
Legal Guide for Direct Marketing Aquaculture Products in Alabama



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July 2014

This document was prepared by the National Sea Grant Law Center to support aquaculture producers in Alabama looking for ways to diversify their business with direct marketing opportunities. The guide is based on the Alabama Direct Farm Business Guide published by the National Agricultural Law Center and the University of Illinois.



Financial support was provided by the Southern Risk Management Education Center and the USDA National Institute of Food and Agriculture under award number 2012-49200-20125. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of SMREC, NIFA, or the U.S. Department of Agriculture.

This project would not have been possible without the generous in-kind and other support provided by the following partner organizations.



LEGAL DISCLAIMERS

This Guide is not intended as legal advice. It is not intended to, and cannot, substitute for sound legal advice from a competent, licensed attorney. Rather, it is meant to help aquaculture producers understand the many issues that must be considered when establishing and operating a direct marketing business. The legal information provided by this Guide is a general overview of the many laws and regulations that may be applicable to a direct marketing aquaculture business. Though the authors have made every effort to ensure the accuracy of the information in this Guide, they cannot guarantee that all of it is correct. Laws, regulations, and guidelines can change at any given time, and the status of laws and regulations in the future cannot be predicted with any certainty. Therefore, every user of this Guide should at all times independently ensure that the legal information is up-to-date before using it in any way. Any URLs provided herein are purely for the convenience of the user, and the authors of this guide disclaim any liability for the content of the referenced websites.

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INTRODUCTION

If you are reading this Guide, then you are probably already well aware of the growing interest in local foods, including catfish, tilapia, shrimp, oysters, and other aquaculture products produced or harvested in Alabama. Consumers seek out local producers for a variety of reasons. While quality seafood may be obtained from a variety of sources, many people want to invest in their local communities and learn more about where their food comes from, as well as make connections with the people who produce it.

Direct marketing businesses are capable of meeting these demands while increasing profitability. Selling directly to consumers has the potential to increase the farmer's share of the consumer's food dollar, as conventional food supply systems often involve several middlemen. Furthermore, building a connection with customers and the community can make doing business a more enjoyable and rewarding experience.

However, running a successful direct marketing business can be difficult. There is a labyrinth of laws and regulations. Further, when direct marketing, you become responsible for permits and licenses you didn't need when you simply delivered products to a processor. Just figuring out who to contact may be a daunting task, let alone knowing what questions to ask and understanding the answers. This guide is intended to provide guidance to aquaculture producers on where and how to get accurate and up-to-date information to foster a more vibrant direct aquaculture business environment.

This guide assumes that you are an aquaculture producer who already operates as an incorporated business. If you are not, extensive technical resources are available to help you start your business. The Southern Regional Aquaculture Center has a variety of useful fact sheets on its website (<http://www.msstate.edu/dept/srac/>) that cover such topics as establishing aquaculture production and small-scale marketing, as well as species-specific information on animal care and production. The Auburn University School of Fisheries, Aquaculture, and Aquatic Sciences, in partnership with the Alabama Cooperative Extension System, provides assistance to producers throughout Alabama, often for free. The School's website (<http://www.aces.edu/dept/fisheries/>) offers additional resources; if answers are not available online, producers should call Auburn's School of Fisheries, Aquaculture, and Aquatic Sciences to connect with a specialist.

The guide is broken into six sections:

- The Direct Marketing Strategies section gives an overview of a variety of direct marketing strategies, including information on strategy or risk management considerations.
- The Registration and Permits section discusses when you need to register the name of your business and FDA registration and permitting requirements.
- The Insurance section identifies insurance needs to consider when starting your direct marketing business.
- The Production section identifies permitting, licensing or certifications necessary for the production and sale of aquaculture products.
- The Sales section discusses pricing and shipping considerations.
- The Marketing section provides an overview of labeling and advertising considerations and discusses branding strategies.

DIRECT MARKETING STRATEGIES

There are many types of direct farm businesses in which a farmer sells directly to the final consumer or a retail establishment, including:

- Farmers markets
- Roadside stands
- Fee fishing
- Community Supported Agriculture (CSAs)
- Delivery service to homes, restaurants, schools, or other institutions
- Mail order/Internet site

A direct farm business may consist of one of these options, or a combination. For example, a farmer might sell products at the farmer's market on Saturday and deliver shares for a CSA during the week. Or a farmer could run a fee-fishing farm, a concession stand that sells foods made from catfish, and offer bed and breakfast facilities to guests. In any situation, *the type of direct farm business selected triggers different legal considerations*. This guide seeks to give direct farm business owners a solid understanding of the legal consequences of these different business models. This guide is not intended as legal advice. Please seek legal advice from a competent attorney before embarking into direct marketing.

To illustrate how a direct marketing plan might look like for aquaculture operations, we will follow two hypothetical producers throughout the guide: Abe and Becky. Abe has a catfish farm in Hale County, while Becky has a lease to farm oysters in state waters off the coast of Mobile County. They both currently sell unprocessed fish to ABC Distributors which processes, markets, and sells the fish and oysters to grocery stores.

INDIVIDUAL SALES

Farmers Markets

One of the most popular venues for direct sales are farmers markets. Several factors define the term "Farmers Market" and distinguish farmers markets from road-side stands, grocery stores, and other types of food marketing outlets. Farmers markets usually involve farmers selling produce and food items they grow and produce to individual customers at a temporary or permanent location, on a periodic basis, typically once or twice a week for a set period of time, usually 3 or 4 hours. Farmers markets are often located on public property, such as a common public area or parking lot.

The Alabama Farmers Market Authority (FMA), part of the Alabama Department of Agriculture and Industries (ADAI), certifies state farmers markets and assists with marketing of certified agricultural products. While farmers markets in Alabama are not required to participate in the certified farmers market program, those that do give consumers confidence that they are buying only fresh, locally raised products.

An aquaculture producer who wishes to sell at a certified farmers market **must obtain a producers permit from the county Cooperative Extension office** in the county in which the aquaculture activities take place. (Ala. Admin. Code r. 350-X-1-.03.) Producers are required to keep the permits with them when selling their products. **Additional licenses and permits for the sale of fish and seafood are outlined in part II, beginning on page 12.**



Fish booth at a farmers market, courtesy of Silus Grok.

Certified agricultural products that may be sold at certified farmers markets include fish and shellfish produced under controlled conditions in waters or ponds located in Alabama. Only raw meats, including fish and seafood, that are processed, packaged, and labeled at an inspected facility or are otherwise exempted from inspection may be sold at a certified farmers market. Fish and shellfish may be sold fresh if maintained at a temperature of 37 to 41 degrees Fahrenheit. Producers must also comply with all other applicable state and federal regulations governing the

production, harvest, preparation, preservation, labeling, safety, and sale of products. In addition, certified farmers markets may have established their own market rules regarding participation in that particular market. These rules may relate to set up, display, pricing, or even food safety.

The Coastal Alabama Farmers & Fishermen's Market in Baldwin County is an example of a local farmers market that provides opportunity to sell fresh, local seafood, fish, and oysters directly to the public. In addition to state and local requirements, the market has established its own vendor rules regarding market operations. For a discussion of the requirements to sell seafood at the market, visit <http://coastalalabamamarket.com/vendors/vendor-information.aspx>. For more information, please visit www.fma.alabama.gov.

Let's say Abe and Becky would like to sell their products at a certified farmers market. Remember that only fish and shellfish produced under controlled conditions in waters or ponds located in Alabama may be sold at certified markets. Because Abe farms inland in controlled waters, he would likely have no problem selling his catfish; however, since Becky farms her oysters in open coastal waters, those waters would likely not meet the "controlled" qualification. When Abe sells his catfish, he would be required to obtain a permit from the Hale County Cooperative Extension office. The catfish would have to be processed, packaged, and labeled at an inspected facility and kept at the appropriate temperature. Abe would also have to comply with all other applicable federal, state, and local regulations governing the production, harvest, preparation, preservation, labeling, or safety of products offered for sale.

