

HELPING FARM CLIENTS WITH ONLINE MARKETING AND SALES

Nicole Cook[†], Lauren Handel^{††} & Margaret Todd^{†††}

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[†] Nicole Cook is Maryland’s Agricultural Law Education Initiative’s Environmental and Agricultural Faculty Legal Specialist at the University of Maryland Eastern Shore. She is also adjunct faculty within the University System of Maryland teaching undergraduate and graduate classes in food and agriculture law. Nicole received her Bachelor of Science degree from the University of Iowa, and her Juris Doctor degree from Northeastern University School of Law. Nicole also holds a Master of Law in Agricultural and Food Law from the University of Arkansas School of Law. Since 2016, Nicole has been educating farmers about laws that impact their farming operations and helping farmers identify legal risks and take actions to protect the viability of their farms.

^{††} Lauren Handel is the principal attorney at Handel Food Law LLC, a law firm focused exclusively on food businesses. Her practice includes compliance with FDA, USDA, and state food regulations; advertising compliance; commercial contracts; and intellectual property. Lauren earned her Bachelor of Arts degree, cum laude, from the University of Maryland, College Park in 1997; her JD, cum laude, from Georgetown University Law Center in 2002; and an LL.M. in Agricultural and Food Law at the University of Arkansas School of Law in 2013.

^{†††} Ms. Todd is Managing Director and Senior Research Associate at the Agriculture Law Education Initiative for the University of Maryland, Baltimore Francis King Carey School of Law. She also teaches Food, Farming, & Sustainability as an adjunct professor. Megan’s work focuses on educating farmers about federal and state laws that impact the viability of their farming operations. Megan earned her Bachelor of Science degree, *magna cum laude*, from the State University of New York College of Environmental Science and Forestry, her Juris Doctor degree from University of Maryland, Baltimore Francis King Carey School of Law with an Environmental Law concentration. She is currently pursuing a Master of Laws in Agricultural and Food Law from the University of Arkansas School of Law.

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ABSTRACT

A significant number of farm businesses are transitioning to include online sales and marketing in their direct marketing activities. While the shift to e-commerce offers farms an efficient means to connect with new customers, it also introduces complex regulatory compliance and liability issues that must be adeptly managed. This Article provides a comprehensive overview of the legal considerations for attorneys advising farm businesses engaged in, or planning to engage in, direct online sales and marketing. Key issues addressed include food safety and labeling regulations, digital marketing and advertising laws, avoiding trademark and copyright infringement, protecting intellectual property, compliance with disability rights and privacy laws, online sweepstakes and contests, general e-commerce compliance, and sales tax regulations. The Article underscores the importance of understanding these multifaceted legal issues in order to effectively counsel farm clients navigating the legal landscape of e-commerce.

I. INTRODUCTION

Many farm businesses advertise and sell their products online. As of 2023, approximately 23% of farmers in the United States use the internet for agricultural

marketing purposes.¹ According to the 2020 Local Food Marketing Practices Survey by USDA's National Agricultural Statistics Service (NASS), among farmers who sell directly to consumers, retailers, institutions, and intermediaries, more than 80 percent use websites to advertise farm products and on-farm activities and operations.² In 2020, farmers sold \$312 million of the \$2.9 billion in direct-to-consumer sales through online markets.³ Farmers may not fully appreciate that when their business transitions from strictly in-person marketing to online marketing, the regulatory compliance and liability issues affecting the business can become far more complex. This is especially true when a farmer uses the internet to market and sell goods to buyers outside the farm's geographic area, potentially requiring the farm business to comply with the laws of all states where it ships products.

When advising a farm business that conducts direct online marketing or that is planning to do so, it is important for attorneys to understand the relevant legal considerations. In this Article, we summarize legal issues applicable to online marketing of farm products, including regulation of food safety and labeling in e-commerce, advertising law, relevant intellectual property law, compliance with disability rights and privacy laws, and sales tax laws.

II. FOOD SAFETY AND LABELING REGULATION OF ONLINE DIRECT MARKETING

A farm's direct marketing of food products online may be subject to multiple levels of regulation—federal, state, and local—with regard to food safety and labeling.

A. Licenses, Registrations, and Inspections

In the United States, businesses that handle and sell food are required to be licensed by, or registered with, various government agencies that inspect them for purposes of compliance with food safety regulations.⁴ These rules apply whether

1. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., TECHNOLOGY USE (FARM COMPUTER USAGE AND OWNERSHIP) 5 (2023), downloads.usda.library.cornell.edu/usda-esmis/files/h128nd689/4j03fg187/fj237k64f/fimpc0823.pdf [<https://perma.cc/5YVE-NN9K>].

2. *Percentage of Farms Using the Internet for Farm Business and Marketing*, NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. (Aug. 2, 2024, 8:15 AM), <https://quickstats.nass.usda.gov/results/C0A0271E-A33B-31C0-88C4-6C444E38E6FC#784B2FCC-6E28-30AE-B881-262712D5FBEC> [<https://perma.cc/6EEE-9TTM>].

3. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., DIRECT FARM SALES OF FOOD 2 (2022), <https://www.nass.usda.gov/Publications/Highlights/2022/local-foods.pdf> [<https://perma.cc/ZY2J-7RFY>].

4. *E.g.*, 21 U.S.C. § 350d(a)(1)–(2).

the business sells food only at brick-and-mortar locations or through e-commerce channels.⁵

1. FDA Food Facility Registration

Federal law requires facilities that manufacture, process, pack, or hold food for human or animal consumption to register with the FDA unless an exemption applies.⁶ Food facilities are required to register even if they do not sell or distribute food across state lines.⁷ Whether a farmer's establishment is required to register has significant implications because food facilities that are required to register with FDA must comply with FDA's regulations for Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls.⁸

While farms are exempt from FDA food-facility registration requirements, not everything that a farm business may do qualifies for the exemption.⁹ If a farm business operates in more than one place, each location must be analyzed separately to determine if an exemption from FDA food-facility registration applies to that location.¹⁰ For example, a facility on a farm will not be exempt from registration if it is used to process or manufacture food other than by drying or dehydrating raw agricultural commodities, manipulating, ripening, or packaging and labeling.¹¹

A facility from which a farm business markets and sells products online may not qualify for the "farm" exemption from registration, but may be exempt as a retail food establishment.¹² To qualify as a retail food establishment, an establishment on a farm or a farm-operated business must sell food to consumers as its primary business—meaning that, on an annual basis, it sells more food (by dollar value) directly to consumers than it sells to businesses and institutions.¹³ E-commerce food sales count in the analysis of whether a farm establishment or farm operated business is exempt as a retail food establishment.¹⁴

5. *See id.*

6. *Id.*

7. *Id.* § 350d(c).

8. 21 C.F.R. § 117.1 (2024) (human food); *id.* § 507.1 (animal food).

9. *See id.* § 1.226(b).

10. *Id.* § 1.227.

11. *Id.* (definition of "primary production farm").

12. *Id.* (definition of "retail food establishment").

13. *Id.*

14. Cori Muse, *E-Commerce Food Businesses Continue to Soar Under the Regulatory Radar*, FOOD SAFETY MAG. (Oct. 3, 2022), <https://www.food-safety.com/articles/8028-e->

2. USDA Grant of Inspection

Under the Federal Meat Inspection Act and Poultry Products Inspection Act, any establishment that processes meat¹⁵ or poultry products must operate under a USDA Food Safety and Inspection Service (FSIS) inspection, unless an exemption applies or it operates under a state meat and poultry inspection (in a state that has its own inspection program) and sells only within the same state.¹⁶ Farm businesses that conduct limited processing of meat or poultry products for sale may be exempt from FSIS inspection as retail stores and “similar retail-type establishment[s].”¹⁷

To qualify for the USDA retail store exemption, an establishment may not process meat or poultry for sale to any businesses other than limited sales to hotels, restaurants, and similar institutions (HRI buyers).¹⁸ In guidance, FSIS has made clear that the retail store exemption can apply to meat and poultry processing establishments that sell their products online, whether through the operator’s website or through a third-party platform, so long as the transactions are directly between the processor and the consumer or HRI buyer.¹⁹

3. State and Local Permits and Inspection

Farmers with food retail operations, including e-commerce operations, may be required to obtain permits from, and be inspected by, state and local authorities. State laws also require food processors who make packaged foods to be licensed and inspected.²⁰ Typically, state health or agriculture departments license and inspect food processing operations, while county and city health departments

commerce-food-businesses-continue-to-soar-under-the-regulatory-radar
[<https://perma.cc/XL4D-FN5G>].

15. “Meat” includes catfish and similar fish species in the order Siluriformes. 21 U.S.C. § 601(w)(2).

16. FOOD SAFETY INSPECTION SERV., U.S. DEP’T OF AGRIC., SUMMARY OF FEDERAL INSPECTION REQUIREMENTS FOR MEAT PRODUCTS 2 (2015), https://www.fsis.usda.gov/sites/default/files/media_file/2021-02/Fed-Food-Inspect-Requirements.pdf [<https://perma.cc/U8YX-2MX7>].

17. 21 U.S.C. §§ 454(c)(2), 661(c)(2); 9 C.F.R. §§ 303.1(d), 381.10(d), 532.3 (2024).

18. SUMMARY OF FEDERAL INSPECTION REQUIREMENTS FOR MEAT PRODUCTS, *supra* note 16, at 1.

19. FOOD SAFETY INSPECTION SERV., U.S. DEP’T AGRIC., FSIS GUIDELINE FOR DETERMINING WHETHER A LIVESTOCK SLAUGHTER OR PROCESSING FIRM IS EXEMPT FROM THE INSPECTION REQUIREMENTS OF THE FEDERAL MEAT INSPECTION ACT 9 (2018), www.fsis.usda.gov/sites/default/files/import/Compliance-Guideline-Livestock-Exemptions.pdf [<https://perma.cc/U8JK-HSZX>].

