

2015

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Stephen Wagner

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### Recommended Citation

Stephen Wagner, *When Tuna Still Isn't Always Tuna: Federal Food Safety Regulatory Regime Continues to Inadequately Address Seafood Fraud*, 20 *Ocean & Coastal L.J.* 111 (2015).

Available at: <http://digitalcommons.minelaw.maine.edu/oclj/vol20/iss1/5>

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## WHEN TUNA STILL ISN'T ALWAYS TUNA: FEDERAL FOOD SAFETY REGULATORY REGIME CONTINUES TO INADEQUATELY ADDRESS SEAFOOD FRAUD

*Stephen Wagner\**

In 2012 alone, Americans consumed approximately 4.5 billion pounds of seafood, over 90% of which was imported.<sup>1</sup> Simply put, Americans eat a lot of seafood, with upwards of 500 different species available to satiate the demand.<sup>2</sup> Consequently, imported and domestic seafood in the United States is a thriving 80.2 billion dollar market,<sup>3</sup> with certain highly desired species of fish fetching steep prices.<sup>4</sup>

One fundamental assumption of the consumer-driven market is that the label on the seafood correctly identifies the species of seafood, thereby, among other things, justifying the market price. It is increasingly clear, however, that this assumption is often not the case for seafood: many consumers are awakening to the upsetting and dangerous reality that the premium-priced, ecologically-certified, wild Atlantic salmon they ordered at the restaurant or picked up at the grocer is perhaps the much less-expensive and arguably unsustainable farm-raised

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\* J.D., *magna cum laude*, University of Maine School of Law, 2015; B.A. College of the Atlantic, 2011.

1. NAT'L MARINE FISHERIES SERV. (NMFS), NAT'L OCEANIC & ATMOSPHERIC ADMIN. (NOAA), FISHERIES OF THE UNITED STATES, 2012 3-4 (Alan Lowther, ed. 2013), available at <http://www.st.nmfs.noaa.gov/commercial-fisheries/fus/fus12/>.

2. OR. STATE UNIV., CORNELL UNIV., UNIVS. OF DEL., R.I., FLA. & CAL. & THE CMTY. SEAFOOD INITIATIVE, SEAFOOD CHOICES: OVERVIEW OF THE U.S. SEAFOOD SUPPLY 1 (2011), available at <http://seafoodhealthfacts.org/pdf/seafood-choices-overview.pdf>.

3. Benjamin Friedman, *Mystery Fish*, CONSUMER REPORTS, Dec. 2011, available at <http://www.consumerreports.org/cro/magazine-archive/2011/december/food/fake-fish/overview/index.htm>.

4. See, e.g., Patrick Bohler, *Japan: World's Most Expensive Fish Sold for \$1.8 Million*, TIME, Jan. 7, 2013, available at <http://newsfeed.time.com/2013/01/07/japan-worlds-most-expensive-fish-sold-for-1-8-million/> ("a 222-kilogram bluefin tuna was sold at Tokyo's Tsukiji market for an all-time high of 155.4 million yen, or 1.8 million dollars").

salmon;<sup>5</sup> or that their sashimi ahi tuna, prized for its delicate flavor and light flesh, is potentially the snake mackerel, a species of fish whose oils are known to cause severe gastrointestinal problems.<sup>6</sup>

The dilemma consumers face is seafood fraud:<sup>7</sup> the substitution, misrepresentation, or mislabeling of a species of seafood that has become progressively prevalent with the increase of globalized trade, consumer demand for seafood, increased consumer demand for sustainably-sourced seafood, and the availability of reliable and inexpensive DNA technology that can test the flesh of the food item to determine its species and origin.<sup>8</sup> Whether seafood fraud is intentional or unintentional, it is an economic, environmental, and food safety harm. Particularly because of the severity of the threat to food safety, this comment examines the adequacy of the existing federal regulatory regime addressing seafood fraud, specifically focusing on potential impacts of the Food Safety and Modernization Act (FSMA) on seafood fraud.

Part I of this comment explores what exactly seafood fraud is and the negative impacts this has on the economy, the environment, and human health. Part II lays out the different federal agencies responsible for regulating seafood fraud and briefly analyzes the agencies' attempts to address the problem. Part III summarizes the origin and scope of FSMA and highlights potential new powers and opportunities it gives the Food and Drug Administration (FDA) for addressing seafood fraud. Finally, part IV concludes that even with FSMA, there remain significant problems with the current food safety regime that inhibit real action on

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5. See, e.g., Sarah Zielinski, *Seafood Sleuthing Reveals Pervasive Fish Fraud in New York City*, NPR: THE SALT (Dec. 11, 2012, 5:10 PM), <http://www.npr.org/blogs/thesalt/2012/12/11/166981454/seafood-sleuthing-reveals-pervasive-fish-fraud-in-new-york-city>.

6. KIMBERLY WARNER, WALKER TIMME, BETH LOWELL, & MICHAEL HIRSHFIELD, OCEANA STUDY REVEALS SEAFOOD FRAUD NATIONWIDE 16 (2013), available at [http://oceana.org/sites/default/files/reports/National\\_Seafood\\_Fraud\\_Testing\\_Results\\_FINAL.pdf](http://oceana.org/sites/default/files/reports/National_Seafood_Fraud_Testing_Results_FINAL.pdf) ("Escolar, or oilfish (*Lepidocybium flavobrunneum*), is not actually a tuna species at all, but is instead a snake mackerel that contains a naturally occurring toxin, gempylotoxin. This toxin can cause mild to severe gastrointestinal problems even for some who eat only a few ounces of the fish. Because of the health problems associated with escolar, Italy and Japan have banned it, several other countries have issued health advisories for it and the FDA advises against the sale of it in the U.S.").

7. Author uses the term seafood "fraud" in the non-tortious sense, acknowledging that not all misrepresentation or species substitution constitutes intentional fraud.

8. Yale Sch. of Forestry & Envtl. Studies, *A New Fish DNA Test Could Help in the Fight Against Illegal Fishing*, ENV'T 360 DIG., (May 13, 2011), available at [http://e360.yale.edu/digest/a\\_new\\_fish\\_dna\\_test\\_couldhelp\\_in\\_the\\_fight\\_against\\_illegal\\_fishing/2942/](http://e360.yale.edu/digest/a_new_fish_dna_test_couldhelp_in_the_fight_against_illegal_fishing/2942/) ("An international consortium has developed a DNA test that can trace the origin of fish and fish products, an innovation that could improve enforcement of marine fisheries laws and reduce overfishing worldwide.").

addressing seafood fraud on the federal level and discusses other potential alternative approaches, including Senator (then Representative) Ed Markey's recently re-introduced Safety And Fraud Enforcement for Seafood Act (SAFE Seafood Act).

#### I. AN INTRODUCTION TO THE PROBLEM OF SEAFOOD FRAUD

Many recent studies and investigations, by both government and non-profit watch groups, have found extensive fraud, misrepresentation, and species substitution in fish and other forms of seafood. From 2010 to 2012, Oceana,<sup>9</sup> a non-profit organization advocating for international ocean conservation, conducted one of the largest of such investigations, gathering more than 1,200 seafood samples from 647 retail outlets in 21 states to determine if they were honestly labeled.<sup>10</sup> Oceana's DNA testing found that one-third of the samples analyzed were mislabeled according to FDA guidelines, with red snapper and tuna having the highest rates of fraud.<sup>11</sup> Further, Oceana found that 44 percent of retail outlets sampled sold food that tested positive for fraud; it also identified "which types were the worst (sushi venues) and best (grocery stores) in honestly labeling seafood according to federal guidelines, with these patterns being repeated everywhere [it] sampled in sufficient numbers."<sup>12</sup>

In 2012, the Consumers Union of the United States published a report in the Consumer Reports magazine about an investigation by The National Oceanic Atmospheric Administration (NOAA)<sup>13</sup> into alleged seafood fraud.<sup>14</sup> NOAA sent out both fresh and frozen samples obtained

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9. OCEANA, *Protecting the World's Oceans*, <http://oceana.org/en/about-us/what-we-do> ("Oceana, founded in 2001, is the largest international organization focused solely on ocean conservation") (last visited Mar. 12, 2014).

10. WARNER ET AL., *supra* note 6, at 4; Gretchen Goetz, *Looking Upstream: Seafood Traceability in a Global Economy*, FOOD SAFETY NEWS (May 20, 2013), <http://www.foodsafetynews.com/2013/05/looking-upstream-seafood-traceability-in-a-global-economy/#.VPCndodxtUQ>.

11. WARNER ET AL., *supra* note 6, at 25.

12. *Id.* (explaining that this may be due to the stricter private regulations and practices addressing seafood fraud at large, chain grocery stores).

13. NMFS Seafood Inspection Program is responsible for the development and advancement of commercial grade standards for fishery products, health and sanitation standards in the industry, and for inspecting, evaluating, analyzing, grading, and certifying services to interested parties. Memorandum of Understanding Between FDA and NOAA on Seafood Inspections (Nov. 30, 2009), *available at* <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm201263.htm>; NOAA, Seafood Inspection Program, <http://www.seafood.nmfs.noaa.gov/> (last visited Feb. 1, 2015).

