

VIABILITY OF SMALL TO MID-SIZED AGRICULTURE

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ABSTRACT

Consumer demand for local food had been on the rise well before the COVID-19 pandemic, but the pandemic has highlighted the vulnerability of the United States food system. Despite increased demand, small independent

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producers continue to struggle with a regulatory system that holds them back. This essay demonstrates how small farms that sell to their local community struggle with the myriad of federal, state, and local regulation of agriculture and food production. These challenges include nearly impossible record keeping requirements, regulatory limitations on the production of meat, insufficient access to processing facilities, and complicated and expensive licensing requirements—even for simple, homemade food items. Relevant laws include the Federal Meat Protection Act, the Federal Poultry Processing Act, the Pasteurized Milk Ordinance, the Food Safety Modernization Act, and a myriad of state and local regulations. This essay addresses policy solutions that can assist small producers in gaining viability and serving the consumer market with the wholesome, locally grown food they crave. The essay explores current and pending state legislative effort to decrease the regulatory burden, such as in Wyoming, Montana, Oklahoma and Arkansas, allowing for production and intrastate sale of raw milk, homemade foods, and even a few measures to permit production of beef and poultry.

I. INTRODUCTION

In February 2020, just as the American public began to recognize the potential seriousness of the COVID-19 virus, the United States Department of Agriculture (USDA) Economic Research Service (ERS) published a report on consolidation in United States meatpacking.¹ This report found a dramatic increase in consolidation of the beef slaughter and processing industry.² In fact, data shows the top four beef processors control approximately 80% of the United States meat supply,³ and the top four pork producers account for 64% of the hog market.⁴ Shortly after the February 2020 ERS report, meat processing plants began to close across the country as close working conditions led to the infection of thousands of

1. See generally JAMES M. MACDONALD ET AL., USDA ECON. RSCH. SERV., CONSOLIDATION IN U.S. MEATPACKING 1 (2000).

2. *Id.*

3. *Id.*

4. HARRISON M. PITTMAN, THE NAT'L AGRIC. L. CTR., MARKET CONCENTRATION, HORIZONTAL CONSOLIDATION, AND VERTICAL INTEGRATION IN THE HOG AND CATTLE INDUSTRIES: TAKING STOCK OF THE ROAD AHEAD 5 (2005); see also generally Jen Skerritt, *Tyson Foods Helped Create the Meat Crisis It Warns Against*, BLOOMBERG BUSINESS (Apr. 29, 2020, 10:29 AM), <https://www.bloomberg.com/news/articles/2020-04-29/tyson-foods-helped-create-the-meat-crisis-it-now-warns-against> [<https://perma.cc/GY4W-6Y9P>].

processing plant workers.⁵ This created a supply chain problem wherein “supply and demand . . . can’t reach each other.”⁶

II. CONSUMER DEMAND FOR LOCALLY PRODUCED SUSTAINABLY FARMED FOODS.

Consumer demand for local food had been on the rise well before the COVID-19 pandemic. Between 2007–2012, the number of farms conducting direct-to-consumer (DTC) marketing increased, but the total value of DTC revenue did not substantially change.⁷ When meatpacking plants began to close during COVID-19, some consumers naturally turned to local farms.⁸ Consumers sought out local farms not only for meat, but for dairy, fruits, vegetables, and home produced food items (e.g., baked goods and freshly-jarred items like jams and salsas).⁹ While small farms were able to meet some of the demand, the local food industry is now at a crossroads.¹⁰

Although consumer demand for locally produced food continues to rise, producers struggle with a regulatory system that holds them back. This essay demonstrates how small farms that sell to their local community struggle with the myriad of federal, state, and local regulation of agriculture and food production. This essay does not describe the entire experience of small producers, but it does provide a sample of the challenges faced in their efforts to grow and produce the food sought by consumers. These challenges include nearly impossible record keeping requirements, regulatory limitations on the production of meat, insufficient access to processing facilities, and complicated and expensive licensing requirements—even for simple, homemade food items. Thus, while

5. See Dianne Gallagher, *Meat processing plants across the U.S. are closing due to the pandemic. Will consumers feel the impact?*, CNN BUSINESS (Apr. 27, 2020), <https://edition.cnn.com/2020/04/26/business/meat-processing-plants-coronavirus/index.html> [<https://perma.cc/Y3GZ-WSR9>].

6. *Id.* (quoting Associate Professor of Supply Chain Management at Syracuse University Julie Niederhoff).

7. SARAH A. LOW ET AL., ADMINISTRATIVE PUB. NO. 068, TRENDS IN U.S. LOCAL AND REGIONAL FOOD SYSTEMS: REPORT TO CONGRESS 2 (2015).

