

July 28, 2011

Hearing Clerk
U.S. Department of Agriculture
1400 Independence Ave., SW Room 1031-S
Washington, DC 20250-9200

**Re: Proposed National Marketing Agreement Regulating Leafy Green Vegetables;
Recommended Decision and Opportunity to File Written Exceptions to Proposed
Marketing Agreement No. 970 [Docket No. AO-FV-09-0138; AMS-FV-09-0029;
FV09-970-1]**

The Center for Science in the Public Interest (CSPI)¹ appreciates this opportunity to comment on the recommended decision to establish a National Marketing Agreement Regulating Leafy Green Vegetables under the Agricultural Marketing Service [Docket No. AO-FV-09-0138; AMS-FV-09-0029; FV09-970-1]. CSPI supports industry efforts to improve the safety of leafy green vegetables but has opposed the use of marketing agreements as a public health regulatory mechanism. We incorporate by reference our comments on the Oct. 4, 2007, notice of proposed rulemaking for a national leafy green marketing agreement.² In addition, we add the following comments.

Circumstances leading the industry to file a petition on June 10, 2009, for a national agreement changed with passage of the FDA Food Safety Modernization Act (FSMA).³ Signed into law in January 2011, FSMA postdates the 2009 hearing record. This is significant because section 105 of FSMA requires FDA to establish science-based minimum standards for the safe production and harvesting of leafy greens among other raw agricultural commodities.⁴ Noticeably the existing record does not recognize changes under FSMA that affect the proposed marketing agreement. For example, section 970.11 of the agreement directs on-farm participants to follow only FDA's current guidelines. Yet, within two years, FDA is to supersede these guidelines with mandatory safety standards.

Coverage of leafy greens under both a national marketing agreement and FSMA could have other unintended consequences.

Creating a national marketing agreement could lead to confusion. Consumers may be misled that produce marked as being under the agreement is safer than other produce. In fact,

¹ CSPI is a non-profit consumer advocacy and education organization that focuses largely on food safety and nutrition issues. It is supported principally by the 850,000 subscribers to its *Nutrition Action Healthletter* and by foundation grants.

² Handling Regulations for Leafy Greens Under the Agricultural Marketing Agreement Act of 1937, 72 Fed. Reg. 56678 (Oct. 4, 2007).

³ FDA Food Safety Modernization Act, Pub. L. 111-353, 124 Stat. 3885 (2011).

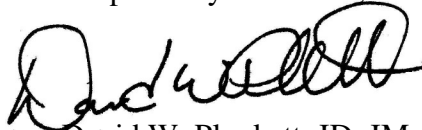
⁴ *Id.* § 105, 124 Stat. at 3899-3900.

both would have to meet FDA mandated standards. Importers may confuse compliance with the marketing agreement as sufficient verification of safety under FSMA's Foreign Supplier Verification Program.⁵ However, the voluntary components of the agreement alone may not be sufficient to ensure compliance with FDA's mandatory standards. If there are differences between marketing agreement and FDA standards, farmers may misinterpret the agreement as an authorized variance and inadvertently violate the law.⁶ In each case, the confusion would have market consequences that could best be avoided by adopting a single mandatory standard for leafy green safety.

The confusion could extend to agency actions as well. Under the new law, FDA is to coordinate with the U.S. Department of Agriculture and contract with state agencies for enforcement. Regulators would have to contend with separating the requirements of the marketing agreement from the regulations and applying each as appropriate during inspections. The competing requirements increase the likelihood that farmers will get conflicting information from inspectors. That could raise costs for farms that do not participate in the voluntary program without improving safety. Conversely, participating farms may receive advice that leads them inadvertently to violate their commitments under the marketing agreement. A single national standard mandated by FDA would be easier for the regulatory agencies and farms to manage.

CSPI supports industry efforts to improve safety, but believes there are insurmountable problems with the recommendation to use a marketing agreement to regulate the safety of leafy green vegetables. Chief among the problems is that the record for decision is incomplete because it does not account for changes in the law that expanded FDA's authority to regulate the safety of leafy greens. As a result, it is unclear how the marketing agreement will function within FDA's new regulatory framework. We urge the Secretary to deny the marketing order, or delay it until the public record can be updated and the agreement revised to recognize changes brought about by enactment of FSMA.

Respectfully submitted,



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⁵ *Id.* § 301, 124 Stat. 3953-55.

⁶ Section 105 of FSMA permits FDA under certain conditions to authorize a variance. Pub. L. 111-353 § 105, 124 Stat. at 3902.