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## FARMERS' MARKET FRAUD: CALIFORNIA'S APPROACH AND WHAT IT MEANS FOR FARMERS' MARKET REGULATION

*Nathan J. Marketich*



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## FARMERS' MARKET FRAUD: CALIFORNIA'S APPROACH AND WHAT IT MEANS FOR FARMERS' MARKET REGULATION

*Nathan J. Marketich\**

The United States Department of Agriculture (“USDA”) defines a farmers’ market as “a multi-stall market at which farmer-producers sell agricultural products directly to the general public at a central or fixed location, particularly fresh fruit and vegetables (but also meat products, dairy products, and/or grains).”<sup>1</sup> The recent resurgence in the popularity of farmers’ markets represents a return to days past where local producers were the predominant source for fresh produce and agricultural goods. With the most farmers’ markets of any state,<sup>2</sup> California has a large interest in the success of its farmers’ markets. In furtherance of this interest, California endeavors to protect its farmers’ markets from fraud.<sup>3</sup> Prior to 2015, California had one of the strictest farmers’ market regulatory programs in the United States.<sup>4</sup> Even so, the California legislature decided that more needed to be done in order to prevent farmers’ market fraud and on September 26, 2014 enacted Assembly Bill 1871 (“A.B. 1871”).<sup>5</sup>

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\* Candidate for J.D., May 2016, University of Pittsburgh School of Law.

<sup>1</sup> *What is a Farmers’ Market?*, USDA FOOD & NUTRITION SERV. (May 27, 2015), <http://www.fns.usda.gov/ebt/what-farmers-market>. This Note will adhere to this definition of “farmers’ market,” and any reference to “farmers’ market,” unless specifically stated otherwise, is intended to reference this definition.

<sup>2</sup> *National Farmers Market Directory*, USDA AGRIC. MKTG. SERV., <http://search.ams.usda.gov/farmersmarkets/> (last visited Feb. 1, 2015). As of January 2015, California had over 760 farmers’ markets registered with the USDA. The USDA’s Agricultural Marketing Service (“AMS”) collects farmers’ market information and numbers through voluntarily submitted data. *Id.*

<sup>3</sup> For the purposes of this Note, farmers’ market “fraud” indicates whenever a vendor sells something that the vendor did not produce, cultivate, or harvest himself/herself and/or a vendor misrepresents something as being from a local area. A discussion on the nature of farmers’ market fraud is contained *infra*, Part II.

<sup>4</sup> Samuel R. Wiseman, *Emerging Issues in Food Law: Fraud in the Market*, 26 REGENT U. L. REV. 367, 386 (2013–14) (discussing California’s previous system of farmers’ market regulation).

<sup>5</sup> A.B. 1871, 2014 Cal. State Assemb., Reg. Sess. (Cal. 2014).

The primary function of this Note is to analyze A.B. 1871 and develop an understanding of the California model for regulation of farmers' markets. This model will be compared to the approaches taken by New York and Michigan (states with the second and third most farmers' markets)<sup>6</sup> to develop a greater understanding of the various approaches to farmers' market regulation. The goal of this Note is to serve as a policy guide for farmers' market regulation. Following this introduction, this Note will proceed in six parts. Part I will discuss the recent history of farmers' markets with a particular emphasis on the economic and social impact that farmers' markets have on the communities in which they operate. Part II addresses the nature of farmers' market fraud and some general ways that states and farmers' market vendors and operators combat fraud. Part III will provide a comprehensive analysis of A.B. 1871 and its components. Part IV will provide a comparative analysis of the regulatory approaches taken by New York and Michigan. Part V outlines four general factors for states to consider before enacting statewide regulations for farmers' markets. Finally, Part VI concludes with guidance on state policy regarding regulation of farmers' markets.

## I. BACKGROUND: THE FARMERS' MARKET ECONOMY

### *A. The History of a Movement*

Currently, farmers' markets occupy a significant role in the United States. According to the USDA, the number of farmers' markets increased by 76 percent from 2008-2014,<sup>7</sup> and, as of January 2015, there are over 8,370 farmers' markets registered with the USDA.<sup>8</sup> The popularity of farmers' markets is a rather recent phenomenon. Following World War II, farmers' markets faced a steep decline in number due to advances in infrastructure and the popularity of supermarkets.<sup>9</sup> The commercialization of food in the United States made it possible for consumers to have access

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<sup>6</sup> *National Farmers Market Directory*, *supra* note 2.

<sup>7</sup> Press Release, USDA Office of Commc'ns, New Data Reflects the Continued Demand for Farmers Markets (Aug. 2, 2014), *available at* <http://content.govdelivery.com/accounts/USDAOC/bulletins/c77dbe>.

<sup>8</sup> *National Farmers Market Directory*, *supra* note 2.

<sup>9</sup> Allison Brown, *Counting Farmers Markets*, 91 GEOGRAPHICAL REV. 655, 655 (2001).

to a greater variety of foods at a convenient location. The commercial system all but destroyed the farmers' market model and by 1970 there were only about 340 farmers' markets in the United States, many of which were actually occupied by resellers, not producers.<sup>10</sup>

In 1976, Congress passed the Farmer-to-Consumer Direct Marketing Act ("Direct Marketing Act") to "promote, through appropriate means and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers."<sup>11</sup> The Direct Marketing Act provided for funding to encourage the development, organization, and marketing of farmers' markets throughout the United States.<sup>12</sup> The Direct Marketing Act initiated a surge in the farmers' market economy that continues today.