Mobile Food Vendors

Mobile food trucks or pushcarts are typically a vehicle where food is cooked, prepared, and served in individual portions. The start-up costs for these types of businesses are typically less than a traditional restaurant; however, the permit and licensing requirements may be greater. For instance, a food truck might require a health permit and a business license, in addition to any site approvals.

The Alabama Department of Public Health (ADPH) defines “Mobile Food Establishment” as “... a unit mounted on or pulled by a self-propelled vehicle; is self-contained with its own drinking water tank and waste water tank unless handling only prepackaged foods; is designed to be readily movable; and is moved daily to return to its commissary. A pushcart is a category of mobile food establishment” (Ala. Admin. Code r. 420-3-22-.09). Mobile food vendors must comply with a variety of health and safety regulations, which are available at <http://www.adph.org/environmental/assets/FoodRules2008.pdf>.

Prior to beginning operation in Alabama, **a mobile food vendor must have his establishment approved by the appropriate ADPH county health officer.** ADPH requires a permit for food service facilities, including mobile food establishments (Ala. Admin. Code r.420-3-22-01). If selling fresh or frozen seafood (not prepared food), you must **add a vehicle license onto your seafood dealer license from the Alabama Department of Natural Resources (DNR) to sell from a food truck.** **Prior to beginning a mobile food business, contact your city or county government to determine if there are additional licensing or permitting requirements.** And, again, producers must also comply with all other applicable state and federal regulations governing the production, harvest, preparation, preservation, labeling, safety, and sale of products.

Abe and Becky are thinking of selling their products on food trucks. Becky would like to sell fried oysters off a truck in Hale County. Abe wants to sell catfish tacos in Mobile and Baldwin Counties. Before beginning operations, Becky should contact the Hale County division of the ADPH while Abe should contact the ADPH divisions in Mobile and Baldwin Counties. They should also contact their respective city and county governments to ensure that their mobile food operations will comply with any additional licensing or permitting requirements. Both Abe and Becky would also have to comply with all other applicable state and federal regulations governing the production, harvest, preparation, preservation, labeling, or safety of products offered for sale. Abe and Becky would not need to obtain vehicle licenses because they are not selling fresh seafood or oysters.

On-site Sales: Fee-fishing Operation, Roadside Stands, or On-farm Sales

A fee-fishing operation, roadside stand, or on-farm sales may be another means to make direct sales.

- Fee fishing operations allow customers to pay to fish in waters stocked with farm-raised

fish or seafood. The operation could be set up to allow customers to catch and release fish or to pay for and keep the fish that they catch.

- Roadside stands allow producers to sell directly to consumers from seasonal, temporary, or semi-temporary structures located on the farm.
- On-farm sales allow consumers to purchase fish from the aquaculture producer on the farm.

In addition to all applicable state and federal regulations governing the production, harvest, preparation, preservation, labeling, safety, and sale of products, as outlined in Part II, participating in on-site sales raises additional land-use concerns.

Siting

During the planning stage of the direct marketing business, a careful review of local zoning ordinances is essential. Zoning ordinances regulate the use of real property, and, in Alabama, both county and local municipality laws may apply to your land. As an aquaculture farmer, it is likely that the land on which you operate has been zoned for agricultural use. Moving from traditional aquaculture production into selling product directly to customers at your farm may result in the applicability of additional zoning laws. For example, a roadside stand on your property could change the use of property from agricultural to retail, which may require a variance or conditional use permit.

Local zoning ordinances are available by contacting the county clerk or local library for a copy of the applicable ordinances. Owners may also wish to consult with a local lawyer who is knowledgeable about property law.

Landowner Liability

Additionally, inviting visitors onto your property raises liability concerns. For example, if injury or property damage occurs due to the negligence of yourself or employees or even one of your visitors, you could be liable. You could even incur liability for disease transmission if a visitor falls ill from a visit to your farm. **Before beginning an on-site sales operation, consult with a licensed attorney and insurance agent to ensure you have addressed potential liability and implement strategies to reduce risk.**

To potentially reduce the risk to visitors, you may want to consider the following risk management strategies:

- Ensure you are compliant with state fire codes, transportation, food safety, and health;
- Identify and reduce dangers facing visitors unfamiliar with your farm;
- Establish safety measures for visitor activities;
- Purchase insurance;
- Train employees and enforce safety standards; and
- Obtain waivers for visitors to sign.

Abe would like to begin a fee-fishing operation at his catfish farm, as well as set up a roadside stand on his property. Abe should check the zoning laws in Hale County to make sure that county zoning laws would not prohibit him from selling fish on his property. When inviting customers on his property for sales or for fee fishing, he should also consider using the risk management strategies mentioned in the guide, such as having customers who fish sign a liability waiver. However, liability waivers are not always enforceable. Ultimately, he should consult with a licensed attorney and insurance agent to ensure he has addressed potential liability and strategies to reduce that liability.

Becky would like to sell her oysters off a public dock near her operation. While state law would allow her to sell from the dock, Becky should also ensure compliance with her city code.

Community Supported Agriculture

Community Supported Agriculture (CSA) programs entail CSA members paying a price upfront in exchange for a weekly share of a crop. Community Supported Fisheries (CSF) programs, which operate similarly to CSAs, allow commercial fishermen to market and sell seafood directly to the public. Both models are contractual arrangements between producers or fishermen and consumers where the CSA/CSF members (also called shareholders) provide producers and fishermen with front-end financial support in exchange for a weekly share of fish or seafood during the season. By receiving payment upfront, instead of post-harvest, producers and fishermen know what they are going to earn and in doing so they have the means to invest in their operations.

These operations reconnect members to the source of their fish and seafood and allow producers and fishermen to develop personal relationships with the people who buy their products. They also provide mutual learning opportunities. Consumers learn about local practices and concerns directly from the producers and fishermen and the producers and fishermen gain knowledge about what their consumers value.

Thimble Island Oyster Company is a CSF in Connecticut modeled on land-based CSAs. The operation consists of one farmer selling his product. For \$175 per year, shareholders receive one dozen oysters and two dozen clams each month for 6 months starting in April. Thimble Island has two pick up locations, one at the dock and one in town. For more information, visit <http://www.thimbleislandoysters.com/cfa-program/>.

While a producer could start a CSA with just his product, consumers might appreciate a variety of products in their shares. In that case, a producer might consider teaming up with other producers to add variety. A number of farmers seeking to establish a CSA might wish to come together as a cooperative because their pooled money would allow them better marketing, access to capital, or increased diversity of their product offering. If they wanted to also sell at a farmers market, cooperative members could take turns attending the stall so that each individual can devote less time to marketing.

The C'ville CSF is an example of multiple farmers teaming up to sell shares. In 2012, the CSF allowed customers to place orders for shares of specific species or shares that include a mix of fish, including channel catfish, rainbow trout, and freshwater prawns. For example, the Mix Plate share provided one pound of fish each week and alternated between species each week. The CSF also offered one-time share purchases. Farmers delivered the shares weekly to the C'ville Farmers Market. For more information, visit <http://cvillecsf.com/fisheryprofile/>.

In addition to general business management issues, such as infrastructure and insurance, farmers must consider a number of other issues including: the prices of shares and payment structures; deliveries (including policies about missed deliveries and missed pick ups); state and federal regulations governing the production, harvest, preparation, preservation, labeling, or safety of products offered for sale; marketing; and how they will address product shortfalls.

