



Food Safety: The Worst of Both Bills (HR 2749 & S 510)

by Pete Kennedy, Esq. - May 6, 2010

If S 510 (the **FDA Food Safety Modernization Act**) passes the Senate, there would be a conference committee between members of the House and Senate to draft a food safety bill that would combine provisions of S 510 and HR 2749 (the **Food Safety Enhancement Act of 2009**) into a final version of the bill. The full House and Senate each would vote on this version of the bill to determine whether the food safety bill becomes law.

Both bills take a one-size-fits-all approach towards food regulation, threatening to leave small farmers and local producers unable to afford the cost of complying with the legislation's requirements. They would also significantly increase the power of the federal government to regulate intrastate commerce and give the Food and Drug Administration (FDA) substantially greater power overall while making the agency less accountable for its actions.

In reality, neither bill would improve food safety; in fact, the new requirements would cause an increase in imported food, a major source of the food safety problems in this country. Either bill would diminish the freedom and liberty Americans currently have to obtain the food of their choice from the source of their choice. What follows is a review of the more damaging provisions of the two bills under the following subheadings:

- A. National Agriculture and Food Defense Strategy
- B. Authority over Movement of Food
- C. Criminal and Civil Penalties
- D. HACCP Plans
- E. Food Traceability
- F. Safety Standards for Produce

A. NATIONAL AGRICULTURE & FOOD DEFENSE STRATEGY

- **S 510: Sec. 108 - National agriculture and food defense strategy [A--pp.161-167]**
- **S 510: Sec. 109 - Food and Agriculture Coordinating Councils [A--pp. 167-168]**

While HR 2749 doesn't mention the Department of Homeland Security (DHS), DHS is referenced no fewer than twenty-two (22) times in S 510--nowhere more so than Section 108 of the bill. Section 108(a)(1) calls for the Secretaries of Health and Human Services (HHS) and Agriculture, in coordination with the Secretary of Homeland Security, to prepare the 'National Agriculture and Food Defense Strategy' and submit it to Congress.

Both bills contain numerous provisions imposing a one-size-fits-all regulatory scheme that will make it difficult for small farms and local producers to comply with the new laws.

Section 108(5) requires that the strategy be consistent with the National Incident Management System, the National Response Framework, the National Infrastructure Protection Plan, and the National Preparedness Goals. All of these programs were created as a result of Executive Orders issued by various presidents bypassing the process of representative government. Moreover, the only reference to food in the Homeland Security Act [6 U.S.C. 188] was a requirement that, in establishing university-based centers of excellence to help DHS carry



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out its mission, one criteria the department was to consider in selecting the 'centers for excellence' was a "demonstrated expertise in food safety" [1--p. 12]. DHS created the frameworks for the programs and is responsible for their implementation by federal, state and local government agencies.

The Food and Agriculture Government Coordinating Councils (GCC) and the Food and Agriculture Sector Coordinating Councils (FASCC) referenced in Section 109 of the bill were created in 2004 as part of the National Infrastructure Protection Plan. The GCC is the government's primary source for the coordination of interdepartmental work on food security in preventing the intentional contamination of food and attacks on U.S. agriculture; FASCC is the private counterpart to the GCC. Its members consist of representatives from groups such as the International Dairy Association (IDA), the National Milk Products Federation (NMPF), and Kraft Foods Global Inc.-small farmers need not apply.

One question that needs to be asked is: Do food and agriculture need to be part of the enormous homeland security apparatus that has been built up since 9/11? In a 2007 report, entitled "The Department of Homeland Security's Role in Food Defense and Critical Infrastructure Protection" [1], DHS Office of Inspector General (OIG) listed three "prominent domestic incidents of food contamination:

In 1984, members of a religious cult poisoned ten Oregon salad bars with *Salmonella*, resulting in 751 individual cases of illness.

In 1996, a disgruntled employee of a Texas hospital willfully tainted snacks in a staff breakroom. This incident caused illness in 12 people.

In 2003, a Michigan supermarket employee infected 200 pounds of beef with an insecticide, causing illness in 92 people." [1--p. 4]

That was it! The OIG report listed no other incidence of foodborne illness being caused by intentional contamination.