Another contributing factor of farmers' market prevalence was a change in attitude among consumers, from an attitude that supported the commercial food model to one that became more skeptical towards it. In particular, the so-called "locavore" movement reflects a desire to return to the old model of locally-sourced food consumption.<sup>13</sup> Characterized by concerns of the existing commercial food system for a lack of transparency, food safety issues, and perceived environmental unsustainability, the locavore movement has been especially fueled by media coverage.<sup>14</sup> Among other media outlets, popular food documentaries such as "Supersize Me"<sup>15</sup> and "Food Inc."<sup>16</sup> have spurred conversation among Americans regarding the food that they consume.

### *B. The Economic and Social Impact*

At the forefront of the locavore trend is the farmers' market. The desire for locally sourced foods has led farmers' markets to become

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<sup>10</sup> *Id.*

<sup>11</sup> 7 U.S.C. § 3001 (2012).

<sup>12</sup> 7 U.S.C. §§ 3004–3006 (2012).

<sup>13</sup> Amanda Ruth-McSwain, *Eating Green: Coverage of the Locavore Movement*, 50 J. EXTENSION, 5FEA7 (Oct. 2012), available at [http://www.joe.org/joe/2012october/pdf/JOE\\_v50\\_5a7.pdf](http://www.joe.org/joe/2012october/pdf/JOE_v50_5a7.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> SUPER SIZE ME (Sony Pictures 2004).

<sup>16</sup> FOOD INC. (Magnolia Pictures 2009).

important economically. Exact national economic impact is unknown, but the USDA estimates that farmers' markets generated slightly over \$1 billion in total sales in 2005.<sup>17</sup> In 2012, California, New York, and Michigan each generated direct-to-consumer agricultural sales of \$169,915, \$100,646, and \$58,793 million, respectively.<sup>18</sup>

In support of this economic growth, farmers' markets are facing increasing support from Congress. In particular, the expansion of the Supplemental Nutritional Assistance Program (SNAP), commonly referred to as "food stamps," will allow farmers' markets to tap into another customer base. SNAP has already proved to be a great source of revenue for farmers' markets.<sup>19</sup> In 2009, around 900 farmers' markets accepted SNAP benefits and during that year \$4.33 million in SNAP benefits were redeemed at farmers' markets.<sup>20</sup> In 2012, the federal government allocated \$4 million to help farmers' markets cover the cost of the equipment necessary to accept electronic benefit transfer ("EBT") cards in order to speed up the expansion of SNAP benefits at farmers' markets.<sup>21</sup> As of January 2015, 2,914 farmers' markets registered with the USDA accepted SNAP benefits, a number that is steadily increasing.<sup>22</sup> Another federal effort that could be beneficial for farmers' markets is the Food Insecurity

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<sup>17</sup> EDWARD RAGLAND & DEBRA TROPP, USDA AGRIC. MKTG. SERV., USDA NATIONAL FARMERS MARKET MANAGER SURVEY, 2006 1 (2009), available at <http://ageconsearch.umn.edu/bitstream/147043/2/Farmers%20Market%20Survey.pdf>.

<sup>18</sup> USDA, 2012 CENSUS OF AGRICULTURE [hereinafter CENSUS OF AGRICULTURE], available at [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1\\_Chapter\\_2\\_US\\_State\\_Level/st99\\_2\\_002\\_002.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_2_US_State_Level/st99_2_002_002.pdf). This data is not limited solely to sales at farmers' markets and includes sales at roadside stands, pick-your-own sites, and Community Supported Agriculture ("CSA") programs. The USDA has not published recent data specifically based on state farmers' market sales.

<sup>19</sup> WENDY WASSERMAN ET AL., USDA AGRIC. MKTG. SERV., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) AT FARMERS MARKETS: A HOW-TO HANDBOOK 3 (2010), available at <http://ageconsearch.umn.edu/bitstream/146994/2/Supplemental%20Nutrition%20Assistance%20Program.pdf>. The impact of accepting SNAP benefits on farmers' markets was studied on a small scale by researchers at Arizona State University. Farryl M.W. Bertman et al., *Implementation of Wireless Terminals at Farmers' Markets: Impact on SNAP Redemption and Overall Sales*, 102 AM. J. PUB. HEALTH 53 (2012). The study found that supplying the equipment necessary to accept SNAP benefits resulted in an increase in revenue ranging from \$500 to \$4018 for the farmers' markets. *Id.* at 53.

<sup>20</sup> WASSERMAN ET AL., *supra* note 19, at 3.

<sup>21</sup> *Farmers' Market Equipment Funds: A Funding Opportunity for Certain Farmers' Markets and Direct Marketing Farmers*, USDA FOOD & NUTRITION SERV., <http://www.fns.usda.gov/sites/default/files/FM-update.pdf> (last visited Nov. 9, 2015).

<sup>22</sup> *Learn About SNAP Benefits at Farmers' Markets*, USDA FOOD & NUTRITION SERV., <http://www.fns.usda.gov/ebt/learn-about-snap-benefits-farmers-markets> (last updated Aug. 21, 2015).

Nutrition Incentive Program (“FINIP”), made possible by the Agricultural Act of 2014.<sup>23</sup> The FINIP encourages SNAP recipients to use their benefits at farmers’ markets by doubling their SNAP benefits when they shop at farmers’ markets.<sup>24</sup> Thus, the current farmers’ market economy is poised to increase in the coming years as more consumers flock to farmers’ markets and farmers’ markets receive government support.

