



# **Pennsylvania's Chapter 57 and Its Effects on Farmers Markets**

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# I. Introduction<sup>1</sup>

In 2010, Pennsylvania enacted Act 106: Raising the Bar for Food Safety in Pennsylvania, designed to “clarify and strengthen oversight of food safety inspections” for retail food facilities.<sup>2</sup> The portions of this statute affecting farmers markets have since been incorporated into Pennsylvania law under Chapter 57 of Title 3 (hereafter “Chapter 57”).<sup>3</sup> As a result of the law, many farmers market vendors in Pennsylvania were classified as individual retail food facilities for the first time and thus subject to new requirements.<sup>4</sup> The new law took many farmers market vendors and other stakeholders by surprise, causing concerns that the law was too stringent and that once enforced it would become prohibitively expensive for farmers and other food vendors to sell their products at farmers markets. Some of the concerns seemed to stem from the Pennsylvania Department of Agriculture’s (PDA) initial failure to educate vendors, market managers, and local health departments about the law’s effects on farmers markets. However, after hearing concerns from stakeholder groups, the PDA has since worked to explain the law to stakeholders and local officials.

Keep Food Legal, a nonprofit, Washington, DC-based membership organization dedicated to food freedom—the right to grow, raise, produce, buy, sell, share, cook, eat, and drink the foods of one’s own choosing—commissioned the Harvard Food Law and Policy Clinic to write a report on Chapter 57’s effects on farmers markets in Pennsylvania and to compare the new requirements to food safety regulations in other states. To research the new law’s effect on farmers markets, we examined media reports and interviewed market managers, farmers, state officials, and other stakeholders throughout Pennsylvania. Additionally, we analyzed comparable laws and regulations in nine other states through secondary research and interviews in order to gauge whether Chapter 57 was more stringent than food safety regulations in place elsewhere in the United States.

## II. Executive Summary

As a result of our research, we found that Chapter 57 and the Pennsylvania Food Code compare favorably to the laws and regulations affecting farmers markets in the nine other states examined. The requirements for refrigeration and toilet facilities are similar to those found in other states, and often less stringent. Chapter 57’s licensing scheme and its preemption of local food safety requirements also benefit farmers market vendors. By barring local authorities from instituting more stringent regulations, Chapter 57 ensures that Pennsylvania’s farmers markets are regulated in a uniform and coherent manner, and are not burdened with excessive requirements.

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<sup>1</sup> This memo was prepared by Nathan Rosenberg, student in the Harvard Food Law and Policy Clinic, under the supervision of Emily Broad Leib, Director, Harvard Food Law and Policy Clinic. Special thanks to Professor Robert Greenwald, Director, Center for Health Law and Policy Innovation; Danielle Purifoy and Matthew Woodbury, students in the Harvard Food Law and Policy Clinic; Yasmin Ghassab, summer intern in the Harvard Food Law and Policy Clinic; and Sam Osterling, summer intern for the Delta Directions Consortium.

<sup>2</sup> PENN. DEP’T OF AGRIC., *Act 106 of 2010*, *supra* note 2.

<sup>3</sup> *See* 3 PA. CONST. STAT. ANN. § 5701 (West 2012). Act 106 of 2010 also amended Chapter 65 of Title 3, the Food Employee Certification Act. However, these amendments do not substantially impact farmers markets and therefore are beyond the scope of this report. *See id.* at §§ 6501-10.

<sup>4</sup> *See id.* at § 5702.

Our research results are not only relevant to the situation in Pennsylvania, but also to the growing nationwide debate surrounding the appropriate level of food safety regulations that should be applied to local food systems. “Direct marketing” venues like farmers markets, through which farmers are able to sell their products directly to consumers instead of to an intermediary such as a food distributor or processor, have been expanding rapidly in Pennsylvania and across the country.<sup>5</sup> Further, policymakers across the nation are re-examining the regulatory framework under which farmers markets operate, largely due to two separate phenomena: the rising number of reported foodborne illness incidents<sup>6</sup> and the growing role played by direct marketing in the American food system.<sup>7</sup> Nonetheless, direct sales still comprise a relatively small percentage of total food sales and many local food advocates believe that the direct sales market is constrained by excessive food safety regulations that are more appropriate for the scale of large, industrial food enterprises. If farmers markets are going to be regulated in an efficient and appropriate manner, it is vital that supporters of direct marketing become familiar with the regulatory issues affecting farmers market and work to educate policymakers about the appropriate balance between fostering food safety while maximizing food freedom. As discussed in Section V, our findings suggest several possible future avenues of research in this area.

We begin by explaining why farmers markets are an important part of the American food system and by providing a brief overview of the current debates regarding food safety regulations and direct marketing. Next we review Chapter 57 and explain the main problems with its implementation. The following section summarizes our research comparing the food safety laws and regulations affecting farmers markets in nine different states to those implemented by Pennsylvania’s Chapter 57. Finally, we include policy recommendations for state agencies and governments, as well recommendations for further research on food safety laws and regulations affecting farmers markets and local food systems.

### III. Food Safety Regulations and Farmers Markets

#### A. Overview of Farmers Markets

Farmers markets are becoming an increasingly important part of the American food system. At the end of 2011, there were 7,175 markets in the United States, an increase of 228% from 2002.<sup>8</sup> The growth in markets continued through the economic downturn: more markets came into operation between 2009 and 2011 than existed in 1994, when the U.S. Department of Agriculture (USDA) first began a tally of farmers markets.<sup>9</sup> The popularity of farmers markets has risen alongside consumer interest in purchasing locally grown, fresh produce directly from farmers.<sup>10</sup> Many consumers, farmers, nonprofit organizations, and local governments are also eager to support farmers markets due to the many

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<sup>5</sup> Other forms of direct farm marketing include roadside markets and farmstands, community supported agriculture, direct sales to restaurants and stores, and pick-your-own sales.

<sup>6</sup> Laura Landro, *Why Some Foods Are Riskier Today*, WALL ST. J., Feb. 15, 2010, available at <http://online.wsj.com/article/SB10001424052748704431404575067273540514144.html>.

<sup>7</sup> James Andrews, *Relaxing the Rules for Small, Local Food Sellers*, FOOD SAFETY NEWS, Mar. 16, 2011, available at <http://www.foodsafetynews.com/2011/03/loosening-the-rules-for-small-local-food-sellers/>.

<sup>8</sup> U.S. DEP’T OF AGRIC., *Farmers Market Growth: 1994 – 2011*, <http://1.usa.gov/hrw0tz> (last modified Aug. 8, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> U.S. DEP’T OF AGRIC., *Farmers Markets and Local Food Marketing*, <http://www.ams.usda.gov/AMSV1.0/FARMERSMARKETS> (last modified Apr. 18, 2012).

benefits they can bring to communities, including increasing access to a wide variety of healthy, fresh foods, providing a more vibrant civic life, and creating more resilient local economies.

The economic benefits that farmers markets can bring to local communities are particularly well documented. Dollars spent at a farmers market go to local farmers and entrepreneurs, generating additional spending on local products or services.<sup>11</sup> Economists at the University of Wisconsin found that each dollar earned by a small farm in Minnesota and Wisconsin generates another \$1.30 of local expenditures.<sup>12</sup> In contrast, much of the money spent at an out-of-state based grocery store or convenience store leaves the local community. Markets are also an inexpensive way for farmers and entrepreneurs to sell their products without having to worry about the administrative costs of contracting, guaranteeing production, or paying for marketing and publicity, making them an ideal venue for small or beginning businesses. By providing a starting point for beginning businesses, they create local jobs and spur innovation in food production. Additionally, farmers markets bring customers to nearby businesses on market days, serving to revitalize shopping districts in communities across the country. An Oregon State University found that between 33% and 65% of market shoppers also shopped at local stores when they came to the farmers market.<sup>13</sup>

One of the reasons why farmers markets hold so much economic potential in the United States is that they are one of the country's main venues for direct marketing. Direct sales in some other developed economies make up a significantly larger proportion of food sales than they do in the United States, indicating that direct sales could potentially rise in the United States for some time. Italian farmers, for example, earn almost three times as much from direct sales than American farmers in total dollars despite the fact that the United States' population is more than five times larger than Italy's.<sup>14</sup> Similarly, Austria's once negligible direct marketing sector now shows similarly impressive numbers. Several factors, including governmental rural development initiatives and an increased desire among consumers to buy local products, produced a dramatic increase in direct sales in Austria during the late 1980s and throughout the 1990s.<sup>15</sup> Although direct marketing had been largely insignificant in the country prior to 1987, 36% of all Austrian farmers were involved in direct marketing by 2004.<sup>16</sup> In contrast, the 2007 Census of Agriculture found that only 6% of American farmers sell directly to consumers.<sup>17</sup>

Since farmers markets present such considerable opportunities for local communities and the country as a whole, it is important that food safety regulations are crafted and enforced in such a way that they do not impede the development of farmers markets. The initial implementation of Chapter 57, as discussed in Section III below, shows how poorly-crafted regulations can stifle farmers markets. It is also, however, a good example of how advocacy groups and responsive government agencies can quickly change the

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<sup>11</sup> Ken Meter, *Local Food as Economic Development*, CROSSROADS RESOURCE CENTER 2 (Oct. 2008), available at <http://www.crcworks.org/lfced.pdf>.

<sup>12</sup> Ken Meter and Jon Rosales, *Finding Food in Farm Country: The Economics of Food and Farming in Southeast Minnesota*, 19 (2001), available at <http://www.crcworks.org/ff.pdf>.

<sup>13</sup> LARRY LEV, LINDA BREWER & GARRY STEPHENSON, RESEARCH BRIEF: HOW DO FARMERS MARKETS AFFECT NEIGHBORING BUSINESSES?, Oregon Small Farms Technical Report 16 (Dec. 2003), available at <http://smallfarms.oregonstate.edu/sites/default/files/publications/techreports/TechReport16.pdf>.

<sup>14</sup> In 2007, direct sales were estimated at \$3.3 billion in Italy and \$1.2 billion in the United States. Riccardo Vecchio, *Local Food at Italian Farmers' Markets: Three Test Cases*, 17 INT'L J. AGRIC. & FOOD, 122, 123 n.1 (2010).