Abe and Becky decide they want to form a CSA in which they will make weekly deliveries to customers who buy shares of the CSA. To form an agricultural cooperative in Alabama, there must be five individuals, so Abe and Becky will need to secure three other agricultural producers. They may consider other aquaculture producers, or it might make sense to incorporate farmers who would provide produce, poultry, pork, or beef. Assuming Abe and Becky opt to work with other aquaculture producers, they would next need to consult with a local attorney to draw up the legal documents to set up the cooperative. The members of the cooperative would then need to decide several practical aspects of running the business, such as marketing, delivery, and payment.

Internet Marketing

Many small businesses consider an Internet presence an essential part of their business strategy. The Internet and other forms of electronic communication (e.g., email or social networking sites such as Facebook) can open doors to a direct aquaculture business for customers otherwise unable to visit the retail operation due to distance, time, or other factors. USDA's Agriculture and Marketing Service (AMS) has published an informative brochure, **How to Direct-Market Farm Products on the Internet**, that explains many issues related to the Internet marketing of farm products (<http://www.ams.usda.gov/AMSV1.o/getfile?dDocName=STELDEV3101222>). The brochure encourages farm businesses to identify Internet marketing goals (save time, save labor, increase market access, provide customers information) and to research the potential market before setting up a website. Other things to consider are the cost and feasibility of shipping products and loss of personal interaction (which may be precisely what customers are looking for in a direct aquaculture business).

In addition to setting up a webpage or sending customers email, a direct aquaculture business may wish to list itself on some local, state, or national online farm business directories such as Alabama Market Maker (<http://al.marketmaker.uiuc.edu>), a statewide directory. Such directories help farmers disseminate information on their products and reach consumers, including commercial retailers and businesses such as restaurants. Although the Internet's

flexibility as a marketing tool makes it an attractive option for direct aquaculture businesses, farmers should be aware of several important legal issues that may arise in the context of doing business on the Internet.

Protecting Customers' Personal Information

If a business allows consumers to enter personal information into its website, the Federal Trade Commission (FTC) requires that the business have a plan to safeguard that information. There are no specific requirements that a business information security plan must contain. Adequate safeguard measures depend on various factors, such as the size and nature of the business and the amount and type of information collected on the Internet. The FTC maintains a **website** to assist businesses in complying with consumer protection requirements (<http://www.ftc.gov/infosecurity/>).

Sending emails

Emailing a weekly, monthly, or annual newsletter requires little time or money, and avoids the costs and hassle of printing and sending documents through the mail. Short email updates concerning revised hours of operation or seasonality may be a convenient method of communication between the direct aquaculture business and its customers. All commercial email from a business to a consumer is regulated by the FTC's CAN-SPAM Act (15 U.S.C. § 7701 *et seq.*). When sending commercial emails, the "from" and "to" lines and routing information must be accurate and identify who initiated the email, and may not contain deceptive subject lines. The email must give the recipient an opt-out method if they do not wish to receive any more commercial emails from the business. The email must also be identified as an advertisement and include the sender's valid physical postal address. As a general rule, emails concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of the rules in this Act can result in significant fines.

Abe and Becky should consider starting web pages, blogs, or social media accounts for their businesses, as well as making sure they are listed on any local, state, and national online farm business directories. Emailing customers is another good and free way for Abe and Becky to advertise. However, they should make sure that they meet FTC requirements when sending emails by clearly identifying who sent the email, having an accurate subject line, allowing customers to unsubscribe for emails, and including their physical addresses in the email.

INSTITUTIONAL SALES: NURSING HOMES, HOSPITALS, SCHOOLS

Nursing homes, hospitals, schools, and other institutions can be important customers for producers seeking to diversify their sales. Producers can make direct sales to these institutions, which can be economically beneficial for the farmer and provide nutritional and educational benefits for the community. These types of sales, however, can provide a challenge, as they often involve limited institutional budgets and the involvement of many decision makers.



Fresh catch of fish, courtesy of Alan Tao.

General Contracts

Before entering into these business agreements, the parties may be required by law to execute a written contract. For example, an Alabama statute lists a number of circumstances specifically requiring a written contract, but the ones most relevant to farmers are contracts that will take more than one year to perform, including leases of land that will last more than a year, and sales of real property (Ala. Code § 8-9-2). Another law requires contracts for the sale of goods totaling \$500 or more to be in writing (Ala. Code § 7-2-201).

Whether or not a written contract is technically required, it is *always* a good business practice to put contracts in writing. Doing so protects legal interests and avoids potential disagreements that can lead to a negative business reputation and possible legal battles. When preparing a written contract, it is important to be thorough and accurate. At the bare minimum, the contract should contain the identities of the parties, what item is being contracted for, including quantities and a clear description including quality standards, the negotiated price, and when performance is expected. It might also include ways the contract can be cancelled and what remedies each side will have

if the other fails to perform. Contradictory oral statements made during negotiations will not override the terms contained in a written contract. Taking the time to prepare a well-crafted written document will increase the security of each side's interest in the contract, reduce the chance of unmet expectations due to ambiguity, and create a tangible record in case any problems do arise. Regardless of the dollar amount or the time involved in a contract, it is advisable to have an attorney at least review any important contract before signing it.

Procurement Contracts

Procurement contracts can be another advantageous way for a direct aquaculture business to make significant sales. The USDA purchases large quantities of commodities through various procurement programs in order to supply food for school lunch programs, prisons, international food aid, and other programs. USDA's programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive bidding process. Information for small businesses is compiled by the USDA and **available online** at <http://www.dm.usda.gov/procurement/business/procedure.htm>. The Agricultural Marketing Service (a subsidiary of the USDA) also maintains commodity-specific information available on its **website**. (<http://bit.ly/commodity-specific-information>).

Generally, to participate in these programs, producers will need to be capable of producing significant output and may need to comply with more rigorous food safety handling requirements, depending on the destination of the food. The Alabama Small Business Development Center has a Procurement Technical Assistance Center (PTAC) to help small businesses successfully contract with governmental entities. (<http://al-ptac.org/>).

Alabama's Farm to School Program

Alabama's Farm-To-School Procurement Act establishes that the Alabama Department of Agriculture and Industries (ADAI) and the State Department of Education should collaborate to establish procurement procedures for school food authorities to purchase local unprocessed agricultural products, abiding by federal regulations. "Unprocessed agricultural products" is defined as "only those agricultural products that retain their inherent character." Handling and preservation, including "cooling, refrigerating, freezing;" "size adjustment through size reduction made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding;" or "butchering livestock, fish, and poultry" does not change a product's inherent character (Ala. Code § 16-1-46).

The ADAI has a person to coordinate efforts between the ADAI, the State Department of Education, and the ADPH, to identify local farmers, processors, and suppliers. The ADAI has information on the school food procurement process to help farmers, processors, and suppliers learn more about the process (Ala. Code § 16-1-46).

Abe and Becky would like to sell to their local hospital and the federal prisons in state. If selling more than \$500 of goods to a private hospital, they will need a contract. If selling less than \$500, it will probably be a good idea for them to sign a contract, rather than relying on an oral agreement. To sell to the federal prison, they will need to obtain a contract through the USDA's procurement program mentioned above. The Alabama Small Business Development Center has a Procurement Technical Assistance Center (PTAC) to help small businesses successfully contract with governmental entities. Their website is <http://al-ptac.org/>.

CHECKLIST

Have you...?

- ✓ Conducted a feasibility study and developed a marketing plan?
- ✓ If beginning a new business entity, such as a cooperative for a CSA, consulted with an attorney or accountant regarding business entities?
 - Will you be comfortable with the liability protection that the entity offers?
 - Will your choice of business entity require any registration or ongoing paperwork?
- ✓ Is your Internet business in compliance with all the requirements for shipping products, protecting personal information, email marketing, and taxation of goods?
- ✓ Considered where you want to **locate** your business? Depending on what type of business (u-pick, farm stand, farmers market, food truck, etc.) you are considering, this requires reviewing applicable **zoning laws** in your area.
- ✓ Addressed contractual issues for your operations? This requires:
 - Understanding terms and consequences of any contracts you have agreed to, both oral and written;
 - Knowing when the law requires you to have a written contract in order to enforce it against the other party; and
 - Complying with the formal requirements for the creation of production contracts and requirements/output contracts, if used.

