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**Commission I**

**National Report – Rapport national – Landesbericht  
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**Legal incentives and legal obstacles to diversification for farmers –  
Incitations et obstacles juridiques de la diversification de  
l'agriculture – Rechtliche Fördermittel und Hindernisse für die  
bäuerliche Diversifikation**

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**XXV<sup>th</sup> European Congress and Colloquium of Agricultural Law**  
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**Commission I**

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Farming in the United States, as in other nations, is inherently risky. US agricultural operations face production risks from the vagaries of weather, disease, and pests and financial risks from changing economic conditions, including market prices and cost of production. Government policies, articulated in laws and regulations, have an effect on farmers and their business decisions. Producers often adopt management strategies to reduce their risks. Among these strategies is enterprise diversification, which assumes that “incomes from different crops and livestock activities do not move up and down in perfect correlation, so that low income from some activities would likely be offset by higher income from others.”<sup>1</sup>

Though the term “diversification” is not defined by statute, it is generally understood to encompass nontraditional agricultural products, activities, or land uses. Diversification may involve production that targets niche markets or satisfies a growing demand for organic products, land uses that mitigate environmental impact, and other activities that allow the farmer to earn income from a nontraditional source. Value-added processing and packaging of traditional products, production of nontraditional crops or livestock, new methods of marketing (eg, direct or internet), and many types of agritourism are common ways that farmers diversify.<sup>2</sup>

In a February 2009 speech, the US Secretary of Agriculture encouraged diversification. Noting that federal farm program payments have been criticized globally and nationally and may therefore be at risk, he recommended that producers consider supplementing their income by other activities -- eg, organic production, biofuels, or windmills.<sup>3</sup>

Many opportunities for diversification exist. The complexities and costs associated with changes in production have prompted federal and state governments to create programs that assist or encourage some types of diversification. In addition, significant information about diversification is available. The US Department of Agriculture (USDA), for example, provides access to sources of information about diversification, accompanied by an extensive list of possible crops, livestock, and farm enterprises.<sup>4</sup> The Sustainable Agriculture Network suggests economical ways to diversify cropping systems.<sup>5</sup> Some states also provide helpful information.<sup>6</sup> These programs and information sources help to advance and promote socially desirable activities, including organic production, conservation, recreation, and community supported marketing arrangements.

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<sup>1</sup> Economic Research Service, US Department of Agriculture, Farm Risk Management: Risk Management Strategies, <http://www.ers.usda.gov/Briefing/RiskManagement/Strategies.htm>. Other strategies include vertical integration, use of production or marketing contracts, hedging, insurance, and off-farm employment.

<sup>2</sup> Michigan State University Extension, How are Farms and Ranch[es] Diversifying their Revenues?, <http://www.prr.msu.edu/agdiversity/paper.html> (accessed 4 June 2009).

<sup>3</sup> Informa Economics Policy Report, 10 February 2009 (reporting on a speech to the National Association of Wheat Growers and US Wheat Associates, Washington DC, 9 February 2009).

<sup>4</sup> National Agricultural Library, USDA, Alternative Crops and Enterprises for Small Farm Diversification (January 2009), <http://www.nal.usda.gov/afsic/pubs/altlist.pdf>.

<sup>5</sup> Sustainable Agriculture Network, Diversifying Cropping Systems (February 2004), <http://www.sare.org/publications/diversify/diversify.pdf>.

<sup>6</sup> Eg, Minnesota Department of Agriculture, Agriculture Diversification Compass (2004), <http://www.mda.state.mn.us/news/publications/protecting/sustainable/compass.pdf>.

This report focuses on legal incentives and legal obstacles to diversification in the US. It first outlines some farm characteristics that may influence diversification. It then turns to the possible impact of the agricultural tenancy relationship on diversification and the relevance of land-use restrictions and other laws for the producer who plans to undertake a new activity. The report then discusses a number of activities that are typical of farm diversification in the US, with a focus on federal government programs that support diversification. These activities include organic production, alternative crops and livestock, marketing strategies, agritourism, conservation, and production of renewable energy.

## I. Factors in Diversification

### A. Farm Characteristics

Diversification in the US may be influenced by farm characteristics and often attracts small-scale producers. According to USDA, a farm is any place from which \$1,000 or more of agricultural products were produced or sold during the year. USDA categorizes farms by level of sales. Small family farms have gross sales less than \$250,000 and include both rural-residence farms and intermediate farms. Rural residence farms are retirement farms and residential/lifestyle farms (with a major occupation other than farming). Intermediate family farms include low-sales farms (gross sales less than \$100,000) and high-sales farms (sales between \$100,000 and \$249,999). Large family farms are commercial farms, either large (gross sales between \$250,000 and \$499,999) or very large (gross sales over \$500,000).<sup>7</sup> Though most US farms are family farms, a small percentage are nonfamily farms, with the majority of the business owned by nonrelated individuals.

The 2007 Census of Agriculture, released in early 2009, indicated that the US had a total of 2,204,792 farms (76,000 more than in 2002); land in farms was 922.1 million acres (373.5 million hectares), with an average farm size of 418 acres (169.3 hectares).<sup>8</sup> Relying on that Census, the US Secretary of Agriculture noted some troubling changes in the demographics of US farms. Since 2002, the numbers of both small and large farms have grown. For example, farms with sales less than \$2,500 increased by 74,000, and farms with sales over \$500,000 increased by 46,000. Farms with sales between \$10,000 and \$500,000, however, declined by 80,000. The largest 125,000 US farms, only about 5 percent of the total, produced 75 percent of food products in 2007.<sup>9</sup>

#### 1. Farm-Related Activities

Not all farm income comes from traditional farm production. "Farm-related" activities, which generate income from use of farm assets for nonproduction activities, are financially significant, especially for farms selling less than \$50,000 annually. Many farm-related activities are a type of diversification. These include "direct sales of farm output and value-added products directly to consumers, on-farm energy production, running an on-farm recreation business (agrotourism), and forest product sales."<sup>10</sup> USDA tracks farm-related income. In 2007, for example, direct sales to consumers, through farmers markets, roadside stands and pick-your-own operations, amounted to \$1 billion. About 5 percent of all farms sold directly, and more than 80 percent of

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<sup>7</sup> ERS, USDA, Farm Household Economics and Well-being: Glossary, <http://www.ers.usda.gov/Briefing/WellBeing/glossary.htm>. The Census of Agriculture collects data in more detailed categories.

<sup>8</sup> NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, 2007 CENSUS OF AGRICULTURE, UNITED STATES SUMMARY AND STATE DATA, Table 1, at 7 (2009).

<sup>9</sup> USDA, News Release, Keynote Address by Agriculture Secretary Tom Vilsack at the U.S. Department of Agriculture's "Agricultural Outlook Forum 2009" (Release 0048.09, 26 February 2009); USDA, News Release, Census of Agriculture Shows Growing Diversity in U.S. Farming (Release 0036.09, 4 February 2009).

In 2007, 40 percent of farms in the US received government payments. Farms with less than \$50,000 in sales made up 58 percent of those farms and received an average of \$3,167 per farm; the largest farms (sales over \$1 million) made up only 3 percent of those farms and received 22 percent of total payments, an average of \$80,386 per farm. Smaller farms received only 5 percent of commodity payments, but 55 percent of conservation payments; farms with more than \$500,000 in sales (7 percent of farms receiving government payments) collected almost 50 percent of commodity payments. J. Michael Harris et al, *Agricultural Income and Finance Outlook* 15-16 (ERS, USDA, AIS-86, December 2008).

