

# CRS Report for Congress

## State-Inspected Meat and Poultry: Issues for Congress

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## Summary

Federal law has prohibited state-inspected meat and poultry plants from shipping their products across state lines. The final conference version of H.R. 2419, the omnibus farm bill, amends the Federal Meat Inspection Act and the Poultry Products Inspection Act to permit such interstate shipment under certain conditions.

Limiting state-inspected products to intrastate commerce is unfair, many state agencies and state-inspected plants have long argued, because the 27 currently state-operated programs by law already must be, and are, “at least equal” to the federal system. Meanwhile, foreign plants operating under U.S. Department of Agriculture (USDA)-approved foreign programs, which are to be “equivalent” to the U.S. program, can export meat and poultry products into and sell them anywhere in the United States. Advocates for change have contended that they should not be treated less fairly than the foreign plants which, they say, are not as closely scrutinized as state plants.

Opponents have argued that state programs are not required to have, and do not have, the same level of safety oversight as the federal, or even the foreign, plants. For example, foreign meat and poultry products are subject to U.S. import reinspection at ports of entry, and again, when most imported meat is further processed in U.S.-inspected processing plants. Opponents also have contended that neither the USDA Office of Inspector General in a 2006 report nor a relevant 2002 federal appeals court ruling would agree, without qualification, that state-inspected meat and poultry were necessarily as safe as federally inspected products.

The Senate-passed farm bill — the approach ultimately adopted by conferees — supplements the current federal-state cooperative inspection program with a provision whereby state-inspected plants with 25 or fewer employees could opt into a new program that subjects them to federally directed but state-operated inspection, thus allowing them to ship interstate. The Senate version reportedly was developed as a compromise by those on both sides of the issue.

The House-passed farm bill would have replaced (rather than supplemented) the current federal-state cooperative inspection programs with a new program to enable meat and poultry that is not federally inspected to be shipped across state lines, so long as the state programs adopted standards identical to those of USDA along with any additional changes USDA required. The House bill also would have enabled many plants currently under federal inspection to apply for state inspection and continue to ship interstate. Opponents of this change feared that many would seek to opt out of the federal system if they believed that could receive more lenient oversight by the states — an assertion that state proponents dismissed.

If the conference farm bill becomes law, as many anticipate, stakeholders will next turn their attention to USDA, where implementation details will be determined through the rulemaking process.

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# State-Inspected Meat and Poultry: Issues for Congress

## At Issue

Currently, U.S. meat and poultry slaughter facilities and processing plants operate under one of two parallel inspection systems. The one familiar to most people is the federal meat and poultry inspection system administered by the U.S. Department of Agriculture's (USDA's) Food Safety and Inspection System (FSIS). The other is made up of 27 separate state-administered inspection programs.

Federal law has prohibited state-inspected meat and poultry plants from shipping their products across state lines, a ban that many states and small plants have long sought to overturn. Both the House and Senate versions of the omnibus farm bill (H.R. 2419) included amendments to the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) that would permit interstate shipment of these products if USDA approves and certain requirements are met. However, the Senate approach diverged in significant ways from the House version. The conference farm bill, cleared in May 2008, generally opted for the Senate approach, viewed by many on both sides of the issue as an acceptable compromise.<sup>1</sup>

Proponents of ending the current ban have long argued that limiting state-inspected products to intrastate commerce is unfair. Many state agencies and state-inspected plants have argued that their programs by law already must be, and are, "at least equal" to the federal system. While state-inspected plants cannot ship interstate, foreign plants operating under USDA-approved foreign programs, which are to be "equivalent" to the U.S. program, can export meat and poultry products into and sell them anywhere in the United States. Advocates for change have contended that that they should not be treated less fairly than the foreign plants, and that foreign programs are not as closely scrutinized as state programs.

Opponents of allowing state-inspected products in interstate commerce have argued that state programs are not required to have, and do not have, the same level of safety oversight as the federal, or even the foreign, plants. For example, foreign meat and poultry products are subject to U.S. import reinspection at ports of entry, and again, when most imported meat is further processed in U.S.-inspected

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<sup>1</sup> See for example "Consumer Federation of America, Other Consumer Groups, Join Labor, Farm Groups and State Departments of Agriculture to Assure All meat and Poultry Shipped Across State Lines Will Remain Subject to Federal Meat and Poultry Inspection Laws, Regulations and Policies," October 23, 2007, at [[http://www.consumerfed.org/pdfs/Interstate\\_Meat\\_Press\\_Release\\_10\\_23\\_07.pdf](http://www.consumerfed.org/pdfs/Interstate_Meat_Press_Release_10_23_07.pdf)]. Also, "Compromise Reached on State Meat Inspection," October 23, 2007, the National Association of State Departments of Agriculture (NASDA) at [<http://www.nasda.org/interstatemeatshipment/>].

processing plants. Opponents also contended that neither the USDA Inspector General (OIG) in a 2006 report nor a relevant 2002 federal appeals court ruling would agree, without qualification, that state-inspected meat and poultry were necessarily as safe as federally inspected products.

