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# It Takes a Village<sup>1</sup> to Provide Quality Food for Our Pets

Diantha V. Ellis\*

## I. INTRODUCTION

How much does your pet mean to you? In many American households, pets have risen from the status of possessions to the role of

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1. Hillary Rodham Clinton, *IT TAKES A VILLAGE* (10th Anniversary Ed. 1996). The title is a reference to the book by Hillary Rodham Clinton, Former Secretary of State, Former First Lady, and the Democratic nominee for President in 2016. Secretary Clinton's book title was borrowed from the African proverb: "It takes a village to raise a child."

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family members.<sup>2</sup> For many people, pets have even taken the place of children or are treated as one of the children.<sup>3</sup> For those of us who have pets who we love as family, it is deeply concerning when reports are issued about the dangerous chemicals or toxic levels of vitamins in their food.<sup>4</sup> Reading the recall reports on a food that our dog or cat has trustingly eaten every time we place it in front of them, can hit at the very core of our hearts, leaving us—the human caretakers—feeling vulnerable and attacked because we both love our pets and know that they depend upon us for survival.<sup>5</sup> Thus, finding out that what we have fed them has in actuality poisoned them makes us feel as if we have both hurt someone we love as well as neglected our moral duty to keep those who are vulnerable and depend on us for survival safe from harm.<sup>6</sup>

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2. *More than Ever, Pets are Members of the Family*, THE HARRIS POLL (Jul. 16, 2015), <https://theharrispoll.com/whether-furry-feathered-or-flippers-a-flapping-americans-continue-to-display-close-relationships-with-their-pets-2015-is-expected-to-continue-the-pet-industrys-more-than-two-decades-strong/>. 95% of people with pets consider their pets to be family members, with 45% affirming that their pets receive birthday presents. The rates of pet parents who buy health insurance for their pets is increasing as well, with one in ten pet parents purchasing pet insurance. The bottom line is that pets are more than just possessions; they are living, breathing beings upon whom their families depend as much as the pets depend on their families. *Id.*

3. Kate Taylor, *The \$225 Billion Pet Care Industry is Exploding, as Millennials Delay Marriage and Babies While Turning to Pets to 'Fill That Void,'* BUSINESS INSIDER (May 27, 2019), <https://www.businessinsider.com/pet-care-industry-grows-as-millennials-elevate-pets-2019-5> (noting that many companies are now seeing the market value of targeting the “humanization” of pets, with some pet stores even setting up kitchens in the store where consumers can purchase chef-made meals for their pets).

4. Packaged Facts, *Recalls Have 60% of Pet Parents Concerned About the Safety of Dog and Cat Food*, CISION PR NEWSWIRE (Feb. 6, 2019), <https://www.prnewswire.com/news-releases/recalls-have-60-of-pet-parents-concerned-about-the-safety-of-dog-and-cat-food-reports-packaged-facts-300790672.html>. A 2018 survey by market research firm Packaged Facts notes the role that the concern of contamination plays in the selection of pet food products by both dog (57%) and cat (55%) owners. Also, this survey notes that while reform came after the 2007 Menu Foods Recalls, there are still strong concerns over frequent contaminants like listeria, salmonella, and pentobarbital in pet food.

5. Packaged Facts, *supra* note 4.

6. Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest Convergence, Hierarchy, and Property*, 16 ANIMAL L. REV. 65, 78–80 (2009) (discussing the moral obligations human animals have toward the non-human animals who depend upon them for care). Of note here is that humans create a permanent environment of dependency for domesticated non-human animals who are under our care and as such contribute to domesticated animals being “perhaps the most vulnerable of all sentient beings.” *Id.* at 80.

In the early months of 2007, the Menu Foods Recall<sup>7</sup>—what would come to be known as one of the largest food recalls in history—highlighted on a national scale just how important pets had become to the American public. As the body count for beloved pets began to grow,<sup>8</sup> concerned pet parents nationwide began raising awareness of the pet food production process.<sup>9</sup> After the company issued a recall of the pet foods spanning numerous brands, both high-end pet foods and lower-priced pet foods, the United States Food and Drug Administration (FDA) began an investigation that eventually resulted in a Senate subcommittee inquiry into the mistakes of the 2007 Menu Foods Recall.<sup>10</sup>

In the years following the 2007 Menu Foods Recall, it has become increasingly clear through the continued recalls for pet foods that while the legislation and the reforms made as a result of the crisis were a step in the right direction, it was not enough to ensure that pet foods are not contaminated with toxins, chemicals, and pathogens.<sup>11</sup> From 2018 to 2021, numerous pet foods have been recalled due to the presence of contaminants—such as toxic levels of vitamin D,<sup>12</sup> and

7. MARION M. NESTLE, *PET FOOD POLITICS: THE CHIHUAHUA IN THE COAL MINE* 13 (2008).

8. NESTLE, *supra* note 7, at 57–59. Because of the lack of an official national system of communication of the number of pet deaths and illnesses, the website, [www.petconnection.com](http://www.petconnection.com), which was overseen by a group of pet professionals, kept an unofficial tally. The deaths and illnesses ranged in the thousands. *Id.* at 58. The Veterinary Information Network (VIN) also kept an unofficial count of the number of deaths and illnesses and surmised that “the national death toll should be somewhere in the range of 2,000 to 7,000, and that veterinary care expenses might cost pet owners \$2 million to \$20 million.” *Id.* Of course, these are all unofficial and it is estimated by many experts that the actual numbers were much higher. The FDA reported receiving hundreds of calls a day, which is far more than they had ever received regarding any recall issue. *Id.* at 59.

9. *Id.* at 57.

10. *Id.* at 13.

11. Nancy Kerns, *Ongoing Pet Food Recalls*, *THE WHOLE DOG JOURNAL* (Apr. 22, 2019), [https://www.whole-dog-journal.com/food/ongoing-pet-food-recalls/?gclid=EAIaIQobChMIqMqTm9yY6QIVCZ2zCh3q0QB9EAMYASAAEgKHiPD\\_BwE](https://www.whole-dog-journal.com/food/ongoing-pet-food-recalls/?gclid=EAIaIQobChMIqMqTm9yY6QIVCZ2zCh3q0QB9EAMYASAAEgKHiPD_BwE) (describing the frustrations that consumers face when trying to discern if what is on the label of a pet food is all that will be found in the pet food as well as the issues that manufacturers face when producing their products). The article notes that the reforms of the past several years have seemed to lead to even more recalls, questioning whether that is a result of more oversight or more problems in the production process.

12. *FDA Alerts Pet Owners and Veterinarians about Potentially Toxic Levels of Vitamin D in 33 Varieties of Hill’s Canned Dog Food in Expanded Recall*, FDA (May 20, 2019), <https://www.fda.gov/animal-veterinary/outbreaks-and-advisories/fda-alerts-pet-owners-and-veterinarians-about-potentially-toxic-levels-vitamin-d-33-varieties-hills>. The vitamin D toxicity recalls in 2019 included several varieties of both Hill’s Science Diet and

pentobarbital<sup>13</sup>—with some recalls being issued for premium and even prescription brands of pet food.<sup>14</sup>

The continuing problems with the safety and quality of our pet foods indicates that the system of regulation as it is currently designed is not working as well as it could be.<sup>15</sup> The system, while better than it was prior to 2007, is still largely based on self-reporting and it lacks uniformity and consistency across all states.<sup>16</sup> Further, the FDA is historically underfunded and the budget it does have is stretched thin.<sup>17</sup>

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Hill's Prescription Diet. Prescription Diet formulas are for pets who already exhibit certain medical conditions, thus magnifying the issue. Vitamin D toxicity can attack the kidneys and, if too high, can result in death. The FDA notes that symptoms of Vitamin D toxicity include: vomiting, loss of appetite, increased thirst, increased urination, excessive drooling, and weight loss.

13. *FDA Alerts Pet Owners about Potential Pentobarbital Contamination in Canned Dog Food Manufactured by the J.M. Smucker Company*, FDA, <https://www.fda.gov/animal-veterinary/outbreaks-and-advisories/fda-alerts-pet-owners-about-potential-pentobarbital-contamination-canned-dog-food-manufactured-jm> (last updated Mar. 2, 2018); See Susannah Cullinane, *Dog Food Brands Recalled over Possible Euthanasia Drug*, CNN HEALTH (Feb. 18, 2018, 6:18PM), <https://www.cnn.com/2018/02/18/health/dog-food-pentobarbital/index.html>. Pentobarbital, a common euthanasia drug, was found in trace amounts in dog foods produced by J.M. Smucker Company. Like the melamine issue in the 2007 Menu Foods Recall, the recall was linked to a single supplier. The company issued a voluntary recall and informed the FDA. The FDA noted that any presence of pentobarbital in pet food, even trace amounts, was a violation of the Federal Food, Drug, and Cosmetic Act. The FDA stated that pets who ingested food laced with pentobarbital experienced the following symptoms: drowsiness, dizziness, excitement, loss of balance, nausea, nystagmus (a condition of jerky eye movement), and inability to stand.

14. FDA, *supra* note 12.

15. Kerns, *supra* note 11.

16. *The Role of AAFCO in Pet Food Regulation*, AAFCO, <https://talkspetfood.aafo.org/roleofaafo> (last visited Sept. 20, 2021). The FDA functions as a voting member of the AAFCO but the bulk of the regulatory power is concentrated among the various agricultural departments of each state. The AAFCO states it seeks to promote uniformity among feed laws and regulations to the extent possible.

17. NESTLE, *supra* note 7, at 145 (describing how the FDA is responsible for nearly 80% of the food supply, human and non-human animal, but only receives 20% of the federal budget for this purpose while the USDA is responsible for 20% of the food supply and receives 80% of the federal budget for this purpose). *Compare Fact Sheet: FDA at a Glance*, FDA (Nov. 2020), <https://www.fda.gov/about-fda/fda-basics/fact-sheet-fda-glance> (last visited Aug. 20, 2021) (noting that this underfunding is largely unchanged since 2007, as the FDA's budget in 2020 was \$5.9 billion and only 4% of that budget went to animal drugs and feed), *with FY 2020 Budget Summary*, USDA, <https://www.usda.gov/sites/default/files/documents/fy2020-budget-summary.pdf> (noting the total USDA budget for 2020 was \$119 billion). Food safety in the USDA budget is included in the "all other" category that encompasses rural development, research, marketing and regulatory, and departmental management, all of which make up 5% of the USDA total outlays.