<sup>15</sup> Markus Schermer, *The Decline of Farmers' Direct Marketing in Austria: Consequences and Counter Strategies*, in EMPOWERMENT OF THE RURAL ACTORS: A RENEWAL OF FARMING SYSTEMS PERSPECTIVES, 211, 213 (Benoit Dedieu & Sylvie Zasser-Bedoya eds., 2008).

<sup>16</sup> *Id.* at 214.

<sup>17</sup> DEP'T OF AGRIC., *2007 Census of Agriculture*, *supra* note 14.

regulatory dynamic, ensuring that farmers markets are able to continue to meet growing consumer demand.

## ***B. The Food Safety Debate***

Policymakers across the United States have recently become increasingly interested in changing the regulatory framework under which farmers markets operate due, in large part, to two independent trends: growing concern over foodborne illness,<sup>18</sup> and the tremendous rise in the amount of sales made via direct marketing over the last decade.<sup>19</sup> This growth in direct marketing offers supporters of farmers markets an opportunity to make favorable changes to the current regulatory system. It also poses a serious threat. As pressure has mounted on legislators to enact more demanding food safety laws, some industry groups and food safety advocates have sought to extend regulations designed for large industrial operations to small-scale farmers that may lack the resources necessary to follow them. However, many sustainable agriculture and local food system proponents agree that these overbearing food safety regulations would have the negative impact of suppressing the direct sales market.<sup>20</sup>

The tension between the desire for a more rigorous food safety system and concerns about over-regulating small-scale farmers gained national attention during the debate over the Food Safety Modernization Act (FSMA). Introduced by Senator Dick Durbin (D-IL) in March of 2009 after large-scale foodborne illness outbreaks and recalls of eggs, spinach, and peanut butter, FSMA was designed to increase the Food and Drug Administration's (FDA) power to prevent foodborne disease outbreaks.<sup>21</sup> Many local food advocates were concerned that FSMA would be prohibitively burdensome for small-scale farmers because its provisions are designed for industrial scale farming operations.<sup>22</sup> Small-scale farmers, they argued, do not have the resources to comply with costly and time-consuming regulations developed for much larger operations.<sup>23</sup> In response to these concerns, Senators Jon Tester (D-MT) and Kay Hagan (D-NC) sponsored an amendment that exempted local farmers and food processors from FSMA, leaving regulation of these smaller, local entities to state and local authorities.<sup>24</sup> The first exemption applies to operations that have annual sales under \$500,000 and sell the majority of their product directly to consumers, retailers, and restaurants within 275 miles of their business or within the same state.<sup>25</sup> It also directs the FDA to conduct a study analyzing the relationship between the scale and type of food processing operations and foodborne illnesses.<sup>26</sup> The FDA must then use this study to create the requirements for the second exemption, which will apply to an additional group of operations

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<sup>18</sup> Landro, *supra* note 6.

<sup>19</sup> Andrews, *supra* note 7.

<sup>20</sup> Sustainable agriculture and local food advocates have long argued that most food safety regulations are designed for large-scale industrial operations and disadvantage small-scale growers and food processors, who are more likely to participate in direct sales. See, e.g., Joel Salatin, *Everything I Want to Do Is Illegal*, ACRES, Sept., 2003, available at [http://www.acresusa.com/toolbox/reprints/Salatin\\_Sept03.pdf](http://www.acresusa.com/toolbox/reprints/Salatin_Sept03.pdf). The academic literature on the subject is small, but growing. See, e.g., Laura B. DeLind and Philip M. Howard, *Safe at Any Scale? Food Scares, Food Regulation, and Scaled Alternatives*, 25 AGRIC. & HUM. VALUES 301 (2008).

<sup>21</sup> Lisa Kivistik, *Senators Begin Food Safety Legislation Debates*, HOBBY FARMS, Nov. 17, 2010, available at <http://www.hobbyfarms.com/farm-industry-news/2010/11/17/food-safety-legislation.aspx>.

<sup>22</sup> See Tom Philpott et al., *Will the Food Safety Modernization Act Harm Small Farms or Producers?*, GRIST (Nov. 10, 2011, 6:46 am), <http://grist.org/politics/food-2010-11-15-food-fight-safety-modernization-act-harm-small-farms/full/>.

<sup>23</sup> See *id.*

<sup>24</sup> Food Safety Modernization Act of 2010 §105, 21 U.S.C.A. § 350g & 350h (2012).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at § 350g.

classified as “very small business[es].”<sup>27</sup> These operations will be exempt from current food processing requirements.<sup>28</sup>

Congress passed FSMA with strong bipartisan support in late 2010, with the provisions of the Tester-Hagan amendment incorporated into the law.<sup>29</sup> The Act was signed into law by President Obama on January 4, 2011. Although the Tester-Hagan amendment was perceived to be a major victory for local and sustainable agriculture advocates, it does not preempt state legislatures from choosing to extend the requirements of FSMA to currently exempted entities within their borders.<sup>30</sup> State legislatures can also enact other food safety regulations for exempted entities.<sup>31</sup> Some of the stakeholders we interviewed while researching food safety regulations affecting farmers markets expressed concern that state governments would extend the requirements of FSMA to all producers and processors, effectively eliminating the exemptions authorized by the Tester-Hagan amendment.<sup>32</sup> Pennsylvania’s Chapter 57 received a considerable amount of attention as it was being implemented, in part because it passed shortly before FSMA and was the first statewide reform of food safety laws to be put into effect after FSMA. Fresh from the struggle over the Tester-Hagan amendment, local and sustainable agriculture advocates were anxious that Chapter 57 might negatively impact small-scale growers and processors in Pennsylvania.

## IV. Chapter 57’s Impact on Vendors

Signed by Governor Rendell on November 23, 2010, Pennsylvania’s Act 106 was enacted just before Congress passed FSMA.<sup>33</sup> The statute took effect on January 22, 2011, a few weeks before FSMA was signed into law and a few months before the farmers market season began in Pennsylvania.<sup>34</sup> The new law required all jurisdictions in Pennsylvania to enforce the Pennsylvania Food Code and any regulations or requirements stemming from it.<sup>35</sup> Some jurisdictions, inexperienced and unprepared for regulating farmers markets, immediately began to institute expensive and excessively burdensome requirements. Pennsylvania Department of Agriculture’s (PDA) efforts to standardize enforcement throughout the state quickly addressed this problem and, as will be discussed below, farmers market vendors and other stakeholders generally believe that the law’s effect on farmers markets has been benign, if not beneficial. This section begins with an overview of Chapter 57 and proceeds to explain how its implementation resulted in confusion and in the enforcement of overly burdensome requirements by some local health authorities, before ultimately being corrected at the state level.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Gardener Harris and William Neuman, *Senate Passes Sweeping Law on Food Safety*, N.Y. TIMES, Nov. 30, 2011, available at <http://www.nytimes.com/2010/12/01/health/policy/01food.html>.

<sup>30</sup> See Food Safety Modernization Act of 2010 §105, 21 U.S.C.A. § 350g & 350h (2012).

<sup>31</sup> *Id.*

<sup>32</sup> Among the individuals expressing this concern was the head of national organization dedicated to supporting direct marketing venues and the policy director of a statewide advocacy organization for sustainable agriculture. Both individuals requested anonymity.

<sup>33</sup> PA. DEP’T OF AGRIC., ACT 106 OF 2010, *supra* note 2.

<sup>34</sup> *Id.*

<sup>35</sup> 3 PA. CONST. STAT. ANN. § 5733(d) (West 2012). The Pennsylvania Food Code constitutes Title 7, Chapter 46 of the Pennsylvania Code. 7 PA. CODE ANN. § 46 (2012).

## A. Overview of Chapter 57

Act 106 was designed to provide Pennsylvania with a less confusing and more uniform food safety system.<sup>36</sup> Though local jurisdictions could enforce regulations more stringent than the statewide ones prior to Act 106, the new law does not allow local health departments to deviate from the Pennsylvania food code, nor from any regulations or requirements stemming from it.<sup>37</sup> Act 106 supplanted two major food-related statutes, The Food Act and The Public Eating or Drinking Places Law, with two new statutes covering similar subject matter, The Retail Food Facility Safety Act and The Food Safety Act, both found in Chapter 57 of Title 3 of the Consolidated Statutes.<sup>38</sup> Act 106 also amended Chapter 65 of Title 3, the Food Employee Certification Act, and repealed several outdated statutes.<sup>39</sup> However, these latter amendments do not substantially impact farmers markets and therefore are beyond the scope of this report.<sup>40</sup>

Chapter 57 changed the food safety system for farmers markets in three significant ways.

- First, it classifies vendors that sell meat, eggs, dairy, or potentially hazardous prepared foods<sup>41</sup> as “retail food facilities” and requires them to obtain licenses from local health departments or PDA.<sup>42</sup> Vendors selling only raw fruits and vegetables or pre-packaged, non-potentially hazardous food are exempt from the retail food facility licensing requirement.<sup>43</sup> Prior to the passage of the Act, each market held one license that covered all of its vendors.<sup>44</sup> Thus, if one vendor violated the law under the old system, the whole market was held responsible because each vendor operated under the market’s license. Under Chapter 57, each vendor that receives a retail food license is responsible for his/her violations.
- Second, as mentioned above, Chapter 57 requires that each local jurisdiction in the state enforce the state food code.<sup>45</sup> Local food safety regulations are now preempted: counties and municipalities cannot institute ordinances or regulations that are inconsistent with state law and regulations in any

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<sup>36</sup> PA. CONST. STAT. ANN. § 5733(d).

<sup>37</sup> *Id.*

<sup>38</sup> PA. DEP’T OF AGRIC., *Food Safety Statutes as Revised by Act 106 of 2010*, available at [http://www.eatsafepa.com/files/ACT\\_106\\_OF\\_2010\\_Effective\\_01-22-11.pdf](http://www.eatsafepa.com/files/ACT_106_OF_2010_Effective_01-22-11.pdf).

<sup>39</sup> *Id.*; among the statutes repealed were the Organic Food Products Standards Act (3 PA. CONST. STAT. ANN. §§ 5901 – 5909), The Maple Products Act (3 PA. CONST. STAT. ANN. §§ 6101 – 12) and Section 602-A(16) of the Administrative Code of 1929.

