



# The Florida Senate

*Interim Project Report 2004-102*

*December 2003*

Committee on Agriculture

James E. "Jim" King, Jr., President

## **STUDY THE FEASIBILITY OF SELF-INSPECTION OR OTHER ALTERNATIVES OF GROCERY STORES, SUPERMARKETS AND MINOR FOOD OUTLETS**

### **SUMMARY**

The Division of Food Safety of the Department of Agriculture and Consumer Services (Department) permits and inspects food establishments to assure compliance with sanitation requirements in retail food stores, food processing plants and food distribution points where food is sold to the public. The program issues a permit after determining that a facility is in compliance with sanitation requirements and periodically inspects it to ensure continual compliance with sanitation standards.

The Florida Food Safety Act, chapter 500, F.S., is the basis for the state's food safety laws, and was first codified in 1939, with subsequent amendments adopted, the most recent being Laws of Florida, Chapter No. 2003-255, which created the Florida Food Safety and Food Security Advisory Council.

Retail food store permit fees range from \$75 for small businesses, to \$500 for supermarkets. Convenience stores pay an annual fee of \$300 to \$425 for a food permit depending on the level of foodservice offered. A fee of \$110 has been established for re-inspections of all businesses regulated under the program.

Prior to the establishment of food permit fees in 1992, the Department's entire food safety program was funded from General Revenue, as are many other public health functions.

All General Revenue has been replaced in the program's current (FY 2003-04) operating budget by General Inspection Trust Fund sources so that program costs are derived from industry fees and fines.

Section 500.147, F.S., authorizes the Department to initiate a food safety pilot program based on sound science principles of the Hazard Analysis Critical Control Point (HACCP) system.

**The retail food industry's position** calls for the establishment of a permanent self-inspection program for licensed businesses which would ensure food safety and consumer protection compliance.

**It is the Department's position** that, in addition to its food safety pilot program, there may be other alternatives for reduced inspection frequencies.

The difficult matter of appropriate levels of food safety inspections has not been resolved at this time. It is recommended that the Senate Committee on Agriculture continue to dedicate time to this issue in preparation for the 2004 Regular Session. To assist the legislature in its decision, a copy of this report may be delivered to the Florida Food Safety and Food Security Council for review.

It is anticipated that some program changes can be accomplished through departmental policy, memorandum-of-understanding, or administrative rule.

If a statutory change is required for implementation, the Council may offer recommendations for consideration to the Legislature.

### **BACKGROUND**

The Division of Food Safety of the Department of Agriculture and Consumer Services (Department) permits and inspects food establishments to assure compliance with sanitation requirements in retail food stores, food processing plants and food distribution points where food is sold to the public. The program issues a permit after determining that a facility is in compliance with sanitation requirements and periodically inspects it to ensure continual compliance with sanitation standards.

Inspections by Department Inspectors for supermarkets and grocery stores are scheduled to be conducted three

times a year, with minor food outlets, including some liquor stores, scheduled to be conducted two times a year.

The Florida Food Safety Act, chapter 500, F.S., is the basis for the state's food safety laws, and was first codified in 1939, with subsequent amendments adopted, the most recent being Laws of Florida, Chapter No. 2003-255, which created the Florida Food Safety and Food Security Advisory Council.

The laws of this chapter are intended to: (1) Safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and the purchasing public from injury by merchandising deceit; (2) Provide legislation which is uniform and administered so far as practicable in conformity with the Federal Food, Drug, and Cosmetic Act and the Federal Agriculture Marketing Act, and consistent with the Federal Trade Commission Act, to the extent that it expressly prohibits the false advertisement of food; and (3) Promote uniformity of these state and federal laws and their administration and enforcement throughout the United States.

Section 500.09, F.S., provides authority for the Department to make rules in order to promote consumer safety, honesty, and fair dealing. The Department may also adopt rules by reference to the federal rules when applicable and practical. The Department is authorized to collect fees for laboratory services it performs for a person or agency beyond the scope of the Department's regulatory program relating to food safety for checking the compliance of food with the requirements of chapter 500, F.S., and to recover the costs of each reinspection of a food establishment when the reinspection is conducted for the purpose of verifying compliance. Additionally, the Department is authorized to adopt rules necessary for the sanitary manufacture, processing, or handling of food.

