

ELIMINATING THE MIDDLE MAN: POTENTIAL LEGAL REQUIREMENTS AND
CONSIDERATIONS FOR PENNSYLVANIA'S FARMERS' MARKET VENDORS

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INTRODUCTION

Under most traditional business models, producers of goods use some form of intermediary to get their products into the hands of consumers. While effective, this practice requires the producer to share a portion of the profits to be had with the intermediary; the so-called middle man. Perhaps as long as humans have been involved in commerce, some producers have attempted to retain all potential profits by eliminating the middle man and selling direct to consumers. Historically, many producers of agricultural food products have been able to eliminate the middle man by selling direct to consumers through local farmers' markets.

More than ever, farmers' markets have become a popular choice for agricultural producers hoping to capture a larger portion of potential profits. There are currently over 7,000 farmers' markets registered with United States Department of Agriculture (USDA).¹ As of 2010, Pennsylvania claimed over 1,200 farmers' markets.² In recent years, the numbers of farmers' markets, both nationally and in Pennsylvania, have increased steadily.³

Possibly, the recent increase in farmers' market popularity is a result of active governmental promotion. At the federal level, the USDA has sought to stimulate interest in farmers' markets by promoting the consumption of local food through the Know Your Farmer, Know Your Food Initiative.⁴ The USDA has also attempted to make farmers' markets more accessible to lower income families by increasing the number of farmers'

¹ USDA, "Farmers Market Search," <http://www.searchams.usda.gov/farmersmarkets>.

² PDA, "Act 106 Farmers Market Information Meeting Online/Frequently Asked Questions," <http://www.agriculture.state.pa.us>.

³ Id.

⁴ USDA, "Know Your Farmer, Know Your Food," <http://www.usda.gov/wps/portal/usda/knowyourfarmer?navid=KNOWYOURFARMER>.

markets that accept the federal Supplemental Nutritional Assistance Program (SNAP).⁵ According to the USDA National Farmers Market survey of 2006, 65.6% of all farmers' markets in the Mid-Atlantic region (where Pennsylvania is located) participated in the Women, Infants, and Children Farmers Market Nutrition Program (WIC FMNP) which provided vouchers for fresh fruits and vegetables at farmers' markets.⁶ The average value to each Mid-Atlantic farmers' market as a result of the WIC FMNP was \$1,813.00.⁷

At the state level, the Pennsylvania General Assembly, through the legislative agency the Center for Rural Pennsylvania, provides informational resources to anyone interested in starting or expanding a farmers' market.⁸ Additionally, the state's Bureau of Food Distribution, through its Direct Farm Sales Grant Program, offers farmers' market vendors the potential of receiving an annual government grant of \$7,500 per farm stand or farmers' market location.⁹

In addition to governmental promotion, various non-profit organizations have also attempted to raise the prominence of farmers' markets. At the national level, the Pennsylvania based FoodRoutes Network has been at the forefront of promoting farmers' markets through their Buy Fresh Buy Local campaign.¹⁰ In Pennsylvania, the non-profit Pennsylvania Association for Sustainable Agriculture (PASA) not only administers the Pennsylvania chapter of Buy Fresh Buy Local, but also provides training and informational resources for farmers' market managers and vendors.¹¹ Due to the

⁵ USDA, "Food and Nutrition Service," <http://www.fns.usda.gov/snap/ebt/fm.htm>.

⁶ USDA, "USDA National Farmers Market Manager Survey 2006," <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5077203>.

⁷ Id.

⁸ The Center for Rural Pennsylvania, "Starting and Strengthening Farmers' Markets in Pennsylvania," <http://www.agmarketing.extension.psu.edu/ComFarmMkt/PDFs/StartStrengthenFarmMkt.pdf>.

⁹ PDA, "Programs," <http://www.agriculture.state.pa.us>.

¹⁰ FoodRoutes Network, <http://www.foodroutes.org>.

¹¹ PASA, <http://www.pasafarming.org>.

increased prevalence, popularity, and active promotion of farmers' markets, many agricultural producers in Pennsylvania may immediately conclude that this form of direct selling to consumers will automatically increase their profits.

While on the surface eliminating the middle man through a farmers' market appears to make financial sense, an agricultural producer must carefully weigh all factors before determining that such a decision is economically sound. As a starting point, a potential farmers' market vendor must have a realistic expectation of the amount of sales that can be generated. According to the USDA National Farmers Market Managers Survey of 2006, the mean annual sales per vendor at all farmers' markets in the Mid-Atlantic region were \$17,017.¹² Additionally, the survey reported that the median annual sales per vendor at all farmers' markets in the Mid-Atlantic region were \$5,552.¹³ The survey further stated, that for seasonal farmers' market vendors in the Mid-Atlantic region, mean sales were \$16,662 per vendor and Median sales were \$5,500 per vendor.

Obviously, the USDA survey is not a perfect indicator of what sales will be generated by an individual farmers' market vendor. Many variables, such as market location, stand location, size of stand, competition, types of products offered, and consumer income determine what an individual farmers' market vendor will ultimately be able to realize in sales. Though any assessment of a potential farmers' market stand should be conducted in context, the numbers supplied by the USDA offer a valid starting point to anticipate what profits might reasonably be realized.

Against the statistical realities of what a Pennsylvania farmers' market vendor can expect to generate in sales, a careful assessment should be made of potential expenses.

¹² USDA, "USDA National Farmers Market Survey 2006," <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5077203>.

¹³ Id.

Common fiscal considerations for farmers' market vendors include: processing costs, market stand fees, employee expenses, and the fate of any unsold products. But just as important as those business considerations, anyone wishing to sell food products direct to consumers at a Pennsylvania farmers' market must also factor in the time and costs involved in complying with all legal requirements. In Pennsylvania, an individual farmers' market vendor engaged in the selling of food products must meet all legal requirements involving Pennsylvania sales tax, liability, Food and Drug Administration (FDA) labeling requirements, and as of 2010, Pennsylvania Department of Agriculture (PDA) licensing and regulation.

