2011

The Food Safety Modernization Act: Keeping Dinner Safe and Farmers in the Fields

Sarah K. Baker
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/kjeanrl

Part of the Agriculture Law Commons, and the Food and Drug Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/kjeanrl/vol3/iss2/5

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Journal of Equine, Agriculture, & Natural Resources Law by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
THE FOOD SAFETY MODERNIZATION ACT: KEEPING DINNER SAFE AND FARMERS IN THE FIELDS

SARAH K. BAKER*

I. INTRODUCTION: “WHY LOCALLY GROWN?”

People worldwide are rediscovering the benefits of buying local food. It is fresher than anything in the supermarket and that means it is tastier and more nutritious. It is also good for your local economy—buying directly from family farmers helps them stay in business.

-LocalHarvest.org

“Local food” does not have a set definition. It is a phrase defined by the organizations or individuals that decide to use it. However, a common and broad definition of “local food” would be that which has traveled less than 1,500 miles between where it originates and where it reaches the end consumer. There are almost two million farms across the United States, and about eighty percent of those are small farms in local communities, a large percentage of which are family-owned. Many of these farmers sell their crops directly to the public through farmers’ markets, road-side produce stands, Community Supported Agriculture programs (CSA), and through other direct marketing. CSA programs have become a popular way for consumers to buy seasonal produce directly from farmers. In these programs, the farmer will offer a certain number of “shares” to the public, typically consisting of a box of seasonal produce. Consumers then purchase a membership or subscription for a share, and in


3 Id.

4 Id. at 11.


6 Id.


8 Id.
return, receive a box of seasonal produce each week throughout the farming season.9

There are many advantages to buying directly from farmers. Consumers are financially supporting local farmers and often develop a direct and personal relationship with those actually growing the food that they eat.10 This establishes a sense of community and allows for the consumption of ultra-fresh and healthy food.11 At a local farmers’ market or road-side produce stand, consumers can also see for themselves exactly what is available and pick the precise food that they want.

The local food movement and popularity of organic produce in the United States has seen an upsurge in interest over the past several years and in that time has become a mainstream movement.12 National grocery chains have organic sections in their stores, and specialty groceries and restaurants exclusively selling local food are opening across the country. Increasingly, consumers desire to connect with the source of the food that they prepare and provide for their families. With a sense of environmental responsibility, pride, and health conscious behavior, people all over the United States are looking to their own communities for locally produced food.13

However, as this interest continues to gain popularity, certain changes are predictably taking place—including increased oversight and regulation by the federal government.14 With President Obama’s signing of the Food Safety Modernization Act (“FSMA”) in January, 2011, food safety in the United States will inevitably be modified.15 Nevertheless, new regulations and amended food laws should not come at the expense of local farming, the benefits of which are too important to consumers, communities, and the nation to sacrifice.

This Note examines the history of food law, its purpose in today’s society, proposed solutions to modernize the complicated and fractured system, and recent legislation intended to put solutions into practice and improve food safety in the United States. Section II outlines the basic functions of the government agencies currently regulating the nation’s food supply. Section III addresses the dangers of food-borne illness and the commonality of outbreaks in the United States under the pre-2011 system. Section IV introduces the Food Safety Modernization Act, intended to

9 Id.
10 Id.
11 Id.
12 Braaten & Coit, supra note 2, at 10.
13 Id.
14 Id.
modernize food law, but also initiating a nationwide outrage against sweeping regulations, eventually resulting in an exemption from the law for local produce. Finally, Section V addresses the controversy over funding the $1.4 billion necessary for implementation of the FMSA, as well as the anticipated impact the law will actually have on the nation's food safety.  

II. FOOD LAW: A FRAGMENTED SYSTEM

In order to assure continuing improvements in food safety, Congress must create a unified, independent food safety agency and enact improved statutory mandates. Until that time, consumer protection from unsafe food will continue to depend on the more effective functioning of a disjointed and fragmented food system.

- Caroline Smith DeWaal, Director of Food Safety for the Center for Science in the Public Interest, Washington D.C.  