8. See Rachel Rabkin Peachman, *Amid Meat Supply Disruptions, Consumers Have Options*, CONSUMER REPORTS (Apr. 30, 2020), <https://www.consumerreports.org/supply-demand/amid-meat-supply-disruptions-during-coronavirus-pandemic-consumers-have-options/> [<https://perma.cc/TL5Y-46DC>].

9. See Liz Crampton, *Coronavirus has more Americans turning directly to farms for food*, POLITICO (Mar. 31, 2020, 1:45 PM), <https://www.politico.com/news/2020/03/31/coronavirus-demand-for-local-farms-157538> [<https://perma.cc/AT4Z-QGKB>].

10. See generally *id.*

consumers desire local, healthy food from a known local farmer, the United States' regulatory system, as a result of these challenges, favors large producers and fails to support local food production.

The meat processing industry is a compelling example. In 1967, there were nearly 10,000 slaughterhouses operating in the United States.¹¹ Today there are only about 800 federally inspected slaughterhouses and numerous state inspected facilities.¹² Of the limited number of available slaughterhouses, many are also located hours away from small farms and ranches.¹³ As a practical matter, these facilities serve large producers and the processing industry, whereas small producers find accessing and legally processing their animals at such facilities to be challenging.¹⁴ Plant closures during COVID-19 have highlighted the vulnerability of the present system. Large plants will often not process small quantities, making it nearly impossible for smaller meat producers to ensure proper inspection of their consumer products.¹⁵ “At best, small producers are often told that plants cannot process their meat for six months.”¹⁶ They are relegated to the back of the line. “At worst, they are turned away. In addition, small producers have to transport their animals long distances for processing at these plants, often hundreds of miles. This transportation has an obvious environmental impact and causes unnecessary stress to the animals” otherwise raised on pastures in healthy conditions.¹⁷ The long transport distances add to small producers' costs and “create financial disincentives for small producers to raise animals for sale locally.”¹⁸

11. Deena Shanker, *There Aren't Enough Slaughterhouses to Support the Farm-to-Table Economy*, BLOOMBERG (May 23, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-05-23/there-aren-t-enough-slaughterhouses-to-support-the-farm-to-table-economy> [<https://perma.cc/CNM2-J6UR>].

12. See Michael Corkery & David Yaffe-Bellany, *The Food Chain's Weakest Link: Slaughterhouses*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html#:~:text=After%20decades%20of%20consolidation%2C%20there,for%20food%20stores%20each%20year> [<https://perma.cc/JS95-EFHQ>].

13. See Beth Hoffman, *Small-Scale Slaughterhouses Aim to Put The 'Local' Back in Local Meat*, NPR (June 4, 2012, 11:11 AM), <https://www.npr.org/sections/thesalt/2012/06/04/153511889/small-scale-slaughterhouses-aim-to-put-the-local-back-in-local-meat> [<https://perma.cc/KF2H-C989>].

14. See *id.*

15. See *id.*

16. Alexia Kulwiec, *Give meat a chance*, FOOD SAFETY NEWS (June 8, 2020), <https://www.foodsafetynews.com/2020/06/give-meat-a-chance/> [<https://perma.cc/R8JK-JVFB>].

17. *Id.*

18. *Id.*

The Farm-to-Consumer Legal Defense Fund, which represents small farmers and food producers, reports slaughterhouse processing dates of 2022, despite being booked during the spring of 2020.¹⁹ Many producers state they cannot afford to care for their animals during the extended time period prior to slaughter, and many animals have been wastefully destroyed as a result.²⁰

As consumers increasingly demand additional kinds of local food, such as produce, locally made jams, and canned goods, local producers are struggling to expand because of the regulatory system in place.²¹ Local farms receive little—if any—assistance from the Federal Farm Bill, despite remaining subject to many Farm Bill regulations, such as those concerning conservation and wetlands.²² Another example of regulation imposed on small farms is the federal egg rule regarding sanitation, refrigeration, and environmental testing for salmonella enteritidis.²³ These farms must also contend with a host of state and local regulations.

III. LEGAL OBSTACLES TO THE VIABILITY OF SMALL FARMS.

A. Meat and Poultry

The Federal Meat Inspection Act (FMIA) prohibits the sale of meat or meat products from an animal that was not slaughtered and processed in a USDA facility or a state inspection facility with requirements equal to or greater than the USDA.²⁴ As discussed above, however, small producers are regularly turned away from these facilities or are given slaughter dates two years from their request, which

19. See Pete Kennedy, *Remedy for Slaughterhouse Logjam?*, FARM-TO-CONSUMER LEGAL DEF. FUND (Nov. 20, 2020), <https://www.farmtoconsumer.org/blog/2020/11/20/remedy-for-slaughterhouse-logjam/> [<https://perma.cc/3HEN-8X8J>].

