



June 21, 2021

Agricultural Marketing Service
U.S. Department of Agriculture

Docket No. AMS-TM-21-0034

Re: Supply Chains for the Production of Agricultural Commodities and Food Products

Thank you for this invitation to comment on the U.S. Department of Agriculture's (USDA) work in local and regional food systems. We are excited to share some of our ideas as they relate to "creating new market opportunities (including for value-added agriculture and value-added products), facilitating fair and competitive markets (including traceability and supply chain transparency), advancing efforts to transform the food system, meeting the needs of the agricultural workforce, supporting and promoting consumers' nutrition security, particularly for low-income populations, and supporting the needs of socially disadvantaged and small to mid-sized producers and processors."

The Farm Bill Law Enterprise (FBLE) brings together faculty, staff, and students from programs at seven law schools with expertise in agriculture, nutrition, and the environment. Our mission is to work toward a farm bill that reflects a thoughtful consideration of the long-term needs of our society, including economic opportunity and stability, public health and nutrition, public resources stewardship, and fair access and equal protection. We accomplish this mission through joint research, analysis, and advocacy and by drawing on the experience of our members, collaboratively building deeper knowledge, and equipping the next generation of legal practitioners to engage with the farm bill.

Our comments address two primary topics. First, drawing on our previous research and the practical experiences of our consortium members, we make a variety of recommendations related to supporting diversified agricultural economies. These comments emphasize the tools at USDA's disposal to support socially disadvantaged farmers and to enhance the economic viability of small and medium sized food and farm businesses. Second, we make a variety of recommendations related to the power of the USDA to protect and enhance the livelihoods of farmworkers, the lifeblood of the American food system. These recommendations are not comprehensive but instead focus on particular issues about which FBLE has amassed expertise.

I. Supporting Diversified Agricultural Economies

Leading up to the 2018 Farm Bill, FBLE published a report on Diversified Agricultural Economies that addressed many of the concerns USDA highlighted in its Request for Public Comments. The report sought to address the barriers facing small, medium-scale, beginning, female, and minority farmers and ranchers, and farms with diversified crops, and recommend ways in which the farm bill can create opportunities for these producers by improving access to markets, insurance, credit, and land. Several of these recommendations are incorporated below and updated, where appropriate, to reflect changes since the report's publication. Additional background information and recommendations may be found in the [Diversified Agricultural Economies](#) report, available on our website, farmbilllaw.org. In addition, we also

address the importance of direct legal services in supporting these same farmers and food businesses and the potential role of USDA in facilitating provision of these services.

A. General Recommendations to Support Diversified Agricultural Economies

Prioritize socially disadvantaged farmers, beginning farmers, and small- and mid-sized farmers in the Specialty Crop Block Grant Program.

The Specialty Crop Block Grant Program (SCBGP) provides grants to U.S. states and territories to increase the market competitiveness of specialty crops. This vital program supports a wide range of activities, including increasing consumer demand for specialty crops, raising awareness about the benefits of specialty crop consumption, improving the efficiency of specialty crop distribution systems, conducting research to improve pest control and develop new seed varieties, and developing local farm-to-school programs and school gardens. These projects benefit both farmers and consumers.

The 2021 Specialty Crop Block Grant Program Request for Applications makes available \$72.9 million in annual farm bill funding and \$97 million in additional funds provided in response to the COVID-19 pandemic's impact on the food system.¹ State departments of agriculture are eligible to apply.² The RFP encourages applicants to reach out to "interested parties, including socially disadvantaged farmers and ranchers, new and beginning farmers or ranchers, veteran producers, and underserved communities" in developing their own requests for applications and submission to SCBGP.³ However, because there is no mandate to prioritize or specifically benefit socially disadvantaged farmers, beginning farmers, or small- and mid-sized farms, funding may not flow to support these producers.⁴

To ensure SCBGP funds benefit socially disadvantaged, beginning, and small- and mid-sized farms, USDA should adjust the program's priorities to include supporting the economic standing of these types of producers in the specialty crop sector. Though USDA does not currently target support for such producers in its regulations or RFA, such focus appears permissible within the legislative language.⁵ USDA could require states to expressly address how their proposal will support these producer categories. Additionally, USDA could incorporate such support as an outcome measure in its SCBGP Grant Performance Evaluation Plan.⁶

Ensure owners and operators of heirs' property can access USDA support and program opportunities.

Advocacy organizations with longstanding expertise on the challenges facing heirs' property owners estimate that "60% of all black owned land is heirs property."⁷ The cloudy title to land and complex ownership structure associated with heirs' property has historically limited access to USDA programs and lending opportunities, and has encouraged predatory land development practices.

¹ AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., SPECIALTY CROP BLOCK GRANT PROGRAM FISCAL YEAR 2021 REQUEST FOR APPLICATIONS 2 (2021), https://www.ams.usda.gov/sites/default/files/media/2021_SCBGP_RFA.pdf.

² *Id.* at 10.

³ *Id.* at 7.

⁴ *See id.* at 5 ("Project Types"); 7 C.F.R. § 1291.1(b).

⁵ *See* 7 U.S.C. § 1621 note.

⁶ AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., SPECIALTY CROP BLOCK GRANT PROGRAM FISCAL YEAR 2016 EVALUATION PLAN (2015), https://www.ams.usda.gov/sites/default/files/media/SCBGP%20FY15%20PerformanceFINAL_10272015.pdf; SPECIALTY CROP BLOCK GRANT PROGRAM FISCAL YEAR 2021 REQUEST FOR APPLICATIONS, *supra* note 1, at 11 (linking to the 2016 plan).

