

SEE SPOT EAT, SEE SPOT DIE:  
THE PET FOOD RECALL OF 2007

By  
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*When dogs and cats across the country fell inexplicably ill in March of 2007, their human companions became sick with worry. Veterinarians eventually determined contaminated pet food was the source of these illnesses. Melamine, an industrial chemical used in cookware, furniture, and industrial fertilizers, contaminated wheat gluten manufactured in China and utilized in many pet food brands in the United States and Canada. This contamination led to a recall of more than two hundred brands of pet food—the largest in American history. This comment explores the reasons behind the contamination and the ensuing recall. The author attributes inadequate domestic regulation as the primary reason behind the contamination and notes these inadequacies permitted pet food distributors and manufacturers to skirt responsibility during the recall. The comment highlights changes instituted in light of the recall and suggests further changes to the FDA and its regulations so that this heartbreaking situation can be avoided in the future.*

I. INTRODUCTION.....	2
II. REGULATION OF THE PET FOOD INDUSTRY.....	3
A. <i>Federal Pet Food Regulation</i> .....	3
1. <i>Federal Regulation by the FDA</i> .....	5
2. <i>Regulation by the AAFCO</i> .....	6
III. THE RECALL.....	7
A. <i>Recall Timeline</i> .....	7
B. <i>Reaction of Pet Owners</i> .....	9
C. <i>Reaction During and After Recall by Involved Officials</i> ....	11
IV. CHANGES RESULTING FROM THE RECALL.....	14
V. CHANGES THAT SHOULD BE IMPLEMENTED .....	17
A. <i>What Should Have Been Done During the Recall</i> .....	17
B. <i>Changes That Should Be Made in Light of the Recall</i> .....	21
VI. CONCLUSION .....	26

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## I. INTRODUCTION

Gregory Kontoes did not mean to hurt his best friend.<sup>1</sup> Neither did any of the thousands of others who fed their pets contaminated food in 2007.<sup>2</sup> But they did.

For Kontoes, it was not pretty. His cat George looked like he had been in a fight when he came into his Webster, Massachusetts, home. The big yellow cat was bleeding from the mouth and could barely stand.<sup>3</sup> Kontoes worried when the strange behavior continued and took his cat to the veterinarian.<sup>4</sup> The veterinarian quickly diagnosed the twelve-year-old feline with kidney failure.<sup>5</sup> Treatment did not work, and George was euthanized just a few days later.<sup>6</sup> “He had lost two pounds,” Kontoes said. “He went down quick. It wasn’t something that came on subtle. He was strong as a tiger.”<sup>7</sup> Kontoes later compared the Special Kitty brand cat food he had fed George with the list of recalled food and found it was listed as one of the ninety-one brands of cat food recalled in 2007.<sup>8</sup>

While pet owners felt they had betrayed their friends by feeding them tainted food, the owners themselves may have been betrayed by both the pet food industry and the federal regulatory system. Outsourcing—manufacturing pet food ingredients in China, for instance—coupled with an inadequate domestic system of regulations led to the largest pet food recall in American history. The recalled food, sold mainly by Canada-based Menu Foods Income Fund (Menu Foods), was made with tainted wheat gluten from China.<sup>9</sup> The gluten was contaminated with melamine, an industrial chemical used in cookware, furniture, and industrial fertilizers.<sup>10</sup> The recall was announced March 16, 2007.<sup>11</sup> More than two hundred brands of pet food made with the Chinese wheat gluten were affected.<sup>12</sup>

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<sup>1</sup> Martin Luttrell, *Pet Food Woes Causing Grief: Mystery Illness Suspected by Local Pet Owners, Vets*, *Telegram & Gazette* A1 (Mar. 21, 2007) (available at 2007 WL 5426479).

<sup>2</sup> Different sources confirmed different numbers of pet deaths: Menu Foods reported sixteen pet deaths on March 28, while the Veterinary Information Network reported 104 the same day. Associated Press, *104 Deaths Reported in Pet Food Recall*, 156 N.Y. Times A13 (Mar. 28, 2007). PetConnection.com set up a self-reporting system for pet owners and counted 4,867 deaths as of May 16. *Pet-food recall: The scope of the tragedy*, <http://www.petconnection.com/recall/> (last accessed Nov. 8, 2008).

<sup>3</sup> Luttrell, *supra* n. 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* See also U.S. Food and Drug Administration (USFDA), *Search for Pet Food Recalls*, <http://www.accessdata.fda.gov/scripts/petfoodrecall/> (last updated June, 25, 2008) (One hundred nine brands of dog food were recalled, along with two brands of ferret food and one brand of fish food.).

<sup>9</sup> Kristina Dell, *Unraveling the Pet-Food Mystery*, *Time Magazine*, <http://www.time.com/time/nation/article/0,8599,1607483,00.html> (April 5, 2007) (last accessed Nov. 8, 2008).

