

## From Risk to Regulation: How Safe Are Our Food Deliveries?

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We have a rapidly growing third-party food delivery industry to consumers that is increasing the likelihood for foodborne related illness while potentially adding risk to the food production businesses supplying them. On the edge of these conditions is a Sanitary Food Transportation Act (SFTA) waiver in place that appears to permit this to occur. This is a startling thought but with unregulated third-party deliveries the likelihood of added risk of foodborne illnesses and other forms of sickness will escalate unless we consider revising current rules or mandate new regulation to inspect these services.

The FDA Food Safety Modernization Act (FSMA) rule on Sanitary Transportation of Human and Animal Food is now final, advancing FDA's efforts to protect foods from farm to table by keeping them safe from contamination during transportation. This rule is one of seven foundational rules proposed since January 2013 to create a modern, risk-based framework for food safety. The goal of this rule is to prevent practices during transportation that create food safety risks, such as failure to properly refrigerate food, inadequate cleaning of vehicles between loads, and failure to properly protect food.<sup>1</sup>

The Sanitary Food Transportation Act (SFTA) allows the agency to waive the requirements of this FSMA rule if it determines that the waiver will not result in the transportation of food under conditions that would be unsafe for human or animal health, or contrary to the public interest. The FDA has published three waivers for businesses whose transportation operations are subject to Federal-State or local controls.<sup>1</sup> One of these waivers includes third-party transportation as follows:

Shippers and carriers in operations in which food is transported from the establishment as part of the normal business operations of a retail establishment, such as:

- delivery of the food directly to the consumer(s) by the authorized establishment or a third-party delivery service.<sup>1</sup>

The FDA has taken considerable time and with good intention to establish these rules, however from a reasonable perspective an unregulated area has developed with the allowance of this SFTA Waiver that may not have been foreseen. The SFTA Waiver appears to differentiate that a business is performing their own deliveries, or the third-party is, and therefore they will perform due diligence in this regard due to their obligatory Health Department Regulations. The primary concerns are threefold; third-party deliveries are not required to be inspected, they are not required to follow the health and sanitary procedures of the food preparer providing them the product, and there is no regulation that they must be managed or employed by individuals that maintain training in food handling procedures.

Every day there are dozens of articles outlining occurrences in the marketplace with recalls due to mislabeling, allergen intrusion, extraneous materials, and serious foodborne illness. In the 24 days between March 15, 2018 and April 8, 2018 a news agency known as Food Safety News <http://www.foodsafetynews.com/> reported a minimum of forty nationwide instances of foodborne

illness cases and recalls, and these alerts come from inspection regulated entities. How an unregulated food delivery market will influence foodborne occurrences is concerning and remains to be seen.

The trend of food deliveries by restaurants, catering businesses, supermarkets, and meal kit businesses are on the rise, and many use third-party services as a method of delivery. With labor costs rising and difficulty finding employees the brands delivering their own food is not as common as in the past. Many third-party deliveries are being conducted by privately owned vehicles, trucks, and bicycles. We want delivery services to have good intentions and practical methods for keeping our food safe during transfer, although we are not currently monitoring their actions and current new regulation may have missed the mark for protecting us from the risks that ride alongside this growth. Food deliveries by third-party services to the consumer are not being inspected to protect us, and this is not good news for anyone.

It is everyone's responsibility to keep food safe for consumption, and failure to maintain proper receiving, preparation, and distribution checks along with Hazard Analysis Critical Control Points (HACCP) monitoring can result in recalls, violations, or an illness or poisoning condition. These same rules should apply after the product leaves the preparers facility to a third-party transportation or delivery service providing to the end-user public. However, under the FSTA Waiver no one is asking these drivers to wash their hands, keep their vehicle clean, or hold the food to proper temperatures, and these are all troublesome risks to the public. A food preparation facility must maintain the safe condition of your food up to the point of delivery, however upon leaving their doors the responsibility and liability becomes uncertain. If a third-party delivery company is not regulating themselves it appears no one else is.

