

COMMENTS OF
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At

United States Department of Agriculture
Public Hearing of the Proposed Leafy Green Marketing Agreement No. 970
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Good morning. My name is Michael Hansen. I am a Senior Scientist with Consumers Union, the nonprofit publisher of *Consumer Reports*, *Consumer Reports Online*, *Consumer Reports on Health*, *Consumer Reports Money*, and *Consumer Reports Best Buy Drugs* with 8.3 million subscribers. Additionally, Consumers Union has 806,000 e-activists who follow the issues we care about, and 445,000 members—those subscribers who chose to vote in the 2009 election for our Board of Directors. We appreciate today's opportunity to comment on the proposal to create a national marketing agreement for leafy greens, under the Agricultural Agreement Marketing Act of 1937, which will require industry participants to adhere to Good Agricultural, Handling, and Manufacturing Practices.

We applaud the industry's concern with improving its safety practices, which led to this Proposal for a national Leafy Green Vegetables Marketing Agreement (LGVMA). The broad consumption of leafy greens is essential to the health of consumers, both to insure proper nutrition and to help fight the current epidemic of obesity in the United States. However, we oppose this proposal, as we opposed establishment of the California Leafy Green Marketing Agreement two years ago, as the wrong way to go about solving food safety problems.

One stated purpose of this public hearing is for "determining whether the proposed agreement or any appropriate modification thereof would effectuate the declared policy of the Agricultural Agreement Marketing Act of 1937." We believe the answer to this question is no, for the reasons stated below.

First, the proposed USDA LGVMA is undemocratic and contrary to key legal precedents in the regulatory field, as it allows the leafy green industry to virtually set and oversee its own safety standards. Typically, in America, to solve a safety problem, such as polluted water, pesticide residues in food, or pathogens in meat, we pass a law and the EPA, FDA or USDA establish regulations through a process which gives the entire public an opportunity to give meaningful input on the proposed standard. This has the beneficial effect of getting input from a wide range of sources and experts, some of whom may have been previously unknown to the drafters of the standard. The proposed LGVMA basically will allow the industry handlers and producers to develop the rules and proposed standards virtually all by themselves,

Ex 125

with only a minor tip of the hat to public input. In terms of product safety, consumers are rarely benefited when industry polices itself.

The proposed LGVMA will set up Leafy Green Vegetables Administrative Committee, a Technical Review Board, and a Marketing Review Board, all of which will be overwhelmingly controlled by the Leafy Greens Industry, to propose food safety standards to the Secretary of Agriculture. The Administrative Committee will have 23 members, 19 of which will be handlers and producers, and one representative each of the retail, foodservice, importer and public. While the Secretary of Agriculture will select the producer and handler members by meetings of producer and handler representatives, the other 4 members will then be nominated by the producer and handler members, with final selection by the Secretary. In other words, there will only be one member of the Administrative Committee representing the public (e.g. consumers) and that member is chosen by the Leafy Greens industry! All the non-producer and handlers members of the Administrative Committee will be chosen by the Leafy Green Industry. In other words, the Administrative Committee will be run by the Leafy Green Industry with a fig leaf of representation of the public to make it appear that this is a balanced Committee when it clearly is not.

The Technical Review Board—tasked with helping The Administrative Committee to develop the audit metrics for Good Agricultural Practices, Good Harvesting Practices, and Good Manufacturing Practices, which are supposed to ensure the safety of leafy green vegetables—is only advisory in nature. Thus the power still resides with the Administrative Committee. The Technical Review Board has 14 members, 5 producer/handlers, 5 food safety experts from land grant universities (agriculture schools), 1 from USDA, 1 from EPA and 2 from FDA. However, the 5 food safety experts will be chosen by the Leafy Green Industry (e.g. producer/handlers), and so will not be independent, meaning that the Industry will choose 10 of the 14 advisors.

The Market Review Board, tasked with advising the Committee on how to “maximize consumer confidence through market acceptance and recognition of the program,” is also advisory in nature and will be totally controlled by the Leafy Green Vegetable Industry. Although there will be 9 members—2 representing retail grocers; 2 representing food service companies; 2 from land grant universities with expertise in fresh vegetable marketing, economics or consumer acceptance; and 3 consumers—all will be appointed by the Advisory Committee. The 3 hand-picked consumers will only comment on acceptance of the program and not on the standards (e.g. audit metrics). In other words, a committee totally chosen by the Leafy Greens Industry will advise them on how to convince the public of what a great program the LGVMA is. This committee reminds us that part of USDA’s charge is the promotion of the industry, and for that reason, it is neither wholly independent nor the most appropriate overseer of leafy green safety

From a consumer perspective, it is obvious that there is no way to ensure that safety standards are “science-based, scalable and regionally applicable” when they are being developed by committees (the Advisory Committee with advice from the Technical Review Board) made up of and controlled by industry, which has an inherent financial stake in reducing production costs. The proposed rule states that “the metrics would *reflect* Good Agricultural Practices [GAPs], Good Handling Practices [GHPs], and Good Manufacturing Practices [GMPs]” (e.g.

FDA guidance such as “Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables”, “Commodity Specific Food Safety Guidelines for Lettuce and Leafy Greens Supply Chain,” and the proposed “Draft Guidelines for Leafy Greens” and appropriate FDA regulations) **bold** added. The operative word “reflect” is an ambiguous term which means that the Advisory Committee can deviate from it at will, making the metrics weaker, or changed in ways that reflect only the handler’s needs, and not the needs of consumers, organic or sustainable producers or environmental concerns.