<sup>10</sup> *Id.*

<sup>11</sup> Mike Sakal, *Pet Food Recall Came after Close Call for Family Dog*, *East Valley/Scottsdale Trib.* (Apr. 5, 2007) (available at <http://www.eastvalleytribune.com/story/87219>) (last accessed Nov. 8, 2008).

<sup>12</sup> USFDA, *supra* n. 8.

2008]

*SEE SPOT EAT, SEE SPOT DIE*

3

The effects of this recall are particularly tragic because, at least in part, they could have been avoided—and are very likely to happen again. For companies in the pet food business, recalls are inevitable, thus there is no excuse for being caught unaware.<sup>13</sup> In this case, multiple factors, including lax regulations at the federal level and a poor response by the main company involved, came together to create a heartbreaking series of events. But despite the rabid response from American pet owners, the industry and regulations remain largely unchanged, setting the stage for another devastating recall in the future. This comment discusses several different aspects of the 2007 pet food recall. First, it looks at how the Food and Drug Administration (FDA) promulgates and enforces pet food regulations. Second, it examines the timeline of the recall. Third, it considers the importance of pets to their owners, and why this recall caused more of an uproar than other comparable recalls. Fourth, it discusses the changes the domestic and Chinese regulatory authorities have made since the recall. Finally, this comment suggests new strategies for dealing with pet food regulation and recalls.

## II. REGULATION OF THE PET FOOD INDUSTRY

The American pet food industry is a \$13 billion a year business<sup>14</sup> regulated on state and federal levels. The large scale of the business, coupled with flaws in an understaffed regulatory agency, compounded the tragic effects of the pet food contamination.

### A. Federal Pet Food Regulation

The FDA, a federal agency within the Department of Health and Human Services,<sup>15</sup> works to promote and protect the public health.<sup>16</sup> The FDA regulates food ingredients, medical devices, and drugs, among other things, for use by the American public. It is also in charge of regulating animal food and feed.<sup>17</sup> Within the FDA, the Center for Veterinary Medicine (CVM) regulates “animal drugs, animal feeds, food additives and ingredients.”<sup>18</sup> The CVM is mostly concerned with ensuring that milk and meat for human

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<sup>13</sup> See Richard S. Levick & Gene Grabowski, *Contaminant at the Gate: Crisis Communications in the Age of China Recalls*, 7-3 Mealey's Prod. Liab. & Risk 26 (2007) (noting that “[for] some industries, product recalls are inevitable, which means there’s no excuse for being unprepared to master their myriad public challenges”).

<sup>14</sup> Claudia H. Deutsch, *Makers of Pet Foods Voice Little Worry*, 153 N.Y. Times A40 (Dec. 26, 2003).

<sup>15</sup> USFDA, *FDA Organization*, <http://www.fda.gov/opacom/7org.html> (last accessed Nov. 8, 2008).

<sup>16</sup> USFDA, *FDA's Mission Statement*, <http://www.fda.gov/opacom/morechoices/mission.html> (last accessed Nov. 8, 2008).

<sup>17</sup> USFDA: Center for Veterinary Medicine, *CVM and Animal Food, Feed Ingredients, and Additives*, [http://www.fda.gov/cvm/animalfeed\\_info.htm#ingredients](http://www.fda.gov/cvm/animalfeed_info.htm#ingredients) (last updated Nov. 20, 2007) (last accessed Nov. 8, 2008).

<sup>18</sup> *Id.*

consumption are not tainted, and “because of that work and the cooperative efforts of all FDA employees, the United States can boast the safest food supply in the world.”<sup>19</sup> The organization is concerned with ensuring food and drugs are safe for animal consumption, but only so far as the animals’ consumption would make the animal byproducts unsafe for human consumption.<sup>20</sup>

Pet food is regulated under the Federal Food, Drug and Cosmetic Act (FFDCA).<sup>21</sup> The FFDCA prohibits adulterated or misbranded pet food.<sup>22</sup> According to the CVM, adulterated food is “food packaged or held under unsanitary conditions, food or ingredients that are filthy or decomposed, and food that contains any poisonous or deleterious substance.”<sup>23</sup> Misbranded food is food that has a “false or misleading label,” or does not list the name and location of its manufacturer.<sup>24</sup> In sum, pet food manufacturers are required to make food that is safe, wholesome, is not contaminated and is properly labeled.<sup>25</sup>

The problems with the regulatory system of pet food in America are manifold. First, pet food safety is not treated with the same seriousness as the safety of food for human consumption, despite language in the FFDCA that holds both types of food to the same standard. Second, the FDA is understaffed and under funded, so as to make it incapable of regulating pet food effectively. Further, the FDA does not have the power to issue a recall on contaminated food as it does with defective drugs.<sup>26</sup> In addition, the Association of American Feed Control Officials (AAFCO)<sup>27</sup> has no authority to enforce the regulations that are in place.<sup>28</sup> If the 2007 recall effected any positive changes, it is that it forced some reconsideration of the regulatory scheme and brought public attention to a faulty system.