In a training video on food defense, entitled "Food Defense, CARVER + Shock" [2], then Director of Food Defense for FDA David Acheson listed the Oregon and Michigan incidents (totaling 843 cases) in justifying the multi-billion dollar food defense bureaucracy and nothing more. To put this in perspective, according to the Centers for Disease Control and Prevention (CDC), there are 76 million cases of foodborne illness each year caused by the unintentional contamination of food [3]. Others have disputed the CDC estimate but at a minimum there are hundreds of thousands of cases each year.

Passage of a bill containing Section 108 would be a major step towards the food regulatory system in this country being put on a permanent crisis-mode footing. Instead of integrating food and agriculture further into the 'national security state' that has exploded in growth since September 2001, the best way for Congress to defend our food supply against intentional contamination is to promote the decentralization of food production, encouraging local communities to produce as much of their food as possible. Why waste billions of dollars on a monolithic bureaucracy when there is a much cheaper and more effective way to build food defense?

Another question to be raised about S 510's National Agriculture and Defense Strategy is: Should DHS be involved in any facet of food regulation other than imported food (currently regulated in part by DHS's Customs and Border Protection)? Section 108 would implement Homeland Security Presidential Directive 9, a 2004 executive order, which appointed DHS "responsible for coordinating the overall national effort" to protect the food and agriculture sectors, and designated the DHS Secretary as "the



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principal federal official to lead, integrate, and coordinate federal, state, local and private sector elements." For some of the problems with DHS involvement in pre-harvest food production see the Government Accountability Office (GAO) report, "Much Is Being Done to Protect Agriculture from a Terrorist Attack but Important Challenges Remain" [4].

Here are some of the findings from the 2007 OIG report, "The Department of Homeland Security's Role in Food Defense and Critical Infrastructure Protection" [1], which focused on post-harvest food production:

DHS was assembled from twenty-two (22) preexisting agencies and organizations, none of which had a primary mission focus on post-harvest food products. [1--p. 15]

"The enormity of the food sector and the complexity of government oversight pose substantial challenges to food defense and critical infrastructure protection. These challenges are compounded by the fact that some of the department's obligations to the food sector are set out in guidance documents that are not clearly compatible." [1--p.17]

The legislation will disproportionately impact local food producers, the sector of our food system producing the safest most nutritious food, thus benefiting food imports and industrial processors (those sectors of the food system that have been most responsible for the problems with food safety).

"Several organizational units in the department carry out DHS food-sector-related activities. The supervision of these activities is distributed across several managers in these units. This divided leadership arrangement has produced similar programming across different components and has not provided the level of internal coordination required." [1--p.18]

"Because numerous public sector entities regulate the food industry, the insights to be gained through partnerships with food industry regulators come with a significant coordination requirement." [1--p. 16]

Different frameworks created under different Homeland Security Presidential Directives put priorities into question. [1--p. 17]

DHS has four directorates, seven agencies, fifteen major offices and a center. "There is no major organizational entity within DHS that is focused exclusively or even largely on the execution of DHS responsibilities in the food sector." [1--p. 19]

"The management of DHS' food-sector-related activities is as dispersed as the activities themselves. At the time of our fieldwork, no single senior manager or official in DHS was dedicated to monitoring or overseeing all of the department's food sector activities." [1--p. 22]

"The limited leadership attention to food defense and critical infrastructure protections is so pronounced that several key DHS staff could not identify a senior DHS official responsible for Homeland Security Presidential Directive 9 implementation. One DHS employee advised us that a single DHS contractor was responsible for tracking and monitoring the department's efforts to implement Homeland Security Presidential Directive 9 responsibilities." [1--p. 29]

"FDA and National Counterterrorism Center staff were critical of food-related intelligence products developed by the Homeland Infrastructure Threat and Risk Analysis Center. They said that these products had not drawn on subject matter expertise as much as conjecture, and said that some



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included irresponsible speculation. They said that they often considered the center's products to be at odds with the experts in other government organizations, and asserted that the center's products had not been vetted to the extent necessary." [1--p. 43]

"To improve overall U.S. food defense and critical infrastructure protection, DHS must execute its related responsibilities more effectively. Disjointed DHS work on defense of the food supply caused by the absence of a clear leader brought confusion in cases in which DHS made good faith efforts to work with partners." [1--p. 90]

Passage of the food safety legislation will reduce judicial restraints on FDA while at the same time giving the agency previously unheard of powers. Does FDA's track record merit the agency more power in regulating our food?

