



# Farm to School Legal Toolkit

A Legal Guide for New York Farmers

Prepared by the Food and Beverage Law Clinic at the Elisabeth Haub School of Law  
in partnership with Common Ground Farm

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**Disclaimer:** This document is meant to be a reader-friendly and simplified explanation of legal topics of farm to school and its related components, with a focus on New York State. This guide is meant for personal and educational purposes only. A guidebook, even one referencing the law, is no substitute for a lawyer. *This guide reflects the state of the law as of September 2019, and the regulations and other authorities referenced herein may have changed since that time.*

# Table of Contents

Acknowledgments .....	1
Introduction .....	3
I. Insurance and Liability for Farm to School Programs.....	4
A. Insurance Requirements .....	6
B. Relevant Types of Insurance for Farm to School.....	6
A. Good Agricultural Practices (GAP)/Good Handling Practices (GHP) Certification.....	8
B. The Food Safety Modernization Act and the Produce Safety Rule .....	9
1. Food Safety Modernization Act (FSMA) Exemptions and Qualified Exemptions.....	10
2. Modified Requirements for Qualified Exempt Farms .....	12
III. Procurement Regulation.....	14
A. Federal Procurement Procedures .....	15
1. Federal Procedures for Purchases Worth \$250,000* or More .....	15
2. Federal Procedures for Purchases Worth Between \$10,000 and \$250,000 .....	16
3. Federal Procedures for Purchases Worth Less than \$10,000 .....	16
B. New York State Procurement Procedures.....	18
1. New York State Procedures for Purchases Worth More than \$20,000 .....	19
2. New York State Procedures for Purchases Worth Equal to or Less than \$20,000 .....	19
3. New York State Procedures for Purchases Directly from Farms (for Farm to School Arrangements Worth up to \$50,000) .....	19
C. Local & School District Procurement Procedures.....	22
D. Flowchart for Compliance with Federal and New York State Procurement Procedures.....	23
E. “Geographic Preference” and How it Affects the Procurement Procedures Above .....	24
IV. Ways to Engage in a Farm to School Arrangement .....	26
A. Traditional Distributors or Food Service Management Companies.....	27
B. Direct Sale to the School .....	27
C. Selling Through a Cooperative.....	28
1. Cooperative Legal Basics .....	28
2. Cooperatives Participating in Farm to School Arrangements.....	30
D. Food Hubs .....	31
V. Conclusion .....	33



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# Introduction

When we first started looking into farm to school arrangements, we were concerned by the lack of legal resources available to farmers. Many of the publicly available materials on farm to school are prepared for the perspective of a school district. Plus, even with our legal backgrounds, we found that the relevant law is complex and often hard to find. We could not imagine how hard it must be for a farmer with a busy schedule to figure it all out! It was then that the idea of creating a legal toolkit for farmers interested in farm to school arrangements was born.

Farm to school is a federal and state sponsored program that improves access to local foods in schools by promoting distribution relationships between schools and local farms.<sup>1</sup> These arrangements can be beneficial to all the parties involved, as they provide a stable source of income for local farms while also providing schools with healthy, nutritious foods for children, all with a lower carbon footprint. The farm to school movement helps connect communities to their local growers and the land itself, and in addition to food distribution it encompasses opportunities for agriculture-based learning experiences such as school gardens, farm field trips, farm visits, and more. In New York, recent legislation introduced significant subsidies for school districts that source at least 30% of their food from New York growers or processors, making farm to school an all the more promising economic opportunity.<sup>2</sup>

Despite all the benefits, entering into a new business arrangement with a school as a local farm can be a daunting task. What are the relevant laws around distributing to schools? What are the necessary steps to secure a contract to provide produce to a school? This guide seeks to help answer your legal questions on farm to school and present options available to you when starting a new farm to school venture. Part I of this toolkit discusses insurance concerns for farmers in establishing a farm to school relationship. Part II covers food safety regulations. This includes an analysis of GAP and GHP certification and the Food Safety Modernization Act's Produce Safety Regulation. Part III proceeds to discuss procurement in detail, going into the specific procurement regulations that apply to a farm to school arrangement and how "geographic preferences" relate to these procedures. Lastly, Part IV reviews the different ways a farmer can partake in farm to school. This includes looking at options for direct sale, cooperatives, and food hubs. We hope that you find this toolkit useful as you pursue your farm to school opportunities!



## I. Insurance and Liability for Farm to School Programs

Insurance is important for any farm business to protect itself from risks. In farm to school arrangements, however, there may be increased risks since school children have immune systems that are still developing. In farm to school arrangements, it is especially important to have liability insurance to protect your business against claims that your products caused illness or injury.<sup>3</sup> Insurance brokers specialize in risk management and insurance policies. Speaking with an insurance broker is the best way to determine what type of insurance is the best fit for your needs. Once your insurance broker has more in-depth knowledge of your operations, they will be able to suggest best practices. To give you some background on important insurance basics and to aid in future discussions with a broker, this section will provide an overview of (1) insurance requirements, (2) types of insurance, and (3) questions to ask your broker.

## A. Insurance Requirements

There are no federal or New York state regulations that require farmers to obtain insurance to participate in farm to school, but a school district may require certain insurance. The school district's requirements are usually found in the school district's policy manual. If not, the district's food service director should have this information.

## B. Relevant Types of Insurance for Farm to School

The school district has discretion to set insurance requirements because there is no federal or New York regulation demanding that farms obtain insurance to participate in farm to school programs. The type of insurance policy you should have depends on the arrangement you want to have with the school district. The two most relevant types of insurance for farm to school are:

1. *Product Liability Insurance*: protects the farm when a person who consumed the farm's products gets sick.<sup>4</sup> It also covers the injured party's medical costs and legal fees.<sup>5</sup> A survey done by the USDA found that most school districts request between \$100,000 and \$3 million in product liability insurance coverage.<sup>6</sup>
2. *Premises Liability Insurance*: covers injuries that may occur on the farm during school activities or field trips.

The school district may ask to be added to your liability insurance policy as an "additional insured." An "additional insured" is a person or entity that is added to the policy of the primary holder but is not required to pay premiums or other fees.<sup>7</sup> This allows the additional insured to file a claim under your insurance if they are exposed to liability that is covered under your policy.

## Questions to Ask Your Broker

- 1) What should I ask my broker if I am considering a policy?
  - Do you have any experience insuring farms participating in farm to school programs?
  - What policies do farms typically obtain when they are providing food to schools or other institutions?
- 2) What should I ask my broker if I already have a policy?
  - What is the limit on our current policy?
  - Is the policy limited per person, per incident, or in the aggregate?
  - Should we increase our policy limit to accommodate the new venture?
  - Would our policy premium increase if we were to cover more schools?
  - Are there additional policies or changes to our existing policies you would recommend if we are providing food to schools or other institutions?

The factors mentioned above are just a few of the initial considerations for a farm to school arrangement. Related to the insurance issues are food safety regulations which are discussed below.



## II. Food Safety

Farmers who are interested in entering into a farm to school arrangement with a school district will have to comply with certain local, state, and federal food safety requirements. In addition, they may have to comply with food safety standards required by the applicable school district.

Regardless of the food safety standards required by law or by a school district, it is important to have strong food safety protocols because school children have developing immune systems and are vulnerable to food-borne illness. Further, compliance with food safety laws does not absolve a farm from liability if someone gets sick as a result of eating the farm's food. As a result, farmers should consider preparing a food safety program for their farm, obtaining GAP (Good Agricultural Practices) and/or GHP (Good Handling Practices) certification, and/or completing a food safety self-audit to assure school customers that their products are safe.

Farmers should also be aware of the requirements imposed by the Food Safety Modernization Act ("FSMA"). FSMA is a federal food safety law providing guidelines and standards for producers to follow in order to prevent food borne illnesses. It is by no means the only federal regulation farmers will have to comply with, but it is the focus of the section below because it is a significant new law affecting produce growers, and fresh produce accounts for a large percentage of farm to school sales. A key difference between GAP/GHP certification and FSMA is that a farmer does not necessarily have to be GAP/GHP certified to engage in a farm to school arrangement (unless required by the school district) but they do need to comply with FSMA unless they qualify for one of the exemptions described in more detail below.

In this section, we will first explore why GAP and GHP are important. We will then discuss the Food Safety Modernization Act and the Produce Safety Regulation, and which farms are subject to these regulations. Next, we will delve deeper into the exemptions and corresponding requirements.



## A. Good Agricultural Practices (GAP)/Good Handling Practices (GHP) Certification

GAP and GHP are voluntary audits that verify that fruits and vegetables are produced, packed, handled, and stored using practices that minimize the risks of microbial food safety hazards. GAP stands for Good Agricultural Practices while GHP stands for Good Handling Practices. Being GAP/GHP certified guarantees a school that a producer follows at least the minimum number of food safety practices mandated by the certification.

There is no law requiring that farms selling to schools be GAP/GHP certificated, but many school districts require it. A farmer should contact the school district to determine if that particular school district requires GAP/GHP certification.