⁷ *The Federation of Southern Cooperatives/LAF Leads Research and Advocacy to Address Heirs Property and Eligibility to Participate in USDA Programs*, RURAL COALITION (Jun. 21, 2018), <https://www.ruralco.org/press-releases/2018/8/31/federation-of-southern-coops-leads-research-and-advocacy-on-heirs-property-august-2-2018>.

The 2018 Farm Bill included several important advancements for owners and operators on this type of farmland. In particular, Section 12615 of the bill established alternative acceptable documentation for farm operators on heirs' property to obtain a USDA farm number from the Farm Service Agency (FSA).⁸ As noted in FSA's fact sheet about the change, "[a] farm number is required to be eligible for many different USDA programs, including lending, disaster relief programs, and participation in county committees."⁹ This change was a critical first step, but success in achieving the intended impact depends on implementation and it is unclear how much training and information has been provided to FSA loan officers to ensure these new opportunities are effectively communicated.¹⁰ Furthermore, for many opportunities, a farm number is just one of many application requirements and operators on heirs' property may still face unique barriers to participation due to their land tenure status. Lastly, the relending program authorized in the 2018 Farm Bill—through which certain entities would relend funds to individuals and entities for projects that assist heirs' property owners in resolving ownership and succession on farmland¹¹—has not moved forward, despite continuing support from Congress through appropriations.¹²

To ensure operators on heirs' property enjoy equitable access to USDA opportunities, the agency should:

- Ensure FSA officers can effectively communicate the new documentation requirements and support potential borrowers that own or operate on heirs' property through additional training and protocols.
- Review USDA programs to identify additional eligibility or application challenges that hinder access for operators of heirs' property and work to eliminate such roadblocks.
- Issue the proposed rules and work to swiftly implement the relending program authorized in the 2018 Farm Bill.

Reinstate the Fair Farmer Practice rules introduced under Secretary Vilsack in 2016.¹³

Proper implementation of the Packers & Stockyard Act (PSA) has been a long battle, with strategies shifting between administrations and congresses.¹⁴ The PSA was enacted in 1921 to regulate market competition in the livestock, meat, and poultry industries.¹⁵ The PSA is a dual-purpose statute. First, Sections 202(a) and (b) provide producers and growers recourse against packers, swine contractors, and poultry growers who engage in unfair, discriminatory, and deceptive practices or who give undue or unreasonable preferences.¹⁶ Second, Sections 202(c) through (g) resemble other federal antitrust legislation (i.e., the Sherman Act and the Clayton Act).¹⁷ They address market-wide antitrust issues that include monopoly, price fixing, and anti-competitive practices.¹⁸ Thus, Congress intended the PSA to protect individual farmers from misconduct and to protect livestock and poultry markets from monopoly and manipulation.

⁸ Agriculture Improvement Act of 2018, Pub. L. 115-334, § 12615, 132 Stat. 4490, 5014 (2018).

⁹ FARM SERV. AGENCY, GUIDANCE FOR HEIRS' PROPERTY OPERATORS PARTICIPATING IN FARM SERVICE AGENCY (FSA) PROGRAMS (2020), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/guidance_heirs_property_operators_participating_in_fsa_programs-factsheet.pdf.

¹⁰ This question may be answered through forthcoming research from the Federation of Southern Cooperatives/Land Assistance Fund.

¹¹ Agriculture Improvement Act of 2018, Pub. L. 115-334, § 5104, 132 Stat. 4490, 4669 (2018)

¹² See Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534, 2623 (2019).

¹³ This recommendation benefitted from research and drafting by R. Scott Sanderson, Harvard Law School J.D. 2021, and Stefane Victor, Harvard Law School J.D. 2021.

¹⁴ See *Big Meat Just Won a 100-year Battle. Wait, what?*, THE COUNTER (Oct. 17, 2017), <https://thecounter.org/big-meat-just-won-100-year-battle-wait/>.

¹⁵ 7 U.S.C. § 181.

¹⁶ Packers and Stockyards Act, 1921 §§ 202(a)–(b), 308(a)(2) 7 U.S.C. §§ 192(a)–(b), 209(a)(2).

¹⁷ See Sherman Antitrust Act §§ 1–3, 15 U.S.C. §§ 1–3; Clayton Act §§ 2–3, 15 U.S.C. §§ 13–14.

¹⁸ Packers and Stockyards Act, 1921 § 202(c)–(g), 7 U.S.C. § 192(c)–(g).

The PSA prohibits unjustified discriminatory practices and anticompetitive behavior in the livestock industry, but leaves several key terms undefined, making its exact stipulations unclear. Until late 2017, regulatory responsibility for the PSA's administration had resided in the Grain Inspection, Packers and Stockyards Administration (GIPSA), a standalone agency within USDA. Secretary Perdue abolished GIPSA in late 2017 and transferred its regulatory authority to the Fair Trade Practices programs within USDA's Agricultural Marketing Service (AMS).¹⁹ This move was controversial, particularly owing to AMS's role as a promoter of agricultural markets and the removal of GIPSA from the Secretary's direct oversight.²⁰

The 2008 Farm Bill directed GIPSA to develop regulations to address unfair practices, clarifying what types of conduct constitute a violation of the PSA, increasing transparency in contract negotiations between producers and packers, and limiting vertical integration in the meat industry.²¹ In 2010, GIPSA proposed a series of rules expanding protections for growers, including one that would have confirmed that anticompetitive or misleading practices can be challenged on the basis that they harm an individual grower.²² However, Congress intervened via appropriations riders and delayed further action.²³ Finally, in 2016, USDA issued its Farmer Fair Practices Rules, which included an interim rule and two proposed rules.²⁴ The interim rule "clarifie[d] that conduct or action may violate sections 202(a) and (b) of the [PSA] without adversely affecting, or having a likelihood of adversely affecting, competition."²⁵ The proposed rules would have clarified the types of conduct that would violate section 202(a) of the PSA and the criteria the Secretary would use to determine violations of section 202(b), including violations related to poultry grower ranking systems.²⁶