With the lack of DHS experience in the food sector and the difficulty of coordination within DHS itself, much less the coordination between DHS and FDA and USDA, S 510's National Agriculture and Food Defense Strategy promises to be a boondoggle that will do nothing to improve food defense.

Billions of dollars are going to industry, universities and the bureaucracy-particularly DHS-to protect against a terrorist attack on the food and agriculture sector. A more effective way to protect our food supply is to create a more diverse food supply in the country.

B. AUTHORITY OVER MOVEMENT OF FOOD

- **HR 2749: Sec. 133 - Authority to prohibit or restrict the movement of food [B--pp. 118-121]**

Under Section 133, there would be no judicial oversight or any other oversight over the power of an unelected official to single-handedly shut down the movement of food in a State. The current version would give the Secretary the power to issue a quarantine in any State to prohibit the movement of food. Before the order is issued, the Secretary must notify the governor or another public official of the State involved, issue a public announcement and must also publish an announcement of the quarantine in the *Federal Register* [B: Sec. 133(b)(1)(2)--p. 119]; the Secretary must repeat this process every fourteen days thereafter if the quarantine is still in effect [B: Sec. 133(b)(1)(6)--p. 121].

This section of HR 2749 was originally titled, "Quarantine Authority for Foods". If this provision is so benign, why did the bill drafters feel compelled to change the title of the section? The latest version of Section 133 imposes more requirements on the Secretary of HHS; but the bottomline is that the Secretary can still order a quarantine without needing a court order. [Click here to read more from [the original June 2009 review of HR 2749](#)]

C. CRIMINAL & CIVIL PENALTIES

- **HR 2749: Sec. 134 - Criminal penalties [B--pp. 121-122]**
- **HR 2749: Sec. 135 - Civil penalties for violations relating to food [B--pp. 122-123]**

Under HR 2749 anyone who knowingly introduces, or delivers adulterated or misbranded food for introduction into interstate commerce, knowingly adulterates or misbrands food in interstate commerce or knowingly receives adulterated or misbranded food in interstate commerce can receive up to ten (10) years in prison [B: sec. 134(3)--p. 122]. Under current law, anyone violating these provisions can only be sentenced up to one year in prison unless the accused is guilty of intent to defraud or mislead in which case that person can be sentenced up to three years [21 USC 333(a)]. Those knowingly shipping across



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state lines raw milk and raw milk products that don't meet 'standard of identity' regulations would not merit the aggravated penalty under current law if the consumer knew what the product was and accepted it [21 USC 333(a)(2)]; however, under HR 2749 the producer could be imprisoned for up to ten (10) years [B: sec. 134(3)--p. 122].

The civil penalties contained in HR 2749 are much more draconian as well than those under current law. Presently, fines can only be issued against those who introduce, or deliver for introduction, adulterated food into interstate commerce, with violators liable for fines up to \$50,000 in the case of an individual and up to \$250,000 for a corporation [21 USC 333(f)(2)(A)]. Under HR 2749, fines can be levied for any violation of the Prohibited Acts section [21 USC 331] of FFDCA, with the maximum fine for a knowing violation under the section ranging from \$100,000 for an individual to \$7,500,000 for a corporation [B: sec. 135(a)(2)(B)--p. 123]. Each day during which a violation continues is considered to be a separate offense. Violations which have nothing to do with food safety such as being late for registering a food facility or not having the correct paperwork for a HACCP plan could result in substantial fines. Section 135 would give FDA a license to harass and bankrupt small farmers and local producers.