Food safety in this country is primarily implemented by two agencies—the Food and Drug Administration (FDA) and United States Department of Agriculture (USDA). Each agency has its statutory origins in 1906, similar legal definitions of safety-related terminology, and shared safety standards for food additives and contaminants, but that is where the similarities end. Although primarily delegated to these two agencies, responsibility for food safety is also widely dispersed among federal, state, and local organizations, the roles of each vary greatly depending on their statutory authority and available resources. As of 2009, at least 15 federal agencies, operating under 30 foundational statutes, form the national food safety system at the federal level. This fragmentation undercuts both the federal government’s ability to effectively operate an efficient food safety program and its accountability for the nation’s food safety.

16 Id.
19 Id.
20 Id. at 18.
22 Taylor, supra note 20 at 18.
A. The FDA

The FDA is part of the federal government’s Department of Health and Human Services (HHS).\(^{23}\) The FDA is responsible for all categories of food that are not meat or poultry products (which are regulated by the USDA), and includes regulatory power over produce, seafood, dairy, nuts, grains, juice and bottled water.\(^{24}\) Under the FDA system, food companies have a legal duty to produce foods that are not “adulterated,” as defined by the Federal Food, Drug and Cosmetic Act of 1938.\(^{25}\) FDA jurisdiction includes over 53,000 establishments that produce, process, or store food, and involves 250 FDA food inspectors that conduct about 5,000 establishment inspections each year.\(^{26}\)

The principle weaknesses of the FDA system are the infrequency of its inspections and largely reactive approach to situations that have often already harmed large numbers of consumers.\(^{27}\) Because a year or more can pass between inspections, the FDA relies heavily on food companies to not only produce safe products, but also to take that responsibility seriously.\(^{28}\) Food manufacturers are legally and economically motivated to ensure their products are safe, so the system has generally yielded good food safety results; however, more inspections would undoubtedly create an added incentive for companies to meet FDA standards.\(^{29}\) The great number of food establishments that fall under the FDA’s jurisdiction has also made it necessary for the FDA to turn over some of its regulatory duties to state and local governments.\(^{30}\) For example, the states have completely assumed control of inspecting local restaurants.\(^{31}\) While necessary under these conditions, this split of authority fragments and complicates the system.

FDA enforcement has also been largely reactionary, with typical action involving the removal of adulterated food from the market through voluntary, publicized recalls by the responsible manufacturer, or by FDA-initiated court action.\(^{32}\) While responding well to problems after they occur, the system as originally implemented lacks strategies and mechanisms to anticipate and prevent major food safety problems.\(^{33}\)

\(^{23}\) Chyau, supra note 23 at 317.
\(^{24}\) Id.
\(^{25}\) Taylor, supra note 20, at 15.
\(^{26}\) Taylor, supra note 20, at 15.
\(^{27}\) Id. at 16.
\(^{28}\) Id.
\(^{29}\) Id.
\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Taylor, supra note 16, at 16.
B. The USDA

In the USDA system, and under the Federal Meat Inspection Act and the Poultry Products Act, meat and poultry processors also have a legal duty to produce food that is not “adulterated.” However, the USDA traditionally has taken a much more active role than the FDA in enforcing its duties. Because the USDA is under statutory mandate to “continuously” inspect meat and poultry plants, USDA inspectors physically examine every carcass passing through slaughter houses, and inspect the plants that process meat and poultry on a daily basis. Today, approximately 7,400 USDA inspectors carry out the daily inspection of roughly 6,200 such plants throughout the United States.

C. Problems in a Fragmented System

Under the United States’ disjointed and fragmented food safety system, it is easy for safety problems to slip through the cracks, particularly with the infrequent and inefficient inspections by the FDA. A classic example of the illogical overlap under the current structure is that the same food manufacturing plant may receive two entirely different inspections. For instance, a plant that produces both pepperoni and cheese frozen pizzas will have daily visits from a USDA inspector to check plant conditions as workers slice and apply pepperoni to the pepperoni pizzas, while the cheese pizza line will be subject to FDA inspection occurring as infrequently as once every ten years. “The difference in hazards between the processing of cheese and pepperoni pizza is not enough to justify the vast disparity in government inspections.”

