

**Comments of Consumers Union on Agricultural Marketing Service (AMS) Proposed National Agreement Regulating Leafy Green Vegetables; Recommended Decision and Opportunity to File Written Exceptions to Proposed Marketing Agreement No. 970  
Docket No. AO-FV-09-0138; AMS-FV-09-0029; FV09-970-1**

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Consumers Union<sup>1</sup> (CU) welcomes the opportunity to comment on the United States Department of Agriculture's (USDA) Agricultural Marketing Service's (AMS) Proposed National Agreement Regulating Leafy Green Vegetables, under the Agricultural Agreement Marketing Act of 1937, which will require industry participants to adhere to Good Agricultural, Handling, and Manufacturing Practices.

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

While the proposed NLGVMA has been improved by the input from the various public hearings, we still feel that the NLGVMA runs afoul of the Agricultural Marketing Agreement Act of 1937 (AMAA), and is primarily designed for marketing an image of food safety in order to restore consumer confidence in leafy green vegetables in the aftermath of the 2006 *E. coli* outbreak in spinach and subsequent outbreaks. It is seriously flawed because the standards it will embody will not apply to the entire industry, only to members of the NLGVMA, and because the standards will be ultimately decided on by the industry itself, making it industry self-regulation. Most importantly, since the U.S. Food and Drug Administration (FDA) has been mandated to develop on-farm and processing food safety regulations under the FDA Food Safety Modernization Act of 2011, this program will at best duplicate, and at worst could contradict, FDA's more broadly applicable, openly developed, and mandatory standards. We therefore urge that the NLGVMA not be established.

**Food safety is not a marketing issue**

**First, the NLGMA falls outside the scope of the AMAA, which focuses on providing for an orderly flow of commerce “in the interests of producers and consumers” not on ensuring food**

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<sup>1</sup> *Consumers Union, publisher of Consumer Reports, is an expert, independent nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. To achieve this mission, we test, inform, and protect. To maintain our independence and impartiality, Consumers Union accepts no outside advertising, no free test samples, and has no agenda other than the interests of consumers. Consumers Union supports itself through the sale of our information products and services, individual contributions, and a few noncommercial grants. Over 7 million people subscribe to Consumer Report or Consumer Reports online.*

**safety.**<sup>2 3</sup> The AMAA is designed to benefit producers and consumers, but not handlers. Handlers and processors are not the focus of the law, yet they are the ones seeking the NLGVMA, which is opposed by many producers, especially smaller and more specialized producers, as well as consumers. In addition, the words “food safety” never appear in the AMAA.

Furthermore, AMS has no expertise in food safety; rather, its economists and marketing specialists help AMS fulfill its mission to promote U.S. agriculture products. AMS administrator Rayne Pegg, when testifying before Congress in 2009, plainly stated that “AMS is not a food safety agency.”<sup>4</sup> Consequently, AMS’ marketing mission would make it virtually impossible to fulfill a food safety role.

Finally, food safety is not a measurable “quality” trait, and so does not fit into the framework of a marketing agreement. Food safety should not differ between producers or brands on the basis of whether or not they are part of a NLGVMA. Food safety should be a baseline requirement for all food products, not something to be used to gain advantage in the market place. Choosing a brand of leafy greens by a company that is outside of a marketing agreement should not result in an increased risk of illness.

### **The NLGMA is industry self-regulation**

**Second, the proposed NLGVMA fails to incorporate the input of all stakeholders, and is contrary to key legal precedents in the regulatory field, as it allows the leafy green industry to virtually set and oversee its own safety standards.** We strongly believe that the more appropriate mechanism is that which is typically used, to solve a safety problem such as polluted water, pesticide residues in food, or pathogens in meat: Congress will, through statute, direct an agency such as the Environmental Protection Agency, FDA or USDA to establish regulations through a process that gives the entire public an opportunity to give meaningful input on the proposed standard. This has the beneficial effect of getting input from a wide range of sources and experts, some of whom may have been previously unknown to the drafters of the standard. The proposed NLGVMA, however, removes the robust public input aspect and allows the industry handlers and producers to develop the rules and proposed standards virtually all by themselves, with only a tip of the hat to public input. Although the public would be able to comment on the proposed audit standards (e.g. audit metrics), they can only do so after they have been developed by the industry-dominated National Leafy Green Vegetable Board. This Board would not include adequate representation of either consumers or government (e.g. USDA/FDA) experts. In terms of product safety, consumers are rarely benefited when industry polices itself.