<sup>40</sup> See PA. CONST. STAT. ANN. §§ 6501 – 6510.

<sup>41</sup> Chapter 57 adopts the definition of “potentially hazardous food” found in the 2009 model Food Code published by the United States Food and Drug Administration (FDA). 3 PA. CONST. STAT. ANN. § 5701. The 2009 FDA Food Code defines potentially hazardous food as “a food that requires time/temperature control for safety to limit pathogenic microorganism growth or toxic formation.” FDA 2009 Food Code §1201.10, available at:

<http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/ucm186464.htm>.

<sup>42</sup> See PA. CONST. STAT. ANN. § 5702. Act 106 only affects retail licensing and does not address licensing requirements outside of farmers markets and other retail food facilities, such as licenses required to warehouse or process certain foods. *Id.*

<sup>43</sup> PA. DEP’T OF AGRIC., *Act 106 of 2010: Guidance for Farmers Market Vendors*, available at

<http://www.eatsafepa.com/FarmersMarketVendors.aspx> (last visited July 28, 2012). Neither Chapter 57 nor the Pennsylvania Food Code explicitly exempts such vendors. Chapter 57, however, states that PDA’s regulations should be guided by the most current edition of the FDA Food Code. PA. CONST. STAT. ANN. § 5707. The FDA Food Code excludes facilities selling only prepackaged, non-potentially hazardous foods or fresh, uncut fruits and vegetables from its recommended regulatory and inspection requirements. See FDA 2009 Food Code §201.10.

<sup>44</sup> Telephone interview with Joanna Pernick, former market manager, Farm to City (Oct. 18, 2011); telephone interview with Brian Moyer, Program Assistant, Penn State Extension (Nov. 23, 2011); telephone interview with PDA official (Apr. 27, 2011).

<sup>45</sup> PA. CONST. STAT. ANN. § 5733(d).



way.<sup>46</sup> Both regulations that are stricter than those required by Chapter 57 and those that are less strict are unenforceable. Under the old law, each of the state's 167 local jurisdictions was allowed to have their own inspection procedures and reporting mechanisms.<sup>47</sup> The new uniformity requirement forced some local jurisdictions to amend or stop enforcing excessively restrictive regulations, while making it easier for vendors to sell in multiple areas of the state under the same set of regulations.

- Finally, Chapter 57 now bans PDA from entering into agreements with local health departments to inspect retail food facilities on their behalf.<sup>48</sup> Prior to the passage of Act 106, PDA often made such agreements,<sup>49</sup> but Chapter 57 only allows PDA to license and inspect retail food establishments in areas without local health departments.<sup>50</sup> As a result, a large number of local health departments began inspecting retail food facilities for the first time in 2011. As they began to inspect local facilities, some of these health departments instituted unnecessary and overly burdensome requirements, causing vendors to leave affected markets and raising concerns about the law throughout the state. However, as discussed below, the state government addressed this problem quickly after Chapter 57 went into effect.

## **B. Problems with the Implementation of Chapter 57**

In order to determine how Chapter 57's implementation affected farmers markets, we reviewed media reports and interviewed market managers, farmers, advocacy groups and state officials.<sup>51</sup> We identified three significant ways that the implementation of Chapter 57 either negatively affected farmers market vendors or was initially perceived to have negatively affected them. First, the new law required certain vendors to obtain retail food licenses for the first time. Second, some local jurisdictions required expensive handwashing sinks for certain vendors. Lastly, some vendors were required to purchase motorized cooling devices in order to sell animal-based products.

The licensing requirement proved to be the simplest issue to address. As mentioned above, under Chapter 57 vendors selling meat, eggs, dairy, or prepared foods were classified as "retail food facilities" and required to obtain licenses from local health departments.<sup>52</sup> In areas without local health departments, PDA would continue to issue retail food licenses.<sup>53</sup> Many vendors were initially concerned about having to purchase a retail food license, but these concerns largely dissipated after they learned more about the licensing requirements – and learned that they were not going to be treated like brick

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<sup>46</sup> *Id.*

<sup>47</sup> Jim Dino, *Food Safety Law Sets Uniform Inspection Standards*, THE CITIZEN'S VOICE, Dec. 20, 2011, <http://citizensvoice.com/news/food-safety-law-sets-uniform-inspection-standards-1.1079787#axzz1tIY4J7bH>.

<sup>48</sup> PA. CONST. STAT. ANN. § 5702.

<sup>49</sup> Telephone interview with PDA official, *supra* note 44.

<sup>50</sup> A complete list of local health jurisdictions can be found on the Pennsylvania Department of Agriculture's website. PA. DEP'T OF AGRIC., *Local Health Jurisdictions in PA*, [http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_24476\\_10297\\_0\\_43/AgWebsite/Files/Publications/localHealthDepts.pdf](http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/AgWebsite/Files/Publications/localHealthDepts.pdf).

<sup>51</sup> Telephone interview with Joanna Pernick, *supra* note 44; telephone interview with Susan Beal, D.V.M., Ag Science Advisor, Pennsylvania Association of Sustainable Agriculture (Oct. 25, 2011); telephone interview with Brian Moyer, *supra* note 44; telephone interview with PDA official *supra* note 44; Jeremy Roebuck, *Stricter Food Law in Pa. Frustrates Farmers' Markets*, THE PHILADELPHIA INQUIRER, May 1, 2011, available at [http://articles.philly.com/2011-05-01/news/29493407\\_1\\_market-vendors-food-safety-new-rules](http://articles.philly.com/2011-05-01/news/29493407_1_market-vendors-food-safety-new-rules).

<sup>52</sup> 3 PA. CONST. STAT. ANN. § 5701.

<sup>53</sup> *Id.*

and mortar establishments (like restaurants), as some feared they would be.<sup>54</sup> Further, PDA's licensing fee was a relatively low \$82 and PDA encouraged local health departments to keep their respective fee similarly low and to honor licenses from other jurisdictions.<sup>55</sup>

The remaining two issues, costly sink requirements and onerous refrigeration rules, did not arise out of any new food safety requirements stemming from the law. Instead, according to stakeholders we interviewed, they were primarily caused by inexperienced local health authorities that misinterpreted the provisions of the Pennsylvania Food Code. For example, some local health inspectors initially required vendors selling potentially hazardous products to purchase highly expensive commercial sinks, which can cost up to \$1500.<sup>56</sup> In Montgomery County, Caleb Torrice of Tabora Farm & Orchard spent \$750 on a commercial sink after local health authorities told the baked goods vendor that he needed one in order to sell unpackaged food.<sup>57</sup> In fact, PDA does require vendors selling prepackaged potentially hazardous foods to have handwashing sinks on site,<sup>58</sup> however, such vendors are allowed to use inexpensive temporary handwashing sinks.<sup>59</sup> Made from thermal containers, these sinks can cost as little as \$5 to \$10.<sup>60</sup> Similarly, some local inspectors told vendors selling food products requiring refrigeration, such as meat and eggs, that they had to have a motorized cooling device on site.<sup>61</sup> However, motorized cooling devices are not any safer than other less expensive options like thermal containers filled with ice, and Pennsylvania law only mandates that vendors selling such products keep them at or below 41 degrees, and does not require any particular method for doing so.<sup>62</sup> Nonetheless, farmers markets in locations where the more stringent rules were enforced lost some of their market vendors. For example, in Bucks County, markets lost at least five vendors after the county health department began enforcing unnecessary rules, such as requiring motorized cooling devices.<sup>63</sup>

### **C. Addressing Excessive Regulations**

In response to the public outcry in the wake of Chapter 57's implementation, the Pennsylvania Association for Sustainable Agriculture (PASA) worked with PDA to organize two informational sessions to explain the new licensing scheme and describe how the law would impact farmers market vendors.<sup>64</sup> PASA, PDA and Penn State Extension also worked to inform farmers and farmers market managers about the new requirements through a variety of methods, including accessible online factsheets and resources,<sup>65</sup> a telephone hotline,<sup>66</sup> and informal conversations.<sup>67</sup>

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<sup>54</sup> PA. DEP'T OF AGRIC., *supra* note 43; telephone interview with Brian Moyer, *supra* note 44; *see also* PA. DEP'T OF AGRIC., *Act 106 Farmers Market Presentation* (Mar. 16, 2011), available at <http://www.pameetingplace.com/onsync/join.php?id=53bfebf5bcef8b3cd07f93fd4bf79015&afid=&pw=&r=c4ca4238a0b923820dccc509a6f75849b>.

<sup>55</sup> Telephone interview with PDA official, *supra* note 44.

<sup>56</sup> Roebuck, *supra* note 51.

<sup>57</sup> Roebuck, *supra* note 51; LANSDALE FARMERS' MARKET, VENDOR SPOTLIGHTS, <http://www.lansdalefarmersmarket.org/resources/highlighted-items/> (last visited July 28, 2012).

<sup>58</sup> *See* 7 PA. CODE ANN. § 46.131 (2012).

<sup>59</sup> Telephone interview with PDA official, *supra* note 44.

<sup>60</sup> *Id.*

<sup>61</sup> Roebuck, *supra* note 51.

<sup>62</sup> 7 PA. CODE ANN. § 46.382.

<sup>63</sup> Telephone interview with Brian Moyer, *supra* note 44.

<sup>64</sup> The first information session was held in southeastern Pennsylvania on March 16, 2011 and a second one was held in western Pennsylvania on March 21, 2011. The March 16th session is available online. *See* PA. DEP'T OF AGRIC., *supra* note 54.

<sup>65</sup> The Pennsylvania Department of Agriculture set up a webpage explaining the Act's implications for farmers market vendors, containing guidance documents, answers to frequently asked questions, a recording of the March 21<sup>st</sup> informational session,

The Pennsylvania stakeholders and officials interviewed for this report unanimously agreed that PDA worked hard to educate overly-aggressive local departments on how to properly enforce the food code.<sup>68</sup> Although many of the excessive requirements were the result of inexperience and were quickly adjusted, some health departments only began to comply with PDA's interpretations of the law after they received considerable pressure from local government officials, residents, and PDA.<sup>69</sup> For example, after initial discussions between PDA and the local health department in one county in southwest Pennsylvania proved ineffective at changing the way the Food Code was being enforced, PDA sent an attorney to discuss the law with the department, which subsequently adopted PDA's interpretation of the food code.<sup>70</sup> According to representatives from PASA and Penn State Extension, most vendors in Pennsylvania were content with the Food Code's provisions once it was interpreted uniformly throughout the state.<sup>71</sup> In fact, Pennsylvania's food safety laws and regulations are in many ways more favorable to vendors than the comparable laws and regulations found in the other states we surveyed. This experience highlights how important it is for supporters of farmers markets to engage government authorities on regulatory issues. PDA's response was quick and effective, but was nonetheless a response: they did not begin to educate local officials on how to properly regulate farmers markets until stakeholders across the state voiced their concerns.