In order to improve food safety, Congress apparently felt pressured to modernize the current system and create a unified, independent food safety agency, as well as increase FDA regulation and inspections.

---

34 See id.
35 Chyau, supra note 20, at 319.
36 Id.
37 Id.
39 Id.
40 Id.
The United States has the safest food supply in the world. . . [However,] more than 300,000 people are hospitalized and about 5,000 deaths are attributable to food-borne diseases each year. Obviously those numbers are staggering.

- Bala Swaminathan, food safety expert and former chief of the food-borne disease lab at the Centers for Disease Control and Prevention.  

A. Not So Safe Numbers

In August and September of 2006, 204 people were sickened and at least three died in twenty-six states due to an E. coli outbreak traced back to fresh, bagged spinach. Later that same fall, 183 people became ill in twenty-one states when restaurants across the country served their patrons tomatoes contaminated with salmonella, and 152 fast food customers were also sickened by contaminated shredded lettuce. Unfortunately, 2006 was not an abnormal year for food safety in this country. Since the late 1990s, there has been a substantial increase in the number of produce-related outbreaks reported across the United States, as produce has surpassed all other food categories as a source of food-borne illness. In 2010 alone, recalls on lettuce, peppers, sprouts, and greens made headlines. However, it was one of the largest food contamination scares in America’s history that truly sparked a public desire for change.

---

43 Id. at 929.
B. Peanut Products Catastrophe of 2009

In January 2009, nearly 700 people were sickened and nine died from a salmonella outbreak linked to peanut butter manufactured by the Peanut Corporation of America (PCA). The contaminated peanut butter spread was used in products such as peanut butter crackers, as well as other snacks made by large companies such as Kellogg and King Nut. On February 13, 2009, PCA filed for Chapter 7 bankruptcy. The recall was massive, encompassing all food products of PCA since 2005 and also those products manufactured by every company using PCA-created peanut butter since 2005.

Avoiding this catastrophe should have been easy. FDA officials relied on state inspectors from the Georgia Department of Agriculture to inspect the Blakely, Georgia plant. In this plant, before any known contamination, state inspectors found gaps in warehouse doors large enough for rodents to enter, mold on the ceiling and walls, and rust that could flake into food. Yet Oscar S. Garrison, Georgia’s assistant agriculture commissioner, described the violations as “minor.” However, a later inspection by the FDA, in response to the outbreak, concluded that the PCA plant did not adequately separate raw products from the finished products, and therefore should not have been allowed to make peanut butter at all. According to FDA rules, finished products should be stored far from raw materials in order to reduce the chances of contaminating the finished food. Yet, nothing was done, nine people died from eating seemingly harmless packaged food, and ultimately, the system failed.

C. President Obama Wants Change

In response to the massive peanut products crisis and recall and the increasing frequency of produce related outbreaks across the country, President Obama made it clear that he was ready to initiate change in U.S. food safety regulation. The President addressed the nation over the radio on March 14, 2009, disclosing that the FDA inspects only five percent of the approximately 150,000 food processing and manufacturing facilities in

---

47 Williamson, supra note 41.
48 Id.
49 Id.
50 Id.
51 See Harris, supra note 46.
52 Id.
53 Id.
54 Id.
55 Id.
the United States each year. His first step was to create the Food Safety Working Group (FSWG), chaired by the secretaries of the Department of Agriculture and Health and Human Services with representatives from other agencies including the Centers for Disease Control Prevention (CDC), the Environmental Protection Agency (EPA), and the Department of Homeland Security. The FSWG’s purpose is to analyze food regulation and pinpoint the areas needing modernization by advising the President on “how to upgrade U.S. food safety laws for the 21st century, foster coordination of food safety efforts throughout the government, and ensure laws are being adequately enforced to keep American people safe from food-borne illness.” Considering lawmakers introduced the last key food regulation in 1906, the group had plenty of areas to review.