## **Current Federal-State Cooperative Inspection Program**

Approximately 2,100 meat and poultry establishments in 27 states are subject to state-conducted rather than federal inspection programs.<sup>2</sup> However, these state programs are operated in accordance with cooperative agreements that USDA's Food Safety and Inspection Service (FSIS) has with each of the states; the federal government also provides 50% of the cost of state programs. The "Federal and State Cooperation" provisions of the FMIA (21 U.S.C. 661) were added by the Wholesome Meat Act of 1967 (P.L. 90-201).<sup>3</sup>

Congressional Quarterly (CQ) at the time of the 1967 legislation observed that the state cooperation provision was "[t]he farthest-reaching portion [of the measure] ... aimed at helping — or, if necessary, forcing — states to strengthen their own meat inspection systems." All plants providing meat for interstate and foreign commerce had been subject to federal inspection regulations basically since passage of the Meat Inspection Act of 1907. However, plants that limited their product sales within a state were covered by what critics described as a patchwork of varying, often inadequate laws and regulations; seven of them had no inspection at all, according to CQ. "Revelations in the press and during committee hearings about slaughter and packing practices at some state plants made meat inspection the most emotional consumer issue of 1967."<sup>4</sup>

Currently, the Secretary of Agriculture (hereafter, USDA or FSIS) is authorized to approve a cooperative program in any state if it has enacted a "law that imposes mandatory ante mortem and post mortem inspection, reinspection and sanitation requirements that are *at least equal to* those under Title I of [the FMIA], with respect

<sup>2</sup> Before August 2007, when USDA took over inspection in New Mexico, there were 28 state programs. New Mexico decided to cede these responsibilities to USDA after USDA deferred a finding of "equal to" status in a 2006 on-site review and asked the state to make a series of corrective actions in its program. During the initial on-site review, FSIS concluded that the state was not adequately implementing and enforcing the meat and poultry inspection requirements, did not have an effective pathogen testing program, and that inspection personnel lacked the education and training needed to apply the state's inspection methodology. The FSIS *Review of State Programs*, including the findings on individual states, can be accessed at [[http://www.fsis.usda.gov/PDF/Review\\_of\\_State\\_Programs.pdf](http://www.fsis.usda.gov/PDF/Review_of_State_Programs.pdf)].

<sup>3</sup> Comparable provisions for state inspection were added to the PPIA by the Wholesome Poultry Products Act of 1968 (P.L. 90-492). Thus, although this report primarily references meat animals and meat products covered by the FMIA, it presumes that poultry and poultry products are affected similarly under both current and proposed authorities.

<sup>4</sup> Congressional Quarterly, "Nation's Meat Inspection Requirements Tightened," *1967 CQ Almanac*, pp. 705-713.

to all or certain classes of persons engaged in the State in slaughtering amenable species [i.e., cattle, sheep, swine, goats, equines], or preparing the carcasses, parts thereof, meat or meat food products, of any animals for use as human food solely for distribution within such State” (21 U.S.C. 661(a)(1); emphasis added by CRS). Section 661 also requires USDA to assume federal inspection of state plants whenever a state decides to terminate its own program, or USDA determines that FMIA requirements are not being met.

Pursuant to the FMIA as amended by the Wholesome Meat Act, USDA-FSIS must receive a formal request for a program from the governor, and review the state’s laws, regulations, and performance plan (including funding, staffing, training, labels and standards, enforcement, laboratory and testing procedures, and other aspects). To ensure continued compliance, FSIS annually certifies state programs based on a review of materials (like performance plans and an annual report submitted by the state); FSIS also conducts a more comprehensive review of each state every one to five years.<sup>5</sup>

## Proposed Inspection Changes

Section 11103 of the House version of H.R. 2419 would have rewritten rather than merely amended Title III of the FMIA.<sup>6</sup> It would have entailed a number of major departures from current authority. The Senate language was approved as Section 11067. House-Senate conferees generally adopted the Senate language, as Section 11015 of the final bill. Unlike the provisions in the House bill, the conference-adopted Senate language would not replace Title III (federal-state cooperation) in the current FMIA. Rather, it would create a new Title V — Inspections by Federal and State Agencies.<sup>7</sup>

### Allowing State-Inspected Products in Interstate Commerce

Currently, state-inspected meat cannot be sold in interstate commerce. Under the **Senate** bill as endorsed by the **conference** committee, state programs currently operating under the Title III “at least equal to” requirements presumably could continue, so long as products were not shipped across state lines. The new Title V would enable many state-inspected establishments — i.e., those already covered by Title III — to be selected by USDA (in cooperation with the state agency) to receive the federal mark of inspection and ship products in interstate commerce. Although state inspectors could continue to be in these designated plants, inspection in such plants essentially would be under federal supervision.