### 1. Federal Regulation by the FDA

While the FFDCA regulations apply to food for both human and animal consumption,<sup>29</sup> the standards for human consumption are higher than those

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<sup>19</sup> USFDA: Center for Veterinary Medicine, *Structure and Responsibilities*, <http://www.fda.gov/cvm/structtxt.html> (last updated Aug. 10, 1999) (last accessed Nov. 8, 2008).

<sup>20</sup> *Id.*

<sup>21</sup> 21 U.S.C. § 321 *et seq.* (2006).

<sup>22</sup> 21 U.S.C. § 331(a).

<sup>23</sup> USFDA: Center for Veterinary Medicine, *Animal Food (Feed) Product Regulation*, <http://www.fda.gov/cvm/prodregulation.htm> (last updated Oct. 25, 2005) (last accessed Oct. 12, 2008); 21 U.S.C. §342 (a)(5).

<sup>24</sup> *Id.*; 21 U.S.C. §§ 343(a), (e).

<sup>25</sup> Sen. Subcomm. of the Comm. of Appropriations, *Examine the Current Pet Food Recall*, 110th Cong. 19 (Apr. 12, 2007) (testimony of Dr. Stephen Sundlof, director, Center for Veterinary Medicine).

<sup>26</sup> Richard S. Levick, *Run to the Crisis: The Food Industry Must Confront Communications Problems Head-On*, 1-4 Mealey’s Food Liab. 26 (July 2007).

<sup>27</sup> The AAFCO is a non-governmental organization composed of FDA, CVM, and state officials. *See infra* n. 47.

<sup>28</sup> USFDA, *CVM Update*, [http://www.fda.gov/cvm/cvm\\_updates/aafco\\_mou.htm](http://www.fda.gov/cvm/cvm_updates/aafco_mou.htm) (Nov. 19, 2007) (last accessed Nov.8, 2008).

<sup>29</sup> 21 U.S.C. § 321(f).

2008]

*SEE SPOT EAT, SEE SPOT DIE*

5

regulating animal consumption. In reality, “animal feeds provide a practical outlet for plant and animal byproducts not suitable for human consumption.”<sup>30</sup> Clearly, regulatory agencies do not treat pet food with the same level of concern as they treat food for human consumption.

Further, unlike a case of a food-borne illness affecting humans, contamination of pet food does not warrant the involvement of the Centers for Disease Control and Prevention, leaving the entire burden on the FDA.<sup>31</sup> The FDA could spare only four hundred employees to deal with the recall, a “huge number” for the understaffed agency<sup>32</sup> with only nine thousand employees nationwide.<sup>33</sup> Those employees had to field more than twelve thousand calls from affected pet owners just twenty-two days into the recall.<sup>34</sup>

At the same time, “the Food and Drug Administration and our federal government [had] no power to recall poisoned and contaminated products. Most Americans are shocked to learn that, but it’s a fact.”<sup>35</sup> The FDA cannot issue a recall on tainted food but could issue a press release to pressure the company to issue a recall or request the company to issue such a recall.<sup>36</sup> However, these limited steps do not ensure consumers are protected from dangerous products. Such was the case when the FDA started to investigate reports of salmonella at a peanut butter plant in Georgia in 2005. Company managers refused to provide the requested documents, and the inspectors simply left because they could do nothing further.<sup>37</sup> The contamination resulted in four hundred people in forty-four states becoming sick in August, 2006.<sup>38</sup>

A potentially fatal flaw in the FDA’s regulatory system is that importers do not have to notify the FDA about products that fail private laboratory tests because of contamination.<sup>39</sup> While importers are required to submit a

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<sup>30</sup> USFDA: *CVM and Animal Food, Feed Ingredients, and Additives*, *supra* n. 18.

<sup>31</sup> Julie Schmit & Elizabeth Weise, *Pet-food Death Toll Unlikely to be Known: FDA Staff Too Small for Full Investigation*, USA Today B1 (July 23, 2007).

<sup>32</sup> *Id.*

<sup>33</sup> USFDA: *FDA Overview*, <http://www.fda.gov/oc/opacom/fda101/sld015.html> (last accessed Nov. 8, 2008).

<sup>34</sup> Andrew C. von Eschenbach, FDA Commissioner, *State of the FDA* (Keynote Address at the 50th Food and Drug Law Institute Annual Conference, Bethesda, Md., April 12, 2008), in 62 Food and Drug L.J. 423, 426 (2007).

<sup>35</sup> Dick Durbin, Senator Dick Durbin’s Official Podcast: Senator Durbin discusses food safety (Ill., May 3, 2007) (podcast available on iTunes); *see also* Gina Spadafori, PetConnection Blog, *Statement of Facts . . . and More Spin to Come* <http://www.petconnection.com/blog/?s=friday+afternoon> (June 8, 2007) (Internet blog summarizing Senator Dick Durbin’s podcast) (post no longer available).