20. *E.g.*, CAL. HEALTH & SAFETY CODE § 110460 (West 2024); N.Y. AGRIC. & MKTS. LAW § 251-z-3 (McKinney 2024).

license and inspect retail food stores and food service establishments, though the name and level (state or municipal) of the agency with jurisdiction over the different types of food operations vary from state to state.²¹

If a farmer wants to sell foods produced in a home kitchen over the internet, it is necessary to determine if the cottage food law in the farm's state allows it.²² In general, state food laws prohibit home processing of food for commercial purposes.²³ However, all states now have cottage food laws allowing home processing of certain foods that are not potentially hazardous, such as baked goods that do not require refrigeration for food safety.²⁴ Cottage food laws vary considerably in terms of what foods are allowed, limitations on the dollar value or volume of sales, where and how cottage foods may be sold, and whether a permit or registration is required.²⁵ While most states allow cottage food operators to sell their products online, some do not allow the products to be shipped to the consumer.²⁶ Most states allow cottage foods to be sold only to consumers, not to businesses.²⁷ Almost all cottage food laws prohibit sales across state lines.²⁸

21. For example, in New York, the New York Department of Agriculture and Markets licenses and inspects both food processors and retail stores, while county and city health departments license and inspect food service establishments (e.g., restaurants and caterers). N.Y. AGRIC. & MKTS. LAW § 251-z-3 (McKinney 2024); N.Y. COMP. CODES R. & REGS. tit. 10 §§ 14-1.190(a), 14-2.2(a) (2024). In California, the State Department of Public Health licenses wholesale food processors, while local health departments license and inspect retail food facilities. CAL. HEALTH & SAFETY CODE §§ 110460, 114381 (West 2024).

22. *The Ultimate Guide to Cottage Food Law*, CASTIRON (Aug. 2, 2024, 10:25 AM), <https://shopcastiron.com/seller/cottage-food-law> [<https://perma.cc/W94Q-EF2H>].

23. *Id.*

24. *Recent State Reforms for Homemade Food Businesses*, INST. FOR JUST. (July 4, 2024, 12:23 AM), [ij.org/legislative-advocacy/state-reforms-for-cottage-food-and-food-freedom-laws/](https://www.ij.org/legislative-advocacy/state-reforms-for-cottage-food-and-food-freedom-laws/) [<https://perma.cc/TH7C-VTWU>].

25. *Id.*

26. *Id.*

27. *Id.*

28. *The Ultimate Guide to Cottage Food Law*, *supra* note 22. *But see* ARK. CODE ANN. § 20-57-504(b)(2) (2024) (detailing how Arkansas is an exception. The Food Freedom Act allows cottage foods to be sold across state lines as long as they comply with federal requirements).

B. Labeling Rules for Food Sold Online

Food in interstate commerce must comply with FDA and USDA food labeling regulations.²⁹ State laws require compliance with federal labeling rules for intrastate sales.³⁰ Some states impose additional labeling requirements that do not exist in federal law.³¹

1. Required Label Information

Federal and state laws require packaged food labels to include: a statement of identity (the name of the food), the net quantity of contents, a declaration of ingredients and major food allergens, nutrition information (unless an exemption applies), and the name and address of the manufacturer or distributor of the product.³² While this information must appear on food packages, there is currently no regulation requiring it to be disclosed online.³³ That may change, however. The FDA has shown interest in ensuring that consumers have appropriate product information when shopping for food online and has recommended that when nutrition information is shown online, it be presented consistently with FDA's nutrition labeling regulation under 21 C.F.R. § 101.9.³⁴

2. Regulation of Label Claims

Farm businesses selling products and advertising online must be aware of the importance of making truthful, not misleading statements. A business that uses false or deceptive marketing can face regulatory enforcement and civil lawsuits.³⁵ Consumers may bring class action lawsuits under state consumer protection laws.³⁶ Additionally, competitors may sue under federal and state unfair competition

29. FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS 7, 19 (2007), https://www.fsis.usda.gov/sites/default/files/media_file/2021-07/Labeling_Requirements_Guide.pdf [<https://perma.cc/VZK2-ERVW>].

30. *See id.*

31. *See* discussion *infra* Section II.B.3.

32. 15 U.S.C. § 1453(a); 21 U.S.C. § 343(w)(1).

33. *See generally* 15 U.S.C. § 1453(a); 21 U.S.C. § 343(w)(1).

34. Food Labeling in Online Grocery Shopping; Request for Information, 88 Fed. Reg. 24808, 24810 (Apr. 23, 2023).

35. *Consumer Protection 101*, NAT'L ASSOC. OF ATT'YS GEN. (July 12, 2024, 4:26 PM), <https://www.naag.org/issues/consumer-protection/consumer-protection-101/> [<https://perma.cc/9UN9-2DK9>].

36. *Consumer Protection Laws: 50-State Survey*, JUSTIA (Aug. 6, 2024, 7:18 PM), <https://www.justia.com/consumer/consumer-protection-laws-50-state-survey/> [<https://perma.cc/YY9K-M2MN>].

laws.³⁷ In general, all advertising must be truthful, not deceptive, and have adequate substantiation.³⁸

It is also important to know that certain kinds of claims about food are regulated by FDA, for example, claims about nutrient content and claims that a food has health-related benefits.³⁹ The regulations prohibit certain kinds of claims entirely (such as claims that a food prevents or treats disease) and allow other kinds of claims, such as nutrient content and health claims, only if specific wording is used and mandatory criteria are met.⁴⁰ Even when a claim is true and not misleading, it still may be illegal if it does not comply with applicable regulations.

FDA, USDA, and the Federal Trade Commission (FTC) have overlapping authority with respect to the advertising of food products.⁴¹ State attorneys general also have power to prevent deceptive marketing.⁴² The FDA considers e-commerce webpages to be “labeling” of food products subject to the FDA’s regulations regarding product claims.⁴³ In exercising its power to prevent deceptive advertising, the FTC generally enforces FDA’s standards for nutrient content claims and health claims.⁴⁴

With regard to claims that foods and production methods are organic, the USDA’s Agricultural Marketing Service enforces the Organic Foods Production Act⁴⁵ and the National Organic Program (NOP) regulations.⁴⁶ It is illegal to sell, label, or represent an agricultural product as organic unless it was produced in

37. *Anticompetitive Practices*, FED. TRADE COMM’N (Aug. 6, 2024, 7:20 PM), <https://www.ftc.gov/enforcement/anticompetitive-practices> [<https://perma.cc/W74Z-EVQU>].

38. *Consumer Protection 101*, *supra* note 35.

39. *See generally* 21 C.F.R. § 101.13 (2024).

40. *See, e.g., id.* (regarding nutrient content claims, general principles); *id.* § 101.14 (regarding general requirements of health claims).

41. *Enforcement Policy Statement on Food Advertising*, FED. TRADE COMM’N (May 13, 1994), www.ftc.gov/legal-library/browse/enforcement-policy-statement-food-advertising [<https://perma.cc/VA64-4ZSG>].

42. *Consumer Protection 101*, *supra* note 35.

43. Letter from Food and Drug Admin. Regarding Food Labeling to Manufacturers (Sept. 20, 2018), www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-and-fda-dear-manufacturer-letter-regarding-food-labeling [<https://perma.cc/VN4C-VYFY>].

44. *Enforcement Policy Statement on Food Advertising*, *supra* note 41.

45. 7 U.S.C. § 6501.

46. *See generally* 7 C.F.R. § 205 (2024).

compliance with NOP standards.⁴⁷ In general, certification by an accredited organic certifier is required to represent a food as organic.⁴⁸

3. “Extra” State Labeling Requirements

If a farm business sells food products online and ships the products out of state, it is required to comply not only with federal labeling laws and the laws in the farm’s home state, but also with the laws of the buyer’s state.⁴⁹ While, for the most part, state food labeling laws are the same as federal law, there are notable exceptions where state laws impose additional requirements. For example, several states regulate kosher labeling, requiring certification of kosher foods and registration of kosher products.⁵⁰ In addition, a handful of states have laws prohibiting labeling foods as local unless they were produced within the state.⁵¹ Many states also have laws requiring date labeling of perishable foods.⁵²

California’s Proposition 65 (Prop 65) is probably the most significant state labeling law in terms of the potential liability it creates. Prop 65, formally

47. *Id.* § 205.660(c).

48. *Id.* § 205.501.

49. *E.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (“[T]he States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.”); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–44 (1963) (holding that the California Legislature may impose more demanding standards on the quality of avocados imported into the state than the federal standards since the maturity of avocados is not a subject of exclusive federal regulation and the state has a legitimate interest in the protection of the public against fraud and deception in the sale of food products); *Sciortino v. Pepsico, Inc.*, 108 F. Supp. 3d 780, 796 (N.D. Cal. 2015) (holding California’s Proposition 65 warning requirements for food not preempted by federal laws).

50. *See, e.g.*, 410 ILL. COMP. STAT. ANN. 645/1 (West 2024); MINN. STAT. ANN. §§ 31.651–.681 (West 2024); N.Y. AGRIC. & MKTS. LAW § 201-a (McKinney 2024); N.J. ADMIN. CODE § 13:45A-21 (2024).

51. *See, e.g.*, ME. REV. STAT. ANN. tit. 7 § 443-A (West 2024) (prohibiting the sale of farm products as “locally grown” unless produced within the state); MD. CODE REGS. 15.01.19.03(B)(5) (West 2024) (stating “[l]ocally grown” includes grown in “or within 50 miles of the Maryland state border,”); N.H. REV. STAT. ANN. § 426:5 (2024) (declaring the terms “local,” “locally grown,” and “locally produced” are limited to products grown in New Hampshire); N.J. STAT. ANN. § 4:10-19.3 (West 2024) (prohibiting labeling or advertising produce as local unless it was grown, harvested, and packaged in New Jersey); VT. STAT. ANN. tit. 9, § 2465a(b) (West 2024) (stating “local” and “locally grown or made” is allowed for products that also identify the specific region where grown).

52. *U.S. Food Waste Policy Finder*, REFED (May 7, 2024), policyfinder.refed.org/?category=prevention&key=date-labeling [<https://perma.cc/LYW4-GNRX>].

California's Safe Drinking Water and Toxic Enforcement Act of 1986, requires manufacturers to provide warnings if their products may expose consumers to substances that are determined by the state to be carcinogens or reproductive toxins.⁵³ Agricultural products commonly contain heavy metals, such as lead, arsenic, and cadmium, at levels that exceed regulatory "safe harbor" limits and require warnings under Prop 65.⁵⁴ The California Office of Environmental Health Hazard Assessment is the state agency responsible for the administration of Prop 65.⁵⁵ However, the biggest risk of enforcement comes from civil lawsuits brought by "bounty hunter" plaintiffs' lawyers.⁵⁶ The consequences of not providing a warning when required can be severe, including civil penalties of up to \$2,500 per day.⁵⁷ Private enforcers can recover their attorneys' fees.⁵⁸ Given the potential consequences for non-compliance, it behooves anyone planning to sell products in California to determine if they are required to provide a warning.

C. E-Commerce Food Delivery Obligations

Currently, there are no federal regulations specifically for direct-to-consumer e-commerce food delivery.⁵⁹ Farm businesses that are selling food online might have to comply with federal, state, and/or local food safety rules in terms of how they grow, harvest, process, and package the food, but that's not just because they're selling the food online.

