

PROPOSED LEGISLATION EXPANDS FDA AUTHORITY TO RECALL CONTAMINATED FOOD

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On October 22, 2009, the Senate Health, Education, Labor, and Pensions ("HELP") Committee held a hearing about the proposed Food and Drug Administration Food Safety Modernization Act ("FDAFSMA" or "the Act"), S. 510. The FDAFSMA is a bill amending the Federal Food, Drug, and Cosmetic Act that was introduced by a bipartisan group of Senators on March 3, 2009. The Act is comprised of three titles focused on improving: prevention of food safety problems, detection and response to food safety problems, and safety of imported food. Senator Tom Harkin of Iowa, Chairman of the HELP Committee, stated his hope to have FDAFSMA to President Obama before January 2010.

FDAFSMA would expand the authority and resources of the Food and Drug Administration ("FDA") by giving power to the Secretary of the United States Department of Health and Human Services. This new risk-based, preventive approach has the goal of spotting and stopping contaminated food before it enters domestic supply chains. Specifically, the Act would require food facilities to register, enact preventive food contamination plans, provide the FDA with access to records during food emergencies, and participate in enhanced surveillance and tracing systems. The FDA would also have the authority under the FDAFSMA to verify imported food and to authorize routine inspections by third-parties of international facilities in certain instances. Most notably, the Act provides the FDA with the direct authority to conduct mandatory recalls of adulterated food if there is a reasonable probability of serious adverse health consequences or death.

This Act is similar to its companion legislation, the Food Safety Enhancement Act, H.R. 2794, which was passed in the United States House of Representatives in July by a vote of 283-142. The Food Safety Enhancement Act gave the FDA authority to inspect food facilities, require facilities to have preventive plans, mandate the cessation of distribution of contaminated foods, and the option to subsequently recall such foods required all facilities to have food safety plans in place. If the Senate passes FDAFSMA, the two acts will go to a Conference Committee with members from each house, a conference report will be prepared, and then both the House and the Senate will be required to approve the report before the legislation can be sent to President Obama for review.

We expect Congress to pass this legislation, and we further expect President Obama to sign it into law. If passed, the Act is expected to reduce the number of food-borne bodily injury claims, since contaminated food should be identified earlier and removed from the marketplace. However, because the FDAFSMA provides newfound authority to the FDA to mandate recalls, GL insurers may face new claims for recall coverage, and Product Recall insurers are likely to face an increase in claims as the number of recalls rise.

Cozen O'Connor is a global leader in representing the insurance industry in all coverage areas. For further analysis of coverage issues involving food contamination please contact Kevin Haas, Chair of Cozen O'Connor's Food Contamination & Product Recall Practice area, in our New York office (khaas@cozen.com, 212.908.1322).