<sup>36</sup> 21 C.F.R. § 7.45 (2006); *see also* Levick & Grabowski, *Contaminant at the Gate*, *supra* n. 13 at 3 (discussing FDA’s need to increase communication).

<sup>37</sup> Elizabeth Williamson, *FDA Was Aware of Dangers to Food: Outbreaks Were Not Preventable, Officials Say*, Washington Post A1 (April 23, 2007) (available online at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/22/AR2007042201551.html>) (last accessed Nov. 8, 2008).

<sup>38</sup> *Id.*

<sup>39</sup> Julie Schmit, *Loophole Keeps FDA in the Dark: Private Labs Don’t Have to Tell When Food Imports Fail*, USA Today B1 (Nov. 19, 2007).

passing laboratory test to the FDA before the product will be allowed into the United States, an unscrupulous importer can go from one laboratory to another until it gets a passing test.<sup>40</sup> This is not news to the FDA—the Administration proposed a regulation in 2004 that would require importers to submit all test results to the FDA but did not follow through on the proposal.<sup>41</sup>

Once a manufacturer incurs a safety violation, that manufacturer's products are put on "import alert" by the FDA.<sup>42</sup> The FDA automatically detains import alert products and does not release them until they pass the tests at a private laboratory.<sup>43</sup> Importers are not likely to voluntarily report failing tests to the FDA because products on import alert must have five consecutive clean shipments to get off import alert.<sup>44</sup> Reporting a failed shipment would break the record of clean shipments and keep the product on import alert.<sup>45</sup> Getting off import alert is important to manufacturers because foods are then subject only to regular FDA review, which covers only one percent of imported food.<sup>46</sup>

## 2. Regulation by the AAFCO

AAFCO, a non-governmental organization composed of FDA, CVM, and state officials, regulates most pet food.<sup>47</sup> As the FDA explained, "continued partnership with AAFCO is vital to the continued regulation of pet food products because the FDA has limited enforcement resources that are focused on human food safety issues."<sup>48</sup> This delegation of power appears to be a good idea because, as Representative Henry Waxman noted, the FDA is understaffed and lacks authority to protect food for human consumption, let alone pet food.<sup>49</sup> However, AAFCO has no authority to enforce FDA regulations<sup>50</sup> and does not perform any tests on pet food.<sup>51</sup>

Despite the existence of multiple tiers of seemingly specialized regulatory bodies,<sup>52</sup> it goes without saying that sick and dying animals are

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Schmit, *Loophole*, *supra* n. 39.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Association of American Feed Control Officials, *Purpose and Function of AAFCO*, <http://www.aafco.org> (last accessed Nov. 8, 2008).

<sup>48</sup> Sharon Benz, *FDA's Regulation of Pet Food*, 16 FDA Newsltr. 4 (Jan./Feb. 2000) (available at [http://www.michigan.gov/documents/FDAsRegulationofPetFood\(Benz2000\)\\_125166\\_7.pdf](http://www.michigan.gov/documents/FDAsRegulationofPetFood(Benz2000)_125166_7.pdf)) (last accessed Nov. 8, 2008).

<sup>49</sup> Elizabeth Weise, *Rep: 'Broken' FDA Can't Keep Food Safe*, USA Today B1 (April 24, 2007).

<sup>50</sup> David Syverson, *How Pet Food is Regulated*, AAFCO Fact Sheet, available at [http://www.aafco.org/Portals/0/Public/petfood\\_regulations.pdf](http://www.aafco.org/Portals/0/Public/petfood_regulations.pdf) (last accessed Nov. 8, 2008).

<sup>51</sup> Ann N. Martin, *Food Pets Die For: Shocking Facts about Pet Food* 85 (NewSage Press 1997).

<sup>52</sup> States also regulate pet food. Syverson, *How Pet Food is Regulated*, *supra* n. 50. However, given the nationwide nature of the 2007 recall, a look at individual states' regulatory schemes

2008]

*SEE SPOT EAT, SEE SPOT DIE*

7

not the byproducts of an effective regulatory system.<sup>53</sup>

### III. THE RECALL

Menu Foods manufactured most of the food affected by the recall.<sup>54</sup> The affected products were pet treats and wet pet food products made with contaminated wheat gluten imported from China.<sup>55</sup>

#### A. Recall Timeline

The recall was announced on March 16, 2007,<sup>56</sup> but officials at Menu Foods knew their products may be killing animals almost a month earlier.<sup>57</sup> On February 20, Menu Foods learned that three cats may have gotten sick from its cat food but was not concerned due to evidence that two of the cats may have become sick from antifreeze.<sup>58</sup> Then, on March 2, three other cats became sick after Menu Foods taste tests.<sup>59</sup> Four days later, on March 6, Menu Foods stopped using the supplier ChemNutra, a company that obtained wheat gluten from China.<sup>60</sup>