We only have to look at the metrics/standards developed by the California Leafy Greens Marketing Agreement or by some of the larger handlers to see what could go wrong when there is not broader input into these metrics from the sustainable agriculture and ecological perspectives. A story published on July 13 in the *San Francisco Chronicle* found a range of environmental problems. Dick Peixoto, an organic farmer in the Pajaro Valley near Watsonville told of the need to create sterile buffers around his fields, with no vegetation, no water and no wildlife of any kind permitted. Previously, he had planted hedges of fennel and flowering cilantro around his fields to harbor beneficial insects as an alternative to pesticides. Those plants had to be ripped out. One field had evidence of deer tracks, but no plants were eaten; it didn’t matter and he had to destroy all crops within 30 feet of each side of the tracks. Jill Wilson, an environmental scientist at Central Coast Regional Water Quality Review Board in San Luis Obispo spoke of demands to create 450-foot dirt buffers around fields, which removes the agencies chief means of preventing pollution from entering streams and rivers. Other farmers bulldozed ponds since they were told that using them to recycle irrigation water was unsafe. Ken Kimes, owner of New Natives farms in Aptos, Santa Cruz County, was told that no children younger than 5 could be allowed on his farm for fear of diapers. Such scorched earth tactics make no sense when trying to farm in a sustainable, organic or ecologically rational way. Furthermore, despite the existence of the LGMA in California, they continue to experience incidences of tainted leafy greens—the week of September 23 there was a recall of loose spinach due to salmonella contamination. The product was grown in Salinas and distributed to several states and Canada before it was recalled.

After the Administrative Committee has developed them, the safety standards must be submitted to the Secretary of Agriculture, who will put the metrics/safety standards out for notice and comment. Although this certainly is a good idea, we fear that it will be extremely difficult to have real input to the standards at this point. The proposal doesn’t lay out what exactly will be reviewed or for how long. Indeed, with metrics developed by the industry with virtually no input from independent outsiders (e.g. those not chosen by the industry), it seems as those the metrics developed for comment will be a “done deal.”

A second major concern for Consumers Union is that, since participation is voluntary, the marketing agreement does not cover all leafy green growers and processors. Consumers cannot, therefore, be assured that all leafy greens that reach the marketplace will be as safe as possible. For example, the Arizona Leafy Greens Marketing Agreement, implemented in 2007, only covers 75% of the leafy greens produced in the state. Indeed, the proposed LGVMA was requested by a group of handlers and producers who “claim to represent a majority of the volume of leafy green vegetables produced for the US fresh market.” Not “all,” only a “majority.” Experts agree that government standards and enforcement of (GAPs) for **all** farms

and GHPs, GMPs, and Hazard Analysis Critical Control Point (HACCP) programs for *all* processors are essential to maintaining the safety of leafy greens, and thereby consumer confidence and the financial health of the industry. If not all leafy greens in the marketplace are subject to these Best Practices, the door remains open for contaminated produce to reach consumers, with all the attendant negative health effects and negative publicity that that incurs.

Thirdly, we are concerned that the LGMA may propose the use of a certification mark to convey to consumers that leafy green products from those participating farms and processors are subject to Best Practices. This standard will have USDA behind it because it will choose the auditors and grant the use of the certification mark. In essence, this approach turns safety into value added in the marketplace. Consumers have a right to expect, and government authorities must guarantee the highest level of food safety for all food that enters the marketplace. Safety should not be something that consumers must search out and possibly pay extra for. Furthermore, if romaine lettuce, for example, is implicated in a future *E. coli* contamination incident, many consumers will not stop to ask whether produce has a safety seal—they will simply stop buying all leafy greens for a period of time. . The LGVMA proposes the use of the certification mark on “bills of lading or manifests...**or any other such uses recommended by the Committee and approved by the Secretary to carry out the purposes of this Agreement**” bold added. This language provides the wiggle room that could lead to certification marks on leaf green products sold to consumers.

Finally, Consumers Union is concerned that this proposal for a national marketing agreement to set safety standards for leafy greens, through a predominantly closed, industry-led process, is being considered at a time when Congress is in the midst of passing legislation that would require FDA to develop safety standards for leafy greens, through an open, public, and democratic process. HR 2749 overwhelmingly passed the House and SB 510 is pending in the Senate. This likely to lead to two different and potentially conflicting set of standards. This will be confusing and possibly harmful for both industry and consumers. We thus conclude that proposed LGVMA will not meet the declared policy of Agricultural Marketing Act on 1937 and so should not be pursued.

In conclusion, while this marketing agreement may bring some improvement in leafy green safety, because of the insular, exclusive way in which these standards are being created, and more importantly, because this process does not cover all leafy green growers and processors in the United States, we believe that this agreement will not provide the industry with the extremely high standard of safety that it must achieve to keep and expand its market. We are also deeply concerned about beginning to view safety as something that can be used as a marketing tool, and we oppose the use of a certification mark that suggests an added level of safety on some leafy green products and not on others. Consumers Union strongly supports legislation in Congress that would require FDA to issue regulations governing growing and processing of leafy green vegetables—essentially turning its Guidance into mandatory regulation.