Direct-to-consumer e-commerce businesses are not currently required to ship food using a fleet that's covered by the Sanitary Food Transportation Act, or the Sanitary Transportation of Human and Animal Foods rule that was included in the Food Safety Modernization Act (FSMA).⁶⁰ This means the shipper may lack

53. CAL. HEALTH AND SAFETY CODE § 25249.6 (West 2024).

54. See *The Proposition 65 List*, CAL. OFF. OF ENV'T. HEALTH HAZARD ASSES. (July 6, 2024, 11:52 PM), oehha.ca.gov/proposition-65/proposition-65-list [https://perma.cc/V9XQ-HDBL].

55. *Id.*

56. Sophia B. Castillo & Mitzi Ng Clark, *June 2024 Bounty Hunter Plaintiff Claims*, THE NAT'L L. REV. (July 16, 2024), https://natlawreview.com/article/june-2024-bounty-hunter-plaintiff-claims [https://perma.cc/3YB8-FVAL].

57. CAL. HEALTH AND SAFETY CODE § 25249.7 (West 2024).

58. *Id.*

59. Muse, *supra* note 14.

60. See Sanitary Food Transportation Act of 2005, Pub. L. 109-59, § 7201, 119 Stat. 1144, 1150 (2005); *FSMA Final Rule on Sanitary Transportation of Human and Animal Food*, U.S. FOOD & DRUG ADMIN. (Sept. 12, 2018), https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-sanitary-transportation-human-and-animal-food [https://perma.cc/E5YH-E34A] (explaining the law applies to shippers, receivers, loaders, and

temperature control in its trucks, drivers might not be trained in food safety, and there could be no restrictions on mixing hazardous cargo with food.⁶¹ Furthermore, once the food is with an unregulated shipper (in terms of food safety), the traceability chain is broken, particularly when shipping companies use “last-mile delivery” services.⁶²

The FDA is starting to get interested in e-commerce food delivery, as evidenced by issuing a series of guidance documents, organizing a conference, and requesting information on the topic of food delivery.⁶³ In July 2020, the FDA released its New Era of Smarter Food Safety Blueprint, outlining the approach the agency said it will take over the next decade in four priority areas—what the FDA calls “core elements.”⁶⁴ The third core element is “New Business Models and Retail Modernization.”⁶⁵ Within that element, the agency says it is exploring the best ways “to address new business models that may not be currently covered by FSMA,” including, “who ‘owns’ the food in the last mile” of delivery.⁶⁶

In 2021, the FDA held a virtual conference called the “FDA New Era of Smarter Food Safety Summit on E-Commerce: Ensuring the Safety of Foods Ordered Online and Delivered Directly to Consumers.”⁶⁷ The agency said the purpose of the summit was to help improve understanding of how human and animal foods are sold through “Business-to-Consumer . . . e-commerce models.”⁶⁸ Concerns brought up during the summit included the lack of federal oversight and inappropriate or inadequate regulations.⁶⁹

carriers. However, there is no provision requiring direct-to-consumer e-commerce businesses to ensure their transportation provider complies with the law).

61. See generally *FSMA Final Rule on Sanitary Transportation of Human and Animal Food*, *supra* note 60.

62. See U.S. FOOD AND DRUG ADMIN., NEW ERA OF SMARTER FOOD SAFETY 13 (2020), <https://www.fda.gov/media/139868/download?attachment> [<https://perma.cc/SP59-BGND>].

63. See, e.g., FDA Notice, Food Labeling in Online Grocery Shopping; Request for Information, 88 Fed. Reg. 24808 (Apr. 24, 2023).

64. NEW ERA OF SMARTER FOOD SAFETY, *supra* note 62, at 6.

65. *Id.* at 7.

66. *Id.* at 13.

67. *New Era of Smarter Food Safety Summit on E-Commerce: Ensuring the Safety of Foods Ordered Online and Delivered Directly to Consumers*, U.S. FOOD & DRUG ADMIN. (Dec. 14, 2021), <https://www.fda.gov/food/workshops-meetings-webinars-food-and-dietary-supplements/new-era-smarter-food-safety-summit-e-commerce-ensuring-safety-foods-ordered-online-and-delivered> [<https://perma.cc/FK8P-R89R>].

68. *Id.*

69. *Id.*

In December 2022, the FDA published “Best Practices on Food Safety for Online Delivery Services,” which covers food safety recommendations for third-party delivery services.⁷⁰ It is only a guidance document, not a regulation, but it is an indication of what the agency wants to see for possible future regulation of e-commerce food delivery.⁷¹ Specifically, the recommendations focus on food safety practices companies should consider when delivering food directly to consumers, including recommendations for appropriate packaging, temperature control and storage, labeling and allergen control, and processes for returning compromised product.⁷²

In April 2023, the FDA issued a Request for Information (RFI) on “Food Labeling in Online Grocery Shopping.”⁷³ The purpose of the request was to obtain up-to-date information on the “content, format, and accuracy of food label information” presented through online grocery shopping platforms.⁷⁴ The RFI was part of the Biden-Harris Administration’s “National Strategy on Hunger, Nutrition, and Health,”⁷⁵ released in September 2022, and FDA plans to use the responses to enhance consumer access to consistent and accurate nutrition, ingredient, and allergen information for packaged foods sold online.⁷⁶

As such, it seems likely that federal regulation of e-commerce food delivery businesses is forthcoming. Farm clients who are expanding into e-commerce food delivery will need advice on general risk management strategies such as developing a food safety and traceability plan; obtaining Good Agricultural Practices or FSMA Produce Safety Rule certification; using tamper-proof, airtight,

70. *FDA Highlights Best Practices on Food Safety for Online Delivery Services*, U.S. FOOD & DRUG ADMIN. (Dec. 9, 2022), <https://www.fda.gov/food/cfsan-constituent-updates/fda-highlights-best-practices-food-safety-online-delivery-services> [<https://perma.cc/4PMD-9CDS>].

71. *Id.*

72. *Id.*

73. FDA Notice, *Food Labeling in Online Grocery Shopping; Request for Information*, 88 Fed. Reg. 24808 (April 24, 2023).

74. *Id.*

75. THE WHITE HOUSE, *BIDEN-HARRIS ADMINISTRATION NATIONAL STRATEGY ON HUNGER, NUTRITION, AND HEALTH 22* (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/09/White-House-National-Strategy-on-Hunger-Nutrition-and-Health-FINAL.pdf> [<https://perma.cc/N6Y8-Z4SY>].

76. *Food Labeling in Online Grocery Shopping; Request for Information*, 88 Fed. Reg. at 24809 (“[O]nline grocery” refers to foods ordered through grocery retailer (e.g., supermarket) websites, directly from the manufacturer’s websites, and third-party online grocery providers (e.g., a grocery fulfillment service that offers food products from various grocery retailers). It does not include ready-to-eat meals (e.g., salad or hot food bar) that are ordered online from grocery providers for pick-up or delivery.”).

and insulated packaging; employing GPS and temperature-monitoring solutions; vetting delivery vendors for temperature control and delivery personnel health standards; and preparing crisis management protocols.⁷⁷

III. MARKETING AND ADVERTISING IN DIGITAL SPACES

No farm business would be successful without marketing and advertising to draw in customers and create brand loyalty. Producers, especially small or family-owned businesses, may not give sufficient thought or planning to their marketing needs and may not understand that laws apply. When advising farm clients in their marketing and advertising efforts, the following principles are paramount: avoiding actions that violate the rights of others, protecting what is rightfully theirs, and maintaining truth in advertising.

A. Helping Clients Avoid Trademark and Copyright Infringement

Trademark⁷⁸ and copyright⁷⁹ infringements are common risks farm clients face when trying to market their farms or farm products. The best way for them to avoid lawsuits, of course, is to make sure they don't infringe on others' intellectual property. Most people know that, without written permission or a license from the owner of a trademark, they may not use someone else's trademark. It is also fairly common knowledge that using someone else's image, design, or content without permission from the copyright owner is a copyright violation. Clients may,

77. There are also a number of resources available to help guide e-commerce food delivery businesses. *See, e.g.*, CONFERENCE FOR FOOD PROT., GUIDANCE DOCUMENT FOR DIRECT-TO-CONSUMER AND THIRD-PARTY DELIVERY SERVICE FOOD DELIVERY 21 (2020), <https://www.foodprotect.org/media/guide/guidance-document-for-direct-to-consumer-and-third-party-delivery.pdf> [<https://perma.cc/8EKQ-G5H8>] (providing food safety best practices for managing or performing direct to consumer or third-party delivery services).

78. A trademark is a distinctive mark used to identify and differentiate specific goods or services. *See Trademark & Trade Dress*, LUCAS & MERCANTI LLP (July 9, 2024, 6:55 PM), <https://www.lmiplaw.com/trademarks-and-trade-dress/> [<https://perma.cc/F3EC-KPXU>]. It can take various forms, including words, names, symbols, slogans, devices, sounds, fragrances, colors, or "trade dress." *Id.* Trademarks help people and businesses build brand trust and loyalty, making them valuable assets to their owners. *Id.*

79. Copyright protects original works automatically the moment the work is created in a tangible form. U.S. COPYRIGHT OFF., COPYRIGHT BASICS 2, 6 (2021), www.copyright.gov/circs/circ01.pdf [<https://perma.cc/KWP4-Z3V2>]. No © symbol is required to protect the work, and the protection applies to both published and unpublished works. *Id.* Copyright grants four exclusive rights: to reproduce, publicly display, create derivatives, and distribute the work. *Id.* It does not protect facts, ideas, systems, or methods of operation, but it may protect their expression. *Id.*

however, overlook nuances and pitfalls that attorneys can help them navigate.⁸⁰ Counsel can provide value to farms by helping them conduct basic due diligence like doing a trademark search and reviewing marketing materials for copyrighted material misuse.

B. Helping Clients Protect Their Intellectual Property

Attorneys can also provide value to farm clients by helping them protect their intellectual property.