On March 8, ChemNutra quarantined its inventory after learning that the imported wheat gluten was contaminated.<sup>61</sup> When Menu Foods conducted another test of its cat food on March 12, nine tester cats died.<sup>62</sup> Four days later, Menu recalled more than sixty million cans and pouches of pet food manufactured between December 3, 2006, and March 6, 2007.<sup>63</sup>

On March 20, the FDA confirmed fourteen food-related pet deaths, and Menu Foods announced the recall on its Web site and through press releases.<sup>64</sup> Initial tests indicated that the cat food contained rat poison.<sup>65</sup>

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would not prove useful or conclusive. As AAFCO said, "the FDA is the agency which is in the best position to deal with it because its authority crosses all lines." *Id.*

<sup>53</sup> See generally Justine S. Patrick, *Deconstructing the Regulatory Façade: Why Confused Consumers Feed Their Pets Ring Dings and Krispy Kremes* (discussing the problems of pet food regulation) (available at <http://leda.law.harvard.edu/leda/data/784/Patrick06.html>) (last accessed Nov. 8, 2008).

<sup>54</sup> Dell, *Unraveling the Pet-Food Mystery*, *supra* n. 9.

<sup>55</sup> *Id.*

<sup>56</sup> Menu Foods Income Fund, *Menu Foods Income Fund Announces Precautionary Dog and Cat Food Recall*, Press Release, (March 16, 2007) (available at [http://www.menufoods.com/recall/Press\\_Recall\\_03162007.htm](http://www.menufoods.com/recall/Press_Recall_03162007.htm)) (last accessed Nov. 8, 2008).

<sup>57</sup> *How Pet Food Recall Unfolded*, USA Today (Apr. 5, 2007) (available at [http://www.usatoday.com/money/industries/2007-04-05-petfood-timeline-usat\\_n.htm](http://www.usatoday.com/money/industries/2007-04-05-petfood-timeline-usat_n.htm)) (last updated Apr. 11, 2007) (last accessed Nov. 8, 2008).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *How Pet Food Recall Unfolded*, *supra* n. 57; Menu Foods Income Fund, *Menu Foods Income Fund Announces Precautionary Dog and Cat Food Recall*, *supra* n. 56.

<sup>64</sup> *How Pet Food Recall Unfolded*, *supra* n. 57.

<sup>65</sup> *Id.*

Later, several lab tests detected the presence of melamine in the pet food.<sup>66</sup>

Ten days after the recall was made public, the FDA confirmed that melamine caused the contamination and restricted wheat gluten importation from China's Xuzhou Anying Biological Technology Development.<sup>67</sup> The same day, Menu Foods CEO Paul Henderson said, "We are angered that a source outside of the company has apparently adulterated the product, causing this regrettable loss."<sup>68</sup>

On April 2, ChemNutra recalled wheat gluten it had sold to three pet-food manufacturers and one pet-food distributor.<sup>69</sup> On April 5, Menu Foods expanded its recall, and the FDA said all tainted imported gluten had been tracked.<sup>70</sup> But Menu Foods expanded the recall on April 10.<sup>71</sup> It was not until April 24, after melamine was found in feed for fish, hogs, and chickens, that the FDA said it would test imported additives for melamine.<sup>72</sup>

On May 9, federal officials disclosed that the tainted ingredient was not even wheat gluten; instead, it was actually mislabeled wheat flour, a less-expensive material substituted to save money.<sup>73</sup> The flour had been mixed with melamine, to make it appear more like protein-rich wheat gluten. Adding melamine would increase the flour's nitrogen level, which is what manufacturers look at to determine the product's protein level.<sup>74</sup>

It is unknown how many pets died as a result of these tainted products. "The sad truth is that we will probably never know with any confidence the number of animals that fell victim to the pet-food poisoning," FDA spokeswoman Julie Zawisza said.<sup>75</sup> The FDA reported sixteen deaths, but "that number is meaningless because so many reports [of sick or dead pets] weren't investigated."<sup>76</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *How Pet Food Recall Unfolded*, *supra* n. 57.

<sup>71</sup> *Id.*

<sup>72</sup> *China and Food Safety*, Washington Post D1 (Dec. 12, 2007) (available online at <http://www.washingtonpost.com/wp-dyn/content/story/2007/12/12/ST2007121200087.html>) (last accessed Nov. 8, 2008).

<sup>73</sup> *After the Pet Food Contamination*, N.Y. Times (May 7, 2007) (available online at [http://www.nytimes.com/2007/05/07/opinion/07mon2.html?\\_r=1&n=Top/Reference/Times%20Topics/Subjects/P/Pet%20Food%20Recall&oref=slogin](http://www.nytimes.com/2007/05/07/opinion/07mon2.html?_r=1&n=Top/Reference/Times%20Topics/Subjects/P/Pet%20Food%20Recall&oref=slogin)) (last accessed Nov. 8, 2008).