<sup>10</sup> Harris et al, *supra* note 9, at 70.

these were small farms (sales under \$50,000).<sup>11</sup> Agritourism also generated significant farm-related income.

## 2. Off-Farm Income

The majority of farms in the US do not produce enough income from agriculture to support the farm family. Off-farm income has increased steadily since the 1960s, and recent data indicates that off-farm employment provides nearly 80 percent of farm household income.<sup>12</sup> In fact, of the 2.2 million farmers or ranchers included in the 2007 Census of Agriculture, 900,000 perform off-farm work 200 days per year.<sup>13</sup> That is, the farm operator, not a spouse, spends a major portion of his or her working time off the farm. Moreover, about 70 percent of farm operator households have a farmer or spouse working off the farm. Only on farms with sales of more than \$250,000 per year (the largest 8 percent) does farm income exceed off-farm income.<sup>14</sup> As the US Secretary of Agriculture noted, these statistics “may explain why 60 percent of America’s farms have less than \$10,000 in sales.”<sup>15</sup>

### B. Farm Tenancy

Tenancy is significant in US agriculture. The 2007 Census of Agriculture indicates that 69 percent of farms are operated by full owners, 24.6 percent by part owners, and 6.4 percent by tenants. Census data makes clear, however, that full owners operate the smallest farms, with an average size of 226 acres (107.8 hectares); more than 1 million of the 1.5 million full-ownership farms produce less than \$10,000 (market value and government payments) per year. The largest farms with highest production include rented land. The average farm size for part owners was 915 acres (370.6 hectares) and for full tenants, 582 acres (235.7 hectares); a significant majority of these part-owner and full-tenant farms produced more than \$10,000, and many produced more than \$500,000.<sup>16</sup>

In the US, states govern most aspects of the landlord-tenant relationship. State statutes and common-law principles regulate some aspects of farm leasing, particularly lease termination and remedies for breach.<sup>17</sup> Long-term leases of farmland, though legally permissible, are unusual in the US; state statutes do not require specific lengths for lease terms. Short-term leases (often one year) are common, and no automatic right of renewal exists. The lease can be terminated without justification by landlord or tenant at the end of a lease term, provided that notice, if required by state law or contract, is timely. In practice, however, many tenants farm the same rented land for long periods of time.

Landowners and tenants enjoy considerable freedom of contract. Under a typical farm lease, the tenant is in possession and control of the land for the lease term. Unless the lease provides otherwise, the tenant determines the cropping system. Leases can, and often do, include provisions that permit or prohibit specific land uses on the rented farm. Many leases provide that the tenant must farm in a “husbandlike” manner, follow accepted conservation practices, and avoid committing waste (willful or negligent destruction of property). In practice, landowner and tenant often cooperate closely in making management decisions about crop production and conservation, especially in a crop-share lease, under which the landlord’s rent is a percentage of the crop. Under a cash lease, the landowner may be less involved in the farming operation.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3. The average farm household income from farm sources was projected to decline in 2008 by 30 percent to \$5,900 and to constitute only 7.3 percent of total farm household income. A projected increase of 4.2 percent in off-farm income would bring that average to \$80,897. Average farm household income was projected to reach \$86,798, a increase of less than 1 percent from 2007. Farm household income is generally higher than income for all US households. *Id.* at 31, 35.

<sup>13</sup> USDA, Release 0048.09, *supra* note 9.

<sup>14</sup> Harris et al, *supra* note 9, at 31. Most income tax paid by farm households comes from off-farm income, with a majority of farmers declaring a net farm loss. Ron Durst, *Federal Tax Policies and Farm Households* 4 (ERS, USDA, EIB 54, May 2009).

<sup>15</sup> USDA, Release 0048.09, *supra* note 9.

<sup>16</sup> 2007 CENSUS OF AGRICULTURE, *supra* note 8, Table 65, at 262.

<sup>17</sup> For more discussion see Margaret Rosso Grossman, *Leasehold Interests and the Separation of Ownership and Control in U.S. Farmland*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 119-148 (Charles Geisler & Gail Daneker, eds, 2000).

Thus, the tenant's ability to diversify the farming operation will depend in large part on the terms of the farm lease. Unless the lease specifies the cropping system, for example, the tenant will be free to plant specialty crops or carry out other nontraditional agricultural activities. The tenant whose plan for diversification involve significant changes in the farming operation would be wise to secure the agreement of the landowner, particularly if a new activity requires construction or alteration of structures. Without an express agreement from the landowner, the tenant may not have the right to receive compensation for permanent improvements made to the farm property. Also, because leases are short term and can be terminated easily, a landowner who disapproves of the tenant's new activities can terminate the lease. Moreover, the profitability of some new activities (eg, organic production) requires a lease with a longer term than the typical one-year farm lease.

Participation in federal farm programs on rented land will depend both on the lease terms and on the requirements of the particular program. The decision to participate in government programs may be a matter of contract, if the lease addresses that subject. For example, a crop-share lease form used in Illinois states that "Lessor and Tenant shall decide each year whether to enter into governmental programs designed to aid agriculture and how payments for doing so and the cost involved shall be shared between them."<sup>18</sup>

Federal farm programs often protect both tenants and sharecroppers, and regulations may give specific guidance. In some instances the type of lease (cash or crop share) determines how government payments should be divided. For direct or counter-cyclical payments under US agricultural legislation, for example, the landlord under a cash lease is not eligible for payments, but under a crop-share lease, neither landlord nor tenant may receive 100 percent of the payments. Moreover, payments cannot be made if the owner or operator has terminated a lease in violation of state law or has acted to deprive a tenant or sharecropper of payments that he or she would otherwise be entitled to receive.<sup>19</sup> Conservation programs often require signatures of both landowner and tenant.<sup>20</sup>

### C. Land Use Regulation

In the US, land use is generally a matter of local control. Though state-wide land use planning exists in a few states, most states delegate the power to zone to local authorities -- counties and municipalities. Some jurisdictions have enacted agricultural protection zoning, which limits land uses, particularly activities incompatible with agriculture, in agricultural zones. The majority of rural land, however, is not zoned.

The issue for diversification of activities on a farm, however, is whether zoning regulations will prohibit or impose restrictions on a nontraditional activity. "Whether a particular use enjoys exemption from regulation under a zoning ordinance depends first on what immunities are afforded agricultural or farming operations by state statute, normally included in the zoning enabling statute, and then on what type of zoning district encompasses the particular tract of land upon which the new activity is to be undertaken."<sup>21</sup> Farmers who plan to diversify have faced obstacles from zoning ordinances; in some instances litigation, sometimes focused on whether the proposed activity was agriculture or a farm, has resulted.<sup>22</sup>

When an activity is clearly agricultural and carried out in a rural area, land use regulation is unlikely to pose obstacles to diversification. In fact, some jurisdictions restrict the power of zoning officials to govern agricultural activities. In Illinois, for example, counties have authority to regulate and restrict location and use of structures through zoning. County zoning authority may

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<sup>18</sup> Illinois Crop-Share Cash Farm Lease, Farmdoc Form CSL 01-0911, <http://www.farmdoc.uiuc.edu/legal/index.asp>.