1. Protecting Trademarks

Most farm owners understand the importance of creating a brand for their business. What they may not understand are the steps necessary to create a strong brand and the value of investing in protecting the brand. In the United States, trademarks can be protected in three ways. The first way is through common law rights.⁸¹ Trademark rights exist without formal registration, known as a “common law” trademark claim.⁸² Businesses can use the SM (service mark) or TM (trademark) symbols before formal registration.⁸³ Once registered, the ® symbol can be used.⁸⁴ The second and third way is through state and/or federal registration: Trademarks can be registered federally with the United States Patent and Trademark Office (USPTO) and/or at the state level with the Secretary of State.⁸⁵ Federal registration is recommended for goods or services used in interstate commerce, as it provides stronger legal protections.⁸⁶

80. For example, farmers probably understand that, unless they have express authorization from the copyright owner, they shouldn't use pictures that they find online because that would be a copyright violation. What they might not know is that that includes pictures of their own farm that someone else may have taken. The image might be of their farm; however, they didn't take the picture, and it's the picture that's protected. *See* 17 U.S.C. § 201(a). Therefore, the farmer will need to get permission from the copyright owner to use that image. *See id.*

81. Neil Juneja, *Choosing the Right Cannabis Trademark Identity*, GLEAM L. (July 9, 2024, 6:58 PM), <https://www.gleamlaw.com/cannabis-law-blog/trademark-law/choosing-right-cannabis-trademark-identity/#:~:text=Trademarks%20can%20be%20protected%20in%20three%20ways%20and/or%20logo%20as%20a%20trademark> [<https://perma.cc/8VLH-PHH7>].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See id.*

Before clients use their mark in marketing materials or apply to register their mark it is important to ensure the mark is not too similar to an existing mark. The easiest way to do this is by searching the United States Trademark Database, which is free for all users.⁸⁷ The client can search the database themselves, but a thorough search requires understanding of trademark law. It might also be prudent to search international registers or registers in other jurisdictions, depending on how broadly the client plans to market using the mark.

When a farm client is ready to file a trademark application in the United States, their attorney should use the “Trademark Electronic Application System” to file the document.⁸⁸ After filing, attorneys should remind clients that renewal is required at regular intervals and set up alerts for when it’s time to renew their trademark registration(s).

2. *Protecting Copyrights*

If a client is using original marketing assets and investing significant time or money into marketing materials, their attorney should discuss registering any copyrights with the United States Copyright Office.⁸⁹ Copyright protection begins automatically once a work is created and fixed in a tangible form, but registration is crucial for enforcing exclusive rights through litigation.⁹⁰ A copyright notice does not replace registration.⁹¹ Attorneys should also discuss with farm clients the importance of clearly outlining intellectual property use expectations in their website’s “Terms of Service” for added protection.

C. FTC Guidelines for Advertising on Social Media

As noted previously, the general principles of truth in advertising, such as not making misleading statements or unsubstantiated claims, holds true for all online and digital platforms, including social media.⁹² While websites are the

87. See *Search Our Trademark Database*, U.S. PAT. & TRADEMARK OFF. (July 6, 2024, 11:35 PM), www.uspto.gov/trademarks/search [<https://perma.cc/7ZWN-JVD9>].

88. See *Apply Online*, U.S. PAT. AND TRADEMARK OFF. (July 6, 2024, 11:36 PM), www.uspto.gov/trademarks/apply [<https://perma.cc/P2CH-M37Q>].

89. See *Register Your Work: Registration Portal*, U.S. COPYRIGHT OFF. (July 6, 2024, 11:34 PM), www.copyright.gov/registration/ [<https://perma.cc/HW5J-BHXA>].

90. *What is Copyright?*, U.S. COPYRIGHT OFF. (July 9, 2024), <https://www.copyright.gov/what-is-copyright/> [<https://perma.cc/FV6Q-6T8R>].

91. *Id.*

92. See Fair Trade Commission Act, 15 U.S.C. § 45(a)(4)(A) (prohibiting “unfair or deceptive acts or practices”); *id.* § 52(a) (prohibiting the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, services, or

primary tool used for online marketing, according to the NASS data, in 2023 approximately 26.5% of farms used social media as a way to provide information to consumers about their business and products.⁹³ These platforms are easily accessible, widely used, and invaluable marketing tools for producers looking to connect directly with their customers, build brand loyalty, and communicate special events or changes in their operations.

The FTC has authority to enforce the prohibitions on unfair or deceptive acts or practices by commencing administrative proceedings, issuing final cease and desist orders, seeking civil penalties, and obtaining injunctive relief in court.⁹⁴ Thankfully, the FTC has published several guides covering the nuances of how it oversees and regulates online advertising and marketing.⁹⁵ Local consumer finance protection bureaus and state regulators can also bring a suit for advertising violations pursuant to state consumer protections laws.⁹⁶

cosmetics); *id.* § 55(a)(1) (detailing how a “false advertisement” is any advertisement that is “misleading in a material respect” (i.e. likely to affect a consumer’s purchasing decision)); *see also* FTC Policy Statement on Deception, Letter from Fed. Trade. Comm’n to The Hon. John D. Dingell, Chairman, Comm. on Energy and Com., U.S. House of Representatives (Oct. 14, 1984) [hereinafter Deception Statement], https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/64DM-J9R2>]; *FTC Policy Statement Regarding Advertising Substantiation*, FED. TRADE COMM’N (Nov. 23, 1984) [hereinafter Substantiation Statement], <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation> [<https://perma.cc/E6VL-3WMQ>].

93. *Percentage of Farms Using the Internet for Farm Business and Marketing*, *supra* note 2 (the average of the Percentage of Farms Conducting Business on Social Media to Provide Farm Information to Consumers and the Percentage of Farms Conducting Business on Social Media to Provide Information on Market Channels for Farm Products).

94. 15 U.S.C. § 45(l).

95. *See, e.g.*, FED. TRADE COMM’N, ADVERTISING AND MARKETING ON THE INTERNET (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bus28-rulesroad-2024_508.pdf [<https://perma.cc/B2QZ-UPCE>]; FED. TRADE COMM’N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [<https://perma.cc/J3YE-GRWL>].

96. NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 33–34 (2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [<https://perma.cc/G3K2-E7YE>] (in almost all states the Unfair and Deceptive Practice statutes allow the state to ask a court to impose a monetary penalty on a business that has engaged in an unfair or deceptive practice).

1. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising

Advertising on social media channels often involves the use of endorsements, which is an advertising message that consumers are likely to believe reflects the opinions or beliefs of the person communicating (who is not the sponsoring business).⁹⁷ Endorsements can be communicated in a variety of ways beyond verbal statements.⁹⁸ For example, consider an “unboxing” video on YouTube where product features are highlighted and discussed, or a reel on Instagram that features someone enjoying a beverage from a local store, or simply tagging a business in a Facebook post.

If there’s a material connection between an endorser and the producer that consumers wouldn’t expect, but knowledge of the connection would affect how consumers evaluate the endorsement, that connection should be disclosed clearly and conspicuously.⁹⁹ Endorsements must reflect the truthful experiences and opinions of the endorsers.¹⁰⁰ Endorsers—who can be individuals, groups, or institutions—should avoid reviewing or promoting products they’ve never personally experienced in a way that suggests they have.¹⁰¹

A “clear and conspicuous” disclosure must be made if any financial, employment, personal, or family relationship exists between the business or product and the endorser.¹⁰² On social media platforms, “clear and conspicuous” means that the disclosure is hard to miss, easily understandable, unavoidable, and matches the format of the endorsement.¹⁰³ An endorsement provided visually and verbally in, for example a video on TikTok, should include a visual disclosure statement that, by “its size, contrast, location, the length of time it appears, and other characteristics, . . . stand[s] out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.”¹⁰⁴ Audible disclosures should be delivered in a volume, speed, and cadence that can be easily heard and

97. 16 C.F.R. § 255.0(b) (2024) (stating if the message isn’t an advertising message by or on behalf of a marketer, it isn’t an endorsement).

98. *Id.* (“Verbal statements, tags in social media posts, demonstrations, depictions of the name, signature, likeness or other identifying personal characteristics of an individual, and the name or seal of an organization can be endorsements.”).

99. *Id.* § 255.5(a).

100. *Id.* § 255.2(b).

101. *Id.* § 255.0(g)(3) (noting that a spokesperson or announcer who never used a product can be distinguished by clearly disclosing that they are speaking on behalf of a company and not on the basis of their own opinions).

102. *Id.* § 255.0(f).

103. *Id.*

104. *Id.*

understood.¹⁰⁵ Importantly, at least a “significant minority of the audience” must understand the relationship based on the disclosure.¹⁰⁶ Common hashtags, like “#ad” and “#sponsored,” often accompany social media posts and are acceptable ways to signal to the public that a post contains sponsored content, so long as they do not require clicks to reveal the text.¹⁰⁷

Farm businesses managing their own social media advertising efforts should be aware of how a material connection with an endorser could be established and understand when disclosures may be required. Giving away incentives and free samples in exchange for reviews is one clear way to create a material connection.¹⁰⁸ Posts by friends and family or other parties who have an interest in the success or profitability of the business (e.g. employees) could also be considered endorsement relationships that require disclosure.¹⁰⁹

Influencers who frequently promote a business should continue to disclose their connection to the advertising business for as long as they are under contract or receiving compensation, even if the endorser thinks the relationship has become common knowledge to their followers.¹¹⁰ The FTC would consider each new endorsement made without a disclosure deceptive because viewers might not have seen the prior posts.¹¹¹ Although endorsers may not be agents or employees of the advertising business, failure by a business to adequately monitor endorser activities on its behalf could result in steep financial consequences. A recent FTC enforcement action against Teami, LLC illustrates how having a written policy on endorsements is not sufficient for businesses to avoid liability.¹¹² Even though

105. *Id.*

106. *Id.* § 255.5(a).

107. *FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N. (July 4, 2024, 12:08 AM) [hereinafter *FTC’s Endorsement Guides*], www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking [https://perma.cc/TLX3-BT4F]; see Warning Letters from Fed. Trade Comm’n to Various Instagram Influencers (Mar. 5, 2020) [hereinafter *Warning Letters from Fed. Trade Comm’n*], www.ftc.gov/system/files/documents/cases/1823174teamiwarningletters.pdf [https://perma.cc/5BZA-2JLJ] (“Consumers must be able to see the disclosure without having to click to expand additional text. A disclosure should not be hidden among multiple tags, hashtags, or Instagram handles.”).

108. 16 C.F.R. § 255.0(g)(7)(iii).

109. See, e.g., *FTC’s Endorsement Guides*, *supra* note 107.

110. Warning Letters from Fed. Trade Comm’n, *supra* note 107.

111. *Id.* (“In addition, you should put a disclosure in each and every social media post and not assume that consumers will see and associate multiple posts.”).

112. Complaint for Permanent Injunction and Other Equitable Relief, Fed. Trade Comm’n v. Teami, LLC., No. 8:20-cv-00518 (M.D. Fla. Mar. 17, 2022) (alleging deceptive failure to disclose material connection between endorsers and the company).