The Trump Administration withdrew the interim rule the following year²⁷ and announced it would take no further action on the proposed rules.²⁸ It then proposed and finalized (with some important changes)²⁹ a rule establishing criteria that USDA may consider to determine whether a packer, swine contractor, or live poultry dealer violated section 202(b) by giving undue or unreasonable advantages.³⁰ The rule did not

¹⁹ U.S. DEP'T OF AGRIC., SECRETARY'S MEMORANDUM 1076-018: IMPROVING CUSTOMER SERVICE AND EFFICIENCY (2017), <https://www.ocio.usda.gov/sites/default/files/docs/2012/SM%201076-18.pdf>.

²⁰ See R-CALF USA COMMENTS ON IMPROVING CUSTOMER SERVICE 2-4 (2017), <https://www.r-calfusa.com/wp-content/uploads/2017/10/171007-R-CALF-USAs-Comments-Re-Improving-Customer-Service.doc>; *Our Mission*, AGRIC. MKTG. SERV., <https://www.ams.usda.gov/about-ams>.

²¹ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11006, 122 Stat. 923, 1358 (2008).

²² Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338 (Jun. 22, 2010).

²³ See, e.g., Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-15, § 721, 125 Stat. 552, 583 (2011).

²⁴ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92594 (Dec. 20, 2016) (Interim Final Rule); Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92703 (proposed Dec. 20, 2016); Poultry Grower Ranking Systems, 81 Fed. Reg. 92723 (proposed Dec. 20, 2016).

²⁵ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92594 (Dec. 20, 2016) (Interim Final Rule).

²⁶ Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92703 (proposed Dec. 20, 2016); Poultry Grower Ranking Systems, 81 Fed. Reg. 92723 (proposed Dec. 20, 2016).

²⁷ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594 (Oct. 18, 2017) (withdrawing the Interim Final Rule).

²⁸ Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 82 Fed. Reg. 48604 (Oct. 18, 2017) (notice of no further action)

²⁹ In particular, the Final Rule did not include consideration of whether a practice is "customary in the industry" in determining whether an actor violated section 202(b), as had been proposed.

³⁰ Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 79779 (Dec. 11, 2020) (codified at 9 C.F.R. pt. 201).

address section 202(a). The final rule has received substantial criticism for “fail[ing] to protect livestock and poultry farmers from the abusive and exploitative practices that have become customary in the meat industry.”³¹

The PSA is a critical tool in meeting USDA’s objective of facilitating fair and competitive markets. To ensure it serves this purpose, USDA should:

- Revisit the rules implementing section 202(b) and revise the parameters to reflect more closely the rule proposed in December 2016.
- Reintroduce the rule proposed in December 2016 to implement section 202(a) of the PSA.
- Return enforcement of the PSA to a standalone agency within USDA under the Secretary of Agriculture’s direct supervision.

Adjust the criteria for the Certified and Preferred Lender Programs.

Target participation rates and set-asides have helped increase the number and dollar amount of loans that reach socially disadvantaged farmers and ranchers (SDFR) and beginning farmers and ranchers (BFR), but are not enough to meet demand. While SDFR and BFR received 71 percent of direct loan dollars in FY2020, they only received 35 percent of guaranteed loan obligations that year.³² Additionally, the bulk of these loans went to BFR, who actually make up a smaller proportion of the farming population than SDFR,³³ but nonetheless received 66 percent of all direct loan dollars and 30 percent of all guaranteed loan dollars in FY 2020 compared to 17 and 12.5 percent respectively for SDFR.³⁴ These numbers suggest that private lenders are not as successful at reaching SDFR and BFR as the government has been with direct loans, and that both private lenders and FSA can improve participation rates among SDFR.

Private lenders of FSA-guaranteed loans can join the Certified or Preferred Lender Program if they meet a number of criteria, including a satisfactory loss-recovery ratio, minimum loan closures, and proven ability

³¹ *Undo the Packers & Stockyards “Under Preference” Final Rule*, NAT’L SUSTAINABLE AGRIC. COAL. (Feb. 17, 2021), <https://sustainableagriculture.net/blog/undo-the-packers-and-stockyards-undue-preference-final-rule/>.

³² SDFR and BFR received approximately \$2.4 billion in direct loans out of a total of \$3.36 billion and \$1.44 billion in guaranteed loans out of a total of \$4.16 billion. *Compare* U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, FARM LOAN PROGRAMS COMBINED/UNDUPLICATED BEGINNING FARMER AND SDA OBLIGATIONS REPORT FY 2020, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/program-data/FY2020/FY2020_Combined_SDA_BF_Obligations_Report.pdf, with U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, EXECUTIVE SUMMARY FARM LOAN PROGRAMS FY 2020, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/program-data/FY2020/FY2020_Executive_Summary.pdf.

³³ Based on the 2017 Census of Agriculture, BFR make up approximately 24.6 percent of principal producers in the United States while SDFR make up approximately 30 percent. *See* NAT’L AGRIC. STATISTICS SERV., 2017 CENSUS OF AGRICULTURE – TABLE 70, https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1_Chapter_1_US/st99_1_0070_0070.pdf; CONG. RSCH. SERV., DEFINING A SOCIALLY DISADVANTAGED FARMER OR RANCHER (SDFR): IN BRIEF (2021), https://www.everycrsreport.com/files/2021-03-19_R46727_200ac4f11846453109b2e3e2825b694aa07f4c05.pdf.