REGISTRATION AND PERMITS

No matter which marketing strategies you employ, producers must also comply with all other applicable state and federal regulations governing the production, harvest, preparation, preservation, labeling, safety, and sale of aquaculture products.

ASSUMED NAME REGISTRATION

Direct farm business owners often adopt an “assumed name” for their business (e.g., Sunnyside Farm) when they do not wish to conduct the business in their real names (e.g., Jane and John Doe Farm). **While assumed names are not required to be registered, a person who wishes to reserve the exclusive use of their business or entity name should submit an application to the Alabama Secretary of State** (Ala. Code § 10A-1-5.11). The Secretary of State’s Business Entity Division is a depository for records of all domestic and foreign entities that have qualified to do business in Alabama. These entities include For-Profit Corporations, Non-Profit Corporations, Limited Liability Companies, Limited Partnerships, Registered Limited Liability Partnerships, and Limited Liability Limited Partnerships. The Business Entity Division website is <http://sos.alabama.gov/BusinessServices/BusinessEntities.aspx>.

Abe and Becky will need to register any assumed name. Let’s say Abe and Becky want to use the name “Awesome Alabama Aquaculture” for their CSA. To ensure that no one else is able to use the name, they should register the name with the Alabama Secretary of State.

FDA FOOD FACILITY REGISTRATION

The Federal Food, Drug and Cosmetic Act (FDCA) requires all facilities that hold, pack, manufacture, or produce food (with the exception of meat, poultry, or egg products) for animal or human consumption in the U.S. to register with the U.S. Food and Drug Administration (FDA) prior to beginning manufacturing/processing, packing, or holding food (21 U.S.C. § 350d). Facilities that fail to register face civil fines and criminal prosecution. Farms, retail facilities, restaurants, nonprofit food facilities, fishing vessels, and operations regulated exclusively by the USDA throughout the entire facility are **exempt** from the registration requirement. Therefore, many types of direct farm businesses are exempt from registration requirements (21 C.F.R. §1.226). FDA has published a helpful 16-page guide on facility registration titled *What You Need to Know About Registration of Food Facilities*, available at <http://www.directfarmbusiness.org/storage/fsbtreg.pdf>. The Guide explains who must register (including exemptions) and how to register. Whether a direct aquaculture business qualifies for an exception to the registration requirement depends on the definitions set forth in FDA regulations:

- **Farm:** a facility in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including fish and seafood), or both (21 C.F.R. § 1.227(b)(3)). The term “farm” includes:

- Facilities that pack or hold food, provided that all food used in such activities is grown, raised, or consumed on that farm or another farm under the same ownership; and
- Facilities that manufacture or process food, provided that all food used in such activities is consumed on that farm or another farm under the same ownership.
- **Restaurant:** a facility that prepares and sells food directly to consumers for immediate consumption (21 C.F.R. § 1.227(b)(10)).
- **Retail Food Establishment:** an establishment that sells food products directly to consumers as its primary function. *A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers* (emphasis added). A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term "consumers" does not include businesses. A "retail food establishment" includes grocery stores, convenience stores, and vending machine locations (21 C.F.R. § 1.227(b)(11)).

Many questions arise about whether a facility qualifies for an exemption under these definitions. FDA considers some facilities a "mixed-type" that require registration. For example, a catfish farmer who harvests catfish and delivers those fish to a processor falls within the exemption. A farmer harvesting catfish and then processing it himself for sale *to a distributor or grocery store* is an example of a mixed-type facility that requires registration. Processing the fish for consumption off the farm removes the facility from the farm exception. In this instance, the facility would not qualify for the retail food establishment exception, because the farmer is not selling the final product directly to consumers as its primary function. Arguably, its primary function is farming fish.

The FDA has published a **guidance document** that contains a long list of questions and answers regarding whether an exception to registration applies. (<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucmo82703.htm#fn1>) There are also flowcharts at the end of this section that may assist in determining whether a facility is exempt from registration. **Businesses that are uncertain whether they must register should contact an attorney or the FDA help line at (800) 216-7331. The ADPH also provides information on FDA registration and can be contacted at (334) 206-5375.**

FDA maintains a **webpage** that contains step-by-step instructions and tutorials for registering online or by mail (<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm>). Under the Food Safety Modernization Act, facilities must register every two years. However, if information about the facility changes, the facility must update the registration within 60 days of the change. If a facility relocates, it must cancel the existing registration and submit a new registration.

If the facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

The Food Safety Modernization Act (21 U.S.C. Chapter 27) may also have a significant impact on the direct marketing of food; however at the time of publication the regulations for implementing this legislation have not been released. Information about the proposed rulemaking is available at <http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm>.

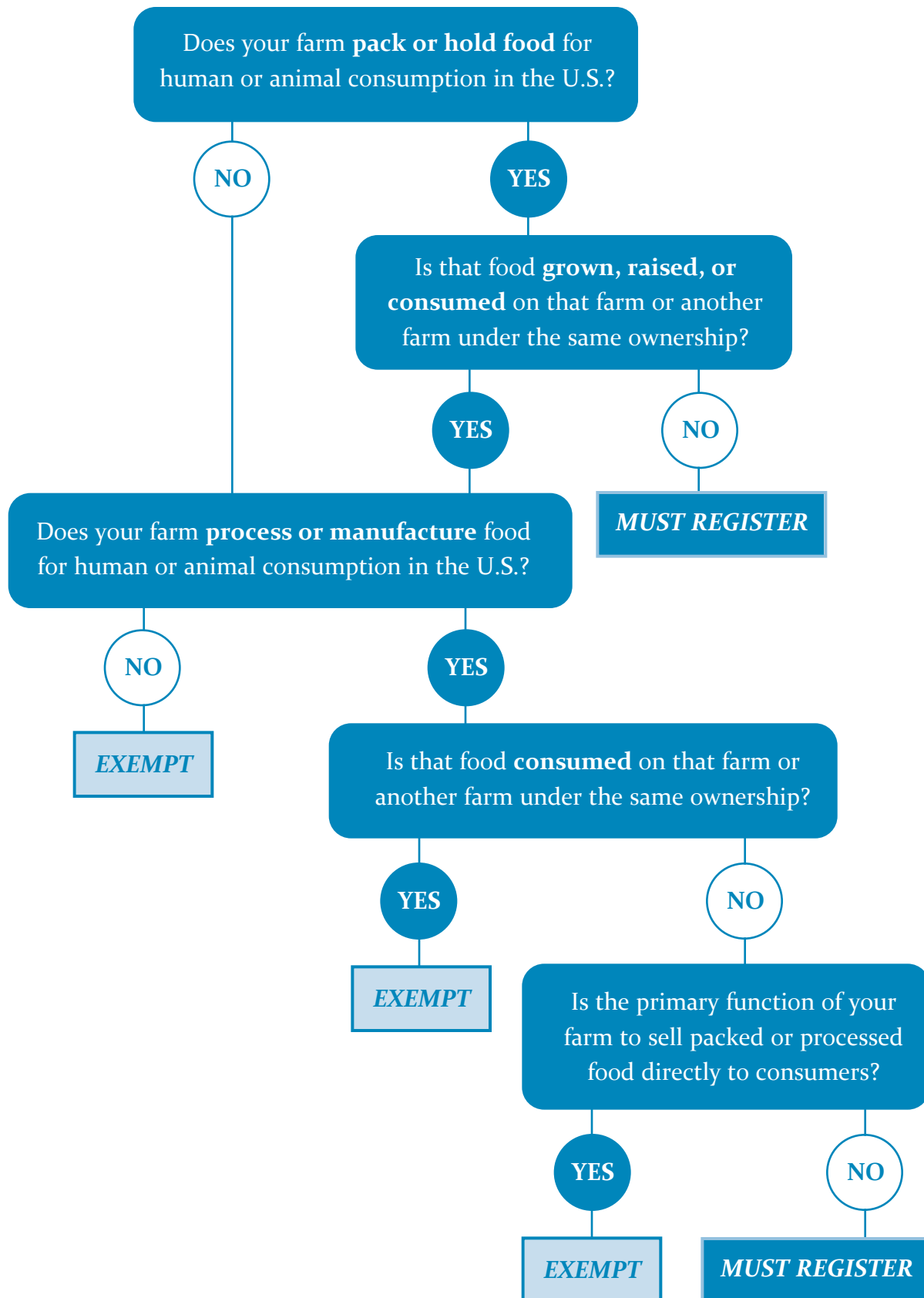
Prior to beginning any direct marketing endeavors, Abe and Becky likely would have been exempt from registering their farms with the FDA under the farm exception, since they were facilities raising fish and seafood and they did not process or pack their own seafood. However, when they moved to direct marketing enterprises, they might need to register. For example, if Abe began processing his fish for consumption off the farm, he would be removed from the exception and would be required to register with the FDA.

