



Health Law and Policy Clinic of  
Harvard Law School

# Legislative Recommendations for Protecting Arkansas Farmers and Arkansas Farmers Markets<sup>1</sup>

January 2011

---

<sup>1</sup> This report was prepared by Emily Broad, Harvard Law School Health Law and Policy Clinic with assistance from Eleanor Simon, HLS '11. Special thanks to Shannon Mirus and Rusty Rumley at the National Agricultural Law Center.

## Introduction

Farmers markets have been experiencing a national renaissance in the past decade. According to United States Department of Agriculture, the number of farmers markets in the United States grew by 43% between 2000 and 2005, and by the end of 2005 there were over 4,000 markets in the nation.<sup>2</sup> Arkansas specifically has also seen a boom in farmers markets in recent years, with markets springing up throughout the state and an increasing number of farmers choosing to sell directly to consumers. The increase in farmers markets is a positive development for consumers and communities alike. Many factors drive consumer demand for farmers markets, including the wish to support local farmers, the desire to obtain produce at cheaper prices, and the goal to alleviate concerns about the safety of the global food supply chain. In turn, farmers markets produce a variety of benefits for local communities, including bringing the community together, promoting healthy foods, creating jobs, and keeping Arkansas food dollars in local communities.

The above benefits are among the countless reasons for states to support their small farmers and farmers markets. However, many of the above benefits are lost if the state has a weak definition of the term “farmers market” and what food items can be sold there. If markets are selling foods that are brought in from far away, then the food is not as fresh as consumers expect, they are not reducing the food miles traveled by their food, and they are not spending money that will in turn help to revitalize their local community, since the money will go to farmers in other communities or states. In addition, if vendors at farmers markets are reselling produce purchased from a grocery store or dumped from a refrigerated truck that did not keep the produce at the right temperature, the benefits that consumers expect are again not being fulfilled – the food may be cheap, but it is not necessarily grown locally, may have traveled many miles, may not be fresh, and is probably not supporting local growers. Since this dumped produce can often be purchased very cheaply, vendors of such produce are also able to undercut the market, selling their secondhand produce at a lower price than the small farmers who are struggling to make a living off of their farms, and thereby threatening their continued existence.

For these reasons, the Arkansas Food Policy Council is working with partners from around the state to help strengthen the legislation and regulations surrounding what is called a “farmers market,” specifically considering whether such a market can benefit from legislative advantages such as sales tax exemption, and whether the produce sold at such a market should be labeled to help inform consumers about the quality, locality, and freshness of the product they are purchasing. The following recommendations are first steps intended to help effectuate those changes and in turn support small farmers and farmers markets throughout the state.

---

<sup>2</sup> Agricultural Marketing Service, “USDA National Farmers Market Manager Survey 2006”, *available at* <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5077203>, (May 2009).

## Recommendations

**Recommendation #1(a):** *Further define the term “farmers market” as used in the sales tax code at Ark. Code Ann § 26-52-401 to clarify that the sales tax exemption applies only when the farmers market is a certified farmers market.*

This recommendation would be preferable, as it would give the Agriculture Department some power to maintain the integrity of the term “farmers market” and make sure that only true farmers markets are getting the benefits of the law. In addition, it would allow the Agriculture Department to develop a definition for the term “farmers market” and apply that definition going forward. Finally, as noted in the proposed text below, the language of the law could allow for certification to be carried out either by the Arkansas Agriculture Department or by an organization, individual, or group of individuals designated by the AAD to conduct such certification. A nongovernmental organization such as the Arkansas Farmers Market Association or another similar organization could be designated to do this.