Food permits issued by the Department are required of any person who operates a food establishment or retail food store, with certain exceptions as outlined under section 500.12, F.S. Specific exemptions are provided for persons and businesses operating minor food outlets, such as video stores, that sell only commercially pre-packaged, nonpotentially hazardous candy, chewing gum, soda or popcorn, provided that the shelf space for those items does not exceed 12 linear feet and no other food is sold; businesses that are subject to continuous, on-site federal or state inspections; or businesses selling only legumes in the shell, including parched, roasted or boiled.

Ice is considered a food and commercially packaged ice must be labeled, handled, and otherwise processed and sold according to the provisions of chapter 500, F.S. An application for a food permit to operate a wholesale packaged ice plant must state the location of the packaged ice plant, the source of the water, the treatment of the water prior to its being made into ice and packaged and any other information considered necessary by the Department to verify compliance with the safety, quality, and labeling requirements of the chapter.

Section 500.12, F.S., requires a fee to accompany an application for food permit from the Department. The fee is determined by rule, may not exceed \$500, and is to be used solely for the recovery of costs for the services provided. However, the fee for a food permit for operating a bottled water plant may not exceed \$1,000 and the fee for a food permit for operating a packaged ice plant may not exceed \$250, with the exact amount to be set by department rule. Additionally, Section 500.459, F.S., requires that all fees collected under the state's water vending machines statutes are deposited into the Department's General Inspection Trust Fund.

Food permits must be renewed annually by January 1 of each year. If an application for renewal of a food permit is not received by the Department within 30 days after its due date, a late fee, not to exceed \$100, must be paid in addition to the food permit fee before the food permit will be issued. The Department is authorized to suspend a food permit of food establishments or retail food stores for violations, and may also impose a fine of up to \$5,000 against a firm that has violated the provisions of the chapter.

The maximum fee for a retail food store food permit was increased from \$350 to \$500 in the 2001 Legislative Session. The \$350 maximum had been in place since 1992, when the permit fee was initially established. The current fee schedule was implemented by Department rule and was in effect for 2002 permit renewals. Permit fees range from \$75, for small businesses, to \$500 for supermarkets. Convenience stores pay an annual fee of \$300 to \$425 for a food permit depending on the level of foodservice offered. The Department was also given authority in the 2001 Legislative Session to recover the costs of a follow-up inspection when necessary to verify the correction of deficiencies noted in a prior failing inspection. A fee of \$110 has been established for these re-inspections.

Prior to the establishment of food permit fees in 1992, the Department's entire food safety program was funded from General Revenue, as are many other public health functions. Several fund shifts from General Revenue have been implemented in recent years as the number of establishments and fee revenues have grown. All General Revenue has been replaced in the program's current (FY 2003-04) operating budget, by General Inspection Trust Fund sources so that program costs are derived from industry fees and fines. This includes to a significant degree, all training and educational activities, laboratory support for analysis of food products, monitoring for contaminants, and related overhead. However, since the program's revenues from food fees are not sufficient to cover all of the costs of the Division of Food Safety, a portion of the fees supporting the division are being derived from industries regulated by other department programs.

Regulatory and permitting authority over any food establishment is preempted to the Department of Agriculture and Consumer Services, except as provided in chapters 370 and 372, F.S., such as commercial fishing operations licensed by the Florida Fish and Wildlife Conservation Commission which may prepare and sell their products at wholesale or retail. Also, exempt are food service establishments, as defined in section 381.0072, F.S., "Food Service Protection", which have ancillary, prepackaged retail food sales regulated by the Department of Health. Additionally, public food service establishments, as defined in section 509.013, F.S., which have ancillary, prepackaged retail food sales are licensed and inspected by the Department of Business and Professional Regulation. The Department of Agriculture and Consumer Services and the Department of Business and Professional Regulation are directed to cooperate to assure equivalency of inspection and enforcement.