As of the spring of 2010, the FSWG proposed “a new, public health-focused approach to food safety based on three core principles: (1) prioritizing prevention; (2) strengthening surveillance and enforcement; and (3) improving response and recovery.” Simultaneously, as encouraged by President Obama, Congress began discussion regarding ways to modify and improve the food safety system. In 2009, Congress introduced more than ten pieces of legislation relating to improving the effectiveness and organization of food safety responsibilities at the national level. One of those bills was the Food Safety Modernization Act, introduced to the House of Representatives by Democratic Representative Rosa DeLauro from Connecticut, on February 4, 2009. Change was in sight.

**IV. THE FOOD SAFETY MODERNIZATION ACT: A SOLUTION AT LAST?**

*The notion that we are destroying backyard farms is absurd. It’s ludicrous.*
- Representative Rosa DeLauro.

**A. The Legislation**

On Tuesday, January 4, 2011, President Obama signed into law legislation that represents the first major overhaul of the nation’s food

---

56 Williamson, supra note 41.
57 Braaten & Coit, supra note 2, at 19.
58 Id.
59 Williamson, supra note 41.
60 Braaten & Coit, supra note 2, at 19.
61 Id. at 19-20
62 Id.
63 Williamson, supra note 41.
The food safety system in over 70 years—The Food Safety Modernization Act. This law makes major changes in areas of surveillance, specific targets, enforcement, inspections, record checks, and provides some controversial exemptions.

The FDA's original focus on responding to adulterated food once sickness has already been discovered shifts to one of pre-illness preventative measures. New surveillance requirements force farmers to address steps in production where contamination is likely to occur, and requires food processors to write and implement approved food-safety plans for their facilities. The FSMA also modifies where the majority of the FDA directs its attention. Originally treating all foods the same despite the fact that some are more likely to become contaminated than others, the FDA can now develop regulations that focus exclusively on the highest risk foods, including produce and imports.

Enforcement strategy was also overhauled. Before, the FDA could not force a food manufacturer to recall contaminated food; instead, the agency was only able to passively seek a voluntary recall by the responsible company. Under the new legislation, however, the FDA itself can, when necessary, order a mandatory recall of tainted food. Inspections by the FDA will also be greatly increased through FSMA. According to a 2010 report from the inspector general of Health and Human services, “more than half of food facilities have gone five or more years without a federal inspection.” In order to increase inspections, the FSMA authorizes the FDA to hire 2,500 more field safety inspectors and food safety experts by 2014. This authorization to the FDA will not only substantially increase inspections, but will also place more regulatory power in the hands of the federal government. Beginning in 2015, those facilities considered “riskiest” will be inspected every three years. In addition, inspections will also be upgraded, as the FDA will have access to the facilities’ mandatory food safety plans, records, and test results linked to the plans, as opposed to only conducting “spot checks” of what was happening at a production facility on any given day.

---

66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id., supra note 65.
73 Id.
74 Id.
75 Id.
76 Id.
Much of the nation’s food industry has supported the new changes. In a statement signed by twenty such organizations, including the National Restaurant Association and Grocery Manufacturers Association, it was agreed that the new rules would “raise the bar for the entire food industry.” The legislation is not without criticism, however. The greatest source of controversy appears to regard the FDA’s power to set nationwide standards for producing and harvesting fresh produce, and its exemption for small food production facilities and local farms. Under the original statute, large industrial farms and small-scale farmers and producers were treated the same. With the passage of the FSMA, however, farmers who sell less than $500,000 a year to direct consumers are exempt from the new regulations. While on the surface the exemption may seem reasonable, local small-scale farmers all over the country disagree, having been critical of the entire legislation since its introduction to Congress by Representative DeLauro in 2009, specifically those parts with a potential impact on small scale, local farming.

B. Internet Outrage

Shortly after DeLauro introduced the bill, at the time H.R. 875, angry phone calls and letters, demanding she stop her “assault on backyard organic farms,” bombarded DeLauro’s offices both in Washington, D.C. and Connecticut. Critics claimed that the act would “effectively criminalize organic gardening, . . . outlaw seed banking, and [would] serve as part of a concerted [corporate agriculture] conspiracy” to drive all other produce sources out of the market.