20. Tom Polansek & P.J. Huffstutter, *Piglets aborted, chickens gassed as pandemic slams meat sector*, REUTERS (Apr. 27, 2020, 4:41 PM), <https://www.reuters.com/article/us-health-coronavirus-livestock-insight/piglets-aborted-chickens-gassed-as-pandemic-slams-meat-sector-idUSKCN2292YS> [<https://perma.cc/H4AW-XS2E>].

21. See STEVE MARTINEZ ET AL., USDA, LOCAL FOOD SYSTEMS CONCEPTS, IMPACTS, AND ISSUE 27-28 (May 2010), https://www.ers.usda.gov/webdocs/publications/46393/7054_err97_1_.pdf?v=0 [<https://perma.cc/AJA7-4T4R>].

22. See generally Clean Water Act 33 U.S.C. §§ 1251 – 1387.

23. See generally 21 C.F.R. § 118.4 (2021).

24. See 21 U.S.C. §§ 458(a), 603(a).

places an enormous financial burden on the small producer in the meantime.²⁵ Moreover, because of the consolidation of meat processing, there are far fewer USDA and state inspected facilities than ever before.²⁶ The lack of facilities means that a small producer—who has raised animals on pasture with care—must transport those animals longer distances for purposes of slaughter, thereby increasing the environmental cost of meat production.

Likewise, the Poultry Processing Inspection Act (PPIA) requires inspection at a USDA facility or state facility that is equal to or greater than the USDA for the sale of processed poultry and poultry products.²⁷ As discussed below, the PPIA includes exemptions that serve the small producer far better than the FMIA.

B. Raw Unpasteurized Milk and Milk Products

Federal regulation prohibits the interstate sale of raw unpasteurized milk and milk products.²⁸ The Food and Drug Administration (FDA) established the model Pasteurized Milk Ordinance (PMO), which sets minimum standards and requirements including pasteurization for milk production and processing.²⁹ States can adopt some or all of the PMO in regulating the intrastate sales of milk and milk products.³⁰

Milk and dairy products sold *intrastate* are a matter of state law.³¹ State laws on the legality of raw unpasteurized milk vary significantly from state to state.³² To be clear, reference in this article to raw, unpasteurized milk refers to milk and dairy items produced with the intention of human consumption and the concomitant precautions taken—usually at small farms—in the production. Raw milk produced with the intention of homogenization and pasteurization at a licensed dairy plant is handled differently and is generally not safe for human consumption prior to pasteurization.

25. See *Tell Congress the PRIME Act is the best shot for small livestock farmers!*, FARM & RANCH FREEDOM ALLIANCE (Apr. 24 1:15 PM), <http://farmandranchfreedom.org/prime-act-for-small-livestock-farmers/> [<https://perma.cc/S4NJ-YATA>].

26. See Jodi Helmer, *COVID-19 is Highlighting an Old Problem: the Lack of Meat Process Plants*, FOODPRINT (July 14, 2020), <https://foodprint.org/blog/meat-processing-plants/> [<http://perma.cc/A5SP-YKK9>].

27. See 21 U.S.C. §§ 455, 458(a).

28. 21 C.F.R. § 1240.61 (2019).

29. See Food and Drug Admin., U.S. Dep't of Health and Hum. Services, *Pasteurized Milk Ordinance* vi (2017).

30. See *id.* at iv.

31. See *id.* at vi.

32. See *id.* at iv.

Some states, such as California and Pennsylvania, allow retail sales of raw milk if producers obtain a permit and meet certain production requirements.³³ In some states direct farm-to-consumer sales are lawful, and in others such sales are unlawful.³⁴ Even where the sale of raw milk and raw milk products is permitted, sales are only lawful on an *intrastate* basis.³⁵ Thus, producers near state lines—which are common in the eastern portion of the United States—are often stymied by the prohibition on selling their products across state lines.³⁶

C. The Federal Egg Rule

The federal egg rule regulates biosecurity, sanitation requirements, refrigeration, environmental testing, and record keeping of egg production.³⁷ This can be daunting for a smaller producer who simply wishes to keep laying hens and sell eggs directly to local consumers or at the local farmers' market. Small farms may be exempt if they keep less than 3,000 laying hens, but then must contend with different—often stricter—state regulation, as well local regulations and individual farmers' market rules.³⁸

D. The Food Safety Modernization Act

The Food Safety Modernization Act (FSMA) is federal legislation intended to shift food safety regulation to prevention rather than reaction to outbreaks of foodborne illness.³⁹ The FSMA produce safety rule creates a number of requirements on produce growers to ensure food safety.⁴⁰ While there are exemptions for very small farms with less than \$25,000 in produce revenue annually,⁴¹ the rule generally requires: stringent training of personnel; hygienic practices; specific use of manure to prevent contamination; the separation of

33. See CAL. AGRIC. CODE §§ 32510, 33222, 33226, 33513, 35017 (West, Westlaw through Ch. 10 of 2021 Reg. Sess.); 31 PA. STAT. AND CONS. STAT. ANN. § 646 (West, Westlaw through 2021 Reg. Sess. Act 4); 7 PA. CODE §§ 7.24, 9.34 (Westlaw current through Pa. Bull. Vol. 51, Num. 11).