SALES TAX

In Pennsylvania, anyone engaged in retail sales must comply with all sales tax obligations to the state. Under the Pennsylvania Tax Code, certain items commonly offered for sale at farmers' markets qualify as taxable sales.¹⁴ Common taxable food products sold at farmers' markets are limited to: "soft drinks; wine; meals; sandwiches; food from salad bars; hand-dipped or hand-served ice-based products, including ice cream and yogurt; hot soup, hot pizza and other hot food items; brewed coffee and hot beverages."¹⁵ Common taxable non-food items sold at farmers' markets includes, but is not limited to: "flowers, non-food plants, handicrafts, decorative items, pet and pet items, books and collectibles."¹⁶

Generally, "vegetables, fruits, meats, cheeses, any food item not on the list above, clothing for everyday wear and medicine and medical supplies are not subject to sales

¹⁴ Pennsylvania Department of Revenue, "Retailers Information Guide," http://www.revenue.state.pa.us/portal/server.pt/community/sales%2C_use_hotel_occupation_tax/14487.

¹⁵ Id.

¹⁶ Id.

tax.”¹⁷ However, the list is not exhaustive. The complete list of taxable and non-taxable items, located at the Pennsylvania Department of Revenue’s website, should always be consulted prior to the sale of any item at a farmers’ market.¹⁸

If the state determines that a retailer is selling goods that qualify as taxable, the retailer must obtain a “Pennsylvania sales and use tax license.”¹⁹ At the time of all taxable sales, the farmers’ market vendor is required to charge and collect a 6% sales tax.²⁰ This fee must then be remitted to the state within thirty days of the sale.²¹ If a farmers’ market vendor fails to collect or remit the tax to the state, the state will hold the vendor liable for the tax, plus any interest and penalties.²² Therefore, a Pennsylvania farmers’ market vendor must always carefully consider any state sales tax implications.

LIABILITY

Anyone engaged in commerce will necessarily be concerned about matters of liability. When agricultural producers sell direct to consumers at a farmers’ market, those producers must be aware of any potential liability regarding the products they sell and the premises where those products are sold. As is the case with most businesses engaged in commercial activity, the vast majority of farmers’ markets vendors will seek to limit their liability through the securing of insurance. However, the purchasing of insurance is an additional cost, and not every insurance policy will provide adequate protection. Therefore, when an agricultural producer seeks to increase profits by eliminating the

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

middle-man, through selling direct to consumers at farmers' markets, those producers should determine the total costs involved in acquiring adequate insurance.

To mitigate the effects of potential lawsuits, many Pennsylvania farmers' markets require their vendors to carry some form of liability insurance. A standard farmers' market agreement in Pennsylvania often reads as follows:

Each farmer or vendor shall obtain General liability [insurance] which includes products liability and premises liability. Each and every such policy shall expressly provide coverage that includes General Liability insurance with a minimum single limit for personal injury of \$100,000.00 for any occurrence and of \$100,000.00 for property damage for any one occurrence. Failure to obtain such insurance coverage or failure to furnish the certificate of insurance required shall constitute a breach of the Market Rules and Regulations by a farmer or vendor.²³

Therefore, if an agricultural producer wishes to sell their products at a farmers' market, they must meet the liability requirements established by each individual market.

Because most agricultural producers currently carry liability insurance as part of their entire agricultural operation, many of these insurance policies may already provide liability coverage for the sale of products at farmers' markets. If so, the agricultural producer would not need to incur the expense of acquiring additional coverage.

However, not every insurance policy provides coverage for direct sales to consumers at farmers' markets, and those that do provide coverage, often limit the coverage to the sale of certain types of products.

²³ New Hope Farmers' Market Rules and Regulations March 2011, <http://www.newhopefarmersmarket.com>.

According to Larry Spilker, an agent with the Campbell Risk Management Insurance Company, most farm policies limit liability insurance coverage regarding direct sales to consumers to those products sold at roadside stands located on the actual farm property.²⁴ In those instances, not only would the farm liability coverage not cover products sold at a farmers' market, but the coverage would not cover a "slip and fall" suit relating to any occurrence on the farmers' market premises.²⁵

Even if a farm policy provides liability coverage for both the sale of products at a farmers' market and the farmers' market premises, the agricultural producer must be careful to maintain compliance with the policy. Quoting Mr. Spilker, "A policy may cover a farmer selling raw corn at a farmers' market, but the moment that farmer cuts the corn and makes it into salsa, most policies would no longer provide coverage."²⁶

Because not every insurance company that currently writes farm insurance policies cover direct sales to consumers at farmers' markets, the Campbell Risk Management Insurance Company has developed the first national farmers' market vendor liability insurance program.²⁷ Under there program, a participating farmers' market vendor would receive coverage of "\$1,000,000 per occurrence in both general and product liability coverage with no deductible and a \$2,000,000 annual aggregate limit."²⁸ The policy coverage would extend to all farmers' markets the vendor participated in.²⁹ Annual policy rates are determined by total annual sales, and will vary from a minimum

²⁴ Telephone interview with Larry Spilker, Agent Campbell Risk Management Insurance Company, March 7, 2012.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

of \$275.00 to a maximum of \$425.00.³⁰ According to Mr. Spilker, “the average policy tends to run around \$350.00 per year.”³¹

Limiting your liability through insurance is generally a wise business decision. Furthermore, many Pennsylvania farmers’ markets require their vendors to maintain some form of liability insurance. Since numerous farm insurance policies do not provide complete coverage for direct sales of agricultural products to consumers at farmers’ markets, an agricultural producer should review the extent of their current liability protection. If additional coverage is required, the agricultural producer should weigh the expense of liability compliance with any anticipated profits.

FDA LABELING REQUIREMENTS

Food safety is a matter taken seriously by the federal government. According to the Centers for Disease Control and Prevention (CDC), each year in the United States, an estimate of “48 million get sick, 128,000 are hospitalized, and 3,000 die from foodborne diseases.”³² In an effort to limit the number of foodborne illnesses, the FDA has established labeling requirements for all packaged food products; including packaged food products sold at farmers’ markets. While food safety is laudable, compliance with FDA labeling regulations could prove costly for a potential farmers’ market vendor.

The food labeling requirements for all packaged food products sold at farmers’ markets are governed exclusively by Title 21 of the Code of Federal Regulation.³³ Accordingly, at a minimum, all packaged food products sold at farmers’ markets are required to contain labeling that provides the name of the food, the net quantity of the

³⁰ Id.

³¹ Id.

³² CDC, “Estimates of Foodborne Illness in the United States,” <http://www.cdc.gov/foodborneburden/index.html>.