This legal change could be adopted alone or in conjunction with Recommendation #1(b) below, which suggests amending the definition of “farmers market” within the legislation itself. Again, requiring markets to be certified is the strongest way to protect the integrity of the term “farmers market” and ensure that benefits that were created for farmers markets in the legislature are only being applied to true farmers markets. The term “farmers market” would still have to be defined in a way that protects true farmers markets, but the legislature could choose whether to define the term itself or to allow the AAD to define the term. The addition of a farmers market certification requirement to the sales tax legislation would read as follows:

**Ark. Code Ann. § 26-52-401** There is specifically exempted from the tax imposed by this chapter the following: . . .

(18) (A) Gross receipts or gross proceeds derived from the sale of:

(iii) Raw products from the farm, orchard, or garden, when the sale is made by the producer of the raw products directly to the consumer and user, including the sale of raw products from a farm, orchard, or garden that are produced and sold by the producer of the raw products at a farmers' market, including without limitation cut or dried flowers, plants, vegetables, fruits, nuts, and herbs; . . .

(B) (i) An exemption granted by this subdivision (18) shall not apply when the articles are sold at or from an established business, even though sold by the producer of the articles.

(ii) A farmers' market is not an established business if the farmers' market sells raw product directly to the user of the raw product and the farmers' market is certified by the Arkansas Agriculture Department or an agent designated by

the Arkansas Agriculture Department.

- ~~(a) Comprised of one (1) or more producers of a raw product;~~
- ~~(b) Operated seasonally; and~~
- ~~(c) Held out of doors or in a public space.~~

This type of legislation would mirror many other states that require some sort of farmers market certification. For example, Mississippi allows for a sales tax exemption for “sales of food products that are grown, made or processed in Mississippi and sold from farmers markets that have been *certified* by the Mississippi Department of Agriculture and Commerce” (emphasis added).<sup>3</sup> Texas defines a farmers market as a location at which a group of farmers that are certified by the Department of Agriculture’s certification program offer produce for sale.<sup>4</sup> Thus, Texas links the entire definition of a farmers market to market certification.

In a similar vein, California states in its regulations that only produce grown by the vendor him or herself can be sold at certified farmers markets.<sup>5</sup> This route could be another option for Arkansas to ensure that only produce grown by the vendor is sold at farmers markets.

***Recommendation #1(b):*** Further define the term “farmers market” as used in the sales tax code at Ark. Code Ann § 26-52-401 to allow the sales tax exemption to apply only when the produce sold at the farmers market is grown within a 150-mile radius of the farmers market.

Strengthening the definition of “farmers market” in the sales tax code would help to ensure that those who are selling produce at a market that is not a true farmers market would not enjoy the same sales tax exemption as those selling their produce at true farmers markets. In addition, a strong definition of “farmers market,” if included in this section of the Code, could be referenced as the authoritative definition of a farmers market in future legislation and regulations intended to benefit farmers markets. Many states including Connecticut,<sup>6</sup> Maine,<sup>7</sup> Maryland,<sup>8</sup> Nevada,<sup>9</sup> and others include definitions of farmers markets in

---

<sup>3</sup> MISS. CODE ANN. § 27-65-103(f) (2010).

<sup>4</sup> TEX. AGRIC. CODE ANN. § 15.001 (1) (2010): “‘Farmers market’ means a location at which a group of two or more farmers that are certified under the department’s farmers market certification program offer produce for retail sale.”

<sup>5</sup> CAL. CODE REGS. tit. 3 § 1392.4 (2010): “Except as provided in subsection (f) below, producers or certified producers may sell or offer to sell only agricultural products which they have produced to consumers at a certified farmers’ market. The certified producer’s immediate family or employee(s) may also act for and sell the certified producer’s agricultural products. No certifiable agricultural products may be sold at a certified farmers’ market unless such products are listed on the certified producer’s certificate.”

<sup>6</sup> CONN. GEN. STAT. § 22-6r (a)(1) (2010) “‘Farmers’ market’ means a cooperative or nonprofit enterprise or association that consistently occupies a given site throughout the season, which operates principally as a common marketplace for a group of farmers, at least two of whom are selling Connecticut-grown fresh produce, to sell Connecticut-grown farm products directly to consumers, and where the farm products sold are produced by the participating farmers with the sole intent and purpose of generating a portion of household income.”

