

ATT: Food Safety Bill

July 30, 2009

Dear Representative:

Representative Dingell today issued a letter in an attempt to rebut the concerns of the small and moderate-sized sustainable and organic farmers we represent concerning H.R. 2749, The Food Safety Enhancement Act. We clarify our points and respond to his letter below for the sake of continuing education and dialogue about the bill as it heads to the Senate and ultimately to conference with the Senate. We also thank Representatives Farr and Blumenauer for their floor colloquy with Representative Dingell that addressed many of the issues below as well as additional concerns with specific provisions of the bill from the sustainable and organic agricultural communities that are not mentioned in the Dingell rebuttal.

Dingell Letter:

“Concern: H.R. 2749 will require all farms to register with the Food and Drug Administration (FDA) and pay an annual \$500 fee.

FACT: Farmers who sell a majority of their product direct to consumer are EXEMPT.

Farms, that act only as farms, and sell their food or product directly to consumers or at a farmer’s market are exempt from registering or paying a fee to the FDA. Farmers that manufacture food for sale are also exempt as long as they sell the majority of their food to consumers; this includes sales by mail or over the internet.”

NSAC and NOC Response: NSAC and NOC never claimed that “all farms” will have to register and pay the \$500 fee. Our concern centers on farmers who process their harvest into value-added products, an activity both we have promoted for over a decade and that Congress has funded and USDA has also promoted. Many farms process their own jams, cheeses, beverages, or other products, therefore qualifying as “facilities” under the terms of the bill.

While H.R. 2749 bill exempts facilities that sell over 50.1% of their processed products directly to the consumer, it still imposes a fee on those who primarily sell wholesale. We represent a large number of farmers who sell their value-added products to the wholesale market as well as a large number who sell direct to consumer, and in fact, most farmers increasingly do some of each. The direct marketing exemption while welcome is not sufficient, and we would also call attention to the practical consideration of implementing the provision given FDA’s or even USDA’s inability to ascertain on a year-to-year basis in a continuously changing and evolving marketplace which farmer is 50.1% retail and which is 50.1% wholesale.

H.R. 2749 requires facilities of all size, regardless of whether their annual revenue stream is \$1,000 or \$1 million or \$100 million, to pay the same fee. In fact, according to the Energy and Commerce Committee staff estimates, the majority of the registration fees will be collected from the smallest processors including farmer processors. In many cases, the \$500 fee will be cost-prohibitive for a small farm operation whose value-added processing activity is a small offshoot of the primary farming business. This is a fundamental issue of equity. The tax in the bill as written and approved

by the House violates the basic principle of ability to pay which is the bedrock of our system. If any fee is going to remain in the bill that returns from conference, it will need to be progressive and exempt the small-scale on-farm processing or we will continue to strenuously oppose it.

In addition, it is incredibly important to put the fee controversy in perspective. According to the CBO, the fee schedule in the bill will, when fully ramped up, will bring in \$368 million a year, yet the total cost of the bill at the same point in time will be nearly \$1.5 billion a year. So no one should be under any illusion that the ultimate fate of the bill rests on the collection of the fee from thousands of small and mid-scale farms scattered across the countryside. The cold hard reality is that if the very important food safety promises in the bill are going to be realized, Congress is going to have to come up with very substantial additional appropriations regardless of what the conference report includes or does not include on fees.

Dingell Letter:

“Concern: FDA will have the authority to issue safety standards that will apply to farms and interfere with organic farming practices.

FACT: FDA is PROHIBITED from imposing safety standards unless it determines those standards are “are reasonably necessary to minimize risk of serious adverse health consequence or death.”

This means that the FDA can only issue standards for the absolute riskiest products. Further, in the Amendment in the Nature of a Substitute, the FDA is directed to coordinate with USDA—who runs the National Organic Standards Board—in issuing these safety standards. This will ensure that the concerns of organic farmers are taken into consideration before issuing any standards. FDA is also directed to take into consideration “the impact on small-scale and diversified farms, and on wildlife habitat, conservation practices, watershed-protection efforts, and organic production methods.”

NSAC and NOC Response: As instructed by the language in the current bill, FDA can require certified organic farms to follow the new safety standards promulgated by FDA. While the language instructing FDA to coordinate with USDA, secured by the House Agriculture Committee in its negotiation with Energy and Commerce, is a very positive step in the right direction, we are simply asking for the inclusion of specific language that requires the FDA to coordinate with the National Organic Program on the development and enforcement of standards with respect to organic farming.