<sup>19</sup> 7 CFR 1412.54 -.55 (2009). Sharecroppers are not tenants, but receive a portion of the crops as payment for their labor.

<sup>20</sup> Eg, the Conservation Reserve Program, regulations at 7 CFR 1410.5, 1410.32 (2009). See *infra*, text at notes 108-11.

<sup>21</sup> Robert Andrew Branan, *Zoning Limitations and Opportunities for Farm Enterprise Diversification: Searching for New Meaning in Old Definitions* 9 (National Agricultural Law Center, 2004).

<sup>22</sup> *Id.* at 10-20 (reviewing court decisions).

not be exercised to “impose regulations, eliminate uses, buildings, or structures, or require permits with respect to land used for agricultural purposes,” though agricultural buildings and structures may be required to follow building or set-back lines and counties may establish a minimum lot size for residences on agricultural land.<sup>23</sup> Other states have similar provisions.<sup>24</sup>

When an activity carried out on rural land is not clearly agricultural, however, county and municipal zoning regulations may impose requirements. For example, operation of a farm stand that sells produce directly to customers may not be considered agriculture, and local ordinances often govern the location and operation of such roadside stands. In some states, however, statutes protect diverse activities related to agriculture from zoning restrictions. A Massachusetts statute, for example, limits the regulation of agricultural activities, “including those facilities for the sale of produce, wine and dairy products” under certain conditions.<sup>25</sup> Thus, the producer who plans to diversify the farm business must be sure that the proposed activity will comply with local land use restrictions.<sup>26</sup>

#### D. Other Regulation

When farmers diversify their operations, many nontraditional activities will continue to involve agricultural activities. The farmer who diversifies by using organic production, cultivating specialty crops, or raising nontraditional livestock will still be engaged in agriculture. Some states specifically define diverse activities, including selling products and agritourism, as agriculture when performed on the farm.<sup>27</sup> In these situations, the farmer’s legal obligations may not differ significantly.

The determination that a diversified activity of a farm operation is not agriculture, however, may have legal implications. A number of federal and state laws have special provisions (often helpful exemptions) for agriculture, and these provisions may not apply to the nonagricultural part of the farmer’s diversified operation. Bankruptcy law, for example, has provisions that apply specifically to farmers. Under the Bankruptcy Code,<sup>28</sup> a “farmer” is a person who received more than 80 percent of gross income in the prior year from a farming operation, and a “family farmer” receives at least 50 percent of gross income from a farming operation. A “farming operation” includes “farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.”<sup>29</sup> Activities that do not fit in this definition of farming operation may affect eligibility for certain provisions of the Code. For example, both farmers and family farmers are protected from involuntary bankruptcy (cases brought by creditors), and that protection may be lost.<sup>30</sup> Chapter 12 of the Bankruptcy Code, designed for family farmers with regular annual income, is a type of reorganization tailored to the economic situation of farmers. The producer whose diversification takes activities out of the definition of farming operation may be ineligible of Chapter 12.<sup>31</sup>

A number of federal labor laws have special provisions that apply to agriculture. For example, under the Fair Labor Standards Act,<sup>32</sup> the minimum wage requirements do not apply to employees in agriculture who work on small farms. “Agriculture” is defined broadly to include “farming in all its branches . . . and “any practices . . . performed by a farmer or on a farm as an incident to or in

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<sup>23</sup> 55 ILCS § 5/5-12000. Agriculture, defined broadly, includes “the growing of farm crops, truck garden crops, animal and poultry husbandry, apiculture, aquaculture, dairying, floriculture, horticulture, nurseries, tree farms, sod farms, pasturage, viticulture, and wholesale greenhouses when such agricultural purposes constitute the principal activity on the land . . . .”

<sup>24</sup> Eg, Iowa Code Ann. § 358A.2.

<sup>25</sup> Mass. Gen. Laws chap. 40A § 3.

<sup>26</sup> See generally, NEIL D. HAMILTON, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* 102-12 (1999).

<sup>27</sup> N.C. Gen. Stat. § 106-581.1 (defining agriculture).

<sup>28</sup> 11 USC §§ 101-1330.

<sup>29</sup> 11 USC § 101.

<sup>30</sup> 11 USC § 303.

<sup>31</sup> 11 USC §§ 1201-1231. A family farmer must have accrued at least 50 percent of debts from a farming operation. The current debt limit is \$3,544,525.

<sup>32</sup> 29 USC §§ 201-219. See § 213, exempting employers who did not use more than 500 “man days” of agricultural labor during any calendar quarter of the preceding year.

conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation.”<sup>33</sup> Some types of diversified activities (eg, direct sales to consumers) may not be considered agriculture and may trigger minimum wage requirements. Other federal labor laws with special provisions for agriculture may raise similar issues.<sup>34</sup>

State laws, too, often include special provisions for agricultural employment. When an activity is not agricultural, benefits of those provisions will be lost, and some activities may require licenses or permits. Workers’ compensations laws are an example. In Illinois, for example, most employers must provide workers’ compensation insurance for employees. But the workers’ compensation law does not apply to “any agricultural enterprise, including aquaculture,” that employed fewer than 400 working days of agricultural labor per quarter during the prior year. The law does apply, however, to any enterprise that serves food to the public, or sells goods to the public and has an annual payroll of more than \$1,000.<sup>35</sup> Some diversified activities (eg, recreational use, hospitality, direct sales) will therefore trigger application of workers’ compensation requirement.

## II. Organic Agriculture

In the US, organic production has increased significantly since the late 1990s, and sales of organic foods reached \$21.1 billion in 2008. Organic sales are about 3 percent of total food, but organic foods have reached the mainstream; in 2008, 69 percent of consumers purchased organic products, though prices for organic products are usually higher than for conventional products.<sup>36</sup> About 1.6 million US hectares were managed as certified organic land in 2005,<sup>37</sup> more than twice the level in 1997. Nonetheless, certified organic land amounted to only 0.5 percent of cropland (0.2 percent of US maize and soy crops) and 0.5 percent of pasture land; almost 5 percent of vegetable and 2.5 percent of fruit and nut acreage were managed organically. Organic farms are often smaller than conventional farms and market their products directly.<sup>38</sup>

### A. Support for Organic Production

Federal government programs, especially market support mechanisms, have helped to encourage growth of organic production. A cost share program helps producers and handlers of organic products to obtain certification under the National Organic Program (discussed below).<sup>39</sup>

The 2008 Farm Bill,<sup>40</sup> which increased funding for organic agricultural significantly, added new provisions to facilitate organic production. For example, the Environmental Quality Incentives Program now authorizes direct financial support for conservation practices related to organic production and transition to organic production. Producers must carry out an organic plan approved under the National Organic Program and develop and implement appropriate conservation practices. Producers may receive \$20,000 per year, with a maximum of \$80,000 over six years,<sup>41</sup> and they may also receive technical assistance for conservation practices. In May 2009, USDA announced the availability of \$50 million (allocated to states by formula) under the 2009 Organic Initiative. Eligibility was open to farmers making the transition to certified organic production and certified organic farmers adding organic acres or herds or adopting additional conservation measures.<sup>42</sup>

<sup>33</sup> 29 USC § 303(f).

