduction for money spent on soil or water conservation, prevention of erosion, and endangered species recovery costs.<sup>139</sup> These deductions may be particularly relevant to clients who are trying to farm sustainably. To qualify for the deduction, the plan must be “consistent with” soil conservation or endangered species recovery plans as defined by federal government (through the Soil Conservation Service or the Endangered Species Act).<sup>140</sup> This deduction is limited to 25% of income from farming in any single year, but the excess may carry over to future years.<sup>141</sup> In addition, payments from many federal cost-share conservation programs can be excluded from income, but only if those payments are not otherwise deductible.<sup>142</sup>

Other Deductions. There are some deductions that are not restricted to farming businesses—but are relevant to the interests of the farmer—that the attorney should keep in mind.

- *Section 179 expense deduction.* Many farm assets qualify as deductible “Section 179” property, including single-purpose agricultural or horticultural structures (such as a greenhouse), farm machinery and equipment, storage tanks, and livestock, up to a specified amount.<sup>143</sup> For the purposes of this section, livestock includes poultry.<sup>144</sup>
- *Domestic production activities deduction.* All U.S. farmers are eligible for the domestic production activities deduction, which allows an additional deduction of 9% of profits, after costs and other deductions have been taken into account.<sup>145</sup>
- *Start-up costs deduction.* Those starting a new business, including new farmers, ordinarily must capitalize start-up expenses, but the IRS allows a deduction of up to \$5,000 of start-up costs.<sup>146</sup> If the farmer is starting a corporation, the corporation may deduct up to \$5,000 of organizational costs as well.<sup>147</sup> Both of these deductions are reduced by the amount that start-up costs exceed \$50,000.<sup>148</sup> As with all deductions, this election is only useful if the farmer has income to offset in the first years of business, so some analysis of expected income may be required when deciding whether to make this election. The remainder of the capitalized start-up costs can be deducted ratably over 15 years.

**Employment Taxes** Farmers who employ others must generally pay Social Security and Medicare taxes (“employment taxes”) and must withhold federal income taxes for employee wages, under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA).<sup>149</sup> Most farmers are

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<sup>139</sup> I.R.C. § 175(a).

<sup>140</sup> I.R.C. § 175(c)(3).

<sup>141</sup> I.R.C. § 175(b).

<sup>142</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 11 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>143</sup> See I.R.C. § 179(a) § 179(d); see also INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE, 37-38 (2013), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>144</sup> See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 38 (2013), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>145</sup> I.R.C. § 199(a).

<sup>146</sup> I.R.C. § 195(b)(1).

<sup>147</sup> I.R.C. § 248(a).

<sup>148</sup> I.R.C. §§ 195(b)(1)(A)(ii), 248(a)(1)(B).

<sup>149</sup> INTERNAL REVENUE SERVICE, PUBLICATION 51: AGRICULTURAL EMPLOYER’S TAX GUIDE 11 (2014), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

also required to pay self-employment (SE) taxes on their earnings.<sup>150</sup> There are some special rules and exceptions, though, for farms.

The \$150 Test or \$2,500 Test. Wages paid to employees for farmwork are subject to employment taxes (FICA) and FUTA withholding if the employer meets *either* of the following tests:

- Pays cash wages to the employee of \$150 or more in a year for farmwork; *or*
- The total paid for farmwork (cash and noncash) to all employees is \$2,500 or more.<sup>151</sup>

Even if the farmer meets the \$2,500 test, there is an exception for *seasonal farmworkers*. A farmer is not required to pay employment taxes for a seasonal farmworker who makes less than \$150 in annual wages; is appropriately paid on a piece rate basis; commutes daily to the farm; and was employed in agricultural work for less than thirteen weeks in the previous calendar year.<sup>152</sup> However, these wages still count toward the \$2,500 test for other employment tax purposes.<sup>153</sup>

“Farmwork” defined. For the purposes of employment taxes, “farmwork” is defined very broadly. It includes raising or harvesting agricultural or horticultural products, including livestock; working “in connection with” the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment; and work “in connection with” the operation and maintenance of irrigation facilities.<sup>154</sup> It also includes the handling, processing, or packaging of any agricultural or horticultural commodity, if the employing farmer produced over half of the commodity.<sup>155</sup>