“paid influencers were contractually required to obtain approval from Teami for their Instagram posts—including the specific text used—before publishing them . . . numerous Instagram posts published by paid influencers after May 2018 did not comply with Teami’s own social media policy.”¹¹³ Judgment was ordered against Teami, LLC on all claims, including a total monetary penalty of over \$15 million entered against the company and the individual owners.¹¹⁴

2. *FTC Proposed Rule on the Use of Consumer Reviews and Testimonials*

In August of 2024, the FTC finalized updates to the Trade Regulation Rule on the use of consumer reviews and testimonials.¹¹⁵ The rule includes specific acts or practices that could expose marketers to civil penalties.¹¹⁶ Certain practices related to manipulating customer reviews for the purpose of distorting or misrepresenting consumers’ perception or understanding will be prohibited:

1. Creating, purchasing, or procuring fake or misleading consumer reviews and testimonials ([16 C.F.R.] § 465.2) . . .
2. Using or repurposing consumer reviews, otherwise known as “review hijacking,” (§ 465.3) . . .
3. Buying positive or negative reviews (§ 465.4) . . .
4. Writing, disseminating, or soliciting insider reviews or testimonials that fail to include adequate disclosures (§ 465.5) . . .
5. Representing a company-controlled website or entity as providing independent reviews or opinions (§ 465.6) . . .

113. *Id.* at 13.

114. Stipulated Order for Permanent Injunction and Monetary Judgment at 11–13, Fed. Trade Comm’n v. Teami, LLC., No. 8:20-cv-00518 (M.D. Fla. Mar. 17, 2022).

115. Press Release, Fed. Trade Comm’n, Fed. Trade Comm’n Announces Final Rule Banning Fake Reviews and Testimonials (Aug. 14, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials#:~:text=The%20Federal%20Trade%20Commission%20today%20announced%20a%20final,agency%20to%20seek%20civil%20penalties%20against%20knowing%20violators> [<https://perma.cc/MW4S-A55H>].

116. Raqiyyah Pippins et al., *FTC Proposes New Rule to Prohibit Fake Reviews*, ARNOLD & PORTER (July 7, 2023), <https://www.arnoldporter.com/en/perspectives/advisories/2023/07/ftc-new-rule-fake-reviews> [<https://perma.cc/ZL7L-7CV8>]

(“The FTC cited the U.S. Supreme Court’s decision in *AMG Capital Management LLC v. FTC*, [593 U.S. 67 (2021)]—which severely limited the agency’s ability to obtain monetary relief—as one of the key factors for pursuing the rulemaking.”).

6. Suppressing reviews through unjustified threats or misleading display of reviews (§ 465.7) . . .
7. Misusing fake indicators of social media influence (§ 465.8).¹¹⁷

“Consumer review” is defined broadly to include, among other things, consumer ratings (e.g., star ratings), regardless of whether they include text.¹¹⁸ With the new consumer review standards, FTC is targeting “digital dark patterns.”¹¹⁹ Digital dark patterns are online practices intended to manipulate consumers into taking actions they did not intend by creating a false sense of social proof (endorsements), scarcity, or urgency, or by serving to obstruct, hide, interfere, coerce, or present asymmetric choices.¹²⁰ For example, a “hiding” tactic of drip pricing is when a company advertises only part of a product’s total price initially, and then imposes other mandatory charges late in the buying process (e.g. convenience fees).¹²¹ An obstruction tactic is creating roadblocks to subscription cancellations with tedious, time-consuming steps.¹²² Multiple techniques are often employed simultaneously, increasing the likelihood that consumers will become confused or acquiesce in frustration.¹²³

Helping farm clients navigate their social media marketing strategies should include a thorough review of their endorser engagement and disclosure policies, such as monitoring and outlining clear consequences to endorsers who fail to correct or follow acceptable practices, and ensuring employees and others are properly trained on consumer review requirements. Given the potential civil penalties under the consumer review and testimonial rules, attorneys should consider advising farm clients on how to evaluate and eliminate practices intended to manipulate and frustrate consumers that could fall into one of the “digital dark patterns.”¹²⁴

D. Commercial Communications

Most farm businesses use a variety of advertising channels to disseminate information about events, promotional offers, and other information to customers.

117. *Id.*

118. *Id.*

119. STEPHANIE LIEBNER ET AL., FED. TRADE COMM’N, BRINGING DARK PATTERNS TO LIGHT 1 (2022), www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [<https://perma.cc/3ZZY-KCYY>].

120. *Id.* at 21–26.

121. *Id.* at 22–23.

122. *Id.* at 23.

123. *Id.* at 2.

124. *See id.* at 21–26.

The federal CAN-SPAM Act sets rules for those commercial messages (including emails), which ban false or misleading information in commercial communications from a business and establish penalties for violations.¹²⁵ Commercial email communications include messages where the primary purpose is to promote or advertise a product or service, including content on a website operated for a commercial purpose.¹²⁶ By contrast, transactional or relationship communications, which facilitate an already agreed-upon transaction, or which update a customer about an ongoing transaction or change in policy, are excluded.¹²⁷

To comply with CAN-SPAM, businesses should ensure commercial emails are clearly and conspicuously identified as an advertisement or solicitation somewhere in the body of the message.¹²⁸ Every email should include a clear and conspicuous free electronic opt-out mechanism (for example, “unsubscribe” buttons), provide the sender’s valid physical postal address, and avoid deceptive or false header or recipient information.¹²⁹ Importantly, businesses should comply with a consumer’s opt-out request within ten business days.¹³⁰

Each separate email in violation of the CAN-SPAM Act is subject to penalties of up to \$50,120, and more than one person may be held responsible for violations.¹³¹ States also have their own laws—not completely preempted—that may prohibit businesses from sending emails containing false or misleading information in the subject line.¹³² For example, under the Maryland Commercial

125. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701.

126. *Id.* § 7702(2)(A).

127. *Id.* § 7702(2)(B); 16 C.F.R. § 316.3(c) (2024).

128. 15 U.S.C. § 7704(a)(5)(A)(i).

129. *Id.* § 7704(a)(1), (a)(5).

130. *Id.* § 7704(a)(4)(A); *see also* Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, *United States v. ConsumerInfo.com, Inc.*, No. 8:23-cv-01494 (C.D. Cal. Aug. 14, 2023) (ordering Experian to pay \$650,000 in civil penalties and to comply with the CAN-SPAM Act after failing to provide customers a way to opt-out of commercial email communications).

131. David J. Ervin, *CAN-SPAM Act Compliance*, REUTERS (Sep. 2023), <https://www.reuters.com/practical-law-the-journal/transactional/can-spam-act-compliance-2023-09-01/> [<https://perma.cc/ZH8X-T9E9>].

132. Similar to what is currently occurring with data privacy laws, before the CAN-SPAM Act was adopted to establish rules for commercial communications, the states were individually writing and passing their own various laws on the subject. The CAN-SPAM Act was the federal response to align and preempt the majority of state laws, except for those provisions that are included in the savings clause scope. *See* 15 U.S.C. § 7707. State law provisions and penalties on false or misleading subject lines, false routing information, and the use of false third-party return addresses or domain names remain valid. *Id.* § 7707 (b)(1).

Electronic Mail Act, a plaintiff may recover reasonable attorneys' fees, as well as the greater of statutory damages of \$500 per violative email received or actual damages (if any).¹³³

E. Cause-Based Marketing Ventures

Cause marketing is the collaboration between a for-profit company or brand and a nonprofit organization to produce mutually beneficial results.¹³⁴ Cause marketing campaigns can be structured in a number of ways. (1) General charitable support: a farm may donate a fixed amount in exchange for licensing the use of a charity's name and mark. (2) Donation collection: a farm may set up an online portal through which a consumer can donate directly to a charitable organization, or the farm may host an event to raise money for a charity. (3) Social media activity in exchange for a donation: a farm may encourage consumers to like or follow its social media page in exchange for a donation to a charitable organization. (4) Commercial co-ventures: a farm promises a portion of sales or matching donations or donated items per sale.

All states regulate charitable fundraising efforts in some capacity. Some states specifically regulate commercial co-ventures by, for example, requiring registration of the for-profit entity, payment of registration fees or a bond, regularly reporting on co-venture activities, verification that the charity is legitimate and a registered nonprofit, and a written contract between the for-profit and nonprofit entities.¹³⁵ Even if the state where the farm is physically located does not have any official requirements regarding the establishment of charitable co-venture marketing efforts, the farm business may be subject to such laws in other states where it advertises its products and activities.¹³⁶

133. MD. CODE ANN., COM. LAW § 14-3003 (West 2024).

134. *How to Use Cause Related Marketing?*, INTUIT MAILCHIMP (Aug. 8, 2024, 9:56 PM), <https://mailchimp.com/resources/what-is-cause-marketing/> [<https://perma.cc/KVP5-KL9B>].

135. *See, e.g., Commercial Coventurers for Charitable Purposes*, STATE OF CA. DEP'T. OF JUST. OFF. OF THE ATT'Y GEN. (July 3, 2024, 11:20 PM), <https://oag.ca.gov/charities/pf/cc> [<https://perma.cc/F97B-75X3>]; *Professional Fundraiser Guide*, MASS.GOV (July 6, 2024, 11:14 PM), <https://www.mass.gov/info-details/professional-fundraiser-guide> [<https://perma.cc/YN3G-VUJW>]; *Professional Fundraisers and Solicitors*, S.C. SEC'Y OF STATE (July 6, 2024, 11:13 PM), <https://sos.sc.gov/online-filings/charities-pfrs-and-raffles/professional-fundraisers-and-solicitors> [<https://perma.cc/Q92Q-AGB4>].

136. *See* Ron Barrett, *Charitable Sales Promotions: A Primer for Charities and Commercial Co-venturers - Part 1*, COGENCYGLOBAL (May 19, 2022), <https://www.cogencyglobal.com/blog/charitable-sales-promotions-a-primer-for-charities-and-commercial-co-venturers-> [<https://perma.cc/8SFD-NTXT>].

F. Online Sweepstakes and Contests

Online sweepstakes and contest promotions are increasingly popular marketing tools. Due to the complex web of United States laws governing sweepstakes and contests, clients must exercise caution. No single federal law governs all contests and sweepstakes, a few federal laws cover certain aspects,¹³⁷ while each state has its own regulations on gambling, lotteries, and promotions.¹³⁸ Carelessly conducting a contest or sweepstakes can lead to costly consequences.