A farm seeking to become GAP/GHP certified will have to complete a Request for Audit Service. The completed form must then be sent to the closest auditing facility from the list of Local Specialty Crops Inspection Division audit offices. A representative will conduct an initial audit of the farm to determine if its practices meet the standards. A certification is valid for one year from the date of the initial audit. The auditor may also conduct an unannounced verification visit at some point after this initial audit. If the initial audit or the unannounced verification visit demonstrate that the farm is not meeting the program requirements, a follow up audit may be conducted.

Generally, a GAP/GHP audit will be conducted pursuant to the USDA Good Agricultural Practices Good Handling Practices Audit Verification Checklist. The auditor uses this audit checklist to score the food safety performance of the farm. This checklist is broken down into different sections which each cover a certain portion of the supply chain. In order to receive the certification, the applicant must obtain at least 80% of the available points in each applicable section. For example, if the farm has potable water available to all workers the farm will receive 10 points in the “general questions” section of the checklist. Compliant farms will receive a USDA certificate and have its name listed on USDA’s website.

A full breakdown of the requirements for each section is beyond the scope of these materials, but some basic information concerning the requirements for GAP/GHP is provided below. For more information refer to the USDA Good Agricultural Practices Good Handling Practices Audit Verification Checklist.

The applicable questionnaire sections differ for GAP and GHP audits because they cover different portions of the supply chain. However, both GAP and GHP audits contain a “general questions” section which addresses overarching food safety issues. To comply with this section, the farm must have a food safety program, a traceability program, and a recall program. A food safety manual is required as part of the food safety program. This manual must explain the



farm's practices and procedures that reduce the risk of contamination from chemical, physical, or microbial hazards. Finally, this section covers worker health and hygiene and pesticide or chemical use.

In addition to the general questions section, typically, the GAP audit also consists of a farm review section, and a field harvest and field packing activities section. The farm review section focuses on farm specific practices such as water usage, sewage treatment, livestock and manure, and soil. For example, a farm will receive 15 points in the farm review section if its sewage treatment or septic system is functioning properly and there is no leakage or runoff. Finally, the field harvest and field packing activities section concentrates on the farms practices involving field sanitation and hygiene, and field harvesting and transportation.

A GHP audit will generally consist of three sections. In addition to the general questions section, a GHP audit will cover a farm's house packing facility and its storage and transportation practices. The house packing facility section focuses on practices of the farm's packaging facility, including the receiving area and the washing/packing line. This section also covers the packing house's pest control, general housekeeping, and worker health and hygiene. The last section of the GHP audit concerns the farm's product storage and transportation practices, including the pest control measures in place at the storage facility.

## B. The Food Safety Modernization Act and the Produce Safety Rule

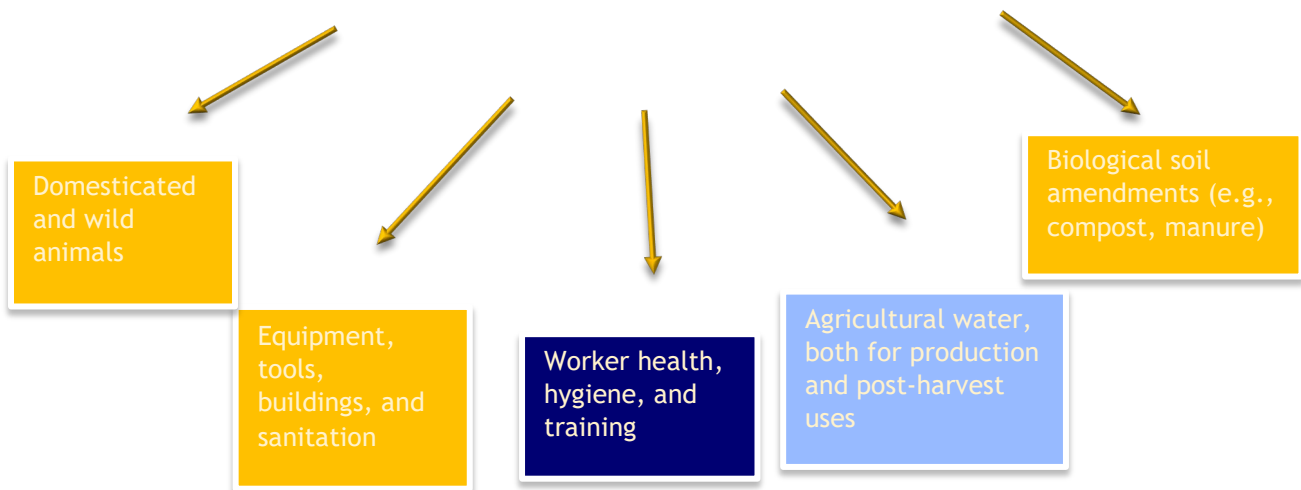
The Food Safety Modernization Act (FSMA) became law in January 2011 and issues guidelines and standards for producers to follow in order to prevent foodborne illnesses. The Act's goal is to make the U.S. food supply safer by moving away from legislation that deals with responding to contamination, and instead focusing on actively preventing contamination from occurring in the first place. This piece of legislation gives the FDA authority to issue mandatory recalls of contaminated food products. It also allows the FDA to establish new regulations for facilities and farms. However, some farms may be exempt from the FSMA requirements, depending on what crops and how much they produce. The Act sets out seven regulations that affect the food production chain, but for the purposes of this guide, this section will focus on the regulation titled "Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption," also known as the "Produce Safety Rule." We focus on this regulation because it is the most relevant for farms selling fresh produce to schools.



Please note that FSMA is not the only food safety regulation. There are multiple state and federal regulations that farms need to comply with, depending on what is being produced. For example, a farm selling dairy to schools must comply with state/federal dairy safety regulations. For more information on milk and dairy regulations see the USDA website. Nevertheless, these materials focus on FSMA in particular due to the fact that farms are still adjusting to the Act's significant new regulations and that fresh produce accounts for a large percentage of farm to school sales.

It is important to understand that just because a farmer is in compliance with FSMA does not mean they are GAP certified, and just because they are GAP certified does not mean that they are in compliance with FSMA. These are two different standards which need to be addressed separately.

The Produce Safety Rule sets the first-ever, science-based minimum standards for the safe production, harvest, and handling of fruits and vegetables, in order to prevent microbial contamination and reduce foodborne illnesses associated with fresh produce. The rule is divided into several parts, including standards for:



For more information on the full requirements under the Produce Safety Rule please see this [fact sheet](#) by the FDA<sup>8</sup>, and the FDA's website on FSMA.<sup>9</sup>

## 1. Food Safety Modernization Act (FSMA) Exemptions and Qualified Exemptions

Certain farms that grow produce may be exempt from the Produce Safety Rule depending on how much and to whom they sell. Producers may either be completely exempt from compliance with the new requirements, or “qualified exempt” and eligible for modified requirements. If you meet one of the exceptions below you will not be required to comply with the Act.

### Farms exempt from the Regulation:

- Farms that have an average annual value of produce sold during the previous three-year period of \$25,000\* or less (This is referred to as the “de minimis” exception.)

### Products not covered by the Regulation:

- Produce used for personal or on-farm consumption
- Food grains, including barley, dent or flint-corn, sorghum, oats, rice, rye, wheat, amaranth, quinoa, buckwheat, and oilseeds
- Produce that is not a raw agricultural commodity (A raw agricultural commodity is any food in its raw or natural state.)
- Produce commodities that FDA has identified as rarely consumed raw. These include black beans, cashews, chickpeas, eggplants, potatoes, and sweet potatoes. (For an exhaustive list see 21 C.F.R. § 112.2(a)(1))<sup>10</sup>
  - The rule provides an exemption for produce that receives commercial processing that adequately reduces the presence of microorganisms of public health significance (such as conducting a “kill step” validation study) as long as certain disclosures are made and written assurances are received, with appropriate documentation.<sup>11</sup>

### Farms qualified exempt/subject to modified requirements:

- Farms that satisfy the following two conditions:
  1. Sales of all food (not just produce) averaging less than \$500,000\* per year during the previous 3 years.
  2. The farm’s sales to qualified end-users must exceed sales to others. A “qualified end-user” is either (a) the consumer of the food or (b) a restaurant or retail food establishment (including a school) that is located in the same state or the same Indian reservation as the farm or not more than 275 miles away.

\* Sales thresholds are based on the average of the past three years’ worth of sales, *adjusted for inflation*. The FDA has clarified that the cutoff for the de minimis exemption (\$25,000) and the qualified exemption (\$500,000) are actually higher when adjusted for inflation. This adjusted number is published in March of each year by the FDA.



## 2. Modified Requirements for Qualified Exempt Farms

Farms are subject to one of three levels of reporting requirements under FSMA. They can be (1) subject to the full reporting requirements; (2) subject to modified reporting requirements if they are a “qualified exempt farm,” or (3) completely exempt from all reporting requirements if they fall within the de minimis exception discussed above. The modified reporting requirements for qualified exempt factors include labeling, record keeping, compliance/enforcement, and the withdrawal of a qualified exemption. This section discusses these requirements.