Besides economic benefits, farmers’ markets provide unique social benefits. Farmers’ markets provide for an interaction between producer and consumer that ordinary supermarkets cannot provide. This social interaction can be beneficial for customers because they can learn about the agricultural process from those who directly engage in the agricultural arts.<sup>25</sup> In addition to consumer benefits, producers can benefit from farmers’ markets as a means to grow their business and foster entrepreneurial opportunities.<sup>26</sup> For example, producers attending farmers’ markets can build contacts with local restaurants to provide wholesale produce directly to restaurants following a farm-to-table philosophy.<sup>27</sup> The visibility at farmers’ markets allows producers to build a brand that helps grow their business and opens up opportunities beyond the farmers’ market.<sup>28</sup> Farmers’ markets have come a long way since the passage of the Direct Marketing Act. They are a symbol of a movement away from commercialization and a return to more basic roots. The expansion of farmers’ markets in number, size, and profit can present some problems, not the least of which is fraud.

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<sup>23</sup> Agricultural Act of 2014, 113 Pub. L. No. 79, 128 Stat. 649 (codified as amended in scattered sections of 7 U.S.C.).

<sup>24</sup> Allison Aubrey & Dan Charles, *Two for One: Subsidies Help Food Stamp Recipients Buy Fresh Food*, NPR (Oct. 4, 2014, 10:23 AM), <http://www.npr.org/blogs/thesalt/2014/10/04/353522055/two-for-one-subsidies-help-food-stamp-recipients-buy-fresh-food>. The FINIP, modeled after similar successful programs by non-profit organizations, allows for up to a \$10 subsidy, so a SNAP user who purchases \$20 worth of produce at a farmers’ market will only have to use \$10 of their SNAP balance. *Id.*

<sup>25</sup> Gilbert Gillespie et al., *Farmers’ Markets as keystones in Rebuilding Local and Regional Food Systems*, in REMAKING THE NORTH AMERICAN FOOD SYSTEM: STRATEGIES FOR SUSTAINABILITY 65, 77 (C. Clare Hinrichs & Thomas A. Lyson eds., 2009).

<sup>26</sup> *Id.* at 75.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## II. FARMERS' MARKET FRAUD

### *A. The Nature of Farmers' Market Fraud*

In any transaction between multiple parties the potential for fraud exists, and the farmers' market is no exception. Compared to ordinary supermarkets, farmers' markets face a unique challenge because of what they represent. Consider the example of a customer looking to buy a tomato at a supermarket. Ordinarily, supermarket customers do not consider the origin of that tomato. They are well aware of the commercial system and the fact that the tomato could originate from anywhere. Typically, the only expectations are that the tomato is in fact a tomato and that it is safely consumable. On the other hand, customers who visit farmers' markets have more expectations of the products sold at the market. Expectations of freshness, quality, and locality are on the minds of customers who visit farmers' markets. Because farmers' markets often purport to be purveyors of quality, fresh, and local produce, they must deliver on that promise or their integrity is threatened. This example is not intended to promote the idea that fraud cannot exist in the commercial supermarket context, but merely to highlight the unique character and reputation that farmers' markets must uphold. When a farmers' market loses its character and reputation, it becomes nothing more than a supermarket with a limited inventory. Farmers' market fraud threatens that character and reputation.

Fraud is very difficult to measure in farmers' markets and its existence is known mainly through anecdotal evidence.<sup>29</sup> Fraud in a farmers' market typically involves the origin of a product. Because farmers' market vendors often purport to sell their own locally grown produce, fraud is committed when a vendor buys wholesale produce and sells it under the guise that they cultivated the produce at a local farm.<sup>30</sup> Because wholesale produce is often cheaper, vendors committing fraud can sell their wholesale produce at a

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<sup>29</sup> Wiseman, *supra* note 4, at 375.

<sup>30</sup> *See id.* at 375–76.

much lower price, thereby undercutting the other vendors and destroying the integrity of the farmers' market.<sup>31</sup>

In Wisconsin, one farmer lobbied the local city council to ban resellers at the local farmers' market after he learned that vendors were buying and reselling produce that they did not grow themselves.<sup>32</sup> Another farmer in Arkansas quit selling at a local farmer's market and started a rival "source-verified" market because he was tired of competing with resellers who, for example, had purchased strawberries from California and repackaged them with Arkansas-grown labels.<sup>33</sup> These examples represent the types of fraud that farmers' market vendors have to confront, but they also highlight the difficulty that ordinary consumers have in detecting farmers' market fraud. For example, to the ordinary, untrained customer a potato looks like a potato. There is no easily discernable way to tell if a potato was grown in a local area or in a completely different state. Even a proactive customer who inquires about the origin of the produce or inspects the produce for common markings of fraud, such as waxing or identification stickers,<sup>34</sup> will likely fail to discover the true origin of the product, short of actually visiting the location where the produce purportedly originated. Because of this inherent difficulty in detection, farmers' market fraud is a particularly thorny issue for farmers' markets.

In California, farmers' market fraud became a popular issue after an NBC investigation in Los Angeles revealed that some vendors at local farmers' markets were not selling what they purported to sell.<sup>35</sup> For the investigation, NBC investigators bought produce at various farmers' markets in the Los Angeles area and then made surprise visits to those farms.<sup>36</sup> Many of the farms were actually growing what they sold at the

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<sup>31</sup> Dan Nosowitz, *Stamping Out Farmers Market Fraud*, MODERN FARMER (Oct. 6, 2014), <http://modernfarmer.com/2014/10/curious-case-farmers-market-fraud> (discussing the different types of farmers' market fraud and the effect on the farmers' market's reputation).