## V. Ten State Analysis

In order to provide context for Pennsylvania's new regulatory scheme, and to see how Chapter 57's requirements compared to those found in other states, we analyzed the food safety laws and regulations affecting farmers markets in other sample states. We looked at five main issues. Four of these were factors that stakeholders consistently cited as affecting farmers market vendors during Pennsylvania's transition to its new food safety scheme: preemption laws, licensing schemes, refrigeration requirements, and sink requirements. Additionally, we looked at bathroom requirements because providing toilet facilities at farmers markets can be expensive and burdensome for some markets. As a result of this research, we found that Chapter 57 and the Pennsylvania Food Code compare favorably to the laws and regulations affecting farmers markets in the nine other states examined. The Pennsylvania requirements for toilet facilities, sinks, and refrigeration are similar to those found in the other states, and sometimes less stringent. Chapter 57's licensing scheme, and its preemption of local food safety requirements, also benefit farmers market vendors and managers.

The nine states we surveyed in addition to Pennsylvania were chosen for a variety of reasons. California and Vermont were picked because of their large numbers of farmers markets.<sup>72</sup> New York, New Jersey,

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among other resources. PA. DEP'T OF AGRIC., *supra* note Act 106 of 2010: *Guidance for Farmers Market Vendors*, <http://www.eatsafepa.com/FarmersMarketVendors.aspx> (last visited July 28, 2012).

<sup>66</sup> Telephone interview with Susan Beal, *supra* note 51.

<sup>67</sup> Telephone interview with Brian Moyer, *supra* note 44.

<sup>68</sup> *Id.*; telephone interview with Joanna Pernick, *supra* note 44; telephone interview with Susan Beal, *supra* note 51; telephone interview with PDA official, *supra* note 44.

<sup>69</sup> Telephone interview with Susan Beal, *supra* note 51; telephone interview with Brian Moyer, *supra* note 44.

<sup>70</sup> Telephone interview with Susan Beal, *supra* note 51.

<sup>71</sup> *Id.*; telephone interview with Brian Moyer, *supra* note 44.

<sup>72</sup> California has the highest number of overall farmers markets, while Vermont has the highest number of markets per capita. Press Release, U.S. Dep't of Agric., *More than 1,000 New Markets Recorded Across Country as USDA Directory Reveals 17*

and Ohio were selected due to their geographic proximity to Pennsylvania. Illinois, Massachusetts, Michigan, and Oregon were selected so that we could compare four regions: the West Coast, New England, Mid-Atlantic, and the Great Lakes Region (which includes Ohio, Illinois, and Michigan).

This section briefly summarizes our findings and compares Pennsylvania’s laws and regulations to those in other states. Each of the five issues is analyzed in turn. A comprehensive list of our findings for each state can be found below in the appendix, and a chart with a general overview of the laws can be found immediately below our summaries. Note that the chart does not include licensing and permitting, as this topic varied too greatly from state to state to be easily expressed in a chart. It is important to note that regulations affecting farmers markets are not always enforced exactly as they are written on the books—as was the case in Pennsylvania—so actual practice may vary from the requirements identified in our analysis.

### **Preemption**

Preemption of local food safety requirements can benefit farmers market vendors by barring local authorities from instituting more stringent regulations and ensuring that farmers markets are regulated in a uniform and coherent manner. Pennsylvania, New Jersey, Ohio, and Michigan do not allow local jurisdictions to enforce more stringent food safety laws. California, Illinois, Massachusetts, New York, Oregon, and Vermont all allow local jurisdictions to adopt regulations more stringent than statewide regulations; however, local bodies cannot implement less stringent regulations.

**Licensing and Permitting Scheme:** In switching to a system where individual farmers market vendors are licensed (instead of farmers markets as a whole), Pennsylvania fell in step with most of the other states that were included in our research. Though local health boards in Massachusetts may license markets instead of vendors, the Massachusetts Department of Health’s Food Protection Program recommends issuing licenses to individual vendors as well.<sup>73</sup> In California, farmers markets are licensed as food facilities.<sup>74</sup> All the states we surveyed have licensing and permitting schemes that are similar but vary in small, significant ways. Consequently, licensing and permitting was not included in the chart below.

**Refrigeration Requirements:** Pennsylvania law requires that a proper temperature ceiling be maintained for some food products,<sup>75</sup> which some local jurisdictions interpreted as requiring mechanical refrigeration for certain products when Chapter 57 was first passed into law.<sup>76</sup> PDA interprets the law as only requiring that food is kept below the appropriate temperature, regardless of method.<sup>77</sup> PDA’s formal regulations will accept ice chests to be used in most cases, allowing vendors to inexpensively keep their products below the required temperature limit.<sup>78</sup> Like Pennsylvania, the other states we reviewed generally have performance-based standards that only require that the temperature remain below the ceiling, regardless of the methods utilized.

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Percent Growth (Aug. 5, 2011), available at <http://1.usa.gov/pGt7OS>; VERMONT PUBLIC RADIO, *Farmers’ Markets: VT Tops the List*, May 17, 2011, available at [http://www.vpr.net/news\\_detail/90880/farmers-markets-vt-tops-list/](http://www.vpr.net/news_detail/90880/farmers-markets-vt-tops-list/).

<sup>73</sup> FOOD PROTECTION PROGRAM, MASS. DEP’T OF PUBLIC HEALTH, POLICIES, PROCEDURES & GUIDELINES NO. RF-08, FARMERS’ MARKETS 1 (2011), available at <http://www.mass.gov/agr/markets/farmersmarkets/docs/fpp-policies-procedures-guidelines.pdf>.

<sup>74</sup> CAL. HEALTH & SAFETY CODE § 113789 (West 2012).

<sup>75</sup> 7 PA. CODE ANN. § 46.382 (2012).

<sup>76</sup> Roebuck, *supra* note 51.

<sup>77</sup> Telephone interview with PDA official, *supra* note 44.

<sup>78</sup> Vendors with prepared foods may be required to have more. *Id.*

**Bathroom Requirements:** Bathroom requirements varied among the states in our sample. Four states, Illinois, New York, Pennsylvania, and Vermont, do not require market vendors to have access to bathrooms. California, Massachusetts, Michigan, New Jersey, and Oregon all require bathrooms at farmers markets. Additionally, Ohio requires bathrooms when vendors are onsite for more than four continuous hours.<sup>79</sup>

**Sink Requirements:** Every state in our sample required both handwashing and warewashing stations depending on how much the food was handled or processed. While the sink requirements were mostly uniform, there was some variation from state to state on when the stations were necessary. Further, all states allow alternatives to traditional sinks for handwashing. Most states provide a diagram that shows the elements of these acceptable alternative handwashing stations.<sup>80</sup> Four states—Massachusetts, Michigan, Ohio, and Pennsylvania—also allow for the use of sanitary wipes in place of any type of handwashing station.

<b>General Legal Requirements for Farmers Markets in Ten-State Analysis</b>				
<i>(Note "v" means yes)</i>				
<b>State</b>	<b>Preemption of Stricter Local Requirements</b>	<b>Authorizes Alternatives to Commercial Sinks<sup>1</sup></b>	<b>Bathroom Requirements</b>	<b>Alternatives to Refrigeration Requirements<sup>2</sup></b>
CA		v	v	v
IL		v		v
MA		vv	v	v
MI	v	vv	v	v
NJ	v	v	v	v
NY	v <sup>3</sup>	v		v
OH	v <sup>4</sup>	v	v <sup>5</sup>	v
OR		v	v	v
PA	v	vv		v
VT		v		v

<sup>1</sup> Note: All ten states have sink requirements, but allow vendors to create temporary handwashing stations as alternatives to traditional metal sinks. States marked with "vv" explicitly allow the use of sanitary wipes in certain instances. Some states give local jurisdictions discretion over how to enforce the sink requirements (see the Appendix for more detailed information).

<sup>2</sup> Note: All ten states have refrigeration requirements. Some states specify particular alternatives and some just say that food must be kept below a certain temperature but do not require specific methods of refrigeration.

<sup>3</sup> Note: In New York, local jurisdictions are preempted from regulating most vendors, but not those that process food on the market site

<sup>4</sup> Note: In Ohio, local jurisdictions can enforce more stringent regulations with the state's permission.

<sup>5</sup> Note: Ohio requires bathrooms when vendors are onsite for more than four continuous hours.<sup>81</sup>

<sup>79</sup> OHIO ADMIN CODE 901:3-6-03(B)(2).

<sup>80</sup> See, e.g., Illinois Department of Public Health, Office of Health Protection, Division of Food, Drugs and Dairies, "Technical Information Bulletin/Food #30: Sanitation Guidelines for Farmers' Markets and Other Outdoor Food Sales Events," May 1, 2010, available at [http://www.agr.state.il.us/farmersmarket/IDPH\\_TIBF30.pdf](http://www.agr.state.il.us/farmersmarket/IDPH_TIBF30.pdf); Michigan Dep't of Agriculture, "Guidelines for Providing Safe Food Samples at Farmers' Markets," available at [http://www.michigan.gov/documents/mda/MDA\\_FdSmpInfgFarmMkts5-09\\_279110\\_7.pdf](http://www.michigan.gov/documents/mda/MDA_FdSmpInfgFarmMkts5-09_279110_7.pdf).

<sup>81</sup> OHIO ADMIN CODE 901:3-6-03(B)(2).

## VI. Recommendations

This section contains state level policy recommendations based on our preliminary analysis as well as recommendations for further research into the laws and regulations affecting farmers markets. The first set of recommendations is designed for supporters of farmers markets that may wish to push for policy change at the state level. The second set of recommendations is aimed at providing Keep Food Legal further research topics to explore regarding the effect of food safety regulations on farmers markets.