³³ 21 CFR 101.1 (2009).

packaged contents, the name and address of the food business, and a list of the packaged ingredients.³⁴ While a packaged food product may include all of the required information on a single label, the FDA also permits the labeling to appear on two separate areas on the packaged food product: the principal display panel and the information panel.³⁵

According to FDA guidelines, the principal display panel refers to “the part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale.”³⁶ In most instances, the principal display panel will be the front of the package. In addition to location requirements, the principal display panel must also “be large enough to accommodate all the mandatory label information required to be placed thereon by this part with clarity and conspicuousness and without obscuring design, vignettes, or crowding.”³⁷ The mandatory label information required on the principal display panel includes the name of the product and the quantity of the package contents.³⁸

If a two label system is being employed, additional mandatory information must appear on the information panel. The information panel is “the part of the label immediately contiguous and to the right of the principal display panel as observed by an individual facing the principal display panel.”³⁹ If used, the information panel must contain a list of the ingredients, and the name and location of the food business.⁴⁰ When applicable, the information panel will also contain the food products nutritional

³⁴ 21 CFR 101.1-101.5 (2009).

³⁵ Id.

³⁶ 21 CFR 101.1 (2009).

³⁷ Id.

³⁸ Id.

³⁹ 21 CFR 101.2 (2009).

⁴⁰ Id.

information.⁴¹ All listings on the information panel must be prominent, conspicuous and legible as determined by FDA guidelines.⁴²

Regardless if a single label is placed on a package, or labeling information is divided between the principal display panel and information panel, all food packages must exhibit certain information. The first mandatory labeling requirement is a statement identifying the name of the food product.⁴³ That portion of the label providing the name of the food product must clearly state a designation that is “specified or required by any applicable federal law,” or by a food product’s “common or usual name,” or by any appropriate description of the food product.⁴⁴ Examples of common names or appropriate descriptions would include terms such as “salsa, applesauce, or vanilla wafers.”⁴⁵ Furthermore, the name of the food product must appear in bold type and that type must be larger and more conspicuous than any of other labeling information.⁴⁶

The second mandatory labeling requirement is a list of the packaged food’s ingredients.⁴⁷ All packaged food that contains two or more ingredients must list those ingredients, not by their scientific name, but by their “common or usual name” as understood by most consumers.⁴⁸ By way of example, ingredient labels should list the common terms sugar and salt, as opposed to their scientific names sucrose and sodium chloride. Additionally, the ingredients must be listed “in descending order of

⁴¹ Id.

⁴² Id.

⁴³ 21 CFR 101.3 (2009).

⁴⁴ Id.

⁴⁵ Penn State Extension, “Food for Profit, facts for starting your food business: food labels” <http://www.extension.psu.edu/food-safety/entrepreneurs/regulations/fda-labeling-regulations>.

⁴⁶ 21 CFR 101.3 (2009).

⁴⁷ 21 CFR 101.4 (2009).

⁴⁸ Id.

predominance by weight.”⁴⁹ However, the order of weight predominance does not apply to any ingredient that accounts for less than two percent of the food products total weight.⁵⁰ In those instances, the ingredient must still be listed, but may be placed at the end of the list of ingredients with “an appropriate quantifying statement,” such as “Contains less than 2 percent of the following.”⁵¹ Furthermore, in order to protect consumers with food allergies, the Food Allergen Labeling and Consumer Protection Act of 2004 requires that all packaged food products prominently display on the ingredient list the presence of any milk, eggs, fish, crustacean shellfish, tree nuts, wheat, or soy beans.⁵²

The third mandatory labeling requirement for all packaged food products is the net quantity of contents.⁵³ The net quantity of contents is a statement describing the amount of food in a package as expressed through weight, volume, or number of pieces.⁵⁴ The FDA requires that the net quantity of contents be displayed on the bottom 30 percent portion of the principal display panel in lines that run parallel to the bottom of the package.⁵⁵ Furthermore, all measurements of net quantity of contents are required to be expressed in both the U.S. Customary System (ounces, pounds, fluid units) as well as the metric system (grams, kilograms, milliliters, liters).⁵⁶

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² FDA, “Guidance for Industry: A Food Labeling Guide,”

<http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/foodlabelingguide/ucm064880.html#label>.

⁵³ 21 CFR 101.105 (2009).

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

Finally, all packaged food products must display the name and location of the business that is the manufacturer, packer, or distributor the food product.⁵⁷ The name that is to be used when the food business is a corporation is the actual corporate name.⁵⁸ When the food business is “an individual, partnership, or association, the name under which the business is conducted shall be used.”⁵⁹ The location of the food business shall be described by stating the “street address, city, state, and ZIP code” of the food business.⁶⁰ The food business is exempt from listing the street address if that address appears in any current city or telephone directory.⁶¹ If the food business named on the package is not the actual manufacturer of the food product, the label must include a phrase describing the relationship between the food business and the food product.⁶² This can be accomplished through terms such as “Manufactured for,” “Packed for,” or “Distributed by.”⁶³

Packaged food products may or may not be required to display nutritional information on the label. The FDA requires all packaged food to display nutritional labeling unless a small business exemption applies.⁶⁴ There are two ways to qualify for a nutritional label exemption. To receive the first exemption, the retailer of the packaged food product must not have annual gross sales that exceed \$500,000.⁶⁵ Since the average annual sales per farmers’ market vendor in the Mid-Atlantic region is \$17,017, most

⁵⁷ 21 CFR 101.5 (2009).

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ 21 CFR 101.9 (2009).

⁶⁵ Id.

Pennsylvania farmers' market vendors would qualify for this exemption.⁶⁶ Retailers who qualify for this exemption are not required to file notice with the FDA.⁶⁷ Second nutrition labeling exemption applies to small businesses that employ fewer than 100 full-time employees, and sell fewer than 100,000 units of that packaged food product in the United States within a twelve month period.⁶⁸ This exemption would apply to both retailers and producers. Small businesses that claim this exemption must file an annual notice with the FDA.⁶⁹ As retailers, Pennsylvania farmers' market vendors only need to apply for this exemption if they fail to qualify for the automatic \$500,000 retailer exemption.⁷⁰

Nonetheless, an exempt farmers' market vendor may elect to list a food products' nutritional information. If such an election is made, full compliance with FDA nutritional labeling is required.⁷¹ The nutritional information must be displayed on a Nutritional Facts panel "on a per-serving basis and must include calories, total fat, cholesterol, sodium, carbohydrates, protein, vitamins A and C, calcium, and iron."⁷² Furthermore, to calculate the required nutritional information, the farmers' market vendor will either need to consult USDA reference values or pay to have the food product tested in a commercial laboratory.⁷³ Thus, time and cost factors will generally preclude most farmers' market vendors from voluntarily supplying nutritional information.