Section 500.147, F.S., authorizes the Department to initiate a food safety pilot program based on sound science principles of the Hazard Analysis Critical Control Point (HACCP) system and involving cooperative compliance efforts of both the Department and the food establishment to assure consumers a safe, wholesome, and properly labeled food supply. A food establishment is eligible for the pilot program only if program criteria are met. Criteria used to establish this special program include:

- A good inspection history over a specified time period;
- Certified food manager activities demonstrated to be effective in assessing food safety practices and

- correcting deficiencies at food establishments;
- Active food training programs in place for employees;
- "Self-inspection" records of the food establishment made available for review by the Department;
- Written sanitation operation procedures in place and the food establishment's verification records made available for review by the Department;
- Freezer/refrigerator units and hot-cold temperature logs on recording charts made available for review by the Department; and
- Records of corrective action to reduce food safety deficiencies made available for review by the Department.

The pilot program was designed to allow for reduced inspections for participating firms. The Department's goal was to recruit 25 stores for participation in the program. The intent of the program was to conduct an annual inspection after the first year of enrollment, which in addition to a regular sanitation inspection, would also include a review of the firm's pilot program documentation. Only seventeen firms actively participated. One major supermarket chain, after originally planning to participate, later declined due to concerns regarding the requirement to provide internal records for Department review. Six relatively small firms dropped out of the program citing time and effort involved. One major supermarket chain with one firm in the program withdrew in early 2003. Overall, compliance with the seven criteria as established by statute has been deemed unsatisfactory by the Department. A further concern with self-inspections as an adjunct to inspections by regulators is that the time involved in review of necessary documentations tends to reduce time savings to the agency, particularly in the first year as industry and regulators work together to establish required recordkeeping and inspectors perform appropriate HACCP-type verification audits.

In 2001 an operational audit entitled "Food Establishment Inspection Program of the Florida Department of Agriculture and Consumer Services" (Report #02-046) was conducted by the Office of the Auditor General with six findings recommended for improvement of the program. The Department prepared a response to the audit agreeing with some of the findings and providing additional information for others.

Additionally, on November 2001, a justification review was conducted by the Office of Program Policy Analysis and Government Accountability entitled,

“Some Funding Shifts are Possible for the State’s Food Safety and Quality Program (Report No. 01-53). A subsequent follow-up review was recently conducted. The follow-up review confirmed that the program provides a public health benefit and should be continued and that responsibility for oversight of the program is properly placed in the Department of Agriculture and Consumer Services.

## METHODOLOGY

A review of current inspection practices of grocery stores, supermarkets and minor food outlets by the Department of Agriculture and Consumer Services, Division of Food Safety was conducted. Laws pertaining to the state food safety inspection program were reviewed. An on-site tour of wholesale dry grocery warehouses was made in the Jacksonville area, with a separate on-site tour of a grocery store, supermarket, and liquor store being conducted in the Tallahassee area. Representatives of the types of businesses under study were contacted and participated in the review. Additionally, the inspection practices of similar businesses in other states were reviewed.

## FINDINGS

The United States is considered to have the safest food supply in the world. It has been built up over many years and is based primarily upon a system of governmental regulatory inspections which, while allowing some latitude for implementation among the separate states, is generally consistent throughout the nation. The findings of this report reflect the positions of the state’s sellers of retail food and the Department of Agriculture and Consumer Services at the time of this report. While those positions recognize a potential opportunity for reduced regulatory inspection they offer differing methods of approach.

It is recognized by the retail food trade and the Department that there is within the state some inconsistency regarding inspection criteria due to overlapping inspection by some county governments. This additional layer of inspection by a county creates an additional difficulty for retail food establishments operating statewide because of inconsistencies in the state and county requirements. The retail food industry and the Department of Agriculture and Consumer Services both support the Department having sole authority over the regulation and enforcement of food safety issues governed under chapter 500, F.S., Food Products. This authorization would assure consistent

application for consumers and businesses throughout the state.