D. HACCP PLANS

- **HR 2749: Sec. 102 - Hazard analysis, risk-based preventive controls, food safety plan, finished product test results from category 1 facilities [B--pp. 25-46]**
- **S 510: Sec. 103 - Hazard analysis and risk-based preventive controls [A--pp.128-140]**

Both HR 2749 and S 510 require a written HACCP (Hazard Analysis Critical Control Points) plan from each registered facility; in HR 2749, the HACCP plan is included as part of a broader food safety plan. The requirements of the HACCP plans under the bills are to:

1. conduct a hazard analysis;
 2. identify and implement effective preventive controls;
 3. monitor preventive controls;
 4. institute corrective actions when-
 - A. monitoring shows that preventative controls have not been properly implemented, and/or
 - B. monitoring and verification show that such controls were ineffective;
 5. conduct verification activities;
 6. maintain records of monitoring, corrective action and verification; and
 7. reanalyze for hazards.
- [B: sec. 102(a)(2)--p. 25; A: sec 103--p. 128]

In looking at whether HACCP will be effective in helping to achieve food safety, we have the benefit of looking at the experience of USDA's Food Safety and Inspection Service (FSIS) in enforcing HACCP in the meat industry. What happened in that industry does not bode well for small food producers or for food safety.

John Munsell, a former owner of a meat processing plant and current manager for the Foundation for Accountability in Regulatory Enforcement, has developed a powerpoint presentation, entitled "HACCP: USDA's Current Style of Meat Inspection" [5]. Munsell found that USDA's implementation of HACCP deregulated the big slaughterhouses and processing plants and enabled big packers to "operate in the relative absence of USDA inspections. They author their own HACCP plans, they self-police, create their own standards in the absence of national standards, and maintain their own command and



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control." Meat inspection consists of paperwork auditing, leaving consumers "unnecessarily imperiled" as a result. In regards to the small plants, Munsell made the following findings:

There was "hyper-regulation" of small plants.

"Paper flow and daily HACCP records, most of which have no connection to safe food, are swamping small plants."

"Small plants have been targeted for higher numbers of enforcement actions."

"Small plants lack staffs to challenge USDA's unethical demands. Easier prey."

Unlike big plants, USDA dictates what must be in their HACCP plans.

Small plant disappeared. Between 2000 and 2005, there was a 21.9% reduction in processing plants and a 19% reduction in slaughter plants, this occurring while more livestock producers were desiring to enter "the niche livestock field (beef, hogs, lambs)."

While large plants had the resources to deal successfully with USDA attempted enforcement actions, the agency could bully small plants.

FDA does not have anywhere near the number of inspectors needed to carry out the inspections of food facilities mandated by HR 2749 and S 510. The agency would have all the incentive to address this shortage of inspectors by implementing USDA-style HACCP. With all the paperwork required by the two bills (especially the food safety plan in section 418A of HR 2749 [B--p. 33]), it would be easy for FDA to enforce the HACCP plan in such a way as to drive significant numbers of small food facilities out of business for reasons that have nothing to do with food safety.

E. FOOD TRACEABILITY

- **HR 2749: Sec. 107 - Traceability of food [B--pp.67-75]**

Section 107 charges the Secretary of HHS to establish a tracing system for food that is located in the U.S. or for import in the U.S. Before issuing any regulation, the Secretary must "identify technologies and methodologies for tracing the distribution history of a food...that enable each person who produces, manufactures, processes, packs, transports or holds a food to -

- "(I) maintain the full pedigree of the origin and previous distribution history of the food;
- "(II) link that history with the subsequent distribution of the food;
- "(III) establish and maintain a system for tracing the food that is interoperable with the systems established and maintained by other such persons; and
- "(IV) use a unique identifier for each facility owned or operated by such person for such purpose."
[B: sec. 107(c)(2)--pp. 67-69]

The regulation is to enable the Secretary to identify each person who grows, produces, manufactures, processes, packs, transports, holds or sells such food in as short a timeframe as practicable but no longer than two (2) business days [B: sec. 107(c)(2)(c)(3)(A)--p. 70].



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In establishing a tracing system, the Secretary may include in the regulations -

- "(i) the establishment and maintenance of lot numbers;
 - "(ii) a standardized format for pedigree information; and
 - "(iii) the use of a common nomenclature for food."
- [B: sec. 107(c)(2)(c)(3)(B)--pp. 70-71]

Section 107(c)(2) provides an exemption from the tracing requirement for food produced on a farm and sold by the owner, operator or agent in charge of such farm directly to a consumer or to a restaurant or grocery store [B: (c)(4)(A)--p. 71]. Farms are still required to keep records for at least six (6) months documenting the restaurants or grocery stores they sold food to [B: (c)(4)(G)--p. 74]. Any farmer selling to another farmer or wholesaler will be subject to the traceability requirement for purposes of that particular transaction [B: (c)(4)(E)--p. 74].