34. See ILL. ADMIN. CODE tit. 77 § 775.55 (Westlaw current through Ill. Reg. Volume 45, Issue 10); KAN. STAT. ANN. §§ 65-784, 65-789, 65-771(cc), 65-778 (West, Westlaw current through 2021 Reg. Sess.); N.J. STAT. ANN. § 24:10-57.17 (West, Westlaw current through L. 2021, c. 16).

35. *State Milk Laws*, NCSL (Aug. 29, 2016), <https://www.ncsl.org/research/agriculture-and-rural-development/raw-milk-2012.aspx> [<https://perma.cc/UXX6-ACFH>].

36. See generally *id.*

37. 21 CFR § 118.4 (2021).

38. See 21 CFR § 118.1 (2021).

39. See 21 U.S.C. § 2202(b)(2).

40. See 21 CFR § 112.11 (2021).

41. 21 CFR § 112.4 (2021).

produce covered by FSMA from non-covered (specific produce items subject to the rule); equipment regulation; and record keeping requirements, with water testing requirements to begin in the near future.⁴² Because strict requirements can be burdensome on smaller producers, these requirements make sense when imposed on large agricultural operations that regularly bundle products with other farms and involve a large number of employees.

IV. POTENTIAL SOLUTIONS

A. Existing Policy Support for Small Farms

As stated above, the federal and state exemptions for meat and poultry assist the small producer in producing locally and providing consumers with locally-grown, healthy food. Meat and poultry producers are prohibited, even under an exemption, from providing consumers with any product that has been misbranded or adulterated, which is defined as injurious to health or handled under insanitary conditions.⁴³ For poultry producers selling less than 1,000 birds per year under the custom slaughter exemption, the requirements relevant to slaughtering and processing the birds on their farm are not terribly onerous.⁴⁴ The 1,000 bird exemption also prohibits the producer from buying and selling other producers' poultry products, and requires that poultry is only sold intrastate.⁴⁵ There also exists a 20,000 bird exemption, which places additional requirements on producers processing and selling between 1,000 and 20,000 birds.⁴⁶ Under the 20,000 bird exemption, the producer is limited to processing poultry under the exemption (i.e., no additional processing methods), the facility cannot be used to slaughter another person's poultry, and shipping containers must include the producer's name, address, and the statement "'Exempt - P.L. 90-492.'"⁴⁷ These requirements can at times be satisfied by a small producer, but are more involved.⁴⁸ These exemptions are set forth in federal law and may be adopted or strengthened by the states.

Similarly, the FMIA includes, *inter alia*, exemptions for the producer's own use and for the use of custom slaughter and processing.⁴⁹ For custom slaughter, a

42. See 21 CFR §§ 112.4, .21, .31 (2021).

43. See 21 U.S.C. §§ 453(g)-(h), 601(m); see also 9 C.F.R. § 381.10(d)(4).

44. See 9 C.F.R. § 381.10(c) (2021).

45. 9 C.F.R. § 381.10(a)(4) (2021); see also 9 CFR 381.10(a)(3) (2021) (noting there is a personal use exemption for the producer's own family, not necessarily relevant to the business of a small farm).

46. See *id.* at (b)(1).

47. See *id.* at (a)(3)-(7), (b).

48. *Id.* at (a)(7).

49. See 21 U.S.C. § 623(a); see also 9 C.F.R. § 303.1(a)(1)-(2) (2018).

producer may sell a live animal and the new owner may then have the animal slaughtered and processed at what is called a custom slaughter facility.⁵⁰ These facilities do not have inspectors on site each time an animal is slaughtered.⁵¹ However, these facilities are required to maintain detailed records and meet stringent federal standards concerning sanitation and use of humane methods of slaughter.⁵² The fact the producer must sell only a live animal intended to be custom processed can complicate the matter for the producer, consumer, and processor. For instance, there may be separate transactions between the producer and end consumer, the producer and processor, and the processor and consumer. More importantly, as with USDA and state inspection facilities, small producers are struggling with availability at custom slaughter facilities.⁵³ There is a shortage of custom slaughter facilities and as a result, small producers often cannot maintain their herd long enough to make the process economically viable.⁵⁴