<sup>74</sup> Julie Schmit & Elizabeth Weise, *Flour, in Disguise, is the Culprit; Some of Tainted Feed Went to Fish Farms*, USA Today B1 (May 9, 2007); Paul K. Henderson, Menu Foods Annual General Meeting, *Remarks from President & CEO* (July 29, 2007) (available online at [http://www.menufoods.com/ir/docs/Menu%20AGM%20speech%20FINAL%20for%20WEB%20\\_JULY%203\\_%202007.pdf](http://www.menufoods.com/ir/docs/Menu%20AGM%20speech%20FINAL%20for%20WEB%20_JULY%203_%202007.pdf)) (last accessed Nov. 8, 2008). Menu Foods requires its wheat gluten to contain no less than seventy-five percent protein. *Id.* Melamine allowed for wheat flour to pass for wheat gluten. *Id.* While flour was the real culprit, commentators continued to call it wheat gluten.

<sup>75</sup> Schmit & Weise, *Pet-food Death Toll Unlikely to be Known*, *supra* n. 31.

<sup>76</sup> *Id.*

### B. Reaction of Pet Owners

For countless Americans, pets are more than just cats and dogs—they are part of the family.<sup>77</sup> Owners often go out of their way to keep their pets happy and healthy, which means buying the best, and often most expensive, pet food.<sup>78</sup> So when those family members got sick or died from that pet food, owners responded with a vengeance.<sup>79</sup>

By April 6, 2007, the FDA had received more than twelve thousand complaints from concerned pet owners—the FDA normally receives only five thousand complaints in an entire year.<sup>80</sup> Earlier recalls of food for human consumption, such as peanut butter or spinach contaminated with salmonella and *E. coli*, did not garner such a response.<sup>81</sup> Pet owners took to the Internet, using web logs to keep track of the recall and share their stories.<sup>82</sup> Bloggers started keeping running logs of pet deaths, which may paint a more accurate picture of the scope of the damage than the official count.<sup>83</sup> For example, while the FDA and Menu Foods reported only sixteen confirmed deaths from tainted food, bloggers reported more than four thousand food-related deaths less than three months after the recall was announced.<sup>84</sup>

Pet owners also took to the courts, filing class-action lawsuits against domestic and Chinese officials. As Chicago lawyer John Blim editorialized, “when laws designed to prevent such crises fail, citizens properly turn to the courts.”<sup>85</sup> Menu Foods faced more than a hundred lawsuits as a result of the contaminated food.<sup>86</sup> Class action plaintiffs filed suit in San Francisco

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<sup>77</sup> Sen. Subcomm. of the Comm. of Appropriations, *supra* n. 25 at PPC (statement of Senator Herb Kohl).

<sup>78</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* (expressing the anger many pet owners felt).

<sup>80</sup> von Eschenbach, *State of the FDA*, *supra* n. 34.

<sup>81</sup> *See* United States Department of Agriculture: Food Safety and Inspection Service, *Washington Firm Recalls Ground Beef for Possible E. coli O157:H7 Contamination*, [http://www.fsis.usda.gov/news\\_events/Recall\\_014\\_2007\\_Release/index.asp](http://www.fsis.usda.gov/news_events/Recall_014_2007_Release/index.asp) (recall announced March 2, 2007) (last accessed Nov. 8, 2008); *see also* Carl Nagin, *How Safe Is Your Salad? New Industry Rules for Leafy Greens Aim to Protect Consumers From E.coli. Farmers and Conservationists Question the Science Behind the Standards*, San Francisco Chron. P-12 (Dec. 16, 2007) (available online at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/12/16/CMMQSSF81.DTL> (last accessed Nov. 8, 2008) (discussing the spinach recall of August 2006).

<sup>82</sup> *See e.g.*, <http://www.itchmo.com/go/tagged/pet-food-product-recall> (site no longer available); <http://menufoodsvictims.blogspot.com/2007/04/simbas-story.html> (blogs listing names and stories of pets who died due to contaminated pet food) (last accessed Nov. 8, 2008).

<sup>83</sup> *See generally* Associated Press, *104 Deaths Reported*, *supra* n. 2 (discussing the increase in reports of kidney failure to the Veterinary Information Network).

<sup>84</sup> *See e.g.*, Great Dane Angel Network, *Fears Grow On Pet food*, <http://www.daneangelnetwork.org/foodrecallupdate.htm> (last accessed Nov. 8, 2008) (citing a Sacramento Bee story stating that petconnection.com reported more than four thousand pet deaths).

<sup>85</sup> John Blim, *Hope Lies in Courts*, USA Today A11 (April 9, 2007).