14. Friedman, *supra* note 3, at 11.

from a retail location to an outside lab for DNA testing, where “researchers extracted genetic material from each sample [of fourteen types of fish] and compared the genetic sequences against standardized gene fragments that identify its species in much the same way that criminal investigators use genetic fingerprinting.”<sup>15</sup> The results found “more than one-fifth of 190 pieces of seafood [NOAA] bought at retail stores and restaurants in New York, New Jersey, and Connecticut were mislabeled as different species of fish, incompletely labeled, or misidentified by employees.”<sup>16</sup>

Members of the press have also not been shy about shining a light on seafood fraud, even conducting investigations of their own.<sup>17</sup> When Consumer Reports tested 23 supposedly wild-caught salmon fillets bought nationwide in 2005-2006, only 10 were wild salmon and the rest were farmed.<sup>18</sup> In 2004, University of North Carolina scientists found 27 percent fish labeled red snapper was not in fact red snapper.<sup>19</sup> In 2008, the *Chicago Sun-Times* tested fish at 17 sushi restaurants and found that fish being sold as red snapper actually was mostly tilapia.<sup>20</sup>

A 2011 investigation of fish from over 134 restaurants in Massachusetts by the Boston Globe “showed that Massachusetts consumers routinely and unwittingly overpay for less desirable, sometimes undesirable, species – or buy seafood that is simply not what it is advertised to be. In many cases, the fish was caught thousands of miles away and frozen, not hauled in by local fishermen, as the menu claimed.”<sup>21</sup> In its investigation, confirming the results of Oceana and NOAA, the Boston Globe found all 23 white tuna samples were escolar, not white tuna, and 24 out of 26 red snapper sampled was actually a less-

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15. *Id.*

16. *Id.*

17. See, e.g., Elizabeth Weise, *Something Fishy? Counterfeit Foods Enter the U.S. Market*, USA TODAY (Jan. 23, 2009), [http://usatoday30.usatoday.com/news/health/2009-01-19-fake-foods\\_N.htm](http://usatoday30.usatoday.com/news/health/2009-01-19-fake-foods_N.htm).

18. *Id.*

19. *Id.*

20. *Id.*

21. Jean Abelson & Beth Daley, *On the Menu, But Not on Your Plate: A Globe Investigation Found Fish Bought At Restaurants Across the Regions Was Mislabeled About Half the Time. Sometimes it Was Innocent Error, But Often the Switch Was Deliberate, Driven by Profits*, BOS. GLOBE, Oct. 23, 2011, <http://www.bostonglobe.com/2011/10/22/dnatest/NDbXGXdPR6O37mXRSVPGIL/story.html> [hereinafter Abelson 2011].

prized species.<sup>22</sup> Despite legislative action on the state level following this report, a follow-up report a year later revealed similar results.<sup>23</sup>

Disturbing as this may be, adulteration or misrepresentation of food has been around for as long as people have purchased food; be it lead in water or chalk and bones in bread, fraudulently misrepresented or adulterated food products have a long history.<sup>24</sup>

However, there are not many recorded instances of adulteration of seafood.<sup>25</sup> This is likely because, prior to modern technology and global trade, seafood consumption was largely confined to coastal fishing communities, where consumers bought directly from the fisherman and could probably themselves identify the species of fish.<sup>26</sup>

With increased globalization and urbanization, as well as advanced technology allowing transportation of seafood beyond the coastline, seafood is more susceptible to such tactics. In *Swindled: The Dark History of Food Fraud, From Poisoned Candy to Counterfeit Coffee*, author Bee Wilson theorizes that the emergence of modern food fraud can be traced to the impact of the industrial revolution and laissez-faire economics on the food industry in 19th century England.<sup>27</sup> She explains that, as the medieval guild system gave way to urban merchants, *caveat emptor* became the governing rule for the buying and selling of food, thus “[foisting] huge responsibility on a population that lacked even basic democratic rights.”<sup>28</sup> Wilson similarly contends that food fraud and adulteration in the United States was exasperated by the advancement in food science and shift in food production from home to factory.<sup>29</sup>

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22. *Id.*

23. Jean Abelson & Beth Daley, *Many Mass. Restaurants Still Serve Mislabeled Fish*, BOS. GLOBE, Dec. 2, 2012, <http://www.bostonglobe.com/business/2012/12/02/dnasidebar/SAe6PdZMRqi6mZUDOdWz7M/story.html> [hereinafter Abelson 2012].

24. See generally BEE WILSON, *SWINDLED: THE DARK HISTORY OF FOOD FRAUD, FROM POISONED CANDY TO COUNTERFEIT COFFEE* (Princeton University Press, ed. 2008) (an excellent resource that explores the history of food fraud, from the leaded wine of the ancient Romans to modern food frauds like the Chinese milk powder scandals and dubious organic food labels) [hereinafter Wilson].

25. See Abelson 2012, *supra* note 23 (“Throughout much of the last century, the cold waters off New England supplied fresh fish that was delivered daily to Massachusetts restaurants and other businesses.”).

26. *Id.*

27. WILSON, *supra* note 24, at 19-34.

28. *Id.* at 95.

29. See Michael T. Roberts, *Cheaters Shouldn't Prosper and Consumers Shouldn't Suffer: The Need for Government Enforcement Against Economic Adulteration of 100% Pomegranate Juice and Other Imported Food Products*, 6 J. FOOD L. & POL'Y 189, 204-

Today, economically-motivated adulteration of food can be defined as the “fraudulent addition of nonauthentic substances or removal or replacement of authentic substances without the purchasers’ knowledge for economic gain of the seller.”<sup>30</sup> Food fraud is a broader term “that encompasses the deliberate substitution, addition, tampering, or misrepresentation of food, food ingredients, or food packaging, or false or misleading statements made about a product for economic gain.”<sup>31</sup>

Seafood fraud is a form of food fraud. It can take the form of species substitution,<sup>32</sup> whereby a lower-quality and less expensive fish is mislabeled as a more desirable and more expensive species.<sup>33</sup> Fillers and other substitutes may be used on processed seafood products for similar reasons.<sup>34</sup> Also, seafood fraud may include transshipment to avoid duties,<sup>35</sup> over-treating,<sup>36</sup> short-weighting, and other forms of mislabeling and misrepresentation.<sup>37</sup> However, this fraud is not always, intentional.<sup>38</sup>

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06 (2010) (laying out a history of the U.S. regulatory response to food adulteration at the turn of the 20th century).

30. Jeffery C. Moore, John Spink & Markus Lipp, *Development and Application of a Database of Food Ingredient Fraud and Economically Motivated Adulteration from 1980 to 2010*, 77 J. FOOD SCI. R118, R118 (quoting J. Devries, US Pharmacopeia’s Food Ingredients Intentional Adulterants Advisory Panel. Presented at USP’s 2009 Food Ingredients Stakeholder Forum, <http://www.usp.org/pdf/EN/stakeholderforum/foodadditives/Aug2009/2009-08-04FISFPresentationspdf.pdf>(slides 80-91)).

31. John Spink, *Defining Food Fraud and the Chemistry of the Crime*, in IMPROVING IMPORT FOOD SAFETY 195, 196 (Wayne Ellefson, Zach Lonra, Darryl Sullivan, eds. 2013).

32. GAO-09-258, SEAFOOD FRAUD 8 (2009) [hereinafter GAO-09-258] (species substitution occurs when “participants in the seafood supply chain . . . label a species of seafood as another species. Typically, a lower-market-value species is labeled as a higher-market-value species to realize a larger profit. This results in consumers paying too much for the product.”).

33. *Id.*

34. *Id.*

35. *Id.* at 8-9 (“Foreign producers may ship seafood products on route to the United States through a third country to avoid import duties by labeling the product’s country of origin as the third country and also to avoid regulatory controls such as FDA import alerts.”).

36. *Id.* (explaining over-treating is a technique whereby processors may, for example, over-bread prepared seafood products, use water-retaining chemicals, or over-glaze with an ice covering to artificially increase the weight of seafood products without indicating the true net weight of the seafood on the label.)

37. Spink, *supra* note 31, at 9 (giving as examples the providing wrong information and commingling of two or more different products with different values that are then sold as one product at the higher price).

38. Goetz, *supra* note 10 (quoting LeeAnn Applewhite, CEO of Applied Food Technologies, “It’s extremely complicated because fishermen go out, and grouper don’t swim in one place all by themselves and cod in another place all by themselves,” she

Rather a species could merely be mislabeled, incompletely labeled, or misidentified by employees at retail stores or restaurants.<sup>39</sup> This is distinct from such condoned practices in the seafood industry such as the re-branding of less desirable species, which is often harmless to the health and safety of consumers and perhaps beneficial in replenishing depleted fish stocks.<sup>40</sup>

#### A. *The Three Major Effects of Seafood Fraud*

Although most intentional seafood fraud may be motivated purely by economic gain,<sup>41</sup> and so is consequently not thought of beyond its economic harm dimensions, the intentional or unintentional effects are broader.