The proposed NLGVMA will set up the National Leafy Green Vegetable Board, a Technical Review Committee, and a Research and Development Committee (Marketing Review Board), all of which will be overwhelmingly controlled by the leafy greens industry, to propose food safety standards to the Secretary of Agriculture. The National Leafy Green Vegetable Board will have 26 members, 21

<sup>2</sup> See “Agricultural Marketing Agreement Act, Declaration of Policy, Subsection (4) at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5067868>.

<sup>3</sup> See also “Agriculture: A Glossary of Terms, Programs, and Laws, 2005 Edition,” Congressional Research Service, at pages 160-61. Available at: <http://ncseonline.org/nle/crsreports/05jun/97-905.pdf>

<sup>4</sup> <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5078609>, page 2.

of which will be handlers and producers, and one representative each of the retail, foodservice, importer and public. The nomination process has been improved in terms of the types of producers and handlers that will serve on the board. It is currently recommended that industry members should include producers that meet the Small Business Administration's (SBA) definition of small agricultural producers; diversified farm producers who produce a variety of crops or animals on one farm; producers and handlers representing certified organic businesses that meet the SBA definition of small business entity in addition to those organic business that exceed SBA definition. But even though the Secretary of Agriculture will select members for the Board from the nominations forwarded to him or her, however, the Board will still be overwhelmingly run by large industry representatives.

The slots reserved for retail, food service, importer and public members – while helpful – are also insufficient. While it is an improvement that these nominations can now come from any person from the production area, instead of just from the leafy greens industry, this still will be a Board that is overwhelmingly controlled by the large leafy greens industry. Only one member of the 26 members of the Board will represent the public (e.g. consumers). In other words, although this Board may create the appearance of balance and fairness, it will effectively be run by the leafy green industry. Consumers Union recommends instead that, if USDA moves forward with a NLGVMA despite the concerns we outline herein, at least half of this board be representatives of the consuming public. In addition, we feel that all members of the Board, the Technical Review Committee, Research and Development Committee, or and other committees should be required to disclose any potential conflicts of interest.

The Technical Review Committee—tasked with helping the National Leafy Green Vegetable Board to develop the audit metrics for Good Agricultural Practices (GAP), Good Harvesting Practices (GHP), and Good Manufacturing Practices (GMPs), which are supposed to ensure the safety of leafy green vegetables—is only advisory in nature. The decision-making power still resides with the National Leafy Green Vegetable Board. The Technical Review Committee will have at least 25 members, rather than 14 members as initially proposed, with one producer, one handler and one food safety expert from the land grant universities (agriculture schools) in each of the eight regions, and one from USDA's National Conservation Service, and potentially three more from USDA (National Organic Program, Agricultural Research Service, and National Institute for Food and Agriculture), one from EPA, one from FDA and one from Department of Interior's Fish and Wildlife Service. However, the food safety experts will be chosen by the leafy green industry (e.g. producer/handlers) members within each of the eight zones, and so will not necessarily be independent, meaning that the Industry will choose 24 of the 25 advisors. The fact that there must be at least one small producer as defined by SBA and one organic producer is an improvement over the original proposal. However, this is only a token improvement. The fact that the number of producer/handlers has gone from five to 16, means that this Committee will add two organic and small producers while adding nine more producer/handlers, and thus will be even more dominated by the leafy green industry than previously proposed, even with the putative nod to organic and small farmers.

The Research and Development Committee, tasked with advising the Board on “research, development and educational and outreach programs” is also advisory in nature and will be totally controlled by the leafy green vegetable industry. Although there will be nine members—two representing retail grocers; two representing food service companies; two from land grant universities with expertise in one or more of four areas (production, handling, and marketing of leafy green

vegetables; small, diversified, or organic production and handling practices; agricultural economics; or educational outreach in the specified or related areas); and three consumers—all will be appointed by the above-mentioned Board. The three hand-picked consumers will only comment on research and development, and not on the standards (e.g. audit metrics).