Thus, the FDA functions more as an organization that makes recommendations, with the federal system stepping in to react to a situation that has gotten out of control after a company has recalled a product following reported deaths and illnesses of thousands of pets.<sup>18</sup>

It is important to note that pre-market approval is not required for a pet food, unless the food falls under a “drug” classification.<sup>19</sup> Further, the Federal Food, Drug, and Cosmetic Act<sup>20</sup> (FD&C Act) requires that the food be subject to pre-market approval only if the company makes a claim as to the ability of the food to help treat certain diseases or conditions.<sup>21</sup> Otherwise, no further approval is needed to sell the product, and the FDA’s job then becomes to simply inform consumers of a suspected quality issue in the production of the product being recalled.<sup>22</sup>

However, when it comes to the safety of both the human and non-human animal food supply, we need a more streamlined approach to regulation that does not change from state-to-state, but instead has a steady continuity that encourages companies to properly ensure quality foods.<sup>23</sup> While the reforms enacted after the 2007 recalls were good, they are not enough. However, we can use existing laws and organizations, particularly the Food Safety Modernization Act (FSMA)<sup>24</sup> and the Association of American Feed Control Officials (AAFCO)<sup>25</sup> to

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18. *FDA’s Regulation of Pet Food*, FDA (Feb. 4, 2022), <https://www.fda.gov/animal-veterinary/animal-health-literacy/fdas-regulation-pet-food>.

19. FDA, *supra* note 18.

20. 21 U.S.C. § 301 (1938).

21. FDA, *supra* note 18.

22. *Id.*

23. NESTLE, *supra* note 7, at 144–45. Nestle argues in this selection for starting completely from scratch in developing a more streamlined system of regulation of the entire food industry, which is probably the right method, albeit perhaps not completely feasible.

24. 21 U.S.C. § 2201 (2011); *Background on the FDA Food Safety Modernization Act (FSMA)*, FDA, <https://www.fda.gov/food/food-safety-modernization-act-fsma/background-fda-food-safety-modernization-act-fsma> (last visited Aug. 20, 2021). The FSMA was signed by President Obama in 2011 and represents a significant overhaul of food safety regulation. Key components of the FSMA include: mandatory preventative controls, mandatory inspections, increased tools of response by the FDA, greater oversight of imports, enhanced state and federal partnerships. While some of this increased oversight does apply to the pet food industry, there is still the problem with the FDA regulating pet food as “feed” and not “food,” which puts much of the pet food industry under a different standard of regulation.

25. *See generally* FDA, *supra* note 18 (explaining that the FDA’s partnership with The Association of American Feed Control Officials (AAFCO) seeks to “[s]afeguard the health of animals and people; [e]nsure consumer protection; and [p]rovide a level playing field of orderly commerce for the animal feed industry.”). The AAFCO is a voluntary

achieve this reform while still maintaining the integrity of our legal system.

This Article proposes the creation of an industry-wide system of supply chain traceability, funded by the pet food industry according to market share and overseen by the AAFCO, which is already connected to the FDA and state agencies on a voluntary basis. Lack of traceability was a key issue in the 2007 Menu Foods Recall, and the solutions that were created post-2007 still focus more on being reactive than on being proactive. Further, this Article proposes that an industry-wide stamp of quality assurance be implemented to provide pet food companies an optimal consumer communication of confidence.

Thus, this Article will address the imperative of implementing a dependable, uniform stamp of approval for the products produced by the United States pet food industry. In effect, this will be a positive step toward ensuring better quality control in the production of pet food. First, this Article will discuss problems with the current system of regulation that we have in the United States, and its lack of uniformity. Then, this Article will propose how the United States could shore up the regulatory system that is already in place by implementing a more uniform means of proactive regulation to ensure better quality of the pet food supply. This proposal will include partnering existing legislation with existing organizations and industry support to ensure that the foods produced by pet food companies meet the quality standards of food—not feed—which is the current means of regulation. Next, counterarguments to the proposed reform will be briefly discussed. Finally, this Article will conclude with how it is possible to enact the reform and why we need to do so.

## II. PROBLEMS WITH CURRENT FDA REGULATION

### A. *Lack of Enforceable Oversight and Uniformity*

Recalls of food products, whether regarding the human food supply or the non-human animal food supply, tend to garner headlines because the issue regards what we put in our bodies or feed to the pets that we love. However, the FDA's powers of pre-market approval as it relates to the food (human and non-human animal) market largely targets the additives that are placed in the food products or health claims the product makes.<sup>26</sup> As some human food manufacturers have discovered,

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organization of feed officials at the local, state, and federal levels and plays a vital role in establishing nutritional guidelines for the pet food supply.

26. *Is It Really 'FDA Approved?'*, FDA (Jan. 17, 2017), <https://www.fda.gov/consumers/consumer-updates/it-really-fda-approved> (stressing that

certain claims about their products can invite the scrutiny of the FDA and effectively classify the food item as a “drug.”<sup>27</sup> In the animal food industry, pre-market approval is also not required to get the product on the shelf.<sup>28</sup> Thus, as long as the food company meets the guidelines of the FD&C Act to provide food that is “safe to eat, produced under sanitary conditions, free of harmful substances, and truthfully labeled,” then the food may be marketed to the consumer.<sup>29</sup> The problem is that an organization like the FDA has limited enforceable oversight until the problem occurs,<sup>30</sup> leading to illnesses among humans or non-human animals that strike before the quality issues are sighted. This is essentially the problem that occurred in the 2007 Menu Foods Recall.

### 1. The 2007 Menu Foods Recall Highlights Problems with FDA Regulation

In 2007, the families of dogs and cats around the world were shaken by the news that much of the pet food supply had been contaminated.<sup>31</sup> This contamination would eventually lead to a massive national recall that impacted trusted pet food brands, both bargain and premium, all of which were predominately manufactured by a single company: Menu Foods, a Canadian corporation.<sup>32</sup>

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the FDA does not approve companies or foods; it approves new drugs, biologics, and medical devices).

27. Wess Siegner & Ricardo Carvajal, *FDA Says Cheerios Cereal is a Drug*, FDA LAW BLOG (May 13, 2009), <http://www.fdalawblog.net/2009/05/fda-says-cheerios-cereal-is-a-drug/>. The FDA cited claims by Cheerios to lower cholesterol by specific percentages and within specific time frames causing the cereal to be an unapproved new drug because it was in violation of FD&C Act § 505(a). Also, the FDA cited General Mills’ Cheerios brand as misbranded under FDA Act § 403 (r)(1)(B) due to the product’s website claims regarding health. See *Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink*, FTC (Dec. 15, 2010), <https://www.ftc.gov/news-events/press-releases/2010/12/dannon-agrees-drop-exaggerated-health-claims-activia-yogurt> (noting that claims by Dannon that Activia relieves irregularity and that DanActive helps prevent colds and the flu were misleading and presented the foods as providing uncorroborated evidence of the health benefits of eating the yogurts).

28. *Pet Food*, FDA, <https://www.fda.gov/animal-veterinary/animal-food-feeds/pet-food> (last visited Aug. 29, 2021).

29. FDA, *supra* note 18.

30. *Id.*

31. NESTLE, *supra* note 7, at 13.

32. *Id.* at 13–14 (detailing how Menu Foods was the manufacturer for seventeen of the top twenty pet food companies in the U.S.). The investigation into the source of contamination revealed that the brands that consumers had come to trust as superior quality were in fact manufactured in the same facilities as the bargain brands and were produced with similar ingredients.



The contamination problem was first reported by concerned pet owners to the customer hotline for Menu Foods when their cats became suddenly ill with kidney disease and, for some, kidney failure.<sup>33</sup> Subsequently, Menu Foods noticed a high rate of cats in their food tasting studies were becoming seriously ill or dying from kidney diseases.<sup>34</sup> The company then alerted the FDA of the problem, citing a possible problem with the wheat gluten used in the production of the foods.<sup>35</sup> The wheat gluten was also provided by a single supplier, ChemNutra, in China.<sup>36</sup> The result was that Menu Foods recalled over sixty million cans and pouches of wet dog and cat food.<sup>37</sup> The Menu Foods recall was so sweeping that it later placed in the top five recalls in United States history.<sup>38</sup>

Once the FDA was notified of the problem, the organization began an investigation into the issue and uncovered the source of the contamination of the wheat gluten was melamine and cyanuric acid.<sup>39</sup> “Melamine is a synthetically produced chemical used for a wide variety of applications, including plastics, adhesives, laminates, paints, permanent-press fabrics, flame retardants, textile finishes, tarnish

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33. *Id.* at 9–10 (describing the discovery by several cat owners of their pet’s kidney illness). The initial reports were originally brushed off by the cats’ veterinarians, who were contacted by Menu Foods. The veterinarians felt the cats had probably just eaten something bad when wandering away from home.

34. *Id.* (describing the separate food tasting projects that an independent company was performing for Menu Foods). This study also involved cats. These types of tests are commonly used in the pet food industry to test whether the animals prefer the food being produced by the company over the food produced by competitors. About fifteen percent of the cats participating in the study either died or had to be euthanized. The company was initially not alarmed at this rate because the cats who became sick were over ten years old, with one being sixteen years old.

35. *Id.* at 11–12 (noting that wheat gluten is used in the production of pet foods because it “adds protein, binds other ingredients, and thickens gravy-style foods”). When this problem occurred with the wheat gluten in pet food, the United States only produced about twenty percent of the needed wheat gluten supply, with the rest coming from other countries.

36. *Id.* (noting that Menu Foods had just changed its wheat gluten supplier to ChemNutra in late 2006).

37. *Id.* at 13.

38. Angie Mohr, *The Five Largest Food Recalls in History*, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/0512/the-5-largest-food-recalls-in-history.aspx> (last updated Oct. 2, 2021). The other recalls whose effects were felt around the country that made this list were: (1) 2008 Hallmark/Westland Meat Packing Recall of 143 million pounds of beef; (2) 2007–08 Peanut Corp. Recall involving salmonella-tainted peanut products; (3) 2010 Wright County/Hillandale Farms Eggs involving salmonella-tainted eggs; (4) 2011 Cargill Meat Solutions recall of over 35 million pounds of salmonella-tainted ground turkey; and (5) 2007 Menu Foods Recall. *Id.*

39. NESTLE, *supra* note 7, at 64.

inhibitors, paper coatings and fertilizer mixtures.”<sup>40</sup> Melamine is not meant to be ingested, but it is sometimes “believed that melamine was added to the wheat flour to increase the flour’s apparent protein content, allowing the flour to pass for a higher-protein-containing ingredient, such as wheat gluten.”<sup>41</sup>

The World Health Organization (WHO) reports that the Tolerable Daily Intake (TDI) of melamine is 0.2 mg per kg of body weight per day.<sup>42</sup> This would effectively mean that the TDI for a ten-pound cat, which converts to approximately 4.54 kg would be 0.908 mg per day. For a forty-five-pound dog, which converts to approximately 20.41 kg, those calculations would be 4.082 mg per day. During the 2007 pet food crisis, samples of over 200 pet foods uncovered melamine concentrations ranging from 0 to 2263 mg/kg.<sup>43</sup>

## 2. 2007 Congressional Inquiry Highlights Regulation Issues

The 2007 Menu Foods Recall raised numerous questions about the regulation of pet foods and resulted in the 110th Congress calling a Special Hearing in April 2007 to address the issue.<sup>44</sup> While the Menu Foods recall was, and continues to be, listed as one of the largest recalls in history, it represented less than 1% of the entire dog and cat food market.<sup>45</sup> The fact that the Special Hearing was formed so quickly in answer to a recall that represented such a small share of the market is

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40. Carla Hiltz & Luc Pelletier, *Background Paper on Occurrence of Melamine in Foods and Feeds*, WHO (2009), [https://www.who.int/foodsafety/fs\\_management/melamine\\_3.pdf](https://www.who.int/foodsafety/fs_management/melamine_3.pdf).