<sup>32</sup> Lauren Etter, *Food for Thought: Do You Need Farmers for a Farmers Market?*, WALL ST. J. (Apr. 29, 2010), <http://www.wsj.com/articles/SB10001424052748703404004575198270918567074>.

<sup>33</sup> *Id.*

<sup>34</sup> *Farmers Market Fraud May Be a Local Concern*, SOC'Y ENVTL. JOURNALISTS (July 21, 2010), <http://www.sej.org/publications/tipsheet/farmers-market-fraud-may-be-local-concern>.

<sup>35</sup> Joel Grover & Matt Goldberg, *False Claims, Lies Caught on Tape at Farmers Markets*, NBC (Sept. 22, 2010), <http://www.nbclosangeles.com/news/local/Hidden-Camera-Investigation-Farmers-Markets-103577594.html>.

<sup>36</sup> *Id.*



farmers' markets, but the investigators learned that some of the licensed vendors had not cultivated their produce and were in fact reselling wholesale produce.<sup>37</sup> Largely in response to this highly publicized report of farmers' market fraud, the California legislature passed A.B. 1871 in September 2014.<sup>38</sup>

### *B. Responses to Farmers' Market Fraud*

California's new law is a rather unique response to farmers' market fraud and there are a number of other ways that fraud has been addressed. A common method of enforcement is by contract. Many farmers' market operators require vendors to agree to a list of rules and regulations. In particular, for producer-only markets the basic tenet is that vendors can sell only those products that they cultivate themselves.<sup>39</sup> GrowNYC is a non-profit organization that runs a number of producer-only farmers' markets in New York City.<sup>40</sup> Before vendors can sell at a GrowNYC market, they must fill out a questionnaire that requires them to affirm that they will only sell what they grow or produce, that they are in full control of the production of all products, that they are expected to come to the market themselves, and that they must be located no more than 120 miles to the south, 170 miles east and west, and 250 miles north of New York City.<sup>41</sup> Moreover, the produce must be fresh and of high-quality and cannot be irradiated or genetically modified.<sup>42</sup> In order to enforce these rules, GrowNYC requires all producers/vendors to submit a crop plan each year, that includes estimates of the name and quantity of the produce that they intend to bring to the market.<sup>43</sup> GrowNYC conducts random checks at the markets and, on

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<sup>37</sup> *Id.*

<sup>38</sup> Dan Charles, *California Cracks Down on Farmers Market Cheaters*, NPR (Oct. 2, 2014 10:30 AM), <http://www.npr.org/blogs/thesalt/2014/10/02/352979875/california-cracks-down-on-farmers-market-cheaters>.

<sup>39</sup> Wiseman, *supra* note 4, at 378–79.

<sup>40</sup> *About GrowNYC*, GROWNOC, <http://www.grownyc.org/about> (last visited Nov. 9, 2015).

<sup>41</sup> *Greenmarket Farmers Market Application Request*, GROWNOC, <http://www.grownyc.org/files/gmkt/questionnaire/farmer.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> Nosowitz, *supra* note 31.

occasion, farm inspections in order to ensure compliance.<sup>44</sup> Penalties for violation range from fines to suspension from the market.<sup>45</sup>

The contractual method has the advantage of allowing farmers' markets to self-regulate. This method gives enforcement power to those who are closest to the situation and allows them to tailor their regulations to fit their needs.<sup>46</sup> Also, enforcement of the regulations may be easier because the inspectors have the local knowledge often needed for effective enforcement.<sup>47</sup> However, self-regulation can easily fail due to a lack of resources. GrowNYC is an example of an organization with adequate resources to, more or less, sufficiently enforce their own rules because they are a relatively large operation. However, many farmers' market operations are small-scale enterprises run by volunteers who may not have the time, finances, nor motivation to strictly enforce any rules that may be in place.<sup>48</sup> This means that some farmers' markets that start small may be thwarted by fraud before they can grow to an adequate size and acquire the resources necessary to combat fraud in the market. Thus, for large, established markets the contractual system may be sufficient, but the many smaller markets may be helpless in the face of fraud.

An alternative to the contractual/self-regulating approach is government intervention that provides for the enforcement of default rules for farmers' markets. The federal government has done very little in terms of effective nationwide regulation of farmers' markets,<sup>49</sup> and so the burden is on the states to regulate the farmers' markets within their borders. California is a prime example of a state that has taken a strong initiative to regulate farmers' markets through the enactment of A.B. 1871.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Wiseman, *supra* note 4, at 385.

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

<sup>48</sup> *Id.* at 385–86.