##### 1. Economic Concerns

Seafood fraud is an economic harm. The consumer is often negatively impacted because when one higher-valued species is substituted for another, the consumer is nearly always the one paying the price.<sup>42</sup> “[S]wapping a lower-cost fish for a higher-value one is like ordering a filet mignon and getting a hamburger instead.”<sup>43</sup>

For example, several investigations found seafood fraud is very common in sushi restaurants where favored species can fetch exorbitant prices.<sup>44</sup> One common example is the substitution of the more expensive

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explained. “You have all these species swimming together and they catch thousands of fish on some of the big boats. They look alike, they’re in the same place, and once they’re filleted, nobody can tell the difference.”)

39. *Id.*

40. Andrea Migone & Michael Howlett, *From Paper Trails to DNA Barcodes: Enhancing Traceability in Forest and Fishery Certification*, 52 NAT. RESOURCES J. 421, 431 (2012).

41. Moore et al., *supra* note 30, at R119.

42. See, e.g., Friedman, *supra* note 3 (“Prices range widely, even for the same type of fish, but be suspicious if fish is supercheap. For what turned out to be real grouper steaks, we paid \$6.80 and \$9.99 per pound. The ‘grouper steaks’ that were really pollock and tilefish cost us just \$4.99 and \$5.60 per pound, respectively.”).

43. Dan Flynn, *Oceana Study: ‘Fish Fraud’ Ripping Off American Consumers*, FOOD SAFETY NEWS (Aug. 8, 2013) (quoting Oceana’s follow up report to the initial investigation).

44. Dustin Cranor & Amelia Vorpahl, *Oceana Study Uncovering Widespread Seafood Fraud Nationwide 33% of Seafood is Mislabeled in Grocery Stores, Restaurants, and Sushi Venues* (Feb. 21, 2013), <http://oceana.org/en/news-media/press-center/press-releases/oceana-study-uncovers-widespread-seafood-fraud-nationwide> (“While 44

red snapper for the bland-tasting, farmed, less-expensive tilapia.<sup>45</sup> In its 2012 follow-up study to the 2011 report exposing rampant fish fraud, the Boston Globe visited, for example, “Symphony Sushi — selected by Boston Magazine as one of the city’s best neighborhood restaurants in 2010 — [where] a \$15.95 crispy red snapper meal turned out to be tilapia.”<sup>46</sup> Similarly, samples taken from the Boston Children’s hospital determined that “the fish sandwich described by a cafeteria clerk as cod tested as less-expensive pollock.”<sup>47</sup> Also, “instead of ‘fresh Boston cod’ promised on the menu, Jerry Remy’s Seaport served Pacific cod, which is often previously frozen, cheaper, and hauled thousands of miles to New England.”<sup>48</sup>

Fish fraud is also bad for business. A study by the Grocery Manufacturers Association found that the cost of food fraud to the food industry alone is \$10 to \$15 billion per year.<sup>49</sup> Seafood fraud damages the domestic seafood industry when domestic fisheries are undersold by foreign fisheries that gain an unfair economic advantage by mislabeling in order to evade tariffs and sell inferior products at inflated prices.<sup>50</sup>

## 2. Environmental Concerns

Second, seafood fraud can indirectly harm the environment because misinformation affects a consumer’s choice, which may be based on social or environmental concerns, undermining the consumer’s reasons and future motivation for paying a higher price.<sup>51</sup> For example, in the case of the over-fished red snapper, substituting or mislabeling the species makes it difficult for a consumer to recognize over-fishing when

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percent of all the retail outlets visited sold mislabeled fish, sushi venues had the worst level of mislabeling at 74 percent.”).

45. Goetz, *supra* note 10 (Other in-demand fish for which a different species is commonly substituted like cod, grouper, halibut and Chilean seabass.).

46. Abelson 2012, *supra* note 23.

47. *Id.*

48. *Id.*

49. Ass’n Food, Beverage, and Consumer Products Companies, Consumer Product Fraud: Deterrence and Detection 3 (2010), *available at* <http://www.gmaonline.org/downloads/research-and-reports/consumerproductfraud.pdf>.

50. See, e.g., Nicole Lou, *Bait and Switch: the Fraud Crisis in the Seafood Industry*, ATLANTIC (Mar. 19, 2015), <http://www.theatlantic.com/business/archive/2015/03/bait-and-switch/388126/>.

51. WARNER ET AL, *supra* note 10, at 26-27 (“With no effective accountability in the seafood supply chain, fish obtained by illegal and unregulated means are finding an easy and entry onto our dinner plates profitable.”).

she sees the species as a readily-available item at restaurants.<sup>52</sup> As Oceana campaign director Beth Lowell said, “if people see something on the menu all the time, they may have no idea it is disappearing from the ocean.”<sup>53</sup> This undermines systems put in place in order to promote sustainable fisheries, like ecological labeling, that rely on proper species identification to drive demand in such a way as to beneficially impact fisheries and the environment.<sup>54</sup> If the consumer were to discover the deception, her faith in the brands may be disrupted.<sup>55</sup> Another environmental harm may arise with seafood fraud when fisheries regulators rely on species labels on imported and domestic fish to set catch limits and conserve fisheries. For example, “The Globe-sponsored testing showed that yellow fin tuna wontons at the chain restaurant ‘Not Your Average Joe’s’ in Westborough were filled with chunks of southern blue fin tuna.”<sup>56</sup> That’s a critically endangered species, according to the International Union for Conservation of Nature, a worldwide environmental network of governments, scientists, and nonprofits.<sup>57</sup>

### 3. Food Safety Concerns

Third, food safety concerns are raised when food is adulterated.<sup>58</sup> Seafood fraud is a significant threat to a safe food system. As stated by FDA, “in the interest of public health, it is vital that both domestically-processed and imported seafood is safe, wholesome, and properly labeled . . . there are numerous potential health risks associated with misbranding seafood species.”<sup>59</sup> In the United States, fifteen percent of documented foodborne illness is due to seafood contamination.<sup>60</sup> Misidentification or adulteration can lead to foodborne illness because certain species have specific care requirements that, when not followed, may cause foodborne

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52. Abelson 2011, *supra* note 21.

53. *Id.*

54. *Id.*

55. *See id.*

56. *Id.*

57. *Id.*

58. Moore et al., *supra* note 30, at R119 (“in essence, the safety of the whole food supply chain collapse into a singular factor, the criminal. Only he or she has enough information to know the extent of the hazard introduced into the food supply chain.”).

59. *DNA-based Seafood Identification*, FDA, <http://www.fda.gov/Food/FoodScienceResearch/DNASeafoodIdentification/default.htm> (last visited Mar. 12, 2014).

60. Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory System*, 51 VA. J. INT’L L. 637, 639 (2011).

illness for certain people.<sup>61</sup> Further, many species substitutes contain higher levels of mercury, an element that should be generally avoided in high quantities or by individuals more sensitive to its negative effects because of pregnancy, age, etc.<sup>62</sup> For example, NOAA found that some of the falsely-labeled grouper was in fact tilefish, a species that contains three times the amount of mercury. Worth mentioning again, and even more severe, is when tuna is substituted by escolar, also known as snake mackerel.<sup>63</sup> Although similar in appearance, escolar is not in the same family as tuna, sells for 20% less, and the FDA advises against its consumption because the fish contains an oil known to cause severe gastrointestinal problems.<sup>64</sup> In 2007, fish fraud made the news when imported puffer fish, containing a deadly toxin, was mislabeled as monkfish and many consumers became severely ill.<sup>65</sup>

More health hazards may arise when the country of origin is misidentified. Many people are allergic to certain species of fish because, for example, fish from a hazardous area may then be unknowingly sold or consumed.<sup>66</sup>

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61. Goetz, *supra* note 10 (found a histamine-containing fish, catfish, substituted for grouper, a species that looks similar but does not require the same post-harvest treatments to avoid histamine; high histamine levels can cause illness).

62. In a 2008 study by the New York Times, writers tested over 20 stores selling sushi in Manhattan and found that a “regular diet of six pieces of sushi a week would exceed the levels [of mercury] considered acceptable by the Environmental Protection Agency.” Marian Burros, *High Mercury Levels Are Found in Tuna Sushi*, N.Y. TIMES, Jan. 23, 2008, [http://www.nytimes.com/2008/01/23/dining/23sushi.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2008/01/23/dining/23sushi.html?pagewanted=1&_r=1). A further alarming fact in the study was that owners of the sushi stores did not know that the fish posed a risk to consumers. *Id.*; WARNER ET AL., *supra* note 6..

63. Jacob H. Lowenstein, George Amato & Sergios-Orestis Kolokotronis, *The Real Maccoyii: Identifying Tuna Sushi with DNA Barcodes – Contrasting Characteristic Attributes and Genetic Distances*, 4 PLOS ONE 11 (2009), available at <http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0007866&representation=PDF>.

64. Beth Daley & Jenn Abelson, *From Sea to Sushi Bar, a System Open to Abuse*, BOS. GLOBE (Oct. 24, 2011) (in response, the distributor claimed that there is no difference between the fish, stating “[w]hite tuna and escolar are the same species,” he said, “[w]e use both names.”).

65. FDA, FDA NEWS RELEASE, FDA WARNING ON MISLABELED MONKFISH: FISH BELIEVED TO BE PUFFER FISH; CONTAINS DEADLY TOXIN (May 24, 2007), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108920.htm>.