The FDA strictly regulates the health or nutritional claims which may appear on a food package label. For a health claim to be permitted on a food package label, the claim

⁶⁶ USDA, "National Farmers Market Survey 2006," <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STLPRDC5077203>.

⁶⁷ 21 CFR 101.9 (2009).

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Penn State Extension, "Food For Profit: facts for starting your own business: food labels," <http://www.extension.psu.edu/food-safety/entrepreneurs/regulations/fda-labeling-regulations>.

⁷³ Id.

must be authorized by the FDA.⁷⁴ The FDA limits approval of health claims to those claims where “there is significant scientific agreement, among experts qualified” to make such evaluations.⁷⁵ Therefore, before a health claim is made on a food package label, it is necessary to ascertain whether the FDA has determined the claim is strongly supported by the scientific community. To make a nutritional claim on a food package label, the food product must qualify under established FDA standards, and like other nutritional information, must be listed on the Nutritional Facts panel on a per serving basis.⁷⁶

Ultimately, a farmers’ market vendor must be aware that all packaged food products require labels. Furthermore, the FDA, in an effort to prevent illness, has very specific requirements for what information must be included on a label, and where that information must appear on a package. As a result, the FDA’s labeling regulations could prove cost prohibited to many potential farmers’ market vendors.

Ultimately, because of the strict federal labeling requirements of food packages, a farmers’ market vendor should consider whether the advantages of selling a packaged food product are greater than the time and expense required for FDA compliance. Furthermore, a farmers’ market vendor must also determine if the financial benefits of promoting health and nutritional claims exceed the additional regulatory burden. If the farmers’ market vendor does decide to package and label food products, prior to the printing of all labels, a wise course of action would be to have a representative from the

⁷⁴ 21 CFR 101.14 (2009).

⁷⁵ Id.

⁷⁶ 21 CFR 101.9 (2009).

PDA or FDA analyze draft versions of the labels and assess whether the labels have met all federal requirements.⁷⁷

PDA LICENSING AND REGULATION

GENERAL OVERVIEW

On November 23, 2010, Pennsylvania enacted Act 106. The intention of Act 106 was to improve consumer food safety, by updating “current food safety laws to reflect modern food science, eliminate duplication of inspections, provide for uniform inspection and address other deficiencies in the current food safety laws.”⁷⁸ To implement these goals, Act 106 entrusted the PDA with the authority to enforce food safety regulations at all retail food facilities throughout the state of Pennsylvania.⁷⁹

Prior to the enactment of Act 106, farmers’ market vendors were not individually licensed and regulated by the state. Instead, each farmers’ market had one “Market Master” who received “a retail food facility license that was designed to cover the entire market.”⁸⁰ Unfortunately, if a food safety violation was found at an individual vendor’s stand, the entire market was at risk for a regulatory shut down.⁸¹ Additionally, food safety regulations were not standard, and each farmers’ market was subject to the whims the local municipality.⁸²

Initially, Act 106 received a less than enthusiastic reaction among established farmers’ market vendors. Concern was expressed over the burden of complying with

⁷⁷ Penn State Extension, “Food For Profit: facts for starting your food business: food labels,” <http://extension.psu.edu/food-safety/entrepreneurs/regulations/fda-labeling-regulations>.

⁷⁸ PDA, “Act 106 of 2010,” <http://www.eatsafepa.com/Act106.aspx>.

⁷⁹ Tit. 3 Pa. Cons. Stat. § 5736 (2010).

⁸⁰ PDA, “Act 106 Farmers Market Information Meeting Online/Frequently Asked Questions,” <http://www.agriculture.state.pa.us>.

⁸¹ Lancaster Farming, “Big Changes For Farmers Market Vendors,” <http://www.lancasterfarming.com>.

⁸² Id.

new regulations, and the expenses involved with acquiring and maintaining a license.⁸³ Farmers' market vendors wondered if selling direct to consumers was still a viable financial option.⁸⁴

Fortunately, Act 106 has not produced the dire consequences predicted by many. According to Stacey Miller, Executive Director of the Farmers Market Coalition, "the regulations and fee structure [of Act 106] are fair and consistent with what's being enacted in other states."⁸⁵ Regarding the issue of PDA food safety standards, Brian Snyder, Executive Director of PASA opined that "many of the regulations have been on the books for years and that it could possibly help some vendors that face multiple jurisdictional issues with counties that have their own health departments and set their own standards."⁸⁶

PDA REGULATORY AUTHORITY

Under Act 106, any regulation put forth by the by the PDA must be "construed in a manner that is consistent with the Federal acts and regulations promulgated under those acts."⁸⁷ Furthermore, Act 106 specifies that in carrying-out the PDA's regulatory function, the secretary (defined as any "authorized representative, employee or agent of the Department of Agriculture"⁸⁸) "shall not enforce requirements to sanitation, food safety, food standards and labeling requirements of any kind or description other than those provided in the Federal acts."⁸⁹ Nevertheless, Act 106 does empower the PDA to

⁸³ Philly.com, "Stricter food law in Pa. frustrates farmers' markets," http://www.articles.philly.com/2011-05-01/news/29493407_1_market-vendors-food-safety-new-rules.

⁸⁴ Id.

⁸⁵ Lancaster Farming, "Big Changes In Store For Farmers Market Vendors," <http://www.lancasterfarming.com>.

⁸⁶ Id.

⁸⁷ Tit. 3 Pa. Cons. Stat. § 5736 (2010).

⁸⁸ Tit. 3 Pa. Cons. Stat. § 5722 (2010).