<sup>34</sup> Federal laws that include special provisions for agricultural labor include the Occupational Safety and Health Act, The Federal Insurance Contributions Act, and the Federal Unemployment Tax Act. See generally Jack L Runyan, *Summary of Federal Laws and Regulations Affecting Agricultural Employers* (ERS, AH 719, 2000).

<sup>35</sup> 820 ILCS 305/3. Workers’ compensation laws compensate victims of occupational accidents.

<sup>36</sup> Catherine Greene et al, *Emerging Issues in the U.S. Organic Industry* 3, 18 (USDA, EIB 55, June 2009). Sales of organic food in 1997 were only \$3.6 billion. “Locally-grown” products may provide competition for organics. *Id.* at 16-18.

<sup>37</sup> Helga Willer, *The World of Organic Agriculture 2009: Summary* 23, in *THE WORLD OF ORGANIC AGRICULTURE: STATISTICS & EMERGING TRENDS 2009* (IFOAM, 2009).

<sup>38</sup> Greene, *supra* note 36, at 4.

<sup>39</sup> 7 USC § 6523. Federal payments may not exceed 75 percent of certification costs, not to exceed \$750.

<sup>40</sup> Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, 122 Stat. 923 [hereinafter 2008 Farm Bill].

<sup>41</sup> 16 USC § 3839aa-2(i).

<sup>42</sup> USDA, News Release, Agriculture Deputy Secretary Merrigan Announces Funding for New Organics Initiative (Release 0146.09, 5 May 2009).

The 2008 Farm Bill included other support for organic agriculture, including mandatory funding for the certification cost-share program, funds for collection of data on organic production,<sup>43</sup> and a large increase in mandatory research funds. Priority research includes conservation and environmental effects of organic production (including carbon storage) and development of seed varieties.<sup>44</sup>

### B. Organic Certification

Products certified as organic must meet stringent production standards. The US Organic Food Production Act,<sup>45</sup> enacted in 1990, provides that farmers cannot label a product as organic, or imply that a product is organic, unless they follow federal guidelines.<sup>46</sup> The law establishes a certification program, under which certifying agents, accredited by the USDA, ensure that statutory and regulatory requirements are met. State organic certification programs must be at least as strict as federal standards.<sup>47</sup>

The National Organic Standards Board, established in the 1990 law, promulgated comprehensive national standards,<sup>48</sup> effective in 2002. Under the National Organic Program (NOP) standards, specified substances, methods (including genetic engineering), and ingredients are prohibited in organic crop production and handling. Products labeled “100 percent organic” or “organic” (at least 95 percent organically produced ingredients) or “made with organic ingredients” (at least 70 percent) may not use excluded methods.<sup>49</sup>

Process standards for organic certification require the producer to follow an approved organic system plan, normally with “management practices and physical barriers” to avoid unintentional contact with unapproved substances.<sup>50</sup> Organic producers must use “distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.”<sup>51</sup> Those who handle organic products must also “prevent the commingling of organic and nonorganic products and protect organic products from contact with prohibited substances.”<sup>52</sup>

NOP standards also apply to organically-produced livestock.<sup>53</sup> With a few exceptions, “[l]ivestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching.”<sup>54</sup> Feed for livestock sold as organic must generally be produced organically, and the producer must not use animal drugs to promote growth.<sup>55</sup> Moreover, a farmer who raises organic livestock must ensure that livestock living conditions “accommodate the health and natural behavior of animals.”<sup>56</sup>

A small farmer or handling operation, whose annual income from organic sales is \$5,000 or less, can sell products as organic without following all federal organic requirements. The small farmer must follow production, handling, and labeling requirements, but is exempt from certification and

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<sup>43</sup> In Summer 2009, USDA conducted an organic production survey, with results to be published early in 2010. See [http://www.agcensus.usda.gov/Surveys/Organic\\_Production\\_Survey/index.asp](http://www.agcensus.usda.gov/Surveys/Organic_Production_Survey/index.asp).

<sup>44</sup> See Greene, *supra* note 36, at 21-22; Renée Johnson, Organic Agriculture in the United States: Program and Policy Issues 9-10 (CRS RL31595, November 2008).

<sup>45</sup> 7 USC §§ 6501-6523.

<sup>46</sup> 7 USC § 6505.

<sup>47</sup> 7 USC §§ 6506-6507.

<sup>48</sup> 7 CFR part 205. State and private organic certification programs must be at least as strict as federal standards, and some are stricter.

<sup>49</sup> 7 CFR 205.105.

<sup>50</sup> 7 CFR 205.101(a)(5).

<sup>51</sup> 7 CFR 205.202(c).

<sup>52</sup> 7 CFR 205.272(a).

<sup>53</sup> 7 USC § 6508. See USDA’s proposed access to pasture rule, 73 Fed. Reg. 63,584 (24 October 2008).

<sup>54</sup> 7 CFR 205.236. Exceptions apply to poultry (second day of life) and dairy (one year prior to production of milk products sold as organic).

<sup>55</sup> 7 CFR 205.237.

<sup>56</sup> 7 CFR 205.239.

need not submit an organic system plan.<sup>57</sup> This exemption is significant in light of the number of small farms in the US.

### III. Alternative Crops and Livestock

Another area of diversification is the production of nontraditional crops and livestock. USDA has compiled a lengthy list of alternative crops and livestock and helpful information for producers. Alternative crops include numerous nontraditional field crops as well as specialty vegetables, fruits and nuts, and horticultural or nursery products, and forestry products. USDA also lists nontraditional livestock, including game-related animals, exotic livestock and minor breeds, poultry, and aquaculture.<sup>58</sup> Government programs encourage production of some of these crops and livestock.

#### A. Crops

Though the term “specialty crops” is often used for all crops that are ineligible for income support under federal Farm Bill commodity programs,<sup>59</sup> the statutory definition refers to “fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including floriculture).”<sup>60</sup> These specialty crops have become increasingly significant, both for US consumption and for export. Fruits, vegetables, and tree nuts make up almost a third of crop cash receipts and, together with floriculture, greenhouse, and nursery crops, almost 50 percent of crop cash receipts. Specialty crops are grown on about 3 percent of harvested cropland, and most growers are “specialized,” with over half their value of production from specialty crops.<sup>61</sup>

Congress enacted the Specialty Crops Competitiveness Act of 2004 to increase consumption of fruits, vegetables, and nuts and to improve the competitiveness of specialty crop producers.<sup>62</sup> The law authorizes block grants to states for market research and promotion to enhance competitiveness of specialty crops; state projects should benefit the industry or the public. The law also finances technical assistance and encourages research. The 2008 Farm Bill reauthorized this program, with increased funding, and authorized programs for pest detection and control, as well as to increase consumption of fresh fruits and vegetables.<sup>63</sup>

Congress has authorized the promotion of some specialty crops through free-standing “checkoff” programs. These programs are proposed by industry groups, governed by federal statutes and USDA regulations, and implemented by majority vote of producers and handlers in the industry association. Producers and handlers pay assessments, on the basis of sales revenue per unit of commodity, and an industry board uses the funds primarily to promote the commodity through generic advertising, but also to develop new uses and to support research.<sup>64</sup> Checkoff programs are available for some specialty crops, including potatoes, flowers, honey, watermelon, pecans, mushrooms, limes, kiwifruit, and avocado.<sup>65</sup> Some states also have

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<sup>57</sup> 7 USC § 6505(d); 7 CFR 205.101. The small farmer's products cannot be used as organic ingredients for further processing.