Employee exceptions. There are some exceptions to the definition of an employee relevant to farmers. The following are *not* considered employees for FICA and FUTA tax purposes:

- Foreign agricultural workers temporarily admitted into the U.S. on H-2A visas.<sup>156</sup>
- Crop share tenants (if the landlord does not materially participate).<sup>157</sup> A *crop share tenant* is a farmer who pays her rent as a share of the crops she grows, instead of in cash.<sup>158</sup>
- Farmworkers employed by a crew leader. A *crew leader* is a person who provides and pays (either on her own behalf or on behalf of the farm operator) workers to do farmwork for the farm operator, but who is not employed by the farmer.<sup>159</sup>

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<sup>150</sup> See Self-Employment Taxes, *infra*.

<sup>151</sup> I.R.C. §3121(a)(8); INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER’S TAX GUIDE 10 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>152</sup> I.R.C. §3128(a)(8); INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER’S TAX GUIDE 10 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>153</sup> INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER’S TAX GUIDE 10 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>154</sup> I.R.C. §2131(g); INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER’S TAX GUIDE 8 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>155</sup> I.R.C. §2131(g); INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER’S TAX GUIDE 8 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>156</sup> I.R.C. § 3121(b)(1).

<sup>157</sup> I.R.C. § 3121(b)(16).

<sup>158</sup> See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER’S TAX GUIDE 9 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

Wages paid to *family members* are generally subject to employment taxes.<sup>160</sup> There are exceptions, however, for farms structured as sole proprietorships:

- Payments to children under the age of 18, working for either parent or both parents, are exempt from all social security, Medicare, and FUTA taxes.<sup>161</sup>
- Payments to spouses are subject to federal income tax withholding and social security and Medicare tax, but not to FUTA tax.<sup>162</sup>

Note that the family member exceptions do not apply to corporations and partnerships unless the requisite relationship exists between the employee and each partner.<sup>163</sup>

In-kind payment exception. Small-scale farmers will sometimes pay their employees in produce from **the farm, or include a CSA share as part of an employee's wages**. Although wages generally include any form of payment, in-kind payments for "agricultural labor" are excluded from wages for the purposes of FICA, FUTA, and federal income tax withholding.<sup>164</sup> "Agricultural labor" is broadly defined to include nearly all activities on a farm or in close connection with a farm.<sup>165</sup> Although this exception allows farmers who pay their employees in kind to save money on employment taxes, it may reduce or eliminate the employees' social security benefits, so this option should be exercised with care.<sup>166</sup>

Self-Employment Taxes. Farmers who operate sole proprietorships or partnerships are required to pay self-employment taxes if their net income from self-employment is greater than \$400.<sup>167</sup> This tax is based on the net income of the partnership or sole proprietorship (subject to certain adjustments).<sup>168</sup>

Like other small business owners, farmers need not pay SE taxes on most capital gains or on rental income.<sup>169</sup> There is an important exception: if a landlord *materially participates* in the production or management of farmland being leased, any income received from the operation is included in SE income.<sup>170</sup> Material participation has a flexible definition, but essentially, if a farmer leases farmland to a tenant and is very involved in the operation of the farm, he or she may fall within this exception.<sup>171</sup>

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<sup>159</sup> I.R.C. §3306(o); I.R.C. §3121(o); See INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 76 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. Note that the definition of "crew leader" for FUTA purposes is slightly different from the definition for FICA purposes.

<sup>160</sup> INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER'S TAX GUIDE 9 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>161</sup> I.R.C. § 3121(b)(3); I.R.C. §3306(c)(5). See INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER'S TAX GUIDE 21 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>162</sup> I.R.C. §3306(c)(5); INTERNAL REVENUE SERVICE, PUBLICATION 51: (CIRCULAR A) AGRICULTURAL EMPLOYER'S TAX GUIDE 21 (2013), available at <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

<sup>163</sup> Treas. Reg. §§ 31.3121(b)(3)-1(c).