⁸⁹ Tit. 3 Pa. Cons. Stat § 5736 (2010).

create and impose its own separate regulations, provided that a regulation: “(1) is justified by compelling and unique local conditions; (2) protects an important public interest that would otherwise be unprotected; (3) relates to subject matter that is primarily local in nature and the Federal agency with responsibility over the subject matter is not exercising its jurisdiction with respect to the subject matter; (4) would not cause a food to be in violation of any applicable requirements under the Federal acts; and (5) would not unduly burden interstate commerce.”⁹⁰

POTENTIALLY HAZARDOUS OR NON-POTENTIALIALLY HARARDOUS

Under Act 106, an essential consideration in determining the PDA’s regulatory authority is whether a food product sold at a farmers’ market is potentially hazardous or non-potentially hazardous. Act 106 provides that the terms potentially hazardous food “shall have the same meaning as defined by the 2009 edition of the U. S. Food Code.”⁹¹ Accordingly, the FDA, through the U. S. Food Code, defines non-potentially hazardous food as (1) air-cooled hard-boiled eggs with intact shells or non-hard-boiled eggs with intact shells that have been pasteurized to destroy all viable Salmonella; (2) food that has been commercially processed to maintain stability without refrigeration; (3) food that contains pH values that fall within a specific range; and (4) food that does not support the growth of pathogenic microorganisms at a level sufficient to cause illness or injury.⁹² Practically speaking, the FDA’s key considerations for determining whether a food product qualifies as a potentially hazardous food or a non-potentially hazardous food, is whether or not a food product supports the growth of pathogenic microorganisms, and

⁹⁰ Id.

⁹¹ Tit. 3 Pa. Cons. Stat. § 5702 (2010).

⁹² FDA, “Food Code 2009: Chapter One Purpose and Definitions,” <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/>

whether or not the food product requires temperature control to remain safe for human consumption.

While the FDA provides farmers' market vendors with guidance for determining whether a food product is potentially hazardous or non-potentially hazardous, ultimately, the PDA makes all such rulings on a case by case basis.⁹³ Therefore, a Pennsylvania farmers' market vendor must always consult a PDA representative to ascertain if their specific food product is potentially hazardous or non-potentially hazardous.

PACKAGING

Under Act 106, another key factor in determining the legal requirements of a farmers' market vendor is whether or not the food products being offered for sale are prepackaged prior to display at a farmers' market stand, or whether the food products being offered for sale are unpackaged during display at a farmers' market stand.

According to Act 106, a package is defined as "Any container or wrapping in which food is enclosed for delivery or display to retail purchasers."⁹⁴ However, Act 106 also specifies that the term package does not pertain to (1) a shipping container or wrapping used to transport bulk food to a manufacturer, packer, processor, wholesaler, or retail distributor; (2) tray pack displays; (3) a shipping container or wrapping that is not properly labeled or (4) a shipping container or wrapping which obscures the required labeling information.⁹⁵ Additionally, if a food product offered for sale at a farmers'

⁹³ PDA, "Requirements for Home Food Processors," http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/agwebsite/Files/Forms/Home%20fed%20processor%20Requirements%2007-2011.pdf.

⁹⁴ Tit. 3 Pa. Cons. Stat. §5722 (2010).

⁹⁵ Id.

market qualifies as packaged, that item must also display a food label which complies with all previously mentioned FDA regulations.⁹⁶

HOME FOOD PROCESSING

Traditionally, many of the food products sold at farmers' markets have been prepared in home kitchens. Signs describing "home-made" cookies, pies, cakes and jellies are prominently displayed at most farmers' markets. Because processing these items in a home kitchen can often be accomplished with existing equipment used to prepare family meals, many agricultural producers have been able to add value to a food product without having to pay another to perform a processing service. In theory, a farmers' market vendor is able to charge more for their product, and by eliminating the middle man, retain more of the profits. Additionally, agricultural producers have often been able to decrease losses by using their home kitchens to convert unsold fruits and vegetables into desirable baked goods and preserves.

At first blush, home food processing appears to make total economic sense. However, in Pennsylvania, a farmers' market vendor must be keenly aware of recent state regulations that govern any home kitchen used to process food for resale. Accordingly, an assessment should be made of all time and costs involved for legal compliance.

Prior to Act 106, an individual in Pennsylvania could use their personal kitchen to process those types of "home-made" baked goods and jarred products commonly sold at farmers markets. While the food products produced needed to meet FDA and Pennsylvania Food Code requirements upon sale, the home processing kitchen itself was not subject state regulation. However, with the passage of Act 106, the PDA has been

⁹⁶ Tit. 3 Pa. Cons. Stat. § 5728 (2010).

granted the authority to register, license and inspect all in home kitchens that produce food products intended for public sale.⁹⁷

Under Act 106, the PDA is charged with enforcing all federal regulations related to food as detailed “by the most current edition of the Food Code, published by the United States Department of Health, Food and Drug Administration.”⁹⁸ In certain instances, the home food processor will also fall under the regulation of the PA Code Title 7, Chapter 46, Retail Food Code.⁹⁹ In addition to those regulations mandated by the PDA, any local municipal zoning restrictions on home businesses will also apply.¹⁰⁰

Unfortunately, Title 21 of the Code of Federal Regulation and PA Code Title 7, Chapter 46, Retail Food Code are generally silent in regards to home food processing. Therefore, in the absence of any governing Federal regulation, Act 106 permits the PDA secretary to establish regulations, provided that those regulations (1) justify a compelling local condition; (2) protect an important public interest; (3) do not unreasonably interfere with interstate commerce; (4) do not cause a violation of a Federal act; or (5) a Federal agency does not exercise its jurisdiction.¹⁰¹ As a result of this grant of power, the PDA has created a set of regulations that now govern home food processing. Accordingly, Act 106 authorizes the PDA to enforce these regulations.¹⁰²

Under Act 106 anyone who operates a food establishment must register with the state.¹⁰³ A food establishment is considered to be “A room, building or place or portion

⁹⁷ Tit. 3 Pa. Cons. Stat. § 5707 (2010).

⁹⁸ Id.

⁹⁹ The authority arises under the Food Act (31 P. S. §§ 20.1-20.18), the Public Eating and Drinking Place Law (35 P. S. §§ 655.1-655.13); and section 1705(d) of the Administrative Code of 1929 (71 P. S. § 455(d).

¹⁰⁰ Tit. 3 Pa. Cons. Stat. § 5733 (2010).

¹⁰¹ Tit. 3 Pa. Cons. Stat. § 5736 (2010).

¹⁰² Id.

¹⁰³ Tit. 3 Pa. Cons. Stat. § 5734 (2010).

thereof or vehicle maintained, used or operated for the purpose of commercially storing, packaging, making, cooking, mixing, processing, bottling, baking, canning, freezing, packing or otherwise preparing, transporting or handling food .”¹⁰⁴ Accordingly, any food processing workplace that meets the Act 106 definition of a food establishment falls under the authority of the PDA and the agency’s power to license and inspect.¹⁰⁵ A home kitchen processing food for sale at a farmers’ market would qualify under the definition as a food establishment by the PDA.