<sup>58</sup> National Agricultural Library, *supra* note 4. See also Sustainable Agriculture Network, *supra* note 5.

<sup>59</sup> 2008 Farm Bill, *supra* note 40, Title I (Commodity Programs).

<sup>60</sup> Specialty Crops Competitiveness Act of 2004, Pub. L. 108-465, § 3, 118 Stat. 3882, codified as 7 USC § 1621 note. See regulations at 7 CFR part 1291.

<sup>61</sup> Renée Johnson et al, The 2008 Farm Bill: Major Provisions and Legislative Action 31 (CRS RL34696, October 2008); Jean M. Rawson, Specialty Crops: 2008 Farm Bill Issues (CRS RL33520, June 2008).

<sup>62</sup> 7 USC § 1621 note. See regulations at 7 CFR part 1291.

<sup>63</sup> See 2008 Farm Bill, *supra* note 40, Title X (Horticulture and Organic Agriculture).

<sup>64</sup> See Kara O'Conner Gansmann, Note, *Government Speech. It's What's For Dinner: Navigating First Amendment Assertions and Generic Commercial Advertisements Funded by Checkoff Subsidies*, 82 NORTH DAKOTA L. REV. 519, 521 (2006); US General Accounting Office, *Agricultural Marketing: Federally Authorized Commodity Research and Promotion Programs 2-3* (GAO/RCED-94-63, 1993). Some checkoffs operate under federal marketing order programs. See Ronald W. Ward, *Commodity Checkoff Programs and Generic Advertising*, 21(2) CHOICES 55 (2006).

<sup>65</sup> Eg, 7 U.S.C. §§ 6801-6814 (fresh cut flowers and greens); 7 U.S.C. §§ 7801-7813 (Haas avocados). Regulations for many checkoff programs are at 7 CFR parts 1200-1280. Some checkoffs have been challenged. Eg, *Johanns v. Livestock Marketing Assoc.*, 544 US 550 (2005) (upholding the beef checkoff program as government speech).

programs to support specialty (and other) crops (eg, New Jersey Fresh for fruits and vegetables).<sup>66</sup>

A provision originating in the 1996 Farm Bill is a possible disincentive to diversification with specialty crops. Producers who participate in the farm income and commodity support program have been restricted from growing perennial fruits, vegetables, or wild rice on base acres for which they receive benefits.<sup>67</sup> The 2008 Farm Bill retained this restriction,<sup>68</sup> but directed the Department of Agriculture to develop a pilot project to permit planting of “cucumbers, green peas, lima beans, pumpkins, snap beans, sweet corn, and tomatoes grown for processing on base acres” in crop years 2009 through 2012.<sup>69</sup> The pilot project is authorized in only seven states on a total of 75,000 acres. Producers must agree to produce the crop under a contract for processing and meet other regulatory requirements.

### B. Livestock

Recent decades have seen the industrialization of US livestock farming. Between 1987 and 2002, the “production locus” of livestock farming increased 60 percent for broilers, 100 percent for fed cattle, 240 percent for dairy, and 2,000 percent for hog production.<sup>70</sup> This shift to larger operations takes advantage of economies of scale and results in increased productivity (and increased risk to environment).<sup>71</sup>

Smaller farmers, as a result, may increase production, go out of business, or consider production of exotic or specialty livestock or animals for niche markets.<sup>72</sup> These include, for example, alpaca, bees, bison, goats, ostrich, llama, caribou, elk, deer, or even worms. Information to help producers is available from USDA<sup>73</sup> and some state sources.<sup>74</sup> Industry organizations, too, provide advice for production of exotic livestock.<sup>75</sup>

### C. Aquaculture

Aquaculture is a growing area of farm diversification. Aquaculture is the “propagation and rearing of aquatic species [including aquatic plants] in controlled or selected environments,” either freshwater or saltwater, for all or part of their lifecycle.<sup>76</sup> The 2005 Census of Aquaculture reported farm-level sales of almost \$1.1 billion in aquaculture products from over 4000 farms.<sup>77</sup> Food fish make up the majority of these products, but fish farmers also raise sport fish, bait, ornamental fish, crustaceans, and mollusks.<sup>78</sup>

<sup>66</sup> Paul M. Patterson, *State-Grown Promotion Programs: Fresher, Better?*, 21(1) CHOICES 41(2006).

<sup>67</sup> 7 USC § 7916 (2002 Farm Bill provision, with a few exceptions). Under the 2002 Farm Bill, direct payments could be paid to producers of wheat, corn, barley, grain sorghum, oats, upland cotton and rice, oilseed crops, including soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, and peanuts. The 2008 Farm Bill added pulse crops. For commodity programs under the 2002 Farm Bill, see 7 USC §§ 7901-8002.

<sup>68</sup> 7 USC § 8717; 7 CFR 1412.47; 73 Fed. Reg. 79,284 (29 December 2008).

<sup>69</sup> 7 USC § 8717(d); 7 CFR 1412.48.

<sup>70</sup> James M. MacDonald & William D. McBride, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks* iii, 5-6 (ERS, USDA, EIB 43, January 2009). Production locus is the farm size at the “center of the distribution of production, where half of annual production comes from larger farms and half comes from smaller farms” -- ie, the median farm size, weighted by production. Production locus is larger than average farm size. *Id.* at 5.

<sup>71</sup> *Id.* at iii-iv, 3.

<sup>72</sup> See University of California, Davis, Small Farm Center, Exotic Livestock A Small-Scale Agriculture Alternative (1989), <http://www.sfc.ucdavis.edu/pubs/brochures/Exoticlivestock.html>.

<sup>73</sup> National Agricultural Library, USDA, Raising Alternative Livestock Breeds, <http://afsic.nal.usda.gov> (accessed 9 June 2009).

<sup>74</sup> Eg, Iowa State University, Agricultural Marketing Resource Center, <http://www.agmrc.org> (accessed 9 June 2009). This resource provides information on value-added agriculture, including brief essays and reference lists for specialty livestock, crops, and other activities.

<sup>75</sup> See, eg, Alpaca Owners and Breeders Association, AlpacaInfo, <http://www.alpacainfo.com> (accessed 9 June 2009).

<sup>76</sup> 16 USC § 2802. See ERS, USDA, Aquaculture: Overview, <http://www.ers.usda.gov/Briefing/Aquaculture> (accessed 9 June 2009).

<sup>77</sup> USDA, 2005 CENSUS OF AQUACULTURE, Table 1, <http://www.agcensus.usda.gov/Publications/2002/Aquaculture/index.asp>.

<sup>78</sup> *Id.* Table 2.

The National Aquaculture Act of 1980<sup>79</sup> and the National Aquaculture Development Plan<sup>80</sup> have helped to encourage aquaculture production. The Plan, in particular, was intended in part to “include, where appropriate, programs to analyze, and formulate proposed resolutions of, the legal or regulatory constraints that may affect aquaculture.”<sup>81</sup> During the 1980s and thereafter, state and federal programs helped to encourage aquaculture. The Illinois Aquaculture Development Act, for example, encourages the practice of aquaculture. It includes aquaculture in state definitions of agriculture: “aquaculture shall be considered an agricultural pursuit as provided in the [US] Internal Revenue Code ... and for purposes of any laws that apply to or provide for the advancement, benefit or protection of the agriculture industry of the State.”<sup>82</sup> This provision and those in other states help to ensure that aquaculture operations will be considered agriculture and benefit from laws that promote and protect agricultural activities.