A report on the Food Safety Pilot Program by the Department indicates that there have been difficulties encountered in implementation, such as some reluctance by firms to participate due to expectations set forth in statute as criteria. The report points out that sanitation ratings of the participating firms over the course of the program appear to have declined, and more broadly, overall compliance with the seven mandated criteria declined during the same period. Either amending the statute to delete the pilot program or making adjustments to more nearly meet the intended goal may be in order.

### Self- Inspection

One existing variation of self-inspection was noted by the state of California which has recognized a certification program developed by the Dried Fruit Association, for the processing of dried fruits. This does not replace the responsibility for inspections by the California Department of Health Services; however, it does lower the priority for inspection of that commodity. The state of California regulates manufacturers, processors and warehouses while county governments have regulatory oversight responsibility for grocery stores, supermarkets, and other retail food establishments. In general, the state attempts to visit each warehouse, manufacturer or processor at least annually; however, due to limited resources, state inspectors are not always able to meet this goal and will inspect other firms prior to those processing commodities under the Dried Fruit Association’s program. If a firm is not inspected in a given year, the priority for inspection the following year is elevated. California officials reported that about 65-75% of the compliance program is funded through fees, penalties, etc. with 25% or more coming from general funds.

### Exemption From Inspection

While the state of Idaho has in regulation the “Food Safety and Sanitation Standards for Food Establishments,” which include supermarkets, convenience stores, and neighborhood markets, an exemption from regulatory licensing and inspection is provided for “low-risk food establishments.” Those establishments may only sell factory-sealed, prepackaged, non-potentially hazardous foods. The types of foods included in this category are those in unopened hermetically-sealed containers which have been commercially processed to achieve and maintain commercial sterility under conditions of

nonrefrigerated storage and distribution. The exempted establishments are also allowed to sell, without inspection, ice, milk, half-and-half cream, butter products, frozen dairy desserts, and other fluid milk products, in the original unopened container. Those businesses may also provide limited preparation of non-potentially hazardous foods such as placing or vending ice in drinks and snow cones, as well as dispensing espresso drinks and heating pastries.

A state regulatory inspection of exempted establishments is conducted only when a consumer complaint is made. Complaints can be made by telephone or in writing to one of the state's seven Health Districts, which have responsibility for the food inspection program.

Concerns were expressed by health officials in Idaho as to the potential for an increase in food related illnesses as a result of having an extended period with no regulatory inspections of exempted business establishments.

**The Florida retail food industry's position** calls for the establishment of a permanent self-inspection program for licensed businesses which would ensure food safety and consumer protection compliance. Businesses would be granted the right to conduct self-inspections if they have obtained three consecutive 'passing grades' in inspections conducted by the Department. The participating businesses would be required to make available monthly summary inspections and actions taken. Those records would be reviewed by the Department at the time it conducts the annual inspection. Under this proposal, both retail food outlets and certain wholesale food distributors licensed by the Department would be eligible for the self-inspection program. Businesses participating in the self-inspection program would be rewarded with a reduction in permit fees.

Additionally, businesses whose food offerings are limited to prepackaged items that are sold without additions or preparations, or that are in sealed containers from the manufacturer, would not be inspected by the Department, but would be required to file an annual report with the agency. Businesses qualifying under this provision would include, but not be limited to, retail liquor stores, movie rental stores, small convenience stores that have no fountain service, and certain wholesale distributors. The industry's position is that this proposal would result in a reduction of Department inspections and allow more efficiency and diligence in the regulation of licensed

establishments that pose a potential threat to public health.

**It is the Department's position** that, in addition to the food safety pilot program, there may be other alternatives for reduced inspection frequencies. The Department has considered reduced inspections based on a two-year history of a firm's passing inspections. However, in implementing this program it is the Department's position that it would increase inspection frequencies for those firms that fail an inspection. This increased frequency is reported by the Department to be consistent with recommendations for inspection frequencies in the FDA Model Food Code. Such a plan would also need to allow for random inspections at any time and also provide for inspections in response to consumer complaints. This approach would allow the Department to focus resources on problem areas while maintaining the capacity to respond rapidly to new concerns.