41. Hiltz & Pelletier, *supra* note 40, at 7 (describing the 2007 pet food crisis and the resulting investigation from the FDA, as well as similar organizations with the European Union, Canada, and other countries into the cause of the melamine contamination of pet food products). The USFDA discovered that “wheat flour presented as wheat gluten and rice protein imported from China as pet food ingredients and subsequently incorporated into pet food manufactured in North America were contaminated with melamine and its analogues, cyanuric acid, ammeline and ammelide.” *Id.* Of particular interest here is that the contaminated wheat gluten found in the pet food was “human food-grade,” which is likely a contributor to the overwhelming outrage surrounding the Menu Foods recall. *Id.*

42. *Experts Set Tolerable Level for Melamine Intake*, WHO (Dec. 5, 2018), <https://www.who.int/news/item/05-12-2008-experts-set-tolerable-level-for-melamine-intake> (noting that although melamine should not be present in food products, the level set as a TDI is the maximum amount that experts believe the body can take before being negatively affected by the chemical).

43. Hiltz & Pelletier, *supra* note 40, at 7 (noting also that the California Animal Health and Food Safety Laboratory reported 10 to 3200 mg per kg in their samples).

44. *See generally* Examine the Current Pet Food Recall: Hearing Before a Subcomm. of the Comm. on Appropriations, 110th Cong. 1 (2007) (hereinafter *Hearing*).

45. *Hearing*, *supra* note 44, at 6.

a testament to how important this topic was to both legislators and the voting public.

Comprised of a panel of experts from across the veterinary and FDA spectrum, the Special Hearing addressed concerns about (1) the lack of a set time period that companies were required to report any issues with their product to the FDA; (2) the process that the FDA and the company went through to identify the source of the problem; (3) how the FDA informed the public about the problem; (4) the responsibilities of the state governments and the USDA working in concert with the FDA in the process of identifying the problem; and (5) the possibility that the contaminated wheat gluten made its way into the human food supply chain.<sup>46</sup>

### 3. A Global Market Complicates Matters

If it was not already clear to consumers, companies, and government agencies, the 2007 Menu Foods Recall illustrated on a massive scale how very difficult it is to regulate food, whether pet or human, in a global marketplace.<sup>47</sup> Another major issue that arose was how antiquated the food and drug laws that govern pet food regulation, as well as the regulation of the human food supply chain, actually were in 2007.<sup>48</sup>

Dr. Marion Nestle's research into this area vividly describes the problem with trying to regulate twenty-first century food supply chains with twentieth century laws, noting that the pet food recalls brought national attention to the issue of food safety for both pets and their humans.<sup>49</sup> The problem in 2007 was that the food supply chain was being regulated by laws that were enacted in a time when "whole foods [were] brought in from a 50-mile radius. Now we have food products that may contain ingredients from 50 countries."<sup>50</sup>

Herein lies the root of the problem that led to the 2007 Menu Foods Recall and that plays a role in ongoing food recalls, both human and

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46. See generally *Hearing*, *supra* note 44.

47. Cary Coglianese et al., *Consumer Protection in an Era of Globalization*, in *Import Safety: Regulatory Governance in the Global Economy*, FACULTY SCHOLARSHIP AT PENN LAW 4, 4–18 (2009) (discussing the public health issues and economic effects of recalls in a global economy in which it is increasingly hard to pinpoint the source of the problem).

48. NESTLE, *supra* note 7, at 143–45.

49. *Id.*

50. *Id.* at 144 (quoting Robert E. Brackett Named Director of the National Center for Food Safety and Technology (NCFST), ILLINOIS TECH (Jun. 11, 2010), <https://www.iit.edu/news/robert-e-brackett-named-director-national-center-food-safety-and-technology-ncfst>).

non-human animal. According to the CIA World Factbook, the major export partners of the United States in 2019 were Canada, Mexico, China, and Japan, and its import partners were China, Mexico, Canada, Japan, and Germany.<sup>51</sup> If one were to trace the import and export partners of each of these countries and then the partners of the resulting countries, one would soon find a tangled web of intrigue that stretches across the globe in a spidery fashion, challenging even the most agile sleuth among us to determine the true culprit of the end result. It is rather like trying to find patient zero in a global pandemic.<sup>52</sup>

Thus, while pet owners around the country expressed their displeasure through customer service complaints to the companies whose products caused the illness and death of their beloved animals, the question that hovered over the process was where the fault lay. Was the fault entirely that of the company or even of regulation? And would even more laws really be the answer to the problem? The senators from the Senate subcommittee thought stricter regulation was a piece of the solution, and thus introduced legislation to try to curb the problem, but even they noted that more measures needed to be put into place.<sup>53</sup>

#### 4. Ongoing Recalls: 2019 and 2021 Bring More Troubles

If the 2007 Menu Food Recall accomplished one thing well, it was to streamline future FDA recalls so that there was less confusion and more information.<sup>54</sup> Part of the solution was the creation of the Pet Event Tracking Network (PETNet) in 2008.<sup>55</sup> PETNet was created to respond to the need for a better flow of information regarding pet foods

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51. *The World Factbook: United States*, CIA, <https://www.cia.gov/the-world-factbook/countries/united-states/> (last updated Nov. 10, 2021). The economy overview on this site notes the export partners for the United States as: Canada 17%, Mexico 16%, China 7%, Japan 5%. The import partners for the United States are listed as: China 18%, Mexico 15%, Canada 13%, Japan 6%, Germany 5%. *Id.*

52. Philip Williams et al., *The Coronavirus 'Patient Zero' Set Off a Chain of Events which Upturned the Lives of 7 Billion People*, ABCNEWS (Apr. 22, 2020, 3:10PM), <https://www.abc.net.au/news/2020-04-23/how-coronavirus-went-from-patient-zero-to-the-world/12165336> (describing the continuing mystery of who is patient zero in the coronavirus pandemic).

53. *See Hearing, supra* note 44, at 45–46.

54. FDA & HHS, *Pet Event Tracking Network—State, Federal Cooperation to Prevent Spread of Pet Food Related Diseases*, 78 Fed. Reg. 52774 (Aug. 26, 2013) (introducing the launch of the PETNet Tracking system to streamline the reporting of illness related to pet food). The purpose of this network was to create an easier method for exchanging information between FDA and other Federal and State regulatory agencies. The LivestockNET was also created to track issues with illnesses linked to livestock feed.

55. FDA & HHS, *supra* note 54.

with potential safety problems.<sup>56</sup> The FDA noted in 2008 that no federal agency monitored or tracked companion animal diseases and outbreaks, unlike the tracking of human diseases and outbreaks by the CDC and livestock diseases and outbreaks by the USDA, and developed the PETNet to address this issue.<sup>57</sup> During 2021, the PETNet system appears to have been updated to a new portal called the Safety Reporting Portal (SRP).<sup>58</sup> In the SRP, the product safety issue reporting process has been streamlined among the various agencies, including FDA and the National Institutes of Health (NIH).<sup>59</sup>

In recent years, the FDA has trended toward providing consumers with frequently updated information surrounding tainted pet foods.<sup>60</sup> As of the writing of this article, there are a total of 133 entries documented on the FDA recall link for tainted pet foods between 2017 and 2021.<sup>61</sup> These are listed according to company name, product description, brand name, and recall description.<sup>62</sup> Further, for the sake of the company involved, the FDA notes when the recall is terminated.<sup>63</sup> In general terms, these are all good steps toward ensuring product safety and consumer confidence in the products we are serving to our pets.

What was particularly concerning about the 2019 recalls was how many prescription diet pet foods were on the list and the types of contamination problems present in those foods (for example, toxic levels of vitamin D and pentobarbital present in the food).<sup>64</sup> Also quite disturbing to pet parents in 2019 were the FDA-validated reports of a link between Dilated Cardiomyopathy (DCM) in dogs who were not

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56. *Id.*

57. *How to Report a Pet Food Complaint*, FDA, <https://www.fda.gov/animal-veterinary/report-problem/how-report-pet-food-complaint> (last updated Apr. 1, 2021).

58. *Safety Reporting Portal*, HHS, <https://www.safetyreporting.hhs.gov/SRP2/en/Home.aspx?sid=e1ff5f9c-6bbf-4eb5-af7b-d208aa93690b> (last visited Oct. 14, 2021). The products that may be reported on the SRP include: Marketed human drug and biologics, Human or animal reportable foods, Animal drugs, Animal foods, Tobacco products, Dietary supplements, and NIH gene-transfer research. I am hopeful that the streamlining of the reporting process is a step in the right direction toward a faster and more efficient response to any human or non-human animal food crisis.

59. *Safety Reporting Portal*, *supra* note 58.

60. *Recalls and Withdrawals*, FDA, <https://www.fda.gov/animal-veterinary/safety-health/recalls-withdrawals> (last updated Feb. 4, 2022).

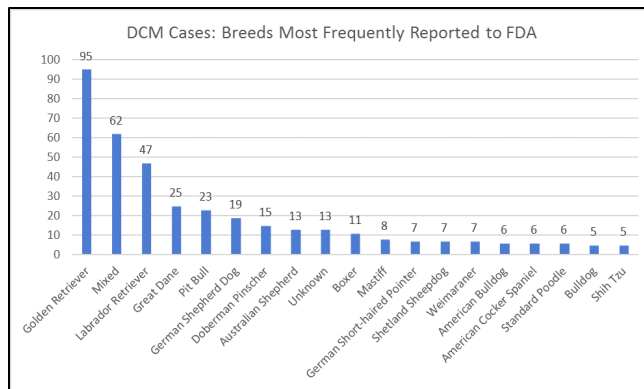
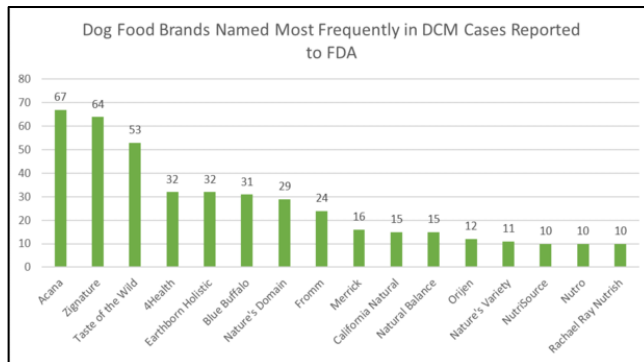
61. *Recalls and Withdrawals*, *supra* note 60.

