FOR WHOM THE BILL TOLLS

By Scott C. Tips, General Counsel, NHF

"Was there ever a people whose leaders were as truly their enemies as this one?" —Robert Jordan in Ernest Hemingway's For Whom the Bell Tolls

Imagine that huge, commercialized feed lots, over-crowded with cattle, poultry and other meat are sited close to rivers, streams and other water sources that also irrigate adjacent or downstream farms. Imagine also that local and State food regulators are lax in enforcing long-standing food-safety laws in those areas. Imagine further that – quite predictably – the hoofed and beaked food meat sources, weakened as they are by a nutritionally weak diet, stress-inducing cramped enclosures, and heavy medical drug use to avoid disease outbreaks, actually succumb to disease. Imagine that these diseases then make their way onto farmland to an extent we have never before seen.

Now imagine that this had taken place 50 years ago, 40 years ago, yes, maybe even 30 years ago. There would have been a hue and cry for the County and State Health Departments in those areas affected to take action. Heads would have rolled, the press would have been merciless and the local citizenry would have been alert until the problems were corrected.

Leap Forward to the Gleaming 21st Century

But that was then. Today, the shackles are off. The checks and balances, the dispersion of coercive power, even the image of government as a dangerous servant, are all gone, barely remembered, if at all, as the amusingly quaint mumbles of long-dead men. In their places, people look for "protection" by an obese Federal government that is increasingly replacing local and State governments, relegating them to servant status and ignoring its Constitutional constraints. It is the Age of Imperialism, domestically as well as internationally.

So in our industry, this means that instead of the local and State health departments dealing with local food-safety issues, the more-distant and (some think) more-knowledgeable Feds are taking charge. Since the Feds succeeded so well with their War on Cancer, their War on Drugs, and now their War on Terrorism, of course they are confident of victory in their War on Unsafe Foods. All it will take is a mountain of red tape, rules and regulations, more inspectors with increased powers, heavy fines, SWAT teams, if necessary, and America's food supply will be as safe as an embalmed corpse in a coffin six feet under.

H.R.2749—The Food Safety Bill

Just prior to its Summer recess, the House of Representatives passed the Food Safety Enhancement Act of 2009 (H.R.2749), which had been launched by industry nemesis Representative John Dingell (D-MI) and amended by equally repugnant Representative Henry Waxman (D-CA). This bill replaced other food "safety" bills about which this column reported previously.

Yet, instead of addressing the root causes of such contamination by, for example, tackling the over-crowded, disease-laden Big Agri-feedlots that contaminate the water used by the farms downstream, Dingell, Waxman and their fellow travelers ignored existing laws that would, if properly used, rectify this problem in order to suffocate innocent small farms and food producers with costly rules, regulations and fees that will drive many of them out of business.

As the Congressional Budget Office (CBO) itself says, H.R.2749 "would require facilities engaged in manufacturing, processing, packing, or holding food for consumption in the United States or export to other countries **to register with the Secretary of HHS and pay an annual fee**. Under current law, all of those facilities are required to register with the Secretary except for facilities holding food for export, but the annual fee would be a new requirement. CBO estimates fees would total almost $210 million in 2010 and rise to almost $370 million by 2014. The costs of those payments alone would exceed the threshold established by UMRA.

"The bill also would place new requirements on entities involved in producing, manufacturing, processing, packing, transporting, distributing, receiving, holding, importing, or exporting articles of food. In general, the costs of those mandates on the private sector would depend on future guidance and regulations established by the Secretary. For example, the Secretary would be required to develop science- and risk-based standards, to establish **a tracing system** for food located in the United States or for import into the country, and to develop safety and security

guidelines for the importation of food. It is unclear how those requirements would be implemented and how they would affect the food industry. Therefore, CBO cannot estimate the cost to private entities of those provisions.