66. Goetz, *supra* note 10, at 3 (discussed as an example fish sold with an inaccurate label could have been fished in an area flagged for Ciguatera, a toxin found in some tropical reef fish, or Vibrio, formed in shell fish when waters are too warm); WARNER ET AL., *supra* note 6.

Another food safety threat from seafood fraud is that at least half of the imported seafood is from aquaculture production.<sup>67</sup> Although aquaculture is safe in many cases, the potential danger here is that seafood grown in confined aquaculture areas can have high rates of bacterial infections, so growers may treat them with antibiotic and antifungal drug agents in order to increase their survival rates.<sup>68</sup> The residue from these drugs can remain in the fish after harvesting and processing, which then means it can be consumed.<sup>69</sup> These drugs “have been linked to cancer, severe allergic reactions, and increased antibiotic resistance.”<sup>70</sup> As aquaculture imports continue to increase, so does this potential risk.<sup>71</sup>

Despite this evidence, seafood fraud is not often considered a food safety issue. A mere skimming of the titles of news reports included in this comment reveals that the emphasis is often placed on the economic impact to the consumer or the market. As this article will discuss, the FDA, despite having the authority to inspect imported fish to protect against seafood fraud, places very few resources on detecting food fraud because, one could argue, the FDA does not view this as a serious enough food safety concern to devote sufficient resources.<sup>72</sup> Therefore, this comment concludes that greater emphasis on the legitimate food safety implications of seafood fraud may be the most effective strategy to focusing the existing regulatory regime and resources on addressing seafood fraud.

While it is evident seafood fraud is happening, it is less certain at which point in the chain from “hook to fork” this is occurring.<sup>73</sup> For example, Oceana conceded that “because [their] study was restricted to seafood sold in retail outlets, [they] cannot say exactly where the

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67. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-286, SEAFOOD SAFETY: FDA NEEDS TO IMPROVE OVERSIGHT OF IMPORTED SEAFOOD AND BETTER LEVERAGE LIMITED RESOURCES, at 1 (2011) [hereinafter GAO Report 11-286].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. GAO Report-09-258, *supra* note 32, at 7.

73. The phrase “hook to fork” is commonly used in food and fishing literature and generally refers to the adaption of the terrestrial local food culinary movement to seafood. Harry Hurt III, *Dinner, From Hook to Fork*, N.Y. TIMES, Sept. 19, 2008, [http://www.nytimes.com/2008/09/20/business/20pursuits.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/09/20/business/20pursuits.html?pagewanted=all&_r=0). It can also refer to a risk-based approach to food safety that traces the different stages of the food chain system and examines the practices and procedures. European Food Information Council, *Farm to Fork* (Jun. 2006), <http://www.eufic.org/article/en/food-safety-quality/farm-to-fork/expid/review-farm-to-fork/> (last visited Mar. 3, 2015).

fraudulent activity occurred.”<sup>74</sup> Part of this difficulty stems from the fact that many hands will touch the seafood along this chain, making nearly impossible with current laws and technology to determine where exactly the fraud occurred.<sup>75</sup> After harvesters catch the seafood, they ice or flash-freeze, and it is then sometimes transferred at sea to larger vessels, where it may be mixed with other species.<sup>76</sup> At this point, the seafood may then be processed at sea, which includes removing the heads and guts in order to delay spoilage, making identification all the more difficult.<sup>77</sup> “Unscrupulous people may try to falsify documentation or hide illegally caught fish with legally captured ones, resulting in mislabeled fish ending up at supermarkets and restaurants.”<sup>78</sup>

## II. THE CURRENT FOOD SAFETY REGULATORY REGIME’S REGULATION OF SEAFOOD FRAUD

The difficulty in detecting and addressing seafood fraud is compounded by the inadequacy of the current federal regime regulating the safety of seafood. This comment focuses on the federal level; any discussion of reform logically should begin at the point where the majority of seafood enters the U.S. market. Attempts to address seafood fraud at the local and state level have been largely unsuccessful.<sup>79</sup> That said, several proposals exist to address seafood fraud at the local, state, international, and private sector levels, which could be complementary to federal regulatory reform.<sup>80</sup>

The current federal food safety regime is an inter-tangled web of conflicting agency objectives and redundancy; commentators often criticize the U.S. food safety system for having both a lack of coordination and a lack of adequate funding.<sup>81</sup> The often-repeated

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74. WARNER ET AL., *supra* note 6, at 2.

75. Friedman, *supra* note 3.

76. *Id.*

77. *Id.*

78. *Id.*

79. Abelson 2011, *supra* note 21.

80. *See generally* Recommendations of the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud, 79 Fed. Reg. 75537 (proposed Dec. 18, 2014) [hereinafter Recommendations of the Presidential Task Force] (submitting for public comment recommendations for implementing strategies for addressing seafood fraud that include local, state, federal, and international proposals); Ching-Fu Lin, *supra* note 60 (identifies the essential elements of successful global regulation of food safety).

81. *See, e.g.*, Nathan M. Texler, “Market” Regulation: Confronting Industrial Agriculture’s Food Safety Failures, 17 WIDENER L. REV. 311, 323 (“As aforementioned,

example of the food safety regulation of the all-too-familiar-to-law-students pizza illustrates the situation:

The FDA regulates frozen pizza, but the USDA takes over if it is topped with two percent or more of meat or poultry. Therefore, inspections at these facilities follow two different sets of guidelines issued by the FDA and the USDA. Therein lies the rub: the USDA inspects facilities that make pepperoni on a daily basis and then inspects the plants that produce pepperoni pizza every day, whereas the FDA will inspect cheese pizza facilities once every ten years. The difference is astounding, especially considering certain frozen pepperoni pizza products – despite receiving more inspections than given to cheese pizza – were recalled in 2007 due to possible *E. coli* O157:H7 contamination.<sup>82</sup>

The regulation of seafood fraud is no exception; there is no single agency regulating seafood fraud on the federal level, the agencies that do regulate it do not often cooperate, and funding is scarce.<sup>83</sup> This section examines the historical background of the food safety regime in order to give context to its regulation of seafood fraud. It then reviews each agency's role in addressing seafood fraud, identifies its active and latent regulatory authority, and analyzes its respective shortcomings and common criticism in regards to addressing seafood fraud.

#### *A. Historical Background of the Modern Food Safety Regulatory Regime*

This article does not attempt to provide a historical analysis of the food safety regime, a topic thoroughly covered in food and drug law literature.<sup>84</sup> Nonetheless, a brief summary of how the modern food safety regulatory regime in the United States came about is necessary to place the current regulation of seafood sale and distribution, and the fraud thereof, in context.

The United States' first attempt to address the growth of adulteration and food safety issues in general was the 1906 Pure Food and Drug Act, an omnibus act passed largely in reaction to a string of expository journalism of the widely-read finding of Upton Sinclair in his expository

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the federal food safety bureaucracy is a maze of responsibility, which understandably makes it difficult for agencies to communicate and proceed along one common path.”).

82. *Id.*

83. See GAO Report-09-258, *supra* note 32.

84. See, e.g., Roberts, *supra* note 29.

piece, *The Jungle*.<sup>85</sup> This was followed in 1930 with the Food, Drug, and Cosmetic Act (FDCA), largely creating FDA in its modern form.<sup>86</sup> This pattern of separate, reactionary laws eventually led Congress to create a “bifurcated system that foreshadow[s] the current confusion.”<sup>87</sup> One scholar in this area explains that this chasm between food and food safety grew even greater when FDA was consolidated within the Department of Health and Human Services (HHS).<sup>88</sup> As it stands now, “currently four agencies stand at the center of the morass: (1) the USDA’s Food Safety and Inspection Service (FSIS); (2) the FDA’s Center for Food Safety and Applied Nutrition (CSFAN); (3) the Environmental Protection Agency’s (EPA) Office of Prevention, Pesticides, and Toxic Substances; and (4) the Centers for Disease Control’s (CDC) Food Safety Office.”<sup>89</sup> “No single agency or voice has the ultimate responsibility or authority to make the decisions necessary to assure the American public that what we eat will not make us sick.”<sup>90</sup>

### *B. Current federal regime for seafood safety*

Three federal agencies play key roles in detecting and preventing seafood fraud: the Department of Homeland Security’s Customs and Border Protection (CBP), the Department of Commerce’s National Marine Fisheries Service (NMFS), and the FDA.<sup>91</sup> Additionally, minor roles in regulating fish fraud are held by NOAA’s Office of Law Enforcement, the USDA, and the Federal Trade Commission (FTC).<sup>92</sup> Again, outside the scope of this article, but critical to full understanding of the overall regulation of fisheries, is the role of state, local, and international regulatory bodies.<sup>93</sup>

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85. Textler, *supra* note 81, at 317.

86. See U.S. FDA., WHAT WE DO: HISTORY (2010), available at <http://www.fda.gov/AboutFDA/WhatWeDo/History/default.htm> (explaining that the FDA traces its history to 1848, making it arguably the oldest comprehensive consumer protection agency in the US federal government).