#### IV. Marketing Strategies

Some farm diversification takes the form of marketing strategies. Producers may, for example, sell products directly to consumers at farmers’ markets, roadside stands, or through community supported agriculture (subscription farms). Others may add value to a crop by processing, packing, or other activities. Two programs in the 2008 Farm Bill, the Farmers’ Market Promotion Program and the Value-Added Producer Grants Program, help to “increase farmers’ share of the food and agricultural system profit ... and increase consumer access to healthy food.”<sup>83</sup>

##### A. Direct Marketing

Farmers’ markets and other direct marketing devices allow farmers to receive retail prices for their farm products – that is, farmers can be “price makers” instead of “price takers.” Between 1997 and 2007, direct food marketing to consumers increased 104.7 percent, though total sales of agricultural products increased only 47.6 percent.<sup>84</sup> Between 1994 and 2006, the number of farmers’ markets in the US increased by almost 150 percent.<sup>85</sup> To some extent, federal law has helped to stimulate this growth. The Farmer’s Market Promotion Program (FMPP), amended by the 2008 Farm Bill, encourages consumption of locally-grown agricultural products by promoting producer-to-consumer ventures, including farmers’ markets, roadside stands, community supported agriculture, and agritourism.<sup>86</sup> Competitive grants, up to \$75,000, are available for local governments, producer associations, regional farmers’ market authorities, and other entities. Grant funds may be used for purposes related to direct marketing, and some funds must facilitate the use at farmers’ markets of electronic benefits transfer cards from federal nutrition programs (eg, food stamps).

Farmers’ markets and other direct marketing ventures are subject to numerous laws and regulations. Federal, state, and local laws may apply; therefore the legal issues raised by direct marketing vary by location. For example, local land use requirements may apply; state or local licenses may be required; food hygiene rules may require that food sold at a market be prepared in a kitchen that meets regulatory standards; and state sales tax laws may apply. Some states and municipalities have special exemptions for direct marketing; others do not. In addition, each farmers’ market will have its own regulations that govern issues such as application or site fees,

<sup>79</sup> 16 USC §§ 2801-2810.

<sup>80</sup> JOINT SUBCOMMITTEE ON AQUACULTURE, NATIONAL AQUACULTURE DEVELOPMENT PLAN (1983).

<sup>81</sup> 16 USC § 2803(b)(5).

<sup>82</sup> 20 ILCS 215/2.

<sup>83</sup> ZACHARIAH BAKER ET AL, SUSTAINABLE AGRICULTURE COALITION, GRASSROOTS GUIDE TO THE 2008 FARM BILL 61 (October 2008). The Rural Micro-Entrepreneur Assistance Program provides technical assistance and loans of less than \$50,000 to those who cannot get help elsewhere. 7 USC § 2008s.

<sup>84</sup> Adam Diamond & Ricardo Soto, Facts on Direct-to-Consumer Marketing 3 (AMS, USDA, May 2009). Farms with over \$50,000 in direct sales accounted for 58.1 percent of direct sales, but were only 2.8 percent of farms that sold directly. For statistics on farmers’ markets, see USDA, *National Farmers Market Manager Survey 2006* (AMS, USDA, May 2009).

<sup>85</sup> Harris et al, *supra* note 9, at 70. See Janet Bachmann, ATTRA, Farmers’ Markets: Marketing and Business Guide (2008), [www.attra.ncat.org](http://www.attra.ncat.org).

<sup>86</sup> 7 USC § 3005(a). See also the Federal State Marketing Improvement Program, authorized by 7 USC § 1623(b), which provides matching funds to states for new marketing opportunities.

permits or licenses, health inspections, products that may be sold, market operation, and other provisions. Markets often require vendors to comply with applicable state and local rules and regulations.<sup>87</sup>

Other forms of direct marketing are common. For example, community supported agriculture involves direct sales. Through a legal or other commitment, members of the farm provide the farmer's salary and costs of the farm operation in exchange for shares of the farm produce. Producers provide weekly deliveries of in-season farm products to members, who share some risks of production.<sup>88</sup> Roadside stands or pick-your-own operations involve direct sale of in-season produce to consumers, often on the farm property. Some producers sell farm products (including value-added products, like cheese) directly to a restaurants or shops.

#### B. Value-Added Products

Value-added agriculture is another area of diversification in which a farmer adds value to a traditional crop by processing it or converting it into unique products. A value-added enterprise can help to increase farm income and give consumers a wider choice of foods.<sup>89</sup> Value-added enterprises often involve the processing of raw farm products into other food items -- eg, converting corn into corn meal, processing fruits into jam, or making cheese from goat milk.

The sale of processed or prepared foods may trigger application of federal or state laws that regulate food processing, food labeling, food handling, and other matters. The producer may need state licenses and be subject to inspections and enforcement. In addition, the sale of meat and poultry products may trigger application of federal and state meat inspection laws.<sup>90</sup>

Federal law encourages value-added enterprises. Value-added producer grants, authorized in 2000 and expanded in the 2002 and 2008 Farm Bills, make planning and working capital available to agricultural producers and specified producer groups to develop enterprises that produce value-added products. For purposes of the grant program, a "value-added agricultural product" is any agricultural commodity or product that has undergone a "change in physical state" (eg, diced tomatoes or wool rugs), is produced or segregated in a way that enhances its value (eg, organic crops), is a source of renewable energy, or is marketed as locally-produced food. In addition, the physical change or manner of production must expand the customer base and the producer must receive a greater portion of revenue from marketing, processing, or physical segregation of the product.<sup>91</sup>

In the competitive grant process, priority goes to projects that increase opportunities for beginning farmers or ranchers, socially disadvantaged farmers or ranchers, and operators of small and medium sized family farms. The recipient must match the amount of the grant with non-federal funds or in-kind contributions. The maximum grant for fiscal 2009 is \$300,000, with a simplified application for small (less than \$50,000) projects.<sup>92</sup> Grants have been awarded to projects like development of a frozen-dough bakery in Oklahoma and production and marketing of single-serving fruit bowls in California.<sup>93</sup>

#### V. Agritourism and Recreational Uses

Agritourism links agricultural production with opportunities for recreation, education, or entertainment available to members of the public. It supplements and diversifies farm income and expands employment for members of the farm household. Moreover, it often benefits the local

<sup>87</sup> See Neil D. Hamilton, *Farmers' Markets Rules, Regulations and Opportunities* 9-26 (National Agricultural Law Center, 2002)

<sup>88</sup> For more information on community supported agriculture, see NAL, USDA, CSA Resources for Farmers, <http://www.nal.usda.gov/afsic/pubs/csa/csafarmer.shtml> (accessed 10 June 2009).

<sup>89</sup> See BAKER ET AL., *supra* note 83, at 62-65.

<sup>90</sup> For an identification of issues and some examples, see NEIL D. HAMILTON, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING*, chaps. 11, 12 (1999).

<sup>91</sup> 7 USC § 1632a; 7 CFR part 5002.

<sup>92</sup> 7 USC § 1632a. See USDA, Announcement of Value-Added Producer Grant Application Deadlines, 74 Fed. Reg. 20,900 (6 May 2009).