62. *Id.*

63. *Id.*

64. FDA, *supra* note 12; FDA, *supra* note 13.

normally prone to the disease and certain brands of dog food, many of which are considered to be premium foods (see chart below).<sup>65</sup>



The companies at the heart of the FDA investigations into DCM strongly disagreed with the FDA's investigation of these reports because it was conducting third-party reviews and internal investigations into the reports. The companies found it misleading for the FDA to report an investigation of their premium brands without any direct scientific evidence to support the link.<sup>66</sup> The very fact that

65. Kate Gibson, *16 Dog Food Brands May Cause Heart Disease in Pets*, CBSNEWS (Jul. 1, 2019), <https://www.cbsnews.com/news/dog-food-and-heart-disease-fda-warns-16-dog-food-brands-may-cause-heart-disease-in-pets/> (citing FDA-validated reports of Dilated Cardiomyopathy (DCM) in dogs not normally prone to the disease, which included several premium brands).

66. Gibson, *supra* note 65. See *FDA Investigation into Potential Link between Certain Diets and Canine Dilated Cardiomyopathy*, FDA, <https://www.fda.gov/animal-veterinary/outbreaks-and-advisories/fda-investigation-potential-link-between-certain->

there were numerous investigations between the FDA and the companies surrounding this issue points toward the need for a more uniform system of quality control.

Another illustration of why a more uniform system of regulation for pet food is required involves the issues that the pet food, Taste of the Wild, found itself embroiled in during 2019. In March 2019, a class action lawsuit was filed against Taste of the Wild, which is manufactured by Diamond Pet Foods, Inc. (Diamond), alleging that the company's product contained "undisclosed levels of heavy metals [(including arsenic, lead, mercury, and cadmium)], BPA, pesticides, and/or acrylamides."<sup>67</sup> Diamond's motion to dismiss was subsequently granted in part for a lack of personal jurisdiction and issues relating to alleged company misstatements, implied warranty, and equitable remedies.<sup>68</sup> However, the United States District Court for the Eastern District of California denied Diamond's motion to dismiss the fraud and consumer protection claims against Diamond's misstatements that appeared on their website and product packaging.<sup>69</sup> The issues that both Diamond and its consumers endured in 2019 could have been resolved by better regulatory procedures and a clear organizational structure of quality inspection.<sup>70</sup>

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diets-and-canine-dilated-cardiomyopathy (last updated Jun. 27, 2019). The FDA investigation was launched because of numerous reports of the development of DCM in dogs without a genetic predisposition to DCM. The dogs were eating foods predominately labeled as "grain-free." The FDA's Center for Veterinary Medicine (CVM) and the Veterinary Laboratory Investigation and Response Network (Vet-LIRN) worked together toward investigating these reports. The dogs were eating a predominately dry food diet and there was a heavy concentration of peas, lentils, potatoes, and sweet potatoes in the foods. These reports to the FDA spiked during 2018 to 2019. The mean age of the dogs in the study was 6.6 years and the mean weight was 67.8 pounds.

67. Grossman v. Schell & Kampeter, Inc., No. 2:18-cv-02344-JAM-AC, 2019 U.S. Dist. LEXIS 47407, at \*1 (E.D. Cal. Mar. 20, 2019) (This class action case was eventually settled).

68. *Id.* at \*20.

69. *Id.* at \*14.

70. See *Company Statement of Quality Assurance*, DIAMOND PET FOOD, <https://www.diamondpet.com/about/quality-assurance/> (last visited Oct. 12, 2021). Both Taste of the Wild and Diamond Pet Foods appeared to be forthcoming with information throughout the lawsuit for their customers and the court. The company also now reports on the company website that it has received the Safe Quality Food Certification (SQF) for its brands, which indicates that important safety upgrades have been implemented by Diamond Pet Foods and the Taste of the Wild brand. See also *About SQFI*, SQF INSTITUTE, <https://www.sqfi.com/about-sqfi/> (last visited Oct. 12, 2021).

*B. Animal, Pet, Human—Shouldn't the Food of All Be Treated Equally?*

The consensus among most pet parents is that our pets are so much more than animals—they are members of the family.<sup>71</sup> And yet, while it is agreed that their foods should be safe to eat and produced in a clean environment, the FDA lumps the regulation of pet food in with animal feed, granting it lesser status to the food that is produced for humans.<sup>72</sup> But is this really a good idea? And, what happens if discarded pet food ends up in the food supply of farm animals that are being raised for human consumption and thus indirectly becomes a part of the human food supply?

As Marion Nestle points out in her research, this became one of the key issues behind the government response to the 2007 Menu Foods Recall.<sup>73</sup> As was soon discovered, some of the melamine-tainted food involved in the recall had indeed made its way to the farm animal feed supply before the recall was issued.<sup>74</sup> Hogs, poultry, and farmed fish are among the animals who regularly receive discarded pet food, and a large portion of the melamine-tainted pet food in 2007 had been recycled into the animal feed supply for livestock.<sup>75</sup> Without a clear trail to where the discarded food went, it was very hard to track it down; experts were unsure of how much of the tainted food had been fed to livestock intended for the human food supply chain.<sup>76</sup> While most experts did not feel that there would be enough melamine in the animal to harm the human who eventually ate the animal's meat, it should still make meat eaters think twice about what kind of meat they eat and what the animal was fed.<sup>77</sup>

Is it not time to consider the need to regulate foods for all biological beings on a more even scale, if for no other reason, than perhaps to safeguard the human food supply? While it is true that most non-human animals are not as picky about cleanliness as most

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71. See The Harris Poll, *supra* note 2; Taylor, *supra* note 3.

72. See FDA, *supra* note 28.

73. See generally NESTLE, *supra* note 7, at 105–13 (noting that once the renal failure in cats and dogs became documented, the FDA worked to trace the source due to concerns that the human food supply could also be tainted).

74. *Id.* Specifically, the recalled salvaged pet feed had made its way into the food supply for (1) pigs; (2) chicken; and (3) fish. Further, melamine had made its way into the binding products for a variety of animal feed, including that for cattle who were being raised for the market.

75. *Id.*

76. *Id.*

77. *Id.*



humans,<sup>78</sup> we still need to consider the matter of chemicals and other tainted products that might contaminate the animal feed supply, whether it be intended for livestock or pets. Having a process that lends itself to more traceability would be advantageous for both human and non-human animal food production since the production process and ingredients are similar.<sup>79</sup>

*C. Too Much to Regulate and Not Enough FDA Funds to Do It*

A major problem with the FDA regulation of the food supply is that the organization is overloaded and has a very limited budget with which to work.<sup>80</sup> Marion Nestle's work in nutrition has argued that "[the FDA] no longer has the capacity to protect the food supply."<sup>81</sup> Her argument stems from the fact that the regulation requirements and funding distributed between the two agencies is imbalanced with the USDA getting the bulk of the funding while the FDA is responsible for the bulk of the regulation.<sup>82</sup> A truly scary statistic shared from Dr. Nestle's research is that given the lack of funding and staffing at the FDA, "it would take the agency 1,900 years to inspect every foreign plant that exports food to the United States."<sup>83</sup> Dr. Nestle's research discovered that at the time of the 2007 Menu Foods Recall, the FDA was devoting only about 1% of its resources to inspecting imported

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78. I refer to this as "most" here because personal observations of some breeds and types of non-human animals make me wary of stereotyping by lumping all of them in one basket. Let's be honest, there are some non-human animals who can exhibit very strong traits of cleanliness.

79. Joe Pinsker, *The Humanification of Pet Food is Nearly Complete*, THE ATLANTIC (Dec. 26, 2018), <https://www.theatlantic.com/family/archive/2018/10/pet-food-organic-gmo/574060/> (noting the similarities of ingredients that companies now use in pet foods to make them seem more appealing to the numerous consumers who consider themselves more "pet parents" than "pet owners"). I contrast this with the type of pet foods that were produced in the early days of the industry at the turn of the twentieth century.

80. NESTLE, *supra* note 7, at 145–47 (noting the discrepancies that exist between the funding for the FDA versus the USDA).

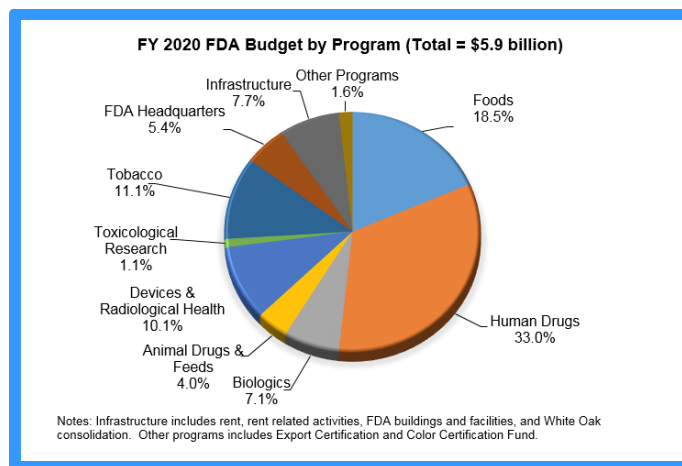
81. *Id.* at 143. Dr. Marion Nestle is a nationally renowned nutritionist and Professor Emerita of NYU's Nutrition and Food Studies Department.

82. *Id.* at 145 (explaining that while the FDA regulates eighty percent of the food supply, it only receives twenty percent of the federal funding).

83. *Id.* at 146 (noting that the FDA is spread thin on its ability to inspect every type of product, especially since the bulk of its time is devoted to enforcing regulations of dietary supplements and tobacco products). Dr. Nestle also argues that the highly politicized nature of the FDA, in that it undergoes changes with every presidential administration, does not lend itself well to uniform regulation. Nowhere has this politicized nature of the FDA approval process been more widely noted than the ongoing COVID-19 pandemic and the heated opinions swirling incessantly around the vaccines.

goods.<sup>84</sup> When put in perspective, it seems that with the current ability to inspect, both human and non-human animal chances of being poisoned by a food product are equally quite high.