From a consumer perspective, this proposal seems to leave no way to ensure that safety standards are “science-based, scalable and regionally applicable” when they are being developed by committees (the Board with advice from the Technical Review Committee) controlled by the regulated industry, which has an inherent financial stake in reducing production costs. The proposed rule states that “the metrics would *reflect* Good Agricultural Practices [GAPs], Good Handling Practices [GHPs], and Good Manufacturing Practices [GMPs]” (e.g. FDA guidance such as “Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables”, “Commodity Specific Food Safety Guidelines for Lettuce and Leafy Greens Supply Chain,” and the proposed “Draft Guidelines for Leafy Greens” and appropriate FDA regulations) (emphasis added). The operative word “reflect” is an ambiguous term which raises concerns that the Advisory Committee can deviate from these principles at will, making the metrics weaker, or can change them in ways that reflect only the handler’s needs and not the needs of consumers, organic or sustainable producers or environmental concerns.

We only have to look at the metrics/standards developed by the California Leafy Greens Marketing Agreement (LGMA), or by some larger California handlers to see what could go wrong when there is not broader input into these metrics from the sustainable agriculture and ecological perspectives. A story published on July 13, 2009 in the *San Francisco Chronicle* found a range of environmental problems resulting from such requirements.<sup>5</sup> Dick Peixoto, an organic farmer in the Pajaro Valley near Watsonville told the *Chronicle* of the need to create sterile buffers around his fields, with no vegetation, no water and no wildlife of any kind permitted. Previously, he had planted hedges of fennel and flowering cilantro around his fields to harbor beneficial insects as an alternative to pesticides; those plants had to be ripped out. One field had evidence of deer tracks, but no plants were eaten; nevertheless, he had to destroy all crops within 30 feet of each side of the tracks, resulting in waste and loss to Mr. Peixoto’s business. Jill Wilson, an environmental scientist at Central Coast Regional Water Quality Review Board in San Luis Obispo, CA spoke of demands to create 450-foot dirt buffers around fields, which removes the agencies’ chief means of preventing pollution from entering streams and rivers. Other farmers bulldozed ponds since they were told that using them to recycle irrigation water was unsafe. Ken Kimes, owner of New Natives farms in Aptos, Santa Cruz County, was told that no children younger than 5 could be allowed on his farm for fear of diapers. Such “scorched earth” tactics make no sense when trying to farm in a sustainable, organic or ecologically rational way.

In addition, despite the existence of the LGMA in California, which included 99% of the leafy greens produced and handled in California, consumers continue to experience incidences of tainted leafy greens: on September 18, 2009 there was a recall of loose spinach due to *Salmonella* contamination. The product was grown in Salinas and distributed to several states and Canada before it was recalled<sup>6</sup>. After the marketing agreement went into effect in California, spinach produced by

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<sup>5</sup> “Crops, ponds destroyed in quest for food safety,” [http://articles.sfgate.com/2009-07-13/news/17218619\\_1\\_food-safety-cookie-dough-food-borne](http://articles.sfgate.com/2009-07-13/news/17218619_1_food-safety-cookie-dough-food-borne)

<sup>6</sup> See: <http://www.fda.gov/Safety/Recalls/ArchiveRecalls/2009/ucm182964.htm>

California grower Metz Fresh was recalled due to *Salmonella* contamination<sup>7</sup>. Clearly, the use of a voluntary marketing agreement, developed by the very people who brought spinach contaminated with *Salmonella* to market, is not the way to restore consumer confidence or to ensure that another outbreak does not occur.

Under the proposed NLGVMA, after the Board has developed the safety standards (with input from the Technical Review Committee) the standards must be submitted to the Secretary of Agriculture. The Secretary will then put the metrics/safety standards out for notice and comment. Although we commend the inclusion of this step, we are concerned that it will be extremely difficult to have real input to the standards at this point. The NLGVMA proposal does not lay out what exactly will be open for public notice and comment, or for how long. Indeed, with metrics developed by the industry with virtually no input from independent outsiders (i.e. those not chosen by the industry), it seems as though the metrics developed for comment will be a “done deal” by the time comments are requested.