The first thing for clients to know is they cannot run a lottery. Under federal and state laws, lotteries cannot be run by private entities.¹³⁹ Lotteries involve prizes, consideration, and chance.¹⁴⁰ In order to avoid running a lottery, a business must eliminate at least one of those three elements from its promotion.¹⁴¹ Careful review of the promotional materials is warranted to make sure it cannot be classified as a lottery.

Clients may instead run a contest or sweepstakes. Knowing the difference between a contest and a sweepstakes is important because businesses must use the correct terms in marketing their promotion. Contests are skill-based promotions where winners are chosen based on merit.¹⁴² In most states, but not all,¹⁴³ requiring a purchase or other form of consideration for contest entries is allowed as long as the winners are chosen based on merit—thereby eliminating the third element of chance, while the other two elements of a lottery (a prize and consideration) remain.¹⁴⁴

In contrast, sweepstakes are luck-based. Winners are chosen at random, and no purchase can be required to participate.¹⁴⁵ If someone has to make a purchase to enter a sweepstakes, it's a lottery.¹⁴⁶ If a farm business wants to run a chance-

137. *See, e.g.*, Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. § 3017.

138. *See generally* U.S. POSTAL SERV., A CONSUMER'S GUIDE TO SWEEPSTAKES AND LOTTERIES (2007), https://www.uspis.gov/wp-content/uploads/2019/12/pub-546_consumers-guide-to-sweepstakes-lotteries_508.pdf [<https://perma.cc/MS6-PAQW>].

139. *Id.* at 3.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See, e.g.*, COLO. REV. STAT. ANN. § 6-1-803 (West 2024); VT. STAT. ANN. tit. 13, § 2143b (West 2024) (Colorado and Vermont both prohibit purchase requirements for sweepstakes and for contests where winners are chosen on merit).

144. *See, e.g.*, LA. STAT. ANN. § 51:1726(5) (2024); ME. REV. STAT. ANN. tit. 17, § 1831(6), (17) (West 2024); ME. REV. STAT. ANN. tit. 17-A, § 952(6) (West 2024).

145. A CONSUMER'S GUIDE TO SWEEPSTAKES AND LOTTERIES, *supra* note 138, at 3.

146. *See id.*

based promotion that involves entrants providing consideration for a chance to win, it must also provide an entirely free alternate method of entry (AMOE).¹⁴⁷ Common AMOEs include completing an online entry form, in-person entry at stores or events, sharing the giveaway on social media,¹⁴⁸ or entering the sweepstakes via social media, email, or text.¹⁴⁹ All the AMOEs must be disclosed in the sweepstakes rules, and people who enter the sweepstakes using an AMOE must have the same odds of winning as all other entrants.¹⁵⁰

Lastly, every promotion should have clear rules. The rules are the contract between the sponsor and the entrants.¹⁵¹ They safeguard the sponsor in case issues arise during the promotion (e.g., a virus infects the entry platform and causes multiple winners, a contestant submits an inappropriate entry that the sponsor wants to disqualify).¹⁵² Every state has different requirements regarding the exact information that has to be included in the official rules for the promotion.¹⁵³ Generally, however, your client should include the following:

- Name and address of the sponsor;
- Where people can find the official rules;
- Exactly how people can participate, and for a sweepstakes, a statement that no purchase is necessary to enter, that a purchase will not enhance the chances of winning, and clear and conspicuous information about the AMOE;

147. *Alternate-Method-of-Entry (AMOE)*, PROMOTION ACTIVATORS (July 27, 2024, 12:41 PM), <https://promotionactivators.com/faq-items/alternate-method-of-entry-amoe#:~:text=AMOE%20stands%20for%20alternate%20method,entry%20methods%20require%20a%20purchase> [https://perma.cc/UMG6-QVC5].

148. *See* 16 C.F.R. § 255.5 (2024). The FTC has made it clear that offering entries for sweepstakes in exchange for mentions in social media creates a material connection between the promotion sponsor and the consumer, and the consumer then, in effect, becomes an influencer for the brand, in which case that relationship must be disclosed, and the correct hashtags must be used. *See id.*

149. Jennifer Valentino, *What Is an AMOE?*, NAT'L SWEEPSTAKES CO. (Sept. 27, 2022), <https://nationalsweepstakescompany.com/blog/what-is-an-amoe-alternate-method-of-entry/#:~:text=Your%20AMOE%20must%20provide%20entrants,signing%20up%20via%20the%20AMOE> [https://perma.cc/2HR5-FLMW].

150. *Id.*

151. *Sponsoring Sweepstakes Without Getting Swept into a Lawsuit*, BERNSTEIN SHUR (July 27, 2024, 12:16 PM), <https://www.bernsteinshur.com/what/publications/sponsoring-sweepstakes-without-getting-swept-into-a-lawsuit/> [https://perma.cc/Z5TM-BF7C].

152. *Id.*

153. *Id.*

- Entry eligibility requirements (e.g., age and states of residence) and exclusions (e.g., family members of sponsor employees);
- The value of the prize;
- The number of prizes available and the number of entries permitted;
- Opening and closing dates for submitting entries, including time zones;
- The odds of winning the prize based on the number of estimated and completed entries received;
- When and how winners will be selected, including what happens in the event of a tie;
- For a contest, detailed directions about what an entrant must submit and in what format, and information about the selection criteria and who the judging panel will be;
- When prizes will be awarded; and
- How and when a list of winners will be available.¹⁵⁴

States may require additional filings and registration, impose prize limits, and/or require bonding for giveaways.¹⁵⁵ National prizes must comply with each state's laws.¹⁵⁶ Requiring winners to travel for prize collection may violate laws

154. See *Sweepstakes Law Basics*, OLSHAN (Aug. 1, 2024, 1:10 PM), <https://www.olshanlaw.com/sweepstakes-law-basics> [<https://perma.cc/Z2LJ-RZWZ>].

155. For example, Florida and New York require registration and bonding if the total value of the prizes offered is greater than \$5,000. FLA. STAT. ANN. § 849.094(3), (4)(a) (West 2024); N.Y. GEN. BUS. LAW § 369-e(1) (McKinney 2024). Rhode Island has no bonding requirement but does require registration if the value of the prizes offered is greater than \$500. 11 R.I. GEN. LAWS ANN. § 11-50-1 (West 2024). Arizona requires registration of contests, but not sweepstakes. ARIZ. REV. STAT. ANN. § 13-3311 (2024).

156. See, e.g., *State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 299 (Wash. 1972) (the fact that the FTC, which filed a complaint challenging the nature of defendant's advertising for its word puzzle game on grounds of misrepresentation, did not take a position with regard to whether the game was an unlawful wager or lottery did not preclude state from taking such a posture); *Dep't of Legal Affs. v. Rogers*, 329 So. 2d 257, 267 (Fla. 1976) (entry of FTC cease and desist order, which dealt only with deceptive aspects of sweepstakes promotion and contained no indication the FTC considered the lottery issue, did not preclude the Florida Supreme Court from striking down sweepstakes as a lottery under state law).

banning post-winning consideration.¹⁵⁷ Additionally, a variety of laws govern giveaways relating to certain industries like dairy, alcohol, and cannabis.¹⁵⁸

What businesses should never do is copy rules that they see in other businesses' promotions. Attorneys should encourage clients to vet their rules for compliance and make sure they understand the promises they are making. Clients also must ensure the same version of their rules are posted in each place they are promoting the sweepstakes or contest.

In all likelihood, the contest or sweepstakes will be run on a social media platform such as Facebook, X, Instagram, or TikTok, which means it's important to ensure clients are complying with the respective platforms' promotion guidelines and rules. Each platform has rules about promotions, which are subject to change.¹⁵⁹ Attorneys can help clients by interpreting those rules and making sure they are following the most current version.

In addition to complying with the rules for running a contest or sweepstakes, there are other considerations about which attorneys will want to remind clients to be cautious. For example, if a client wants to use entries as a way to build their library of digital marketing content by having people submit pictures as part of the promotion, remind them that they should provide notice in the rules informing entrants that any copyright ownership in the photographs transfers to the client upon entry.¹⁶⁰ Clients might also want to send marketing materials to the email addresses or mobile phone numbers that they collect from entrants. In that case, be sure to remind them they need to consider if that might violate the Telephone Consumer Protection Act,¹⁶¹ the CAN-SPAM Act,¹⁶² or state laws.

IV. GENERAL E-COMMERCE COMPLIANCE CONSIDERATIONS

By doing business online, farmers add layers of regulatory complexity to their businesses, including in the areas of disability rights, cybersecurity and privacy, and state sales tax obligations.

157. *E.g.*, TEX. BUS. & COM. CODE ANN. § 621.108(a) (West 2023) (prohibiting offering a prize if the person must incur an expense to receive the prize).

158. *E.g.*, CAL. BUS. & PROF. CODE § 25600.2(a)(5) (West 2024) (alcohol cannot be the sole prize awarded); *id.* § 26153(a) (cannabis or any product containing cannabis cannot be given as a prize).

159. *See, e.g.*, *Terms and Policies*, FACEBOOK (Aug. 9, 2024, 3:37 PM), www.facebook.com/policies_center/ [<https://perma.cc/4S9M-KV2Q>].

160. *See* discussion *supra* Section III.A.

161. 47 U.S.C. § 227.

162. 15 U.S.C. § 7701.

A. Compliance with Federal and State Civil Rights Laws

Farms operating e-commerce websites should be aware that their sites may be considered “place[s] of public accommodation” that legally must be accessible to persons with disabilities under Title III of the Americans with Disabilities Act (ADA),¹⁶³ and state and local laws, such as the New York State Human Rights Law,¹⁶⁴ the New York State Civil Rights Law,¹⁶⁵ and the New York City Human Rights Law.¹⁶⁶ The United States Department of Justice takes the position that the ADA, including Title III, applies to websites.¹⁶⁷ Additionally, courts have held that private websites are subject to the ADA, as well as state and local civil rights laws, at least when the online business has a “sufficient nexus” to a brick-and-mortar location that is open to the public.¹⁶⁸ Courts in New York, as well as other courts in the First, Second, and Seventh Circuits have held that the ADA and state disability rights laws apply even to online-only businesses.¹⁶⁹

This has led to hundreds of lawsuits brought by a few plaintiffs’ law firms, mostly in New York, on behalf of visually impaired persons.¹⁷⁰ These firms are prolific in filing lawsuits mostly targeting businesses that sell products and offer services through their websites.¹⁷¹ The plaintiffs generally allege that the website operators failed to make their sites accessible because the plaintiffs could not successfully navigate the websites to complete transactions using a screen reader device.¹⁷²

163. 42 U.S.C. § 12182.