The 2020 FDA budget information backs up Dr. Nestle's claim, with the FDA stating that it "regulates about 78% of the U.S. food supply. This includes everything we eat except for meat, poultry, and some egg products."<sup>85</sup> As the figure below points out, only about 4% of the FDA budget for fiscal year 2020 was attributed to animal drugs and feeds.<sup>86</sup> The bulk of the budget went to human drugs, foods, tobacco, and medical devices.<sup>87</sup> When taken into context, this again illustrates that the food supply for non-human animals is considered to be unequal to that of the food supply for human animals.<sup>88</sup>



However, a further graph of 2020 budget funds provided by the FDA illustrates something very interesting about the tobacco industry. While the FDA budget for the tobacco industry is a little over 11%, the 2020 budget appropriation notes that the tobacco industry fully funds the tobacco industry user fees. By contrast, the animal drug and food industry funds about 20% of their user fees.<sup>89</sup>

84. *Id.*

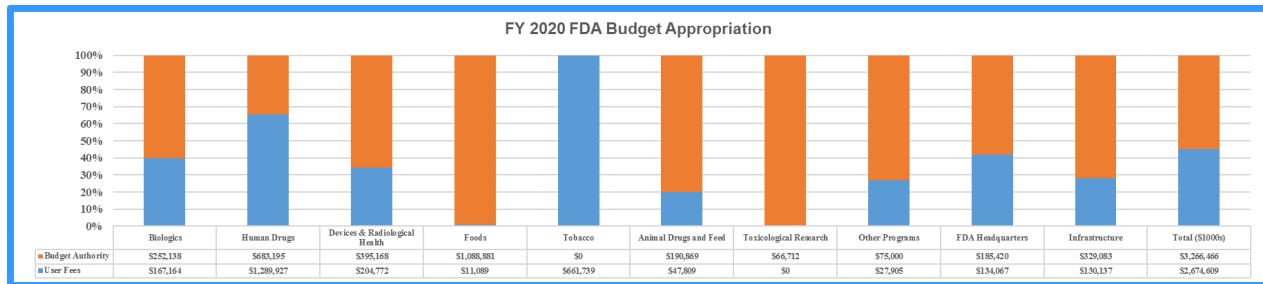
85. *Id.* at 145.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*



What does this mean? The tobacco industry, under the Family Smoking Prevention and Tobacco Control Act,<sup>90</sup> which was enacted in July 2009, “gives FDA authority to regulate the manufacture, distribution, and marketing of tobacco products.”<sup>91</sup> Among the regulations for marketing to children and requirements for warning labels, the Tobacco Control Act also requires tobacco companies to annually register with the FDA and submit to FDA inspections every two years.<sup>92</sup> Further, FDA regulation is funded entirely by the tobacco companies, as based on their United States market share.<sup>93</sup>

So, if regulation of a major industry like tobacco can be paid for by the companies who participate in the competitive market in the name of public health, with the FDA exercising strict control of the regulatory process, why not try such a system for the food industry, starting with the pet food industry? This could be accomplished by enacting a system similar to that implemented by the European Union to regulate their pet food industry,<sup>94</sup> and could alleviate a good deal of the financial burden on the FDA.

90. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776.

91. *Family Smoking Prevention and Tobacco Control Act: An Overview*, FDA, <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview> (last updated Jun. 3, 2020).

92. FDA, *supra* note 91.

93. *Id.*

94. *Guide for Good Practice for the Manufacture of Safe Pet Foods*, FEDIAF (Feb. 2018), [http://www.fediaf.org/images/FEDIAF\\_Safety\\_Guide\\_February\\_2018\\_online.pdf](http://www.fediaf.org/images/FEDIAF_Safety_Guide_February_2018_online.pdf) (explaining the EU’s use of strict industry standards to enforce the regulations enacted by the EU member nations).

### III. SHORING UP PET FOOD REGULATION USING THE EU AS A GUIDE

#### A. *Proactive, Not Reactive*

A more streamlined approach to pet food regulation would assist in (1) reforming regulation, (2) promoting industry involvement, and (3) promoting product safety and, as a result, customer satisfaction. This would help alleviate the haphazard response that was highlighted in the 2007 Menu Foods Recall as authorities at the federal, state, and company level scrambled to pinpoint the source of the problem while pets were dying by the thousands, struggled to get the word out to consumers, and pondered which entity was most responsible.<sup>95</sup> While the law in the United States does not trend toward swiftness to change, the good news is that there is already a law in place as well as a well-respected organization that can help facilitate the process of adapting a more streamlined approach to regulation.

#### 1. FSMA and AAFCO—Partners in Reforming Regulation

The Food Safety Modernization Act (FSMA) and the Association of American Feed Control Officials (AAFCO) are perfect partners to work in concert toward continuing the reformation of regulation for the pet food industry.

FSMA was enacted in 2011 and advocates for preventive measures in food safety to move the FDA and other food regulatory authorities away from the reactive approach toward regulation that had predominated the bulk of FDA history.<sup>96</sup> In 2015, the FSMA finalized the FDA rule on approved third-party certification accreditation, establishing a voluntary industry program through which companies could easily and efficiently address food safety evaluations.<sup>97</sup>

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95. See *Hearing, supra* note 44, at 1. Particularly, the discrepancy between the FDA's estimates of the total number of pet deaths from the melamine-tainted food and the numbers provided by the Banfield Pet Hospital (the largest veterinary hospital in the United States) and the Vet Information Network, both of which reported that the number of pets who were sickened and/or died were in the thousands, not hundreds as the FDA reported. Also, the Subcommittee report makes frequent mention of the haphazard means of reporting the recall issue as well as the struggle to find the source of the melamine contamination.

96. *Background on the FDA Food Safety Modernization Act (FSMA)*, FDA (Jan. 30, 2018), <https://www.fda.gov/food/food-safety-modernization-act-fsma/background-fda-food-safety-modernization-act-fsma>.

97. *FSMA Final Rule on Accredited Third-Party Certification*, FDA (Apr. 22, 2020), <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-accredited-third-party-certification> (highlighting the scope and process of the third-party

The AAFCO is an organization made up of voluntary members with ties to local, state, and federal regulatory agencies and is already actively involved with helping the FDA regulate animal foods.<sup>98</sup> The AAFCO is nationally recognized by many consumers and plays an active role within the animal feed industry in the process for defining what ingredients are best for animal feed and pet food.<sup>99</sup>

Both the FSMA and AAFCO have been effective in the movement toward proactive measures of protection for pet food safety and could be even more instrumental in further streamlining regulation of pet food and animal feed among the different states. The purpose of the streamlined approach to regulation is to eliminate the fluidity from one state to another and to create a steady continuity that encourages companies to properly ensure quality foods.<sup>100</sup> Presently, the AAFCO works with local and state officials to enforce state and local guidelines, all of which change from one state and locality to another, with some states being much stricter on pet food industry guidelines than others.<sup>101</sup> This lack of continuity lends itself to lax standards in one state or region with strict standards in others, causing a lack of uniformity across the industry.<sup>102</sup>

Creating a system of traceability, overseen by the AAFCO and an FDA-approved third-party certifying organization, would help industry experts keep track of the entire production process from start to finish and then back again.<sup>103</sup> The Fediaf model used in the European Union establishes an industry-standard manufacturing process that traces the source of ingredients and processes from the grower to the retailer and back again.<sup>104</sup> This allows the producers to more easily pinpoint the potential source of the problem if it arises but, even better, to prevent the problem before it does arise. Establishing a traceability system in the United States, which is made up of a variety of states much like the European Union, would eliminate many questions about who was involved in the supply chain and what products they provided.<sup>105</sup>

The lack of a traceability system in the United States on the human public health scale has been vividly illustrated during the COVID-19

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certification program and how certifying authorities can become FDA-approved and help to streamline the process within industries).

98. See generally AAFCO, <https://www.aafco.org/> (last visited Aug. 29, 2021).

99. AAFCO, *supra* note 98.

100. *Id.*

101. *Id.*

102. *Id.*

103. Fediaf, *supra* note 94, at 17.

104. *Id.*

105. *Id.*

pandemic, with state and federal governments scrambling about with no clear, unified response to addressing the problem.<sup>106</sup> Of course, the result has been that people suffer while officials who are motivated by political aspirations pander to the desires of their supporters.<sup>107</sup> If we are seeing such a fractured response to a human health need with no uniform way to trace the source of the problem or to find a solution, how much more likely is that to be a problem when related to a non-human animal's need?

## 2. Using the Model of the Tobacco Control Act Program to Increase Industry Involvement

Because tobacco is a drug, strong FDA oversight is warranted in the tobacco market where such oversight may not be as easy to obtain in the food market. However, there is a part of the Tobacco Control Act Program that is illustrative of a good model for the pet food industry to follow in the effort to protect the quality of pet foods distributed. In addition to registering with the FDA as required by Section 905 of the Tobacco Control Act,<sup>108</sup> and submitting to inspections when needed under the provisions of the Federal Food, Drug, and Cosmetic Act (FDCA),<sup>109</sup> pet food companies could help to increase the perceived quality of their products by forming an industry coalition that independently oversees the quality and inspections of pet food facilities. This would be like the EU version under Fediaf, in which industry guidelines help to secure quality control.<sup>110</sup> It could also mimic the FDA regulation of the tobacco industry, which is funded entirely by the tobacco companies, as based on their United States market share.<sup>111</sup>

In essence, the pet food industry could partner with the FDA in moving toward the example set by the tobacco companies and completely fund their regulation through the FDA, as based on their United States market share. This would help to offset the costs of

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106. Alexandra Villarreal, *Trump Guidance Puts Burden on States to Reach COVID-19 Testing Targets*, THE GUARDIAN (Apr. 28, 2020, 1:38PM) <https://www.theguardian.com/us-news/2020/apr/28/trump-guidance-states-covid-19-testing-targets>.

107. See Nathan Layne, *Outbid and Left Hanging, U.S. States Scramble for Ventilators*, REUTERS (Apr. 11, 2020, 2:52PM), <https://www.reuters.com/article/us-health-coronavirus-usa-ventilators/outbid-and-left-hanging-u-s-states-scramble-for-ventilators-idUSKCN21S20D>.

108. *Registration and Listing*, FDA, <https://www.fda.gov/industry/fda-basics-industry/registration-and-listing> (last updated Aug. 30, 2020).

109. FDA, *supra* note 91.

110. See Fediaf, *supra* note 94.

111. FDA, *supra* note 91.

regulation that smaller companies might otherwise encounter, while spreading out the costs across the industry in the effort to signal that safety is paramount to the industry.

While the regulation might not be as stringent as that of the regulation on the tobacco industry because of tobacco's status as a drug, such a movement toward funding pet food regulation through the pet food industry could still help to increase the FDA funding for regulation. In the process of sharing the financial burden with the FDA, pet food companies would signal to consumers, both nationally and globally, that they are serious about ensuring the quality of the foods that they sell to their customers.

As of the 2020 FDA budget, the animal drugs and feed industry contributed about 20% to the FDA budget.<sup>112</sup> If this could be increased to even 40% or 50%, it could likely make a dramatic difference in the ability of the FDA to respond to and prevent massive recalls, effectively communicating to consumers that the companies to whom they trust their pets' health are equally concerned about pets. Such an action of sharing the financial burden would effectively illustrate financially that the pet food industry is not just saying that it believes in safe quality production methods, but that it is also willing to show its dedication by ensuring that all pet food companies become serious about quality control.