More specifically, under the **conference** (and **Senate**) bill, the U.S. Secretary of Agriculture would be required to designate and directly supervise a federal

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<sup>5</sup> An FSIS summary of Cooperative Inspection Program Functions can be accessed on the Internet, at [<http://www.fsis.usda.gov/OPPDE/FSLGRS/MPI/oversight.htm>].

<sup>6</sup> As indicated, although this report generally does not reference poultry and the PPIA, the farm bill provisions discussed here would similarly affect the poultry program.

<sup>7</sup> As with the House-passed bill, similar provisions would apply to poultry products as well.

employee as the state coordinator for each appropriate state agency. This new coordinator's responsibilities would be to provide oversight and enforcement of Title V, and to oversee state training and inspection activities by state personnel. The coordinator would have to visit the covered establishments to ensure they are operating consistently with the FMIA, submit quarterly reports on each establishment's status and compliance, and "deselect" plants or suspend their inspection if they violate any requirement.

The **House** language would have explicitly allowed "the shipment in commerce" of products (i.e., carcasses, carcass parts, meat, and meat food products) under the newly approved Title III programs. Another **House** provision would have changed Title IV of the current FMIA to further direct that "a State or local government shall not prohibit or restrict the movement or sale of meat or meat food products that have been inspected and passed in accordance with the Act for interstate commerce."

Currently USDA is authorized to approve state programs that have requirements at least equal to federal requirements. According to FSIS, "at least equal to" now means "that the food safety and other consumer protection measures effected by a State program address the same issues addressed by the Federal (FSIS) program, and the results of the State's approach are to be at least as effective as those of the Federal program. The State program need not take exactly the same action as the Federal program."<sup>8</sup>

The proposed **House** language would have authorized USDA to approve (and then enter into cooperative agreements with) only those state programs that "adopt (including adoption by reference) provisions identical to titles I, II, and IV (including the regulations, directives, notices, policy memoranda, and other regulatory requirements under those titles) ..." States would have had to ensure that their products bear a mark of state inspection as the official mark. Titles I, II and IV essentially are all other provisions of the FMIA, which cover such components as inspection requirements, definitions of adulteration and misbranding, and enforcement authorities, among other provisions.

## Restrictions on Size of State-Inspected Plants

The **conference** (and **Senate**) bill would limit eligible establishments to those with 25 or fewer employees. Also, USDA would be authorized to develop procedures enabling state-inspected establishments with more than 25 employees to shift to regular federal inspection. Finally, under the **conference** (**Senate**) version, state-inspected plants with more than 25 employees but fewer than 35 employees could be selected for the new state program, but they would have to shift to regular federal inspection within three years of promulgation of a final rule.

The **House** version would have imposed a restriction limiting the size of an establishment that could be accepted under a new state program to no more than 50

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<sup>8</sup> "State Cooperative Inspection Programs," FSIS Directive 5720.2, Revision 3, November 16, 2004.

employees. However, it appears that larger establishments could have continued to participate if they became state-inspected within 90 days of enactment.

## **Option to Become State-Inspected**

Under the **conference** (and **Senate**) bill, current, future, and previously federally inspected establishments would be ineligible to join the new state program. Under the **House** bill, certain establishments that currently are federally inspected could have applied for inspection under the new state program if their states had one.

## **Cooperative Agreement and Other Support Provisions**

Currently, USDA and the states with programs enter into formal cooperative agreements that provide for, among other things, matching federal funds of 50%. Under the **conference** bill, states would continue to be eligible for federal reimbursement, but now for up to 60% of the cost of their meat and poultry inspection programs. Conferees deleted a provision in the Senate bill that would have reimbursed a state for 100% of eligible costs if the state provided additional microbiological verification testing of selected establishments. The **conference** (and **Senate**) bill also would create a new technical assistance division at FSIS to coordinate training, education, technical assistance, and outreach for very small and certain smaller-sized establishments.

## **Earlier Legislative Proposals**

**New Markets for State-Inspected Meat and Poultry Act of 2007 (H.R. 2315/S. 1150).** The state inspection provisions of the House-passed farm bill essentially were adapted from language found in H.R. 2315/S. 1150, introduced, respectively, by Representative Pomeroy in May and Senator Hatch in April 2007.

**H.R. 1760/S. 1149.** Introduced in March 2007 by Representative Kind and in April 2007 by Senator Kohl, H.R. 1760/S. 1149, would strike the provisions in the FMIA and PPIA that prohibit the interstate shipment of state-inspected meat and poultry. The bills also would set the federal reimbursement rate for state costs at no less than 50% and no more than 60%.