87. Textler, *supra* note 81, at 317.

88. *Id.*

89. *Id.*

90. *Id.*

91. GAO Report-09-258, *supra* note 32, at 2.

92. *Id.*

93. See, e.g., Brandt T. Bowman, *Roll Sushi, Roll: Defining “Sushi Grade” for the Consumer and the Sushi Bar*, 116 PENN ST. L. REV. 495, 509 (2011) (discussing the role of the Food Code at the local and state levels, writing that “FDA created the Code as a model to assist state and local governments in initiating and maintaining effective programs for the prevention of food borne illnesses.”); BETH DALEY & JEAN ABELSON,

## 1. UNITED STATES CUSTOMS AND BORDER PROTECTION

Considering the predominance of imported over domestic seafood in the United States, CBP has a significant role in the regulation of imported seafood safety and the adulteration of imported seafood and seafood products.<sup>94</sup> Broadly speaking, CBP collects import duties and tariffs, assesses money damages for the failure to redeliver imported products, and oversees the exportation or destruction of refused products.<sup>95</sup> In terms of seafood, “CBP reviews seafood import documentation to detect schemes to avoid paying the appropriate custom duties as seafood products enter the country, among other things.”<sup>96</sup> Besides inspection, CBP operates a national statistical sampling program, known as the Compliance Measurement Program, “which randomly selects shipments of imports by commodity for review or examination to determine the degree to which they comply with trade laws and regulations.”<sup>97</sup> Finally, CBP can assess penalties against a violating importer, which can range from two to four times the loss of lawful duties and fees.<sup>98</sup>

CBP is, however, limited in its resources. For example, in 2008 CBP officials examined between approximately 1 to 2.4 percent of all seafood imports.<sup>99</sup> Similarly, the Compliance Measurement Program in 2008 examined only 766 seafood products out of nearly 400,000 imported.<sup>100</sup> Also, the fees are limited to enforcing violations of anti-dumping and tariff evasions, which are a limited fraction of the overall seafood fraud problem.<sup>101</sup>

The overlap in authority between FDA and CBP on imported foods has been largely seen as positive. Although technically, because of this overlap, an import found to be in violation by FDA could still be re-exported for sale by CBP, in practice CBP complies with requests by the

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ALI CLE COURSE OF STUDY MATERIALS, CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS, ST036 ALI-ABA 103 (2012) (“Several states have taken matters into their own hands. Florida officials regularly inspect menus and compare them with invoices and boxes of fish in the restaurants. Proprietors found with misrepresented fish face fines of up to \$800 and can have their restaurant license suspended or revoked.”).

94. ARTHUR N. LEVINE, FDA ENFORCEMENT MANUAL, ¶ 910 STATUTORY AUTHORITY OVER IMPORTS, 2004 WL 5032328.

95. *Id.*

96. GAO Report-09-258, *supra* note 32, at 2.

97. *Id.* at 6.

98. *Id.*

99. *Id.* at 8.

100. *Id.*

101. *Id.*

FDA for seizure.<sup>102</sup> Further, FDA has worked with CBP to support a seizure under laws that give the authority to CBP, even though false entry declaration is also within the purview of the FDA.<sup>103</sup> In short, “[t]he laws establishing FDA and Customs authority over imports give the two agencies flexibility in seizing violative imports.”<sup>104</sup>

## 2. National Marine Fisheries Service

NMFS has the ability to regulate seafood fraud through its voluntary fee-for-service inspection program, which inspects seafood purchases made by retailers, processors, distributors, and other firms in order to verify their net weight, ensuring that the species is identified correctly and not adulterated.<sup>105</sup> This inspection addresses “economic integrity issues, such as the accuracy of a seafood product’s label, as well as seafood safety issues.”<sup>106</sup> NMFS’s Quality Management Program enables the organization to apply Hazard Analysis and Critical Control Points (HAACP) principles to food safety and economic fraud risks, helping identify measures that can prevent seafood fraud.<sup>107</sup>

Overall, NMFS officials interviewed by GAO reported that they inspect approximately one-third of seafood consumed in the United States.<sup>108</sup> NMFS officials reported that they had used these two functions to identify instances of seafood fraud, especially short-weighting, in both domestic and international facilities.<sup>109</sup> NMFS reported finding species substitution through visual inspection and testing in NOAA’s National Seafood Inspection Laboratory.<sup>110</sup> However, a GAO report in 2009 found that NMFS does not keep a comprehensive record of these inspections.<sup>111</sup> Further, FDA admitted it does not rely on these inspections.<sup>112</sup>

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102. Levine, *supra* note 94.

103. *Id.*

104. *Id.*

105. GAO Report-09-258, *supra* note 32, at 4-5.

106. *Id.* at 2.

107. *Id.* at 10.

108. *Id.* at 13.

109. *Id.*

110. *Id.* at 17.

111. *Id.*

112. *Id.* at 6.

### 3. Food and Drug Administration

While FDA's legal authority comes from the FDCA and other laws briefly highlighted above, the FDA's structure is a creation of administrative order and could, therefore, "be extinguished by the stroke of a pen."<sup>113</sup> Broadly speaking, in terms of addressing food fraud, 21 U.S.C. § 371(a) sets out the general authority to the HHS to promulgate regulations for efficient enforcement of the FDCA.<sup>114</sup> Section 331 specifically prohibits the act or cause thereof of adulterated or misbranded food.<sup>115</sup> Section 343 provides that food is "misbranded" when it is "false or misleading in any particular way," it is "offered for sale under another name," it has a "false or misleading label," or is an "imitation of another food."<sup>116</sup> Further, section 342 provides that a food shall be deemed to be "adulterated" if it "contains any poisonous or deleterious substance which may render it injurious to health . . . if the quantity of such substance in such food does not ordinarily render it injurious to health."<sup>117</sup> Although the latter has not been used to address common types of fish fraud, courts have interpreted this broadly,<sup>118</sup> providing a potential source of authority for FDA to regulate fish fraud.

Next, FDA derives its authority to regulate imports from 21 U.S.C. § 381, which prescribes that a food may be refused entry into the United States if it appears to be manufactured, processed, or packed under unsanitary conditions or if it is adulterated or misbranded.<sup>119</sup> The 2002 Public Health Security and Bioterrorism Preparedness and Response Act (known as the Bioterrorism Act) significantly expanded the authority of FDA to potentially regulate the food system to prevent and address fish fraud.<sup>120</sup> The Act dictates that food processors and handlers must be able to "identify the immediate previous sources and the immediate subsequent recipients of food."<sup>121</sup> The Act exempts restaurants and farms (including fish farms) from these requirements.<sup>122</sup> Thus, "[w]hile

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113. RICHARD A. MERRILL & PETER BARTON HUTT, *FOOD AND DRUG LAW: CASES AND MATERIALS* 20 (Foundation Press ed., 3d ed. 2007).

114. 21 U.S.C. § 371(a) (2012).

115. 21 U.S.C. § 331 (2012).

116. 21 U.S.C. § 343 (2012).

117. 21 U.S.C. § 342 (2012).

118. *See* U.S. v. 88 Cases, More or Less, Containing Bireley's Orange Bev., 187 F.2d 967 (3d Cir. 1951).

119. 21 U.S.C. § 381 (2012).

120. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified as amended at 21 U.S.C. § 350c (2012)).

121. 21 U.S.C. § 350c (2012).

122. *Id.* § 350c(a)(1).

this means seafood handlers must have a record of where they got a shipment of seafood and where they sent it, it does not affect the labeling that accompanies the food.”<sup>123</sup>

The FDA has three responsibilities in the regulation of seafood: first, the FDA maintains a list of seafood names that is intended to help the industry correctly label products; second, it offers guidance to help seafood producers comply; third, FDA administers a HACCP program that requires seafood producers to identify and develop a process to mitigate biological, chemical, and physical hazards that are likely to occur.<sup>124</sup>

First, the FDA maintains a list of seafood names that is intended to help industry correctly label products and ensure FDA inspectors identify mislabeled products. The “Seafood List” compiles the scientific and market names for imported and domestic seafood in order to promote uniformity in the use of FDA-acceptable market names by the industry.<sup>125</sup> In theory, this could be an adept tool at preventing species substitution, but the GAO found this list had not been updated substantially or made readily available to the public.<sup>126</sup> Similarly, FDA also maintains an “import alert” list to detain “entries of imported foods that appear to have significant recurring violations.”<sup>127</sup> However, the GAO found in 2009 that the FDA only physically examined a small amount, and, thus, the list is underutilized.<sup>128</sup>

Second, the primary form of guidance offered by the FDA for seafood producers, as well as state and local governments seeking to create effective programs for seafood safety, is the Food Code.<sup>129</sup> Although the Food Code is not any form of legal authority,<sup>130</sup> it is commonly regarded as the FDA’s best advice for creating “a uniform system of provisions that address the safety and protection of food offered at retail and in food service.”<sup>131</sup> The Food Code does so by

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123. Goetz, *supra* note 10.

124. GAO Report-09-258, *supra* note 32, at 10.

125. *Id.* at 5.

126. *Id.*

127. *Id.* at 18.

128. *Id.* at 19.

129. FDA, FOOD CODE: 2013 RECOMMENDATION OF THE U.S. PUBLIC HEALTH SERVICE (2013) [hereinafter FOOD CODE], *available at*, <http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf>.

130. *Id.* at i.