### Labeling

The labeling requirements vary depending on whether a food packaging label is required pursuant to the Federal Food, Drug, and Cosmetic Act. Produce will fall into one of two categories:

1. For produce where a food packaging label *is* required, under § 112.6(b)(1) you must prominently and conspicuously display the name and the complete business address of the farm where the produce was grown on the label.
2. For produce where a food packaging label *is not* required, under § 112.6(b)(2) you must prominently and conspicuously display, at the point of purchase, the name and complete business address of the farm where the produce was grown, on a label, poster, sign, placard, or documents delivered contemporaneously with the produce in the normal course of business, or, in the case of Internet sales, in an electronic notice.<sup>12</sup>

### Record Keeping

To maintain qualified exempt status, farms must keep records in accordance with the Produce Safety Rule Section 112.7 which requires farms to:

1. Keep business records like sales receipts and other documents generated during the normal course of business. Details of how sales documents must be kept are discussed in Subpart O of the Rule which requires information like date and price of sale.
2. Demonstrate that the farm satisfies the criteria for a qualified exemption. This includes keeping business records like sales receipts and documentation that the farmer has reviewed and verified their records establishing their continued eligibility for the qualified exemption. The review of continued eligibility must be completed annually. These records do not have to be submitted to the FDA but must be retained and made available on request.<sup>13</sup>

## Withdrawals of a Qualified Exemption

Even if a farm is granted a qualified exemption that status is not guaranteed. The FDA can withdraw a farm’s qualified exempt status under two scenarios:

1. In the event of an active investigation of a foodborne illness outbreak that is directly linked to the farm.
2. If it is “determined [withdrawal] is necessary to protect the public health and prevent or mitigate a foodborne illness outbreak based on conduct or conditions associated with your farm that are material to the safety” of the covered produce the farm is growing, harvesting, packing, and holding.<sup>14</sup>

## Compliance/Enforcement

Farms covered by FSMA’s full reporting requirements and qualified exempt farms are subject to the same penalties for non-compliance.<sup>15</sup> Committing a prohibited act is considered a federal offense punishable by fines or incarceration. Compliance deadlines for labeling and record keeping requirements for qualified exempt farms are based on the size of the farm and the type of produce the farm grows. The applicable deadlines for qualified exempt farms are as follows:

FSMA Labeling and Record Keeping Compliance Deadlines <sup>16</sup>	Very Small Farms farms with an average annual value of produce sold during the previous three-year period of between \$25,000 and \$250,000	Small Farms farms with an average annual value of produce sold during the previous three-year period of between \$250,000 and \$500,000
January 26, 2016	All farms must retain records (e.g. receipts) demonstrating eligibility for a qualified exemption pursuant to 112.7(b)	All farms must retain records (e.g. receipts) demonstrating eligibility for a qualified exemption pursuant to 112.7(b)
January 26, 2018	N/A	Farms producing sprouts must comply with all other requirements in 112.6 & 112.7
January 28, 2019	Farms producing sprouts must comply with all other requirements in 112.6 & 112.7	Farms producing other produce (not sprouts) must comply with all other requirements in 112.6 & 112.7
January 1, 2020	All farms must comply with the label requirement outlined in 112.6(b)(1)	All farms must comply with the label requirement outlined in 112.6(b)(1)
January 27, 2020	Farms producing other produce (not sprouts) must comply with all other requirements in 112.6 & 112.7	N/A



### III. Procurement Regulation

One of the key aspects to setting up any farm to school program is ensuring that proper procurement procedures are followed. In this context, “procurement” is the process the school district must go through when purchasing goods and/or services for use by the institution. School districts must comply with federal, state, and local school district procurement procedures. The most restrictive of these procedures will apply to and govern the farm to school arrangement. While the onus is on a school district to comply with these regulations, understanding these procedures is important from a farm’s point of view in order to develop a strategy for successfully accessing farm to school opportunities. The applicable procedures can expose farms to either less formal or more formal methods of competition with other suppliers. For further assistance, contact your USDA Farm to School Regional Lead located in each of the USDA Food and Nutrition Service (FNS) Regional Offices<sup>17</sup> and refer to FNS’s local procurement guide and related resources.<sup>18</sup>

This section will proceed by discussing first the federal procurement procedures, then the New York State procurement procedures, and finally the local/school district procurement



procedures. The section generally lays out each of these procedures, the dollar thresholds that dictate when they would apply, and how these different rules interact with each other to govern setting up a farm to school arrangement. Last, this section discusses “geographic preference” as a separate, but important, consideration for farm.

## A. Federal Procurement Procedures

Any school district that is administering federally reimbursed nutrition programs<sup>19</sup> must follow federal procurement guidelines, along with the applicable state and local procurement procedures.<sup>20</sup> Most school districts use federal funds to fund their farm to school programs.

The applicable federal procurement procedures are based on the aggregate amount a supplier is selling to the school district. When the purchase is \$250,000 or more, formal procedures apply. When the purchase is worth less than \$250,000, but more than \$10,000, informal procedures apply. “Micro-purchase” procedures apply when the purchase is worth less than \$10,000.

### 1. Federal Procedures for Purchases Worth \$250,000\* or More

If a school district makes a purchase worth \$250,000 or more from one supplier then the school district must follow the “formal” federal procurement procedures for that purchase, using either of the two following available methods:

1. Procurement by “sealed bids”: Bids are publicly solicited through an Invitation for Bid (IFB) and the contract must be awarded to the responsible bidder whose conforming bid is the lowest in price.<sup>21</sup>
2. Procurement by “competitive proposals”: A Request for Proposal (RFP) is publicized identifying all evaluation factors and their relative importance, and the contract must be awarded to the responsible first whose proposal is most advantageous to the program, with price *and other factors* considered.<sup>22</sup> USDA guidance materials note that factors other than price that could be considered include “technical expertise, past experience, years in business, marketing, etc.,” and may also include “elements such as ability to host farm visits, showing the state or farm of origin on the invoice, or providing farm information for education in the lunchroom as part of their selection criteria.”<sup>23</sup>

\* It is important to note that states may set their own thresholds and corresponding procurement procedures that differ from the federal thresholds and procedures. Therefore, a state can require school districts and farms to follow the state’s own formal procurement procedures even if the purchase falls below the \$250,000 federal threshold.<sup>24</sup> As described

below under “New York State Procurement Procedures,” New York requires its own formal procurement procedures at a lower threshold than the \$250,000 federal threshold.

## 2. Federal Procedures for Purchases Worth Between \$10,000 and \$250,000

If a school district makes a purchase worth less than \$250,000, but greater than or equal to \$10,000, then the school district is subject to “informal” federal procurement procedures for that purchase.<sup>25</sup> Federal law does not supply these informal procedures, and instead requires each school district to determine these procedures.<sup>26</sup> Federal regulations do put forth two requirements for school districts and other vendors:

1. **The school district must obtain quotes from an “adequate number of qualified sources.”**<sup>27</sup> The USDA considers three suppliers an adequate number of qualified sources.<sup>28</sup>
2. **One purchase cannot be split up into multiple smaller purchases “arbitrarily” to be under \$250,000.**<sup>29</sup> For example:
  - If a school district puts out a bid for \$300,000 worth of spinach for the year, it cannot split this bid of spinach into two separate purchases from the same producer for the year and avoid using the competitive bidding process for each purchase.<sup>30</sup> The school district must use the competitive bidding process for the entire amount if it intends to purchase this amount from one producer for the year.
  - A school district may split a \$300,000 bid for spinach into two separate purchases if it intends to purchase this spinach from two different producers, but it must inform both producers of its intention to split the bid before doing so.<sup>31</sup>

## 3. Federal Procedures for Purchases Worth Less than \$10,000

If a school district makes a single “transaction” worth less than \$10,000, then more lenient federal procedures, called “micro-purchase procedures,” apply.<sup>32</sup> These micro-purchase procedures enable school districts to award purchases to suppliers without having to solicit competitive quotes.

### Micro-Purchase Requirements

1. **A micro-purchase “transaction” must be less than \$10,000.** A school district can only use the micro-purchase procedures if it needs to make a “one-time purchase of a product and the purchase is valued under [the micro-purchase threshold].”<sup>33</sup> By way of illustration:

- The purchase of a variety of vegetables from a single farm at the same time for \$9,999, is considered ONE permissible micro-purchase transaction, regardless of whether the vegetables are delivered all at one time or if the arrangement calls for multiple deliveries.
- One purchase of vegetables from one farm and, on the same day, a separate purchase of vegetables from a different farm, where the dollar amount spent at each farm is less than \$10,000, would be TWO permissible micro-purchase transactions.

2. **Transactions cannot be split “arbitrarily” for the sole reason of being under the \$10,000 micro-purchase threshold:**

- If a school district knows at the beginning of the year it needs to purchase \$9,999 worth of carrots for the year, \$9,999 worth of lettuce for the year, and \$9,999 worth of apples for the year, the school district cannot categorize these as three different transactions to take advantage of the micro-purchase procedures to purchase this food from only one supplier.<sup>34</sup>
- If a school district knows in advance that it will need to make purchases of less than \$10,000 of lettuce at several times throughout the school year from one producer, unless it meets one of the valid reasons for splitting up transactions discussed below. In this situation, the school district should plan its needs over a period of time and use a competitive procurement method.<sup>35</sup>

A “transaction” is when a school district purchases products and services, either similar or dissimilar, at one time as a single, collective

In contrast, the following are examples of valid reasons for making micro-purchases:

- If the school district needs to make purchases for its harvest of the month or tasting programs separate from its formal contract with a distributor (and the use of micro-purchases is noted in the formal contract for the harvest of the month program).
- If the school district has delivery arrangements or storage capacity constraints that need to be accommodated.