## **Selected Policy Issues**

Under the new farm bill, for the first time in 40 years, meat and poultry that is not federally inspected could be shipped across state lines. These and other pending changes raised a series of issues that were debated by proponents and opponents of the legislation.



## What Is “Identical”?

At issue have been the impacts, if any, of these changes on the safety of meat and poultry products. Concerns about any adverse effects stem largely from the supposition, long held by consumer advocates and other critics, that state inspection programs do not provide the same level of safety as the federal inspection programs. As noted, state measures now must be “at least equal to” the federal measures, notably including mandatory ante mortem and post mortem inspection, reinspection and sanitation requirements.

The current FSIS state review manual provides more specifics on how this is to be achieved. For example, under FSIS rules promulgated in 1996, each federally inspected establishment must have a HACCP (for hazard analysis and critical control point) plan that identifies each point in its process where contamination could occur, have a remedy to control it, implement the plan, monitor the process, and keep detailed records. As part of the plans, all operations must have site-specific standard operating procedures (SOPs) for sanitation. USDA inspectors check the establishment’s records to verify a plant’s compliance.

Accordingly, the FSIS state review manual directs that “State MPI Program officials also must verify a HACCP or equivalent system that evaluates hazards, takes steps to address hazards, and routinely verifies that product is safe, wholesome, unadulterated, and properly labeled.”<sup>9</sup> FSIS must approve and regularly review the states to ensure that they are following these types of procedures.

The House farm bill language would have gone even further by requiring that they be identical, and making it clear that this applies to all “regulations, directives, notices, policy memoranda, and other regulatory requirements.” Moreover, a condition of acceptance into the new state program would have been that the state implement, within 180 days of a USDA review of its system, all changes identified in the review to ensure enforcement of federal requirements. A possible indication of its more prescriptive nature was that the National Association of State Departments of Agriculture (NASDA), which promoted interstate shipment legislation for many years, had once suggested that it might not support a proposal with a requirement that states adopt “identical” rules.<sup>10</sup> Nonetheless, supporters of the House bill had argued that it would replace the current collection of 27 separate state programs with a single type of state program operating seamlessly with the federal system.

On the other hand, opponents of the House bill countered that it was unclear whether or not the “identical” language would also apply to all activities associated with inspection, some of which might fall outside of the “regulations, directives, notices, policy memoranda and other regulatory requirements.” Would or could the language apply, for example, to states’ certifying procedures and contractual relationships with testing laboratories? What about staffing and training practices?

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<sup>9</sup> *FSIS Manual for State Meat and Poultry Inspection Program Reviews*, August 2007, at [[http://www.fsis.usda.gov/PDF/State\\_Programs\\_Review\\_Manual\\_2007.pdf](http://www.fsis.usda.gov/PDF/State_Programs_Review_Manual_2007.pdf)].

<sup>10</sup> September 11, 2007, telephone discussion with NASDA staff.

Opponents of the House farm bill language had argued that at a minimum, these types of questions should be answered before a new program was passed that might continue some “at least equal to” activities that, in their view, have been substandard. They cited a September 2006 report by USDA’s Office of Inspector General (OIG) that examined FSIS’s oversight of the state programs. Though FSIS routinely gathers state staffing data, it does not use the data to determine if state staffing levels are appropriate for carrying out inspection activities, so some state programs may not have enough personnel to ensure their programs are “at least equal to” the federal program, OIG concluded. FSIS state reviews did not include determinations of whether laboratories used by the state to test products were providing accurate, reliable results, OIG also concluded, adding that FSIS officials told the OIG investigators that these were outside the scope of the FMIA and PPIA.<sup>11</sup>

One area where state and federal programs may diverge is in their sampling and testing methodologies used to verify that HACCP plans are producing safe products. Inspection officials have argued that regardless of which particular testing system is used, it has to be scientifically and legally defensible; critics have asserted that different methodologies can lead to different safety findings and therefore potentially different levels of safety. Another area where a present state program may differ from the federal system is in staffing and training; some states, for example, avail themselves of at least some USDA training; others may prefer their own programs — but all must meet basic outcomes. By requiring a federal employee to oversee each new state program, and by creating a new FSIS training division, drafters of the Senate bill (adopted by conferees) aimed to address concerns about these aspects of state-level inspection.

## **Are State Inspectors More Lenient than Federal Inspectors?**

The Senate Agriculture Committee held a hearing in April 2000 on a proposal (S. 1988) by Senator Daschle to permit state-inspected products in interstate commerce, if the programs adopted all federal inspection requirements. At that hearing, the director of the Ohio Department of Agriculture argued that state personnel are generally more accessible and flexible in providing inspection resources geared to the needs and time constraints of small plants; and that states offer practical information, technical assistance, and other support to smaller plants that lack the scientific and legal expertise needed to deal with government regulations. Furthermore, the Ohio director characterized the federal system as a “multilayered chain of command [with a] frequently adversarial attitude.”<sup>12</sup> Several meat processing companies also testified that communicating with state officials to solve problems was far easier than with federal officials.