### ***A. Recommendations for State Governments and Agencies***

#### ***Provide accessible explanations of laws and regulations affecting farmers markets***

Farmers markets have only recently become widespread and many extant food safety laws and regulations were crafted without consideration of how they would affect farmers markets. Further, there is no national set of model regulations designed specifically for farmers markets or direct marketing venues. Thus, state agencies and food safety inspectors have often had to use laws and regulations designed for restaurants, grocery stores, or other traditional food service establishments for farmers markets. Not all states formally promulgate regulations explicitly for direct marketing venues, and if they do, they often do not make these regulations accessible or explain them to stakeholders. Arbitrary and unequal enforcement may follow when the public does not have access to the rules because they are unable to hold public officials accountable. This occurred in Pennsylvania before PDA and its partners began a statewide campaign to explain the actual content of the law. States should present food safety laws and regulations affecting farmers markets in an accessible manner, encouraging further participation in these markets.

#### ***Replace process-driven regulations with results-driven ones***

Regulations that focus on whether foods are safe are sometimes called “results-driven” or “performance-based,” while those that focus on following certain procedures are called “process-driven” in contrast. Many current food safety regulations are process-driven. Such regulations reduce the ability of farmers and other entrepreneurs to innovate because they must follow required procedures, even if less expensive or more effective procedures exist that may produce better results. Results-driven regulations on the other hand allow stakeholders to innovate as long as their methods meet established safety requirements. Pennsylvania’s refrigeration requirements for potentially hazardous foods at farmers markets are an example of results-driven regulations. Instead of requiring certain equipment, they are blind to method, and only require that the proper temperature requirements be met.<sup>82</sup> Well-constructed results-driven regulations such as Pennsylvania’s refrigeration requirements can both ensure food safety and save small farmers money. States should look for places to refashion process-driven food safety laws and regulations into results-driven ones, benefiting both the public and small farmers.

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<sup>82</sup> See 7 PA. CODE ANN. § 46.385 (2012); telephone interview with PDA official, *supra* note 44.

### ***Work to ease local health department burdens on farmers markets***

Six of the states we surveyed allow local jurisdictions to create food-related ordinances and regulations more stringent than state laws and regulations.<sup>83</sup> Instead of allowing local jurisdictions to experiment in reducing regulations, state governments generally only allow them promulgate more onerous restrictions, reducing opportunities for local innovation. States should either allow local jurisdictions to enact less stringent requirements in addition to more exacting ones or, as in Pennsylvania, state law and regulations should completely preempt local ordinances and regulations. Having consistent statewide regulations makes it easier for stakeholders to comply with requirements and discourages local enforcement agencies from enforcing needlessly burdensome regulations. It also promotes direct marketing by making it easier for vendors to sell at multiple outlets, without requiring them to meet various different rules.

### ***Collaborate with small scale farming organizations and allies***

One of the main reasons PDA was able to successfully address vendor concerns about Chapter 57 was its relationship with PASA. PASA is a member-based sustainable farming organization that works to facilitate learning between farmers and to build relationships between farmers and consumers that wish to purchase local and sustainable food.<sup>84</sup> PASA was able to identify and express the concerns of small-scale farmers quickly and effectively, organizing a meeting between PDA representatives and PASA soon after the law went into effect.<sup>85</sup> Not all states have organizations with such extensive connections to small-scale farmers as PASA; however, all state agencies can gain valuable insight from building relationships with small-scale growers and their allies. State agencies and policymakers should also include vendors in conversations on how to regulate farmers markets. By learning from each other, state agencies and small-scale farmers can help set in place food safety regulations that are efficient, effective, and appropriately scaled to the size of the producer.

### ***Audit state regulations that apply to direct marketing***

Although state requirements differ little in some areas—such as product refrigeration—state laws and regulations can vary drastically. State governments and agencies should audit state regulations that apply to direct marketing and/or farmers markets in order to identify any potential regulatory barriers to such venues. They should then work with farmers market vendors and stakeholders to craft more favorable regulations.

## ***B. Recommendations for Further Research***

### ***Track new state food safety laws and implementation of FSMA at the state level***

As discussed in the “Food Safety Regulations and Farmers Markets” section, sustainable and local food advocates and organizations like our client, Keep Food Legal, are concerned that as anxiety over foodborne illness outbreaks increases and the popularity of farmers markets continue to grow, state governments will enact more stringent food safety requirements in efforts to ensure that these markets are operating safely. In particular, as FSMA begins to be enforced, states may choose to extend FSMA

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<sup>83</sup> Local jurisdictions must receive permission from the Ohio Department of Agriculture or the Ohio Public Health Council before veering from state requirements, however. OHIO REV. CODE ANN. § 3717.05 (West 2011), available at <http://codes.ohio.gov/orc/3717.05>.

<sup>84</sup> PA. ASS’N. OF SUSTAINABLE AGRIC., *Our Work*, [http://www.pasafarming.org/about/copy\\_of\\_about-us](http://www.pasafarming.org/about/copy_of_about-us) (last visited July 9, 2012).

<sup>85</sup> See PA. ASS’N. OF SUSTAINABLE AGRIC., *PASA and the PA Department of Agriculture Invite You to Attend*, <http://bit.ly/JD56tW> (last visited Mar. 7, 2012).

requirements to small-scale processors and producers that are exempted under the law or otherwise increase the regulatory burden for small-scale growers. Either way, such requirements could negatively impact farmers markets. As part of its mission to reduce needless regulation and expand food choices, Keep Food Legal could track whether state governments begin to implement more stringent food safety regulations as FSMA is phased in.

### ***Analyze the regulatory environment surrounding animal-based products***

Animal-based products are among the most highly regulated products sold at farmers markets. Any attempt to create more farmer-friendly farmers market regulations would need to devote considerable attention to animal-based products. State laws and regulations surrounding animal-based products may also vary considerably, and little research has been done to examine how different variations impact farmers markets. Some states, for example, follow the federal exemptions that allow poultry growers to sell up to 20,000 chickens processed outside of state- or USDA-inspected facilities, while other states require all poultry sold for consumption to be processed in state- or USDA-inspected facilities.<sup>86</sup> These differences can have a large impact not only on the amount of animal-based products sold through direct markets, but also on the amount of produce that is sold through direct marketing because animal based products can make farmers markets more successful and are a vital but often-overlooked element of local food systems.<sup>87</sup> Research into laws and regulations surrounding production, processing, and sales of animal-based products could help to identify and dismantle barriers to growth in this element of the food system.

### ***Perform a comparative analysis of state farmers markets laws and regulations***

There are currently no comprehensive comparative analyses of state farmers market laws and regulations. Without reference points, it is difficult for local stakeholders and statewide organizations to advocate for less burdensome requirements or innovative new food safety practices. Identifying states with less burdensome yet effective laws and regulations would help create a set of best practices that local groups could use to try to remodel requirements within their locality or state. It would also help researchers evaluate whether any potential benefits of more stringent requirements outweigh their costs.

### ***Compare American food safety laws affecting farmers markets to those in foreign countries***

As mentioned above in the “Food Safety Regulations and Farmers Markets” section, direct marketing venues like farmers markets are much more widespread in some other developed countries. Analyzing the laws and regulations in these countries may provide clues on how to develop a food safety regulatory system that can still allow growth in the direct sales arena by minimizing the burdens of regulatory requirements on small vendors while still ensuring the safety of the food supply.

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<sup>86</sup> California, for example, allows poultry producers to process and sell up to 20,000 birds in non-inspected facilities under certain conditions. See CAL. AGRIC. CODE ANN. § 24713 (West 2012). Other states, such as Nevada, require all poultry sold for human consumption to be processed in a licensed facility. NEV. REV. STAT. ANN. § 583.080 (2012).

<sup>87</sup> In a 2002 survey of market managers in Oregon designed to identify why some farmers markets fail, respondents were given a list of nine product categories and were asked whether their market would be improved if it offered more of any product categories. The top three products that managers said would improve their markets were all animal-based products: cheese, fish, and meat. OREGON STATE EXTENSION, WHEN THINGS DON'T WORK: SOME INSIGHT INTO WHY FARMERS' MARKETS CLOSE 11 (2008), available at [extension.oregonstate.edu/catalog/pdf/sr/sr1073-e.pdf](http://extension.oregonstate.edu/catalog/pdf/sr/sr1073-e.pdf).



## VII. Appendix: Research Results by State

### California

- **Preemption:** California law generally does not allow local authorities to veer from the state’s Food Code.<sup>88</sup> However, there are exceptions to this general rule: local authorities may promulgate more stringent requirements regarding the provisioning of consumer toilet and handwashing facilities, as well as in a few other areas beyond the scope of this report.<sup>89</sup>
- **Permitting and Licensing:** California requires all markets to be certified through the local county’s agricultural commissioner.<sup>90</sup> In order to be certified, farmers markets must comply with several requirements that are not directly related to food safety, such as prohibiting the resale of agricultural products.<sup>91</sup> However, this section will only discuss the relevant food safety regulations in this report. Certified markets are treated as food facilities for enforcement and permitting purposes in the California Retail Food Code and are required to follow applicable regulations.<sup>92</sup> Producers must receive a Certified Producer’s Certificate from a county agricultural commissioner in order to sell fresh fruits, nuts, vegetables, shell eggs, flowers, and nursery stock at a certified market.<sup>93</sup> Non-certifiable agricultural products, such as meat, dairy, poultry, and some processed foods, may also be sold at farmers markets.<sup>94</sup>
- **Refrigeration Requirements:** California has a performance-based standard, requiring that potentially hazardous foods be kept at or above 135°F or at or below 41°F, without specifying a method.<sup>95</sup>
- **Bathroom Requirements:** The CA Retail Food Code requires toilet and handwashing facilities to be within 200 feet of the market unless otherwise approved by an enforcement officer.<sup>96</sup> Also, in an exception to the general rule that the CA Retail Food Code preempts county and municipal food safety standards, local authorities may promulgate more stringent requirements regarding the provisioning of consumer toilet and handwashing facilities.<sup>97</sup>
- **Sink Requirements:** Generally, if there is any food preparation, including samples, vendors must be equipped with potable water and wastewater tanks or a temporary alternative.<sup>98</sup> Potable water for handwashing and sanitizing must be available within 200 feet of the farmers’ market, or as approved by the enforcement officer.<sup>99</sup> Utensil and handwashing water must be disposed of in a facility connected to the public sewer system, or in a manner approved by the local enforcement

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<sup>88</sup> CAL. HEALTH & SAFETY CODE § 113705 (West 2012).