131. *Food Code 2013*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm374275.htm> (last visited Nov. 24, 2014).

providing “a model to develop or update their own food safety rules and to be consistent with national food regulatory policy.”<sup>132</sup> Certain provisions are directly applicable to seafood. For example, Section 3-402.11 “Parasite Destruction” recommends a freezing process for raw fish.<sup>133</sup> However, the Food Code then subsequently exempts the freezing requirement from shellfish, shucked scallops, several tuna species, any aquaculture fish, and processed fish eggs.<sup>134</sup>

Further, commentators point out other problems with the effectiveness of the Food Code, beyond its exemptions. First, state legislatures have not adopted or implemented the Food Code uniformly.<sup>135</sup> Second, specifically in regards to sushi, the regulations do not require enough information be provided to consumers to allow consumers to make educated decisions.<sup>136</sup> This further underscores the need of a uniform or cooperative federal regulatory effort to address seafood fraud.

Third, FDA’s HACCP program requires seafood producers to identify and develop process to mitigate biological, chemical, and physical hazards that are likely to occur.<sup>137</sup> Every processor is required either to conduct or have conducted a hazard analysis identifying likely safety hazards and establishing preventative measures that the processor can apply.<sup>138</sup> The regulations further provide that every processor shall have and implement a written HACCP plan whenever a hazard analysis reveals one or more food safety hazards that are reasonably likely to occur.<sup>139</sup> The HACCP must be specific to each processing location and each type or group of types of fish.<sup>140</sup>

The HACCP plan can be understood in two steps.<sup>141</sup> The first step under the plan is for the processor to identify and list food safety hazards that are likely to occur.<sup>142</sup> Second, the processor is to list the “critical control points” for each of the hazards identified include those “designed to control food safety hazards introduced inside or outside of the

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132. *Food Code*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/default.htm> (last visited Nov. 24, 2014).

133. *FOOD CODE*, *supra* note 129, at § 3-402.11.

134. *Id.* § 3-402.11(B).

135. *See, e.g.*, Bowman, *supra* note 93, at 511.

136. *Id.* at 512.

137. 21 C.F.R. § 120 et seq. (2012).

138. *Id.* § 123.6(a) (2012).

139. *Id.* § 123.6.

140. *Id.*

141. Bowman, *supra* note 93, at 507 (describing the program as two steps).

142. *Id.*; 21 C.F.R. §§ 123.6(b)-(c).

processing plant environment, which may include hazards that occur before, during, [or] after harvest.”<sup>143</sup> In all, the HACCP plan must include a list of critical limits,<sup>144</sup> monitoring procedures, corrective action plans, verification, and other miscellaneous administrative requirements.<sup>145</sup> The processor is supposed to take the corrective action noted within the HACCP plan if they deviate from the plan.<sup>146</sup> A failure to comply with this renders the product adulterated under section 402(a)(4).<sup>147</sup>

While some commenters proclaim the HACCP to be the best food safety system available,<sup>148</sup> others identify clear shortcomings in the HACCP program.<sup>149</sup> First, there are several issues of validation.<sup>150</sup> Further, there are specific shortcomings of the HACCP plan in addressing seafood fraud: under the HACCP program, FDA inspects domestic firms involved in the production, storage, and distribution of seafood to ensure that their HACCP plans are properly designed and being implemented.<sup>151</sup> However, GAO found in 2009 that FDA agents spend “very little time” looking for seafood fraud.<sup>152</sup> Specifically, only .5 percent of FDA inspections included searching for indicators of seafood fraud between 2003 and 2008.<sup>153</sup> In regards to foreign importer inspections under the HACCP program, the GAO investigation in 2009 found that FDA was inspecting only 61 out of 14,569 registered foreign seafood firms for indicators of seafood fraud.<sup>154</sup> The GAO report found two potential reasons for this, aside from limited resources and a

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143. *Id.* § 342(a)(4); Bowman, *supra* note 93, at 507.

144. “Critical limit means the maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to prevent, eliminate, or reduce to an acceptable level the occurrence of the identified food safety hazard.” 21 C.F.R. § 123.3(c).

145. Bowman, *supra* note 93, at 507; 21 C.F.R. §§ 123.6(c)(3)-(7).

146. *Id.* § 123.7.

147. *Id.* § 123.6(g).

148. William H. Spurbur & Richard F. Stier, *Happy 50th Birthday HACCP: Retrospective and Prospective*, FOODSAFETY MAG. (Dec. 2009), available at <http://www.foodsafetymagazine.com/magazine-archive1/december-2009january-2010/happy-50th-birthday-to-haccp-retrospective-and-prospective/>.

149. Bowman, *supra* note 93, at 508.

150. *Id.* (discusses how validation issues arise when processors fail to follow plan and when a poor initial hazard analysis fails to establish adequate controls for the risks because the risks have not been properly identified).

151. 21 C.F.R. §§ 123.6(b)-(c).

152. GAO Report 09-258, *supra* note 32, at 19.

153. *Id.*

154. *Id.*

perception that this is not a food safety issue.<sup>155</sup> The first is that FDA does not cooperate sufficiently with NMFS inspectors.<sup>156</sup> Second, FDA's HACCP regulations do not include measures to identify and mitigate economic fraud risks.<sup>157</sup>

Overall, even with these major tools for addressing seafood fraud, FDA is not adequately addressing seafood fraud. More specifically, less than 2% of fish imported to the US, within the jurisdiction of FDA, is inspected; although it may be detected incidentally, of that 2 %, only .05% is inspected specifically for seafood fraud.<sup>158</sup> The one exception has been the progress FDA has made against certain importers who regularly adulterate food.<sup>159</sup> Further, funding is limited. Gavin Gibbons, of the National Fisheries Institute, says that FDA has the authority to deal with species substitution and other types of fraud "but they basically don't use it, saying essentially that that's an unfunded mandate."<sup>160</sup> Due to the mismanagement of the Seafood List, and the limitations and voluntary nature of the guidance to industry and states, and the inadequacy of the HACCP program, consumers have little assurance that the seafood they purchase is correctly labeled, which presents an economic, environmental, and food safety problem.<sup>161</sup>

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155. *Id.* at 13 ("FDA directs its field staff to minimize work on economic fraud issues because it considers food safety a higher priority than economic fraud. Nonetheless, FDA's health and safety actions, such as examinations of seafood imports, sometimes uncover seafood fraud incidentally.").

156. *Id.* at 25 ("In addition, these key agencies have not established policies and procedures to promote effective collaboration and better leverage resources to achieve their common goal. As a result, the agencies have not taken advantage of opportunities to share information that could benefit each agency's efforts to detect and prevent seafood fraud, nor have they identified similar and sometimes overlapping activities that could be better coordinated to use limited resources more efficiently and effectively.").

157. *Id.* at 20.

158. *Id.* at 19.

159. Lyndsey Layton, *FDA Pressured to Combat Rising "Food Fraud"*, WASH. POST, Mar 30, 2010, at A01 (Peter Xuong Lam, president of Virginia Star Seafood Corporation of Fairfax, was convicted last year of selling the mislabeled catfish. Ten other individuals and companies were also charged. Lam was sentenced to five years in prison and is barred from importing food into the United States for the next 20 years.).

160. Friedman, *supra* note 3.

161. GAO Report-09-258, *supra* note 32, at What GAO Found.

#### 4. United States Department of Agriculture

USDA regulates country of origin labeling for seafood products.<sup>162</sup> More specifically, much of the regulations focus on the distinction between farmed and wild-caught labels.<sup>163</sup> However, commentators claim USDA did not create a strong labeling program in implementing this law: “[p]rocessed seafood is exempt, leaving more than 50% sold in the U.S. without labels; 90% of fish sellers, such as wholesale markets, are exempt; and no enforcement mechanism exists and violators face paltry fines.”<sup>164</sup> Further, this does not seem to address mislabeling; for example, a 2005 study revealed that “wild-caught” salmon at six of eight New York City stores was actually farm-raised.<sup>165</sup> Although obviously limited in scope, USDA also oversees the food safety of farm catfish.<sup>166</sup>

#### 5. Federal Trade Commission

FTC is responsible for regulating whether seafood is being truthfully advertised, and has authority to regulate the context of seafood labeling, marketing, and advertising.<sup>167</sup> Specifically, FDA and FTC share authority over the misbranding of fish.<sup>168</sup> FTC derives this power from section 5 of the FTC Act.<sup>169</sup> FTC cannot seek civil penalties, but it may issue cease and desist orders.<sup>170</sup> Similar to FDA’s guidance, FTC issues Green Guides that provide interpretive guidance on what might be considered

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162. Passed into law as part of the 2002 Farm Bill, the Farm Security and Rural Investment Act of 2002, the Country of Origin Labeling (COOL Act) requires retailers to provide country-of-origin labeling for fresh beef, and some seafood; Distribution and Marketing of Agricultural Products, 7 U.S.C. § 1638a (2012).

163. 7 C.F.R. § 60.300 (2006).

164. *Seafood Labels*, FOOD AND WATER WATCH, <https://www.foodandwaterwatch.org/common-resources/fish/seafood/labeling/> (last visited Mar. 2, 2015).

165. *Id.*

166. 21 U.S.C. § 601 (2006); GAO Report 11-286, *supra* note 67, at 11.