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<sup>11</sup> *Audit Report: Food Safety and Inspection Service — State Meat and Poultry Inspection Programs* (USDA/OIG-A/24005-1-AT), September 2006. The OIG report also raised questions about FSIS’s criteria and documentation for determining the “equal to” status of other aspects of state programs, which is discussed elsewhere in this report.

<sup>12</sup> Fred L. Dailey, Director, Ohio Department of Agriculture and President, National Association of State Departments of Agriculture, April 6, 2000 testimony before the Senate Agriculture Committee.

Pressed for more specifics on barriers to joining federal inspection, the Ohio director cited three reasons. First, USDA's plant design and engineering requirements include elements that, he said, do not relate to food safety but would be expensive to meet — changing 3-inch drains to 4-inch drains, for example. Second, plants would rather communicate with the state than federal “bureaucracy,” as noted above. Third is overtime costs (which plants pay for inspection beyond regularly scheduled shifts); the federal government charges considerably more than states.

In a 2001 report, the University of Nebraska examined, for the state legislature, the potential impacts of adopting a state inspection program there. It polled other states to determine why some adopt such programs and others do not. Among those that chose to maintain state inspection, the most frequently cited factor was “the desire for greater responsiveness to the unique needs of producers and processors.”<sup>13</sup>

Consumer advocates interpret the communication and flexibility arguments to mean that companies can more easily influence states to adopt less stringent safety requirements or to enforce them less rigorously. One consumer advocate who testified at the 2000 Senate hearing argued that the state “equal to” provision was adopted as a compromise: The 1967 Wholesome Meat Act “was driven by the revelation of filthy conditions and the lack of standards in state-inspected meat plants and the need to improve physical facilities and sanitation practices. However, it became clear that some of the smallest plants could not meet the physical facility requirements of the proposed law.... There was no discussion in 1967 of the potential public health risk inherent in this action, but the prohibition on sale across state lines recognized that these products were likely not to be the same as those produced in federally inspected plants.”<sup>14</sup> Such advocates continue to assert that state standards are not as strong as federal standards, regardless of the “equal to” determination.<sup>15</sup>

## **Does USDA Provide Adequate Oversight of State Programs?**

Neither the OIG in its 2006 report nor a relevant 2002 federal appeals court ruling would agree, without qualification, that state-inspected meat and poultry are

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<sup>13</sup> Kara Slaughter and others, *Potential Impacts of State Meat and Poultry Inspection for the State of Nebraska*, Submitted to the Agriculture Committee of the Nebraska Unicameral by the University of Nebraska Public Policy Center, May 2001 (revised July 2001).

<sup>14</sup> Testimony of Carol Tucker Foreman, Distinguished Fellow and Director, Food Policy Institute, Consumer Federation of America. Recent releases and statements by Foreman and others argue that it is untrue that very small plants cannot operate under federal inspection, citing as evidence the nearly 3,000 (generally those with less than 10 employees) that do, according to USDA data.

<sup>15</sup> It should be noted that the Consumer Federation of America (CFA) and other consumer groups had extended their support for this earlier proposal (S. 1988) to permit interstate shipment. Their support was made contingent on retention of the introduced bill's language requiring not only that states adopt identical standards, but also that state-inspected plants be subject to a pathogen reduction program as then being implemented in federally inspected plants. For background on pathogen testing and issues, see CRS Report RL32922, *Meat and Poultry Inspection: Background and Selected Issues*, by Geoffrey S. Becker.

necessarily as safe as federally inspected products. The OIG report concluded, for example, that although FSIS had a manual with detailed procedures and checklists for conducting onsite state reviews, “how the agency arrived at its decisions regarding the acceptability of State MPI (meat and poultry inspection) programs are not clearly documented in FSIS’ summary reports. In other words, while the manual establishes clear guidelines for identifying problems in State MPI programs, how those problems are weighed in the determination and documented in the summary report [on a state program] was less clear. This condition was caused by the agency’s decision to eliminate specific decision-making criteria from its comprehensive review methodology.”<sup>16</sup>

OIG noted elsewhere in its findings: “When the agency revised its directives for inspecting these programs, an agency official said FSIS eliminated specific criteria for weighing violations and rendering decisions in order to avoid being overly prescriptive and to allow reviewers to use their discretion. Officials reviewing these programs thus lack clear, objective, and uniform guidelines for weighing the effect of establishment deficiencies on State MPI program findings and for documenting the relationship between these violations and the final determinations.” OIG said, for example, that FSIS had granted “at least equal to” status to several states even though they found HACCP and sanitation deficiencies in establishments in those states — and the deficiencies were similar to those from a review of another state program where “significant concerns” were cited.<sup>17</sup>

