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# SETTING THE TABLE

Current Issues in Food Transport, Storage and Security from Benesch's Transportation Group

## The FDA's Proposed Food Safety Rule: What Warehouse Leaders Need to Know



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Although the FDA has characterized the risk of food contamination during transportation as “low,” a proposed FDA regulation, entitled “Sanitary Transportation of Human and Animal Food” will impose new

restrictions which all companies in the food supply chain—distribution center leaders in particular—must understand.

The draft rule, published in January 2014 under the Food Safety Modernization Act, received hundreds of suggestions from the industry during an extended notice and comment period, although it is unclear to what extent the FDA will ultimately incorporate industry suggestions. One thing, however, is known: the rule, as it stands, would be costly for food warehouses, even those currently employing Good Manufacturing Processes.

While a complete examination of the proposed rule's implications exceeds the scope of this brief article, the following highlights are particularly noteworthy for warehouses:

- **Private fleet and intra-company operations.** The proposed rule assigns independent administrative responsibilities to carriers, shippers, and receivers alike. This is troublesome for distribution operations as the

rule applies in equal force not only to product received from outside carriers or shippers, but for all intra-company movements after the product is received at an initial distribution center as well. Accordingly, by the proposed rule's definition, the distribution operation has the potential to stand as the receiver, shipper, and carrier (if using a privately owned fleet) on intra-company transfers of product, backhauls, and shipments of product to destination. Thus, should the final rule not provide for a reasonable “intra-company exception” to its requirements, distribution operations will be required to maintain extensive, redundant records in all three of these capacities terminating only when the product finally reaches stores. For many operations, compliance with this requirement alone will require the hiring of additional administrative personnel.

- **Increased regulation of combination loads to stores.** It is no secret in the industry that maximization of cube on outgoing loads reduces fuel costs, reduces labor costs, and is simply good business. For those in food distribution, maximization of cube often requires loading multiple commodities (such as raw foods, ready-to-eat and non-edible) on the same trailer. By all accounts, such “combination” loads are regularly loaded safely and with little risk of cross-contamination by following

industry practices. While the proposed rule does not abolish combining commodities, it does mandate that “effective measures such as segregation or isolation to protect food from contamination ... by ensuring the adequate separation of ready-to-eat foods from raw foods in the same load.” Should this language be adopted in the final rule without clarification, a potential for an interpretation which restricts current industry practices is possible.

- **Capital expenditures.** Additionally, the proposed rule requires that shippers and receivers provide “convenient” sinks for drivers who handle “food not completely enclosed by a container” to wash their hands. This would mean for all perishable operations (where, for example, berries are received in plastic “clamshell” containers), that drivers must be provided a “convenient” hand washing location. Given the ambiguous nature of the term “convenient,” distribution operations are likely to be subject to an array of varying requirements, depending on the inspector, and compliance may prove costly.

Many businesses will be given one year to comply with the final rule as the FDA publishes it, and those that qualify as “small businesses” will be given two years. Taking full advantage of this grace period, however, may not be the best approach, as the FDA has gone on record as stating that its strategy to enforce the new

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rule will be to give “incentives for compliance” in the form of “less frequent and less intense inspection for good performers,” and “enhanced presence in and targeted scrutiny of high-risk firms.” In other words, the faster you can demonstrate compliance, the less special attention you will receive from the federal government. Accordingly, distribution center leaders can do themselves a favor by remaining mindful of the proposed rule’s obligations, and having a plan in place for quick compliance.

**For more information**

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