<sup>89</sup> HEALTH & SAFETY CODE § 113709. The Food Code also allows local governments to adopt an evaluation or grading system for food facilities, prohibit any type of food facility, adopt an employee health certification program, and adopt requirements “for the public safety” regulating the type of vending and the time, place, and manner of vending from street vehicles. *Id.*

<sup>90</sup> CAL. CODE REGS. tit. 3, § 1392.6 (2012).

<sup>91</sup> *See id.* at §1392.4; CAL. AGRIC. CODE § 47002 (West 2012).

<sup>92</sup> HEALTH & SAFETY CODE § 113789; HEALTH & SAFETY CODE § 114370.

<sup>93</sup> CAL. CODE REGS. tit. 3, § 1392.2(l); CAL. CODE REGS. tit. 3, § 1392.5.

<sup>94</sup> *Id.* at § 1392.1.

<sup>95</sup> HEALTH & SAFETY CODE § 113996. Raw egg shells and potentially hazardous foods held for sampling at a certified farmers market may be kept at or below 45°F. *Id.*

<sup>96</sup> HEALTH & SAFETY CODE § 114371(c).

<sup>97</sup> HEALTH & SAFETY CODE § 113709.

<sup>98</sup> Cal. Health & Safety Code § 114371 (West 2012).

<sup>99</sup> *Id.*

agency.<sup>100</sup> As much of the authority is left to local enforcement, sanitation regulations can vary significantly from county to county.<sup>101</sup>

## Illinois

- **Preemption:** Illinois gives local health departments discretion over permitting and inspections of farmers market vendors.<sup>102</sup> Although localities must comply with established state regulations, they are not preempted from making their regulations more stringent.<sup>103</sup>
- **Permitting and Licensing:** Local health departments determine specific permits, licenses, and inspections for vendors selling anything other than fresh, uncut, unprocessed produce.<sup>104</sup> Such produce is exempt from inspections and fees pursuant to the Illinois Farm Products and Marketing Act.<sup>105</sup>
- **Refrigeration Requirements:** Illinois has a performance-based standard, requiring that potentially hazardous foods be kept at or above 135°F or at or below 41°F, without specifying a method.<sup>106</sup>
- **Bathroom Requirements:** State law does not explicitly require bathrooms on-site, however local health departments may require them.<sup>107</sup>
- **Sink Requirements:** Any food processed on-site or off-site requires a handwashing station. If pressurized warm water is not available, vendors can use a temporary handwashing station, which includes a warm water container with a spigot, a bucket for waste water, a garbage can, soap, and single use towels.<sup>108</sup>
- **Note:** Any research into Illinois' laws and regulations affecting farmers markets must take into account two important developments. First, although Illinois classifies some market vendors as retail food stores, the Retail Food Store Sanitation Code does not apply to them.<sup>109</sup> Illinois Department of Public Health (IDPH) has ceased using the Retail Food Store Sanitation Code because it has fallen out of date.<sup>110</sup> As a result, IDPH uses the Food Service Establishment Sanitation Code as its guiding document when regulating both retail food stores and food service establishments.<sup>111</sup> Second, in response to “inconsistencies, confusion, and lack of awareness” regarding farmers market guidelines, the Illinois legislature created a task force in 2011 charged with assisting the Department of Public Health in implementing statewide administrative

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<sup>100</sup> *Id.*

<sup>101</sup> Compare Manhattan Beach Certified Farmers' Market Rules & Regulations (April 2009) [http://www.mbfarmersmarket.com/pdf/Manhattan%20Beach%20CFM\\_Rules\\_2009%20revisions.pdf](http://www.mbfarmersmarket.com/pdf/Manhattan%20Beach%20CFM_Rules_2009%20revisions.pdf) with Certified Farmers' Markets and Community Events in the County of San Diego Food and Housing Division Department of Environmental Health County of San Diego (December 2010) available at <http://www.sdcounty.ca.gov/deh/food/pdf/farmersmarkets.pdf>.

<sup>102</sup> ILL. ADMIN. CODE tit. 77, § 750.10(2012) (granting state and local bodies regulatory authority); telephone interview with environmental specialist, Illinois Department of Health, June 26, 2011.

<sup>103</sup> Interview with environmental specialist, *supra* note 102.

<sup>104</sup> See Technical Information Bulletin /Food #30, Illinois Department of Public Health, Office of Health Protection, Division of Food, Drugs, and Dairies, at [www.agr.state.il.us/farmersmarket/IDPH\\_TIBF30.pdf](http://www.agr.state.il.us/farmersmarket/IDPH_TIBF30.pdf), p. 1.

<sup>105</sup> 505 ILL. COMP. STAT. ANN. 70/0.01 (2012).

<sup>106</sup> Telephone interview with representative from Illinois Department of Public Health, December 1, 2011.

<sup>107</sup> ILL. ADMIN CODE tit. 77, § 750.1110 (2012) (requiring toilet facilities for food service establishment employees).

<sup>108</sup> Technical Information Bulletin Sanitation Guidelines for Farmers' Markets and Other Outdoor Food Sales Events (May 1, 2010) Illinois Department of Public Health Office of Health Protection Division of Food, Drugs and Dairies [http://www.agr.state.il.us/farmersmarket/idph\\_tibf30.pdf](http://www.agr.state.il.us/farmersmarket/idph_tibf30.pdf).

<sup>109</sup> Telephone interview with environmental specialist, *supra* note 102.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

regulations for farmers markets.<sup>112</sup> The task force will release its first report by December 31, 2012.<sup>113</sup> Thus, the above research findings are subject to change.

## Massachusetts

- **Preemption:** The Massachusetts Sanitary Code provides minimum sanitation requirements.<sup>114</sup> Local governments may and do promulgate their own regulations regarding markets and vendors.<sup>115</sup>
- **Permitting and Licensing:** Vendors of maple syrup, farm fresh eggs, and raw, unprocessed produce and honey are exempt from licensing requirements.<sup>116</sup> Local boards of health may issue retail establishment licenses to each individual market or to the individual vendor, although the Massachusetts Department of Health's Food Protection Program recommends issuing licenses to individual vendors.<sup>117</sup>
- **Refrigeration Requirements:** Ice refrigeration is acceptable as long as food temperatures can be maintained and verified.<sup>118</sup>
- **Bathroom Requirements:** Restrooms and handwashing facilities must be available for vendors.<sup>119</sup>
- **Sink Requirements:** If only agricultural products and packaged-food items are offered for sale, there is no requirement for handwashing stations at each individual vendor area.<sup>120</sup> However, if portable toilets are provided, a handwashing station must also be available.<sup>121</sup> Handwashing sinks must be easily accessible (within 25 feet) to vendors handling exposed, processed foods, and if restrooms and handwashing facilities are not available, the market must provide alternative handwashing stations which must consist of warm running water, soap and individual paper towels.<sup>122</sup> The local board of health may approve the use of chemically treated towelettes in place of handwashing facilities only if foods requiring limited preparation are served.<sup>123</sup> If a vendor offers food sampling, the local board of health can choose to impose additional handwashing requirements.<sup>124</sup> Warewashing facilities, when required, must comport with the federal food code's standards.<sup>125</sup>

## Michigan

- **Preemption:** Local governments cannot enforce regulations that are not consistent with state law.<sup>126</sup>

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<sup>112</sup> 410 ILL. COMP. STAT. ANN. 625/3.3 (West 2012).

<sup>113</sup> *Id.* at (o).

<sup>114</sup> See 15 MASS. CODE REGS. 590.000–590.021 (2012).

<sup>115</sup> See, e.g., Provincetown Bd. of Health Bylaws & Regulations, part 4, art. 5, available at <http://www.provincetown-ma.gov/index.aspx?NID=461>.

<sup>116</sup> FOOD PROTECTION PROGRAM, MASS. DEP'T OF PUBLIC HEALTH, POLICIES, PROCEDURES & GUIDELINES NO. RF-08, FARMERS' MARKETS 1 (2011), available at <http://www.mass.gov/agr/markets/farmersmarkets/docs/fpp-policies-procedures-guidelines.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.*

<sup>120</sup> FOOD PROTECTION PROGRAM, *supra* note 73, at 2.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> 105 CMR 590.009(C).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> MICH. FOOD CODE, MICH. COMP. LAWS § 289.4101(3) (West 2012); MICH. COMP. LAWS 289.3113 (West 2012).

- **Permitting and Licensing:** All vendors, including those that resell products, are exempt if they sell whole, uncut produce; honey; maple syrup; single-service, non-potentially hazardous food or beverages; and “incidental” prepackaged non-potentially hazardous food.<sup>127</sup> Farmers markets operated within permanent structures are inspected using the FDA Food Code, while non-permanent farmers markets are inspected using the Michigan Department of Agriculture and Resources’ “Temporary Food Establishment Checklist” and the “General Inspection Guide for Farmers Markets.”<sup>128</sup> Non-exempt vendors are classified as temporary food establishments.<sup>129</sup>
- **Refrigeration Requirements:** Vendors may use insulated hard-sided cleanable containers with sufficient ice to maintain potentially hazardous foods at 41°F or below.<sup>130</sup>
- **Bathroom Requirements:** Employees of non-exempt vendors must have access to toilets.<sup>131</sup> Toilets may, however, be portable.<sup>132</sup>
- **Sink Requirements:** Handwashing facilities are required for temporary food establishments.<sup>133</sup> Unless an exception is approved, the licensee must have potable hot and cold running water under pressure with suitable hand cleaner, dispensed paper towels, and a waste receptacle.<sup>134</sup> Acceptable substitutes, when approved, include (1) a large insulated container with a spigot with hand cleaner, disposable towels, and a waste receptacle; or (2) chemically treated towelettes, if food items are otherwise protected from contamination.<sup>135</sup> When utensils are used, either a commercial dishwasher or a three-compartment sink must be used to sanitize equipment.<sup>136</sup>

## New Jersey

- **Preemption:** Local health department are responsible for inspecting farmers markets and must enforce regulations that are at least as stringent as those derived from the state law.<sup>137</sup> When the code is ambiguous, the New Jersey Department of Health and Senior Services (DHSS) can issue interpretations that local health authorities are obligated to follow.<sup>138</sup>
- **Permitting and Licensing:** Vendors are exempted from licensure requirements if they sell only whole, uncut fresh fruits and vegetables, fresh eggs, honey, or maple syrup.<sup>139</sup> Local health departments license and inspect all other vendors on behalf of DHSS.<sup>140</sup>

<sup>127</sup> MICH. DEP’T OF AGRIC. & RURAL DEV., LICENSING AT FARMERS’ MARKETS, [http://www.michigan.gov/mdard/0,4610,7-125-1569\\_16958-169359--,00.html](http://www.michigan.gov/mdard/0,4610,7-125-1569_16958-169359--,00.html) (2011).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 3.