The traceability provision is about further integrating the American food system into the global market. Section 206 of the bill covers the unique identification number required for food facilities, importers and custom brokers. Under Section 206, the Secretary of HHS may in consultation with the Commissioner responsible for Customs and Border Protection specify the unique identifier to be used. The development of any guidelines for the identifier must "take into account the utilization of existing unique identification schemes and compatibility with customs automated systems, such as integration with the Automated Commercial Environment (ACE) and the International Trade Data System (ITDS), and any successor systems" [B: Sec. 206, Sec. 1011(c)--p. 142].

The purpose of ITDS is to meet the need for information of the federal government agencies involved in international trade, the business community and the general public; ACE was developed by federal agencies working with U.S. Customs and Border Protection (CBP). ACE is "designed to enhance national border security and expedite lawful trade" by allowing for "unprecedented integration of information and communication between CBP, the trade community, and other participating government agencies" [6]. The likelihood is that even those food facilities engaged in only domestic commerce would have to obtain a unique identification number feeding into an international database.

Instead of further integrating into the global food system, the U.S. should promote a policy of self-sufficiency in food production. Right before NAFTA was ratified in 1992, there were 1.1 million imported food line items presented at U.S. ports of entry; in 2009, there were 9.5 million [7--pp. 1-2]. Only 1 to 2 percent of this food receives any inspection [7--p. 2]. There are currently 226,000 foreign food facilities [7--p. 1]; less than 1% of them are currently being inspected. Food safety and food security are impaired by failing to reverse the trend of increased food imports.

FDA has shown that it does not work to protect the health of the American people but rather to protect the profits of the biotechnology and pharmaceutical industries, promoters of genetically modified foods and concentrated animal feeding operations (CAFOs)-the antithesis of food safety.

Beyond the issue of globalization, there remains the question of whether the traceability system will be workable at all and whether it will be affordable. How far will the regulations extend the traceback requirement to "maintain the full pedigree of the origin and previous distribution history of the food"? Will it go back to the harvested crop (or even seed) from which the food is produced? How will traceback be done on multi-ingredient foods? Will part of determining the full pedigree require tracing the inputs used in producing the food? How large a database will be needed to store this information? What will its cost be? Will FDA selectively enforce the traceability requirement against small producers? Clearly, the agency will not have the resources to check the food safety plan



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mandated by HR 2749 (which requires a description of the food facility's procedures for tracing the distribution history of food) of hundreds of thousands of registered facilities.

F. SAFETY STANDARDS FOR PRODUCE

- **HR 2749: Sec. 104 - Safety standards for produce and certain other raw agricultural commodities [B--pp. 48-53]**
- **S 510: Sec. 105 - Standards for produce safety [A--pp. 140-147]**

Both bills provide that the Secretary of HHS in coordination with the Secretary of Agriculture establish by regulation "science-based" safety standards for types of produce that the Secretary of HHS has determined are reasonably necessary to minimize the risk of serious adverse health consequences or death [A: Sec. 105(a), sec. 419(a)(1)--p. 141; B: Sec. 104(b), sec. 419A(a)--p. 49].

The regulations will likely include standards with respect to growing, harvesting, processing, packing, sorting, transporting and storing produce which could include standards concerning manure use, soil amendments, water quality, employee hygiene, sanitation and animal control and temperature controls. Passage into law of a national safety standard for produce would represent a significant increase in federal power to regulate intrastate commerce [A: (3)(B)--p. 142; B: (b)(3)--p. 50].

Those selling produce at roadside stands and farmers' markets that are subject to national safety standards would be under FDA jurisdiction. Any farm producing and selling produce subject to national standards would have to allow federal inspectors "to have access to and copy all records relating to an article of food (e.g., produce subject to the national standard) produced, manufactured, processed, packed or held on such farm" [B: Sec. 106(a), (a)(3)(B)--p. 62]. This would include someone selling produce grown just in their garden at a roadside stand or a farmers' market. The inspector would be able to review the records without cause.