Other policies that assist the small farm and food producer include state laws regarding food produced in home kitchens and on the farm. These laws typically provide some provision for the production and sale of “nonpotentially hazardous food,” or those products with low water activity and thus low pH level, which inhibit the growth of dangerous microorganisms.⁵⁵ For instance, these items typically include foods that do not need to be refrigerated such as baked goods, breads, cookies, fruit pie, jams, jellies, preserves, fruit butter, honey, nuts, herbs, and spices.⁵⁶ Forty-nine states have some version of these cottage food laws permitting home production of nonpotentially hazardous food.⁵⁷

In addition, some states allow the sale of ungraded eggs directly to consumers but do not allow wholesale. For example, Wisconsin permits the sale

50. See *What is a “custom slaughter” facility?*, NICHE MEAT PROCESSOR ASSISTANCE NETWORK (Mar. 29, 2021, 4:07 PM), <https://www.nichemeatprocessing.org/what-is-a-custom-slaughter-facility/> [<https://perma.cc/4YPB-HAFD>].

51. *Id.*

52. See 9 C.F.R. § 381.10(a)(4).

53. See generally Abbie Fentress Swanson, *Small Meat Producers Take Their Slaughterhouse Gripes to Congress*, NPR (Oct. 15, 2015, 5:30 PM), <https://www.npr.org/sections/thesalt/2015/10/15/448942740/small-meat-producers-take-their-slaughterhouse-gripes-to-congress> [<https://perma.cc/Z7Q5-GBTT>].

54. See *Tell Congress the PRIME Act is the best shot for small livestock farmers!*, *supra* note 25.

55. See INSTITUTION OF FOOD TECHNOLOGISTS FOR THE FDA, EVALUATION AND DEFINITION OF POTENTIALLY HAZARDOUS FOOD 6, 8-9 (2001).

56. See *id.* at 36-41.

57. See CHRISTINA RICE ET AL., HARV. L. SCH. FOOD L. & POL’Y CLINIC, COTTAGE FOOD LAWS IN THE U.S. 21 (2018).

of ungraded eggs directly to consumers if the producer has 150 birds or less.⁵⁸ Minnesota has a similar allowance for producers with less than 3,000 laying hens.⁵⁹

B. Potential Federal Policy Solutions

1. The PRIME Act

The Processing Revival and Intrastate Meat Exemption Act (PRIME), S.B. 1620 / H.R. 2859, could help small producers tremendously.⁶⁰ Currently, custom meat processors are regulated by federal and state law, with federal regulations prohibiting the dissemination of any adulterated or misbranded meat product from a custom facility.⁶¹ The regulations further set forth detailed requirements that apply to custom processing facilities, the grounds, equipment, and procedures that ensure sanitary conditions.⁶² Despite the fact that these facilities are required to meet federal requirements, such facilities can only process meat for the owner of the animal and not for resale.⁶³ As discussed above, this often leads to a convoluted transaction involving end consumers purchasing live animals from producers, which are then brought to custom processors for processing for the end consumer. The PRIME Act would permit producers to directly utilize custom processors for slaughter and processing and sell the resulting cuts of meat and meat products.⁶⁴ Producers report that this would simplify their business, allowing for expansion and to better meet consumer demand.⁶⁵ These facilities are regulated and safe, and consumers could still receive a warning about the lack of federal or state inspection at each slaughter to make an educated decision regarding their food source.⁶⁶

58. See WIS. STAT. § 97.28(2)(a) (2021).

59. See *Egg Handling and Sales of Shell Eggs*, MINN. DEP'T OF AGRIC. (March 21, 2021, 4:32 PM), <https://www.mda.state.mn.us/egg-handling-sales-shell-eggs> [<https://perma.cc/J9KR-P5CU>].

60. See S. 1620, 116th Cong. (2019).

61. See 9 CFR § 303.1(a)(2)-(b)(1) (2018).

62. *Id.* at (a)(2)(i)-(iv).

63. *Id.* at (a)(2).

64. See *Tell Congress the PRIME Act is the best shot for small livestock farmers!*, *supra* note 25.

65. See Mike Callicrate, *What about the PRIME Act?*, NO-BULL FOOD NEWS (May 8, 2020), <https://nobull.mikecallicrate.com/2020/05/08/emergency-measures-to-protect-the-us-meat-supply> [<https://perma.cc/CDQ8-PTJP>].

66. See H.R. 2859, 116th Cong. (2019).

2. The Direct Interstate Retail Exemption for Certain Transactions Act and the Requiring Assistance to Meat Processing for Upgrading Plants Act

Additional proposed federal legislation would permit sales of meat inspected at state facilities to be sold across state lines. Currently—under the FMIA—meat inspected by a state facility can only be sold intrastate.⁶⁷ The Direct Interstate Retail Exemption for Certain Transactions (DIRECT) Act would change that.⁶⁸ H.R. 547 would permit the interstate sale of state inspected meat so long as it is shipped directly to household consumers and in “normal retail quantities.”⁶⁹ This would particularly help producers near state lines with consumers interested in purchasing locally produced meat and meat products.