³⁴ These percentages are not additive as one might fall into both groups. *Compare* U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, FARM LOAN PROGRAMS COMBINED/UNDUPLICATED BEGINNING FARMER AND SDA OBLIGATIONS REPORT FY 2020, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/program-data/FY2020/FY2020_Combined_SDA_BF_Obligations_Report.pdf, with U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, FARM LOANS PROGRAM BEGINNING FARMERS OBLIGATIONS REPORT FY 2020, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/program-data/FY2020/FY2020_BF_Obligations_Report.pdf, and U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, FARM LOAN PROGRAMS SOCIALLY DISADVANTAGED OBLIGATIONS REPORT FY 2020, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/program-data/FY2020/FY2020_SDA_Obligations_Report.pdf.

to process FSA guaranteed loans.³⁵ Certified and Preferred Lender status comes with several benefits, including a reduction in paperwork and faster loan approvals.³⁶ There is currently no requirement for lenders to prove a history of nondiscriminatory lending practices in order to achieve either certified or preferred lender status.

Congress has authorized the Secretary of Agriculture to make rules and regulations governing the terms of making and insuring loans, which includes establishing criteria for its Certified Lenders Program.³⁷ To increase SDFR and BFR participation in guaranteed loan programs, USDA should exercise this authority to require that lenders prove a satisfactory history of consistently lending to SDFR and BFR at rates matching FSA target participation rates in order to achieve Certified or Preferred Lender status. In this case “consistently” could be defined as 3 out of 5 years, and any lender not meeting this target would be considered ineligible. This would help to reduce the gap that still persists between direct and guaranteed FSA lending rates to SDFR and BFR.

Make Whole Farm Revenue Protection more accessible.

Farms with diversified crops struggle to access insurance products that protect their livelihoods when bad weather or other mishaps threaten their production or marketability. This puts such farms at a disadvantage—insurance provides more than protection against catastrophic loss; it is often a prerequisite to access credit.³⁸ Whole-farm insurance policies allow farmers to avoid applying for coverage separately for each crop they plant, which can be logistically difficult given the paperwork involved.³⁹ In some cases, applying for each crop can even be impossible since crop insurance offerings are determined on a county-by-county basis.⁴⁰ If coverage for a particular crop is not offered for farmers in a particular county, that portion of the harvest goes uninsured.⁴¹ Under whole-farm policies, farms can purchase subsidized insurance for their total farm revenue regardless of what they produce.⁴²

The Whole Farm Revenue Protection (WFRP) program, a pilot program authorized by the 2014 Farm Bill, made whole-farm insurance policies available in all 50 states.⁴³ The technical and other improvements of WFRP over its predecessor programs have increased both participation and program viability. However, USDA must continue to tailor WFRP to better meet the needs of smaller and multi-crop operations in order to expand and institutionalize the program. Paperwork, recordkeeping, and certain accounting requirements prevent broader participation in WFRP.⁴⁴ These hurdles are particularly acute for small and mid-sized

³⁵ See U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, LENDER’S GUIDE TO ELEVATED LENDER ELIGIBILITY STATUS FOR FSA GUARANTEED LOAN PROGRAMS 1–2 (2010), https://www.fsa.usda.gov/Internet/FSA_File/clp_plp_criteria.pdf.

³⁶ See *id.*

³⁷ 7 U.S.C. § 1989.

³⁸ See, e.g., Formulation of the 2012 Farm Bill: Hearings Before the Subcommittees on: Rural Development, Research, Biotechnology, and Foreign Agriculture; Conservation, Energy, and Forestry; Livestock, Dairy, and Poultry; Nutrition and Horticulture; Department Operations, Oversight, and Credit; and General Farm Commodities and Risk Management of the Comm. on Agric., 112th Cong. 2047, 2052, 2064 (2012), <https://archives-agriculture.house.gov/sites/republicans.agriculture.house.gov/files/transcripts/112/112-30Pt2.pdf>.

³⁹ DENNIS A. SHIELDS, CONG. RESEARCH SERV., FEDERAL CROP INSURANCE: BACKGROUND 10 (2015), <https://fas.org/sgp/crs/misc/R40532.pdf>.

⁴⁰ *Whole Farm Revenue Protection for Diversified Farms*, NAT’L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/publications/grassrootsguide/credit-crop-insurance/whole-farm-revenue-protection-for-diversified-farms/> (last visited Jun. 18, 2021).

⁴¹ *Id.*

⁴² SHIELDS, *supra* note 39.

⁴³ *New Pilot Program Offers Coverage for Fruits & Vegetables, Organic & Diversified Farms*, U.S. DEP’T OF AGRIC. (May 21, 2014), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2014/05/0100.xml>.

⁴⁴ See CARA FRAVER, SCOTT MARLOW, & JONATHAN COPPESS, AGREE, SPECIALTY CROP RISK MANAGEMENT: AN ISSUE PAPER ON THE NONINSURED CROP DISASTER ASSISTANCE PROGRAM AND WHOLE FARM REVENUE

farms, and beginning farmers, that need comprehensive and affordable risk management most.⁴⁵ RMA should study these barriers and take immediate steps to ameliorate them. In particular:

- RMA should develop a simplified WFRP policy for small and mid-sized farms, which USDA defines as farms with under \$1 million in annual revenue.⁴⁶
- RMA should also further relax the production and revenue history requirement for beginning farmers and ranchers. RMA should find better ways to predict new farms' revenues rather than offering benefits exclusively to those with revenue history.