The “anti-875 movement” placed great emphasis on the bill’s definition of “food production facility” as “any farm, ranch, orchard, vineyard, agriculture facility, or confined animal feeding operation.” As originally presented, the bill made each of these “food production facilities” subject to safety inspections and regulations, leading to fears that federal inspectors would soon be stomping through gardens, sniffing through produce at farmer’s markets, and outlawing unregulated roadside produce stands. Other protesters pointed out specific sections of the bill such as

---

77 Weise, supra note 65.
78 Id.
79 Id.
80 Id.
82 Grim, supra note 64.
83 Doherty, supra note 81.
84 Grim, supra note 64.
85 Id.
Section 203(b) which would seem to apply stronger regulation even upon small farms:

The Administrator shall, upon the basis of best available public health, scientific, and technological data, promulgate regulations to ensure that food establishments carry out their responsibilities under the food safety law...the Administrator shall promulgate regulations that require all food establishments...(1) to adopt preventative process controls that

(A) Reflect the standards and procedures recognized by relevant authoritative bodies;
(B) Are adequate to protect the public health
(C) Meet relevant regulatory food and safety standards;
(D) Limit the presence and growth of contaminants in food prepared in a food establishment using the best reasonably available techniques and technologies.86

Protestors also singled out Section 206(c)(3), “which says that regulations will ‘include, with respect to growing, harvesting, sorting, and storage operations, minimum standards related to fertilizer use, nutrients, hygiene, packaging, temperature controls, animal encroachment, and water.’”87 These protestors worried about what would happen if government regulators decide that certain organic practices did not meet “regulatory food and safety standards,” or use the “best reasonably available techniques” that were “adequate to protect public health?”88 In short, the anti-875 community was wary about trusting their local food practices to government regulators, and decided to do something about it.89

Critics not only appealed directly to DeLauro, but thousands also took to the Internet. By mid-April 2009, there were over 344 Technorati hits, yet the bill received less than 15 hits on the LexisNexis newspaper database, none of which came from major national newspapers.90 The bill became an internet phenomenon, and “the subject of alarmist emails warning gardeners that Congress [was] plotting against their plots, that the vote [was] coming any day, and [that gardeners] must take action!”91 The outraged citizens, many farmers themselves, varied widely across the political spectrum.92 One libertarian blogger at CampaignforLiberty.com noted, “Didn’t Stalin nationalize farming methods that enabled his administration to gain control over the food supply? Didn’t Stalin use food

86 Doherty, supra note 81.
87 Id.
88 Id.
89 Id.
90 Id.
91 Grim, supra note 64.
92 Id.
to control the people?" Concern, accusations, and anger popped up all over the internet. While several bloggers posted factual information citing specific sections of the bill, most exaggerated concerns, making statements based on no authority at all. As described in April 2009 by the Huffington Post, the closest thing to a "prestige venue" that had given the bill much attention, "there is more material—some ridiculous, some sensible, some questionable—on the Internet about this one bill than any citizen could possibly care about. While the level of factual and analytical rigor of the material varies widely, all of it is available and searchable." In short, the bill became "a lively representation of what 'journalism,'" or at least widespread fear, can do to democracy, even without national media attention.

As the bill gained attention and bloggers increased awareness on the internet, DeLauro publically repeated that she had no plans to collectivize agriculture in the United States. Her official homepage directed people to get the facts about the FSMA, and she told the Huffington Post that the "intent of the bill is to focus on the large, industrial processes such as the peanut processing plant in Georgia that was responsible for the salmonella outbreak that killed nine people." She further added that "[t]his notion that we’re destroying backyard farms is absurd. It’s ludicrous. I chair the agriculture subcommittee of appropriations. Why would I be putting farmers out of business?"

The online debate over the bill, however, did leave an impact. As the bill reached the Senate floor on November 17, 2010, senators proposed amendments in order to clarify exemptions for small farms and locally grown produce from all encompassing rules and regulations, hoping to appease the majority of opponents.