Food Safety Permit

Food service establishments selling any potentially hazardous food, which is defined by law and **includes seafood, shellfish, or any other fresh or frozen fish, requires a food safety permit** issued by the Alabama Department of Agriculture and Industries (ADAI) (Ala. Code § 20-1-33). Food service establishments are defined as retail and wholesale stores and places of business and similar establishments, mobile or permanent, engaged in the sale of food primarily for consumption off the premises (Ala. Code § 20-1-20).

If Abe and Becky begin any endeavors that will involve selling from “food service establishments” they will need to obtain a state food safety permit from the ADAI. Food service establishments could include farmers markets, roadside stands, and food trucks.

DO I NEED TO REGISTER MY FARM WITH THE FDA?



CHECKLIST

Have you...?

- ✓ Looked into the **registration and permitting requirements**? Most of the registration steps are relatively simple, but failure to comply can have significant consequences.

- ✓ **Key Contact Information**
 - **U.S. Food and Drug Administration (registration of food facilities help desk)**
Ph: (800) 216-7331 or (301) 575-0156

 - **Alabama Department of Environmental Management**
Ph: (334) 271-7700

 - **Alabama Department of Agriculture and Industries**
Ph: (334) 240-7275

 - **Alabama Department of Public Health**
Ph: (334) 206-5375

INSURANCE

In order to best determine the insurance needs of a direct aquaculture business, it's a good idea to start with a visit to a qualified insurance agent - preferably one who is familiar with how direct aquaculture businesses operate. Aquaculture farmers should be prepared to explain their operation in detail, and should request an insurance proposal in writing from the agent that addresses each of the operation's risks and associated potential amount of loss. Businesses may also wish to compare policies from multiple agents. Specific types of insurance products that may be necessary include premises liability (to cover liability for injuries that may occur on the property), workers' compensation, physical damage to business property, product liability, motor vehicle insurance, crop insurance, and some kind of casualty insurance to cover transactions until title passes to the purchaser.

Many of these insurance needs may be already incorporated into your basic farm insurance policy. These policies generally include provisions for losses to farm dwellings and outbuildings, personal property (including tractors and other equipment), and premises liability arising from some incidental on-farm business operations. Depending upon the scale of the operation and the particular insurance company, roadside farm stands and fee-fishing enterprises may be covered under incidental business operations in the basic farm insurance policy, but it is important to verify that this coverage exists with your insurance agent in writing. Agritourism or seasonal farm festival activities generally are not considered incidental farm business operations for insurance purposes and will require specific endorsements. Insurance field agents should review all of the above mentioned operations and require implementation of best management practices to eliminate or reduce potential risks in the operation.

Due to the variability of insurance coverage and prices depending upon the specific direct aquaculture business, insurance needs and costs should be assessed early-on in the business planning process. Bank financing may require insurance expenses to be incorporated as part of the cost structure and profitability models in the business plan. Further, some potential customers (e.g., restaurants, institutional sales) may require proof of adequate insurance.

Again, it is important to discuss these issues with an insurance specialist and an attorney to ensure the business owner *and* the direct aquaculture business have the necessary insurance coverage to protect the business assets and minimize personal liability exposure.

Prior to beginning any direct marketing operations, Abe and Becky should meet with their insurance agents to either ensure that their new operations are covered by their current policies or to purchase additional insurance.

CHECKLIST

Have you...?

- ✓ Informed yourself about **insurance options and costs**? Insurance (or lack thereof if something goes wrong) can represent a significant cost for a small-scale farmer. It should be considered as part of your initial overall business plan and not left as an afterthought.

PRODUCTION

There are many components to successfully managing a direct aquaculture business. First and foremost, aquaculture production is subject to regulation by the Alabama Department of Conservation and Natural Resources (ADCNR), the Alabama Department of Environmental Management (ADEM), and the ADPH. **While beyond the scope of the guide to discuss all necessary environmental permits prior to beginning an aquaculture production, all aquaculture producers must obtain a permit by contacting ADEM.**



Catfish ponds, courtesy of Roger Smith.

FDA FOOD CODE

Every four years, the FDA publishes a model regulation for state and local officials to use in regulating retail food sales and food service establishments. The Code's purpose is to protect public health by providing regulators with a scientifically sound legal basis for regulating the food industry. States do not have to adopt the Food Code, but a significant number of states incorporate the Code nearly word-for-word into their regulations. Alabama has in large part adopted the Food Code, though it does differ from the federal model language on a few points.

Alabama's adoption of the Food Code has a couple of major impacts. First, FDA publishes many guidance manuals and standards for interpreting and applying the Food Code, as well as the scientific rationale for the rules the code proposes. Therefore, if an Alabama inspector requires a particular material or process for production, the mandate likely has roots in the FDA's standards. Looking to the FDA's model rule may help the producer understand the purpose of the requirement or work with the inspector to reach an alternative solution that meets the food safety standards inspectors strive for.

The second impact of the Food Code's near-universal adoption is that it may make it easier for some producers to engage in interstate sales. All of Alabama's neighbors have adopted some version of the Food Code, and because the Food Code standardizes the rules, complying with Alabama's rules brings a producer very close to satisfying both federal and neighboring states' food safety rules. To be sure, some additional steps (e.g., inspection certificates) may be necessary in order to sell products across state lines, but most producers who are in compliance with Alabama's requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

Information on specific state Food Code requirements may be obtained from your county health department or the ADPH state office at (334) 206-5375.

HACCP

Pursuant to the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Chapter 9), the FDA requires fish processors to use Hazard Analysis and Critical Control Point Plans (HACCP, pronounced ha-sip) (21 C.F.R. § 123.6). These plans are essentially a method of food safety control in which food safety is addressed through the analysis and control of biological, chemical, and physical hazards from raw material production, procurement and handling, to manufacturing, distribution and consumption of the finished product.

Implementing the HACCP standards requires identifying chemical, biological, and physical hazards that are reasonably likely to occur and the critical control points where the hazard is likely to occur, establishing limits for the hazard at each critical control point, and implementing procedures for testing for limits and verifying effectiveness of the plan (21 C.F.R. § 123.6). The processor must also have a record keeping system to document the monitoring of the critical control point systems (*Id.*). HACCP plans must be in writing and signed by the most responsible individual on site or a higher-level official within the company. An individual trained in the application of HACCP principles to fish and fisheries products must develop the HACCP plan (21 C.F.R. § 123.10). This individual can be a trained employee or an outside contractor.