"The bill would require owners, operators, and agents of **facilities to conduct hazard analyses, implement and monitor preventive controls, institute corrective actions when necessary, repeat hazard analyses at least every two years, and maintain records of these activities**. They also would have to develop food safety plans that outline how facilities would meet these requirements. High-risk facilities that manufacture or process food, also referred to as 'category 1 facilities,' would be required to test finished products for the presence of contaminants and submit the results of the tests to the Secretary. The Secretary would have the option to establish guidance or regulations, which would determine the extent of the requirements for complying with these provisions of the legislation.

"The bill also would require entities, among other things, to be prepared **to present all records related to the production, manufacture, processing, packing, transporting, distribution, receipt, holding or importation of an article of food**; to report to a food registry; to use accredited laboratories recognized by the Secretary for analytical testing of an article of food; to notify the Secretary of the identity and location of an article of food that is believed to be adulterated or misbranded; to maintain records with respect to infant formula for at least one year after the expiration of the shelf life; and to identify the country in which the final processing occurred and for unprocessed food to identify the country of origin of the food. Under current law, many entities may already have the capability to meet some of those requirements, but entities such as farms and restaurants that are not currently subject to any of those requirements previously could incur significant costs to comply with their respective mandates." (emphasis added) (See *www.cbo.gov/ftpdocs/104xx/doc10478/hr2749.pdf*.)

Based upon information from the Food and Drug Administration (FDA), the CBO estimates this bill would require the FDA to inspect some 360,000 domestic and foreign food facilities on a risk-based frequency schedule.

Hard, last-minute lobbying resulted in a limited exemption for certain small food producers. As Rep. Dingell himself said, "The bill before us includes important language that would exempt from registration and from fees on-farm processors who sell more than half of their product by value directly to consumers or who process grain for sale to other farms. I believe these two provisions go a long way to satisfying the kinds of concerns being expressed. However, I realize there are other small farms or small local processors who will not fit under these exemptions who may face a hardship and I promise to work with my colleagues to address these concerns as the bill moves into conference."

This House bill now sits in the Health, Education, Labor and Pensions (HELP) Committee in the Senate, awaiting its action. If the Senate passes a different version, then there will be a House–Senate conference to reconcile the differences.

S.510—The Senate's Version

In early March, Senator Richard Durbin (D-IL) and six fellow Senators introduced his version of a Food Safety Bill, S.510. At the time, an identical House bill, H.R.1332, was sponsored by Representative Jim Costa (D-CA). As of this writing, neither of these bills has progressed.

Similar in most ways to H.R.2749, Durbin's "FDA Food Safety Modernization Act" was introduced in order to amend the Food, Drug and Cosmetic Act (FDCA) to expand the Secretary of Health and Human Services' power over the country's food supply. It, too, would require registration of domestic and foreign food facilities, with annual fees, including empowering the Secretary to suspend the registration of any food facility in violation of the law. (§102) S.510 would also enhance existing food borne illness surveillance systems by instituting tracking and tracing of raw agricultural commodities (§§204–205). It would further require each food facility to evaluate hazards and implement preventive controls (§103), make food recalls when ordered to (§206), allow inspection of all records when the Secretary deems it necessary (§101) as well as inspection of the food facilities themselves (§§ 201 & 307), and create a couple of crypto-fascist councils called the Food and Agriculture Government Coordinating Council and the Food and Agriculture Sector Coordinating Council (§109) to, among other things, facilitate Mussolini-style "partnerships between public and private entities to help unify and enhance the protection of the agriculture and food system of the United States."

But that's not all. Basically, S.510 will do everything that H.R.2749 wants to do and more. It will conduct an outreach project to build other nation's competing food industries for export of their food to the U.S. (and to other countries as well, in competition with our own exports). (§306) S.510 also requires the Secretary to prepare a National Agriculture and Food Defense Strategy and "*build domestic capacity*," as if any government is ever even remotely capable of competently doing so. Washington cannot even govern itself; how can it possibly tell us how to live or manage and direct such an incredibly complex and sophisticated food-supply system as the U.S. currently has?

Last, but not least, S.510 contains – but of course – a Codex provision. This provision is hidden within Section

306 of the bill, and briefly speaks about the Secretary developing a plan that includes "[r]ecommendations to harmonize requirements under the Codex Alimentarius." This provision does ***not*** exempt supplements, violates provisions of both the Dietary Supplement Health and Education Act of 1994 and the FDA Modernization Act of 1997, and is flatly unconstitutional.