B. Support Food System Actors' Expanded Access to Legal Services⁴⁷

One often overlooked element of local and regional food supply chains is legal services. Farmers and food businesses operate in a complex legal and regulatory space and in an economically challenging industry. Even with the most supportive regulatory climate, small- and mid-scale food producers and food startups of all sizes face a number of legal questions that must be answered before they can begin business operations. From negotiating or renegotiating leases; to structuring loans or equity investments; to complying with building codes; to addressing legal issues in employment; to ensuring adequate insurance coverage; legal assistance for small organizations is critical, yet often under-provided. These legal challenges may be exacerbated in the COVID-19 era, as the governmental response including curfews, shutdowns, and trade interruptions led to supply chain disruption or forced renegotiation of longstanding contracts. Even governmental programs to support food producers and food businesses during COVID-19 often necessitated legal support. For example, in the United States, the emergency Paycheck Protection Program (PPP) loan program proved difficult to navigate for many small food businesses; as such, funding was primarily issued to larger established organizations.⁴⁸ Food businesses, especially those that are small-scale or under-resourced, face a multitude of legal hurdles and a critical need for transactional legal support. Capable legal assistance is critical to the success of these businesses. This need is only greater for those social enterprises that seek to bring access to local healthy food and economic opportunities to underserved communities, or to innovate more sustainable practices. Lack of legal support for these fledgling entrepreneurs presents an obstacle in developing a food system that is diverse in scale—allowing for the success of local and regional food chains—and that promotes environmental and food justice.

Many farmers lack the capital to pay for market rate legal assistance. At the same time, these businesses are also often not eligible for traditional pro bono assistance. Research suggests that most small- and medium-sized farms do not hire attorneys when dealing with important legal issues.⁴⁹ The degree to which

PROTECTION INSURANCE 9 (2019), <https://www.youngfarmers.org/wp-content/uploads/2019/08/Issue-Paper-Specialty-Crop-Risk-Management.pdf> (identifying accrual accounting, in place of cash accounting, as a barrier); ANNA JOHNSON & GLEN READY, CTR. FOR RURAL AFFAIRS, NEW OPTION FOR RISK MANAGEMENT: WHOLE FARM REVENUE PROTECTION USAGE IN NEBRASKA 10 (2017), <https://www.cfra.org/sites/www.cfra.org/files/publications/WFRP%20Report.pdf>.

⁴⁵ HOSSEIN AYAZI & ELSADIG ELSHEIKH, HAAS INST. FOR A FAIR AND INCLUSIVE SOC. AT UNIV. OF CAL., BERKELEY, THE U.S. FARM BILL: CORPORATE POWER AND STRUCTURAL RACIALIZATION IN THE U.S. FOOD SYSTEM 57 (2015), http://haasinstitute.berkeley.edu/sites/default/files/haasinstitutefarmbillreport_publish_0.pdf.

⁴⁶ *Distribution of farms and value of production varies by farm type*, U.S. Dep't of Agric., Econ. Research Serv., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58288>.

⁴⁷ This section benefitted from prior research, drafting, and review by Jonathan Brown, Director of the Food & Beverage Law Clinic and Professor of Law at the Pace University Elisabeth Haub School of Law.

⁴⁸ Amanda Robert, *Small Businesses have COVID-19 questions, and the legal profession is working to answer them*, ABA JOURNAL (Jun. 29, 2020), <https://www.abajournal.com/web/article/law-firms-and-legal-service-providers-help-small-businesses-with-covid-19-questions>.

⁴⁹ A. Bryan Endres et al., *The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey*, 69 MONT. L. REV. 135, 149 (2010) (reporting the results of a survey of legal needs of family farms in Illinois, finding that only 16% of respondents with gross farm sales below \$100,000, and only 29% of respondents with gross farm

farms hire attorneys is highly correlated to their cash flow, indicating that financial constraints are a significant factor limiting the use of legal services by farmers.⁵⁰ The majority of small- and medium-sized farm businesses lack the cash flow to afford market-rate legal services: for farms the USDA classifies as “intermediate farm businesses,” meaning that “farming is the operator’s primary occupation,” but gross cash income is less than \$350,000, average net income in 2019 was only \$7500.⁵¹ The medium- and large-scale farms that grow the bulk of our food are adequately resourced and do not need assistance accessing legal services, but for the smaller commercial farms whose existence is so essential to diversity of scale and participation in the food system, this essential service is often out of reach.

Further, farmers do not seek legal advice in part because they do not think attorneys understand the farm industry well enough to be of service.⁵² In fact, many attorneys do lack familiarity with the nuances of the agricultural space and the legal issues facing farmers.⁵³ At the same time, for operators of small farm and food businesses, it is often unclear when one should proactively seek legal advice.

There is, accordingly, an acute need for low cost and pro bono legal services provided by trained and capable attorneys for small farm and food businesses. Meeting this need requires the education of farm and food entrepreneurs on fundamental food supply chain legal issues so that they can better understand when to seek the professional advice of an attorney. It also requires attorneys available and competent to provide direct legal representation of small farms and businesses on these matters. The more this need is met, the more successful farms and businesses will be in building resilient local and regional food supply chains.

A small but growing number of legal service providers are seeking to fill this gap. This includes a variety of law school clinics that are part of the FBLE consortium. These clinics provide direct transactional legal services, run food and agriculture law training programs both for farmers and business owners and for attorneys, train students who will graduate to work in this field, and develop toolkits on key food and agriculture law issues. These efforts support businesses, public programs, and non-profits working to develop regional food economies. Lawyers can play a pivotal role in a variety of situations. For instance, lawyers can assist in obtaining more economically favorable and protective terms for businesses when negotiating access to land, funding, or markets and can protect businesses from legal risks by advising on appropriate business structures, estate planning and farm transitions, branding and trademarks, regulations relating to food safety, marketing, labeling, and a host of other issues. This need is even greater when businesses employ innovative techniques, structures, and business models—for example, small farms shifting from wholesale production to marketing directly to consumers, processing their own value-added products, and conducting “agri-tourism” activities.

sales between \$100,000 and \$249,999, had hired an attorney when dealing with the legal issue most important to them).