Prior to using a home kitchen for food processing, an individual must first register with the PDA by submitting a “Home Food Processors Plan Review Application.”¹⁰⁶ Based upon the information submitted, the PDA determines whether the applicant meets the Department’s regulatory requirements.¹⁰⁷ If compliance is in order, the PDA will have a local representative (Food Sanitarian or Supervisor) physically inspect the home kitchen.¹⁰⁸ If the home kitchen passes inspection, a fee of \$35.00 will be collected by the representative, who will at that time issue the home processing license.¹⁰⁹ The registration, inspection, fee, and licensing are to be conducted on an annual basis.¹¹⁰ Accordingly, prior to obtaining a home food processing license, a farmers’ market vendor should calculate the amount of time and expenses that will be required for regulatory compliance.

¹⁰⁴ Tit. 3 Pa. Cons. Stat. § 5722 (2010).

¹⁰⁵ Tit. 3 Pa. Cons. Stat. § 5734 (2010).

¹⁰⁶ PDA, “Requirements for Home Food Processors,”

http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/agwebsit e/Files/Forms/Home%20fed%20processor%20Requirements%2007-2011.pdf.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

For matters of regulation, the PDA places food processed at home into two categories: potentially hazardous food and non-potentially hazardous food.¹¹¹ As previously mentioned, the PDA follows FDA guidelines for determining potentially hazardous and non-potentially hazardous foods, and makes each determination on a case by case basis.¹¹² The most common types of food products processed in the home as non-potentially hazardous include baked goods, jams and jellies, canned acidic foods and candy making.¹¹³ Nevertheless, if any of these items contain levels of high moisture and low acid content that fail to meet FDA guidelines and therefore become unsafe for human consumption without refrigeration, those items would be classified by the PDA as potentially hazardous.¹¹⁴ If the PDA determines a food product requires laboratory testing for proper classification, such testing will be “arranged for and paid for by the producer.”¹¹⁵

Those food products determined by the PDA to be potentially hazardous “can only be produced in a commercial (non-residential) licensed/registered kitchen.”¹¹⁶ This rule does not prohibit the processing of potentially hazardous foods at home, but would require that “foods can only be produced in a second kitchen, meeting all regulatory standards, separate from the private home kitchen.”¹¹⁷

While possible to process potentially hazardous food from a separate commercial home kitchen, in reality, the vast majority of home processors will not incur the additional financial and regulatory burden. Therefore, most food processed at home for

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

sale at farmers' markets will be produced in a private home kitchen, and as a result, those items must necessarily qualify as non-potentially hazardous.¹¹⁸ Generally, most traditional baked goods such as “cakes, breads, cookies, rolls, muffins, brownies, fruit pies and pastries” qualify as non-potentially hazardous, and thus are permitted for processing in a private home kitchen.¹¹⁹ Nevertheless, because the PDA always reserves the right to declare a particular product potentially hazardous, a home processor will necessarily need to obtain approval for their specific products.

Regardless of whether a home processed food product is potentially hazardous or non-potentially hazardous, all home food processors must meet certain PDA regulations. These regulations are not enumerated under the FDA or the Pennsylvania Food Code, and are solely formulated by the PDA under the regulatory grant of Act 106.¹²⁰ Though challenges to regulations are often difficult, some of the regulations promulgated by the PDA appear vague or arbitrary and seemingly open the potential for future litigation.

A number of the regulations implemented by the PDA deal with whom or what may not be present when food is actually being processed in a home kitchen. First, “children are not permitted in the kitchen area during food processing for the business.”¹²¹ Though child is not defined in the regulation, ostensibly, this rule would deny kitchen access to any minor under the age of eighteen. Accordingly, parents with small children requiring attention will need to arrange for (and perhaps pay for) alternative child supervision while food is being processed. Additionally, teenage

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Tit. 3 Pa. Cons. Stat. § 5734 (2010).

¹²¹ Id.

children accustomed to helping prepare meals for the family, will also be barred from the kitchen during food processing.

As with children, while food is being processed, “no animals/pets are permitted in the home at any time.”¹²² This rule applies not only to the kitchen, but the entire house. In other words, even if the family turtle is placed in the attic during food processing, the home food processor would still be in violation. Since the term “home” is not defined by the regulation, issues of what constitutes a home may arise when dealing with multi-family structures. For instance, the regulation is unclear if an attic apartment or “in-law quarters” attached to a house are considered part of the home. Potential litigation may ensue if a home food processor is determined to be in violation of PDA regulations because a tenant failed to remove their pet parakeet during the time of food processing.

Furthermore, the PDA states that “there must be restricted use of the home kitchen during any commercial processing.”¹²³ Unfortunately this is a vague standard, as the regulation does not define restricted use and does not make clear if there is a requirement that at the time of commercial processing the home kitchen must be used only for that purpose. Therefore, the possibility of a violation exists when a turkey intended for the family’s dinner is cooking in the oven while the mother sits at the kitchen table applying frosting to a cupcake scheduled for resale. This regulation appears to be open for judicial interpretation.

¹²² PDA, “Requirements for Home Food Processors,”
http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/agwebsite/Files/Forms?Home%20fed%20processor%20Requirements%2007-2011.pdf.

¹²³ Id.

The PDA has also mandated that the water being supplied to the home food processing facility must be from an approved source.¹²⁴ If the home food processing facility uses water from a private source (such as a well), the home owner is responsible for having the water tested annually for coliform bacteria.¹²⁵ Implicit in the regulation is that the testing will be paid for by the food processor.

PDA regulations require that the home food processor must obtain written consent from their local municipality verifying that local zoning ordinances permit a home food processing facility.¹²⁶ While no financial outlay is required, time and effort are still necessary to achieve compliance. Furthermore, if the municipality delays their written verification, the home food processor would be foreclosed from processing activities.

Home food processors are also required to keep all food ingredients used in the production of an item for retail sale separate from food ingredients used for personal consumption.¹²⁷ Additionally, those ingredients used in the production for retail sale, must “be properly stored or protected.”¹²⁸ However, the regulation gives not guidance as to what is considered proper storage and protection.