164. N.Y. EXEC. LAW § 290 (McKinney 2024).

165. N.Y. CIV. RIGHTS LAW § 40 (McKinney 2024).

166. N.Y.C. ADMIN. CODE § 8-101 (2024).

167. *Guidance on Web Accessibility and the ADA*, U.S. DEP’T OF JUST. CIV. RTS. DIV. (March 18, 2022), <https://www.ada.gov/resources/web-guidance/> [<https://perma.cc/JDE4-TTFA>].

168. *See, e.g., Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019). *But see Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x. 179, 183–84 (3d Cir. 2010) (finding no ADA violation as website is not sufficiently connected to a physical space); *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1276–77 (11th Cir. 2021) (holding that websites are not places of public accommodation).

169. *E.g., Access Living of Metro. Chicago v. Uber Techs., Inc.*, 351 F. Supp. 3d 1141, 1156 (N.D. Ill. 2018); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 397–98 (E.D.N.Y. 2017); *Nat’l Fed’n of the Blind v. Scribd, Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015); *Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 199–202 (D. Mass. 2012).

170. *See, e.g., Andrews*, 268 F. Supp. 3d at 384.

171. *See, e.g., id.* at 385.

172. *See id.* at 386.

To comply with the law and minimize the risk of being sued, farmers that operate e-commerce websites should ensure that they offer reasonable accommodations to persons with disabilities who use the farmer's websites. The Website Content Accessibility Guidelines (WCAG) published by the World Wide Web Consortium are standards for development of accessible websites that are often referenced in legal settlements and by courts as best practice standards, although they have not been formally adopted into law.¹⁷³

B. INFORM Consumers Act for Online Marketplaces

As of June of 2023, the FTC and state attorneys general also enforce the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (INFORM Act).¹⁷⁴ The INFORM Act requires online marketplaces to verify the identity of high-volume third-party sellers on their platforms and make it easier for consumers to report suspicious conduct, such as the sale of stolen or counterfeit goods.¹⁷⁵ Online marketplaces include web platforms like Amazon, eBay, Wal-Mart, Facebook, and Etsy, among many others.¹⁷⁶ However, smaller platforms, like online food hubs or farm markets, may also satisfy the definition of an online marketplace.¹⁷⁷

The law requires online marketplaces to obtain bank account, tax ID, and contact information from certain "high-volume third party seller[s]," and ensure

173. *WCAG 2 Overview*, WEB ACCESSIBILITY INITIATIVE (Mar. 7, 2024), <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/9W5A-5FVF>]; Press Release, U.S. Dep't of Just., Settlement Agreement Under the Americans with Disabilities Act Between the U.S. & the Kroger Co. 3 (Jan. 28, 2022), https://archive.ada.gov/kroger_co_sa.pdf [<https://perma.cc/B5W7-SYAR>]; *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1351 (S.D. Fla. 2017), *rev'd on other grounds*, 993 F.3d 1266 (11th Cir. 2021).

174. 15 U.S.C. § 45f(c), (d).

175. *What Third Party Sellers Need to Know About the INFORM Consumers Act*, FED. TRADE COMM'N (Aug. 2023), www.ftc.gov/business-guidance/resources/what-third-party-sellers-need-know-about-inform-consumers-act [<https://perma.cc/6NDH-5B86>].

176. *The Best Online Marketplaces to Sell Products and Spark Growth*, BIG COM. (Aug. 9, 2024, 5:00 PM), https://www.bigcommerce.com/articles/omnichannel-retail/online-marketplaces/#h2_the_biggest_benefits_of_selling_on_online_marketplaces [<https://perma.cc/7ZVP-TZ2P>].

177. See 15 U.S.C. § 45f(f)(4) (defining an "online marketplace" as a person or business that operates a consumer-directed platform that allows third party sellers to engage in the "sale, purchase, payment, storage, shipping, or delivery of a consumer product in the United States"). Further, "consumer product" includes "tangible personal property for sale and that is normally used for personal, family, or household purposes." *Id.* § 45f(f)(2), 2301(1).

that information is clearly disclosed.¹⁷⁸ Violations could result in civil penalties of \$50,120 per violation for online marketplaces.¹⁷⁹ A “high-volume third party seller” is a seller that doesn’t operate the online marketplace and that, “in any continuous 12-month period during the past 24 months, has had 200 or more separate sales or transactions of new or unused consumer products, and \$5,000 or more in gross revenues.”¹⁸⁰ “The only sales that count are ones made through that online marketplace and for which payment was processed by the online marketplace.”¹⁸¹ This threshold is relatively low and it’s likely that a fair number of farms could meet the definition of a “high-volume third party seller.”¹⁸² The marketplace must “suspend any future sales activity” of the seller if the seller doesn’t provide the information within 10 days of notice of non-compliance.¹⁸³

Farm clients who currently participate in online marketplaces have likely already been asked to disclose the required information. If, however, annual gross sales exceed \$20,000 on a particular marketplace, additional information must be made public to allow customers to directly contact the seller.¹⁸⁴ Practitioners should ask farm clients about their marketing channels to ensure they understand the full implications tied to each platform and report annual updates.

C. Cybersecurity and Consumer Data Privacy Laws

Balancing cybersecurity and consumer data privacy protection obligations should be a key liability concern for small family farms and larger farms alike, particularly as the sector is increasingly reliant on computer software and internet connectivity for conducting business. According to the Federal Bureau of Investigation (FBI), ransomware attacks against farm businesses average about \$320,000 in ransom amounts.¹⁸⁵ In its first annual report, the Food and Agriculture-

178. *Id.* § 45f(a)(1)(A), (b)(1)(A). Individuals can submit their name, work email, and phone. *Id.* § 45f(a)(1)(A)(ii)–(iv). The law specifically exempts businesses that have made their name, business address, and contact information available to the general public; that have a contractual relationship with the marketplace to manufacture, distribute, wholesale, or fulfill shipments of consumer products; and that provide the marketplace with identifying information that the marketplace has verified. *Id.* § 45f(f)(6).

179. *What Third Party Sellers Need to Know About the INFORM Consumers Act*, *supra* note 175.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Spencer Chase, *FBI Warns of Risks Facing Agriculture*, AGRI-PULSE (Mar. 6, 2024, 6:05 AM), www.agri-pulse.com/articles/20755-fbi-warns-of-risks-facing-agriculture.

Information Sharing and Analysis Center (Food and Ag-ISAC) said the industry was the seventh most targeted sector in the country, behind manufacturing and financial services.¹⁸⁶ Whether or not a farm business is a likely target of a cyberattack, a business can fall victim through the now-standard methods of phishing, or clicking the wrong hyperlink in an email, text message, or webpage, exposing their laptops, mobile devices, and data networks and all the data therein to malware.¹⁸⁷ In addition to the risks associated with cyberattacks, consumers are increasingly aware and dissatisfied that the large amounts of personal information they volunteered as the cost of doing business through electronic platforms is tracked, used, and monetized to tailor and manipulate the information delivered to them on the internet.¹⁸⁸

Data privacy laws take aim at data brokers and business practices as they relate to collection, use, and security of consumers' data.¹⁸⁹ There is not yet a comprehensive federal consumer data privacy law.¹⁹⁰ Eighteen states have enacted comprehensive consumer data privacy laws, and another seven states have introduced narrower privacy laws which establish general duties for businesses that collect personal information, and rights for consumers to access, correct, delete, copy (data portability), or opt out of sale and processing of their data.¹⁹¹ Businesses that collect and retain data on large amounts of consumers through marketing channels like subscription lists, social media platforms, web traffic analytics, etc., are referred to as "controllers."¹⁹² Third-party service providers and

186. FOOD AND AG ISAC, FARM-TO-TABLE RANSOMWARE REALITIES 2 (2024), www.foodandagisac.org/_files/ugd/473ff0_c3dc3a5c53d44cefb9c123640275b029.pdf [https://perma.cc/RW22-8NP2]. The Food and Ag-ISAC is an organization formed in 2013 that "provides threat intelligence, analysis, and effective security practices that help food and agriculture companies detect attacks, respond to incidents, and share indicators." *Home*, FOOD AND AG ISAC (Aug. 13, 2024, 9:26 PM), <https://www.foodandag-isac.org/> [https://perma.cc/6SKF-6NUX].

187. FARM-TO-TABLE RANSOMWARE REALITIES, *supra* note 186.

188. Rande Price, *Consumers Believe That Data Privacy Is a Human Right*, DIGIT. CONTENT NEXT (August 17, 2020), digitalcontentnext.org/blog/2020/08/17/consumers-believe-that-data-privacy-is-a-human-right/ [https://perma.cc/G4FP-AXED]; *Corporate Data Responsibility: Bridging the Consumer Trust Gap*, KPMG (July 6, 2024, 11:50 PM), [kpmg.com/us/en/articles/2023/bridging-the-trust-chasm.html](https://www.kpmg.com/us/en/articles/2023/bridging-the-trust-chasm.html) [https://perma.cc/9YSZ-P3JN].

189. *See generally* Price, *supra* note 188.

190. *Which States Have Consumer Data Privacy Laws?*, BLOOMBERG L. (March 18, 2024), <https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/#states-with-comprehensive-data-privacy-laws> [https://perma.cc/6Z9J-HYXA].

191. *Id.*

192. Chris Brook, *Data Controllers vs. Data Processor: What's The Difference?*, DIGIT. GUARDIAN: DATA INSIDER (May 21, 2018), <https://www.digitalguardian.com/blog/data-controller-vs-data-processor-whats-difference> [https://perma.cc/LS79-6J5K].

contractors are referred to as “processors,” and can include e-commerce platforms, online marketplaces, and companies that process data provided by controllers to provide services, like sending newsletters, coordinating advertising communications, or processing payroll.¹⁹³

Consumer data privacy laws typically apply to controllers and processors collecting personal data from at least 100,000 consumers, or at least 25,000 consumers while also deriving over 50% of gross revenue from the sale of personal data.¹⁹⁴ Controllers and processors are typically only held liable under these laws for their own violations, provided the other business did not have actual knowledge, or reason to believe, that the service provider or contractor intended to commit the violation.¹⁹⁵ State and local governments, nonprofit organizations, institutions of higher education, and others are usually exempt.¹⁹⁶

Smaller farm clients may not be subject to state data privacy laws, however, all 50 states have data breach notification laws that dictate what steps must be taken in the event of a security breach.¹⁹⁷ The applicability of these laws is not determined by business size, but rather applies to all businesses that maintain or possess records or data containing personal information on the state’s residents.¹⁹⁸

A data breach is defined by each state and is generally a security violation where unauthorized access and acquisition of sensitive, protected, or confidential data is copied, transmitted, viewed, stolen, or used by an unauthorized individual as a result of a hacking event, lost or stolen device, mishandled sensitive information, or other theft.¹⁹⁹ Data breach laws are enforced by state attorneys general, and specify which entities must comply, how the state defines “personally

193. *Id.*

194. Nyambura Kiarie, *U.S. State Data Privacy Laws: What You Need to Know*, AUDITBOARD (Nov. 22, 2023), <https://www.auditboard.com/blog/updates-to-us-state-data-privacy-laws/> [https://perma.cc/99C8-5KUV].