⁵⁰ *Id.*

⁵¹ CONG. RSCH. SERV., U.S. FARM INCOME OUTLOOK: DECEMBER 2020 FORECAST 21 (2021) (citing data from the USDA’s Economic Research Service), https://www.everycrsreport.com/files/2021-02-09_R46676_e1e1fd5ab04975b7ba0701482530f3f360448927.pdf.

⁵² Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL’Y (Nov. 20, 2013), <http://vimeo.com/80411482>.

⁵³ Rural areas in general suffer from lack of legal services. Wendy Davis, *No Country for Rural Lawyers: Small-town attorneys still find it hard to thrive*, AM. BAR ASS’N J. (Feb. 1, 2020), <https://www.abajournal.com/magazine/article/no-country-for-rural-lawyers>; *Legal deserts threaten justice for all in rural America*, PROFILE OF THE LEGAL PROFESSION, AM. BAR ASS’N (Aug. 3, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/08/legal-deserts-threaten-justice/>.

Farmers, restaurants, and other food producers benefit from the growing effort to provide low cost legal services by nonprofit legal services organizations and pro bono practices at law firms around the country.⁵⁴ For example, the Legal Food Hub of the Conservation Law Foundation connects small-scale farmers and food entrepreneurs with a network of law firm attorneys who are willing to provide pro bono legal services to food businesses.⁵⁵ The Hub's clients typically run their businesses on tight margins and therefore often cannot afford heavy legal bills. From 2014 through 2021, the Hub handled 500 clients, totaling over \$2.5 million of legal work.⁵⁶ The Hub currently operates across five New England states and plans to expand to the remaining New England state (New Hampshire) in the coming year. In order to support the attorneys offering their services and help them to do their work efficiently, the Legal Food Hub offers legal guides and trainings for attorneys operating in each of their states, modeled off of an initial legal guide created when the Hub launched in Massachusetts.⁵⁷

As another example, one of our consortium members has a law school clinic dedicated to providing pro bono transactional legal services to small farm and food businesses and nonprofits. With work done primarily by law students under faculty supervision, the clinic assists clients in forming and structuring business entities and nonprofits, negotiating contracts to access land and capital, and navigating other important issues including land use laws, trademarks, employment law, and other regulatory matters. Over a four-year period, the clinic provided legal support to over fifty small farm and food businesses and nonprofits. Approximately half of the clients are small farms that support local and regional food supply chains by selling all or most of their products directly to consumers. Many of the other clients are small nonprofit organizations focused on building more sustainable local and regional food systems and/or more equitable access to food and economic opportunities. During the COVID-19 pandemic, the clinic represented a number of clients creating new models of food access and distribution to address rising food insecurity while supporting local farms. Examples of representative matters include representing a refugee community group in negotiating a farmland lease to launch a community farm; representing a nonprofit loan fund formed to provide capital access to black-owned farms and food businesses on the fund's formation, legal structure, and contracts; and representing a small business formed during the pandemic as a farmers' market delivery service on its legal organization and regulatory matters.

Increase USDA Funding for Legal Services.

USDA should allocate funding toward both pro bono legal service providers and micro grants to support small farms and food businesses seeking to hire market rate attorneys. Many of the legal service providers in this area are struggling to find adequate funding as traditional funders in the food space, including the USDA itself, tend to direct resources toward the entities engaged directly in food production and distribution. USDA does allocate some grant money for technical support, but this funding is limited and is shared among a variety of types of technical services providers.

⁵⁴ See, e.g., *Clinic Stories: Democracy Brewing*, HARV. LAW TODAY (Sept. 17, 2019), <https://perma.cc/XC7M-WP8B>.

⁵⁵ Jan E. Spiegel, *For these pro bono lawyers, "Know your farmer" takes on new meaning*, THE COUNTER (Jun. 7, 2018), <https://thecounter.org/legal-food-hubs-small-farm-business/>.

⁵⁶ VERMONT CTR. FOR AGRIC. & FOOD SYSTEMS, LEGAL TRENDS FOR FARM AND FOOD OPERATIONS IN THE NEW ENGLAND REGION (2021), https://www.vermontlaw.edu/sites/default/files/2021-05/FINAL_Trends%20Report.pdf; Laurie Schreiber, *At Legal Food Hub, attorneys help food businesses, pro bono*, MAINEBIZ (Nov. 11, 2019), <https://www.legalfoodhub.org/2019/12/06/at-legal-food-hub-attorneys-help-food-businesses-pro-bono/> (providing the \$2.5 million estimate).

⁵⁷ See ALLI CONDRA, ET AL., HARV. L. SCH. FOOD L. & POL'Y CLINIC & CONSERVATION L. FOUND., FARM & FOOD LAW: A GUIDE FOR LAWYERS IN THE LEGAL FOOD HUB NETWORK (2016), http://www.legalfoodhub.org/wp-content/uploads/2014/05/Legal-Food-Hub-Guide-Version-2.FINAL_.pdf.

One option Congress and USDA might consider is establishing a program similar to the funding appropriated for Agricultural Mediation Programs in all states. USDA's Farm Service Agency administers the AMP by distributing grants to states in order for them to fund an entity that provides alternative dispute resolution services for farmers, their creditors, and other directly-affected parties. A national-scale program to help support pro or low bono legal services to the food system could be modeled on the successes of the AMP, with grants administered to states through Rural Development. Such grants could be distributed to states, which would designate an organization that would provide these services to individuals. Doing so would not only ensure access to legal services critical to sustainable regional food economies, but also would provide a more robust data collection tool that could be coordinated at the federal level. Such data would help gain a clearer picture as to the legal services each region's food system requires.