Under the Act, “fish” means “fresh or saltwater finfish, crustaceans, other forms of aquatic animal life (including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, where such animal life is intended for human consumption” (21 C.F.R. § 123.3). “Processing” means freezing, changing into different market forms, manufacturing, preserving, packing, labeling, dockside unloading, or holding (*Id.*). The regulations do not apply to (1) harvesting or transporting fish or fishery products, without otherwise engaging in processing; (2) practices such as heading, eviscerating, or freezing intended solely to prepare a fish for holding on board a harvest vessel; or (3) the operation of a retail establishment.

As with most other FDA rules, the HACCP requirements only apply to food moving in interstate commerce. **Therefore, fish and shellfish producers raising and direct marketing their goods wholly within Alabama are not subject to the HACCP rules. If the producer or processor sells to a wholesaler and has good reason to believe the product may be sold across state lines, then they must comply with HACCP.** And because the local public health inspector may require standards for processing of seafood that approach HACCP-level standards, producers who are exempt from the federal HACCP requirements should nonetheless study and understand the requirements and consider developing an internal HACCP plan.

More information on applying HACCP principles to fish and seafood is available in FDA’s *Fish and Fisheries Products Hazard Control Guidance*, available **online** at <http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm2006764.htm>. Sample HACCP plans and forms are available at seafood.oregonstate.edu/Seafood-HACCP.html.

ALABAMA DEPARTMENT OF PUBLIC HEALTH

Numerous agencies regulate agricultural production and marketing; however, the ADPH has general rules that apply to all food sales. **As discussed in Part I at page 4, sales from retail food establishments require a permit from county health officers. Retail food establishments may include mobile food establishments or farmers markets.**

The Alabama Safe Foods Act prohibits the sale of adulterated food (Ala. Code § 20-1-27). Generally, adulterated means produced, prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth or been rendered diseased, unwholesome, or injurious to health (Ala. Code § 20-1-22). The ADPH regulations require all food sold at retail or at food service establishments to be from sources that comply with the food safety and labeling laws (Ala. Admin. Code r. 420-3-22-.08). This means everything sold in Alabama, other than raw, unprocessed commodities, must come from an inspected and licensed facility. (Ala. Admin. Code r. 420-3-20-.01). **A producer therefore will need to either contract with a licensed and inspected facility to process their animals or work with the ADPH to build adequate facilities on-site.** Construction plans for processing facilities must receive pre-approval from the ADPH (Ala. Admin. Code r. 420-3-20-.08).

The ADPH adopts the FDA Food Code regulations that pertain to the construction and sanitation of food production and processing facilities (Ala. Admin. Code r. 420-3-22-.01). ADPH inspectors certify facility compliance subject to general regulations concerning the construction, equipment, and processes for producing food (*Id.*). These regulations mandate surface sanitization, vermin control, adequate clean water, sewage disposal, sanitary facilities for employees, and adequate sanitation principles and processes. These regulations are necessarily vague because they apply to a variety of production facilities, which inspectors interpret according to the applicability for the particular operation.

Processors also must comply with specific requirements for processing different types of foods, which ADPH bases on the unique risks inherent to each food. Many times, local regulators or individual inspectors decide on the adequacy of the facility's processing. However, ADPH communicates guidance to its inspectors through uniform, ongoing training. ADPH relies on many of the training, guidance manuals, and technical documents that the FDA publishes to accompany the FDA Food Code. Although guidance manuals facilitate consistent interpretation and application of the regulations, they are not binding and individual inspectors' interpretation of their applicability to a unique set of facts may differ. However, in no case may an ADPH inspector allow a facility to fall *below* the general standards established in the regulations.

Since HACCP requirements only apply to food moving in interstate commerce, Abe and Becky are only required to comply with these requirements if they are selling in interstate commerce. In the direct marketing context, this might arise if Abe and Becky engage in Internet sales or if they have a good reason to believe that the product may be sold across state lines. If processing, packing, and labeling their products for sale in state, they must comply with ADPH requirements. However, HACCP is a widely promoted and accepted risk management strategy that all producers should consider implementing.

DCNR DEALER LICENSES

Producers must **obtain a seafood dealer license from the Department of Conservation and Natural Resources if selling fresh or frozen seafood.** (Ala. Code § 9-12-125.) **A wholesale or retail fish dealers license must be obtained from the DCNR for the sale of freshwater species.** (Ala. Code § 9-11-153.)

Abe and Becky must obtain dealers licenses from DCNR.

COUNTRY OF ORIGIN

Federal law requires retailers of wild and farm-raised fish and shellfish to provide a product's country of origin. Retailer is defined as any person subject to be licensed as a retailer under the Perishable Agricultural Commodities Act (7 U.S.C. § 499ab). The information may be provided in a variety of ways, including by placards, signs, or labels. Alabama also requires food service establishments to disclose the country of origin for wild and farm-raised fish and shellfish. Food service establishment includes "[a]ny place, vehicle, or vessel where food for individual portion service is prepared, stored, held, transported, served, or dispensed and includes any such place regardless of whether consumption is on- or off-premises and which is regulated by the Alabama Department of Public Health" (Ala. Code § 22-20A-2). Hospitals are excluded.

Under state and federal law, Abe and Becky must disclose the country of origin on their catfish and oysters. They may do this by using placards, signs, or labels.

WEIGHTS AND MEASURES

Alabama's Weights and Measures Law (Ala. Code § 8-16-1 *et seq.*) applies to all sales of commodities and commercial goods within the state. **When a sale is made, the direct aquaculture business must accurately measure its products in order to comply with state law.** The Division of Weights and Measures, which is located within the ADAI, administers the law. The law ensures accurate measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed and requiring certification of the accuracy of scales. Direct aquaculture businesses must make sure that any instruments and devices used in commerce for weighing and measuring comply with the provisions of the law. Generally, the law requires weighing and measuring devices and packaging labels to comply with standards set by Congress (Ala. Code § 8-16-3). For this purpose, Congress created the National Institute of Standards and Technology (NIST), which makes technical standards and uniform laws and regulations available through **its weights and measures website**, <http://ts.nist.gov/WeightsAndMeasures/index.cfm>. Liquid substances may be sold by measure of length and surface, weight, or capacity and dry substances are to be sold in conformity with the standard measure of length, surface, weight, and capacity established by Congress (Ala. Code § 8-16-2).

Inspectors from the ADAI within the state, the county sealer within the county, and the city sealer within the city may inspect commercial weighing and measuring devices at any time, and scales must undergo an inspection at least once per year (Ala. Code § 8-16-7). **To ensure compliance with these laws, businesses should contact the Division of Weights and Measure at (334) 240-7133 to have a state-authorized service agent inspect scales and measuring devices.**

When making sales, Abe and Becky must ensure that they have weighed their products in compliance with state law and correctly labeled their packages. To do this, they should contact the Division of Weights and Measure to have a state-authorized service agent inspect scales and measuring devices.

REGULATIONS FOR SPECIFIC PRODUCTS

In addition to the general requirements mentioned above regarding sales and production that apply to all aquaculture products in Alabama, several products are subject to additional regulation.

Catfish

Catfish has to meet regulations at both the state and federal levels, which are discussed below.

Alabama Regulations

Alabama has one law that applies exclusively to catfish marketing. The Alabama Catfish Marketing and Consumer Act of 1975 (Ala. Code § 2-11-30 *et seq.*) requires retailers, wholesalers, and restaurants to label catfish according to whether it is “farm raised,” “river or lake,” “imported,” or “ocean catfish.” The Act defines “farm raised” as “produced in fresh water according to the usual and customary techniques of commercial aquaculture” (Ala. Code § 2-11-33). A food item may not be labeled as catfish unless it is fish classified in the Ictaluridae family.