<sup>49</sup> For example, the Women Infant Children ("WIC") program is one of few federal efforts to set a standard for farmers' markets, but one that is rather inadequate. *Id.* at 389–90. As part of the WIC program, the USDA requires states to conduct annual inspections of just 10% of their farmers' markets to ensure that they sell locally grown produce. *Id.*

### III. 2014 CAL. A.B. 1871

On September 26, 2014, California enacted A.B. 1871 which took effect on January 1, 2015.<sup>50</sup> The reasons for the enactment of A.B. 1871 were articulated in the legislative history of the bill. After Congress passed the Direct Marketing Act, the California Department of Food and Agriculture (“CDFA”) enacted regulations that exempted certain producers from packaging and labeling requirements.<sup>51</sup> In order to fall under the exemption, California producers had to be certified by the local agricultural commissioner that the producers were in fact selling what they produced.<sup>52</sup> Soon after these regulations were promulgated, certified farmers’ markets (“CFM”) in California grew in large numbers.<sup>53</sup> By 1999, problems of enforcement and funding developed which led to the passage of A.B. 593.<sup>54</sup> A.B. 593 authorized CFMs to adopt more restrictive rules and required that each vendor pay a fee of \$0.60 per market day in order to pay for the CFM program.<sup>55</sup> Following A.B. 593, the growth of CFMs and reductions in the CDFAs budget resulted in a situation whereby the \$0.60 fee could not cover the costs of inspection and enforcement of the CFM program.<sup>56</sup> This fiscal shortage coupled with media reports of farmers’ market fraud led to the introduction (and subsequent enactment) of A.B. 1871 in order to combat farmers’ market fraud and enforce California CFM law.<sup>57</sup>

#### *A. New Crimes*

A.B. 1871 contained sweeping changes to existing California law relating to CFMs. The first notable change is the creation of new crimes that target farmers’ market fraud directly:

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<sup>50</sup> Assemb. B. 1871, State Assemb., 2013–2014 Reg. Sess. (Cal. 2014). As a matter of clarity, when this Note references the California legislation in its entirety it will be referred to as “A.B. 1871” but when discussing the specific components of the legislation, citations to the relevant statutory code will be made.

<sup>51</sup> S. APPROPRIATIONS COMM., FISCAL SUMMARY OF A.B. 1871, Reg. Sess. (Cal. 2014).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> ASSEMB., CONCURRENCE IN SENATE AMENDMENTS OF A.B. 1871, Reg. Sess. (Cal. 2014).

<sup>57</sup> S. APPROPRIATIONS COMM., FISCAL SUMMARY OF A.B. 1871, Reg. Sess. (Cal. 2014).

(a) It is unlawful for any person or entity, or employee or agent of that person or entity, to make any statement, representation, or assertion orally, by public statement, advertisement, signage, or by any means that relates to the sale or availability of agricultural products that is false, deceptive, or misleading regarding any of the following:

- (1) The area of production of the agricultural product.
- (2) The identity of the producer of the agricultural product.
- (3) The manner and method of production of the agricultural product.<sup>58</sup>

Violation of section 890(a) is punishable by “imprisonment in the county jail not exceeding six months, or by a fine not exceeding [\$2,500], or by both that imprisonment and fine.”<sup>59</sup> In lieu of prosecution, a civil penalty in an amount of not less than \$500 and not more than \$5,000 may be levied against a violator of section 890(a) for each violation.<sup>60</sup> Finally, the Direct Agricultural Marketing Penalty Account was created in which all civil penalties levied under section 891 are to be deposited.<sup>61</sup> These funds are to be used “to conduct investigations and enforcement actions upon complaints filed or pursuant to information received that results in the investigation of a violation of [section] 890” and “for expenses incurred by county agricultural commissioners for investigative and enforcement actions. . . .”<sup>62</sup>

### *B. Baseline Rules for Certified Farmers' Markets*

As part of A.B. 1871, section 47004 was added to the Food and Agricultural Code and outlines baseline requirements that all CFM operators and vendors must follow.<sup>63</sup> Section 47004 requires that CFM operators establish a clearly defined marketing area where only “agricultural products” are sold.<sup>64</sup> Within this defined area of a CFM, there

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<sup>58</sup> CAL. FOOD & AGRIC. CODE § 890(a) (Deering 2014).

<sup>59</sup> *Id.* § 890(b).

<sup>60</sup> *Id.* § 891.

<sup>61</sup> *Id.* § 893(a).

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

<sup>63</sup> CAL. FOOD & AGRIC. CODE § 47004(g) (stating that operators of CFMs may establish more restrictive rules as long as they do not conflict with California state laws or regulations, thus, section 47004 constitutes a baseline approach).

<sup>64</sup> *Id.* § 47004(b). “Agricultural Product” is defined as

can be no reselling of agricultural products and only the producer, or the lawful authorized representative of the producer, may sell “agricultural products.”<sup>65</sup> These requirements ensure that agricultural products are segregated from non-agricultural products and reduce the chance for fraud by allowing CFM attendees to easily discern between, for example, reseller vendors and actual farmers selling directly to consumers. Second, CFM operators that also operate a separate sales activity in close proximity to the CFM cannot allow sales of fresh whole fruits, nuts, vegetables, and flowers in those non-CFM adjacent areas.<sup>66</sup> Third, operators must keep an accurate participation record of the producers at the CFM and provide quarterly reports of these records to the CDFA. In terms of vendor requirements, section 47004 requires that all vendors of agricultural products selling within the agricultural products-only area comply with the following: post a conspicuous sign that identifies the name and location of the farm and a

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a fresh or processed product produced in California, including fruits, nuts, vegetables, herbs, mushrooms, dairy, shell eggs, honey, pollen, unprocessed bees wax, propolis, royal jelly, flowers, grains, nursery stock, livestock meats, poultry meats, rabbit meats, and fish, including shellfish that is produced under controlled conditions in waters located in California. Products that are characterized as services, arts, crafts, bakery, candies, soaps, balms, perfumes, cosmetics, pottery, clothing, fabrics, pastas, compost, fertilizers, candles, ceramics, foraged foods, and types of wares are not agricultural products for purposes of this chapter. A product that combines an agricultural product with a nonagricultural product or service in a manner that materially increases the purchase price of the product shall disqualify the product from being sold as an agricultural product for purposes of this chapter.