<sup>93</sup> Sally Vielma, Sweet smell of success, <http://www.rurdev.usda.gov/rsb/pub/nov03/value.html>; Karen Spatz, Adversity to Advantage, <http://www.rurdev.usda.gov/rbs/pub/sep03/value.html> (accessed 9 April 2009).

community by generating economic activity (with related tax revenue) and protecting farmland and natural amenities.<sup>94</sup> Though not as developed in the US as in Europe,<sup>95</sup> agritourism was expected to generate \$560 million in 2008. In 2007, about 1.9 percent of US farms (39,500 farms, the majority in the South and Midwest) provided recreational activities. Small operations (sales under \$50,000) were 60 percent of farms with income from recreation, but their earnings were only 40 percent of total recreation earnings. Most income came from outdoor recreation (including hunting, fishing, and horseback riding) and hospitality (bed and breakfast, ranch stays).<sup>96</sup>

Though some federal statutes are relevant,<sup>97</sup> in general, state common law and statutes apply to agritourism and agricultural recreational uses. Some activities (eg, hospitality) may require state or local licenses or permits. An important concern for agritourism enterprises is liability, especially for injuries to participants.

Most states have enacted statutes that limit liability of landowners for injuries that occur during recreational use of agricultural land. Under recreational use statutes, a landowner owes no duty of care to keep property safe for entry or use for recreational activities so long as the landowner does not maliciously or willfully conceal hazardous conditions. That protection, however, does not usually apply if the landowner receives payment for the recreational use.<sup>98</sup>

Similarly, laws in over twenty states promote or facilitate agritourism.<sup>99</sup> Though many provide governmental or financial support, a few mitigate liability. One law, for example, allows agritourism operators to register their agritourism activity with the state. Participants then assume the inherent risks of the registered agritourism activity; the agritourism location must post notice about assumption of the risk and include notice in written contracts.<sup>100</sup>

In most states, however, the farmer or rancher who operates an agritourism business will owe a high duty of care to participants and must ensure that hazards on the farm property do not threaten their safety. Liability insurance tailored to the operation is essential.<sup>101</sup>

## VI. Conservation

Numerous federal programs encourage farmers and ranchers to adopt conservation practices.<sup>102</sup> Conservation payments under federal farm programs have increased in amount,<sup>103</sup> and the 2008 Farm Bill enacted new programs and authorized increased conservation spending, especially for conservation practices on working lands. The Conservation Stewardship Program<sup>104</sup> and the Environmental Quality Incentives Program<sup>105</sup> are important examples.

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<sup>94</sup> Dennis M. Brown & Richard J. Reeder, *Farm-Based Recreation: A Statistical Profile* 1-2 (ERS, USDA, ERR 53, December 2007). Farmers and local communities also suffer some negative effects, including loss of privacy, risk of liability, and overtaxing of local facilities (roads, wildlife).

<sup>95</sup> *Id.* at 1. In the UK, a third of farm operations support agritourism; in France and Italy, the percentage is higher.

<sup>96</sup> Harris et al, *supra* note 9, at 16-17, 70. Over 60 percent of outdoor recreation income came from livestock operations -- eg, dude ranches, horseback riding, and related activities. Other sources of farm-related income include custom work, machine hire, sales of forest products, feeding of livestock.

<sup>97</sup> Eg, Americans with Disabilities Act, 42 USC §§ 12101-12213 (requiring access to public accommodations, including recreational facilities, for persons with disabilities); Civil Rights Act of 1964, 42 USC 2000a (prohibiting discrimination on the basis of race, color, religion, or national origin); Animal Welfare Act, 7 USC §§ 2131-2159 (imposing requirements for exhibitors of animals).

<sup>98</sup> Eg, N.Y. Laws 24-1 § 9-103.

<sup>99</sup> National Agricultural Law Center, States' Agritourism Statutes, <http://nationalaglawcenter.org/assets/agritourism/index.html> (accessed 10 June 2009).

<sup>100</sup> Kan. Stat. Ann. §§ 74-50,165 to -50,173. See also N.C. Gen. Stat. § 99E-30 to -32.

<sup>101</sup> Carefully-drafted liability release forms may be used, but are not always effective, especially if a minor child is injured. Roger A. McEowen, *Recreational Use of Private Lands: Associated Legal Issues and Concerns* (National Agricultural Law Center, 2003).

<sup>102</sup> For an ecosystem approach to farm "multifunctionality," see J.B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENVTL. L.J. 424 (2008).

<sup>103</sup> Robert A. Hoppe et al, *Structure and Finances of U.S. Farms: Family Farm Report* 26 (ERS, USDA, EIB 24, June 2007). Most farm program payments are commodity related.

<sup>104</sup> 16 USC §§ 3838d-3838g. The Conservation Stewardship Program replaces the earlier Conservation Security Program.

<sup>105</sup> 16 USC §§ 3839aa-3839aa-9. See the Organic Initiative, *supra*, text at notes 40-42. For other programs, see 2008 Farm Bill, *supra* note 40, Title II (Conservation).

Conservation programs for working land often help producers adopt practices in their ongoing operation; this report does not emphasize programs for working land, which often apply to traditional agricultural activities.

Land retirement programs, in contrast, offer owners or operators of eligible land the opportunity to diversify by setting aside vulnerable land for conservation purposes.<sup>106</sup> The following discussion focuses briefly on two major programs, the Conservation Reserve and the Wetlands Reserve. Others, eg, the Grasslands Reserve,<sup>107</sup> offer opportunities for payments in exchange for restrictions on land use.

#### A. Conservation Reserve Program

The Conservation Reserve Program (CRP),<sup>108</sup> established in 1985 and most recently amended in the 2008 Farm Bill, is a voluntary program that offers environmental benefits, including reduced erosion and water pollution. Eligible land includes highly erodible cropland, marginal pastureland, and certain other vulnerable land. During sign-up periods, applicants with eligible land compete for CRP contracts, with preference to land with highest environmental benefits. A smaller continuous sign-up program targets specific environmental objectives (eg, riparian buffers, filter strips, grass waterways, farmable wetlands).

Under the CRP, agricultural owners, operators, or tenants<sup>109</sup> enter 10 or 15-year contracts with the federal government. In exchange for annual per-acre rental payments, participants agree to retire land from agricultural use, to implement an approved conservation plan, and to plant approved vegetative cover on the CRP land. The federal government shares the cost of establishing conservation practices required by contract. Producers may obtain permission to use CRP land for some commercial uses. These include commercial shooting preserves; managed haying, including harvest of biomass, and limited grazing (with a reduction of annual payments); forestry maintenance; sale of carbon, water quality and other environmental credits; and installation of wind turbines.<sup>110</sup>

The 2008 Farm Bill reauthorized the CRP through 2012, but reduced maximum enrollment from 39.2 million to 32 million acres. In March 2009, 33.69 million acres (750,000 contracts on 421,000 farms) were enrolled in all CRP programs; total annual rental payments were estimated at \$1.7 billion. Average rental payments on most CRP land were \$44.01 per acre.<sup>111</sup> Thus the CRP offers a type of diversification, albeit with significant land use restrictions, for owners or operators of eligible land.