C. Amendments

As the FSMA, at the time S. 510, reached the Senate floor for debate, the overarching consensus was that, while the bill took necessary and important steps to improve food safety and FDA regulation, it was not appropriate for small farms and processors that sell directly to consumers, through restaurants, community supported agriculture groups, small

---

93 Id.
94 See id.; See Doherty, supra note 81.
95 Doherty, supra note 81.
96 Id.
97 Grim, supra note 64.
98 Id.
99 Id.
groceries, and wholesalers at produce stands and farmers markets across the country.\textsuperscript{101} Groups such as the National Sustainable Agriculture Coalition (NSAC) encouraged the public to write their senators, asking them to vote for the Manager's Amendment and the Tester-Hagan Amendment to the FSMA.\textsuperscript{102} The NSAC stated that "it is critical that as we ramp up food safety protections we don't inadvertently do harm to family farm value . . . by imposing expensive, one-size-fits-all rules."\textsuperscript{103}

The Manager's Amendment to the legislation incorporates a wide variety of changes, all approved by both the Democratic and Republican sponsors of the bill.\textsuperscript{104} The changes were mostly directed at farmers, and included a reduction of paperwork and excess regulation required under the preventative control plan and produce standards sections of the bill, as well as not requiring small farmers to meet extensive recordkeeping requirements if they sell food directly to consumers.\textsuperscript{105} Most importantly, the Tester-Hagan Amendment clarifies the existing law, and therefore addresses the concerns of most critics. This amendment also provides size-appropriate and less costly compliance alternatives for farmers who:

- Directly market more than 50% of their products directly to consumers, stores or restaurants, and
- Have gross sales (direct and non-direct combined) of less than $500,000, and
- Sell to consumers, stores, or restaurants that are in-state or within 275 miles.\textsuperscript{106}

Farmers who qualify must provide documentation that the farm complies with state regulations, and "prominently and conspicuously" displays the name and address of the farm or facility on its label.\textsuperscript{107} The amendment also provides alternatives to the produce standards for farms that meet the requirements listed above and requires that the farms display their names and addresses on all produce labels.\textsuperscript{108} Together, these amendments to the FSMA seek to exempt, and thereby protect small farms and locally grown produce from excessive and unnecessary regulation. Nevertheless, there are still many opponents to the bill, even after the President signed it into law.
We still have a food supply that's 99.99 percent safe. . . . No one wants anybody to get sick, and we should always strive to make sure food is safe. But the case for a $1.4 billion expenditure isn't there.

- Republican Representative Jack Kingston of Georgia.¹⁰⁹

On July 7, 2010, President Obama issued a two-paragraph statement to the Senate signaling the White House’s support for the FSMA.¹¹⁰ The statement said that the bill “addresses longstanding challenges in the food safety and defense system by promoting a prevention-oriented approach to the safety of our food supply and provides the Federal Government with the appropriate tools to accomplish its core food safety goals.”¹¹¹ Consumer groups also tried to convince Senate Majority Leader Harry Reid to support the bill by releasing results of a poll showing that Nevada voters (Reid’s home state) supported food safety legislation.¹¹² Hart Research Associates and Public Opinion Strategies polled 504 registered voters, and based on the results released by Make Our Foods Safe, “[seventy-three] percent of Nevada voters [said that] it’s important for Congress to pass legislation to strengthen food safety standards and better protect consumers from contaminated foods, including [forty-nine] percent who [said that] this is very important.”¹¹³ The poll also showed that approximately eighty-four percent of Nevada voters thought ensuring food safety was the government’s responsibility and that sixty-nine percent thought it would be worth having new food safety measures, even if it increased the cost of food.¹¹⁴ Food processors wanted a change too, as shown by a statement released by the Grocery Manufacturers Association: “We strongly agree with the Administration’s call for Senate passage of S. 510 and we continue to be optimistic that this sensible, bipartisan legislation will be brought to the Senate floor as soon as possible and enacted by the end of this year.”¹¹⁵