- If the school district’s typical business practice historically has been to purchase in small amounts.<sup>36</sup>
3. **The school district must conduct some type of market research and choose a price it considers to be “reasonable.”**
  4. **All of the school district’s micro-purchases must be “distributed equitably among all qualified suppliers.”**
    - This means that a school district cannot repeatedly complete micro-purchase transactions with the same supplier.<sup>37</sup>
    - But, there is no requirement as to how many suppliers a school district must transact with.<sup>38</sup>
  5. **School districts must keep records that justify their purchase decisions.**<sup>39</sup>

### Summary of the Five Micro-Purchase Requirements

1. The “transaction” must be less than \$10,000.
2. Transactions cannot be split “arbitrarily.”
3. The school district must conduct some type of market research and choose a price it considers to be “reasonable.”
4. All of the school district’s micro-purchases must be “distributed equitably among all qualified suppliers.”
5. School districts must keep records and documentation that justifies their purchase decisions.

## B. New York State Procurement Procedures

In addition to the federal requirements, states may set their own thresholds and corresponding procurement procedures that differ from the federal thresholds and procedures. Therefore, a state can require school districts and farms to follow its own formal procurement procedures even if the purchase falls below the \$250,000 federal threshold.<sup>40</sup> As school districts are subject to federal, state, and local laws, the most restrictive threshold and the corresponding procedures apply.

New York State’s formal procurement procedures apply when the purchase is worth more than \$20,000. When the purchase is worth \$20,000 or less, informal procedures apply. New York State law imposes certain requirements for purchases of this size but does not supply the specific informal procedures, and instead requires each school district to determine and outline

their own informal procedures. But, New York State law does supply informal procedures that govern a school district's purchase of produce directly from a farm that is equal to or less than \$50,000 or from a single association of ten or fewer producers or growers.

## 1. New York State Procedures for Purchases Worth More than \$20,000

In New York State, the threshold for any school district<sup>41</sup> for the aggregate amount of a purchase contract is \$20,000.<sup>42</sup> This means that:

1. **If a school district spends more than \$20,000 for a particular contract, the formal New York State procurement procedures,<sup>43</sup> which also require a competitive process,<sup>44</sup> must be followed.** This is true even when federal law only requires informal procedures.
2. **The specific school district's internal policies and procedures must also be followed.<sup>45</sup>**

## 2. New York State Procedures for Purchases Worth Equal to or Less than \$20,000

If a school district makes a purchase worth equal to or less than \$20,000 "informal" procedures apply. New York State law imposes certain requirements but does not supply the specific procedures, instead requiring the school districts to impose their own informal procedures.<sup>46</sup> The mandated requirements are as follows:

1. **The particular school district's informal procedures must satisfy certain requirements.<sup>47</sup>** Specifically, if the school district's procedures allow the school to award a contract to anyone other than the lowest bidder, it must adequately justify that decision.<sup>48</sup>
2. **Obtaining bids from an adequate number of qualified sources, at least three.<sup>49</sup>** This is the same as the federal procedures and has been adopted from federal policy.<sup>50</sup>
3. **Purchases cannot be "artificially divided" to be under the \$20,000 threshold limit just to avoid formal competitive bidding procurement procedures.<sup>51</sup>**

## 3. New York State Procedures for Purchases Directly from Farms (for Farm to School Arrangements Worth up to \$50,000)

### Minimum Necessary Requirements

In addition to the general laws described above, New York State law applies a different, more lenient threshold when a school district purchases “eggs, livestock, fish, dairy products (excluding milk), juice, grains, and species of fresh fruit and vegetables *directly* from New York State producers or growers,” or from “associations of producers and growers [that are] comprised of ten or fewer owners of farms.”<sup>52</sup>

Instead of \$20,000, such farm to school arrangements are only required to follow the formal New York State procurement procedures for purchases that are worth more than an annual aggregate amount of \$50,000 per grower or qualified association of growers. Therefore, if the purchase is worth equal to or less than an annual aggregate amount of \$50,000 per grower or qualified association of growers, then the procedures discussed below apply. Even if the annual aggregate amount of such a purchase exceeds \$50,000, or the association of producers or growers has more than 10 members, the school district can apply for an exemption from the formal procurement procedures from the Commissioner of Education of New York State if no other producers or growers have offered to sell to the school district.<sup>53</sup>

The procedures that apply in this situation for all produce, including milk, are detailed below. The applicable procedure depends on the annual aggregate value of the arrangement. These procedures differ between milk purchases and other product purchases. These slight, but important, differences are highlighted below.

### **Direct Farm to School Purchases Worth Between \$10,000 and \$50,000 (inclusive) in Annual Aggregate Amount**

If a farm to school arrangement satisfies the requirements described above in the “Minimum Necessary Requirements” section, and the direct purchase falls between \$10,000 and \$50,000, New York State law imposes the following informal procedures:

1. **The school district cannot exceed an amount equal to (20 cents (or 25 cents in the case of milk)) x (total number of days in the school year) x (total enrollment in the school district) in any fiscal year in the aggregate for all of its direct purchases of produce.**<sup>54</sup> This is an aggregate amount, not an amount that applies to each grower/producer/association of growers or producers.
2. **The school district must ensure that the prices paid by the school district do not exceed applicable price benchmarks, as follows:**
  - *For all products other than milk*, the school district cannot pay more than the wholesale prices in effect on the date of purchase.<sup>55</sup> Such wholesale prices must be ascertained prior to the finalization of any agreement, either by telephone solicitation from local wholesalers or by referring to the most current issue of the Fruit and Vegetable Market News published by the Division of Market

Services, New York State Department of Agriculture and Markets.<sup>56</sup> Records of such price determinations must be kept on file for at least six years.<sup>57</sup>

- For milk, prices paid by the school district cannot exceed the highest price paid by at least two adjacent school districts.<sup>58</sup> This price information must be secured from adjacent school districts each September if the arrangement is for the whole school year, or each September and February if it is for half of the school year.<sup>59</sup> Records of such price determinations must be kept on file for at least three years.<sup>60</sup>
3. **The school district must provide public notice of its intent to purchase without using formal competitive bidding procedures as follows:**
- For all products other than milk, notice must be given in a manner which will provide all producers, growers, and associations of producers and growers who desire to sell to a school district an equal opportunity to do so.<sup>61</sup> At a minimum, all producers and/or growers whose products are grown or produced upon land taxed by the school district must receive the notice.<sup>62</sup> Records of compliance must be kept on file for at least six years.<sup>63</sup>
  - For milk, notice must appear in at least two consecutive issues in the official newspaper designated by the school district at least 10 days prior to the award of the contract.<sup>64</sup>
4. **The school district must solicit bids from at least three different potential suppliers who intend to enter into the farm to school arrangement with the school district.<sup>65</sup> For milk, suppliers must be “licensed milk processors.”<sup>66</sup>**
5. **When more than one licensed milk processor, eligible producer, grower, or association of producers or growers offers to sell products that are similar in type and quality at the same price, the school district must “divide its purchases equally” among all such producers, growers, and associations of producers or growers.<sup>67</sup>**

### **Direct Farm to School Purchases under \$10,000 in Annual Aggregate Amount (Micro-Purchases)**

Even when a farm to school arrangement falls under the federal \$10,000 micro-purchase threshold, *it must still comply with all of the informal procedures required by New York State law described above, except for the following differences:*