In addition to the regulations formulated by the PDA, the home food processor is also required to comply with all FDA labeling requirements prior to the issuance of a Pennsylvania home food processing license.¹²⁹ As previously mentioned such compliance is specific and can be both costly and time consuming.

¹²⁴ Id.
¹²⁵ Id.
¹²⁶ Id.
¹²⁷ Id.
¹²⁸ Id.
¹²⁹ Id.

Ultimately, a Pennsylvania farmers' market vendor must carefully weigh the costs and benefits before deciding to become a home food processor. Traditionally, producing food in the family kitchen for sale at farmers' markets has provided an excellent opportunity to increase profits by adding value to a product without paying a middleman. In many instances it allows a producer to reduce their losses by converting unsold perishable products (such as apples, peaches, and strawberries) into items that have value (pies, pickles, and jams). Despite the positives, recently enacted regulations place upon the home food processor the added burden of registration, inspection, and licensing. While certain regulations may eventually be found arbitrary, until that time, strict compliance is required. Therefore, a Pennsylvania farmers' market vendor should be aware that home food processing may eliminate the middle-man, but it will also impose financial and regulatory burdens.

EXEMPT VENDORS

Under Act 106, there are two types of retail food facilities exempt from state licensing requirements. The first exemption deals with those retail food facilities "in which only prepackaged, nonpotentially hazardous food or beverages are sold."¹³⁰ As mentioned prior, a non-potentially hazardous food is a product that does not support the growth of pathogenic microorganisms and which does not require temperature control to remain safe for human consumption. The PDA makes all non-potentially hazardous determinations on a case by case basis.¹³¹

¹³⁰ Tit. 3 Pa. Cons. Stat. § 5703 (2010).

¹³¹ PDA, "Requirements For Home Food Processors," http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/agwebsit e/Files/Forms/Home%20food%20processor%20Requirements%2007-2011.pdf.

While the FDA has determined that certain food products are safe without being temperature controlled, it is important to remember that to qualify for a Pennsylvania State licensing exemption, all non-potentially hazardous food products must also be pre-packaged prior to the food products display at a farmers market.¹³² All packaged food products must also display labels that comply with FDA labeling requirements.¹³³ Common pre-packaged farmers' market items which generally meet the non-potentially hazardous standard, and therefore would allow an exemption from licensing requirements may include, "baked goods, jams, candy, canned pickled products, apple cider, honey products, and maple syrup."¹³⁴

Though the retailer of the prepackaged, non-potentially hazardous items may be exempt from licensing requirements, to be allowed for sale at a farmers' market, the food product must be produced in a kitchen or facility that is licensed by the PDA and inspected by the Bureau of Food Safety and Laboratory Services.¹³⁵ Furthermore, to verify that the farmers' market vendor is indeed only selling pre-packaged, non-potentially hazardous food products, a Farmers Market Vendor Application and Plan Review must be completed and filed annually with the PDA.¹³⁶ While there is no fee charge for the application, to maintain exempt status from the licensing requirement, the farmers' market vendor has the responsibility of compliance.

¹³² Tit. 3 Pa. Cons. Stat. § 5703 (2010).

¹³³ 21 CFR 101 (2009).

¹³⁴ PDA, "Guidance for Farmers Market Vendors," <http://www.eatsafepa.com/FAQs.aspx#FarmersMarketVendorQuestions>.

¹³⁵ Tit. 3 Pa. Cons. Stat. § 5707 (2010).

¹³⁶ PDA, <http://www.agriculture.state.pa.us>.

The second type of retail food facilities exempt from PDA licensing are those which “sell only raw agricultural commodities.”¹³⁷ According to Act 106, a raw agricultural commodity is “A food in its raw or natural state, including all fruits which are washed, colored or otherwise treated in their unpeeled, natural form prior to marketing.”¹³⁸ This category encompasses the fruits and vegetables most traditionally thought to be sold at farmers’ markets. Additionally, not only are farmers’ market vendors exempt from licensing requirements, those vendors are also exempt from filing an annual Farmers Market Vendor Application and Plan Review with the PDA.¹³⁹

In order to maintain exempt status for the sale of fruits and vegetables, farmers’ market vendors must be careful to abide by the Act 106 definition of raw agriculture commodity. An agricultural producer is permitted to wash, color, or treat a fruit or vegetable, but to be considered raw (and exempt), the fruit or vegetable cannot be processed in any way.¹⁴⁰

The PDA has interpreted the definition of raw agriculture commodity to only permit a fruit or vegetable to be “harvested/cut from the field.”¹⁴¹ Any other type of disturbance to the natural structure of the fruit or vegetable would be considered processing, and would void the farmers’ market vendor’s exempt status. In essence, an agricultural producer is permitted to cut a head of lettuce to harvest in the field and wash of the dirt. The lettuce may then be sold at a farmers’ market without the need to acquire

¹³⁷ Id.

¹³⁸ Tit. 3 Pa. Cons. Stat. § 5722 (2010).

¹³⁹ PDA, “Pennsylvania Department of Agriculture Farmers Market and Farm Stand Inspection and Licensing Guidelines,” <http://www.agriculture.state.pa.us>.

¹⁴⁰ Tit. 3 Pa. Cons. Stat. § 5722 (2010).

¹⁴¹ PDA, “Act 106 Farmers Market Information Meeting Online/Frequently Asked Questions,” <http://www.agriculture.state.pa.us>.

a license or register with the state. However, the moment the head of lettuce is cut or torn post-harvest, the farmers' market vendor no longer retains exempt status.

As with all interpretations, the PDA uses different guidelines for different products. While a farmers' market vendor that sells loose leaf lettuce is not exempt, the same vendor could sell loose leaf spinach and remain exempt.¹⁴² The difference is that when harvested, spinach leaves are loose. However, if the spinach leaves are altered beyond the initial harvest cut, the farmers' market vendor would lose exempt status.

Though licensing is not required for exempt farmers' market vendors, the PDA can still subject these farmers' market vendors to inspection.¹⁴³ Furthermore, if the farmers' market vendor fails to comply with all regulations, the PDA has the power to impose penalties.¹⁴⁴ As such, an agricultural producer should calculate the burden of maintaining exempt status with any potential profits to be earned through eliminating the middleman and selling direct to consumers at farmers' markets.