<sup>164</sup> I.R.C. §§ 3121(a)(8)(A), 3306(b)(11), and 3401(a)(2).

<sup>165</sup> See I.R.C. § 3121(g)(1).

<sup>166</sup> See 5-36 AGRICULTURAL LAW § 36.02.

<sup>167</sup> I.R.C. §1402(b)(2).

<sup>168</sup> I.R.C. §1402.

<sup>169</sup> I.R.C. § 1402(a)(1).

<sup>170</sup> I.R.C. § 1402(b)(2).

<sup>171</sup> For details on what constitutes "material participation," see INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 72 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

Farmers who have a low income have a special reporting option for SE tax, called the *Farm Optional Method*.<sup>172</sup> A farmer may opt to use the Farm Optional Method of accounting if (1) gross farm income is \$7,200 or less, or (2) net farm profits are less than \$5,198.<sup>173</sup> This option may reduce or eliminate the SE tax.<sup>174</sup>

**Tax Reporting** There are a few special rules for Federal Income tax reporting that apply to farmers.

IRS Forms. There are some IRS forms specific to farm businesses. The most important are:

- Form 1040, Schedule F: Profit or Loss from Farming,<sup>175</sup>
- Form 1040, Schedule J: Income Averaging for Farmers and Fishermen,<sup>176</sup> and
- Form 4835: Farm Rental Income and Expenses.<sup>177</sup>

For a more complete list of forms a farmer may need to file, see the instructions to Schedule F.<sup>178</sup>

Income Averaging. Another special tax option available only to farmers is income averaging.<sup>179</sup> If elected, the **farmer's taxable** farming income from the current year is split into thirds, and each third is multiplied by the tax rate that applied in one of the previous three years.<sup>180</sup> This can be beneficial to farmers whose taxable income fluctuates year over year. **For example, if a farmer's income** in the current year is much higher than it was in the previous three years, this election may reduce or eliminate the amount of income taxed in the higher income bracket(s).

Farming Loss 5-Year Carryback. Many farmers have net operating losses in at least some years; in the 2012 Census of Agriculture, two-thirds of Massachusetts farms had net cash losses.<sup>181</sup> While net operating losses for most businesses may be carried back only two years, farming businesses may elect a five-year carryback for losses.<sup>182</sup> This means that if a farmer has a major loss in a given year, he or she can offset that loss against net gains over the previous five years of income, recouping some of the income taxes paid over those years.<sup>183</sup> Carrying back five years rather than two increases the chance that the farmer had sufficient

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<sup>172</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 72-73 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>173</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 72-73 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>174</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 73 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>175</sup> INTERNAL REVENUE SERVICE, SCHEDULE F (FORM 1040): PROFIT OR LOSS FROM FARMING (2013), available at <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

<sup>176</sup> INTERNAL REVENUE SERVICE, SCHEDULE J (FORM 1040): INCOME AVERAGING FOR FARMERS AND FISHERMEN (2013), available at <http://www.irs.gov/pub/irs-pdf/f1040sj.pdf>.

<sup>177</sup> INTERNAL REVENUE SERVICE, FORM 4835: FARM RENTAL INCOME AND EXPENSES (2013), available at <http://www.irs.gov/pub/irs-pdf/f4835.pdf>.

<sup>178</sup> INTERNAL REVENUE SERVICE, INSTRUCTIONS FOR SCHEDULE F: PROFIT OR LOSS FROM FARMING, F-1 (2013), available at <http://www.irs.gov/pub/irs-pdf/i1040sf.pdf>.

<sup>179</sup> I.R.C. § 1301(a).

<sup>180</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 19 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>181</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 14 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>182</sup> I.R.C. §§ 172(b)(1)(A)(i), 172(h)(1)(E).

<sup>183</sup> Note that farming loss deductions are limited to losses from the farm business only. I.R.C. § 172(i) (2014).



taxable income in the carryback period to absorb the loss. Losses can also be carried forward for 20 years, but (due to the time-value of money) the earlier the deduction can be taken the better.<sup>184</sup>

**Special Estimated Tax Rules.** Most businesses are required to pay estimated taxes on a quarterly basis.<sup>185</sup> However, the IRS has special rules for some farmers. *Qualified farmers*—farmers who derive at least two-thirds of their income from farming—are only required to pay estimated income tax once per year, by the fifteenth of the month following the close of the tax year.<sup>186</sup> This significantly reduces the burden of estimated tax reporting.