<sup>86</sup> Menu Foods Income Fund Press Release, *Settlement Agreement In U.S. Pet Food Multi-district Litigation Receives Preliminary Approval*, <http://menufoods.com/ir/docs/>

seeking relief under Chinese and state laws.<sup>87</sup> A breeder in Texas filed suit against an American manufacturer whose contaminated food was labeled “Made in America.”<sup>88</sup> A California woman filed suit against an American dog-treat manufacturer.<sup>89</sup>

Pet owners have proven themselves successful in the courtroom in the past. A 2005 recall resulted in a \$3.1 million settlement for animal lovers when a fungal contamination resulted in a few dozen pet illnesses and deaths across the country.<sup>90</sup> The results of litigation from the 2007 recall may be far worse for the industry, given the higher number of pet deaths.<sup>91</sup> On May 30, 2008, Menu Foods announced that the United States District Court for the District of New Jersey preliminarily approved a \$24 million settlement agreement to end the one hundred plus lawsuits filed against the company.<sup>92</sup> The court approved the settlement agreement on October 14, 2008.<sup>93</sup> This settlement, however, is seen by some pet owners as “a slap in the face.”<sup>94</sup> Indeed, with more than six thousand claimants, any monetary

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Menu%20Foods%20Press%20Release.pdf (May 30, 2008).

<sup>87</sup> *Quintana v. Binzhou Futian Biological Tech. Co.*, No. CG07-465924, Calif. Super., San Francisco Co. (referenced in *Pet Owners Sue Chinese Company Under China's Consumer Protection Law*, 1-6 Mealey's Food Liability 8 (2007)).

<sup>88</sup> *Snell v. Dick Van Patten's Natural Balance Pet Foods Inc.*, No. 6:07cv00066, S.D. Texas (referenced in *Breeder Files Complaint in Texas, Alleges Pet Food Killed Dogs*, 1-6 Mealey's Food Liability 9 (2007)). Improper labeling is one problem that needs to be fixed by the regulatory agencies and is discussed in the fourth and fifth sections.

<sup>89</sup> *Carver v. Del Monte Foods Co.*, No. 2:07-cv-654, E.D. Calif. (referenced in *California Woman Files Class Action Against Dog Treat Manufacturers*, 7-6 Mealey's Litig. Rep. Class Actions 10 (2007)).

<sup>90</sup> CBS News, *Tainted Pet Food Maker Pays Settlement: Diamond Agrees to Pay \$3.1M After Products Containing Aflatoxin Linked to Dog Deaths, Illnesses*, <http://www.cbsnews.com/stories/2008/01/04/business/main3675445.shtml> (Jan. 5, 2008) (last accessed Nov. 8, 2008).

<sup>91</sup> See CBS News, *Pet Food Recall*, <http://www.cbsnews.com/stories/2005/12/31/earlyshow/living/petplanet/main1172326.shtml> (Dec. 31, 2005) (last accessed Nov. 8, 2008) (discussing body count from previous recall).

<sup>92</sup> Menu Foods Income Fund, *Settlement Agreement*, *supra* n. 86 (“The Settlement Agreement creates a Settlement Fund of US \$24 million that will allow a potential recovery of up to 100% of all economic damages incurred by pet owners, subject to certain limitations.”). The company makes no mention of the emotional or psychological damage incurred by pet owners. *Id.* See also Patrick O'Donnell, *Local Pet Owners to Get Compensation for Contaminated Food* The Plain Dealer (June 25, 2008), <http://www.cleveland.com/news/plaindealer/index.ssf?/base/news/121438278265780.xml&coll=2> (discussing the twenty-four million settlement and the lack of damages for emotional harm) (last accessed Nov. 8, 2008).

<sup>93</sup> Geoff Mulvihill, *Judge OKs \$24 Million for Pet Food Recall*, Associated Press (Oct. 14, 2008) (available online at <http://ap.google.com/article/ALeqM5jWoj-xA1xcoCq8oQAb5janun5ZpQD93QGm03>) (last accessed Nov. 8, 2008).

<sup>94</sup> Lisa Wade McCormick, *Pet Owners Not Thrilled with Poison Food Settlement: Despite Compensation, Many Dog, Cat Owners Still Wary of Commercial Pet Food*, Consumer Affairs, [http://www.consumeraffairs.com/news04/2008/05/pet\\_food\\_recalls97.html](http://www.consumeraffairs.com/news04/2008/05/pet_food_recalls97.html) (May 31, 2008) (last accessed Nov. 8, 2008). One pet owner estimated that each person will only take away \$64 from the settlement. Another said, “It’s a sad state of affairs and just goes to prove that until pet owners who really care about their pets push government for stronger laws, these companies will continue to hold our pets at little or no regard.” Pet owners had until November 24, 2008, to file claims under the settlement; claims have averaged \$1,500. Mulvihill, *Judge OKs \$24 Million*

2008]

*SEE SPOT EAT, SEE SPOT DIE*

11

compensation for individual pet owners may be quite low.<sup>95</sup> One pet owner responded to the settlement agreement by saying:

There is no amount of money that will ever make this right in my home . . . . Whether it is one penny or the close to three thousand dollars for my vet – nothing will erase the memory of my cats struggling with trying to stand on their own, hanging over the water bowl, and hanging onto life for months as Smudge (her cat) did and now she struggles with chronic kidney damage and all because I fed them Association of American Feed Control Officials (AAFCO) approved cat food.<sup>96</sup>

Any changes made to the pet food industry or regulations can undoubtedly be traced back to the reaction from pet owners. Were it not for response of pet owners, this recall may have been forgotten almost as quickly as it began.