In *Dailey v. Veneman*, a federal appeals court in 2002 upheld a district court’s decision to reject Ohio’s legal bid to gain interstate acceptance of its state-inspected products. Among other arguments, Ohio had asserted that the lower court should have accepted as true the allegation that state-inspected products were as safe as federally and foreign-inspected meat and poultry and the current federal law lacks a rational basis for treating state-inspected meats and poultry differently. The appeals court responded in part: “Though the USDA does keep an eye on state inspection programs, it keeps yet a closer eye on its own plants and on meat and poultry entering the country, and it is possible that a state program could deteriorate for a time without the USDA’s knowledge. This policy provides a rational basis for Congress to restrict the interstate transport of state-inspected meat.”<sup>18</sup>

CRS informal discussions in 2007 with various state and federal inspection experts suggest that many state inspection procedures look remarkably similar (and often may be identical) to those in federal establishments, including all key ante-mortem and post-mortem functions. For example, in all state programs, a

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<sup>16</sup> *Audit Report: Food Safety and Inspection Service — State Meat and Poultry Inspection Programs*. The *FSIS Manual for State Meat and Poultry Inspection Program Reviews*, current through August 2007, at [[http://www.fsis.usda.gov/PDF/State\\_Programs\\_Review\\_Manual\\_2007.pdf](http://www.fsis.usda.gov/PDF/State_Programs_Review_Manual_2007.pdf)].

<sup>17</sup> *Audit Report: Food Safety and Inspection Service — State Meat and Poultry Inspection Programs*.

<sup>18</sup> *Fred L. Dailey, Director of the Ohio Department of Agriculture, Ohio Department of Agriculture et al., v. Ann M. Veneman, Secretary, U.S. Department of Agriculture* U.S. Court of Appeals for the Sixth Circuit, 2002 U.S. App. LEXIS 24623, December 3, 2002.

government veterinarian examines all live animals before they are slaughtered, just as in the federal system. Trained state inspectors observe slaughter and processing operations and look for virtually the same problems that federal inspectors are looking for, according to these experts. Where the inspection process may diverge appears primarily to be in how the inspector communicates with the establishment to correct deficiencies, those knowledgeable with the programs explain. Federal officials, for example, might simply point out a deficiency and possibly inform the establishment where it might look for information or assistance to correct the situation. State officials are more likely to work directly with the plant, providing technical assistance and other resources to remedy the problem, these inspection experts explained.<sup>19</sup>

A longstanding argument, that federal rules require plants to undertake costly plant and equipment changes, may be less relevant today since all plants, including small and very small ones, now are expected to be operating under HACCP plans, according to those knowledgeable about federal-state inspection. Recordkeeping by establishments and verification by inspection personnel are used to ensure that the system is working. Since January 2000 all slaughter and processing operations, including small and very small establishments, are required to have HACCP plans in place under the federal inspection program — and all state programs also have incorporated HACCP or equivalent plans, these experts state. HACCP by nature is less prescriptive with regard to how individual establishments achieve the standards of safety, they add.<sup>20</sup>

The president of NASDA in 2007 asserted that USDA pays much closer attention to the state programs than to foreign programs. “State inspection programs undergo annual audits containing more than 125 pages of compliance procedures. By comparison, USDA’s audit document for evaluating the 38 foreign inspection systems is a one-page checklist.”<sup>21</sup>

## **Would Federal Establishments Switch to State Inspection?**

This question first arose out of two provisions in the House bill. First, Section 302(d), Restriction on Establishment Size, stated that after the date that is 90 days after enactment, “establishments with more than 50 employees may not be accepted into a State meat inspection program. Any establishment that is subject to state inspection on such date, may remain subject to State inspection.” Second, Section 306, Federal Inspection Option, stated that “[a]n establishment that operates in a State with an approved State meat inspection program may apply for inspection under

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<sup>19</sup> USDA claims to be devoting greater efforts now to outreach and assistance to small and very small plants under its jurisdiction; see [[http://www.fsis.usda.gov/Science/Small\\_Very\\_Small\\_Plant\\_Outreach/index.asp](http://www.fsis.usda.gov/Science/Small_Very_Small_Plant_Outreach/index.asp)].

<sup>20</sup> More on HACCP can be found in CRS Report RL32922, *Meat and Poultry Inspection: Background and Selected Issues*.

<sup>21</sup> Roger Johnson, Commissioner, North Dakota Department of Agriculture, from an op-ed piece reprinted in the October 2, 2007 edition of *Pro Farmer’s Inside Washington Today* column on AgWeb.com [<http://www.agweb.com>]. (Subscription required.)

the State meat inspection program or for Federal inspection.” (Such an establishment cannot apply more than once every four years.)