**MASSACHUSETTS TAX CONCERNS FOR FARMERS** Alongside their federal tax obligations, farmers are required to file Massachusetts state taxes. Massachusetts farmers may qualify for a lower property tax rate, are exempt from a number of excise and sales taxes, and may qualify for the Dairy Farmer Tax Credit.

**Income and Employment Taxes** In Massachusetts, farmers, like all business people, must pay state income taxes. The state income tax rate varies year to year, and it is currently around 5 percent.<sup>187</sup> The amount paid in state income tax is deductible from federal income tax owed.<sup>188</sup>

Farmers must also withhold the state income tax from employees' wages.<sup>189</sup> The Massachusetts employee withholding laws generally follow the federal laws; the farmer need only add on the state income tax when calculating how much to withhold.<sup>190</sup>

**Property Taxes** Under Chapter 61A of the Massachusetts General Laws, a farmer with at least five acres of land in active agricultural<sup>191</sup> and/or horticultural<sup>192</sup> production use may be eligible for a lower property tax rate—the “class two open space rate.”<sup>193</sup> The land must have been in active production for two

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<sup>184</sup> I.R.C. §172(b)(1)(A).

<sup>185</sup> I.R.C. § 6654(a), (c).

<sup>186</sup> I.R.C. § 6654(i).

<sup>187</sup> MASS. GEN. LAWS ANN. 62B §2; MASS. DEP'T OF REVENUE, MASSACHUSETTS TAX RATES, *available at* <http://www.mass.gov/dor/all-taxes/tax-rate-table.html> (last visited July 2, 2015).

<sup>188</sup> I.R.C. §164(a)(3); INTERNAL REVENUE SERVICE, IRS TOPIC 503 – DEDUCTIBLE TAXES (last updated March 5, 2015), <http://www.irs.gov/taxtopics/tc503.html>.

<sup>189</sup> MASS. GEN. LAWS ANN. 62B §4; MASS. DEP'T OF REVENUE, A GUIDE TO WITHHOLDING OF TAXES ON WAGES, (2014), *available at* <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/withholding-tax-guide.html>.

<sup>190</sup> MASS. DEP'T OF REVENUE, A GUIDE TO WITHHOLDING OF TAXES ON WAGES (2014), *available at* <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/withholding-tax-guide.html>.

<sup>191</sup> MASS. GEN. LAWS ANN. 61A § 1. (“Land shall be deemed to be in agricultural use when primarily and directly used in raising animals, including, but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals, for the purpose of selling such animals or a product derived from such animals in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market.”)

<sup>192</sup> MASS. GEN. LAWS ANN. 61A § 2. (Having one’s land in “active horticultural use” is defined as using the land primarily and directly to raise “fruits, vegetables, berries, nuts, and other products for human consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling these products in the regular course of business.”)

<sup>193</sup> MASS. GEN. LAWS ANN. 61A §§ 3, 4A. The farmer must also meet certain (low) thresholds regarding gross income from the property (\$500 per year, plus \$5/acre in excess of five).

years prior to application for special tax treatment.<sup>194</sup> Each municipality determines whether to allow the lower open space rate and how low to set it.<sup>195</sup>

## Tax Exemptions and Credits

Massachusetts gives farmers certain tax exemptions and credits.