Another proposal, the Requiring Assistance to Meat Processing for Upgrading Plants Act (RAMP-UP), was included in the federal COVID-19 relief bill passed on December 21, 2020.⁷⁰ RAMP-UP provided much needed grant funding to improve existing plants, expand plants, or build new ones.⁷¹ Though useful, the expense of such plants will far exceed the grant funding available, and it will take years before production increases. For small producers who cannot afford to maintain their herds in the current moment, this legislation may prove to be too little too late.

3. Amend the Proposed FDA Traceability Rule to Further Exempt Small Farms Using the FMSA Model.

On September 23, 2020, the FDA issued a proposed rule, Docket No. 2014-N-0053, titled “Requirements for Additional Traceability Records for Certain Foods.”⁷² While the stated intention of this policy is to develop stronger food traceability to respond to foodborne illness outbreaks, the proposed rule applies to almost everyone involved in the food system—even very small growers with easy to trace products.⁷³ Compliance for many small producers may be so expensive that it jeopardizes their viability, thus closing small local establishments rather than supporting them.

67. See 21 U.S.C § 610(c).

68. See H.R. 547, 117th Cong. (2021).

69. See *id.* at §§ 2(a)(2)(B), 3(a)(2)(B).

70. See generally H.R. 133, 116th Cong. (2020).

71. See S. 4298, 116th Cong. (2020).

72. Requirements for Additional Traceability Records for Certain Foods, 85 Fed. Reg. 59,984 (Sep. 23, 2020) (to be codified at 21 C.F.R. pt. 1).

73. See generally *id.*

The provisions require extensive record keeping, including specified electronic spreadsheets, GPS coordinates on crop location, and details on harvesting and packing of foods that are considered to be high-risk.⁷⁴ The exemptions to these requirements are more limited than those set forth by statute itself.⁷⁵ The proposed rule applies to almost everyone who manufactures, processes, packs, or holds food.⁷⁶ Many small producers—including many Farm-to-Consumer Legal Defense Fund members—live in rural areas without reliable internet, do not use the electronic spreadsheets required by the proposed rule, and engage in regenerative agriculture by rotating crops on a regular basis.⁷⁷ GPS coordinates would rotate on a regular basis, assuming the small farmer even has access to GPS coordinates.⁷⁸ Moreover, in drafting FSMA, Congress specifically prohibited the agency from prescribing specific technologies for the maintenance of records, a prohibition the proposed rule appears to violate.⁷⁹

Certainly, the rule makes sense when applied to large operations that have a complicated supply chain before reaching consumers or overseas markets. However, the rule places onerous and unnecessary requirements on very small farmers—some of whom lack reliable internet access, which makes compliance impossible to achieve. At a time when consumers are clamoring for increased local food, policy should support the small and very small operations rather than drive them out of business. As of the time of writing, the comment period had closed and the FDA had not yet issued its final rule.⁸⁰ At a minimum, the FDA should apply further exemptions to small producers, and remove the electronic spreadsheet requirement and the requirement for GPS coordinates.

74. *See id.* at 60,007.

75. *See id.* at 59,995.

76. *Id.* at 59,997.

77. *See id.* at 60,009; *see also generally Regenerative Agriculture Ultimate Guide and Examples*, GROCYCLE (Mar. 30, 2021, 11:21 AM), <https://grocycle.com/regenerative-agriculture-ultimate-guide/> [<https://perma.cc/XE4Q-XPk2>].

78. *See generally* DONALD PFOST ET AL., PRECISION AGRICULTURE: GLOBAL POSITIONING SYSTEM (GPS), EXTENSION UNIV. OF MO. (Mar. 30, 2021, 11:15 AM), <https://extension.missouri.edu/media/wysiwyg/Extensiondata/Pub/pdf/envqual/wq0452.pdf> [<https://perma.cc/N5HH-3LB8>].

79. *See generally* Food Safety Modernization Act sec. 204(a)(2)(A).

80. *See* Requirements for Additional Traceability Records for Certain Foods, 85 Fed. Reg. at 60,028.

*C. State Initiatives to Assist the Small Farm and Food Producers**1. State Initiatives to Support Small Livestock and Poultry Producers*

As of the writing of this piece, many states were attempting to assist the small farmer through new legislation or policy interpretation.⁸¹ In 2015, Wyoming passed the Food Freedom Act, which allowed for the sale of homemade food or drink products to informed consumers so as to encourage the expansion of agricultural sales at farmers' markets, ranches, farms, and producers' homes.⁸² Effective July 1, 2020, Wyoming amended this law with its meat share amendment to become one of the most supportive states for small and local meat production.⁸³ Wyoming H.B. 0155 specifically permits the acquisition of meat obtained pursuant to animal share agreements, thereby allowing pricing for specific cuts of meat.⁸⁴ In 2021, Wyoming again amended its Food Freedom Act, permitting the sales of ungraded eggs, and clarifying that homemade food, drinks and eggs may be produced and sold to the maximum extent permitted by federal law.⁸⁵