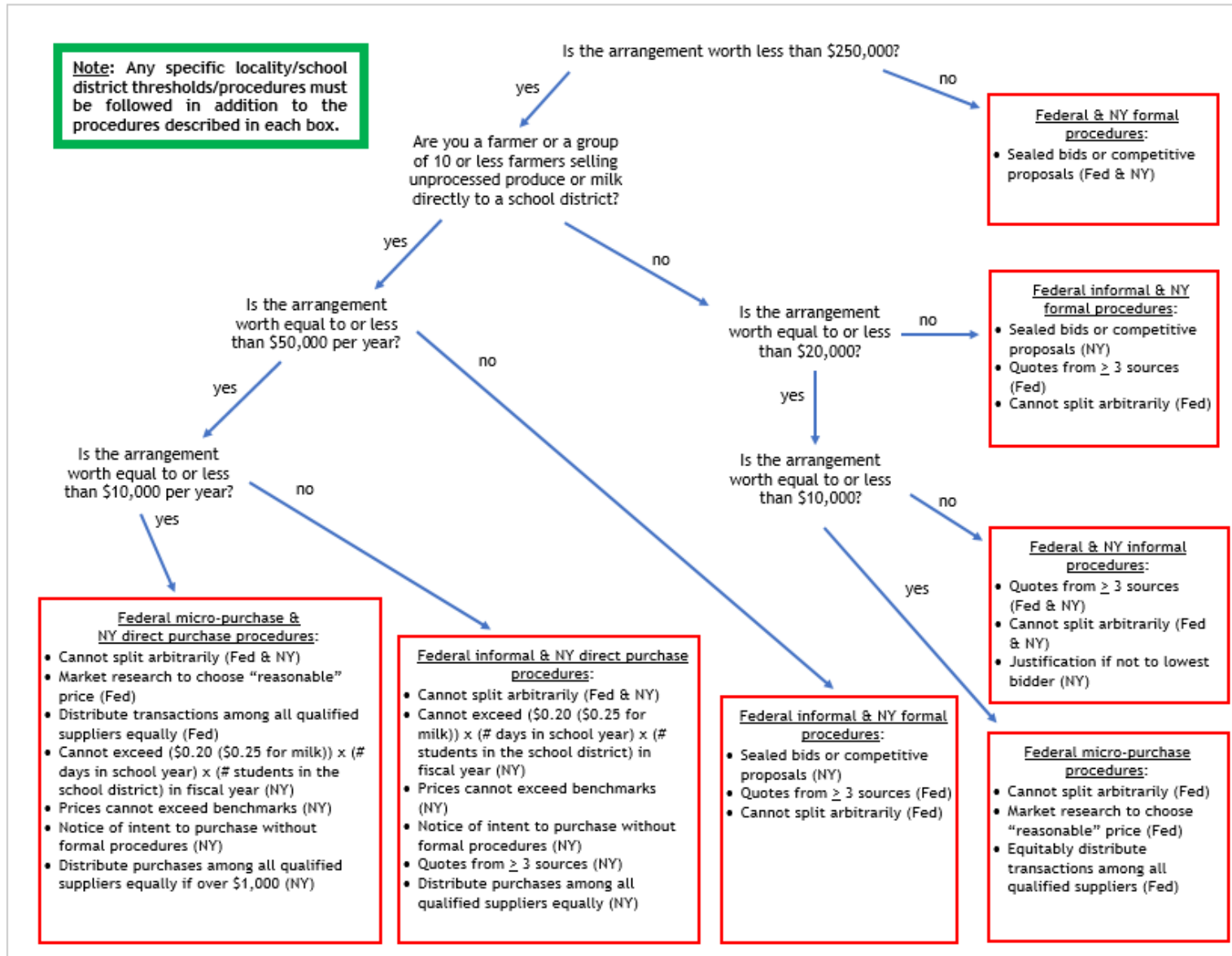


1. **Instead of having to solicit at least three bids, the school district would only have to split up micro-purchases equitably** (there is no requirement as to how many suppliers a school district must transact with in order to satisfy this requirement).
2. **The school district would only have to follow the fifth procedural requirement above (dividing purchases equally) when the total amount of the produce or milk to be purchased exceeds \$1,000.**<sup>68</sup>

## C. Local & School District Procurement Procedures

Localities and/or school districts may set their own thresholds and their own corresponding procurement procedures that differ from those at the federal or the New York State level. The most restrictive threshold out of the federal, New York State, and local thresholds, and the corresponding formal procedures for that particular level of government, would apply. Therefore, a locality or school district can require farms to follow their own formal procurement procedures even when formal procedures are not required under federal or New York State law.<sup>69</sup>

## D. Flowchart for Compliance with Federal and New York State Procurement Procedures



## E. “Geographic Preference” and How it Affects the Procurement Procedures Above

A school district receiving any federal money<sup>70</sup> can state a “geographic preference” for “local” products. Essentially, this means that the school district can prioritize procurement from sources within a certain geographical area.<sup>71</sup> According to federal law, the school district has the discretion to choose:

1. **Whether to implement a geographic preference.** The state cannot force a school district to either implement a geographic preference or not to implement a geographic preference.<sup>72</sup> Note, however, that New York State recently passed legislation that will increase the State’s reimbursement rate for school lunch meals to 25 cents per meal for school districts that purchase at least 30% of their total food costs for lunches in the preceding school year on NYS food products (instead of 5 cents per meal for all other school districts), giving New York school districts a powerful incentive to give geographic preferences for New York-sourced food.<sup>73</sup> Based on guidance prepared by the New York State Education Department and the New York State Department of Agriculture and Markets, “NYS food product” is defined as a food item that is grown, harvested, or produced in NYS or a food item processed inside or outside NYS comprising over 51% agricultural raw materials grown, harvested, or produced in NYS, by weight or volume.<sup>74</sup>
2. **The geographic scope of the geographic preference by setting its own definition for “local.”**<sup>75</sup> This means that the school district has the sole discretion to determine the definition of “local” when participating in one of the federal programs, subject to the limitations discussed below, even if a state or locality has adopted a buy local provision that includes its own definition of “local.”<sup>76</sup>

However, once a school district chooses to impose a geographic preference, federal and New York State law impose some limits on the school district’s definition of geographic preference:

1. **Federal law states that a school district can only set a geographic preference for purchases of “unprocessed locally grown or raised agricultural products.”**<sup>77</sup> These products are those that “retain their inherent character.” This includes some processed food as there are various food handling and preservation techniques that will not take away from the inherent character of the product.<sup>78</sup> Heating and canning are two examples of techniques that alter the inherent character of the product.<sup>79</sup>
2. **Federal law requires that the geographic preference does not “restrict full and open competition” and that the “selection criteria must be clearly described in all solicitation materials.”**<sup>80</sup> This means that a school district can potentially specify a geographic preference such as within the county, within the state, within more than

one state or parts of states, or within a mileage range, but the geographic preference cannot be so narrow that only one or two producers meet the preference.<sup>81</sup> Further, a school district cannot issue a solicitation stating that it will only accept products grown in the geographic preference area: as opposed to a *preference* for locally grown products, an outright *exclusion* of non-locally grown products is considered too restrictive.<sup>82</sup> A bidder from outside of the geographic preference area must still have the opportunity to compete for, and possibly win, a contract should that bidder present the best offer, after geographic preference has been applied.<sup>83</sup> A school district can even include qualitative factors too, but the school district should survey the market before doing this to ensure it does not unreasonably limit competition.<sup>84</sup>

3. **New York State law requires that the school district provide “justification and documentation” for any contract it awards to a supplier other than the supplier with the lowest bid.**<sup>85</sup> This means that a school district must ensure that there is a rational basis for the geographic preference, although what qualifies as a rational basis is not very well defined. It may be difficult for New York State school districts to defend incorporating a price preference within its geographic preference without reasonably basing the preference on other relevant factors. In order to do so, the school district must ensure a reasonableness of price that fosters fair and inclusive competition.<sup>86</sup> Notably, a geographic preference for produce “grown, produced or harvested” in New York State, or for produce where “any processing of such food products take place in facilities located within New York State” is allowed under New York State law.<sup>87</sup>

As a result, there are various, yet limited, ways a school district can define local. It can vary depending on the product or the season. As long as a school district abides by the limitations discussed above, a school district can specify a geographic preference when using either formal or informal procurement procedures.<sup>88</sup>

Geographic preferences can help farms compete locally if they fit into the school district’s geographic preference (and conversely, can make it harder to compete for a farm that does not fit into the geographic preference).





## IV. Ways to Engage in a Farm to School Arrangement

There are several different ways to set up a farm to school arrangement, but generally the school food director determines how a school district will procure its food, subject to state and federal procurement regulations. School food directors have to ensure quality control throughout the supply chain, which can be a daunting and expensive task. This is one reason why school districts often favor larger suppliers, such as traditional distributors. However, schools can buy local products through a variety of different channels. Some receive direct deliveries from farmers or pick up orders at the farmers market. Others purchase local products through traditional distributors, through the USDA Department of Defense Fresh Fruit and Vegetable Program (USDA DoD Fresh),<sup>89</sup> and more recently through food hubs. And finally, some school food directors may purchase locally grown food through an agricultural cooperative. This section will discuss some of these methods and explore the benefits and drawbacks of implementing such methods. It should be noted, however, that school districts' flexibility in their approach to procurement is constrained in certain ways by state and federal procurement regulations, which are discussed in detail in section III of these materials.

## A. Traditional Distributors or Food Service Management Companies

As stated above, school districts have traditionally favored buying their food from large suppliers/distributors or through food service management companies for various reasons, including the low prices associated with economies of scale.

School districts can receive local food through traditional distributors, or can contract out their food services to “food service management companies” who themselves source food from distributors. The school district could ask the distributor or food service management company to provide local products when available, putting the onus on them to find and purchase local item.<sup>90</sup> Schools may also choose available local products when purchasing fruits and vegetables through the USDA Department of Defense Fresh Fruit and Vegetable Program (USDA DoD Fresh).<sup>91</sup>

These arrangements may work for farms that do not have the transportation infrastructure, storage capacity, time, or desire to handle the logistics of farm to school sales themselves.<sup>92</sup>

## B. Direct Sale to the School

An alternate way for a farmer to provide food to local schools (and the main focus of this guide) is to sell directly to that school district. This strategy involves developing a business relationship with a specific school district and coming to an agreement to supply food for their cafeterias. When entering into an agreement to sell to a school district, it is important to note that schools will still be subject to the procurement/bidding requirements discussed in section III of these materials.

A farmer interested in forming such a relationship should start by finding schools in their area and building relationships with food service directors and school community members. Contacting local school food service directors to inform them about your products is a helpful way to jump start the process.