### **The LGVMA does not cover all producers**

**A third major concern for Consumers Union is that, since participation is voluntary, the marketing agreement does not cover all leafy green growers and processors.** Consumers cannot, therefore, be assured that all leafy greens that reach the marketplace will be as safe as possible. For example, the Arizona Leafy Greens Marketing Agreement, implemented in 2007, only covers 75% of the leafy greens produced in the state. Indeed, the proposed NLGVMA was requested by a group of handlers and producers who “claim to represent a majority of the volume of leafy green vegetables produced and handled for the United States market.”<sup>8</sup> Not “all,” only a “majority.” We believe that government standards and enforcement of GAPs for *all* farms and GHPs, GMPs, and Hazard Analysis Critical Control Point (HACCP) programs for *all* processors are essential to maintaining the safety of leafy greens, and thereby consumer confidence and the financial health of the industry. If not all leafy greens in the marketplace are subject to these Best Practices, the door remains open for contaminated produce to reach consumers, with all the attendant negative health effects and negative publicity that that incurs for the entire industry.

### **Food Safety should not be a “value-added” characteristic**

**Fourth, we are concerned about the effect of the NLGVMA proposal on the use of a certification mark to convey that leafy green products from those participating farms and processors are subject to Best Practices.** This standard will have USDA approval behind it because the agency will choose the auditors and grant the use of the certification mark. This USDA-backed approach, unlike the proposed NLGVMA, could turn safety into “value-added” in the marketplace. Consumers have a right to expect, and government authorities must guarantee, the highest level of food safety for all food that enters the marketplace. Safety should not be something that consumers must search out and possibly pay extra for. We commend USDA for inserting language in Section 970.69(b) of the NLGVMA that “such mark may not be used on consumer packages”. However, the remaining language still permits the use of the certification mark on “bills of lading or manifests...**or any other**

<sup>7</sup> See: <http://www.fda.gov/Safety/Recalls/ArchiveRecalls/2007/ucm112265.htm>

<sup>8</sup> See Federal Register notice Vol. 76, no. 83, page 24293. Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5090647>.

**such uses recommended by the Committee and approved by the Secretary to carry out the purposes of this Agreement”** (emphasis added).<sup>9</sup> This language provides “wiggle room” that could lead to use of certification marks on advertising and promotional materials of signatories to the NLGVMA. If there is a final rule, prohibition of use of the mark in advertising and promotional materials must be added.

### **LGVMA at best duplicates and at worst may contradict FDA regulations**

**Finally, Consumers Union believes this proposal for a national marketing agreement to set safety standards for leafy greens, through a predominantly closed, industry-led process, is at best duplicative of requirements under the FDA Food Safety Modernization Act (FSMA), enacted this year. At worst it could undermine the forthcoming FDA standards by differing from them. FSMA requires FDA to develop safety standards for leafy greens through standard, transparent notice-and-comment rulemaking process.** But moving forward with the NLGVMA will likely lead to two different and potentially conflicting set of standards, which will be confusing and possibly harmful for both industry and consumers. Rather than two sets of standards that are duplicative or in competition with each other, FDA’s upcoming produce safety standards should be the national norm. The FDA’s mandate makes the USDA LGMA an unnecessary effort.

### **Conclusion**

In conclusion, while this marketing agreement may bring some improvement in leafy green safety, because of the insular, exclusive way in which these standards are being created, and more importantly, because this process does not cover all leafy green growers and processors in the U.S. and may contradict or undermine upcoming FDA efforts under FSMA., we believe that this agreement will not provide the industry with the highest standard of safety that it must achieve to prevent foodborne illness. Furthermore, this NLGVMA is completely duplicative of requirements in the FSMA for FDA to develop safety standards for leafy greens. We are also deeply concerned that the NLGVMA proposal, for the first time, posits safety as something that can be used as an advertising or promotional tool, and we oppose any use of a certification mark in advertising and promotion that suggests an added level of safety for some leafy green products and not others.

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<sup>9</sup> See Federal Register notice Vol. 76, no. 83, page 24335. Available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5090647>.