<sup>7</sup> ME. REV. STAT. tit. 7 § 415 (2010): “(1)(A) ‘Farmers’ market’ means a building, structure or place used by 2 or more farmers for the direct sale of farm and food products to consumers, at which all sellers meet the requirements of subsection 2, paragraph B.... (2)(B) A person may not sell farm and food products at a market labeled ‘farmers’ market’ unless at least 75% of the product offered by that person was grown or processed by that person or under that person’s direction. A product not grown or processed by that person must have been grown or processed by and purchased directly from another farmer.”

their legislation or regulations. Such definitions are invariably stricter than the one included in the Arkansas Code, enabling these other states to provide stronger protection for small farmers and farmers markets, something Arkansas should do as well.

The current definition of “farmers market” in Arkansas law is too weak, as it allows any individuals selling raw products to be considered a farmers market, whether or not those individuals are actually farmers or instead are just resellers of the product. In addition, the current definition allows the term “farmers market” to include, in the extreme, one individual selling raw produce that he/she did or did not grow with 50 other vendors selling t-shirts, jewelry, and trinkets. It is true that the current sales tax exemption only applies to individuals selling produce directly to consumers and language was added in the last legislative session clarifying that this exemption applies even at farmers markets. This added language created the farmers market definition at issue today. Based on the text of the provision, the sales tax exemption should only apply to individuals selling produce they grew, to consumers, whether at a farmers market or not; however, the weak definition of “farmers market” still creates poor precedent for the state in terms of protecting small farmers and real farmers markets.

Thus, the Arkansas Food Policy Council would like to strengthen the definition of farmers market to both preserve the benefits given to farmers markets by law for true farmers markets and also to protect the integrity of the term “farmers market” as a place where consumers know they purchase fresh produce grown locally by the vendor of such produce. The change would read as follows:

**Ark. Code Ann. § 26-52-401** There is specifically exempted from the tax imposed by this chapter the following: . . .

(18) (A) Gross receipts or gross proceeds derived from the sale of:

(iii) Raw products from the farm, orchard, or garden, when the sale is made by the producer of the raw products directly to the consumer and user, including the sale of raw products from a farm, orchard, or garden that are produced and sold by the producer of the raw products at a farmers' market, including without limitation cut or dried flowers, plants, vegetables, fruits, nuts, and herbs; . . .

(B) (i) An exemption granted by this subdivision (18) shall not apply when the articles are sold at or from an established business, even though sold by the producer of the articles.

(ii) A farmers' market is not an established business

---

<sup>8</sup> Md. REGS. CODE tit. 10 § 15.03.02 (30)(a) (2010): “‘Farmers Market’ means a place where a person offers or sells one or more of the following food products to the public: (i) Raw agricultural products such as fruits, vegetables, and grains supplied directly from a farm; (ii) Products processed in a private home kitchen according to Regulation .27 of this chapter; (iii) Products that are not potentially hazardous and do not require refrigeration that are processed in a food processing plant licensed and operated according to COMAR 10.15.04.19; or (iv) Eggs sold in compliance with Regulation .05A(8) of this chapter.”

<sup>9</sup> NEV. REV. STAT. ANN. 244.336 (1) (2010): “‘Farmers’ market’” means a place of business where the actual producer of farm products can bring the products for direct sale to consumers. The term includes a place of business where a person rents space to producers for the sale of farm products.”

if the farmers' market sells raw product directly to the user of the raw product and the farmers' market is:

- ~~(a) Comprised of one (1) or more producers of a raw product;~~
- (a) Comprised of only producers of a raw product which is produced within 150 miles of the market;
- (b) Operated seasonally; and
- (c) Held out-of-doors or in a public space.

As noted above, this new definition would reinforce Arkansas' commitment to protecting and promoting small farmers and farmers markets.