**Excise Tax Exemptions.** Massachusetts farmers are exempt from paying excise taxes on gasoline and other fuels used for farming activities; more accurately, they may recoup those costs by application to the MA Department of Revenue.<sup>196</sup> Farmers may recoup the state excise tax on *gasoline* used solely for agricultural activities<sup>197</sup> by filing Form GT-9.<sup>198</sup> This covers gas used for farming purposes on the farm, but it does not cover gas used to transport supplies to and from the farm.<sup>199</sup> Similarly, farmers may recoup excise taxes paid on *special fuels* used in the business of farming (namely kerosene and propane)<sup>200</sup> by filing Form SFT-9.<sup>201</sup> Finally, *motor vehicles* with farm license plates and *farm vehicles*, such as tractors, are not subject to MA excise taxes.<sup>202</sup> A farmer should fill out State Tax Form 126-MVE<sup>203</sup> to apply for abatement of any excise tax paid on these vehicles.<sup>204</sup>

**Personal Property Tax Exemptions.** Farm animals, machinery, and equipment are exempt from personal property taxes **if the farmer declares this property to the local assessor's office and pays an excise tax of \$5 for every \$1,000 in value.**<sup>205</sup> This action exempts animals and machinery from the higher prevailing property tax rate. Local authorities have the option of exempting animals and farm machinery altogether, so it is worth calling the local assessor's office.<sup>206</sup>

**Sales Tax Exemptions.** Chapter 64H, Section 6 of the Massachusetts General Laws exempts the following farm-related items from retail sales tax:

- Sales of livestock, poultry, and plants intended for human consumption.<sup>207</sup>
- Sales of feed, including the bags in which the feed is customarily contained, for livestock and poultry of a kind that ordinarily constitute food for human consumption.<sup>208</sup>

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<sup>194</sup> MASS. GEN. LAWS ANN. 61A § 4.

<sup>195</sup> MASS. GEN. LAWS ANN. 61A § 4A.

<sup>196</sup> See *Excise & Sales Tax Exemption Guide for Farmers*, MASS. FARM BUREAU FED'N (2011), available at <http://mfbf.net/Portals/0/pdf/2011Excise%20&%20Sales%20Tax%20Guide%20for%20Farmers.pdf>.

<sup>197</sup> MASS. GEN. LAWS ch. 64A, § 7A. A similar refund of federal gasoline excise taxes is also available. See I.R.C. §6420 and Form 4136.

<sup>198</sup> MASS. DEP'T OF REVENUE, FORM GT-9: GASOLINE REFUND APPLICATION, available at <http://www.mass.gov/dor/docs/dor/forms/miscform/pdfs/gt-9.pdf> (last visited July 2, 2015).

<sup>199</sup> INTERNAL REVENUE SERVICE, PUBLICATION 225: FARMER'S TAX GUIDE 79 (2014), available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. See also Jennifer Hashley et al., *An Entrepreneur's Guide to Farming in Massachusetts*, NEW ENTRY SUSTAINABLE FARMING PROJECT 61 (2013), available at [http://nesfp.org/sites/default/files/resources/an\\_entrepreneurs\\_guide\\_to\\_farming\\_ma\\_0.pdf](http://nesfp.org/sites/default/files/resources/an_entrepreneurs_guide_to_farming_ma_0.pdf).

<sup>200</sup> MASS. GEN. LAWS ANN. 64E § 5. A similar refund of federal excise taxes is also available. See I.R.C. §6497 and author? Form 4136.

<sup>201</sup> MASS. DEP'T OF REVENUE, FORM SFT-9: SPECIAL FUELS REFUND APPLICATION, available at <http://www.mass.gov/dor/docs/dor/forms/miscform/pdfs/sft-9.pdf> (last visited July 2, 2015).

<sup>202</sup> MASS. GEN. LAWS ANN. 60A § 1.

<sup>203</sup> MASS. DEP'T OF REVENUE, FORM 126-MVE: MOTOR VEHICLE EXCISE ABATEMENT APPLICATION (Dec. 2004), available at <http://www.mass.gov/dor/docs/dls/publ/forms/mvabatelong.pdf>.

<sup>204</sup> See *Excise & Sales Tax Exemption Guide for Farmers*, MASS. FARM BUREAU FED'N (2011), available at <http://mfbf.net/Portals/0/pdf/2011Excise%20&%20Sales%20Tax%20Guide%20for%20Farmers.pdf>.

<sup>205</sup> MASS. GEN. LAWS ANN. 59 § 8A.

<sup>206</sup> MASS. GEN. LAWS ANN. 59 § 8A.

<sup>207</sup> MASS. GEN. LAWS ANN. 64H § 6(p).