¹¹¹ Id.
¹¹² Id.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ Id.
Clearly despite the on-line outrage over the bill, statistics and public statements showed strong support for its passage, and, as a result, the bill was eventually approved by the Senate and signed by the President into law. Today, in the beginning stages of implementation, however, new controversy exists—whether updating the food industry is worth the anticipated $1.4 billion taxpayer investment.\textsuperscript{116}

\textit{A. Funding}

The Food and Drug Administration answers questions about the Food Safety Modernization Act on its website.\textsuperscript{117} After addressing the magnitude of food-borne illness in the United States, the site answers a basic question: Why is this law needed?\textsuperscript{118} Focusing on preventative measures, the FDA states that under the new law it “will now have new prevention-focused tools and a clear regulatory framework to help make substantial improvements in our approach to food safety.”\textsuperscript{119} In similarly vague language the site describes “preventative controls” to “include steps that a food facility would take to prevent or significantly minimize the likelihood of problems occurring.”\textsuperscript{120}

To many House Republicans, these basic arguments are not convincing. These individuals are openly question whether spending billions to improve food safety makes sense at a time when many Americans are demanding that Washington begin working to pay off the United States’ $14 trillion debt.\textsuperscript{121} Recent data published by the Centers for Disease Control and Prevention show that while the numbers of food-borne illness outbreaks have more than tripled in the last twenty years, from 100 in 1991 to 350 in 2010, the actual number of Americans getting sick each year has stayed the same, therefore actually showing significant improvement.\textsuperscript{122} Citing these numbers, Republican Representative Jack Kingston said that “although one in six Americans is estimated to be sickened by food every year, if the numbers are divided by the number of meals we eat a day, 99.99 percent of those meals are safe.”\textsuperscript{123} He claimed that the United States was already moving in the right direction under the traditional system of state and federal inspections.\textsuperscript{124} Proponents of the

\begin{itemize}
  \item See Jonsson, supra note 15.
  \item Id.
  \item Id.
  \item Id.
  \item Jonsson, supra note 15.
  \item Id.
  \item Weise, supra note 65.
  \item Id.
\end{itemize}
legislation continue to point at other numbers, particularly the 180,000 Americans hospitalized each year due to food-borne illness, and the 3,000 deaths due to contaminated food each year in this country.125

Regardless of which numbers are emphasized, the practical matter at issue is that the FDA does not currently have sufficient funding to implement the new legislation. Hiring and training new inspectors as well as conducting many more inspections each year will take both time and money, but without additional funding, the FDA admits it will be “challenged in implementing the legislation fully without compromising other key functions.”126 Even with sufficient funding, however, the impact of the FSMA on the safety of food in this country is uncertain.

B. Anticipated Impact

Proponents of the FSMA sold it to Congress and the public as a way to modernize an out-of-date food safety system, save lives, and save the United States some $152 billion per year in medical costs and lost productivity due to food-borne illness.127 However, a long term process is necessary to implement the new prevention-based safety system. Some aspects of the FSMA will go into effect quickly, such as the FDA’s new ability to initiate mandatory recalls, while others require the FDA to prepare and issue guidance documents and regulations, which will obviously take more time.128 It will also take time to lower the incidence of illness and death, even if the law receives full funding. Proponents of the legislation, however, claim they are not looking for an immediate impact and argue instead that implementing this law will actually improve food safety culture as a whole.129

Opponents, on the other hand, point to aspects of the law that will limit its impact, or in some instances change nothing at all. One of these areas brings us full circle—back to the exemptions for small farms and production facilities. The exemptions added to the law through the Tester-Hagan Amendment in November appeased most critics and allowed the law to pass, but did they also limit or even prevent its impact?