167. 15 U.S.C. § 41 (2006); *see generally* Jason J. Czarnecki, Andrew Homan & Meghan Jeans, *Self-Declared Seafood Eco-Labels* (Apr. 7, 2014) (unpublished article) (on file with Pace Law School), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2421530](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2421530) (discussing the role of FTC in seafood labeling).

168. GAO Report-09-258, *supra* note 33, at 10; Czarnecki et al., *supra* note 167, at 3.

169. Czarnecki et al., *supra* note 167, at 3; Letter from Representatives Edward Markey and Barney Frank to Jon Leibowitz, Chairman, Federal Trade Commission (Oct. 31, 2011), <http://www.savingseafood.org/imagines/documents/Washington/frank/markey/letter/on/seafood/labeling-1.pdf>.

170. Czarnecki et al., *supra* note 167, at 4.

mislabeling under the FTC Act.<sup>171</sup> However, “while the [Green Guides] provide important interpretive guidance for what may or may not be considered deceptive or misleading and receive deference from the courts, they are non-binding and occupy a deferred-to middle space between legally mandatory eco-labeling requirements and truly voluntary standards.”<sup>172</sup> Nonetheless, cooperation between FDA and FTC in this area is encouraging and has led to successful detection and persecution of seafood fraud in some instances.<sup>173</sup>

#### 6. Collaboration Between Agencies is Limited

Overall, aside from the specific issues addressed above with regard to each agency’s efforts, a common theme in the criticism by the GAO and other commentators is a lack of cooperation among the CBP, NMFS, and FDA to detect and prevent seafood fraud. Specifically, the GAO 2009 report cited a lack of common goals in detecting and preventing fraud, and the agencies often gave similar or overlapping activities that “could be better coordinated to use limited resources more efficiently and effectively.”<sup>174</sup>

This lack of collaboration leads to a lack of information sharing between agencies that could help each better detect and prevent seafood fraud.<sup>175</sup> The 2009 GAO report found that:

CBP collects information on seafood imports, such as product type, product quantity, and country of origin, through the review and examination of imported goods . . . . NMFS collects information in lot inspection reports that identify short-weighted domestic and imported products. FDA collects information on imported seafood products, such as the accuracy of product labeling, though entry document reviews, food label reviews, product examinations, inspections, and laboratory analysis. . . . However, these agencies have not developed procedures to identify or share useful information.<sup>176</sup>

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171. *Id.* at 2-8.

172. *Id.* at 12.

173. *Id.*

174. GAO Report-09-258, *supra* note 32, at 25.

175. *Id.*

176. *Id.* at 26.

By developing procedures for sharing information on importers and products, the GAO report concluded the agencies could increase inspections without additional resources.<sup>177</sup>

Further, the report found inefficient overlaps.<sup>178</sup> This was sometimes because the agencies were “not sure whether [they] can rely on NMFC inspections, in part due concerns about potential conflicts of interest.” This lack of collaboration occurred despite numerous memoranda of understandings between the agencies.<sup>179</sup>

### III. FOOD SAFETY MODERNIZATION ACT’S (FSMA) IMPACT ON THE REGULATION OF SEAFOOD FRAUD

FSMA<sup>180</sup> is perhaps the most significant legislative change to US food regulation since the introduction of the FDCA. In light of a series of well-publicized food illness outbreaks,<sup>181</sup> as well as continuous criticism of the fragmented nature of food safety regulation in the US,<sup>182</sup> Congress passed FSMA to significantly enhance the jurisdiction of FDA and close several notable gaps in the U.S. food safety system.<sup>183</sup>

Broadly speaking, the following are the key provisions that expanded the power of the FDA: first, FSMA gives FDA the ability to mandate food safety measures at the farm level for fruit and vegetable production<sup>184</sup>; second, FSMA authorizes FDA to create HACCPs for all

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177. *Id.* at 32.

178. *Id.* at 28.

179. *Id.* at 28.

180. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 142 Stat. 3885 (2011) [hereinafter FSMA].

181. *See, e.g.*, Mary Clare Jalonick, *Egg Recall Expands to More Than Half a Billion Nationwide*, HUFFINGTON POST (Oct. 21, 2010), [http://www.huffington.com/2010/08/21/egg-recall-expands-to-mor\\_n\\_690019.html](http://www.huffington.com/2010/08/21/egg-recall-expands-to-mor_n_690019.html); Michael Moss & Andrew Martin, *Food Problems Elude Private Inspectors*, N.Y. TIMES, Mar. 5, 2009, [http://www.nytimes.com/2009/03/06/business/06food.html?\\_r=2&hp&](http://www.nytimes.com/2009/03/06/business/06food.html?_r=2&hp&) (explaining how private inspectors inspecting with authority from the FDA “were too late to prevent what has become one of the nation’s worst known outbreaks of food-borne disease in recent years, in which nine are believed to have died and an estimated 22,500 were sickened”).

182. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-212, FOOD SAFETY: EXPERIENCES OF SEVEN COUNTRIES IN CONSOLIDATING THEIR FOOD SAFETY SYSTEMS 24-25 (2005); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-794, FOOD SAFETY: SELECTED COUNTRIES’ SYSTEMS CAN OFFER INSIGHTS INTO ENSURING IMPORT SAFETY AND RESPONDING TO FOODBORNE ILLNESS 2 (2008).

183. Jalonick, *supra* note 181.

184. A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: The FDA Food Safety Modernization Act, Obesity and Deceptive Labeling Enforcement*, 7 J. FOOD L. & POL’Y 135, 137 (2011); 21 U.S.C. 350h (2012).

food processing facilities<sup>185</sup>; and third, FSMA directs the secretary of HHS to “coordinate with the food industry to develop pilot programs to explore methods to more rapidly and effectively identify foodborne illness outbreaks.”<sup>186</sup> Finally, FSMA expands the authority and power of FDA to regulate how food is introduced into interstate commerce.<sup>187</sup>

Relevant to seafood fraud, FSMA provides FDA new authority to regulate imports and to oversee foreign import inspections. For the first time, importers must verify that their foreign suppliers have adequate preventive controls in place to ensure safety, and FDA will be able to accredit qualified third party auditors to certify that foreign food facilities are complying with U.S. food safety standards.<sup>188</sup> FSMA required of FDA several actions within certain timeframes that relate to seafood safety. For example, FSMA required that, within one year, FDA release a guidance document on mitigation strategies for protection against intentional adulteration.<sup>189</sup> It also required FDA to designate high-risk foods for which additional recordkeeping would be “appropriate and necessary to protect public health,” and make this list available to the public.<sup>190</sup> FSMA further mandated FDA update its Fish and Fished Products HACCP Guidance within 180 days.<sup>191</sup> However, FDA only met the last of these three requirements within the established timelines.<sup>192</sup>

Two FSMA provisions may have some chance of addressing seafood fraud more adequately than the current approach. First, the Foreign Supplier Verification Program that, as proposed, would require importers

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185. Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 78 Fed. Reg. 3646, 3805-08 (Subpart C) (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pt. 117), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00125.pdf>.

186. Endres & Johnson, *supra* note 184, at 138; 21 U.S.C. § 204, 124 .

187. Endres & Johnson, *supra* note 184 (explaining that “within the context of a food safety investigation, the FDA now has mandatory recall authority based on a ‘reasonable probability’ that a food is adulterated or misbranded and the exposure or use ‘will cause serious adverse health consequences’ to humans or animals”); 21 USC § 423.

188. Frequently Asked Questions for FMSA, FDA.Gov, <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247559.htm> (last accessed Feb. 1, 2014).

189. 21 U.S.C. § 350i (2011).

190. 21 U.S.C. § 2223 (2011).

191. FSMA § 103(h), Pub. L. No. 111-353, 142 Stat. 3885 (2011).

192. Guidance for Industry on Fish and Fishery Products Hazards and Controls, Fourth Edition; Availability, 76 Fed. Reg. 23823-01 (Apr. 28, 2011) (providing “current information relating to: (1) Potential hazards associated with the known commercial species of vertebrate and invertebrate seafood, (2) potential hazards associated with certain processing operations, (3) HACCP strategies that may be used to control the potential hazards, and (4) other information related to food safety.”).

subject to the rule perform certain risk-based activities to verify that food imported has been produced in a manner that provides the same level of public health protection as that required of domestic food producers.<sup>193</sup> This proposed rule will have little actual effect on addressing seafood fraud because FSMA exempts a facility already required to comply with, and is indeed complying with, FDA's Seafood HACCP Program.<sup>194</sup>

Second, as mentioned above, FSMA requires FDA designate high-risk foods that would subject certain importers of seafood to higher recordkeeping requirements.<sup>195</sup> Further, FSMA specifically requires FDA to direct inspection resources towards facilities that import high identified as high risk.<sup>196</sup> As of 2014, FDA was still working to implement this provision, and seafood had yet to receive such designation.<sup>197</sup> Even if FDA does designate seafood, the practicable effect again seems limited given existing recordkeeping requirements.<sup>198</sup>

More broadly, FSMA has not been viewed in all that favorable of a light, with many unsatisfied food safety advocates claiming it is inadequate to address the problems plaguing the U.S. food system.<sup>199</sup> While it does fill some jurisdictional gaps and provide previously lacking mandatory recall authority, further calls for reform, particularly with seafood, are likely.