*Id.* § 47000.5(a).

<sup>65</sup> *Id.* § 47004(b). “Producer” is defined as

a person, partnership, corporation, or an otherwise legally formed farm or ranch that produces agricultural products by the practice of the agricultural arts upon land that the person or entity owns, rents, leases, sharecrops, or otherwise controls and has the documented legal right to possession. A person or entity that rents, leases, or otherwise acquires the right to possession of property essentially only for or limited to the period of the harvest season of the agricultural products produced on that property shall not be considered a producer. . . .

*Id.* § 47000.5(c).

<sup>66</sup> *Id.* § 47004(e). This measure has already had the effect of displacing a florist who had attended a local farmers’ market in Santa Monica, California for 24 years in a row. David Mark Simpson, *New law ousts florist from Farmers Market after 24 years*, SANTA MONICA DAILY PRESS (Jan. 21, 2015), <http://smdp.com/law-ousts-florist-farmers-market-24-years/144837>.

statement similar or identical to “We Grow What We Sell,”<sup>67</sup> ensure that all processed agricultural products are labeled appropriately,<sup>68</sup> and, if applicable, ensure that all products being represented as organic are clearly labeled as organic.<sup>69</sup> Finally, all vendors are subject to the criminal and civil penalties of section 890 for any representations made at CFMs.<sup>70</sup>

### *C. Certification Requirements for Certified Farmers' Market Vendors and Operators*

A.B. 1871 added a number of requirements for prospective CFM operators and vendors. In order to become an operator, the prospective operator must apply and obtain a certificate from the local agricultural commissioner.<sup>71</sup> CFM certification is valid for 12 months and requires operators to comply with inspections of the CFM.<sup>72</sup> In order to become a vendor at a CFM, a producer must apply and obtain a certificate from the local agricultural commissioner and, once certified, the producer must annually submit any information requested by the CDFA relating to products that the producer intends to harvest for sale directly to the public.<sup>73</sup> Certification is valid for up to 12 months and requires the producer to submit to at least one onsite inspection to verify that the producer actually produces what he/she purports to sell or will sell at a CFM.<sup>74</sup> After a certification expires, it may be renewed or else denied by either the CDFA or agricultural commissioner for outstanding fees owed.<sup>75</sup> Certification and inspection requirements provide assurance to customers visiting CFMs that vendors are bona-fide producers of what they sell and fosters the overall integrity of the CFMs.

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<sup>67</sup> CAL. FOOD & AGRIC. CODE § 47004(c)(1). Also, if multiple producers occupy the same vendor stall then the products must be separated and proper signage that differentiates between the producers must be displayed. *Id.*

<sup>68</sup> *Id.* § 47004(c)(2).

<sup>69</sup> *Id.* § 47004(c)(3).

<sup>70</sup> *Id.* § 47004(d).

<sup>71</sup> *Id.* § 47020(a).

<sup>72</sup> *Id.* § 47020(b). Inspections are to take place at least once for every six months that the CFM operates and the operator may be responsible for paying inspection costs. *Id.*

<sup>73</sup> CAL. FOOD & AGRIC. CODE § 47020(e)(1)–(2).

<sup>74</sup> *Id.* § 47020(c)(3). Producers may be responsible for paying inspection costs. *Id.*

<sup>75</sup> *Id.* § 47020(d).

#### *D. Certified Farmers' Market Operator Fees*

A.B. 1871 also modified the fee system that applies to CFMs. The previous fee of \$0.60 per vendor participating on each market day was raised to \$2.00.<sup>76</sup> The CFM operator is ultimately responsible for paying the fee to the CDFA but operators may collect all or part of the fee from the participating vendors.<sup>77</sup> This raise in fee is one of the motivating reasons for the passage of A.B. 1871 and addresses the lack of revenue problem under the old system.<sup>78</sup> The Senate Appropriations Committee estimated that the new fee would raise approximately \$1.35 million, a figure roughly equal to the costs of instituting and administering A.B. 1871.<sup>79</sup> The revenue from the fee is to be used to cover various administrative costs, the maintenance of a statewide listing of CFMs and certified producers, and investigation and enforcement expenses needed to ensure compliance with the law.<sup>80</sup>

Even though this is a relatively strict farmer's market enforcement program it is rather inexpensive to implement and is not likely to hinder business. A \$2.00 per day fee is unlikely to materially impact prices, nor is the fee so high that it would deter any vendor except perhaps the smallest-earning vendor. A.B. 1871 does not prohibit CFM market operators from charging vendors a fee in addition to the \$2.00, so any deterrence in vendor participation due to fees would likely only come from the operator's own fee decisions. Thus, the fee provision straddles the line of financing more effective enforcement while not hindering the proliferation and success of California farmers' markets.

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<sup>76</sup> *Id.* § 47021(a). This vendor fee applies to all vendors including vendors selling non-agricultural products. *Id.*

<sup>77</sup> *Id.* An operator may petition for a reduced fee of \$1.00 if the CFM is located in a county with a population less than 400,000 and the CFM only includes vendors of agricultural products produced on land located in the same county as the CFM. *Id.*

<sup>78</sup> ASSEMB., *supra* note 56.

<sup>79</sup> *Id.*

<sup>80</sup> CAL. FOOD & AGRIC. CODE § 47021(c).