There was concern that under the House bill, larger plants could have evaded the size restriction by coming under state inspection if they did it within the initial 90 days of enactment. There was some uncertainty as to whether this 90-day window in the House bill would have applied to larger plants that want to enter *existing* state programs, or whether this would have applied to the newly authorized state program, although it would appear that the existing programs would no longer have been authorized under the proposal. Assuming that the House legislation implied the latter situation, then further uncertainty arose regarding whether a state could apply for and achieve recognition within such a short time period.

The conference-adopted Senate language, by adding a new Title V, supplements rather than replaces the existing state programs.

Consumer advocates and employee unions had found the second House provision — to permit federal plants to convert to state inspection — to be one of the more controversial provisions. They cited statistics provided by USDA that there are 5,603 federally inspected meat and poultry plants. Of these, approximately 80% (or more than 4,500) have fewer than 50 employees, creating the potential for an exodus from the national program. “With that change, if a federal inspector pressures a meat packer to improve sanitation, the packer could instead try to negotiate a more understanding regulatory response from his state inspection program,” these groups recently argued. This would have threatened not only food safety but also the jobs of thousands of federal inspection employees, they claimed. “The provisions would also unleash lobbying campaigns to set up state inspection programs in the 22 (now 23) states that currently do not have them so plants in those states can also seek ‘more understanding’ enforcement of food safety laws under state programs.”<sup>22</sup> The Senate “compromise” language adopted by conferees clarifies that current, future, or prior federal establishments would not be eligible for the new state inspection program.

## How Might Foreign Trade Be Affected?

Under Section 20 of the FMIA (and Section 466 of the PPIA), FSIS is responsible for determining the equivalence of other countries’ meat and poultry safeguards. A foreign plant cannot ship products to the United States unless FSIS has certified that its country has a program that provides a level of protection that is at least equivalent to the U.S. system.<sup>23</sup> FSIS experts visit the exporting country to review its rules and regulations, meet with foreign officials, and accompany them on

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<sup>22</sup> The Safe Food Coalition (Center for Foodborne Illness Research & Prevention, Consumer Federation of America, Food and Water Watch, Government Accountability Project, National Consumers League, Safe Tables Our Priority, United Food and Commercial Workers Union) and the American Federation of Government Employees, July 25, 2007, letter to Members of Congress.

<sup>23</sup> A list of the current agreements can be accessed at [[http://www.fsis.usda.gov/regulations\\_%26\\_policies/Eligible\\_Foreign\\_Establishments/index.asp](http://www.fsis.usda.gov/regulations_%26_policies/Eligible_Foreign_Establishments/index.asp)].

visits to slaughtering and processing plants. When a foreign program is approved, FSIS relies on that government to certify eligibility of, and to inspect, the plants. FSIS periodically reviews foreign government documents and conducts on-site audits at least annually to verify continuing equivalence. In addition, FSIS operates an extensive reinspection program at U.S. border entry points.

Food safety equivalence is a concept the United States adopted as a signatory to the 1994 Uruguay Round (UR) trade agreements, and specifically the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS agreement). Article 4.1 of the SPS agreement states:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

According to FSIS, the burden for demonstrating equivalence rests with an exporting country. The agency's initial evaluation to determine foreign equivalence is quite extensive and detailed.<sup>24</sup> As a practical matter, it would appear to be difficult for a foreign country to demonstrate successfully that any system that is not nationally administered (i.e., state, local) should be recognized as equivalent; apparently, none are so recognized currently. In fact, countries that ship meat and poultry to the United States are more likely to have dual safety regimes: one for the plants that sell domestically, and another, certified by the United States (and possibly other countries) as equivalent for export. If the conference bill permits products inspected by states into commerce (and if such commerce included foreign as well as interstate shipments), it might be reasonable to assume that other countries with their own "state systems" could seek new equivalency determinations which encompass such systems.

As described earlier, the new farm bill would explicitly allow the shipment in commerce of products (i.e., carcasses, carcass parts, meat, and meat food products) under the newly approved programs. Some have argued that the new language should be interpreted to cover only commerce between (not outside) the states and territories. However, Title I of the current FMIA defines commerce as "commerce between any State, any Territory, or the District of Columbia, and any place outside thereof; or within any Territory not organized with a legislative body, or the District of Columbia." Related USDA questions have included whether individual states might be negotiating with foreign trading partners about import policies and conducting their own audits of foreign establishments, whether trading partners would audit all state programs, whether some states could export products to a particular country while others could not, and whether the United States would (and could) segregate products intended for export based upon state of origin.

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<sup>24</sup> See FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, October 2003, at [<http://www.fsis.usda.gov/OPPDE/IPS/EQ/EQProcess.pdf>].