- Sales of plants, including parts of plants, suitable for planting to produce food for human consumption or that are to be sold in the regular course of business.<sup>209</sup>
- Materials, fertilizer, and tools used exclusively for agricultural production.<sup>210</sup>
- Sales of machinery used in agricultural production.<sup>211</sup>

These definitions are broad. There have been numerous directives from the Massachusetts Department of Revenue elaborating on these exemptions in detail, which are summarized in the Massachusetts Farm Bureau Federation's *Excise & Sales Tax Exemption Guide for Farmers*.<sup>212</sup>

Dairy Farmer Tax Credit Program. Under the 2008 Dairy Farm Preservation Act, Massachusetts dairy farmers who hold Certificates of Registration<sup>213</sup> are eligible to receive an income tax credit every month that milk prices fall below a certain trigger price.<sup>214</sup>

**CONCLUSION** Farmers may face complex tax questions. One element of this complexity is the large number of federal tax provisions that apply specifically to farmers. This chapter of the Farm and Food Law Guide **attempts to alert a farmer's attorney** to the places where the tax treatment of farms differs from those of other businesses. There are many rules, regulations, and exceptions regarding farm business taxes.

Many of the tax code provisions specific to farmers increase flexibility but simultaneously complicate tax decisions. Whereas some businesses are required to use accrual accounting and must follow the uniform capitalization rules, farmers may opt out of these defaults – often, but not always, to their tax advantage. Furthermore, farmers are subject to fluctuations in income from year to year, and are given many tax tools to address those fluctuations. Choosing which tools to use is the difficult part, and is where an attorney, accountant, or other tax expert can be of the greatest help.

## RESOURCES

Internal Revenue Service

Publication 225: *Farmer's Tax Guide* (2014).

<http://www.irs.gov/pub/irs-pdf/p225.pdf>.

Publication 51: (Circular A), *Agricultural Employer's Tax Guide* (2014).

<http://www.irs.gov/pub/irs-pdf/p51.pdf>.

Treatises

Neil Harl, 4-27 Agricultural Law.

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<sup>208</sup> MASS. GEN. LAWS ANN. 64H § 6(p).

<sup>209</sup> MASS. GEN. LAWS ANN. 64H § 6(p).

<sup>210</sup> MASS. GEN. LAWS ANN. 64H § 6(p), (r).

<sup>211</sup> MASS. GEN. LAWS ANN. 64H § 6(s).

<sup>212</sup> See *Excise & Sales Tax Exemption Guide for Farmers*, MASS. FARM BUREAU FED'N 8-10 (2011), available at <http://mbf.net/Portals/0/pdf/2011Excise%20&%20Sales%20Tax%20Guide%20for%20Farmers.pdf>.

<sup>213</sup> Massachusetts dairy farmers must obtain a Certificate of Registration pursuant to MASS. GEN. LAWS ANN. 94 § 16A.

<sup>214</sup> MASS. GEN. LAWS ANN. 63 § 38Z; see also MASS. EXEC. OFFICE OF ENERGY AND ENVTL. AFF., DAIRY FARMER TAX CREDIT PROGRAM, <http://www.mass.gov/cea/agencies/agr/animal-health/dairy/dairy-farmer-tax-credit-program-generic.html> (last visited July 2, 2015).

Boris Bittker and Lawrence Lokken, Federal Taxation of Income, Estates, and Gifts, ¶105.8 Farmers and Ranchers, 1997 WL 440052.

Massachusetts Farm Bureau Federation

Excise & Sales Tax Exemption Guide for Farmers (2011).

<http://mfbf.net/Portals/0/pdf/2011Excise%20&%20Sales%20Tax%20Guide%20for%20Farmers.pdf>.

New Entry Sustainable Farming Project

Jennifer Hashley et al., **An Entrepreneur's Guide** to Farming in Massachusetts (2014).

[http://nesfp.org/sites/default/files/resources/an\\_entrepreneurs\\_guide\\_to\\_farming\\_ma\\_0.pdf](http://nesfp.org/sites/default/files/resources/an_entrepreneurs_guide_to_farming_ma_0.pdf).



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