### *E. Enforcement*

Section 47001 provides for the enforcement mechanisms of A.B. 1871.<sup>81</sup> Enforcement of the law is primarily the responsibility of the CDFA and the local county agricultural commissioners.<sup>82</sup> A.B. 1871 provides for two levels of enforcement. For the first level, the CDFA may enter into agreements with county agricultural commissioners to provide the funds for administration, investigations, inspections, registrations, and other requirements of A.B. 1871 related to CFMs.<sup>83</sup> These funds are made available from the \$2.00 per vendor fee that is charged to CFMs.<sup>84</sup> The other level of enforcement is the imposition of section 890 to penalize vendors who commit farmers' market fraud. Section 47001 permits CFM operators, upon reasonable suspicion of a violation of section 890, to contract with the local county agricultural commissioner for an investigation of a suspected vendor committing fraud at a CFM.<sup>85</sup> This enforcement system is well suited to a state, like California, that has a dedicated network of local officials who work directly alongside the agricultural department.

## IV. NEW YORK AND MICHIGAN: A COMPARATIVE ANALYSIS

As of January 2015, New York and Michigan possessed the second and third most farmers' markets in the United States, respectively, with New York having 644 farmers' markets and Michigan having 341.<sup>86</sup> The regulatory approaches followed by New York and Michigan are important to consider in order to provide for a greater contextual understanding of other farmers' market regulations in states that have a significant interest in the success of their farmers' markets.

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<sup>81</sup> *Id.* § 47001.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* § 47001(c).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* § 47001(d).

<sup>86</sup> *National Farmers Market Directory*, *supra* note 2.



*A. New York*

New York has a robust system of promotion for direct sales of New York agricultural goods to consumers. For example, New York's FreshConnect program is designed to support existing farmers' markets and fund new farmers' markets in areas designated as "high-need" locations, i.e. locations with limited supermarket access.<sup>87</sup> Also, New York law provides for the establishment of "trails," which are essentially small geographic areas occupied by multiple producers.<sup>88</sup> The "trail" system is meant to provide for greater marketing opportunities by alerting persons passing through these trails that they are close to fresh, local, New York products.<sup>89</sup> These are just a few of the examples of the efforts New York has pursued and they highlight New York's emphasis on direct sales between producer and consumer.

New York's Agriculture and Markets Law contains an Article specifically devoted to farmers' markets.<sup>90</sup> Like California, New York law defines "farmers' market," but New York's definition is less rigid. For example, New York does not require segregation of products that are grown and harvested, such as fruits and vegetables, and products that are created through non-natural processes, such as wine, juices, and ciders.<sup>91</sup> Moreover, New York law specifically permits the inclusion of "other businesses which reasonably serve the public or make the market more convenient" in a farmers' market.<sup>92</sup> New York's comparatively broad farmers' market law does little to curb any potential fraud that might exist. There are penalties for violation of the farmers' market law,<sup>93</sup> however, the farmers' market laws are primarily designed to promote the success and proliferation of

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<sup>87</sup> Press Release, N.Y., Governor Cuomo Announces \$285,000 in Funding for Third Year of Freshconnect Farmers' Market (Dec. 3, 2012), <http://www.governor.ny.gov/news/governor-cuomo-announces-285000-funding-third-year-freshconnect-farmers-market-program>.

<sup>88</sup> N.Y. AGRIC. & MKTS. LAW § 284-a.

<sup>89</sup> *Id.* New York's burgeoning wine industry has led to the development of a number of "wine trails." N.Y. DEP'T AGRIC. & MKTS., ANN. REP. (2014), available at [http://www.agriculture.ny.gov/annual\\_report.pdf](http://www.agriculture.ny.gov/annual_report.pdf).

<sup>90</sup> N.Y. AGRIC. & MKTS. LAW § 259-63.

<sup>91</sup> *Id.* § 260.

<sup>92</sup> *Id.* § 260(1).

<sup>93</sup> *See id.* § 39.

farmers' markets in New York,<sup>94</sup> not to combat any potential fraud at the farmers' markets. Thus, any instances of fraud that may occur at New York farmers' markets must be dealt with at a local level by, in particular, the operators of the farmers' markets.

### *B. Michigan*

The Michigan Food Law does not specifically address farmers' market regulation and appears to defer farmers' market regulation to a local level.<sup>95</sup> Many vendors at farmers' markets are not required to be licensed by the state due to a number of exemptions, although they are not exempt from other Food Law requirements.<sup>96</sup> Local municipalities are permitted to regulate local farmers' markets by ordinances.<sup>97</sup> On the whole, Michigan farmers' markets are generally controlled by the operators/and or market managers who are free to adopt various regulations and enforcement mechanisms subject to any local ordinances.<sup>98</sup> For example, the New Baltimore Farmers Market in Macomb County, Michigan has a list of rules and regulations that all vendors must follow.<sup>99</sup> The New Baltimore Farmers Market permits reselling of up to 25% of the products at their vendor stall and vendors who choose to re-sell must disclose to the customers which products are resale products.<sup>100</sup> Enforcement of the market rules is performed by the Market Manager who has complete authority over the market,<sup>101</sup> and violation of the market rules can result in permanent expulsion from the market.<sup>102</sup>

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<sup>94</sup> See *id.* § 261-62 (detailing a number of efforts that the New York State Department of Agriculture and Markets must pursue in order to advance the impact of farmers' markets in New York).

<sup>95</sup> MICH. COMP. LAWS SERV. §§ 289.1101–289.8111.

