

An Analysis of Congressman Dingell’s “Dear Colleague” Letter in Support of HR 2749, the Food Safety Enhancement Act of 2009

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After the unexpected defeat of HR 2749 on Wednesday, July 29th, the House Rules Committee quickly made a few cosmetic changes to the legislation and set it for a vote today (Thursday, July 30th). It is important to note that the intent of this legislation from the beginning was to regulate all farmers, regardless of size. It is only because of concerns that the legislation will go down to defeat that these last minute changes were grudgingly agreed to by the supporters of the legislation. If they were sincere in wanting to exempt small and organic farmers from undue regulation, then those concerns would have been evident from the beginning of this legislative process. A rational expectation is that the agencies granted these drastic and unprecedented new powers of regulation over vegetable production will “in the name of food safety”, push them to the limit as they are applied in the real world.

Small and organic farmers run the risk that the rule-making process will be unduly influenced by their competitors who will abuse the political process to gain unfair market advantages via the regulatory system. This would not be the first time something like this happened in the history of federal regulation.

A further dubious aspect of this proposal is the process chosen for its legislative adoption. On Wednesday, debate and amendments were prohibited. On Thursday, only one hour of debate is allowed and amendments are prohibited. This is a profoundly undemocratic method of crafting legislation that will directly impact the lives of many people and the rural and urban communities in which they live.

Rep. Dingell’s letter is structured with a list of “concerns” each of which is followed by his explanation. This analysis will follow that same structure. Text in “quotes” is from the letter. My comments are listed as “Analysis”.

“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.”

Analysis: Farmers who sell their products through a diverse set of marketplaces will have to register and pay the fee unless the “majority” of their sales are direct to the public. This includes many small farms and market garden that do not gross hundreds of thousands of dollars per year. There is no protection for these farmers in the bill and HR 2749 will impact them harshly.

Small farms will not be exempt from whatever regulations the FDA may decide to establish regarding the production, harvesting, and distribution of vegetables. This will not protect the public health, but will act as an unfair and unjust system of barriers to market entry and participation for these farmers.

Further, this does not exempt artisan food processors such as bakers, jam makers, etc., who sell through a diverse set of marketplaces. They already must meet significant local, state, and federal regulations, and pay numerous fees to operate their businesses. They should not be burdened with an additional fee or additional regulations which do not serve the public interest, but instead will function as unfair and unjust barriers to market entry and participation by small-scale producers.

“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 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. 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.” This will ensure that the concerns of organic farmers are taken into consideration before FDA issues any standards. “

Analysis: This is political fluff that provides no protections whatsoever for organic and all-natural farmers. All it prescribes is a set of due process regulations. There are no boundaries on the outcomes in the legislation. Once the i’s have been dotted and the t’s crossed, the FDA can do anything it wants. “Reasonable” is not defined anywhere in this law, and can literally mean anything, anytime, anywhere. To require that the “FDA take into consideration” is not the same as “forbidding the FDA from persecuting organic farmers.”

“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. 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 in this rulemaking process.”

Analysis: Here again we have political fluff that prescribes a due process, but has no boundaries on the outcome of the due process.

“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 notice and comment rule-making in order to establish requirements for the “traceback system.” FDA will be prohibited from requiring farms that sell directly to consumers, restaurants and grocery stores to participate in this system. Additionally, prior to issuing any regulations, FDA must conduct 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 impact of such regulations on different sectors of the food industry. The purpose of such a system is to document the origins of food to help FDA quickly identify the source of outbreaks and ensure that honest farmers and producers are not blamed for food outbreaks they are not responsible for.”

Analysis: Prescribing a due process system is not the same as establishing boundaries on outcomes. Small farmers who sell through a diverse set of markets will be subjected to these record keeping requirements, and this is likely to be an undue burden upon them.

“Given that many of the arguments used against H.R. 2759 are misleading, you can understand why I am disappointed that the Food Safety Enhancement Act failed to pass the House yesterday. It is clear that the needs and concerns of small and organic farms, including the many in my district, are addressed in this bill. Rest assured, it is not my intention, nor the intention of the House Committees on Energy and Commerce or Agriculture, to burden small farmers. This bill is a good, bipartisan bill that is drafted to protect the thousands of Americans who have been sickened or lost loved ones due to unsafe food. “

This bill does not address the needs and concerns of small and organic farmers. It represents a dangerous and drastic expansion of federal authority over the growing of fruits and vegetables. It has few boundaries to limit the problem of bureaucratic over-reach. It has been crafted by politicians and federal departments with little or no experience in agriculture. It will negatively impact rural communities, farmers, and their customers. The rush to pass the bill with rules that limit debate and forbid amendments is an anti-democratic maneuver that is unlikely to produce good legislation. This bill should be defeated in the House and if passed by the House, defeated in the Senate.