#### *B. A Stamp of Quality Assurance*

As discussed in previous sections, many steps have been taken since 2007 to reform the pet food industry and ensure pet food safety. To continue the trend toward assuring consumers that safety is paramount, an industry-standard stamp of quality assurance could be placed in a prominent position on the containers of pet food distributed for sale. This could employ the FSMA's Third-Party Certification (TPC) method that provides greater oversight of imported ingredients.<sup>113</sup> The TPC is required to be an accredited body that can perform inspections of the manufacturing facilities and inform the FDA when something is not right in the process.<sup>114</sup> Utilizing the TPC would help the pet food industry further illustrate a dedication to quality industry specifications while also alleviating the financial burden on the FDA.

Recall that FDA approval is not presently needed to get pet foods on the market.<sup>115</sup> Thus, if a product meets the industry specifics for

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112. FDA, *supra* note 18; FDA, *supra* note 91.

113. FDA, *supra* note 97.

114. *Id.*

115. FDA, *supra* note 28.

product labeling, as suggested by the AAFCO and governed by the FDA,<sup>116</sup> the product can effectively make its way to the store shelf to be sold. The AAFCO merely creates guidelines for what should be included on product labels, while the FDA and state governments create the laws that govern the manufacturing and marketing processes.<sup>117</sup>

While labels that contain important information regarding nutrients, ingredients, feeding instructions, guaranteed analysis, and so forth are certainly important, it is equally important that consumers can easily sort through all the information that the packages provide. As anyone who has ever stood in front of a long line of colorful packages of pet food trying to determine the best one to buy can attest, the selection process is overwhelming. It becomes even more of a hurdle when dealing with a pet who has severe allergies, is aging, or both.<sup>118</sup> A stamp of approval from a respected, recognizable organization would help to ease the uncertainty of the daunting label-reading process. The question then becomes whom would we trust most to help consumers decide what is the best food for our pets?

### 1. Who Should Certify?

The FDA doesn't certify foods, for pets or humans; it simply regulates and requires that foods be "Generally Recognized as Safe" (GRAS).<sup>119</sup> Similarly, the AAFCO as the other voice in the production of animal foods, does not certify foods either.<sup>120</sup> Instead, the AAFCO provides guidelines for labeling requirements and works with local, state, and federal regulatory authorities to make sure that the labeling requirements are met and that the manufacturing facilities meet FDA and state legal standards.<sup>121</sup>

The good thing about the AAFCO is that it has contacts across the nation in the pet food industry as well as within the regulatory agencies. Another positive about the AAFCO is that the organization

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116. *Animal Feed Labeling Guide*, AAFCO 1, 3 (Aug. 2020), [https://www.aafco.org/Portals/0/SiteContent/Publications/Feed\\_Labeling\\_Guide\\_web\\_complete.pdf](https://www.aafco.org/Portals/0/SiteContent/Publications/Feed_Labeling_Guide_web_complete.pdf).

117. FDA, *supra* note 18.

118. I speak from personal experience of label-reading and extensive research on how to deal with the nutritional needs of both a Border Collie with significant food sensitivities and those of a persnickety cat.

119. FDA, *supra* note 18.

120. *The People Behind Animal Feed and Pet Food*, AAFCO (2019), [https://www.aafco.org/Portals/0/SiteContent/Announcements/2019\\_AAFCO\\_The\\_People\\_behind\\_Animal\\_Feed\\_and\\_Pet\\_Food\\_082919.pdf?v20190926](https://www.aafco.org/Portals/0/SiteContent/Announcements/2019_AAFCO_The_People_behind_Animal_Feed_and_Pet_Food_082919.pdf?v20190926).

121. AAFCO, *supra* note 120.



already puts a statement on the packages of pet food that have met the nutritional guidelines,<sup>122</sup> so adding another certification for quality standards would not be too far of a stretch. A key point to make here is that the AAFCO statement merely affirms that the food has met nutritional guidelines for either certain stages of life (namely adult, puppy, or senior) or for all life stages.<sup>123</sup> It does not certify the quality of the food or the cleanliness of the production process in any manner.<sup>124</sup>

Additionally, the AAFCO is not a government organization; it is an independent organization comprised of industry professionals.<sup>125</sup> Therefore, placing an AAFCO seal of approval for quality would not necessarily be a government seal of approval and as such would not necessarily imply FDA approval of the product.

## 2. Suggestions for Certification Process

Since the AAFCO is an organization made up of feed industry officials, instead of food officials,<sup>126</sup> my suggestion that a viable plan for an industry certification for ensuring quality food standards are enforced would be to either (1) create a committee or board within the AAFCO that is composed of veterinary nutritional and toxicology experts who could evaluate the quality of the food, or (2) form an alliance with an established organization of nutritional experts to evaluate the food's standard of quality, with a requirement that certain toxicology tests be performed by the company on samples of the foods and industry standards be met before the company releases the foods to the consuming public.

Even for the second option, the AAFCO could serve as a neutral advisor to the certifying process. This would ensure that food quality standards are achieved while also aligning with an organization that has the appropriate industry contacts and provisional nutritional guidance essential to the pet food industry. Europe has employed a type of system similar to the veterinary nutritional certification process by requiring that if any facility claims to use products of an animal origin

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122. *Pet Food Labels - General*, FDA (Feb. 7, 2020), <https://www.fda.gov/animal-veterinary/animal-health-literacy/pet-food-labels-general>. A sample AAFCO statement is: "Nulo FreeStyle™ Chicken and Cod Recipe Cat & Kitten Formula is formulated to meet the nutritional levels established by the AAFCO Cat Food Nutrient Profiles for all Life Stages." *Id.*

123. FDA, *supra* note 122.

124. *Id.*

125. *See generally* AAFCO, *supra* note 98.

126. *Id.*

that is considered “fit for human consumption,”<sup>127</sup> then that facility must receive a veterinary approval number in order to send the product into the commerce stream.<sup>128</sup>

It is important to note that, according to the AAFCO, “[t]he U.S. Department of Agriculture (USDA) defines products fit for human consumption to be officially ‘edible.’ These foodstuffs have been processed, inspected and passed manufacturing regulations (such as, process control regulations) that are designed to assure safety for consumption by humans.”<sup>129</sup> The AAFCO further notes the distinction that “[e]dible is a standard; human-grade is not.”<sup>130</sup>

Another important note is the need for veterinarian experts as advisers in the production process. The role of veterinary experts in the production process is vital because it ensures that the pet food would be measured up to the appropriate standards of quality for development stages as well as nutritional value that is needed for the pet.<sup>131</sup> Thus, many consumers find that they become overwhelmed when deciding which pet food to buy. Everything on the pet food aisle seems to make one claim or another, and some consumers have not really thought about doing any research about the food brand, current recalls, past recalls with the brand and how they were addressed, whether certain ingredients are even any good for their pet or not, and other vital

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127. “Human Grade,” AAFCO, <https://talkspetfood.aafco.org/humangrade> (last visited Aug. 20, 2021) (describing “human grade”). For one, according to the AAFCO, a pet food that met the “human grade” standard would be quite costly. To be edible for a human, the product must meet the standards of 21 C.F.R. § 110, Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food. Only when this edible standard is met, may the product be promoted as human grade.

128. Diana Beth Miller, *Pet Food Manufacturing Laws: USA vs. Canada vs. Europe vs. China*, TOPDOG TIPS (May 2, 2020) <https://topdogtips.com/pet-food-manufacturing-regulations/>.

129. See AAFCO, *supra* note 127.

130. *Id.*

131. Lisa M. Freeman, *Stop Reading Your Pet Food Ingredient List!*, TUFTS UNIVERSITY (Mar. 1, 2019), <https://vetnutrition.tufts.edu/2019/03/stop-reading-your-pet-food-ingredient-list/> (describing from a veterinarian’s point of view the problem with many of the ingredients that are listed on pet food labels). Dr. Freeman argues that many pet parents get bogged down in what she calls “fairy dust ingredients” that manufacturers put in the pet foods to appeal more to the human who is buying the product than to the nutritional needs of the pet who is eating the product. Dr. Freeman also points out that in addition to the “fairy dust ingredients,” some pet foods do not have enough quality ingredients for a well-balanced diet or have exotic ingredients that have no known benefit to the needs of the pet.

questions that the more serious among the pet parents find themselves pondering.<sup>132</sup>

While it is not always completely without mistakes,<sup>133</sup> there is something comforting about knowing that a food has gone through rigorous testing and evaluation for both nutritional value and quality. This is possibly a reason why many pet parents choose to feed their furbabies foods that are sold at their veterinarian's office because they perceive the quality to be higher if the pet's doctor is selling it, whether the belief is valid or not.<sup>134</sup> Nutritional researchers at the Tufts University Cummings Veterinary Medical Center have noted in their evaluations of pet food that pet parents should not necessarily judge the food based on the ingredients label because some ingredients may not even be necessary to the pet's health.<sup>135</sup> Basically, as the experts in the field of pet nutrition, veterinary nutritional experts can more effectively key into the needs of the pet, based on its life stage, and help the pet's human make a more educated determination as to the quality of the pet food from a nutritional standpoint.<sup>136</sup> So, the value of the pet's personal veterinarian should never be discounted in helping to decide what food to buy. However, when it comes to whether the food is contaminated with harmful by-products, other authorities must be referenced.

With the enactment of the FSMA in 2011, pet food facilities are now required to have certified people on staff in certain areas of the production process for pet food.<sup>137</sup> However, these people are employees of the company and not independent assessors.<sup>138</sup> An independent certifying authority made up of veterinary nutrition and toxicology

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132. Speaking from personal experience with a picky Border Collie and an opinionated tuxedo cat.

133. See FDA, *supra* note 12; see also FDA, *supra* note 13 (referencing the Hill's Science Diet and Hill's Prescription Diet recalls of 2019).

134. Again, speaking from personal experience: as I was going through numerous food sensitivity issues with my Border Collie and discussed with his veterinarian different foods to entice him to eat, she commented that the only ones that she could affirm were of high quality and high nutritional value were the ones that had been tested by veterinarians. Her recommendation was, of course, Hill's Science or Prescription Diet foods. The time was well prior to the Hill's recalls in 2019.

135. See Freeman, *supra* note 131. In addition to noting how certain ingredients are put in there more for the human than the pet, Dr. Freeman also conducted an independent study of some cat foods only to find out that if someone had bought that particular food and fed it to their cat as its main source of food, then an adult cat would have been deficient in four key nutrients while a kitten would have been lacking six important nutrients.

136. *Id.*

137. See FDA, *supra* note 96; see also FDA, *supra* note 97.

138. See FDA, *supra* note 96; see also FDA, *supra* note 97.

experts could be a tremendous help in increasing consumer confidence that the product is safe to feed to pets.

### 3. Established Stamps of Approval

A stamp of approval from a recognized organization whose seal could give more peace of mind in product selection to consumers would be an effective means of ensuring quality standards are being met. This does not have to be a seal from a government authority, and it is unlikely that the FDA or the FDA's Center for Veterinary Medicine (CVM) would agree to provide such a seal. However, there are already organizations in existence who could easily partner with the pet food industry to provide a uniform stamp of approval for all products that meet the standards of the organization. In addition to the AAFCO's standard declaration that the pet food meets federal nutritional guidelines, this stamp of approval could signal conformity to contaminant-free quality guidelines, as set by the pet food industry with the guidance of the FDA and FSMA. There are at least two likely contenders to provide an industry-approved quality seal, either of which would be a good partner for the pet food industry.