When I asked Jason Foscolo at The Food Law Firm (<http://www.foodlawfirm.com/>) who bears the responsibility when a food manufacturing or restaurant supplies goods to a third-party delivery company that delivers to the end-user, he says "prior to giving the product to the delivery company the highest level of care is the responsibility of the food manufacturer or preparer to create and place food into the stream of commerce in a safe condition." Foscolo adds that "not my fault are not defenses," and encourages food preparers to "have strict liability principles and to make the decisions and investment to prepare food properly and also check the product they receive." Jason was unable to comment on the responsibility after the transfer, so the question becomes who is accountable?

Along with deliveries to homes we are also seeing stand-alone vehicles that pick up food from restaurants and sit on the sides of roads with packaged hot and cold food to purchase out of vehicle trunks and back seats and these personal vehicles have no effective methods to keep the food refrigerated or heated to the proper temperatures for any length of time. Without any regulation there are no rules to follow. These scenarios without regulation have increased probability of a foodborne illness, and right now we have no idea where the liability will fall. In a situation where a restaurant is providing the product and then hands off to a third-party delivery service, and someone becomes ill, we just don't know if the liability will fall upon the restaurant that provided the food, or the company delivering, or both. While there is this question of who is responsible, the logic should be; we must modify our current rules or enact new measures to reduce the potential for anyone from becoming ill.

As a foodservice operator you need to consider the risk you may incur when handing your food to a third-party delivery service. Anything can occur after the transfer, from the introduction of allergens, time and temperature failures, introduction of foodborne disease-causing organisms, and chemical transfers. An animal in the vehicle can cause the introduction of a biological or unsanitary hazard. The driver may have poor sanitary and health procedures, The food may fall and open only to be placed back into the containers without anyone's knowledge. What if your delivery company decides to purposely influence damage to your product to affect a poor result upon your business. This may result from how little you paid them to deliver your food, or how poorly they were treated by your staff during the pickup. In many cases you are risking your business to someone you do not employ or know.

In June of 2017, Gizmodo writer Rhett Jones posts: Couple Claims They Ordered Pizza on UberEats But Received... Oh My God What Is That?! The company said the driver has never had complaints and has a rating of 4.8 out of 5. Had he been plotting this dastardly switcheroo with garbage food for months? Was he just waiting for his moment to ruin the appetites of two customers? <sup>2</sup>

The assumption that this cannot not happen may be an irresponsible way to manage the future of your business. Cause to any complaint could be placed on the business that prepared the product, the delivery service, or both. Without a risk assessment on your deliveries you open yourself to the potential of an incident that damages your business reputation.

Delivery of food items have been around for as long as restaurants have been in existence. However, there is a significant difference from where we were ten years ago to where we are in 2018. In the past the practice of delivery to the end-user was more often than not performed by the business itself with the expectation that their own employee has knowledge and maintained all Health Department Regulations. It was normal that a doorbell rings and the person at the door was a representative of the company providing the product you ordered and it can be assumed that this person was being held to the standards of the company in their compliance to make sure their employee has washed their hands, delivered quickly, and they did not do anything questionable to the product during transfer. Today, the expectation that the person delivering is a direct company employee from where your food came from is no longer real or customary and this changes everyone's risk. With this in mind, the SFTA ability to waive the FSMA rule on third-party direct to consumer's food deliveries most certainly increases the potential for foodborne risk because there is no due diligence expectation or Health Department Regulations with these services.

With meal kits, food manufacturers that box these items must maintain some of the highest levels of sanitation of machinery and temperature monitoring required in the industry, but a meal kit subscription does not eliminate risk. Placing an order on-line for a meal kit has a low level of risk from the influence of allergens, chemicals, or pesticides; however foodborne illness from bacteria and viruses remains high when the delivered food is not temperature packaged properly for length of shipment, and/or the package sits outside for any length of time before being refrigerated or cooked.