<sup>131</sup> *Id.* at 6.

<sup>132</sup> *Id.*

<sup>133</sup> MICH. DEP’T OF AGRIC. & RURAL DEV. FOOD & DAIRY DIV., TEMP. FOOD ESTABLISHMENT OPERATIONS CHECKLIST 1. For a diagram of an acceptable alternative, see Guidelines for Providing Safe Food Samples at Farmers’ Markets, Michigan Dep’t of Agriculture [http://www.michigan.gov/documents/mda/MDA\\_FdSmpIngFarmMkts5-09\\_279110\\_7.pdf](http://www.michigan.gov/documents/mda/MDA_FdSmpIngFarmMkts5-09_279110_7.pdf).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Michigan Dep’t of Agriculture, “Guidelines for Providing Safe Food Samples at Farmers’ Markets,” available at [http://www.michigan.gov/documents/mda/MDA\\_FdSmpIngFarmMkts5-09\\_279110\\_7.pdf](http://www.michigan.gov/documents/mda/MDA_FdSmpIngFarmMkts5-09_279110_7.pdf).

<sup>137</sup> See N.J. ADMIN. CODE § 8:24-8.1 (2012); telephone interview with William Manley, Retail Food Project Leader, New Jersey State Department of Health and Senior Services, Food and Drug Safety Program, June 27, 2012.

<sup>138</sup> ADMIN. CODE § 8:24-8.14.

<sup>139</sup> N.J. DEP’T OF AGRIC., *Minimum Food Safety Requirements for Product Sales: Farm Markets and Community Farmers’ Markets*, available at <http://www.state.nj.us/agriculture/divisions/md/pdf/farmmarketguidelines.pdf> (last modified Sept. 6, 2007); see ADMIN. CODE § 8:24-1.5.

- **Refrigeration Requirements:** Meat and poultry can be stored in ice, as long as it is packaged so that it does not come into direct contact with ice or water.<sup>141</sup>
- **Bathroom Requirements:** Farmers markets that sell licensed products are retail food establishments under New Jersey law and, as such, are required to have toilet and handwashing facilities.<sup>142</sup>
- **Sink Requirements:** Fresh, uncut fruits and vegetables can be sold at all farmers markets without restriction but prepared products must meet the same sanitation standards as retail food establishments.<sup>143</sup> Handwashing facilities, including acceptable alternatives, must be adequate in size, number, and location so as to permit convenient use by all employees.<sup>144</sup> Each handwashing sink or group of two adjacent sinks shall be provided with soap and single-use towels or an air-drying device.<sup>145</sup> For manual warewashing, a sink with at least three compartments shall be provided for washing equipment and utensils, or two compartments if other criteria are met.<sup>146</sup>

## New York

- **Preemption:** While New York Department of Agriculture & Markets' (NYDAM) regulations preempt local ones,<sup>147</sup> New York State Department of Health (NYDH) food safety regulations do not.<sup>148</sup>
- **Permitting and Licensing:** Vendors are exempt from licensing requirements if they only sell uncut produce, eggs, grains, legumes, and honey, or maple syrup that does not contain additives.<sup>149</sup> Vendors selling meat or poultry, or food that is processed, pre-packaged, or ready-to-eat, must receive a permit from the NYDAM. Vendors that process their food on the market site must obtain a permit from the county board of health.<sup>150</sup>
- **Refrigeration Requirements:** NYDAM and NYDH give vendors discretion over which refrigeration methods to use, but NYDH requires that packaged food not be kept on undrained ice and prohibits wrapped sandwiches from being stored on ice.<sup>151</sup>
- **Bathroom Requirements:** Bathrooms are not required; however when bathrooms are present, handwashing facilities with warm potable water, soap, and individual paper towels must be available.<sup>152</sup>
- **Sink Requirements:** Generally, farmers market vendors what sell farm produced foods such as whole, fresh fruit and vegetables are not considered retail food stores and are thus not required

<sup>140</sup> See ADMIN. CODE § 8:24-8.2, 8.14.

<sup>141</sup> N.J. DEP'T OF AGRIC., *Minimum Food Safety Requirements for Product Sales*, *supra* note 139.

<sup>142</sup> ADMIN. CODE § 8:24-6.6, 6.7.

<sup>143</sup> N.J. Dept. of Agriculture and N.J. Dept. of Health & Senior Services, *Chapter 24 and You: A Practical Guide to Selling Safely at Farmers Markets*, available at

[http://www.state.nj.us/health/foodanddrugsafety/documents/ch24\\_farmers\\_market\\_guidelines.pdf](http://www.state.nj.us/health/foodanddrugsafety/documents/ch24_farmers_market_guidelines.pdf).

<sup>144</sup> (N.J.A.C. 8:24) 2007 available at

[http://www.state.nj.us/health/foodanddrugsafety/documents/chapter24\\_effective\\_1207.pdf](http://www.state.nj.us/health/foodanddrugsafety/documents/chapter24_effective_1207.pdf).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See N.Y. DEP'T OF AGRIC & MARKETING, *SANITARY REGULATIONS FOR DIRECT MARKETING*, available at

<http://www.agriculture.ny.gov/FS/industry/sanitary.html>.

<sup>148</sup> N.Y. PUB. HEALTH LAW § 308 (Consol. 2012).

<sup>149</sup> N.Y. DEP'T OF AGRIC. & MARKETING, *supra* note 147.

<sup>150</sup> *Id.*

<sup>151</sup> Telephone interview with representative from New York Department of Agriculture (Oct. 13, 2011).

<sup>152</sup> COMP. CODES R. & REGS. tit. 10, § 14-2.12.

to meet the state's strict sanitary guidelines.<sup>153</sup> However, if vendors package, cut, slice or portion any foods, they must have running hot and cold water, equipment cleaning and sanitizing facilities, and handwashing facilities.<sup>154</sup> Handwashing facilities, which include alternatives to traditional sinks, shall be installed and located in or immediately adjacent to toilet rooms, and in food preparation and warewashing areas.<sup>155</sup> Each handwashing facility shall be provided with hot water, hand-cleansing soap, and a supply of towels or a hand-drying device.<sup>156</sup> For manual warewashing, a sink with two or three compartments or acceptable alternative methods shall be provided and used.<sup>157</sup>

## Ohio

- **Preemption:** Local governments may implement more stringent regulations than the state regulations if the State Director of Agriculture or the Ohio Public Health Council concurs.<sup>158</sup>
- **Permitting and Licensing:** Vendors selling fresh unprocessed fruits or vegetables, products from a cottage food operation, maple syrup, sorghum, honey and non-potentially hazardous commercially packaged food at registered farmers markets<sup>159</sup> are eligible for exemption from licensing requirements.<sup>160</sup> These exempt vendors are regulated by the Ohio Department of Agriculture (ODA).<sup>161</sup> All other vendors must be licensed and regulated as retail food establishments by the Ohio Department of Health (ODH) under the Ohio Uniform Food Safety Code.<sup>162</sup> This includes vendors that qualify for the exemption, but market their products at unregistered farmers markets.<sup>163</sup>
- **Refrigeration Requirements:** Ohio has a performance-based standard, requiring that potentially hazardous foods be kept at or above 135°F or at or below 41°F, without specifying a method.<sup>164</sup>
- **Bathroom Requirements:** Toilet facilities must be readily accessible to farmers market personnel when the farmers market is open for more than four consecutive hours.<sup>165</sup>
- **Sink Requirements:** Farmers market vendors that only offer products such as fresh, unprocessed fruits or vegetables and commercially prepackaged foods are not subject to the stricter standards faced by retail food establishments.<sup>166</sup> Vendors licensed as retail food establishments that are engaged in food preparation must have access to a handwashing sink or, as an alternative, a non-permanent handwashing facility approved by the Ohio Department of Health.<sup>167</sup> Handwashing

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<sup>153</sup> *Sanitary Regulations for Direct Marketing*, NY STATE DEP'T. OF AGRIC. & MARKETS, <http://www.agriculture.ny.gov/FS/industry/sanitary.html>.

<sup>154</sup> *Id.*

<sup>155</sup> N.Y. Comp. Codes R. & Regs. tit. 1, § 271-6.16.

<sup>156</sup> *Id.* at § 271-6.18.

<sup>157</sup> *Id.* at § 271-5.3.

<sup>158</sup> OHIO REV. CODE ANN. § 3717.05 (West 2011), available at <http://codes.ohio.gov/orc/3717.05>.

<sup>159</sup> To register a market, organizers must fill out a simple form with their contact information, and the market's hours of operation and location. Telephone Interview with Todd Mers, Food Safety Specialist, Ohio Department of Agriculture (June 27, 2012). No fee or license is required in order to register. *Id.*

<sup>160</sup> OHIO ADMIN. CODE 901:3-6-01(B)(7) (2011), available at <http://codes.ohio.gov/oac/901%3A3-6>.

<sup>161</sup> See OHIO ADMIN. CODE 901:3-6-01(B)(4) (2011).

<sup>162</sup> *Id.* at 901:3-6-01(A).

<sup>163</sup> *Id.*

<sup>164</sup> OHIO ADMIN CODE 3717-1-03.4(F) (2011). Raw egg shells may be kept at or below 45°F. *Id.*

<sup>165</sup> *Id.* 901:3-6-03(B)(2).