## Do Foodborne Illness Data or Pathogen Testing Provide Any Clues to the Relative Safety of State-Inspected Products?

Food safety advocates and others frequently cite the incidences of foodborne pathogens and of foodborne illnesses as reasons to be concerned about food safety programs. A frequently cited estimate used by federal officials and food safety advocacy groups alike is that each year, 76 million people become sick, 325,000 are hospitalized, and 5,000 die from foodborne illnesses caused by contamination from any one of a number of microbial pathogens.<sup>25</sup>

It also should be noted that these estimates reflect illnesses related to all types of foods, not solely to meat and poultry products. The CDC does observe:

Raw foods of animal origin are the most likely to be contaminated; that is, raw meat and poultry, raw eggs, unpasteurized milk, and raw shellfish. Because filter-feeding shellfish strain microbes from the sea over many months, they are particularly likely to be contaminated if there are any pathogens in the seawater. Foods that mingle the products of many individual animals, such as bulk raw milk, pooled raw eggs, or ground beef, are particularly hazardous because a pathogen present in any one of the animals may contaminate the whole batch. A single hamburger may contain meat from hundreds of animals. A single restaurant omelet may contain eggs from hundreds of chickens. A glass of raw milk may contain milk from hundreds of cows. A broiler chicken carcass can be exposed to the drippings and juices of many thousands of other birds that went through the same cold water tank after slaughter.<sup>26</sup>

In April 2007 and April 2008 reports, the CDC compared the incidence of various foodborne infections in 2006 with baseline data from 1996-1998. The reports observed that significant declines in the incidence of certain foodborne pathogens have occurred since 1996, but generally the declines were before 2004.<sup>27</sup>

The April 2007 CDC report had observed that an earlier decline in Shiga toxin-producing *E. coli* O157 (STEC O157) infections was “temporally associated” with measures by FSIS and by beef processors to reduce ground beef contamination — measures which were “accompanied by a decline in the frequency of isolation of STEC O157 from ground beef in 2003 and 2004.” Further, although the frequency of finding the pathogen in products in 2005 and 2006 was the same level as in 2004, “Reasons for the increases in human STEC O157 infections in 2005 and 2006 are not

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<sup>25</sup> The source of this estimate is the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), “Foodborne Illness: Frequently Asked Questions,” accessed at [<http://www.cdc.gov/foodsafety/>]. The estimate appears to be based primarily on 1997 and earlier data in a report by Paul S. Mead et al., “Food-related Illness and Death in the United States,” *Emerging Infectious Diseases*, vol. 5., pp. 607-625, 1999.

<sup>26</sup> CDC, “Foodborne Illness: Frequently Asked Questions.”

<sup>27</sup> CDC, “Preliminary FoodNet Data on the Incidence of Infection with Pathogens Transmitted Commonly Through Food — 10 States, 2006,” *Morbidity and Mortality Weekly Report*, April 13, 2007, and April 11, 2008.



known.” While not attributing this to either meat and poultry or to produce, the CDC did take note of STEC O157 outbreaks in 2006 caused by contaminated lettuce and spinach.

The CDC report explained that transmission of *Salmonella* to humans can occur via many vehicles, including produce, eggs, poultry and other meat, and direct contact with animals and their environments. (It also noted an occurrence through tomatoes in 2006.) However, the report noted that poultry is an important source of human *Salmonella* infections. It also discussed the FSIS initiative to reduce *Salmonella* in poultry and other meat, and that in 2006 the lowest percentages of chickens tested positive for the pathogen.

The FSIS pathogen testing cited by the CDC is one of the ways the agency monitors the effectiveness of establishments’ HACCP plans.<sup>28</sup> Consumer advocates, industry officials, and others closely follow both FSIS testing results and the CDC disease reports, and often speculate about their significance.

Nonetheless, neither FSIS testing results nor this CDC report appear to offer any conclusive evidence of a causal relationship between FSIS program modifications on the one hand, and changes in the occurrence of foodborne illnesses on the other. Even if the difficulties in making such an attribution could be overcome, it would not likely answer the further question regarding the distinctions, if any, between federally inspected and state-inspected products as the cause of foodborne illnesses. Among other potential variables, state testing programs can differ from the federal programs, making comparisons between testing results difficult at best.

## Conclusion

As noted, the new farm bill would amend the FMIA and PPIA in order to modify a key element of federal food safety policy that has been in place for 40 years. At the heart of the debate has been a seemingly simple question: do, or can, state programs provide the same assurance of product safety as the federal program? If the bill becomes law, stakeholders will turn their attention to USDA, which will be required to implement the new provisions. This rulemaking process can be expected to fill in many of the details on program operation and, ultimately, to help determine its effectiveness.

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<sup>28</sup> Information about pathogen reduction and testing results can be found at [[http://www.fsis.usda.gov/Science/Hazard\\_Analysis\\_&\\_Pathogen\\_Reduction/index.asp](http://www.fsis.usda.gov/Science/Hazard_Analysis_&_Pathogen_Reduction/index.asp)].