NON-EXEMPT VENDORS

Farmers' market vendors not meeting the requirements for exempt status are considered non-exempt. Based on the food products sold, the PDA places non-exempt farmers' market vendors into four different categories: (1) unpackaged, non-potentially hazardous (this would include loose cookies or unwrapped bread); (2) pre-packaged, potentially hazardous (this would include milk, cheese, and eggs); (3) unpackaged, potentially hazardous (this would include meat and deli counters); and (4) ready to eat on

¹⁴² Id.

¹⁴³ Tit. 3 Pa. Cons. Stat. § 5725 (2010).

¹⁴⁴ Tit. 3 Pa. Cons. Stat. § 5703 (2010).

the premises (this would include snack counters and food carts).¹⁴⁵ Based on the category and the specific items sold within the category, the PDA will require food safety compliance with either Title 21 of the Code of Federal Regulation or the PA Code Title 7, Chapter 46, Retail Food Code.¹⁴⁶ As a result, in many circumstances, farmers' market vendors will be required to follow the same food safety procedures imposed upon grocery stores and restaurants.

For many non-exempt farmers' market vendors, food safety compliance will require distinct food handling requirements (such as the wearing of sanitized gloves), or the use of necessary equipment (such as refrigerators or hand-washing sinks for employees).¹⁴⁷ As a result, depending on the food product offered by a farmers' market vendor for sale, compliance has the potential to be quite costly.

Prior to selling food products at a farmers' market a non-exempt vendor must complete and file annually with the PDA a Farmers Market Vendor Application and Plan Review.¹⁴⁸ The Plan Review must then be authenticated by a physical inspection conducted by either a PDA officer or a local health officer.¹⁴⁹ This initial inspection is performed without charge. If the prospective farmers' market vendor fails the initial inspection, the PDA officer or local health officer conduct a follow-up inspection at no charge.¹⁵⁰ However, if a PDA officer or local health officer determine that a prospective farmers' market vendor does not pass the follow-up inspection, a fee of \$150.00 will be

¹⁴⁵ PDA, "Act 106 Farmers Market Information Meeting Online/Frequently Asked Questions," <http://www.agriculture.state.pa.us>.

¹⁴⁶ Tit. 3 Pa. Cons. Stat. § 5736 (2010).

¹⁴⁷ PDA, "Pennsylvania Department of Agriculture Farmers Market Inspection and Licensing Guide," <http://www.agriculture.state.pa.us>.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Tit. 3 Pa. Cons. Stat. § 5703 (2010).

charged for a second follow-up inspection.¹⁵¹ If the prospective farmers' market vendor fails to pass the second follow-up inspection, a fee of \$300.00 will be charged for all subsequent inspections.¹⁵² Thus, with the potential for substantial inspection fees, any prospective farmers' market vendor should carefully determine whether they will likely achieve compliance with PDA regulations prior to scheduling an inspection with a PDA officer or a local health officer.

After proper authentication, the prospective farmers' market vendor must obtain a food facility license from either "the Bureau of Food Safety and Laboratory Services or a Local or County Health Department upon passing inspection."¹⁵³ Regardless of which entity issues the license, Act 106 sets all fees relating to the licensing of farmers' market vendors. If a farmers' market vendor has not been previously licensed the required fee is \$103.00.¹⁵⁴ Those farmers' market vendors previously licensed pay an annual renewal fee is \$82.00.¹⁵⁵ While not necessarily excessive, these licensing fees do represent yet another expense to be calculated by an agricultural producer when determining if the costs outweigh the benefits of selling direct to consumers.

VENDORS WITH STANDS AT MULTIPLE MARKETS

Over the years, many agricultural producers have determined that the best way to maximize profits is to eliminate the middle man at more than one farmers' market. By selling at multiple farmers' markets, an agricultural producer is able to expand the number of potential customers. Expanding the customer base is especially important

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ PDA, "Pennsylvania Department of Agriculture Farmers Market Inspection and Licensing Guide," <http://www.agriculture.state.pa.us>.

¹⁵⁴ Tit. 3 Pa. Cons, Stat. § 5703 (2010).

¹⁵⁵ Id.

when the agricultural producer is bearing the risks associated with selling extremely perishable products (such as meat and dairy) direct to consumers. However, Act 106 has made the practice of selling at multiple farmers' markets significantly more expensive.

As currently written, Act 106 requires that whenever a farmers' market vendor operates at more than one location, "the proprietor shall be required to apply for and procure a license for each retail food facility."¹⁵⁶ The statute does not allow a price discount to farmers' market vendors who purchase more than one license.¹⁵⁷

To help mitigate the licensing burden, the PDA permits farmers' market vendors to apply for a "mobile unit" license.¹⁵⁸ Provided the farmers' market vendor physically sets-up and tears-down their market stand at the completion of each business day, the holder of a "mobile unit" license would be allowed to use that same license at a separate location.¹⁵⁹ However, the holder of a "mobile unit" license could not use the license at more than one farmers' market location in the same day.¹⁶⁰

While Act 106 has generally been deemed consistent with laws enacted in other states, the statute's provision regarding the licensing of vendors that operate at multiple farmers' markets has not. PASA Executive Director Brian Snyder believes the multiple retail facility regulations are a "major flaw" in Act 106.¹⁶¹ Regarding the mobile unit issue, Stacey Miller of the Farmers Market Coalition stated, "I think [the state] really needs to do some work on that."¹⁶² While changes may eventual come, until the

¹⁵⁶ Tit. 3 Pa. Cons. Stat. § 5703 (2010).

¹⁵⁷ Id.

¹⁵⁸ PDA, "Act 106 Farmers Market and Farm Stand Inspection and Licensing Guidelines," <http://www.agriculture.state.pa.us>.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Lancaster Farming, "Big Changes In Store For Farmers Market Vendors," <http://www.lancasterfarming.com>.

¹⁶² Id.

Pennsylvania legislature decides to amend this provision to Act 106, farmers' market vendors should determine if the financial gain of selling at multiple farmers' markets outweighs the licensing burdens.

CONCLUSION

With a recent surge in popularity, Pennsylvania's farmers' markets present a tempting possibility for agricultural producers seeking to increase their earnings. Nevertheless, such direct sales to consumers can be accompanied by possible legal burdens. Therefore, every prospective Pennsylvania farmers' market vendor should necessarily assess the legal requirements for sales tax, liability, labeling, licensing, and regulation. While selling direct to consumers at a Pennsylvania farmers' market eliminates the middle man, it is only through a careful cost benefit analysis of all potential legal requirements that an agricultural producer can hope to arrive at a proper economic decision.