Following the meat processing crisis revealed by COVID-19, other states are beginning to follow suit, namely Nebraska and Colorado.⁸⁶ Nebraska Legislative Bill 324 would similarly permit the acquisition of meat pursuant to an animal share agreement, in which an end consumer purchases a share in a live animal or herd.⁸⁷ Colorado SB-21-079 is awaiting the governor's signature, and would exempt sales of animals and animal share from licensing and inspecting, allowing for provision of meat not subject to federal or state inspection. Colorado, through S.B. 21-079, would also permit a person to sell shares in an animal for future meat delivery.⁸⁸ Such sales would be lawful so long as the producer provides conspicuous disclaimers, the meat is directly delivered to the end consumer only within the state, and the end consumer is prohibited from reselling the meat.⁸⁹

81. *See generally Recent Reforms for State Cottage Food and Food Freedom Laws*, INST. FOR JUST. (Mar. 30, 2021, 9:43 AM), <https://ij.org/activism/legislation/state-reforms-for-cottage-food-and-food-freedom-laws/> [<https://perma.cc/9HGB-BNzt>].

82. WYO. STAT. ANN. § 11-49-103(a) (2020).

83. *See* H.R. 0155, 65th Leg. (Wyo. 2020).

84. *Id.*

85. WYO. STAT. ANN. § 11-49-103(m) (2020).

86. *See* S. 21-079, 73rd Gen. Assemb., Reg. Sess. (Co. 2021); *see also* Leg. 324, 107th Leg., 1st Sess. (Neb. 2021).

87. *See* Leg. 324, 107th Leg., 1st Sess. (Neb. 2021).

88. *See* S. 21-079, 73rd Gen. Assemb., Reg. Sess. (Co. 2021).

89. *Id.*; *see also* S. 867, 87th Sess. (Tex. 2021) (explaining there were plans to introduce this legislation in Texas, which appear to have been deprioritized in light of the destructive storms of 2021).

While not a legislative change, South Carolina authorities indicated the state agency now interprets state law as permitting a new owner (i.e., end consumer) of a live animal to utilize custom slaughter facilities to slaughter and process the animal.⁹⁰ Previously, South Carolina interpreted its law as only permitting custom slaughter for the livestock producer's own use.⁹¹

States could provide similar support to small poultry producers. Currently, several states have not adopted the federal poultry exemptions.⁹² Some states have placed stricter requirements on the producer, making the business of growing and processing poultry at a smaller scale difficult.⁹³ An option for states to explore would be to decrease administrative requirements and fully adopt the federal exemptions. The Farm-to-Consumer Legal Defense Fund regularly enlists its members to contact their local state legislators and occasionally even to testify in support of these state initiatives.⁹⁴ Direct contact by constituents to their elected legislators has proven to be an effective tool to advance beneficial policy.⁹⁵

2. State Support for Raw Milk and Dairy

Periodically, there is movement at the state level to ease the regulatory burden on small farms that wish to offer raw milk and raw milk products to consumers who desire the product for health reasons. As of this writing, two states in the early 2021 legislative season have produced such proposals. First, Oregon legislators have proposed House Bill 2612, which would legalize the sale of raw butter intrastate.⁹⁶ Due to the high fat and low moisture content, raw butter is regarded as a safe product, one in which the risk of pathogen growth is quite low.⁹⁷ Opponents claim legalization such products is a poor idea because of food safety

90. See S.C. CODE ANN. § 47-17-90(1), (4) (2020) (amending S.C. CODE ANN. § 47-17-90 (1967)).

91. See generally *id.*

92. See *Poultry Map and Chart*, FARM-TO-CONSUMER LEGAL DEFENSE FUND (2020), <https://www.farmtoconsumer.org/poultry-map/> [<https://perma.cc/2GWS-6PL6>].

93. See *id.*

94. See generally *About Us*, FARM-TO-CONSUMER LEGAL DEFENSE FUND (2020), <https://www.farmtoconsumer.org/about/> [<https://perma.cc/3FKR-SP6C>].

95. See Mitchell Wellman, *5 ways to contact your elected officials and make your voice heard*, USA TODAY (Jan. 24, 2017, 4:53 PM), <https://www.usatoday.com/story/college/2017/01/24/5-ways-to-contact-your-elected-officials-and-make-your-voice-heard/37427477/> [<https://perma.cc/TZ2Y-8KUB>].