The most recent food-borne illness outbreak, sickening at least eighty-nine people in December 2010, involved salmonella-laced sprouts on sandwiches from Jimmy John’s sub restaurants in Illinois.130 The

125 See id.
126 U.S. Food and Drug, supra note 117.
127 Jonsson, supra note 15.
128 U.S. Food and Drug, supra note 117.
129 Jonsson, supra note 15.
sprouts originated from the Tiny Green Organic Farm of Urbana, Illinois, a small farm likely exempt under the FSMA.\textsuperscript{131} Similarly, looking back to the PCA peanut butter products catastrophe of 2009, it is difficult to see how obvious problems such as holes in doors large enough for rodents to enter, rust flaking into food, and mold on the ceiling and walls should not have been prevented under the original laws.\textsuperscript{132} If the original FDA regulations were properly enforced, the outbreak should not have occurred. As well as public health concerns, food production facilities also have their own monetary interests in keeping their food products safe. PCA went bankrupt after its peanut products recall.\textsuperscript{133} It is doubtful consumers would want to order sprouts, or any sandwich at Jimmy Johns for that matter, after getting sick. Nothing hurts the food business more than an outbreak traced back to you and the inevitable media spotlight that will follow.

Even so, several outbreaks in this country probably would have been prevented had the FSMA been in place. If anything, increased regulation and frequent inspections will serve to keep food production facilities conscious of safety issues to an even greater extent. The government’s position remains that “food-borne illness is largely preventable if everyone in today’s global food chain could be held responsible and accountable at each step for controlling hazards that can cause illness.”\textsuperscript{134} While the actual impact of the law remains to be seen, a lot will depend on the additional funding given the FDA and the agency’s commitment to overhauling a century of food law.

A lot will also depend on how the law is enforced. With the addition of the Tester-Hagan Amendment, the government attempted to silence critics worried about small scale farming and the local food industry, yet farmers still have reason for concern. Because of the exemption for farms with revenue under $500,000, many farms nearing that threshold have a difficult choice—attempt to continue growth or get smaller to avoid the burdens and requirements of the new law. In other words and practically speaking, local organic farmers should attempt to be just successful enough not to pass this threshold. While many see the new law as literally placing a cap on the “American Dream,” all realize that strategic planning will be necessary to survive under the new regulatory system.

With few exceptions, local farmers are the producers keeping food safe. As described to Cooking Up a Story, a blog on food and sustainable living with live interviews, Anthony Boutard, a certified organic, urban farmer emphasized his concerns for mid-size farmers having to make this choice. In his eyes, the better solution would be making large industrial

\begin{itemize}
\item \textsuperscript{131} Id.
\item \textsuperscript{132} See Harris, supra note 46.
\item \textsuperscript{133} Williamson, supra note 41.
\item \textsuperscript{134} U.S. Food and Drug, supra note 117.
\end{itemize}
farms behave like small ones: "The best fertilizer on the land is the farmer's shadow. Being out in the field with the staff following everything very carefully—that's what we need. That is the essence of food safety." In his eyes, the biggest advantage of small market farms is that virtually every crop the farmer sells, he and his neighbors eat. Local farming, in its every essence, holds its producers accountable. While the $500,000 exemption will keep many small farms safe from regulation, those close to the mark will have some tough decisions and possibly large transitions to make under the new regulations. Whatever influences the Food Safety Modernization Act has on the FDA and food safety at large, there is no need to regulate or harm the American system of producing, processing, and marketing locally grown produce and other organic food. Local farming is too important to our communities, health, and country to let paperwork and burdensome government regulations sweep the industry away.

VI. CONCLUSION

In implementing the requirements of the Food Safety and Modernization Act, the federal government and the Food and Drug Administration need to commit to an open process with opportunity for input from all stakeholders—especially local small-market farmers. While the fragmented and inefficient food safety system needs modernization, the new rules do not need to come at the expense of local farmers. The Tester-Hagan Amendment attempts to protect local produce growers, yet it also sets a strict cap on how much money local farmers can make and still be exempted from regulation. In essence, this requires that they not be too successful. Small-market farmers and the consumers who buy their produce and crops directly at farmers markets, roadside produce stands, or through Community Supported Agriculture programs should not be penalized for their community-driven, health-conscious behavior. While the food safety system in the United States certainly needs a make-over, lawmakers now need to take the time to tailor the Food Safety Modernization Act to those industrial mass-producers needing regulation, leaving local farmers to their fields.

136 Id.