Experiences with Marketing Agreements

In addition to the issue of increasing the FDA's jurisdiction over intrastate commerce, there remains the question of whether the national standards for produce would be too costly for small, diversified growers to be able to comply with. After the 2006 foodborne illness outbreak caused by E. coli O157:H7 traced to bagged spinach from California, leafy green marketing agreements were implemented by the state governments of California and Arizona and also by private industry groups. Under the state marketing agreements, packers, processors, shippers and marketers were required to certify that their leafy green products were produced and handled according to agricultural practices specified in the agreements. Under the marketing agreements with industry groups representing private buyers, the buyers would not purchase products from leafy green growers unless the growers followed the good agricultural practices (GAPs) contained in the agreements.

In the words of Judith Redmond, President of Community Alliance with Family Farms, "the history of the Marketing Agreement programs is littered with lawsuits claiming that they don't represent the diverse needs of the whole industry. These programs are usually created on a vote proportional to market share, and in the highly concentrated produce industry, they can result in rules inappropriate to smaller and mid-scale business" [8]. This same dynamic will be present when FDA issues regulations establishing national safety standards for various types of produce. The Western Growers Association (WGA), whose members supply about one-half of the nation's fresh produce [9--p. 309], will have the clout in the rule-making process. WGA was the private organization most responsible for hammering out the terms of the



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California and Arizona leafy green marketing agreements with the respective state governments. At least the marketing agreements were voluntary for any grower who chose not to participate in the certification process; the national safety standards for produce will be mandatory.

Based on the recent history of standards imposed on growers subject to the California and private industry marketing agreements, national standards could have little or no effect on the prevention of crop contamination while at the same time contributing to environmental degradation. CAFOs [concentrated/confined animal feeding operations] are the biggest threat to produce growers' crops but the marketing agreements have focused on other potential threats which pose much less risk to food safety. Will Fantle of The Cornucopia Institute has stated that, in most cases, the root cause of the food safety problem is "manure from confined animal feeding operations that is tainted with disease causing pathogenic bacteria" [10].

Survey Results Show Conflict with GAPS

A possible preview of what growers could be facing under national standards can be found in responses to a 2008 survey of 600 irrigated-raw-crop growers conducted by the Resource Conservation District of Monterey County, California [11]. According to the survey, 8% of the respondents reported "they had their crops rejected based on the presence of practices to improve water quality or wildlife habitat on the farm" [11]. As reported by *American Vegetable Grower* [11], some of the reasons given for rejection were

- crop rejected because of deer intrusion
- "crop rejected due to potential frog habitat."
- "harvest stopped due to presence of frogs and tadpoles in creek."
- "crops planted for processor near trees needed a buffer of 100 to 150 feet."
- one grower "lost \$17,500 worth of crop because a food safety audit found deer tracks near his field."

The survey found that 85% of respondents had adopted at least one conservation measure to protect the environment; unfortunately, 32% of those respondents complied with the requests from produce industry buyers to remove some of these practices for "food safety reasons" [12]. One GAP (good agricultural practices) measure that Western Growers Association supported was a requirement that growers either eliminate wildlife around their farms or build fences around their fields to keep all wildlife out; another WGA-backed measure was a requirement for growers to non-crop riparian vegetation around the perimeter of their fields, this even though the vegetation acted as a filter to protect nearby waterways [12].

GAPs that corporate buyers have mandated for the growers selling to them have not been easy on sustainable farms either. For example, produce standards issued by the Food Safety Leadership Council, a group consisting of buyers like Wal-Mart Stores Inc., McDonald's Corporation, and Walt Disney World Company included a requirement to restrict access to all farm fields using "cameras, employee identification, fences with locked gates, security guards, signs, etc." [8]. Chuck Benbrook, chief scientist at the Organic Center in Oregon, summarized the outlook the corporate buyers have: "A lot of these food safety management people who are studying the issue aren't looking at the whole picture. Many of them are lab technicians who want to prevent contamination by sterilizing everything" [12]. FDA will have the same outlook when it issues and enforces regulations establishing national safety standards for produce.



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CONCLUSION

Rather than employing food defense plans and the Department of Homeland Security to prevent bioterrorism, the country would be better off decentralizing food production and distribution."