96. H.R. 2612, 81st Leg., Reg. Sess. (Or. 2021).

97. *Raw Butter*, FARM-TO-CONSUMER LEGAL DEFENSE FUND (2020), <https://www.farmtoconsumer.org/raw-butter/> [<https://perma.cc/2CTM-A49N>].

concerns.⁹⁸ However, in response to litigation documents filed by the Farm-to-Consumer Legal Defense Fund, the FDA could point to just one instance of an illness since 1908 caused specifically by raw butter in the United States, and the butter in that case was not produced for commercial purposes.⁹⁹

Another local initiative was making its way through the legislative process in Montana at the time of this writing. Montana S.B. 199 would permit the sale of raw milk as long as the producer has six or less lactating cows, 11 or less sheep, or 11 or fewer hooved lactating mammals.¹⁰⁰ These efforts could assist small producers and their consumers tremendously. The Farm-to-Consumer Legal Defense Fund on behalf of small and sustainable farmers is assisting in this effort through ongoing litigation concerning raw butter.

3. State or Local Initiatives to Support Cottage Foods

As of this writing, many states were also attempting to assist the small farmers and food producers by loosening licensing requirements for the sale of home produced goods. Previously, Wyoming, Utah, and Maine had opened direct commerce for homemade foods.¹⁰¹ These laws allow small food producers or farmers to produce food in their home kitchens for sale directly to consumers without a commercial kitchen or food establishment license.¹⁰² As many employees lost jobs during COVID-19, quite a few have turned to small food production businesses, making this an important area for reform.

More recently—in addition to the dairy initiatives discussed above—Montana S. B. 199 would permit the sale of certain homemade goods.¹⁰³ Similarly, a Home-to-Market Act was proposed in Illinois, which would expand the sales of certain homemade goods to sales at fairs, festivals, and home delivery.¹⁰⁴ Iowa has introduced the Iowa Food Freedom Act, which permits producers to sell homemade food as long as the producer only sells non-potentially hazardous food

98. See Alex Robinson, *The Fight Over Raw Butter*, MODERN FARMER (Aug. 10, 2020), <https://modernfarmer.com/2020/08/the-fight-over-raw-butter/> [<https://perma.cc/47UM-ERDY>].

99. See *FDA Denies Petition to Lift Interstate Ban on Raw Butter*, A CAMPAIGN FOR REAL MILK (Mar. 21, 2021, 4:33 PM), <https://www.realmilk.com/fda-denies-petition-to-lift-interstate-ban-on-raw-butter/> [<https://perma.cc/B34K-7P5V>].

100. S.B. 199 67th Leg. (Mont. 2021).

101. See H.B. 144, Gen. Sess. (Utah 2016); S.P. 605, 128th Me. Leg., 1st Spec. Sess. (Me. 2017); see also WYO. STAT. ANN. § 11-49-103 (2020).

102. See H.B. 144, Gen. Sess. (Utah 2016); S.P. 605, 128th Me. Leg., 1st Spec. Sess. (Me. 2017); see also WYO. STAT. ANN. § 11-49-103 (2020).

103. S.B. 199.3 § 1(2), 67th Leg. (Mont. 2021).

104. See S.B. 2007 § 5(b)(5), 102nd Gen. Assemb. (Ill. 2021).

directly from the farm.¹⁰⁵ Iowa's bill contemplates the sale of meat products derived from a commodity share agreement, and poultry products if less than 1,000 birds are slaughtered during the prior year by the producer.¹⁰⁶

Legislation was also introduced in Indiana to permit home based products to be sold—without non-hazardous food establishment licensing—by telephone and internet, and to permit producers to deliver to the end consumer directly as long as sanitation and labeling requirements are met.¹⁰⁷ As of this writing, there also appeared to be significant support for a Homemade Food Freedom Act in Oklahoma, which would allow for production and sale of non-time or temperature controlled homemade food products without state licensing requirements.¹⁰⁸

V. CONCLUSION

Consumers desire locally grown food from small farms they know and trust. Food policy in the United States has, however, generally supported larger agricultural operations, which heavily focus on commodity crops grown for processed food manufacturing or intended for export. This support—along with the ever-increasing consolidation—has created a vulnerability in the United States' food system for years. The problems with meatpacking plants during the COVID-19 crisis brought this vulnerability into the open. This means United States consumers and policymakers alike are recognizing the need for change. Based on the new initiatives at the federal and state level, there appears to be movement towards supporting small sustainable farms and allowing for DTC commerce. While a good number of challenges remain, there is some hope for change. This development should please consumers and small producers alike, while adding much needed stability to the United States food system.

105. See H.F. 319 §§ 3, 8, 89th Gen. Assemb. (Iowa 2021).

106. See *id.* at § 10(1)-(2).

107. See H.B. 1103 § 2(c), 112th Gen. Assemb., 1st Reg. Sess. (Ind. 2021).

108. See H.B. 1032 § 3(a)(2), 58th Leg., 1st Reg. Sess. (Okla. 2021).