195. *See, e.g.*, CAL. CIV. CODE § 1798.145(i) (West 2024).

196. *See id.* § 1798.145(n); *Which States Have Consumer Data Privacy Laws?*, *supra* note 190.

197. *See* PRIV. RTS. CLEARINGHOUSE, DATA BREACH NOTIFICATION LAWS IN THE UNITED STATES (2022), <https://privacyrights.org/sites/default/files/pdfs/Data%20Breach%20Notification%20Laws%20in%20the%20United%20States%202022.pdf> [https://perma.cc/K93M-TNYX]. Several states publish lists of reported data breach events. *U.S. State Data Breach Lists*, INT’L ASS’N OF PRIV. PROS. (Oct. 2021), <https://iapp.org/resources/article/u-s-state-data-breach-lists/> [https://perma.cc/CR4P-PS48].

198. *See generally* PRIV. RTS. CLEARINGHOUSE, *supra* note 197, at 2, 9, 12.

199. *See generally id.* (summarizing the various state statutes discussed).

identifiable information” (PII),²⁰⁰ the required timing, manner, and content of notice that must be given to impacted individuals, reporting standards for consumer protection agencies, and penalties for failure to comply.²⁰¹ Businesses may be subject to substantial fines for failure to adhere to the notice requirements, and some states provide a private right of action for impacted individuals.²⁰² States may establish a minimum number of residents impacted before reporting to the state attorney general and consumer reporting agencies is required.²⁰³

The FTC will also hold businesses accountable for security failures that expose personal consumer data and deceptive security statements. Some common themes in the actions that FTC brings on these counts include failure to reasonably respond to, prevent (e.g. implementing policies on training and restricting access), and monitor for data security breaches, and misrepresenting the adequacy of its data security measures to consumers.²⁰⁴

A data privacy policy can be used to inform customers how the business plans to collect, use, store, share, transfer, and protect personal information. State data privacy laws may require businesses to provide notices explaining privacy practices.²⁰⁵ Under current federal law, companies are not required to post privacy policies unless they are collecting personally identifiable information from children under 13.²⁰⁶ The FTC has made clear, though, that if a company posts a

200. Personally identifiable information (PII) is information that can be used directly or indirectly to identify an individual. *Guidance on the Protection of Personal Identifiable Information*, U.S. DEP'T OF LAB. (Aug. 13, 2024, 11:45 PM), <https://www.dol.gov/general/ppii> [<https://perma.cc/26H7-VJFL>]. PII is uniquely defined by each state. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 18-551, 18-552 (2024).

201. *See generally* PRIV. RTS. CLEARINGHOUSE, *supra* note 197.

202. *See id.* at 16, 39, 43, 64, 70, 100, 135, 141, 153, 156.

203. *E.g.*, MD. CODE ANN., COM. LAW § 14-3504(h) (West 2024) (one resident); MO. ANN. STAT. § 407.1500(2)(8) (West 2024) (1,000 residents).

204. Residual Pumpkin Entity, LLC, 2022 WL 2355555, *2, *6–7, *10 (F.T.C. June 23, 2022) (respondents were ordered to establish more robust information security programs, certifications and audits, and to pay \$500,000 in monetary relief for the customers impacted by company data breaches); Drizly, LLC, 2022 WL 16551345, *2–6 (F.T.C. Jan. 1, 2022) (respondents were prohibited from misrepresenting data use, security, or impact of data breaches and ordered to implement written protocols to limit retention, establish more robust information security programs, certifications and audits, and more).

205. *See* Kiarie, *supra* note 194.

206. Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6502; Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (and Why It Matters)*, N.Y. TIMES: WIRECUTTER (Aug. 14, 2024, 9:11 PM), <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/> [<https://perma.cc/D535-HTEK>].

policy and then fails to uphold it, it could be considered an unfair or deceptive practice under Section 5 of the FTC Act.²⁰⁷ Having a privacy policy could be a way for a farm client to garner goodwill and trust from their customers by emphasizing their awareness of the risks of data breaches and transparency about their practices. However, they must also fully understand and implement the policies they adopt.

Helping clients understand the liability risks associated with lax or non-existent cybersecurity measures or policies can be an important role of an attorney, even ones who are not cybersecurity experts themselves. The Food and Ag-ISAC Cybersecurity Guide for Food and Ag Small and Medium Enterprises and the FTC Data Breach Response Guide are useful starting points to introduce farm clients to basic data management and security.²⁰⁸ Farm clients must determine if they own, control or license personal information, sensitive personal information, or PII, and take appropriate measures to shield against potential data breaches. Failure to exercise due diligence by inadequately protecting consumers' data, particularly if internal security problems are known, could be considered unfair or deceptive practices under federal and state laws.²⁰⁹

D. State Sales Tax Laws

E-commerce allows food producers to easily sell to customers across state boundaries, which may trigger obligations in the customers' states for the producer to register with those states' tax departments and collect and remit sales tax.²¹⁰ In 2018, in *South Dakota v. Wayfair, Inc.*, the U.S. Supreme Court held that a state can compel "remote sellers" (out-of-state internet, mail-order, phone-order, etc. sellers) to collect and remit sales tax to the states into which they are selling.²¹¹ In *Wayfair*, the Court ruled that a state tax law that requires out of state sellers to collect and remit sales taxes for online purchases is constitutional as long as the tax applies to an activity that has a "substantial nexus" with the taxing state,

207. *Enforcement Policy Statement on Food Advertising*, *supra* note 41.

208. FOOD AND AG ISAC, FOOD AND AG CYBERSECURITY: A GUIDE FOR SMALL AND MEDIUM ENTERPRISES (2023), https://473ff09f-1966-4407-8ab1-6542ff65f3b5.usrfiles.com/ugd/473ff0_e9cefec045f045849a1c0f1b56be2894.pdf [<https://perma.cc/42XS-YLFY>]; *Data Breach Response: A Guide for Business*, FED TRADE COMM'N (Aug. 14, 2024, 9:27 PM), <https://www.ftc.gov/business-guidance/resources/data-breach-response-guide-business> [<https://perma.cc/LKQ3-YQH8>].

209. *See Enforcement Policy Statement on Food Advertising*, *supra* note 41.

210. *Economic Nexus State by State Chart*, SALES TAX INST. (July 15, 2024), <https://www.salestaxinstitute.com/resources/economic-nexus-state-guide> [<https://perma.cc/2KAR-3Q4F>].

211. *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 188 (2018).

regardless of whether the business itself has a physical nexus with the state.²¹² The Court held that a substantial nonphysical nexus was created through Wayfair's "extensive virtual presence."²¹³

Since *Wayfair*, every state with a sales tax has instituted an "economic nexus" standard requiring remote sellers to collect and remit sales tax for goods or services that they sell to purchasers in those states.²¹⁴ Farm businesses need to know that if they cross a state's economic nexus threshold, they are required to register and then start collecting and paying tax to that state.²¹⁵

Compliance with state sales tax laws is complex. Each state establishes its own economic threshold, which may be based on the number of transactions, total sales within the state, or a combination of both.²¹⁶ States change their sales tax rates, implement new state sales tax holidays, and even update the categories of things that are taxed and exempted from sales tax. In addition, in some states, there could also be locally administered sales taxes.

This can all be extremely challenging for small businesses who are selling directly to out-of-state customers through online sales. Consulting firms and compliance software can help businesses comply with the various state requirements. If a business sells through a marketplace like Amazon or Etsy, the marketplace may be responsible for collecting and paying the correct tax in some states.²¹⁷ The bottom line is, if a farm client is selling products online to customers outside of their state, or they plan to, helping them understand these obligations could help protect them from future costly tax liability.

212. *Id.* at 165.

213. *Id.* Before *Wayfair*, a state could only require a seller to collect and remit sales tax to that state if the seller had some physical presence in the state (a "physical nexus") like an office or a warehouse, or if they had an employee based in the state, or company vehicles made deliveries into the state. *Id.* at 174–76. It was the buyers who purchased goods or services from out-of-state retailers who were supposed to file and remit taxes in their state on the purchases they made. *See id.* Of course, nobody did that, and states' tax revenues started to decline as more people shopped online and purchased from out-of-state sellers.

214. *Economic Nexus State by State Chart*, *supra* note 210.

215. *See id.*

216. *Id.*; *see, e.g.*, S.D. CODIFIED LAWS § 10-64-2 (2024) (requiring sales tax collection and remittance from out-of-state sellers whose gross revenue is above \$100,000 from sales into South Dakota); N.Y. TAX LAW § 1101(b)(8)(iv) (McKinney 2024) (requiring sales tax collection and remittance from out-of-state sellers who have above \$500,000 in gross sales of tangible personal property delivered into New York and more than 100 sales of tangible personal property delivered into the state).

217. *Tax Season Is Here – Tips to Get More Organized As an Amazon and Etsy Seller*, RACHEL ROFE BLOG (March 29, 2023, 11:21 AM), <https://rachelrofe.com/tax-season-is-here-tips-to-get-more-organized-as-an-amazon-and-etsy-seller> [<https://perma.cc/8J3A-5BF2>].

V. CONCLUSION

Farmers have always embraced technological advancements that make food production more efficient. Shifts towards digital marketing and advertising offer an effective and efficient way to connect with new customers and foster loyal relationships within their communities, particularly for farmers who direct market to local and regional customers. Yet, like most new ventures, farm businesses venturing into e-commerce face increased legal and regulatory complexities. Farmers often report that navigating and understanding laws and regulations that impact their operations is a top concern, and for good reason.²¹⁸ Even within the online marketing context the issues are wide-ranging. Attorneys must understand these risks to help their farm clients effectively navigate and manage these challenges.

218. See BYRAN BUTLER ET AL., UNIV. OF MD. EXTENSION, NORTH AND WESTERN MARYLAND AGRICULTURE NEEDS ASSESSMENT 9, 15 (2019), <https://extension.umd.edu/sites/extension.umd.edu/files/publications/North%20and%20Western%20MD%20Agriculture%20Needs%20Assessment%20EB-437%20.pdf> [<https://perma.cc/M5ED-J5DD>].