S.510 and HR 2749 represent landmark legislation that will significantly increase the federal government's power to regulate intrastate commerce while hurting this country's ability to produce safe food and to become self-sufficient in food production. Both bills contain numerous provisions imposing a one-size-fits-all regulatory scheme that will make it difficult for small farms and local producers to comply with the new laws.

The resources given FDA to carry out the inspection mandate of the bill will not be sufficient for the agency to make all the required inspections. Given the experience in the meat industry, it is likely FDA will gravitate towards regulating those offering the least resistance to the agency's enforcement of the law-small producers. Moreover, the number of inspections required under the bill will lead FDA to hire state officials to carry them out, increasing federal control over state agencies regulating food to a much greater degree than currently exists.

The legislation will disproportionately impact local food producers, the sector of our food system producing the safest most nutritious food, thus benefiting food imports and industrial processors (those sectors of the food system that have been most responsible for the problems with food safety). Passage of the legislation will increase our dependence on imports when the government should be encouraging the buildup of domestic food production capacity, particularly at the local level. Instead, the government will be using our tax dollars to help foreign government improve the safety of their own food systems [S510, section 307]. FDA has indicated that it will be using most of its resources to regulate domestic producers, leaving the regulation of imported food primarily up to private third-party certifiers and foreign governments. Problems with traceability are not solved by throwing domestic food producers into an international database but rather by increasing the market share of local food producers; state and local regulation is more than sufficient to provide accurate traceback of local food.

Rather than employing food defense plans and the Department of Homeland Security to prevent bioterrorism, the country would be better off decentralizing food production and distribution. Fighting bioterrorism has been a lucrative vehicle for industry and academia to obtain government contracts; diversification of the food system would be cheaper and more effective.

Passage of the food safety legislation will reduce judicial restraints on FDA while at the same time giving the agency previously unheard of powers. Does FDA's track record merit the agency more power in regulating our food? FDA has shown that it does not work to protect the health of the American people but rather to protect the profits of the biotechnology and pharmaceutical industries, promoters of genetically modified foods and concentrated animal feeding operations (CAFOs)-the antithesis of food safety. What has FDA done to help small farms and local producers? [Click here to read: [Food Safety - Can FDA Be Trusted?](#)]

Passage of food safety legislation will make it more difficult in the future to obtain the food of our choice from the source of our choice. Call your Senators and ask them to vote against S 510.

Contact information for your [U.S. Senators](#) can be found at <http://www.opencongress.org/people/senators>

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Farm-to-Consumer
Legal Defense Fund

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REFERENCES

Legislation

A. **S 510:** FDA Food Safety Modernization Act (S510-RS) as reported in the Senate by Sen. Harkin with an amendment "in the nature of a substitute" and placed on Senate Legislative Calendar as No. 247. Introduced by Sen. Durbin on March 3, 2009. Obtained 22 April 2010 at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s510rs.txt.pdf

Status of the bill is posted at <http://www.thomas.gov/cgi-bin/bdquery/z?d111:S.0510>:

B. **HR 2749:** Food Safety Enhancement Act of 2009 (HR 2749-RFS) as engrossed and assigned to the Senate Committee on Health, Education, Labor and Pensions (HELP) on August 3, 2009 after passing in the House of Representatives on July 31, 2009. Formally introduced by Rep. Dingell on June 8, 2009. Obtained 22 April 2010 at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2749rfs.txt.pdf

Status of the bill is posted at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.2749>:

Referenced Sources

1. **DHS.** "The Department of Homeland Security's Role in Food Defense and Critical Infrastructure Protection" (OIG-07-33), February 2007. U.S. Department of Homeland Security, Office of Inspector General. Obtained 28 Apr 2010 online at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-33_Feb07.pdf

Link to report also posted at http://www.dhs.gov/xoig/rpts/gc_1193965173651.shtm

2. **Acheson, David.** "Food Defense, CARVER+Shock". Center for Food Safety and Applied Nutrition (CFSAN) Training Video captioned in English, French, Chinese, Japanese, Korean and Spanish (48:00 minutes; circa August 2007). Posted May 14, 2009. Accessed 28 Apr 2010 at <http://www.fda.gov/Food/InternationalActivities/ucm151737.htm>

Links to view (captioned in various languages) or download video for offline use (62.8 MB)
<http://www.fda.gov/Food/InternationalActivities/ucm172583.htm>