Emerging USDA Food Safety Regulations for Catfish

Title XI, Section 11016 of the Food, Conservation, and Energy Act of 2008 (The 2008 Farm Bill) (Pub. L. 6124) amended the Meat Products Inspection Act to subject catfish (as defined by the Secretary of Agriculture) to mandatory inspection by the USDA Food Safety Inspection Service (FSIS) (21 U.S.C. § 601(w)(2)). The law’s purpose is to impose higher inspection standards on imported catfish, but it will likely have an impact on domestic processors as well.

On February 18, 2011, USDA issued a proposed rule to implement the catfish inspection program. The proposed rule provides two options for the definition of catfish and describes requirements that will apply to catfish produced in or imported into the United States, as well as how FSIS will inspect US catfish farms, transportation, and processing. The proposed rule calls for a transition period during which domestic and international operations will come into compliance with the catfish inspection program. Once the catfish inspection program rules are issued in final form, FSIS plans to follow-up by announcing the implementation dates for key provisions in the rule.

As of the writing of this guide, USDA has not issued a final rule. Catfish producers should subscribe to industry publications for up-to-date information on this emerging issue. Additionally, FSIS has created a **website**, http://www.fsis.usda.gov/About_FSIS/OCIP/index.asp, that contains the most current information regarding catfish inspections.

Under the state Catfish Marketing Act, Abe must label his catfish as “farm raised.” Further, to be labeled as “catfish” his product must be part of the Ictaluridae family.



Oyster sale at a farmers market, courtesy of Snowpea & Bokchoi Media.

Shellfish

Alabama's shellfish sanitation rules incorporate by reference the National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish, 2009 edition (NSSP Model Ordinance). The NSSP Model Ordinance is a guidance document produced by the FDA. It outlines the responsibilities of the state-designated "Shellfish Authority" with respect to the control of shellfish harvest. The ADPH is the designated "Shellfish Authority" in Alabama; however, many of the

provisions of the NSSP Model Ordinance are actually incorporated into the ADCNR's rules for commercial oyster catcher licensing. In accordance with the NSSP Model Ordinance, and by reference the ADPH rules, individuals holding an oyster catcher's license may only sell to a licensed Alabama Seafood Dealer (Ala. Admin. Code r. 220-3-.80). Additional information on requirements for oyster sales, including tag traceability, may be obtained from the ADPH at (334) 206-5375.

Checklist

Have you...?

- ✓ Obtained necessary permits from ADPH and DCNR?
- ✓ Complied with HACCP or state requirements for processing?
- ✓ Arranged for state inspection and approval of your scales and measuring devices?
- ✓ Correctly labeled your products with country of origin?
- ✓ Correctly labeled any catfish?

Selling aquaculture products to consumers or institutions may require you to consider issues, such as sales tax and shipping.

PRICING

An advantage of direct marketing is that you set the price for your product. On the other hand, you are also responsible for analyzing and developing your market, which may not be a straightforward process. For example, if you set your prices based on retail grocery store prices, it would probably not cover the costs you incur in producing, marketing, packaging, and delivering your product.

When thinking about pricing, there are several considerations. First, think about who will purchase your product and what cost those consumers are willing to bear. Generally, consumers interested in buying seafood directly from a producer are willing to pay a premium to support local products and to be more connected to their food sources. However, you may have to consider taking your product outside of your immediate area to reach those customers. Be sure to consider packaging, transportation, and operating costs when calculating your prices. Please contact your local extension agents for more considerations and information.

SHIPPING PRODUCTS

If the farm's products are capable of shipping via mail, a website that allows customers to place orders online can be an important aspect of the direct aquaculture business. Sending perishable goods through the mail, however, can be costly and requires careful packaging. If food needs to be shipped cold, the USDA recommends shipping with dry ice, foam coolers, and polyethylene film to provide additional insulation. The package should contain a clear label that says "contains dry ice" and "keep refrigerated," and it should be shipped by the fastest means possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. The USDA also provides a helpful **guide of safe handling times** for a large variety of mail-order foods. **Also, keep in mind that shipping food out of state can subject the business to federal laws the operation may not otherwise have to comply with.**

The FTC Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435) applies to sales made over the Internet. The Rule regulates shipment promises, unexpected delivery delays, and customer refunds. To comply with the Rule, a seller must have a reasonable basis for promising shipment within a certain time frame. If online advertising does not specify the shipment period, the seller must have a reasonable basis for believing that they can ship within 30 days. If shipment cannot be made within the promised time period, then the seller must notify the customer of the delay and provide the customer with the option of cancelling the order and receiving a full refund. If a seller cannot fill an order, then they have the right to cancel it but must notify the customer of the cancellation and refund payment to the customer in full.

Further, please note that the Lacey Act prohibits the importation and interstate transportation of listed injurious species which include cultured species such as black carp. (16 U.S.C. § 42(a)(1)). The Lacey Act also makes it illegal to “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold” in violation of state, tribal, or foreign wildlife laws (16 U.S.C. 3372(a)). For more information, visit www.fws.gov/injuriouswildlife/.

TAXATION

Farm taxation rules are detailed, complex and subject to frequent change. **Direct aquaculture businesses may be liable for several types of taxes, such as income, self-employment and employment, sales, excise, and property taxes**, and business owners should consult with a qualified attorney or accountant for guidance. The information provided below addresses only general information on sales tax.

Direct aquaculture businesses that sell food and other goods to customers are responsible for collecting state and local sales and services taxes. Direct aquaculture businesses that purchase goods may be responsible for paying sales tax, but in some instances the purchases will be exempt.

Sales Tax

Alabama levies a tax against all gross sales and receipts in the state (Ala. Code § 40-23-2). If consumers make purchases from out of state without paying sales tax, to use or consume the item in Alabama they must report and remit a corresponding “use tax” (Ala. Code Title 40, Chapter 23, Article 2). Generally, “gross receipts” refers only to tangible personal property (Ala. Code § 40-23-1). However, in Alabama, the tax also applies to fees charged for admission to places of public amusement – for instance, a pumpkin patch (Ala. Code § 40-23-2(2)).

All businesses in Alabama must obtain a sales tax permit from the Alabama Department of Revenue (ADOR) prior to commencing business (Ala. Code § 40-23-2). The permit application form is available on the **ADOR website** at www.ador.alabama.gov/.

Many items are exempt from the Alabama sales tax (Ala. Code § 40-23-4 *et. seq.*). For example, unprocessed farm products sold directly by a producer, family members, or employees are exempt (Ala. Code §§ 40-23-4(a); 40-23-62(8)). Food products are no longer “unprocessed” when they are cooked, boiled, roasted, or mixed or compounded with ingredients other than additional exempt agricultural products (Ala. Admin. Code r. 810-6-3-.01). The exemption does not apply to agricultural products sold through a producer-operated store. (Ala. Admin. Code r. 810-6-3-.01).

Computing the Sales Tax

Retailers compute their tax liability by applying the effective tax rate to the gross receipts from the sale. Tax rates can be found on the ADOR’s website at <http://www.revenue.alabama.gov/salestax/staterates.html>. The effective rate depends on the type of product and location of the sale, as explained in more detail below. The term “gross receipts” means “the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character, all receipts actual and accrued, by reason of any business engaged in” (Ala. Code § 40-23-1).

The general sales tax rate is 4%. Depending on the location of the sale, additional local taxes, such as county or city taxes, may apply. The location of the sale is where the consumer takes delivery. For instance, if a direct aquaculture business operating in Tuscaloosa County takes Internet orders to make weekly deliveries to Birmingham (located in Jefferson County), both Birmingham city taxes and Tuscaloosa County taxes would apply to the sale. The ADOR provides a local tax rate look up tool **online** at <http://www.revenue.alabama.gov/salestax/index.cfm>.