#### IV. CONCLUSIONS AND PROPOSALS FOR REFORM

The fragmented approach to regulation has led to a lack of cooperation and insufficient inspections of imported seafood, which constitutes the majority of seafood consumed in the US.<sup>200</sup> Although FDA is the agency with the most significant authority and ability to

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193. Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, 79 Fed. Reg. 58574-01, (summary) (proposed Sept. 29, 2014) (to be codified 21 CFR pt. 1), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-29/pdf/2014-22448.pdf>.

194. 21 U.S.C. § 350g(j) (2011) (providing an exemption for HACCP).

195. 21 U.S.C. § 2223 (2011).

196. 21 U.S.C. § 384c(a)(2) (2011).

197. See Designation of High-Risk Foods for Tracing; Request for Comments and for Scientific Data and Information, 79 Fed. Reg. 6596-01, (Section I, part A) (proposed Feb. 4, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-02-04/pdf/2014-02255.pdf> (requesting public comment on draft approach to identifying high-risk food).

198. See *supra* Part II.B.3.

199. See e.g., Nicholas Obolensky, Note, *The Food Safety Modernization Act of 2011: Too Little, Too Broad, Too Bad*, 17 ROGER WILLIAMS U. L. REV. 887 (2012) (analyzing common criticisms of FSMA).

200. NMFS, *supra* note 1, at 1.

regulate seafood, FDA does not appear to perceive that this is a significant issue and, perhaps consequently, devotes few resources into investigating seafood fraud.<sup>201</sup> Even national calls for funding FSMA mostly emphasize produce-related food illness.<sup>202</sup> The SAFE Seafood Act, proposed by Rep. Ed Markey, offers several proposals that could address some of the problems raised in this comment. More recently, the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud released for comment several proposed strategies for addressing seafood fraud and related issues. This section lastly explores how increasing the emphasis on food safety could build support for such action.

#### *A. SAFE Seafood Act*

Shortly following the Boston Globe investigation into seafood fraud in the greater Boston area, Rep. Ed Markey (D-MA) sent letters to the FDA, NOAA, and the FTC, inquiring about their oversight of seafood fraud.<sup>203</sup> From the response from the agencies, Markey concluded that the “FDA has the lead responsibility for seafood safety and seafood labeling at the Federal level, but NOAA also has significant expertise and resources that could be utilized to address safety concerns.”<sup>204</sup> Further, the responses indicated that the FRC is responsible for regulating whether seafood is being truthfully advertised.<sup>205</sup> To Markey, “the responses to these letters indicated that the agencies could more effectively work together to combat the issue of seafood fraud.”<sup>206</sup>

In response to these shortcomings, then representative, now senator, Edward Markey, D-MA, introduced 113 H.R. 1012, Safety and Fraud Enforcement for Seafood Act, a bill to strengthen federal consumer protection and product traceability with respect to commercially-marketed seafood, and for other purposes, on March 6, 2013.<sup>207</sup>

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201. *See supra* Part II.

202. *See* FDA, PRESIDENT’S FY 2016 BUDGET REQUEST: KEY INVESTMENTS FOR IMPLEMENTING THE FDA FOOD SAFETY MODERNIZATION ACT (FSMA) (Feb. 2, 2015), <http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM432580.pdf> (mentioning produce safety seven times compared to one mention of seafood).

203. H.R. 6200, the Safety And Fraud Enforcement for Seafood Act (Summary), [http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/documents/SAFE\\_Seafood\\_Summary.pdf](http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/documents/SAFE_Seafood_Summary.pdf).

204. *Id.*

205. *Id.*

206. *Id.*

207. Safety And Fraud Enforcement for Seafood Act [hereinafter “SAFE Seafood Act”], H.R. 6200, 112th Cong. (2012) (reintroduced on Mar. 6, 2013 as H.R. 1012).

The so-called SAFE Act contains proposals that may address some of the criticism of the current federal regulatory approach described above. The bill defines “seafood fraud” as the mislabeling or misrepresentation of seafood information required under this Act or other applicable federal laws and regulations.<sup>208</sup> The Act may increase inspections of imported seafood by requiring that FDA inspectors also include seafood fraud in their inspections for seafood safety violations, requiring the Secretary of Commerce and the Secretary of Health and Human Services (HHS) to execute a memorandum of understanding to improve interagency cooperation and establish procedures for increasing the number of local, state, and federal officials authorized to conduct seafood fraud and safety inspections and increasing cooperation between NOAA and FDA on said inspections.<sup>209</sup>

The Act also has the potential to address the problem of standardized lists and data through two provisions: first, the Act requires HHS Secretary, in consultation with Secretary of Commerce, to update and improve its list of standardized names for seafood and ensure that the list is accurate and publicly available.<sup>210</sup> Second, the Act requires data already required to be collected by U.S. fishermen on species, production method (gear type, farmed, or wild), geographic catch area, and weight or number of fish to stay with the seafood through processing, distribution, and sale, and requires equivalent data to accompany imported seafood.<sup>211</sup>

However, the Act has received no subsequent legislative action after being referred to committee.<sup>212</sup> That said, recent news suggests momentum and activism is continuing to build and support is coalescing behind Markey’s bill.<sup>213</sup> For example, Robert Vanasse, the Executive Director of Saving Seafood, a nonprofit group funded by the domestic fishing industry, publicly noted how Congress is in a better position than states and localities to deal with seafood labeling because the “problem isn’t a local fisherman calling one thing something else,” he said.<sup>214</sup> “It’s

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208. *Id.* § 7(3).

209. *Id.* § 2(a).

210. *Id.* § 2(a)(5).

211. *Id.* § 2(c).

212. SAFE Seafood Act, H.R. 1012, 113th Cong. (2013) (referred to committee on Mar. 11, 2013 with no subsequent action).

213. Bruce Smith, *Bills Crack Down on Seafood Labeling: State and U.S. Legislators are Concerned That Consumers are Paying for Fresh and Local but Getting Old and Imported*, PORTLAND PRESS HERALD, Apr. 13, 2014, [http://www.pressherald.com/politics/Bills\\_crack\\_down\\_on\\_seafood\\_labeling\\_.html](http://www.pressherald.com/politics/Bills_crack_down_on_seafood_labeling_.html).

214. *Id.*

imports being called domestic.”<sup>215</sup> Further, Oceana’s ocean advocate Beckie Zisser said the group is hopeful the SAFE seafood bill will be approved, saying it has bipartisan support in Congress and regional support from groups around the nation, including fishermen.<sup>216</sup>

### *B. Presidential Task Force*

In response to the investigations revealing seafood fraud and criticism of the current regulatory approach to addressing it, on June 17, 2014, the White House released a presidential memorandum: “Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud.”<sup>217</sup> The established task force consists of representatives from most of the agencies discussed above and directed them to propose recommendations for implementing a comprehensive framework of integrated programs to combat seafood fraud.<sup>218</sup> In early 2015, the task force recommended several strategies that generally call for increased cooperation between state and local U.S. agencies and international partners, and they also call for a risk-based traceability program.<sup>219</sup>

Given that a lack of cooperation is one of the major reasons the current food safety regime inadequately addresses seafood fraud, a call for cooperation between not only federal agencies, but also between state and local players is encouraging. Overall, the task force shows promise but requires a sustained effort by the President, implementation through executive orders or rulemaking, and funding.<sup>220</sup> Further, the task force appears to be an effort coordinated by NOAA and the NMFS, agencies with which FDA has previously failed to collaborate effectively with regarding seafood import oversight.<sup>221</sup> At the time of this comment’s

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215. *Id.*

216. *Id.*

217. Presidential Memorandum, *Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud*, GPO (Jun. 17, 2014), <http://www.gpo.gov/fdsys/pkg/DCPD-201400464/pdf/DCPD-201400464.pdf>.

218. Recommendations of the Presidential Task Force, 79 Fed. Reg. at 75537.

219. *Id.*

220. Shiva Polefka & Michael Conathan, *Fighting Fraudulent Fishing*, Center for American Progress, CTR. FOR AM. PROGRESS, Oct. 9, 2014, available at <https://www.americanprogress.org/issues/green/news/2014/10/09/98640/fighting-fraudulent-fishing/> (“Addressing these challenges will require sustained pressure from the highest levels to keep interagency partners focused and working constructively together, not simply protecting turf.”).

221. See *supra* Part II.B.3.

publication, task force comments and recommendations were to be finalized sometime in early 2015.<sup>222</sup>

In short, it remains unclear whether the proposals of the Act or the recommendation of the task force can address the problems raised above. Regardless of the policy strategy, this comment proposes that the key to gaining the resources and attention necessary to address the inadequacy of the current federal approach to seafood fraud is for advocates to change the conversation about seafood fraud effects from one of economic or environmental effects to the food safety threat. FDA seems to give seafood fraud backburner treatment based on this mistaken belief this is not a food safety issue. A greater focus on the food safety aspects, particularly the risk to human health, will exert more pressure on FDA to take action using the tools it has so far neglected. Recognizing a uniform approach is unlikely in the near future, this at least could build the coalition of support and energy needed to pass bills like SAFE that can help encourage agency cooperation. Until then, consumers navigating the path from hook to fork may continue to struggle to know when tuna is tuna.

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222. *See* Recommendations of the Presidential Task Force, 79 Fed. Reg. at 75537.