Under an amended food safety pilot program or self-inspection program, if the Department is required to review or verify the inspection records of a firm, it will take staff time. As a result, there will be a cost to the Department, which should be considered for budget purposes.

Section 500.12, F.S., provides an exemption from permitting requirements for the operation of minor food outlets, including, but not limited to, video stores that sell commercially prepackaged, nonpotentially hazardous candy, chewing gum, soda, or popcorn, provided the shelf space for those items does not exceed 12 linear feet and no other food is sold by the minor food outlet. The Department's position is that this provision may be expanded to include prepackaged, nonpotentially hazardous, nonperishable foods provided that the floor space for these items does not exceed 200 square feet, and no other foods are sold by the minor outlet. Such an expansion would provide an increased variety of foods that present relatively low risk for contamination with food pathogens while maintaining a relatively low volume of product to reduce the likelihood of pest infestation, and reduce the impact if a problem with a particular product arises.

### **Third Party Audits**

There are businesses which perform third-party audits of a food firm, particularly in response to a particular problem a firm may have had. Third parties may also conduct an audit in order to prepare a firm for a regulatory visit or to assist in compliance with regulations such as Hazard Analysis and Critical

Control Point (HACCP) plans in seafood or juice processors. No case was found of a state or federal agency that has privatized or contracted with a third party to conduct either routine sanitation inspections or HACCP inspections. Third parties have been contracted to review a firm's processes, Standard Operating Procedures, assist in writing HACCP plans and similar activities. These cases are viewed as a tool to enhance compliance rather than replace regulatory oversight. There has been no case found of a third party that has been authorized to correct violations or assess penalties for failure to respond to noted deficiencies.

### Areas of Vulnerability

Among areas of vulnerability for food security and potential terrorist action, it is often emphasized that the nation's food supply is a major concern.

Although the U.S. Food and Drug Administration has added more than 600 new staff to support food safety field activities and increased the number of examinations of imported products significantly since 2001, the FDA has acknowledged that states have the primary responsibility for ensuring food safety in retail establishments.

The U.S. Centers for Disease Control have identified surveillance as a primary focus area for its efforts to enhance preparedness and response for bioterrorism at the state level, and has recently provided funds for replacement of laptop computers for all Division of Food Safety Inspectors. This is an initial step in the long term plan to more closely correlate inspection observations, laboratory data, and food illness reports between the Department and the Department of Health.

Funding from the U.S. Office of Domestic Preparedness has also been provided during the current year to allow additional training for food inspection in recognition or response to food terrorism events and for laboratory equipment for surveillance testing.

## RECOMMENDATIONS

A self-inspection program of grocery stores, supermarkets, or minor food outlets in Florida would be a significant change from the existing regulatory program in the state.

Information gathered for this report reflects a desire for responsible change by both the retail food industry which is now carrying the financial burden of paying for the program and the Department of Agriculture and

Consumer Services as the regulatory agency, without sacrificing the paramount issue of food safety

Consideration could be given to deleting the Food Safety Pilot Program or amending it to more nearly meet the intended goals of the retail food industry and the Department, which are outlined in this report.

There is within the state some inconsistency regarding inspection criteria due to overlapping inspection by some county governments. The role of local government inspections should be considered in conjunction with any revisions to the state inspection program.

Since the difficult matter of food safety inspection has not been resolved, it is recommended that the Senate Committee on Agriculture continue to dedicate time to this issue in preparation for the 2004 Regular Session. To assist the legislature in this responsibility, a copy of this report may be delivered to the Florida Food Safety and Food Security Council for review. The council is comprised of a wide range of interests such as food processors, scientists, sellers of wholesale and retail foods, a consumer advocate and governmental regulators.

It is anticipated that some program changes can be accomplished through departmental policy, memorandum-of-understanding, or administrative rule. If a statutory change is required for implementation, the Council may offer recommendations for consideration to the Legislature.