Invest in Attorney Training Programs.

One key lesson from the work of our consortium members and related legal service providers is that providing capable legal assistance requires a broad range of specialized knowledge in food and agriculture law and in food production practices. The need for this specialized knowledge serves as a barrier to entry for new attorneys in the field and prevents otherwise experienced attorneys, such as those at well-resourced law firms, from directing pro bono time toward this type of work. USDA-sponsored training programs to educate attorneys to assist farmers on regulatory compliance on issues such as food safety and cross compliance could go a long way toward closing this gap. Relatedly, USDA-sponsored "Food & Agriculture Law 101" programs for farmers and other food producers could help them understand when and how to access legal resources and seek legal representation.

Establish Regulatory Liaisons.

USDA itself holds a wealth of expertise in a broad range of critical legal issues, including cross compliance, food safety, and land tenure. USDA should establish regulatory liaisons who can provide guidance for attorneys, produce compliance manuals and other guidance documents, and serve as accessible points of contact for notice of and questions about changes in statutory and regulatory programs. These liaisons might be modeled on or incorporate NRCS Service Centers and similar "customer"-focused programs, but would importantly offer regulatory compliance support across the full range of USDA programs for producers, food businesses, and the lawyers who represent them. The Environmental Protection Agency, for example, offers a series of issue-specific hotlines to provide advice to regulated parties and their lawyers.⁵⁸ These hotlines are unique for each of EPA's core regulatory responsibilities, but they are collected together, which makes access easier and provides regulated parties with a clear overview of the range of regulatory subjects that may apply to them.

Increase understanding of food system legal needs through national data collection.

Data on the legal needs of farm and food system stakeholders is not being collected at the national level, or even at the state or regional level except where the Legal Food Hub or other similar organizations operate. To alleviate significant gaps in data regarding farmers', food entrepreneurs', and food system organizations' utilization of legal services, further research is needed to understand current access to legal services and where gaps exist. One way to gather this information would be to add a question to subsequent USDA Censuses of Agriculture.

⁵⁸ *EPA Hotlines*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/aboutepa/epa-hotlines#epcraic>.

II. Supporting the Agricultural Workforce⁵⁹

Appoint a Farmworker Coordinator and provide substantial support.

In 2008, Congress created the role of Farmworker Coordinator at USDA, which now sits in the Office of Partnerships and Public Engagement.⁶⁰ The Coordinator is tasked with administering the low-income migrant and seasonal farmworkers emergency grant program; serving as a liaison to community-based nonprofit organizations; coordinating with other Federal agencies, state and local governments to meet farmworker needs during emergencies; integrating farmworkers concerns and voices into the Department's programming; consulting with relevant institutions on agricultural education opportunities that assist low-income and migrant seasonal farmworkers; and supporting farmworkers in becoming producers or landowners.⁶¹

Under the Obama Administration, the role was filled by Christine Chavez-Gonzalez,⁶² but it is unclear who, if anyone, serves as the Farmworker Coordinator today. It appears that in recent years, the position went unfilled and the agency was vague about what outreach and coordination activities were being conducted.⁶³ USDA does not include any additional information about the Coordinator's role on its website and provides no insight into what the Coordinator is currently working on and prioritizing or has previously accomplished.⁶⁴ Since the change in Administration the website has improved and now includes many more links to federal and external resources related to farmworkers, but still lacks clarity on the Coordinator's role and activities.⁶⁵

The Farmworker Coordinator position provides USDA the opportunity to ensure its programs and services meet the needs of the workers who give life to the U.S. agricultural industry. To better support workers involved in agricultural production, USDA should:

- Appoint a strong farmworker advocate, with longstanding experience working with farmworker communities (and with a preference for someone who has been a farmworker), to the role of Farmworker Coordinator, which will help ensure the individual can be effective in their role as a trusted ally.
- Conduct outreach and publish findings on gaps in federal services reaching farmworkers.
- In particular, ensure meaningful coordination with EPA on administering, implementing, and continuously improving the Worker Protection Standard to ensure the protection of farmworkers from pesticide exposure.
- Develop and make publicly available, in writing, the Farmworker Coordinator's priorities, strategic plan for addressing identified gaps in federal services and fulfilling the Coordinator's mandate, anticipated activities, processes for engaging farmworker communities, and contact information for inquiries.

Provide and clarify opportunities to support farmworkers during emergencies.

Section 5177a of Title 42 of the U.S. Code establishes USDA's authority to make grants to support farmworkers when the Secretary determines that a local, State or national emergency or disaster has caused

⁵⁹ These recommendations benefitted from research and drafting by Bridgette Slater, Harvard Law School J.D. 2022, and Ava Cilia, Harvard Law School J.D. 2022.

⁶⁰ 7 U.S.C § 6934(f).

⁶¹ 7 U.S.C § 6934(f).

⁶² See *USDA Names Courtyard in Washington, DC in Honor of Cesar Chavez*, U.S. DEP'T OF AGRIC. (Mar. 31, 2015), <https://www.usda.gov/media/press-releases/2015/03/31/usda-names-courtyard-washington-dc-honor-cesar-chavez>.

⁶³ See U.S. Dep't of Agric., 2021 USDA Explanatory Notes – Office of Partnerships and Public Engagement, <https://www.usda.gov/sites/default/files/documents/03oppe2021notes.pdf>.

⁶⁴ See *Special Initiatives*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/partnerships/other> (last visited Mar. 3, 2021).