3. **Mead, Paul S., et al.** "Food-Related Illness and Death in the United States". *Emerging Infectious Diseases*, vol. 5, 1999, pp. 607-25. Synopses, published monthly by the Centers for Disease Control and Prevention (CDC). Obtained online 2 Feb. 2008 at <http://www.cdc.gov/ncidod/EID/vol5no5/pdf/mead.pdf>

Published online at <http://www.cdc.gov/ncidod/EID/vol5no5/mead.htm>

4. **GAO.** "Much Is Being Done to Protect Agriculture from a Terrorist Attack but Important Challenges Remain" (GAO-05-214), March 2005. Government Accountability Office (GAO) report to Congressional Requesters. Obtained 28 Apr 2010 online at <http://www.gao.gov/new.items/d05214.pdf>

Links to the "Highlights" and "Recommendations" are posted at <http://www.gao.gov/products/GAO-05-214>

5. **Munsell, John.** "HACCP: USDA's Current Style of Meat Inspection". PowerPoint presentation, January 2010. Received 25 Jan 2010 by email "with absolutely no restrictions on its dissemination".

View online as a PDF file (.pdf) or download as a PowerPoint file (.ppt)



Food Safety: The Worst of Both Bills (HR 2749 & S 510)

by Pete Kennedy, Esq. - May 6, 2010

6. **Customs and Border Protection (CBP).** "CBP Completes First Regional Installation of Nationwide Trade Processing System in Western Washington". News Release June 15, 2005. Obtained 6 May 2010 at link [http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2005_press_releases/062005/06152005_2.xml]

Also appears as a footnote on page 9, referencing
<http://www.cbp.gov/xp/cgov/toolbox/about/modernization> -

Rodysill, Jade. "High Performance: Ensuring global freight security". *Supply Chain Management Viewpoint*. Published by Accenture. Accessed 5 May 2010 at <http://www.accenture.com/NR/rdonlyres/CF6BD051-198D-4F50-B7FC-8039ABAC5A46/0/FreightSecurityViewpointFINAL.pdf>

7. **Corbo, Tony.** "Remarks for the FSRC Workshops: 'Assuring Safety of Imported Food'". February 1, 2010. Posted by the Food Safety Research Consortium (FSRC) for the 2010 conference: "Assuring Safety of Imported Food: Public and Private Roles in a Risk-Based System". Obtained 2 May 2010 online at http://www.thefsrc.org/importsafety/FSRC-import-S1-06_Corbo.pdf

To view the agenda from the conference, click here, as accessed 2 May 2010
 at <http://www.thefsrc.org/importsafety.htm>

8. **Redmond, Judith.** "Food Safety". *American Vegetable Grower*, February 2008. Accessed 16 May 2009 at <http://www.growingproduce.com/americanvegetablegrower/?storyid=380#>

Also posted at <http://www.growingproduce.com/production/foodsafety/?storyid=380>

9. **DeLind, Laura B. and Philip H. Howard.** "Safe at any scale? Food scares, food regulation, and scaled alternatives". *Journal of Agriculture and Human Values* (2008), vol. 25: pp. 301-317.

Available through SpringerLink for download purchase
 at <http://www.springerlink.com/content/4422g52r15066362/>

10. **Fantle, Will** quoted in "National Leafy Greens Marketing Agreement Could Harm Local, Family-scale and Organic Growers". *Cornucopia News*, September 22, 2009. The Cornucopia Institute. Accessed 5 May 2010 at <http://www.cornucopia.org/2009/09/national-leafy-greens-marketing-agreement-could-harm-local-family-scale-and-organic-growers/>

11. **Eddy, David.** "Minimizing Wildlife". *American Vegetable Grower*, July 2008. Accessed 16 May 2009 at <http://www.growingproduce.com/americanvegetablegrower/?storyid=297>

Also posted at <http://www.growingproduce.com/production/foodsafety/?storyid=297>

12. **Lieberman, Lisa.** "Spotlight on Food Safety". *American Vegetable Grower*, March 2008. Accessed 16 May 2009 at <http://www.growingproduce.com/americanvegetablegrower/?storyid=419#>

Also posted at <http://www.growingproduce.com/production/foodsafety/?storyid=419>