Gut S.510 and Stuff H.R.2749 Into It

By the time you read this, the political winds could very well have shifted and this section will all be nothing but unfulfilled speculation. The current assessment by insiders is that it would be a long haul for Durbin to get S.510 out of committee, voted on and passed before this session of Congress ends. There would have to be a House–Senate conference to deal with the two bill's differences and that, too, would take additional time.

But, wait. ***Ready-made***, he and his cohorts already have H.R.2749 at hand. All they need to do is amend S.510 by replacing its existing language with the ***entirety*** of H.R.2749. Once voted upon and passed by the Senate, then there would be no need for a conference since there would be no differences to reconcile. Problem solved.

In any event, for us, a House-Senate conference would be a train wreck waiting to happen because the industry's nemeses, who would be driving the conference, could stuff any manner of unmentionable, anti-health industry provisions into the Conference Committee version of the Bill and we would truly be left hanging high and dry.

A Nightmare Made in Hell

If you are wondering what implementation of these bills (H.R.2749 & S.510) might cost, the CBO's analysis of H.R.2749's cost is a mere $2 billion. And even though very-small producers are exempt, it would hit the medium-size and smaller entities the hardest, probably driving many of them out of business, thereby leaving the playing field to large corporate agri-business.

So what group of geniuses on Capitol Hill has decided to saddle American food businesses with a huge and unnecessary regulatory burden and costs, and encourage foreign competition at taxpayers' expense, ***just as a serious economic downturn has hit this country and will get worse***? It is the same group of idiots that keeps getting reelected to Congress time after time by either outright voter fraud or voters deluded into thinking that the problem lies with every other congress critter but their own. This is even more amazing when polls show support for Congress at just 37%, a decline of 13% just since last April. (See *www.breitbart.com/article.php?id=D9AF97PO1&show_article=1*.)

More problems exist with these two bills than there is space to discuss here, but some of the more serious issues are:

- Both S.510 and H.R.2749 would empower the federal government to regulate how crops are grown, harvested, and sold, thereby placing federal bureaucrats in major control of how the farm is run.

- As others have argued, farmers selling food directly to local markets are inherently transparent and accountable to their customers. Burdensome and costly regulations are unnecessary in their case and will accomplish nothing positive. In fact, given the FDA's less-than-sterling track record, we can be sure that these regulations would be used ***against*** diversified sustainable and organic farms.

- S.510 applies a Byzantine "Hazard Analysis and Critical Control Point" (HACCP) system to even the smallest local processors, imposing burdensome paperwork and record-keeping on them. When HACCP was applied to the meat-packing industry, it eliminated many regional and local meat packers, all to the advantage of the large meat-processing corporations who absorbed the added cost without a hiccup. This is a lesson for what will happen to smaller food businesses here.

- They would unconstitutionally empower FDA to make warrant-less searches of private business records without any evidence whatsoever that a violation has occurred. Even small and local farmers selling direct to consumers would have to provide the federal government with customer lists as well as supply and sales records. What a great tool for harassing unconventional farms.

- Both bills give the Federal government the power to quarantine any geographic region, which means "prohibiting or restricting the movement of food or of any vehicle being used or *that has been used* to transport or hold such food within the geographic area." Regardless of whether or not they are a threat, farmers markets and other local food sources could be closed and all movement of food stopped.

- Both bills would establish a tracing system for food, covering – as H.R.2749 says – every "person who produces, manufactures, processes, packs, transports, or holds such food." Such persons would have to "maintain the full pedigree of the origin and previous distribution history of the food," and "establish and maintain a system for tracing the food that is interoperable with the systems established and maintained by other such persons." The big question mark here is the extent of the traceback and its costs (and actual benefits if any) to both farmers and consumers.