Eliminating the middle man and selling directly to schools can be advantageous both for the farmer and the school. From the farmer’s point of view, this arrangement allows for more control over several aspects of the arrangement in comparison to selling to a distributor. In theory, it also allows farmers to recoup more of a profit by cutting out the middleman (distributor). On the other hand, the scale and logistics associated with direct sales to schools may not be feasible or desirable depending on the farmer’s situation.

## C. Selling Through a Cooperative

A cooperative corporation (or simply, a "cooperative") is a special form of corporation that places ownership and/or control of the corporation in the hands of the employees or patrons of the corporation.<sup>93</sup> In some regions producers of agricultural products have organized into cooperatives, aggregating their products and combining their marketing efforts, in an innovative way to service school districts and provide them with locally sourced food for their farm to school programs. For example, *GROWN Locally* is a cooperative of small farms in NE Iowa, SE Minnesota, and SW Wisconsin dedicated to providing fresh, high quality foods to local food service institutions.<sup>94</sup> The *New North Florida Cooperative*, a cooperative in Florida, began selling food to schools during the 1997-1998 school year.<sup>95</sup> This pioneering and successful cooperative helped launch Florida's current farm to school program.<sup>96</sup> These two examples show the viability of forming an agricultural cooperative to facilitate farm to school arrangements.

Compared to a single producer, "these groups are more likely to be able to fulfill large orders, deliver directly to schools, and provide the school with products that have had some minimal processing [e.g. peeled or cut carrots]."<sup>97</sup> Forming a cooperative allows its members to pool their resources and gain access to markets they may not be able to on their own. By pooling their resources and production, farmers benefit from economies of scale, allowing them to be more competitive with larger more traditional distributors, while retaining their small size and local control. However, starting and maintaining a cooperative is by no means a simple task, and careful consideration should be given to the feasibility of developing a cooperative in any particular instance. Among other resources, the USDA provides guidance on how to conduct a feasibility study for a forming a cooperative business.<sup>98</sup>

If forming a cooperative sounds like an attractive option, there are some key legal issues that you will need to understand and consider. This section will cover information about cooperatives in general and some information specific to cooperatives involved in farm to school. In addition, we will explore some of the benefits and challenges of forming an agricultural cooperative.

### 1. Cooperative Legal Basics

#### Forming a Cooperative Corporation

A cooperative corporation is defined in New York as a corporation organized for the cooperative rendering of mutual help and service to its members.<sup>99</sup> To form a cooperative corporation in New York, there must be five or more members and the articles of incorporation must be filed with the Secretary of State.<sup>100</sup> There are four different types of cooperative corporations that

New York law recognizes, but for these purposes, the “agricultural cooperative” is most relevant.

Farmers who wish to form an agricultural cooperative may do so as long as the members of the cooperative would exclusively be people “engaged in the production of agricultural products or cooperative corporations of such producers.” Additionally, each member must be contributing some agricultural product.<sup>101</sup>

### **Forming an LLC with Cooperative Principles**

Instead of forming an agricultural cooperative, one alternative a farm could pursue is to form a Limited Liability Company (“LLC”) with like-minded farmers to supply schools with locally sourced food. Farmers may choose to incorporate as an LLC instead of a cooperative corporation for a number of reasons, particularly the flexibility the form offers in structuring the organization.<sup>102</sup> The operating agreement is the primary document of an LLC that sets out all of the agreements between members in regard to how the company will conduct its business. Members can mold the agreement to meet the needs of the organization and its members while still maintaining the democratic principles that would be present in an agricultural cooperative. It should be noted, however, that in New York the word “cooperative” (or any abbreviation or variation thereof) cannot be used in an organization’s name if it is formed as an LLC or any other legal entity - it can be used only if formed as a cooperative corporation.<sup>103</sup>

### **Exemption from Federal and New York State Antitrust Laws for Purposes of Coordinating on Price**

Agricultural cooperatives enjoy an exemption from both federal and New York State anti-trust law relating to price coordination. Under both laws, the members of the cooperative must be all bona fide producers of agricultural products in order to receive the exemption. Agricultural cooperatives that are properly organized will be exempt entirely from the antitrust laws, so long as they do not “enter into conspiracies or combinations with persons who are not producers of agricultural commodities.”<sup>104</sup> This means that members are not allowed to coordinate with other organizations or outside businesses to fix prices on produce. An agricultural cooperative, however, is allowed to set prices amongst their members which they would not be allowed to do if they were not members. This could help each individual farm in the cooperative remain competitive when attempting to secure a farm to school arrangement.

### **Tax Treatment of Agricultural Cooperatives**

Cooperatives enjoy certain tax advantages. The principal advantage for cooperatives generally is the exemption of patronage refunds from federal income taxation. This means, for example, that when an agricultural cooperative earns net income from selling its members’ produce, and then distributes that income to its members in amounts proportionate to the produce they sold



into the cooperative, it can deduct the amount distributed from its gross taxable income for federal taxation purposes. However, the IRS gives agricultural cooperatives an additional benefit because of the unique economic situation of farmers. In addition to the exemption discussed above, agricultural cooperatives are able to take two other deductions from their federal income taxes: (1) dividends paid during the taxable year on capital stock,<sup>105</sup> and (2) distributions of non-patronage earnings to patrons on the basis of their patronage.<sup>106</sup> To take advantage of these two additional tax benefits the agricultural cooperative must satisfy four basic requirements:

1. It must be owned and operated for one of two purposes: “(1) marketing the products of members or other producers. The members would receive proceeds from the sale minus the marketing expenses based on either the quantity or the value of the products; or (2) purchasing supplies and equipment for its members to use at actual cost, plus necessary expenses.”<sup>107</sup>
2. It may have capital stock, but substantially all voting stock (85%) must be in the hands of farmers who use the cooperative.
3. Its dividends on capital stock are limited. They may not exceed the legal rate of interest in the State of incorporation or 8 percent per year, whichever is greater.
4. It must conduct a majority of its business with members and may make no more than 15 percent of its supply sales to persons who are neither members nor producers.<sup>108</sup>

If an agricultural cooperative can satisfy the four requirements listed above, then it will be allowed to deduct the two items discussed above. It should be noted that qualification as a cooperative or an agricultural cooperative for purposes of tax law, as well as for purposes of antitrust law, does not depend on whether an organization is organized as a cooperative corporation or an LLC or other entity under state law, but instead depends on the specific structural criteria proscribed by the relevant federal laws.

## 2. Cooperatives Participating in Farm to School Arrangements

### Qualifying as an “Association of Qualified Growers”

Put simply, an “Association of Qualified Growers” is a cooperative that is granted flexibility with respect to New York State procurement regulations. If a cooperative meets certain requirements, it can take advantage of less stringent “informal” procurement procedures that otherwise only apply to stand-alone farms. These informal procurement procedures help agricultural cooperatives remain competitive with other larger suppliers who are subject to formal procurement procedures. (For more information on the requirements of formal and

informal procurement procedures see Section III of these materials.) To qualify as an Association of Qualified Growers, the cooperative:

1. Must consist of ten or fewer farms.
2. Must sell \$50,000 or less in annual aggregate amount to each school district it has a farm to school arrangement with.<sup>109</sup>

### **Undergoing “GroupGAP” Auditing as an Alternative to GAP Auditing**

Many school districts require a farm to be GAP certified in order to enter into a farm to school arrangement. This can be costly and expensive for individual farms to accomplish. One advantage of forming an agricultural cooperative is that the USDA offers the “GroupGAP” audit as an alternative, more cost-effective method for agricultural cooperatives to attain GAP certification. This allows members of an agricultural cooperative to “pool resources to implement food safety training programs and share the cost of certification.”<sup>110</sup> It should be noted that it is not required that a group of farms be organized as a cooperative in order to qualify for GroupGAP.

## **D. Food Hubs**

While direct farm to school programs have successfully provided healthy, local, whole foods to our nation's students, managing food aggregation logistics is a difficult and time-consuming task for school districts. Food hubs hold great promise to help with this problem.<sup>111</sup> According to a USDA report, the increased demand for fresh, local foods has led to the success and rapid expansion of food hubs throughout the country, with well over 200 food hubs now operating in the United States.<sup>112</sup> In particular, food hubs in New York have made great strides providing locally sourced food to institutions across the state.

The U.S. Department of Agriculture defines a food hub as “a business or organization that is actively coordinating the aggregation, distribution, and marketing of source-identified locally or regionally grown food products from primarily small to mid-sized producers.”<sup>113</sup> Stated differently, food hubs are mission-driven organizations that link farmers, distributors and consumers in support of two goals: growing regional agricultural economies and increasing access to healthy foods. They work by aggregating fresh and value-added foods, providing warehousing and distribution activities, and offering educational and technical services to producers and consumers.<sup>114</sup>

Food hubs perform similar functions as traditional distributors, but the main difference is a food hub will primarily source locally or regionally grown food products, mostly from small and

mid-sized farms. A traditional distributor may not be inclined to provide schools with locally sourced food because it might be harder to distribute at a profit.