The NOP has long had food safety measures in place that require traceability via a documented audit trail as well as stringent manure use and composting regulations. Left as is, with broad language instructing FDA to coordinate with USDA across the wide range of issues in the bill and with many different USDA agencies, certified organic farmers could still face duplicative or conflicting requirements or fees. It would be so simple for Congress to ensure that will not happen from the outset, yet the sponsors of the bill have been unwilling to include this straightforward language over many months of discussion. While we are heartened by Representative Dingell’s response to this issue in today’s floor colloquy, we will still work to see that his assurances are included in the actual statutory language.

Dingell Letter:

“Concern: FDA will have access to confidential farm records making such records vulnerable to distribution.

FACT: FDA is already limited in the types of records they can access under the Food, Drug and Cosmetic Act, and cannot access financial data, pricing data, personnel data, research data or sales data other than shipment data regarding sales.

FDA would have access to farm records only relating to fresh produce for which FDA has issued a safety standard or that is the subject of an active investigation of a food-borne illness outbreak. FDA will also be required to establish record-keeping requirements through rule-making and must take into consideration the size of the business.”

NSAC and NOC Response: This was not an issue we have been raising. We are generally supportive of the very important narrowing of the provision that resulted from the Agriculture Committee negotiations.

Dingell Letter:

“Concern: The “traceback system” included in H.R. 2749 will be overly onerous for small farmers.

FACT: Farms that sell directly to consumers, restaurants and grocery stores will be exempt from the “traceback system.”

FDA will be required to go through rule-making in order to establish requirements for the “traceback system.” No rules will be issued until FDA conducts at least two public meetings and one or more pilot projects in order to elicit input from users and other stakeholders. FDA will also have to take into consideration the impacts such regulations will have for different sectors of the food industry. The purpose of such a system is to document the origins of food to help FDA to quickly identify the source of outbreaks and ensure that honest farmers and producers are not blamed for food outbreaks they are not responsible for.”

NSAC and NOC Response: The exemption from traceability for food sold directly from a farmer to consumers, restaurants and grocery stores is important and reflects common sense. However, it is not at all clear why restaurant sales should be exempt but not school or hospital kitchens. There is a groundswell of activity across the country in getting fresh, local, high quality food into our public institutions to help reverse a public health crisis highlighted by burgeoning rates of obesity and diabetes. We have attempted for months to get this important feature into the bill but without success. There is increased demand for locally-produced agricultural products in school cafeterias, but as it stands, the language in HR 2749 would not exempt farmers selling direct to institutional settings which could dampen farmer interest in these important new markets that stand to provide healthy, fresh food to our nation’s children.

In addition, many small and mid-sized farmers do not sell direct to consumer but the identity of their product is preserved through the supply chain and is on the product when it is bought by the consumer. However, HR 2749 fails to include an exemption for “identity-preserved” products

which specify the identity and location of the farm all the way to the consumer. Again, a simple addition could cure this deficiency in the bill.

But there is an even more important issue lurking in the bill. We appreciate the additions to the bill requiring public meetings and pilot projects, but the bottom line is that the bill as approved by the House will place farmers who have not been otherwise exempted under the same requirements as large corporate processors. Once the bill's traceability system is operational, and unless or until FDA pro-actively decides to exempt a particular type of farm or a particular type of food, farmers will be required, according to the bill, *“to maintain the full pedigree of the origin and previous distribution history of the food; link that history with the subsequent distribution of the food; establish and maintain a system for tracing the food that is interoperable with the systems established and maintained by other such persons; and use a unique identifier for each facility owned or operated”* by that farmer.

We do not object to farmers retaining paper receipts of their sales (*“previous sources and subsequent recipients”*), as provided in the bill for grain, oilseeds, hay and several other products. But we do object to other entire sectors of farming being incorporated into the same comprehensive traceability provisions as the food industry. We believe the ‘full pedigree, full food chain’ provisions of the bill are impractical and unworkable for farmers and we believe there will be howls of protest when FDA tries to put this portion of the bill into practice. Those protests in turn will lead to costly and unnecessary campaigns by individual sectors to get the same exemption treatment that the House has provided to grains, oilseeds, hay, honey, sugar, cocoa, and other segments of agriculture. Disparate treatment based on political clout rather than sound principles is not good public policy. The good news again, however, is that problem is relatively easy to correct before this bill returns to the House from conference.

Thank you for considering our views as this bill moves forward through the rest of the legislative process. We believe these issues can be worked out in a manner that supports enhanced food safety and improved family farm survival.

Sincerely,

Aimee Witteman
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National Sustainable Agriculture Coalition

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