- Both bills would impose an annual registration fee of $500 on any facility that holds, processes, or manufactures food. Although small farms are supposedly exempt, most farms would still be covered and have to pay this fee, which along with all of the other costs of recordkeeping, hiring lawyers and accountants, possible fines, and the like could drive small farmers out of business as well as create a barrier to new entrepreneurs, especially during this economic downturn.

- They create severe criminal and civil penalties, including prison terms of up to 10 years and/or fines of up to a total of $100,000.

- With the bills' broad regulatory language, certified organic farmers would face duplicative and conflicting fees and requirements. The National Organic Program (7 *C.F.R.* Part 205) has long had food-safety measures in place that require traceability via a documented audit trail as well as other stringent regulations.

- While H.R. 2749 would exempt facilities that sell over 50.1% of their processed products directly to the consumer, a fee is still imposed on those who primarily sell wholesale. Many exemptions in the bill have already been provided to the grain, oilseed, hay, honey, sugar, cocoa, and other industries due to their lobbying efforts and political clout.

- Because of the burdensome and expensive traceability requirement for foods sold by farmers directly to schools and hospital kitchens, both bills will strangle the current move to put fresh, local, high-quality food into our public institutions to help reverse a public health crisis led by alarming rates of obesity and diabetes.

- S.510 would lead to the United States being even more tightly bound to using Codex standards and guidelines, with no exemption language for dietary supplements, in violation of previously-expressed Congressional intent.

- Combine all of this with the equally burdensome National Animal Identification System (NAIS), which would require every single farm animal to be tagged and tracked, with the failure to do so punishable by a fine of $1,000 per day, and you end up with near-total control of America's food-supply system. This is legislation that would ***bury*** American farmers, food producers, and other food businesses in yet more red tape and regulations.

In Short

According to our NHF Lobbyist, Lee Bechtel, the Senate HELP Committee, headed by its newly appointed Chairman, Tom Harkin (a DSHEA sponsor and supporter), held a public Food Safety hearing on October 22nd, with Dr. Margaret Hamburg (FDA Commissioner), Caroline DeWaal (Center for Science in the Public Interest), Michael Roberson (Food Marketing Institute), and Thomas Stenzel (the United Fresh Produce Association), giving testimony. As Lee reports, it is not known when a HELP Committee markup hearing will be held, let alone reported to the full Senate for a vote. This is possible before the end of this year, but more certain after the health-care reform issue is resolved.

The Senate Committee legislative process is more likely to amend S.510 with the Waxman bill, to avoid having to have a joint House-Senate Conference committee on a final bill. Except for the offending Codex language in the Senate bill, almost all of the other food-safety requirements, including exemption of small farmers, organic and otherwise, are in agreement in these two bills. It is important to consider that if the Senate HELP committee were to amend S.510 with all of the provisions of H.R.2749, which does not have the Codex language, then the Durbin Codex issue would no longer exist, even though the other immense issues with these bills would remain and warrant squashing it entirely.

To that very end, the National Health Federation and several other organizations, such as the Farm-To-Consumer Legal Defense Fund, are opposing these bills. At the absolute least, industry members should support DSHEA exemption language in any final Congressional bill, as well as Congressman Ron Paul's H.R.3396, which would force Congress to review any regulations issued by any Federal agency, including the FDA, as it pertains to Codex and future US policy impacting dietary supplements.

Unfortunately, with S.510 and H.R.2749, our rulers have chosen to follow the path of coercion over voluntarism. Instead of food safety based upon contracts and hard-won reputations enforced by just courts, they want to impose upon us armies of government inspectors, waving hefty volumes of rules and regulations that even most attorneys and legislators cannot understand, backed by guns, fines, and prisons. Force, not freedom, is their mantra. If history shows us anything at all, it shows us that coercive government action in these kinds of matters cannot succeed. Whether it is cancer, drugs, terrorism, or unsafe foods, the government's iron fist will only result in more of what supposedly is to be suppressed. Our food will be less safe, not more. HFN

In less than two years each and every member of the House of Representatives is up for reelection. In less than two years more than one-third of the members of the United States Senate will have to face their constituents. They need to be reminded that they work for us, We the People! —*Michael Cutler*