#### *a. Clean Label Project*

The Clean Label Project (CLP) is a nonprofit organization that was founded in 2014 to test for the safety and purity of foods that are intended for both human and non-human animal consumption.<sup>139</sup> As a part of its commitment to food safety, the CLP tests foods for over one hundred contaminants (lead, arsenic, pesticides, etc.) that have been listed in the major food recalls over the past decade.<sup>140</sup> Importantly, the CLP is comprised of people with a food industry background and has a medical advisory board that aids in the testing of the foods.<sup>141</sup>

The companies who receive CLP awards are those “that place an emphasized focus on purity and surpass the minimum regulations required by the FDA.”<sup>142</sup> For pet foods to meet the CLP's certification of purity standards, the foods are tested for the common contaminants that have been listed in several pet food recalls, such as: acrylamide,

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139. Megan Poiniski, *Beyond the Ingredients: Clean Label Project Seeks to Find Everything in Food*, FOODDIVE (Oct. 6, 2016), <https://www.fooddive.com/news/beyond-the-ingredients-clean-label-project-seeks-to-find-everything-in-foo/427730/>.

140. Poiniski, *supra* note 139.

141. *Id.*

142. *See generally* CLEAN LABEL PROJECT, <https://cleanlabelproject.org/about-us/> (last visited Mar. 4, 2022).

metals, mycotoxins, glyphosates, and pesticides.<sup>143</sup> The Purity Award is purely voluntary, and companies who desire to receive the award bear the cost of the testing and must adhere to the standards of CLP for certification.<sup>144</sup> Its purpose is to create a unified standard to measure purity from contaminants and to illustrate to consumers that the company is serious about providing them with a quality product for their pet.<sup>145</sup> While voluntary, if the company is found to have contaminants in its food, the agreement between the company and the organization is that the company will allow increased surveillance of its production in order to move the company toward becoming compliant with CLP standards.<sup>146</sup>

It is also particularly interesting that the CLP is the organization that first put Taste of the Wild on notice as to the presence of undisclosed levels of heavy metals, pesticides, acrylamide, and BPA in the company's product.<sup>147</sup> The plaintiffs in *Grossman* asserted that the defendants knew or should have known of the levels of contaminants in the products that it was selling because the company held itself out to the public as highly knowledgeable about the production process of pet food, professed itself to have very high quality standards, and had received notice from the CLP that there was contamination in its foods.<sup>148</sup> However, in addition to their jurisdictional missteps, the mistake that the plaintiffs in the *Grossman* case made was that they did not fully explain the purpose of the CLP to the court and how receiving a report from the CLP would have put Taste of the Wild on notice that their food was contaminated.<sup>149</sup>

As an independent organization, the CLP can provide important feedback to the pet food industry regarding the quality of the product being produced without being subject to the influence of either the industry or a government entity. The one drawback to this certification is the limited time that it has been around. However, as consumer and industry recognition of the CLP certification process grows, this could be a viable option for an industry standard seal of approval. It is notable that the CLP certification does require that companies who

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143. *Code of Practice: Purity Award*, CLEAN LABEL PROJECT, <https://cleanlabelproject.org/purity-award/methodology/> (last updated Dec. 2021).

144. Clean Label Project, *supra* note 143.

145. *Id.*

146. *Id.*

147. *Grossman*, 2019 U.S. Dist. LEXIS 47407 at \*1, \*4.

148. *Id.* at \*4.

149. *Id.* at \*6–7, \*15.

want the CLP purity seal to be compliant with ISO 17025 standards,<sup>150</sup> and agree to unannounced sampling and testing of the company's products to ensure continued compliance with CLP quality assurance standards.<sup>151</sup>

***b. NSF International and the NSF-Recognized SQF Program***

The NSF International (NSF) was founded in 1944 and is an established<sup>152</sup> public health safety organization whose seal of approval is recognized on products all over the world.<sup>153</sup> NSF is highly skilled in helping companies stay in compliance with FDA and FSMA guidelines.<sup>154</sup> Certification services for the pet food industry that NSF can help companies who partner with NSF prepare for include: ISO 22000,<sup>155</sup> ISO 9001,<sup>156</sup> ISO 14001,<sup>157</sup> Safe Quality Food (SQF) Institute,<sup>158</sup> and Safe Feed/Safe Food (SFSF).<sup>159</sup>

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150. *ISO/IEC 17025, Testing and Calibration Laboratories*, THE INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), <https://www.iso.org/ISO-IEC-17025-testing-and-calibration-laboratories.html> (last visited Feb. 13, 2022) (explaining that the ISO/IEC 17025 standard certifies that the testing and laboratories results are reliable); see generally *About Us*, ISO, <https://www.iso.org/about-us.html> (last visited Feb. 13, 2022).

151. See Clean Label Project, *supra* note 142. The Clean Label Project states that products are purchased at retail and tested for purity, emphasis being placed on testing for harmful chemicals, metals, and pesticides. The test results are compared to the high-risk chemicals that are listed on the State of California Environmental Health Hazard Assessment Office's Proposition 65 list. Products that meet compliance standards will qualify for Clean Label Project Certification. Pet food brands that are currently listed on the CLP website as having met this standard include: CaniSource, which received the CLP Purity Award and I and Love and You, which received both the CLP Purity Award and the Pesticide Free Award. Awards are renewed annually.

152. *About NSF*, NSF, <https://www.nsf.org/about-nsf/> (last visited Feb. 13, 2022). Founded in 1944, the NSF provides consumers with valuable knowledge about the purity of their food, water, supplements, and other products related to the public health and the environment. *Id.*

153. *Id.*

154. *Meeting FSMA Requirements: Animal Feed and Pet Food*, NSF, [https://d2evkimvhatqav.cloudfront.net/documents/fp\\_animal\\_feed.pdf](https://d2evkimvhatqav.cloudfront.net/documents/fp_animal_feed.pdf) (last visited Feb. 13, 2022) (noting that the NSF is registered as a FSMA compliant partner). The NSF provides training, audits, and consulting services to aid companies in becoming compliant with FSMA regulations and with Current Good Manufacturing Practices (cGMPs).

155. *ISO 2200: Food Safety Management*, ISO, <https://www.iso.org/iso-22000-food-safety-management.html> (last visited Feb. 13, 2022). This certification signals that the company has passed rigorous testing in how to both ensure food safety management as well as how to contain a problem should it occur.

156. *ISO 9000 Family: Quality Management*, ISO, <https://www.iso.org/iso-9001-quality-management.html> (last visited Feb. 13, 2022). The 9000 standards are industry standards of best management practices that ensure that the organization is capable of

The NSF-recognized SQF Program is particularly relevant for the pet food industry in the global marketplace. SQF is recognized by the Global Food Safety Initiative (GFSI)<sup>160</sup> as a standard that meets GFSI benchmark requirements,<sup>161</sup> and was purchased in 2003<sup>162</sup> by the Food Marketing Institute (FMI) Food Industry Association.<sup>163</sup> An internationally recognized program, SQF's slogan is "One World, One Standard."<sup>164</sup> The organization applies FDA-recognized Hazard

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consistently providing consumers with quality products. The 9000 series, particularly 9001, of ISO certification is an internationally recognizable standard of quality management and is adaptable for organizations of varying sizes.

157. *ISO 14000: Family Environmental Management*, ISO, <https://www.iso.org/iso-14001-environmental-management.html> (last visited Feb. 13, 2022). This certification signals that the company is dedicated to improving and promoting a healthy environment.

158. *Safe Quality Food Audits*, VALIDUS, <http://www.validuservices.com/on-site-audits/safe-quality-food-audits/> (last visited Feb. 13, 2022). An interesting note here is that SQF 32 is certification of quality for pet food while SQF 34 is certification for animal feed. This means that the SQF Institute separates the two instead of lumping them together.

159. NSF, *supra* note 154. *See Safe Feed/Safe Food Certification Program*, AMERICAN FEED INDUSTRY ASSOCIATION (AFIA), <https://www.afia.org/issues/feed-food-safety/safe-feed-safe-food-certification/#:~:text=In%202004%2C%20AFIA%20launched%20the,AFIA%20members%20and%20non%2Dmembers> (last visited Feb. 13, 2022) (providing that the feed is produced in a "Safe Feed/Safe Food Facility"). The SFSF certification is obtained through a voluntary, independently certified program in which AFIA members and non-members may participate. The purpose of the program is to establish industry standards that exceed existing regulations with the overall goal of increasing food and feed safety. The SQF assumed the SFSF program in 2014 and under the FSC 32 certification, pet food may be certified as having met the GFSI internationally accepted benchmark for food safety.

160. *Certification: Achieving a GFSI-Recognized Certification*, GFSI, <https://mygfsi.com/how-to-implement/certification/> (last visited Feb. 13, 2022) (noting that while there is not a GFSI certification, the organization has developed benchmarking requirements that are internationally recognized as a mark of quality across industries).

161. *See generally SQF Food Safety Program*, SQF INSTITUTE, <https://www.sqfi.com/what-is-the-sqf-program/sqf-food-safety-program/> (last visited Feb. 13, 2022).

162. *Id.*

163. *See generally About Us*, THE FOOD INDUSTRY ASSOCIATION (FMI), <https://www.fmi.org/about-us/about-us> (last visited Feb. 13, 2022) (describing the scope of FMI as an organization that brings the various stakeholders from producers to retailers to consumers together to engage in conversation concerning food safety). FMI also acts an advocate for food safety in the development of policy.

164. *See generally* SQF Institute, *supra* note 161.

Analysis Critical Control Point (HACCP) standards<sup>165</sup> to its evaluation of food safety and is adept at addressing consumer's food safety demands while also working with companies to effectively meet those demands and provide quality food products.<sup>166</sup> Among the pet food companies that currently claim SQF certification are: Diamond Pet Foods, including Taste of the Wild;<sup>167</sup> Merrick;<sup>168</sup> Earth Animal,<sup>169</sup> and Red Barn Pet Products.<sup>170</sup>

NSF is an independent organization that has extensive contacts throughout the food and feed industries as well as the public health sector.<sup>171</sup> Further, the global recognition of the NSF seal,<sup>172</sup> combined with the over seventy years of experience in the food, feed, and public health industries and with the organization's knowledge of FDA and

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165. *Hazard Analysis Critical Control Point (HACCP)*, FDA (Jan. 29, 2018), <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/hazard-analysis-critical-control-point-haccp>.