#### B. Wetlands Reserve Program

The Wetlands Reserve Program (WRP),<sup>112</sup> established in 1990, allows owners of eligible land to receive payments for long-term protection of eligible wetlands. The 2008 Farm Bill reauthorized the WRP through 2012, with an increased maximum of 3.04 million acres and a decreased annual enrollment goal of 185,000 acres. Land eligible for the WRP is farmed or converted wetland (with functionally dependent adjacent land) and land used for production prior to certain flooding. Under a competitive enrollment process, priority goes to wetlands that maximize wildlife values and provide cost-effective conservation benefits. Acreage can be enrolled under permanent

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<sup>106</sup> Conservation diversification is limited. With a few exceptions, no more than 25 percent of acreage in a county can be enrolled in the Conservation Reserve and Wetland Reserve Programs. BAKER ET AL, *supra* note 83, at 24.

<sup>107</sup> 16 USC §§ 3838n-3838q; 7 USC part 1415.

<sup>108</sup> 16 USC §§ 3831-3835a; 7 CFR part 1410. The CRP and the WRP are now part of the Comprehensive Conservation Enhancement Program. The CRP also includes a Farmable Wetlands Program.

<sup>109</sup> The landowner must sign the CRP contract. A tenant who applies is “a participant with an eligible owner or operator,” and payments must be divided as specified in the contract. 7 CFR 1410.5, 1410.56.

<sup>110</sup> 16 USC § 3832; 7 CFR 1410.63.

<sup>111</sup> FSA, USDA, Conservation Reserve Program Monthly Summary -- March 2009, [http://www.fsa.usda.gov/Internet/FSA\\_File/mar2009.pdf](http://www.fsa.usda.gov/Internet/FSA_File/mar2009.pdf). Contracts under continuous signup, including federal/state partnerships for specific environmental objectives in 32 states under the Conservation Reserve Enhancement Plan, had an average payment of \$102.36 per acre.

<sup>112</sup> 16 USC §§ 3837-3837f; 7 CFR part 1467.

easements, 30-year easements, restoration cost-share agreements, or a combination of these options.

Owners of WRP land must grant an easement to the United States, implement a conservation plan, and record a deed restriction under state law. In exchange, they receive compensation (a lump sum or annual installments) for the easement plus cost-share payments for conservation measures and technical assistance. The landowner retains title to the land and, by agreement, can use the land for compatible economic uses (eg, hunting, fishing, managed timber).

## VII. Renewable Energy

In light of environmental and other concerns, renewable energy -- eg, wind energy or biofuels -- is increasingly significant. Several types of activities connected with renewable energy offer opportunities for new farming activities or additional income.

### A. Biomass Energy

Biofuels are “transportation fuels produced from plants and other organic materials.”<sup>113</sup> US policy supports biofuels through tax credits for production or sale of ethanol and biodiesel, as well as imposition of a renewable fuel standard.<sup>114</sup> At least two dozen programs, administered by five federal agencies, govern biofuels, and many offer incentives or assistance for producers and others.<sup>115</sup> The Energy Title of the 2008 Farm Bill established or amended biofuel incentives and tax credits and authorized other programs to encourage renewable energy.

One new program, for example, provides incentives for farmers whose plans for diversification include crops for biomass energy. The Biomass Crop Assistance Program assists producers who will supply biomass to a biomass conversion facility.<sup>116</sup> The program will support production of eligible crops for conversion to bioenergy and help owners and operators of agricultural and forest land to collect, harvest, store, and transport biomass material. In a competitive application process, a project sponsor (eg, a biomass conversion facility or a group of producers) will apply for designation as a project area. Farmers in a project area will contract with USDA (five years for annual or perennial crops; 15 years for woody biomass). They will receive annual incentive or cost-share payments and a per-ton payment (matched by the biomass conversion facility) for costs of collection, harvest, storage, and transportation. Crops eligible for farm program commodity payments (eg, corn, wheat, oilseeds, etc) are not eligible for the biomass program.

### B. Wind Energy

Wind energy is a fast-growing industry.<sup>117</sup> In locations with access to unobstructed wind of sufficient velocity, wind energy projects offer landowners the opportunity to diversify. Developers of wind energy projects must have access to land, both for turbines and associated uses and for buffer zones. Because turbines and other equipment occupy a relatively small footprint, farming and ranching are compatible with wind energy. Location of wind turbines on farmland can provide supplementary income, through lease payments and royalties.<sup>118</sup>

An increasing number of state and local jurisdictions have enacted laws and regulations to govern the location and operation of wind energy projects,<sup>119</sup> and builders of projects must comply with these requirements. Farmers whose land will be part of a large project generally lease land to the project developer. The lease will bind the farmer for a long term, and many

<sup>113</sup> Brent D. Yacobucci, *Biofuels Incentives: A Summary of Federal Programs* at i (CRS R40110, January 2009).

<sup>114</sup> See 42 USC § 7545 (11.1 billion gallons in 2009, rising to 36 billion in 2022, with an increasing percentage of “advanced biofuel,” eg, cellulosic ethanol). See proposed regulations at 74 Fed. Reg. 24,904 (26 May 2009).

<sup>115</sup> For details, see Yacobucci, *supra* note 113. Value-Added Producer Grants, discussed above, are available for development of biofuel production.

<sup>116</sup> 7 USC § 8111. The Rural Energy for America Program, 7 USC § 8107, provides grants and loan guarantees to farmers and businesses for energy audits and renewable energy development (eg, wind, solar, geothermal). See BAKER ET AL, *supra* note 83, 100-105.

<sup>117</sup> See generally, HELLE TEGNER ANKER ET AL, *LEGAL SYSTEMS AND WIND ENERGY: A COMPARATIVE PERSPECTIVE* (2008).

<sup>118</sup> See American Wind Energy Association, *Wind Web Tutorial*, <http://www.awea.org> (accessed 10 June 2009).

<sup>119</sup> See, eg, National Conference of State Legislatures, *State Siting and Permitting of Wind Energy Facilities* (April 2006).

issues (eg, lease term, compensation, access rights, termination and removal of equipment) must be resolved. Therefore, legal advice is critical.

### **VIII. Conclusion**

As the discussion above has indicated, producers in the US have many choices for diversification. They can plant nontraditional crops, grow specialty breeds or livestock, or adopt organic methods of production. They can market their produce directly to consumers or process farm products to add value. They can earn farm-related income by opening their land for agritourism or wind energy, and they can collect rental payments by setting aside vulnerable farmland for conservation. Other opportunities exist.

The federal government and some state governments provide financial and other incentives for agricultural diversification. Some new activities raise few legal questions or obstacles, but others trigger additional legal requirements, require licenses or permits, or increase the risk of liability. The producer who plans to diversify the farming operation will need a careful business plan and competent legal advice.

The rewards of diversification can be great, both for the producer and for the rural community. As one federally-funded organization noted, "[t]oday's ... farmers, with their prices global and their costs local, are ensnared in an ever-tightening profit squeeze. ... Diversifying can soften impacts on environmental resources, spread farmers' economic risk, exploit profitable niche markets and -- by creating new industries based on renewable agriculture resources -- strengthen rural communities."<sup>120</sup> Indeed, in the US, diversification promises to be increasingly important in managing financial risk and enhancing the financial status of farm households. In addition, diversification can enrich the communities in which farmers live and work and promote a sustainable agricultural heritage.

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<sup>120</sup> Sustainable Agriculture Research and Education, Abstract of *Diversifying Cropping Systems*, <http://www.sare.org/publications/diversify.htm> (accessed 5 June 2009).