<sup>96</sup> *Licensing at Farmers Markets*, MICH. DEP'T AGRIC. & RURAL DEV., [http://www.michigan.gov/mdard/0,4610,7-125-1569\\_16958-169359--,00.html](http://www.michigan.gov/mdard/0,4610,7-125-1569_16958-169359--,00.html) (last visited Nov. 9, 2015).

<sup>97</sup> See, e.g., EASTPOINTE, MICH., CODE OF ORDINANCES ch. 19, art. 2, § 19-28 (2013).

<sup>98</sup> *Farmers Market FAQ*, MICH. DEP'T AGRIC. & RURAL DEV., [http://www.michigan.gov/mdard/0,4610,7-125-1568\\_2387\\_46671-169336--,00.html](http://www.michigan.gov/mdard/0,4610,7-125-1568_2387_46671-169336--,00.html) (last visited Nov. 9, 2015) (“It is generally the Market Manager’s responsibility to enforce the vendor requirements set by market policy.”).

<sup>99</sup> *New Baltimore Farmers Market 2015 Vendor Application*, [http://www.newbaltimorefarmersmarket.com/uploads/8/9/7/0/8970492/2015\\_new\\_baltimore\\_farmers\\_market\\_vendor\\_pre\\_season\\_reservation\\_jan\\_2015.pdf](http://www.newbaltimorefarmersmarket.com/uploads/8/9/7/0/8970492/2015_new_baltimore_farmers_market_vendor_pre_season_reservation_jan_2015.pdf) (last visited Nov. 9, 2015).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

Thus, like New York, Michigan takes a rather hands-off approach to farmers' market regulation and allows great latitude for local management of farmers' markets. This arrangement leaves Michigan and New York farmers' markets potentially vulnerable to fraud depending on how effective local enforcement measures can be. California, however, through A.B. 1871 forgoes strict reliance on local measures to enforce farmers' market rules and regulations and provides baseline rules for farmers' markets.<sup>103</sup> The institution of these baseline rules come with state financial assistance for enforcing those rules,<sup>104</sup> assistance that might help some of the farmers' markets in New York and Michigan if those states had a similar system.

#### V. THE CALIFORNIA MODEL AS A STARTING POINT

Should other states follow California's approach to farmers' market regulation and fraud prevention? The answer to this question is not straightforward and a number of factors should first be considered. The first consideration is the number and economic impact of farmers' markets within a state. States such as New York that have dedicated a lot of resources to the promotion of farmers' markets may want to consider state enforcement measures in order to prevent fraud. As farmers' markets occupy a larger footprint in a state's economy, maintaining the integrity and consumer confidence of those markets will become increasingly important.<sup>105</sup> But, for states that have very little direct sales between farmer and consumer (e.g. Alaska, North Dakota, Montana, and Nevada)<sup>106</sup> a state-regulated system of farmers' markets is simply not going to be a major concern to those state legislatures.

The second factor is the level of fraud that occurs at farmers' markets within a state. This is probably the most difficult factor to assess given the inherent difficulty in measuring fraud. Even in California, the legislature did not know of the exact scale of fraud occurring at California farmers'

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<sup>103</sup> See *supra* Part III.

<sup>104</sup> See *supra* Part III.

<sup>105</sup> Wiseman, *supra* note 4, at 395.

<sup>106</sup> Direct sales between farmer and consumer were less than \$10 million for each of these states in 2012. CENSUS OF AGRICULTURE, *supra* note 18.

markets when A.B. 1871 was passed, and it remains to be seen how much A.B. 1871 actually helps to prevent and prosecute fraud at farmers' markets. Thus, states need to devise a way to measure the instances of fraud at farmers' markets. Perhaps, as an initial matter, states could require that farmers' market operators report instances of fraud directly to the relevant State Department charged with general oversight of farmers' markets. This way states could gather a general sense of the prevalence of fraud.

The third factor is the effectiveness of the existing regime. Indeed, the apparent lack of effectiveness of the system in California was a major reason for the adoption of A.B. 1871.<sup>107</sup> States that may consider following the California model must consider how effective their current system is at addressing fraud at farmers' markets. If an existing model based largely on permitting farmers' markets to self-regulate is sufficiently effective then a new state law would be rather redundant, but if the status quo does little to prevent fraud and protect consumer confidence then a state's farmers' market economy could be threatened.

The last factor to consider is popular support for state regulation. Support for statewide enforcement and prosecution of farmers' market fraud could come from consumers who want greater assurances or honest farmers who do not want to compete with cheaters in the market. The bare truth is that everyone except for the fraudster prefers less fraud, and, thus, it would seem that popular support might come easy. However, there could also be a significant source of opposition towards state regulation of something such as a farmers' market that, by definition, is about as local as it gets. States will need to be careful not to enact laws that, although having the intention of protecting farmers' markets, actually hurt their success by hindering local autonomy and deterring vendor and operator participation.

## VI. CONCLUSION

This Note has attempted to shine a light on farmers' markets in the United States and provide for a discussion of a problem that may threaten the economic and social prosperity of farmers' markets. As it stands, fraud is likely a lesser concern on the minds of farmers' market consumers,

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<sup>107</sup> See *supra* Part III.

operators, and vendors across the United States and it remains to be seen whether fraud in farmers' markets becomes a widespread concern. But if current trends of farmers' market prosperity and growth continue, fraud could become a much bigger problem for the success of farmers' markets because when a market grows, so could the number of persons looking to illegally capitalize on the success of that market. California has taken the preemptive measure to combat farmers' market fraud before it could damage the integrity of the system and has provided a model that other states may use as a guide if they wish take a tougher stance on farmers' market fraud.