Shape.com posted in October 2017 asking: Is the Food In Meal Kit Delivery Services Actually Safe to Eat? The articles goes to says "with the overflow of these subscription services, some skeptics are asking about the negative implications—like the environmental impact of packaging and all those boxes piling

up in your lobby. Another icky thought: Is the food really kept at a safe, cold enough temperature during transit? <sup>3</sup>

Not always, according to Dan Flynn and a Rutgers University study. Researchers placed orders for delivery of 169 meal kits, including entrees of 271 meat items, 235 seafood items, 133 game items, and 39 poultry items. What the researchers found raised concerns about pathogens, packaging, labeling and cold-chain integrity. TSU research found the products are likely to be left outside for eight or more hours before they are opened and refrigerated. Only 5 percent require a signature upon delivery. <sup>4</sup>

With varying outdoor temperatures around the country and delivery times that may not coincide with someone being home, packages that are outside 2 or more hours with internal temperature that end up in the Danger Zone (Between 40 degrees and 140 degrees F) it may be safer to just throw these items away when you know they have been kept at an unsafe temperature for too long. While safety is of great concern, most delivery recipients have no knowledge of safety zone issues and go on to consume the food no matter the temperature, thus elevating the risk of foodborne illness to themselves, and especially the very young and the very old.

Speaking with Scott Absher, CEO of ShiftPixy.com who saw a need to fix the high turnover rate in the hospitality industry, Scott says “foodborne concerns are built into their core values.” ShiftPixy offers companies a form of “sharing platform where one client can share employees with another client, all the while being under the employment of ShiftPixy.” ShiftPixy will take “a couple of company people per shift and hire them directly and provide auto insurance, and deliveries can still be provided under the brand name.” During the hiring stage, ShiftPixy “performs due diligence to adapt the brand and regions curriculum in food safety during the hiring process.” This was a heartening conversation to hear Scott speak about food safety concern and principles as part of ShiftPixy’s everyday process. While third-party is still ShiftPixy’s make-up with their foodservice hiring’s, this is an encouraging model to watch.

A 2016 article: The changing market for food delivery by Carsten Hirschberg, Alexander Rajko, Thomas Schumacher, and Martin Wrulich: Online food-delivery platforms are expanding choice and convenience, allowing customers to order from a wide array of restaurants with a single tap of their mobile phone. The business of delivering restaurant meals to the home is undergoing rapid change as new online platforms race to capture markets and customers across the Americas, Asia, Europe, and the Middle East. Although these new Internet platforms are attracting considerable investment and high valuations—already, five are valued at more than \$1 billion—little real knowledge about market dynamics, growth potential, or customer behavior exists. Research from McKinsey, based on a six-month study covering 16 countries around the globe, provides insight into this fast-changing market. Worldwide, the market for food delivery stands at 102 billion US Dollar, or 1 percent of the total food market and 4 percent of food sold through restaurants and fast-food chains. It has already matured in most countries, with an overall annual growth rate estimated at just 3.5 percent for the next five years. <sup>5</sup>

The 20th Annual Food Safety Summit will be in session beginning May 9, 2018. On April 3, 2018, Food Safety News posted an article about the AFSS related to the new FSMA requirements specifically dealing with plant operations: This article included: “there is uncertainty as to what rules applies, what guidance should be followed, and where agency jurisdiction ends. This situation has created an almost dysfunctional regulatory situation for some operators. It’s somewhat of a conundrum for industry to

understand who regulates, what they regulate, how they regulate, and when they regulate. Throw in state regulations and authorities, and the recent Department of Justice interpretation that guidance documents are not enforceable, and it is easy to see the complexity of the situation.”<sup>6</sup>

Where will we go from here is a question all of us must deliberate upon. The reduction of risk with the implementation of oversight in deliveries is a matter of great importance to the health and safety of us all, as well as, the protection of our businesses. If we do not rethink our packaging methods, the person that receives the product for delivery, how the product is handled during transfer including temperature controls, and cleanliness and other items in the vehicle, we will be adding great risk to ourselves and increasing foodborne illness cases across the region. If you agree that regulation of deliveries is not sufficient, now is the time to talk about this.

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