

Advising Food and Farm Start-Ups

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- **Structure/Management**
- Business Entity
 - Founders of food and farm business startups need liability protection just as much as owners of any other businesses do. It is important to know purpose, primary asset, parties involved, source of funding, and the location of the business. What types of agreements will the business enter into? How many employees will it have? What are the long-term goals of the client?
 - LLC, S-Corp, C-Corp, B-Corp, Non-profit
 - What is the purpose of the business and how will the business be funded? In the food startup sector, especially with food hubs, you may see some sort of hybrid where part of the business makes more sense as a non-profit and part of the business makes more sense as a for-profit.
 - Nonprofit: State corporate law governs structure, management and state tax issues. Federal tax law governs tax exempt status, i.e. 501(c)(3) designation.
 - For-profit: State law governs (LLC or corporate statutes) - LLC laws are more flexible, but take more work on the front end to craft an appropriate LLC Agreement if structure dictates. Corporate law is not as flexible, but more predictable due to settled case law. If you are not a tax lawyer, don't pretend to be. Advise your client to either work with a tax lawyer separately or work with an accountant to make sure the business entity and structure works best for the client.
 - Resources:

- Food Law & Policy Clinic of Harvard Law School, Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network (June 2014), http://www.chlpi.org/wp-content/uploads/2013/12/Farm-and-Food-Law-Guide_June-20-2014.pdf.
- Authority/Management
 - BOD, member-managed, manager-managed, etc.
 - Nonprofit - If the nonprofit will be applying for 501(c)(3), the client needs to be settled on structure, purpose, and relationships. Who will be on the Board of Directors? Who will manager(s)? How will money be raised? Will the nonprofit lobby for legislation? Where will the business operate? Who will the business have agreements with? Should not apply for 501(c)(3) until these are in place.
 - For-profit
 - Corporation - Typically a Board of Directors, with officers appointed to manage the company. Can be same people. Understand tax consequences.
 - LLC - Flexible. LLC Agreement should be drafted by an attorney, especially if multiple people involved. Member-managed or manager-managed. Silent partners? Set out authority of managers and voting requirements. Best to know intentions of all members up front, and make clear to all members how business will be managed on a day-to-day basis.
- Fundraising (Securities)
 - Which model fits with your client's business?
 - How big do they want to get and how quickly do they plan to get there?
 - What are the values of the company? Local investment only?
 - How quickly can the company break even?
 - Crowd-funding - new crowdfunding regs -
 - No more than \$1 million
 - Investor net-worth limits
 - Transactions conducted through intermediary (online platform)
 - Disclosure requirements

- Progress updates/annual reports
- Online fundraising platforms
 - Soliciting gifts (Kickstarter model)
 - Presale/Community supported models
 - Sale of products (offer discounts/rewards)
 - CSA model
 - Selling securities to investors
 - Expensive, time consuming, requires legal expertise, additional management, civil and criminal liability
 - Resources: Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers (2016), <https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm>
- Traditional fundraising - Ownership percentages very important when considering securities laws. For instance, if Sarah is putting up \$100,000, and raising \$20,000 from four other people (silent partners), and Sarah intends to manage the business, the SEC could consider that to be a sale of securities, requiring a costly Private Placement Memorandum to be drafted.
- Note: if client cannot afford (or doesn't want to pay for) PMM, the attorney should revise the engagement letter to carve out any representation relating to securities laws. Violations of securities laws can result in civil and criminal liability, and malpractice suits against the attorney.
- When first meeting a client, think about their potential business as an outside investor would.
 - Does the client have a complete business plan? What are their financial projections based on? Who are the owners?
 - What is the management team? What experience do these people have?
 - What is the value of the business now, and what will it be in a year?
 - What are the most obvious risks to the profitability of the business?
 - Competition
 - Costs (materials, labor, distribution, regulatory compliance)
 - Legal roadblocks (labeling, marketing, processing, etc.)

- Product Liability/Strict Liability (will address in more detail below)
- Agencies that you might have the work with:
 - Federal Trade Commission
 - USDA
 - FDA
 - Alcohol and Tobacco Tax and Trade Bureau
 - State and local governments
 - Securities and Exchange Commission
 - EPA (state environmental agency)
- **Operations**
 - Contracts - This is where the “best practices” come in for a company, and where a company can go sideways without following best practices. Once the business understands what type of agreements it will enter into, it’s important for the client to understand the contractual provisions that are common to those agreements. Form contracts are often okay. Terms, indemnification, termination, breach, default.
 - Production and marketing contracts
 - Supply contracts - food companies, ingredients.
 - Perishable Agricultural Commodities Act (PACA) - Dealer license, PACA Trust
 - Copacker/Comanufacturer - Who owns the IP (recipe, ingredients, process, etc.)
 - Distribution
 - Land Use Issues
 - Leases - New businesses often sign leases provided by landlords without letting an attorney review. Could be huge mistake if terms are not favorable.
 - Purpose
 - Lease Term/Option to renew
 - Parking
 - Maintenance
 - Default/Breach

- Termination
- Conservation Easements/Land Trusts
 - Useful tool for new farmers without land to farm, and for landowners who want to protect family property.
 - What are the objectives of the landowner?
 - Run with the land.
 - Resource: <http://www.youngfarmers.org/wp-content/uploads/2015/01/NYFC-Finding-Affordable-Farmland.pdf>
- Zoning
 - Know your local/applicable zoning ordinance.
 - Be aware of potential impacts on neighbors.
 - Site plan review processes with city or county.
 - Urban farming
 - Commercial/Industrial/Agricultural
 - Nuisance/Right to Farm laws