<sup>166</sup> *Farmers' Markets Fact Sheet*, OHIO DEP'T. OF AGRICULTURE FOOD SAFETY <http://www.agri.ohio.gov/foodsafety/#tog>

<sup>167</sup> OHIO ADMIN CODE 3717-1-02.2(C) (2011) available at <http://codes.ohio.gov/oac/3717-1-05.1>.

sinks must be equipped to provide both hot and cold water and must be supplied with soap and paper towels.<sup>168</sup> Depending on the types of food products being offered and the amount of food handling at the facility, Ohio Department of Agriculture may approve an alternative method, such as alcohol towelettes or a non-permanent handwashing facility.<sup>169</sup> For warewashing, a three-compartment sink with hot and cold water large enough to accommodate the cleaning and sanitizing of equipment and utensils must be provided.<sup>170</sup>

## Oregon

- **Preemption:** While the Oregon Department of Agriculture (ODA) licenses and inspects vendors throughout Oregon, state law allows municipalities to adopt their own regulatory schemes as long as they are at least as stringent as the state regulations.<sup>171</sup> ODA must review each municipal ordinance within two years of its enactment in order to determine whether it meets the requirements and standards set out in state laws and regulations.<sup>172</sup>
- **Permitting and Licensing:** Vendors that sell fresh fruits and vegetables, eggs, and honey are not required to be licensed.<sup>173</sup> Foods prepared and sold at farmers markets require a temporary restaurant license from county health departments.<sup>174</sup> Vendors selling meat and poultry require a license from the ODA.<sup>175</sup>
- **Refrigeration Requirements:** Ice or dry ice may be used with all products except for eggs, which must be kept dry.<sup>176</sup>
- **Bathroom Requirements:** Markets must have “conveniently located” toilet facilities with nearby handwashing facilities.<sup>177</sup>
- **Sink Requirements:** Handwashing facilities are required for all vendors that prepare and serve samples, handle unwrapped products other than produce and nuts in the shell, or have employee toilet facilities.<sup>178</sup> Handwashing stations must, at minimum, have a water-holding capacity of at least five gallons in an enclosed container, provide soap and single-service towels, and maintain a wastewater collection container with a minimum capacity equal to or greater than the freshwater container’s capacity.<sup>179</sup> Gel sanitizer may be used in addition to handwashing but not in its place.<sup>180</sup>

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<sup>168</sup> *Id.* at 05.1.

<sup>169</sup> *Id.* 901:3-6-05(C).

<sup>170</sup> *Id.* at 04.1.

<sup>171</sup> OR. REV. STAT. § 616.726 (2011).

<sup>172</sup> *Id.*

<sup>173</sup> OREGON DEP’T OF AGRIC., *Farm Direct FAQs*, available at

<http://oregonfarmersmarkets.org/mktmngn/docs/Farm%20Direct%20FAQ.FINAL.pdf>.

<sup>174</sup> OR. REV. STAT. ANN. § 624.510 (2011) (granting local health authorities licensing authority over mobile units).

<sup>175</sup> OR. REV. STAT. ANN. § 603.025 (2011).

<sup>176</sup> *See id.* at 603-025-0020(16) (2012); *see id.* at 603-025-0020(16) (2012) (“eggs . . . shall be stored in a manner so that they prevent cross-contamination”).

<sup>177</sup> *Id.* at 603-025-0020(9) (2012).

<sup>178</sup> OR. ADMIN. R. 603-025-0150(1)(d) (2012).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

## **Pennsylvania (post-Act 106)**

- **Preemption:** Local jurisdictions are preempted from adopting food safety regulations.<sup>181</sup>
- **Permitting and Licensing:** Farmers market vendors are licensed instead of farmers markets as a whole.<sup>182</sup> Vendors that sell meat, eggs, dairy, or prepared foods are classified as “retail food facilities” and are required to obtain licenses from local health departments or the Pennsylvania Department of Agriculture.<sup>183</sup> Unprocessed fruits and vegetables are exempt from the licensing requirement.<sup>184</sup>
- **Refrigeration Requirements:** Pennsylvania has a performance-based standard, requiring that potentially hazardous foods be kept at or below 41°F without specifying a method.<sup>185</sup>
- **Bathroom Requirements:** Pennsylvania does not require market vendors to have access to bathrooms.<sup>186</sup>
- **Sink Requirements:** Vendors selling raw produce or pre-packaged, non-potentially hazardous products are permitted to use sanitizing hand wipes to clean their hands and surfaces.<sup>187</sup> All other vendors require handwashing facilities that include soap and towels, but the facilities do not have to be permanent.<sup>188</sup> The Pennsylvania Department of Agriculture (PDA) recommends that vendors use temporary sinks made from thermal containers, and has worked with local health departments to ensure that they are accepted throughout the state.<sup>189</sup> For stands with higher risk products, the vendor may need to have access to a three-compartment sink to wash, rinse and sanitize equipment.<sup>190</sup>

## **Vermont**

- **Preemption:** State law does not preempt local jurisdictions from adopting food safety regulations more stringent than state law or regulations.<sup>191</sup>
- **Permitting and Licensing:** Each individual market is considered a retail food operation, with each vendor responsible for securing the appropriate permits.<sup>192</sup> Vendors of raw, unprocessed agricultural products are exempt from retail licensing.<sup>193</sup> Prepared food vendors, such as mobile food trucks and bakeries, are licensed through the Vermont Department of Health.<sup>194</sup> Vendors

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<sup>181</sup> See 3 PA. CONS. STAT. ANN. § 5701 (West 2012); telephone interview with PDA official, *supra* note 44.

<sup>182</sup> Telephone interview with PDA official, *supra* note 44.

<sup>183</sup> *Id.*

<sup>184</sup> PA. DEP'T OF AGRIC., *supra* note 43.

<sup>185</sup> See 7 PA. CODE ANN. § 46.385 (2012); telephone interview with PDA official, *supra* note 44.

<sup>186</sup> Telephone interview with PDA official, *supra* note 44.

<sup>187</sup> BUREAU OF FOOD SAFETY & LAB. SERV., PENNSYLVANIA DEPARTMENT OF AGRICULTURE FARMERS MARKET AND FARM STAND INSPECTION AND LICENSING GUIDELINES (Mar. 2011), *available at* [http://www.pikepa.org/Planning/2011.03.15\\_Farmers%20Market%20Guidelines.pdf](http://www.pikepa.org/Planning/2011.03.15_Farmers%20Market%20Guidelines.pdf).

<sup>188</sup> *Id.*

<sup>189</sup> Telephone interview with PDA official, *supra* note 44.

<sup>190</sup> *Id.*

<sup>191</sup> See VT. STAT. ANN. tit. 18, § 4301 – 4465; VT. STAT. ANN. tit. 6, § 3301 - 3319 (2012).

<sup>192</sup> Telephone interview with Randy Quenneville, Section Chief, Meat Inspection Division, Vermont Agency of Agriculture, June 2, 2012; telephone interview with Alfred Burns, Sanitarian Supervisor, Vermont Department of Health, June 29, 2012.

<sup>193</sup> Telephone interview with Randy Quenneville, *supra* note 192.

<sup>194</sup> VT. STAT. ANN. tit. 18, § 4305.



selling meat and poultry products must receive a license from the Vermont Agency of Agriculture (VAA).<sup>195</sup>

- **Refrigeration Requirements:** Methods of refrigeration are up to the discretion of the vendors, so long as they do not risk contamination by storing foods in water. Ice is allowed.<sup>196</sup>
- **Bathroom Requirements:** Neither the VAA<sup>197</sup> nor VDH require toilet facilities at farmers markets.<sup>198</sup>
- **Sink Requirements:** Vendors selling prepared food on-site are required to maintain hand-washing facilities, which must have both hot and cold water, a container for wastewater, soap, and paper towels.<sup>199</sup> The handwashing facility must be located in the food preparation area.<sup>200</sup> If using utensils to prepare samples, vendors should bring potable water and dish detergent to sanitize the utensils.<sup>201</sup> Vendors who prepare food at home and bring it to the farmers market packaged and ready for sale are required to have their home water supply tested unless they are on a public water system.<sup>202</sup>

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<sup>195</sup> VT. STAT. ANN. tit. 6, § 3306. Poultry producers slaughtering less than 1,000 birds a year are not required to be inspected or licensed for sale at farmers markets, however. VT. STAT. ANN. tit. 6, § 3312(b).

<sup>196</sup> Londa Nwadike, *Food Safety for Farmers Market Vendors Series: Selling Meat, Egg, and Dairy Products*, U. VT. EXTENSION (Sept. 2007), available at [http://www.uvm.edu/extension/food/pdfs/farmersmarket\\_foodsafety\\_general\\_sept2011.pdf](http://www.uvm.edu/extension/food/pdfs/farmersmarket_foodsafety_general_sept2011.pdf).

<sup>197</sup> Telephone interview with Randy Quenneville, *supra* note 192.

<sup>198</sup> 13-18 VT. CODE R. § 5-212 (2012) (only establishments with seating for 25 or more persons require toilet facilities).

<sup>199</sup> UNIV. OF VT. EXTENSION, *Selling Prepared Foods and Baked Goods*, in *FOOD SAFETY FOR FARMERS MARKET VENDORS SERIES* (Sept. 2011), available at [http://www.uvm.edu/extension/food/pdfs/farmersmarket\\_foodsafety\\_preparedfoods\\_sept%202011.pdf](http://www.uvm.edu/extension/food/pdfs/farmersmarket_foodsafety_preparedfoods_sept%202011.pdf).

<sup>200</sup> *Id.*

<sup>201</sup> UNIV. OF VT. EXTENSION, *General Food Safety Practices, Providing Samples, Selling Fresh Produce*, in *FOOD SAFETY FOR FARMERS MARKET VENDORS SERIES* (Sept. 2011), available at [http://www.uvm.edu/extension/food/pdfs/farmersmarket\\_foodsafety\\_general\\_sept2011.pdf](http://www.uvm.edu/extension/food/pdfs/farmersmarket_foodsafety_general_sept2011.pdf).

<sup>202</sup> 13-18 VT. CODE R. §5-209 (2012).