166. SQF Institute, *supra* note 161.

167. Diamond Pet Foods, <https://diamondpetcompany.com/how-we-ensure-every-pet-is-getting-high-quality-ingredients/food-safety/> (last visited October 12, 2021). Taste of the Wild is a division of Diamond pet foods. Both note that the foods have received SQF certification. There is no mention of when the certification was received and what level the certification is. However, the company does maintain that they are committed to product quality in accordance with SQF, SFSF, and GFSI standards. The company also states that they perform weekly mycotoxin and microbial tests to ensure product quality as well as regular water and air quality tests and monthly ingredient and finished product nutrition tests in accordance with SQF standards. Further, the company states that it requires yearly employee safety training and conducts yearly safety assessments.

168. *Merrick Pet Care Receives Safe Quality Food Certification*, MERRICK (Oct. 15, 2013), <https://www.merrickpetcare.com/news-room/merrick-pet-care-receives-safe-quality-food-certification/> (noting that at the time the certification was received in 2013, Merrick was the only pet food company that manufactures its own food to receive Level 3 SQF certification).

169. *Earth Animal Facility Earns SQF Certification: Riverstone Facility Passes Audit*, PETFOODINDUSTRY.COM (Sept. 6, 2021), <https://www.petfoodindustry.com/articles/10601-earth-animals-riverstone-earns-sqf-certification> (noting that the Riverstone Earth Animal facility in Maryland that manufactures Dr. Bob Goldstein's Wisdom dog foods successfully completed the SQF Edition 9 Pet Food Manufacturing certification process in July 2021).

170. *Redbarn Pet Products Awarded SQF Certification*, PETFOODINDUSTRY.COM (Jun. 9, 2021), <https://www.petfoodindustry.com/articles/10344-redbarn-pet-products-awarded-sqf-certification> (noting that the company received certification for its facilities in Kansas and Paraguay and had joined an elite group of pet food manufacturers who are now SQF certified).

171. *See generally* NSF, *supra* note 152.

172. *The NSF Mark*, NSF, <https://www.nsf.org/about-nsf/nsf-mark> (last visited Feb. 13, 2022) (noting that the NSF mark is internationally recognized and respected and is specific to the type of product on which it is placed).



FSMA standards, makes the NSF seal or the NSF-approved SQF seal both strong options for a uniform pet food industry standard.<sup>173</sup>

#### 4. Which Seal of Approval to Use?

Since recommendation for a stamp of approval is targeted toward creating an industry standard instead of a legally mandated standard, the pet food industry would want to encourage its members to seek and maintain a reputable and recognizable third-party standard such as those listed in the earlier sections. The long-term status of NSF within the food, feed, and public health sectors makes the NSF seal or the NSF-recognized SQF seal the more well-known stamps of approval<sup>174</sup> and potentially better positioned to aid the consumer in the selection process. Further, many within the pet food industry seem to be moving toward SQF certification,<sup>175</sup> so SQF could be more likely to garner industry-wide support. The focus on quality control, food safety, and on adhering to FSMA standards and ISO certification is essential to the selection of an industry-wide seal of approval. Thus, NSF or SQF are arguably stronger in global name recognition and established time in the market.

The recommendation is that the pet food industry move toward a uniform system of third-party certification so that consumers may instantly recognize the pet food products that meet or do not meet the industry standards for quality and safety. The FSMA rule on TPC is strictly voluntary.<sup>176</sup> However, by adopting industry standards that are FDA and FSMA compliant, similar to the EU's Fediaf manual,<sup>177</sup> and encouraging companies to attain an instantly recognizable stamp of approval from a reputable certifying authority, the pet food industry would signal to consumers that it is serious about reducing the number of recalls and increasing the quality of food that we feed to our pets.

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173. See NSF, *supra* note 152; see also SQF, *supra* note 158.

174. See generally SQF, *supra* note 161; NSF, *supra* note 172.

175. See Diamond, *supra* note 167; Merrick, *supra* note 168; Pet Food Industry, *supra* note 169; Pet Food Industry, *supra* note 170.

176. FDA, *supra* note 97.

177. See Fediaf, *supra* note 94.

## IV. COUNTERARGUMENTS

*A. The Traceability System: Too Much Government Involvement?*

The FDA already stipulates that it does not get involved with pre-market approval of pet foods.<sup>178</sup> However, the independent AAFCO is already affiliated with the FDA in helping to provide nutritional guidelines and ensure compliance between the state and federal regulations.<sup>179</sup> Hence, it is unlikely that a traceability system could be perceived as any different from what the AAFCO already does in its partnership with the FDA. The partnership is already established to: “Safeguard the health of animals and people; [e]nsure consumer protection; and [p]rovide a level playing field of orderly commerce for the animal feed industry.”<sup>180</sup> Establishing a traceability system that traces the path of the food from the farm to the table and back again is simply a more targeted means of achieving the purpose that the FDA and AAFCO partnership already have in place.<sup>181</sup>

Further, with no federal agency responsible for who tracks data relating to illnesses that dogs and cats contract as a result of eating contaminated food,<sup>182</sup> a traceability system is vital to ensuring the food safety measures that the FSMA enacted are properly met.<sup>183</sup> In today’s global economy, a traceability system overseen by a reputable certifying authority could help to reduce consumer concerns because the system would be better able to trace where in the supply chain something went wrong before it arrived at the consumer’s home and was fed to a beloved pet.

*B. The Industry Standard*

The pushback against establishing a set of industry standards for quality control is more likely to come from the industry participants who might not want to participate in a process of industry oversight. Small business startups could interpret a set industry standard as a

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178. See FDA, *supra* note 18 (noting that FDA pre-market approval is limited to animal drugs and that animal food does not require FDA approval to be legally marketed to the public). The only requirement is that the stipulations of the FD&C Act be met for food marketed to human and non-human animals. This means that the food need only qualify as “[s]afe to eat; [p]roduced under sanitary conditions; [f]ree of harmful substances; and [t]ruthfully labeled.” *Id.*

179. *Id.*

180. *Id.*

181. Fediaf, *supra* note 94.

182. FDA, *supra* note 18.

183. See generally FDA, *supra* note 96; FDA, *supra* note 97.

way for large corporations to band together and shut the small businesses out of the industry. Large corporations might balk at having their contributions to funding FDA regulation tied to their market share and may try to argue that it would be the small businesses without the established years of experience who would be more likely to be flagged for regulation missteps than would the larger, more established corporation.

For the industry standard to work, the industry, or at least a predominant part of it, would need to willingly participate in the process. Small businesses would want assurance from the larger corporations of the equal partnership and the shared responsibility for enforcing uniform standards of quality. Since there would be no law to mandate that the FDA regulation be funded by the pet food industry, the industry itself could set the standard for company contribution to FDA funding. The wherewithal of this system is not to punish any one company but to encourage all companies toward increasing their self-regulatory measures. This in turn ensures the quality of all pet foods on the market, regardless of company size or brand recognition. It is a banding together with a common goal of producing the best products possible for the companion animals that depend on humans to make the right choices for them.

### *C. Stamp of Approval*

Certification seals are now largely obtained by individual companies seeking the testing necessary to receive the certification.<sup>184</sup> It is possible that companies that are not currently voluntarily participating in a third-party certification process might interpret an industry-approved seal to be too invasive toward their personal manufacturing systems. Further, the selection of an industry-approved third-party certifying authority could be seen by smaller organizations as a choice more conducive to favoring larger companies rather than smaller.

This would be an argument in favor of the industry providing a choice of approved certifications from which the individual company could choose in order to meet industry standards. Some companies may prefer a more cost-efficient but still industry-accepted seal over one that may be more expensive to obtain and retain. Other companies may prefer a seal such as the NSF, which has an established history and stronger ties to the FDA and certification as a FSMA compliant partner.<sup>185</sup> If the choice is given by the industry that the company may

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184. See generally Clean Label Project, *supra* note 142; SQF, *supra* note 161; NSF, *supra* note 172.

185. NSF, *supra* note 152.

choose from a list of industry-approved and consumer-recognized certifying organizations and the company agrees to submit to the testing required to prove that its product is contaminant free and is safe for pets to eat, then the company could meet industry standards without any mandated requirement to submit to a certain organization for testing.

#### V. CONCLUSION

Even with the reforms since the 2007 Menu Foods Recall, there is still much more room for improvement to ensure that our dogs and cats are eating the best quality food possible. With its emphasis on prevention, the FSMA was a huge step in the right direction.<sup>186</sup> However, as the recalls of 2018 to 2021 illustrate,<sup>187</sup> there are still many food quality issues and recalls that must be addressed.

In their favor, many pet food companies have been steadily moving more toward taking the pet food scares even more seriously and working to assure their consumers of the quality and safety of their products by individually seeking out third-party certifying bodies as per FDA recommendations.<sup>188</sup> Instead of passing blame from industry to government and then back again as to where the safety or quality issue originally occurred, such as what happened in 2007, it is more important to find a workable solution to the problem. It has been said before that “it takes a village to raise a child.”<sup>189</sup> Well, that very true statement can be revised to “it takes a village to provide quality food for our pets.” This is not a battle that can be won by simply throwing another law down on the books. The FSMA was the legislative reform that we needed to fix some of the ills with the legal part of the system.<sup>190</sup> The remaining reform needs to move toward enforcing the existing law by partnering with industry reform. The bottom line being that the pet food industry needs to work collectively in taking ownership of the problems that their products and manufacturing processes have encountered.

A key part of the equation that needs to be addressed is the tendency by both the industry and the government to regulate pet food and animal feed as comparable products.<sup>191</sup> By reducing pet food to animal

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186. FDA, *supra* note 24.

187. *See generally* FDA, *supra* note 12; FDA, *supra* note 13; FDA, *supra* note 14.

188. *See generally* Diamond, *supra* note 167; Merrick, *supra* note 168; Pet Food Industry, *supra* note 169; Pet Food Industry, *supra* note 170; FDA, *supra* note 176.

189. Clinton, *supra* note 1.

190. FDA, *supra* note 24.

191. FDA, *supra* note 28.

feed, the FDA effectively reduces the importance of companion animals because the standards of feed are not equal to the standards of food.<sup>192</sup> If companies want to prey on the feelings of attachment that pet parents have toward their fur babies,<sup>193</sup> by labeling the product as “food,” then the company should reciprocate and treat the product quality as that of “food” and not “feed.” The implementation of a traceability system, a set of uniform industry guidelines for quality production, and an industry-approved certification seal would essentially signal to the consumer that pet food companies take the safety of our pets seriously. Moving toward a new era of regulation where the industry partners with the government to provide the best possible product for the consumer, the village will finally come together to protect its vulnerable<sup>194</sup> furry citizens on the path towards pawsitively good health.

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192. Susan Thixton, *Is It Feed or Food?*, TRUTH ABOUT PET FOOD (Mar. 19, 2014), <https://truthaboutpetfood.com/is-it-feed-or-food/> (describing that while pet food is regulated as “feed,” it is marketed as “food” to primarily appeal to the human in the equation).

193. *See generally* The Harris Poll, *supra* note 2; Taylor, *supra* note 3.

194. Satz, *supra* note 6.