The farmer will not be working directly with the school in this particular scenario but will be supplying their products to the food hub for distribution. As a result, working with food hubs may be an attractive option for farmers that would like to engage in a farm to school arrangement but do not have the distribution capabilities or time that a one on one arrangement would require.<sup>115</sup>



### Example of Food Hub Engaged in Farm to School

**Headwater Food Hub** is an award-winning Food Hub based out of Ontario, New York that is focused on local, organic, farm fresh foods. The Headwater Food Hub actively manages the supply chain logistics, aggregation, distribution, and sales of local, sustainable, source-identified, top-quality foods from its network of partner farms and from local food producers. It connects local farms with restaurants, schools, and institutions by providing the infrastructure, supply chain logistics, and innovation required to deliver consistently fresh, local, and great tasting products.<sup>116</sup>



## V. Conclusion

Though it only scratches the surface, we hope that you have found the *Farm to School Legal Toolkit: A Legal Guide for New York Farmers* helpful. It was written during an exciting time in which the laws around farm to school arrangements are changing and expanding. We hope to see these programs grow on the federal, state, and local level, and that more farmers and school districts engage in this wonderful opportunity to bring fresh foods to young mouths and strengthen the connection communities have with their local growers.

# Works Cited

<sup>1</sup> *Community Food Systems: Farm to School Grant Program*, USDA, <https://www.fns.usda.gov/farmentoschool/farm-school-grant-program> (last visited September 29, 2019). For more on farm to school, please see *About Farm to School*, NAT'L FARM TO SCHOOL NETWORK, <http://www.farmentoschool.org/about/what-is-farm-to-school> (last visited September 29, 2019).

<sup>2</sup> For school districts that source at least 30% of their food from New York growers or processors, New York State's reimbursement rate for school lunches served in the school year commencing July 1, 2019 and each July 1 thereafter, is 25 cents per meal (instead of 5 cents per meal for all other school districts). N.Y. Educ. Law § 2554 (McKinney).

<sup>3</sup> *Food Safety and Liability Insurance: Emerging Issues for Farmer and Food Safety Report*, COMMUNITY FOOD SECURITY COALITION, [http://foodsecurity.org/pub/Food\\_Safety\\_and\\_Liability\\_Ins-EmergingIssues.pdf](http://foodsecurity.org/pub/Food_Safety_and_Liability_Ins-EmergingIssues.pdf) (last visited September 29, 2019) [hereinafter COMMUNITY FOOD SECURITY COALITION].

<sup>4</sup> IRMI Online, Product Liability Insurance, <https://www.irmi.com/online/insurance-glossary/terms/p/product-liability-insurance.aspx> (last visited September 29, 2019).

<sup>5</sup> COMMUNITY FOOD SECURITY COALITION, *supra* note 3.

<sup>6</sup> *USDA Farm to School Team: 2010 Summary Report 44-45*, USDA FOOD & NUTRITION SERV. (July 2011), [https://fns-prod.azureedge.net/sites/default/files/2010\\_summary-report.pdf](https://fns-prod.azureedge.net/sites/default/files/2010_summary-report.pdf) (last visited September 29, 2019).

<sup>7</sup> *Insurance Explained: The Difference Between 'Named Insured', 'Additional Insured' and 'Named Additional Insured'*, PSC INSURANCE BROKERS, <http://www.pscinsurance.com.au/insurance-explained-difference-named-insured-additional-insured-named-additional-insured/> (last visited September 29, 2019).

<sup>8</sup> KEY REQUIREMENTS: Final Rule on Produce Safety, FDA (Nov. 13, 2015) <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM472887.pdf> (last visited September 29, 2019).

<sup>9</sup> FDA Food Safety Modernization Act (FSMA), <https://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm> (last visited September 29, 2019).

<sup>10</sup> 21 C.F.R. § 112.2(a)(1).

<sup>11</sup> 21 C.F.R. § 112.2(b)(1)-(6).

<sup>12</sup> 21 C.F.R. § 112.6(b)(1)-(2).

<sup>13</sup> *Id.* § 112.7.

<sup>14</sup> *Id.* § 112.201.

<sup>15</sup> *Id.* § 112.192.

<sup>16</sup> FSMA Final Rules: Key Dates, FDA U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM568798.pdf> (last visited September 29, 2019).



<sup>17</sup> Community Food Systems, USDA Farm to School Staff, <https://www.fns.usda.gov/farmtoschool/usda-farm-school-staff> (last visited September 29, 2019).

<sup>18</sup> Procurement procedure resources, United States Department of Agriculture, <https://www.fns.usda.gov/cfs/procuring-local-foods> (last visited September 29, 2019).

<sup>19</sup> This includes programs such as the National School Lunch Program, the School Breakfast Program, the Summer Food Service Program, the Child and Adult Care Food Program, and the Fresh Fruit and Vegetable Program.

<sup>20</sup> 2 C.F.R. § 200.318(a). In accordance with the National Defense Authorization Acts for Fiscal Years 2017 and 2018, the thresholds for Child Nutrition Programs were increased to \$250, 000 for simplified acquisitions and \$10, 000 for micro-procedures. See *Memo Regarding Federal Micro-Purchase and Simplified Acquisition Thresholds for All Child Nutrition Programs*, USDA (April 17, 2019), <https://www.fns.usda.gov/school-meals/federal-micro-purchase-and-simplified-acquisition-thresholds> (last visited September 29, 2019).

<sup>21</sup> 2 C.F.R. § 200.320(c).

<sup>22</sup> *Id.* § 200.320(d).

<sup>23</sup> USDA, GEOGRAPHIC PREFERENCE: WHAT IT IS AND HOW TO USE IT 2 (2017), <https://fns-prod.azureedge.net/sites/default/files/f2s/GeoPreference.pdf> (last visited September 29, 2019) [hereinafter GEOGRAPHIC PREFERENCE].

<sup>24</sup> USDA, PROCURING LOCAL FOODS FOR CHILD NUTRITION PROGRAMS 39 (Aug. 2015), [https://fns-prod.azureedge.net/sites/default/files/f2s/F2S\\_Procuring\\_Local\\_Foods\\_Child\\_Nutrition\\_Prog\\_Guide.pdf](https://fns-prod.azureedge.net/sites/default/files/f2s/F2S_Procuring_Local_Foods_Child_Nutrition_Prog_Guide.pdf) (last visited September 29, 2019) [hereinafter PROCURING LOCAL FOODS].

<sup>25</sup> 2 C.F.R. § 200.88. Therefore, these procedures apply when below the applicable threshold.

<sup>26</sup> *Id.*

<sup>27</sup> 2 C.F.R. § 200.320(b). The school district can do this by taking an action as simple as making a few phone calls to the USDA, conducting an internet search, sending a few emails, etc. December 5, 2017 correspondence with USDA [hereinafter CORRESPONDENCE WITH USDA].

<sup>28</sup> PROCURING LOCAL FOODS, *supra* note 24, at 42; see also *Guidance on Procurement Methods: Thresholds UPDATED*, N.Y. STATE EDUC. DEP'T (August 16, 2018), <http://www.cn.nysed.gov/content/guidance-procurement-methods> (last visited September 29, 2019).

<sup>29</sup> PROCURING LOCAL FOODS, *supra* note 24, at 77.

<sup>30</sup> *Id.*

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

<sup>32</sup> 2 C.F.R. § 200.67 (which references 48 C.F.R. § 2.101 for the applicable threshold amount).

<sup>33</sup> PROCURING LOCAL FOODS, *supra* note 24, at 40.

<sup>34</sup> December 5, 2017 Correspondence with USDA, *supra* note 27.

<sup>35</sup> PROCURING LOCAL FOODS, *supra* note 24, at 40-41.

<sup>36</sup> December 5, 2017 Correspondence with USDA, *supra* note 27.

<sup>37</sup> December 5, 2017 Correspondence with USDA, *supra* note 27.

<sup>38</sup> *Id.*

<sup>39</sup> 2 C.F.R. § 200.318(i).

<sup>40</sup> PROCURING LOCAL FOODS, *supra* note 24, at 39.

<sup>41</sup> N.Y. GEN. MUN. LAW § 100(1) (McKinney 2017).

<sup>42</sup> *Id.* § 103(1). This threshold is adjusted for when farms are selling directly to school districts, which is further elaborated on below. Additionally, this threshold applies regardless if the school district is using a federal award or not to fund its farm to school program.

<sup>43</sup> *See id.* § 103(1)-(2).

<sup>44</sup> *See* N.Y. STATE FIN. LAW § 163(3).

<sup>45</sup> N.Y. GEN. MUN. LAW § 104-b.

<sup>46</sup> 2 C.F.R. § 200.88.

<sup>47</sup> *Id.*

<sup>48</sup> These principles include the “prudent and economical use of public moneys in the best interests of the taxpayers of the political subdivision or district, to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption.” N.Y. GEN. MUN. LAW § 104-b(1). The school district must maintain documentation of the contract as well. N.Y. GEN. MUN. LAW § 104-b.

<sup>49</sup> PROCURING LOCAL FOODS, *supra* note 24, at 34.

<sup>50</sup> Although this is derived from federal USDA guidance documents, the NYSED adopted this as well in *Memo Regarding Guidance on Procurement Methods*, NYSED (May 26, 2017), <http://www.cn.nysed.gov/content/guidance-procurement-methods> (last visited September 29, 2019) [hereinafter NYSED].