Taxation of Internet Sales

If the direct aquaculture business sells over the Internet, determining what taxes are owed can be complex. For the most part, Alabama direct aquaculture businesses will need to collect state and local sales taxes if a sale takes place in Alabama or the product is delivered to an Alabama address. The local tax where the purchase is delivered applies. Local tax rates are available through the ADOR's website. If an Alabama retailer ships merchandise out of Alabama, a U.S. Supreme Court decision prohibits states from requiring out-of-state retailers to collect and remit the sales tax for the state where the product is delivered if the retailer has no physical presence in the state (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state.

Paying Sales Tax

Businesses must pay sales taxes online and those businesses with sales receipts greater than \$750 are required to pay online. Electronic filing is done through the ADOR's **website**.

Sellers must file a tax return due and payable in monthly installments on or before the 20th day of the month next succeeding the month in which the sale occurs (Ala. Code § 40-23-7). If a business owed less than \$200 in the preceding year they may pay quarterly; if the business owed less than \$10 in the preceding year they may pay annually (*Id.*). Businesses that have average monthly state sales tax liability of \$1,000 or more during the preceding calendar year shall make estimated payments to the ADOR on or before the 20th day of the month in which the liability occurs (*Id.*).

Retailers must keep records to verify sales (Ala. Code § 40-23-9). "Suitable records" must show gross sales, gross proceeds of sales, and gross receipts or gross receipts of sales (*Id.*). Businesses must also keep and preserve all invoices of goods, wares, and merchandise purchased, for resale or otherwise (*Id.*).

*If shipping any products, Abe and Becky should ensure that their products meet HACCP requirements and applicable federal laws. They may be liable for several types of taxes, such as income, self-employment, employment, sales, excise, and property taxes. Business owners should consult **with a qualified attorney or accountant for guidance. They must also obtain a sales tax permit from the ADOR and later pay the sales tax through the ADOR.***

Checklist

Have you...?

- ✓ If shipping out of state, ensured you are cooperating with federal laws the operation may not otherwise have to comply with?
- ✓ Obtained a sales tax permit from the ADOR prior to commencing business?
- ✓ Obtained the necessary forms and established proper taxing procedures for your business entity?

✓ **Key Contact Information**

- **U.S. Internal Revenue Service (general help)**
Ph: 1(800) 829-1040 (individuals)
Ph: 1(800) 829-4933 (businesses)

To find a local Taxpayer Assistance Center (which offers face-to-face tax assistance), visit <http://www.irs.gov/localcontacts/index.html>.

- **Alabama Department of Revenue**
Contact information by department webpage: <http://revenue.alabama.gov/about-contact.cfm>

MARKETING

A direct aquaculture business also needs to have effective marketing in order to reach potential customers and sell the product. At its core, marketing is about informing consumers about the direct aquaculture business's products and building an established reputation to ensure repeat business. There are many ways to engage in marketing, such as sales flyers, eye-catching posters at the farmers' market, roadside signs, and Internet marketing. This guide only addresses legal issues pertaining to labeling and advertising, a few specific issues related to the Internet, and marketing strategies to consider for direct aquaculture businesses.

LABELING AND ADVERTISING

Labeling is regulated by the FDA under the Food, Drug and Cosmetic Act (21 U.S.C. Chapter 9), which prohibits selling "adulterated" or "misbranded" food. The FTC regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer's decision-making process) and is likely to mislead consumers. A statement is unfair if it causes or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers. These laws have implications for several types of claims a direct aquaculture business may wish to make about its products, whether on its labels or in its advertising including: health claims, structure/function claims, and nutrient content claims. Each will be briefly addressed below.

Health Claims

Health claims describe a relationship between the food (or a component of it) and reducing the risk of a disease or health-related condition. For instance, a label might claim "low fat diets rich in fiber-containing grain products, fruits, and vegetables may reduce the risk of some types of cancer, a disease associated with many factors." Producers who wish to place a health claim on a label must first have that claim approved by the FDA. Approved health claims are listed in Appendix C of the FDA's food labeling guide available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/ucm064919.htm>. If a claim is not approved, a food producer can petition the FDA to approve the claim and must support the petition with sufficient scientific evidence.

A label may also contain a *qualified health claim*, which is a health claim supported by emerging scientific evidence that suggests the claim may be valid but is not strong enough to meet the standards for health claims. Like with health claims, qualified health claims must be preapproved by the FDA through a petition. Failure to obtain pre-approval causes the food to be "misbranded" and therefore subject to FDA enforcement.



Fish on Wheels fish truck, courtesy of Upper Hutt Farmers Market.

Structure/Function Claims

Structure/Function Claims describe the role of a nutrient in affecting normal structure or function in humans, like “calcium helps build strong bones.” These types of claims do not need to be preapproved by the FDA, but must be truthful and not misleading. For more information on these types of claims, see the FDA’s **Small Entity Compliance Guide on Structure/Function Claims** available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/DietarySupplements/ucm103340.htm>.

Nutrient Content Claims

Nutrient content claims characterize the level of a nutrient in a food, such “high in vitamin A;” they also encompass claims such as “low-fat” and “light” foods. The FDA prohibits these claims unless specifically approved in FDA’s regulations (21 C.F.R. § 101.13 and subpart D). Raw fruits and vegetables and fish are not required to contain nutritional content labels, but the FDA provides posters for voluntary labeling of their nutritional content.

When marketing or labeling their products, Abe and Becky must comply with FDA rules. Any health claims on the label must comply with FDA regulations. For instance, since Abe's catfish is a low-fat food, he wants to label his catfish with a claim noting that a diet low in the total amount of dietary fat may reduce the risk of cancer. Under FDA regulations, he is allowed to label his fish with this type of claim but must use the terms "total fat" or "fat" and "some types of cancers" or "some cancers." His claim might read: "Development of cancer depends on many factors. A diet low in total fat may reduce the risk of some cancers." Any nutrient claims, such as the amount of omega 3s in catfish, must also be in compliance with FDA regulations.

MARKETING STRATEGIES

Branding

Aquaculture producers may find value in participating in local, state, regional, or national branding campaigns, such as U.S. Farm-Raised Catfish and Alabama Gulf Seafood. However, when using these branding campaigns, producers must adhere to the campaign's standards and may have to submit to inspections of their products or facilities. For example, to obtain the Certified Process Seal from The Catfish Institute producers are required to meet standards set by the organization.

Agri-tourism

Alabama's Agricultural Tourist Attraction Program (Ch. 80-8-11) is available for qualified agribusinesses, and includes seasonal U-pick operations, farm stands, roadside stands, educational and entertainment agritourism farms, and farmers markets that are designated "Certified Markets" by the FMA. To be designated as an Approved Agricultural Tourist Attraction, businesses must meet requirements in regulations at Ala. Admin. Code r. 80-8-11-.05.

The Alabama Agritourism Partnership, which includes the ADAI, Alabama Bureau of Tourism and Travel, Alabama Farmers Federation, and Alabama Cooperative Extension System, developed a statewide database and directory, the Alabama Agritourism Trail. To be listed on the trail, visit www.alabamaagritourism.com.

Abe and Becky may want to participate in branding campaigns to give consumers even more confidence or incentive to purchase their products. They should consider organizations that have such branding campaigns, but must remember that they must adhere to standards set by the organizations. Abe should try to have his fee-fishing enterprise placed on the Approved Agricultural Tourist Attraction list.

Checklist

Have you...?

- ✓ Developed a marketing plan?
 - Do your current practices comply with FDA and FTC law? Are any methods you are considering likely to create legal problems?

- ✓ Are your products properly labeled?