⁶⁵ See *id.*

low-income migrant or seasonal farmworkers to lose income, to be unable to work, or to stay home or return home in anticipation of work shortages.⁶⁶ These grants are awarded to public agencies or nonprofits to provide emergency services to low-income migrant and seasonal farmworkers in such situations. The type of assistance is left to the discretion of the Secretary of Agriculture—and is currently delegated to the Office of Partnerships and Public Engagements (OPPE)—who has the power to determine what is necessary and appropriate given the emergency circumstances. The Farmworker Coordinator is charged with assisting in the administration of this program.⁶⁷

Despite the number of emergencies affecting farmworkers in recent years, including the COVID-19 pandemic, wildfires, and other significant weather events, this grant-making authority does not appear to have been utilized. A search through USDA’s public website does not uncover any guidance for when OPPE has or will make such grants available, how organizations may apply to receive these grants, or what kinds of activities may be covered by these grants. Nor do any announcements or guidance appear in the Federal Register. With the increasing frequency of climate-related natural disasters and potential for future pandemics, USDA must provide clear policies and procedures for administering and quickly distributing the emergency grants authorized in this section. USDA should:

- Develop and issue clear guidance on the administration of emergency grants for farmworkers, including the application process and scope of eligible grant activities.
- In defining the scope, explore its authority to provide organizations with support to distribute enhanced personal protective equipment to farmworkers, without which farmworkers could lose income due to health and safety concerns related to going to work in smoky conditions, a pandemic, or similar circumstances.

Prioritize agricultural workers in USDA research and grant programs.

USDA supports new research and innovative projects through a variety of grant programs. In some cases, USDA controls the solicitation and the types of projects that will be funded. For instance, the National Institute of Food & Agriculture (NIFA) administers competitive grants for farm safety education, which are nested within the Rural Health and Safety Education (RHSE) Program.⁶⁸ Farm safety education grants support programs directed toward farmworkers, family farmers, and timber harvesters and focus on reducing farm chemical exposure, occupational injury and death rates, and agricultural respiratory diseases, among other hazards. However, for FY 2019, 2020, and 2021, NIFA solicited applications specifically for the Individual and Family Health Education area of the RHSE Competitive Grants Program and not for farm safety programs targeting farmworkers.⁶⁹ This Program thus represents just one opportunity through which USDA could support projects directed toward agricultural workers but currently is not doing so.

Other grant opportunities are broad enough to support projects that do target agricultural workers. For instance the (yet-to-be fully-launched) Rural Innovation Stronger Economy Grant Program is meant to “improve the ability of distressed rural communities to create high-wage jobs, accelerate the formation of new businesses with high-growth potential, and strengthen regional economies,” as well as “help rural communities identify and maximize local assets and connect to regional opportunities, networks, and industry clusters that demonstrate high growth potential.”⁷⁰ Qualifying projects could target agricultural workers for career advancement opportunities. Several extramural research grants administered by NIFA,

⁶⁶ 42 U.S.C. § 5177a. Authority has been delegated to the Office of Partnerships and Public Engagement. 7 C.F.R. § 2.38.

⁶⁷ 7 U.S.C. § 6934(f).

⁶⁸ 7 U.S.C. § 2662

⁶⁹ Additionally, a search of NIFA’s Recent Awards database reveals that none of the grants awarded under the RHSE Program include the terms “worker” or “workers” in the title.

⁷⁰ Stakeholder Listening Sessions on New Rural Innovation Stronger Economy (RISE) Regulation, 85 Fed. Reg. 44273 (July 22, 2020), <https://www.federalregister.gov/documents/2020/07/22/2020-15821/stakeholder-listening-sessions-on-new-rural-innovation-stronger-economy-rise-regulation>.

such as the Agriculture and Food Research Initiative, have also awarded funds to projects focused on agricultural workers. Through its grant-making selection process, USDA can continue to fund and prioritize support for the agricultural workforce.

Finally, USDA engages in its own research through the Agricultural Research Service, the Economic Research Service, and the National Agricultural Statistics Service. Under their broad mandates, these agencies can and should engage in research that addresses industry concerns from the perspective of agricultural workers. In the past the National Agricultural Statistics Service (NASS) worked with the National Institute for Occupational Safety and Health (NIOSH) (which sits within the Centers for Disease Control and Prevention), by conducting the Farm Safety Survey (FSS) to produce national estimates for the number of farms with potential injury exposures that can occur from certain types of machinery, animals, grain storage facilities, and other hazards.⁷¹ While results are available for 2006 and 2011,⁷² no subsequent data have been published.

USDA should enhance its support of workers in agricultural and food system by:

- Specifically soliciting applications for agricultural worker-focused projects, where appropriate.
- Prioritize such projects in selecting awardees from grant-applicant pools.
- Devote intramural research resources to projects that support the economic advancement, health, and wellbeing of agricultural workers as individuals and as critical actors in the agricultural sector.
- In particular, reinvigorate its partnership with NIOSH on the Farm Safety Survey to track risks, injuries, and fatalities.

Thank you very much for your consideration of our comments, and please feel free to contact us if you any follow up questions.

Sincerely,

Farm Bill Law Enterprise
farmbilllaw.org

⁷¹ See *Agricultural Safety – Farm Safety Survey (FSS) FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L INSTITUTE FOR OCCUPATIONAL SAFETY & HEALTH, <https://www.cdc.gov/niosh/topics/aginjury/fss/faq.html> (last visited Apr. 7, 2021).

⁷² The FSS relies on the Census of Agriculture, which takes place every five years, as its sampling frame. See *Agricultural Safety – Farm Safety Survey (FSS) Technical Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L INSTITUTE FOR OCCUPATIONAL SAFETY & HEALTH, <https://www.cdc.gov/niosh/topics/aginjury/fss/techinfo.html#Datasource> (last visited Apr. 7, 2021).