***Recommendation #2: Create a new law requiring origin labeling of fresh produce sold at any farmers market or produce market in the state.***

There are no laws currently requiring general produce labeling in Arkansas, though the new Food Safety Modernization Act that was recently passed by the United States Congress will require some produce labeling and will apply nationally. However, many provisions of the final FSMA will have to be determined by agency regulation, meaning that some provisions are still unknown and that the law may take some time to go into effect. In addition, many of the provisions exempt small or very small farms from their applicability. Thus, it will take the FSMA a long time to address the needs of small Arkansas farmers, if it does in fact address them at all.

We recommend a law that would require origin labeling for produce sold in Arkansas. Such a law would prevent people from saying that they grew the produce they are selling unless they actually grew it themselves. It would thus help to promote real farmers and real locally grown produce by allowing consumers to make educated decisions about their produce purchases and know whether the produce was in fact grown locally.

In order to effectuate this change, language could be added into the Arkansas Code in a new location, such as an addendum to the Arkansas Fruit and Vegetable Labeling Act of 1947 at Ark. Code Ann. § 2-20-301 to § 2-20-310. This section of the Code currently requires some produce labeling of specific fruits and vegetables but it exempts from the labeling requirements produce types that are not enumerated in the list (most produce), produce that is sold directly to a consumer, and produce that is sold by a producer to a retail trade exclusively in Arkansas.<sup>10</sup> Thus, the existing Arkansas law does not cover the labeling most produce sold at farmers markets and a new provision would help small farmers.

The new language would read as follows:

**Ark. Code Ann. § 2-20-XX** Produce sold at farmers markets or produce markets must be labeled according to the following rules:

- A. All fresh fruits and vegetables offered for sale shall have a stamp or label affixed to the container or package

---

<sup>10</sup> ARK. CODE ANN. § 2-20-304 (2010).

identifying its farm of origin. If the produce is being resold and the farm of origin is not known, the produce should include a label noting "Produce Sold as Resale."

B. The Agriculture Department shall adopt rules and regulations as are necessary to implement this Section.<sup>11</sup>

Although adding the above language would provide relief to small farmers who are trying to get a competitive edge in selling their produce, as mentioned above, some new produce labeling requirements will become law nationally as part of the new FSMA, which was passed by the U.S. House of Representatives and Senate in late 2010 and signed into law by President Obama on January 4, 2011. Although the new law requires some package labeling, we do not believe this labeling requirement will apply to produce sold directly to consumers or to produce sold from small farms. For these reasons, we believe that it is in the best interest of Arkansas to pass such a law now rather than waiting for the long process of the new federal law to be implemented through regulations and then determine whether the labeling requirements would even apply to produce sold directly to consumers. Arkansas, like many other states, is suffering from the economic downturn, and thus the state should take measures now to increase its protections for small farmers and Arkansas citizens as they struggle to earn a living.

Since applicability of the FSMA labeling requirements to the situation at issue in Arkansas farmers markets is uncertain, the Arkansas legislature could account for its potential applicability by passing an Arkansas produce labeling law that would go into effect now but have a limited term. The law could either include a specific sunset clause (i.e. "This section will go into effect immediately but will be rendered ineffective as of June 1, 2013 unless reauthorized by the Arkansas legislature.") or it could indicate that the federal law will supersede it if and when it goes into effect (i.e. "This section will be effective unless and until any federal law supersedes this language and renders it moot.").

## Conclusion

There are a variety of methods that the Arkansas legislature, in conjunction with the Arkansas Agriculture Department, could employ both to help protect small farmers and true farmers markets and to ensure that consumers are able to make educated decisions about the produce they purchase. As noted above, the best methods would be to require farmers market certification for markets to receive state benefits such as sales tax exemption, define farmers markets more strongly in legislation, or require labeling of food products to identify the farm of origin or indicate that the produce is being resold. In these tough economic times, states like Arkansas must do all that it can to help promote economic activity that benefits its own citizens and particularly that help to ensure the sustainability of its food supply by encouraging small farmers.

---

<sup>11</sup> This language is modeled on language from the Louisiana Code, which requires the labeling of strawberries with the farm of origin. LA. REV. STAT. ANN. § 3:730.8 (2010).