<sup>51</sup> “[A] change to or a renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount.” N.Y. GEN. MUN. LAW § 103(1).

<sup>52</sup> N.Y. GEN. MUN. LAW § 103(9) (emphasis added). “Producer,” “grower,” and “association of producers or growers” are all defined by New York State regulation. 8 N.Y.C.R.R. § 114.3(b).

<sup>53</sup> N.Y. GEN. MUN. LAW § 103(9)(a)(i)-(ii).

<sup>54</sup> *Id.* § 103(9)(b) & § 103(10).

<sup>55</sup> 8 N.Y.C.R.R. § 114.3(d).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 8 N.Y.C.R.R. § 114.4(c).

<sup>59</sup> *Id.*

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

<sup>61</sup> 8 N.Y.C.R.R. § 114.3(e).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 8 N.Y.C.R.R. § 114.4(e).

<sup>65</sup> NYSED, *supra* note 500.

<sup>66</sup> This is defined as a “processor of milk who is licensed by the New York State Department of Agriculture and Markets at the time the milk is supplied to the school district and who employs less than 40 people at that time.” 8 N.Y.C.R.R. § 114.4(b).

<sup>67</sup> *Id.* §§ 114.3(f), 114.4(f).

<sup>68</sup> 8 N.Y.C.R.R. §§ 114.3(f), 114.4(f).

<sup>69</sup> PROCURING LOCAL FOODS, *supra* note 24, at 39.

<sup>70</sup> From any of the following programs: the National School Lunch Program (7 C.F.R. § 210.21(g)), the School Breakfast Program (7 C.F.R. § 220.16(f)), the Special Milk Program (7 C.F.R. § 215.14a(e)), the Child and Adult Care Food Program (7 C.F.R. § 226.22(n)), and the Summer Food Service Program (7 C.F.R. § 225.17(e)).

<sup>71</sup> PROCURING LOCAL FOODS, *supra* note 24, at 64.

<sup>72</sup> *Id.*

<sup>73</sup> N.Y. Educ. Law § 2554 (McKinney).

<sup>74</sup> ADDITIONAL STATE SUBSIDY FOR PURCHASING NEW YORK STATE FOOD PRODUCTS, December 7, 2018, <http://www.cn.nysed.gov/content/additional-state-subsidy-purchasing-new-york-state-food-products> (last visited September 29, 2019).

<sup>75</sup> USDA, PROCUREMENT GEOGRAPHIC PREFERENCE Q&AS - PART II 1 (October 9, 2012), <https://cdnlfrk.pbrc.edu/pdfs/farm/local-food-procurement/SP03-2013os.pdf>.

<sup>76</sup> USDA, PROCUREMENT GEOGRAPHIC PREFERENCE Q&AS - PART II 1 (October 9, 2012), <https://cdnlfrk.pbrc.edu/pdfs/farm/local-food-procurement/SP03-2013os.pdf>. New York State specifically gives school districts the discretion to set a geographic preference for within New York State, but doesn’t limit a school district’s ability to set a more geographically limited geographic preference. N.Y. GEN. MUN. LAW § 103(8-a).

<sup>77</sup> *Id.*

<sup>78</sup> PROCURING LOCAL FOODS, *supra* note 24 at 25. (These techniques are listed on this page.)

<sup>79</sup> *Id.* (See *id.* at 67 for a full list of products that can be subject to geographic preference.)

<sup>80</sup> GEOGRAPHIC PREFERENCE, *supra* note 23.

<sup>81</sup> PROCURING LOCAL FOODS, *supra* note 24, at 43.

<sup>82</sup> U.S. Dep’t Agric., PROCUREMENT GEOGRAPHIC PREFERENCE Q&AS, SP\_18-2011 (Feb. 1, 2011), file: <http://www.cn.nysed.gov/common/cn/files/Procurement%20Geographic%20Preferences%20%23SP18-2011.pdf> (last visited September 29, 2019).

<sup>83</sup> *Id.*

<sup>84</sup> PROCURING LOCAL FOODS, *supra* note 24 at 77.

<sup>85</sup> N.Y. GEN. MUN. LAW § 104-b(1). Valid justifications include the “prudent and economical use of public moneys in the best interests of the taxpayers of the political subdivision or district, to facilitate the

acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption.” *Id.*

<sup>86</sup> Opns. St. Comp., 1991 No. 91-52 & 1992 No. 92-50 (N.Y.St.Cptr.).

<sup>87</sup> N.Y. GEN. MUN. LAW § 103(8-a)(a).

<sup>88</sup> PROCURING LOCAL FOODS, *supra* note 24, at 61.

<sup>89</sup> *Using USDA DoD Fresh to Purchase Local Produce*, USDA, <https://fns-prod.azureedge.net/sites/default/files/f2s/DoDFresh.pdf> (last visited September 29, 2019).

<sup>90</sup> *Selling Local Food to Schools: A Resource for Producers*, USDA (Aug. 2017), <https://fns-prod.azureedge.net/sites/default/files/f2s/SellingLocal.pdf> (last visited September 29, 2019).

<sup>91</sup> *Using USDA DoD Fresh to Purchase Local Produce*, USDA, <https://fns-prod.azureedge.net/sites/default/files/f2s/DoDFresh.pdf> (last visited September 29, 2019).

<sup>92</sup> Kelli Sanger and Leslie Zenz, *Farm to Cafeteria Connections* 15, Washington State Dep’t of Agric. (Jan. 2004), <https://agr.wa.gov/getmedia/b1740926-cf97-45e4-876f-a98b8b1c1a67/102-farmtocafeteriacconnections-web.pdf> (last visited September 29, 2019).

<sup>93</sup> *Cooperative Corporation*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/cooperative-corporation> (last visited September 29, 2019).

<sup>94</sup> *GROWN Locally*, LOCAL HARVEST, <https://www.localharvest.org/grown-locally-M5041> (last visited September 29, 2019).

<sup>95</sup> *The New North Florida Cooperative*, LOCAL HARVEST, <https://www.localharvest.org/the-new-north-florida-cooperative-farm-to-school-program-M11043> (last visited September 29, 2019).

<sup>96</sup> *Id.*

<sup>97</sup> PROCURING LOCAL FOODS, *supra* note 24, at 14.

<sup>98</sup> *Vital Steps: A Cooperative Feasibility Study Guide*, USDA (August 2016), [https://www.rd.usda.gov/files/publications/SR58\\_CooperativeFeasibilityStudyGuide.pdf](https://www.rd.usda.gov/files/publications/SR58_CooperativeFeasibilityStudyGuide.pdf) (last visited September 29, 2019).

<sup>99</sup> N.Y. COOP. CORP. LAW § 3(c) (2017).

<sup>100</sup> *Id.* § 11.

<sup>101</sup> *See generally* N.Y. COOP. CORP. LAW.

<sup>102</sup> Sarah Sexton, *Limited Liability Companies as Worker Cooperatives* at 1-2 (2009), <https://institute.coop/resources/limited-liability-companies-worker-cooperatives> (last visited September 29, 2019)

<sup>103</sup> N.Y. COOP. CORP. LAW § 3(j).

<sup>104</sup> Donald A. Frederick, *Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act* 222-26 (2002).

<sup>105</sup> 26 U.S.C. § 1382(c)(1).

<sup>106</sup> *Id.* § 1382(c)(2).

<sup>107</sup> *Id.* § 521(b)(1).

<sup>108</sup> *Id.* § 521(b)(2)-(4).

<sup>109</sup> 8 N.Y.C.R.R. § 114.3(b)-(c).

<sup>110</sup> *GroupGAP Food Safety Program*, USDA, <https://www.ams.usda.gov/services/auditing/groupgap> (last visited September 29, 2019).

<sup>111</sup> *Food Hubs and Farm to School*, NAT'L GOOD FOOD NETWORK, <http://www.ngfn.org/resources/ngfn-cluster-calls/food-hubs-and-farm-to-school> (last visited September 29, 2019).

<sup>112</sup> James Matson, Martha Sullins, & Chris Cook, *The Role of Food Hubs in Local Food Marketing*, USDA (Jan. 2013), <https://www.rd.usda.gov/files/sr73.pdf> (last visited September 29, 2019).

<sup>113</sup> *USDA Releases Report on the Growing Importance of Food Hubs in Rural America*, USDA (Feb. 2013), <https://www.usda.gov/media/press-releases/2013/02/26/usda-releases-report-growing-importance-food-hubs-rural-america> (last visited September 29, 2019).

<sup>114</sup> New York State-New York City Regional Food Hubs Task Force Final Action Plan (2014), [https://www.agriculture.ny.gov/FHTF\\_report\\_FINAL.pdf](https://www.agriculture.ny.gov/FHTF_report_FINAL.pdf) (last visited September 29, 2019).

<sup>115</sup> *Image courtesy of Australian Food Hub Network*, <http://www.foodhubs.org.au> (last visited September 29, 2019).

<sup>116</sup> *Headwater Food Hub*, THE GOOD FOOD COLLECTIVE, <https://thegoodfoodcollective.com/pages/headwater-food-hub> (last visited September 29, 2019).