### *C. Reaction During and After Recall by Involved Officials*

In the middle of the recall, the Commissioner of the FDA stated at the Food and Drug Law Institute's annual conference that the "FDA's work on the contaminated pet food represents the agency at its best."<sup>97</sup> That work involved "immediately ramping up a massive investigation."<sup>98</sup> "Some four hundred FDA employees and experts across the nation . . . [inspected] manufacturing facilities and warehouses, [conducted] trace backs, [tested] product samples and [responded] to complaints from pet owners."<sup>99</sup>

Commissioner von Eschenbach said the FDA "acted instantaneously, with notification, and did every thing in its power to protect animals. Most likely, we helped save hundreds of thousands of animals' lives . . . ."<sup>100</sup> Paraphrasing John F. Kennedy, von Eschenbach said, "I would ask you to consider this question: What does FDA require to maintain its position at the forefront of public health? I ask further, 'What can *you* do to help FDA accomplish its public health mission?'"<sup>101</sup>

In China, the heads of departments involved with food safety problems were forced to take personal responsibility in a much more drastic manner. The top official of the State Food and Drug Administration, Zheng Xiaoyu, was executed on July 10, 2007, after being convicted of approving untested

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*for Pet Food Recall, supra* n. 93.

<sup>95</sup> United Press International, *Tainted Pet Food Claims Near 6,000*, [http://www.upi.com/Top\\_News/2008/08.26/Tainted\\_pet\\_food\\_claims\\_near\\_6000/UPI-59351219779958](http://www.upi.com/Top_News/2008/08.26/Tainted_pet_food_claims_near_6000/UPI-59351219779958) (Aug. 26, 2008) (last accessed Nov. 8, 2008). Recovery for each pet owner is limited by the settlement agreement to up to nine hundred dollars for veterinary bills and burial expenses.

<sup>96</sup> McCormick, *Pet Owners Not Thrilled, supra* n. 94.

<sup>97</sup> von Eschenbach, *State of the FDA, supra* n. 34.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 427.

<sup>101</sup> *Id.* (emphasis in original).

medicine.<sup>102</sup> Xiaoyu's second-in-command Cao Wenzhuang was also sentenced to death for accepting bribes, but he was given a two-year reprieve that will likely result in life in prison.<sup>103</sup> Zheng's execution is a dramatic illustration of China's attempt to remedy its troubled exportation history.<sup>104</sup>

In contrast, Menu Food's CEO Paul Henderson will lose only part of his salary. He is "sharing the pain" felt by his company, and will take a twenty-two percent pay cut to help cover the losses from the recall.<sup>105</sup> Menu Food's senior executives will take a seventeen percent pay cut, and its Board of Directors will lose twenty percent.<sup>106</sup> Bloggers seem skeptical of Henderson's "sacrifice" in this situation—he earned more than \$724,000 in salary and bonuses in 2007.<sup>107</sup>

Despite China's drastic action, the outlook for the country's food safety seems bleak: Yan Jiangying, the State Food and Drug Administration spokeswoman, said, "China is a developing country and our supervision of food and drugs started quite late and our foundation for this work is weak, so we are not optimistic about the current food and drug safety situation."<sup>108</sup> The country has already shut down problematic factories and implemented new measures to ensure food safety.<sup>109</sup>

China's Health Ministry spokesman Mao Qun'an echoed the same sentiment. He admitted the country faces "severe challenges" in ensuring food safety, but also pointed the finger at foreign media.<sup>110</sup> "The question of food safety is a problem the whole world faces. . . . Foreign media are using irrelevant cases or just a few cases to make the safety issue much bigger than it is. . . ."<sup>111</sup> That argument is hard to accept, however, given the

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<sup>102</sup> *Amid Food Safety Recalls, China Executes Former Top Food, Medicine Official*, 1-5 Mealey's Food Liability 14 (2007) (official accepted \$832,000 in cash and gifts for approving the medicines, six of which turned out to be fake). See also Joseph Kahn, *China Quick To Execute Drug Official*, N.Y. Times C1 (July 11, 2007) (political purpose behind execution was to show that China is serious about confronting its poor product-safety record).

<sup>103</sup> *China Executes Former Watchdog Chief*, USA Today (available online at [http://www.usatoday.com/news/world/2007-07-10-china-tainted-goods\\_N.htm](http://www.usatoday.com/news/world/2007-07-10-china-tainted-goods_N.htm)) (updated July 10, 2007) (last accessed Nov. 8, 2008, 2008).

<sup>104</sup> *Id.*

<sup>105</sup> Kevin Bell, *Menu Foods Pet Food Recall Costs Rise to C\$55 Million*, Bloomberg (available online at <http://www.bloomberg.com/apps/news?pid=20601082&sid=a.dt12.pYQ.g>) (Oct. 10, 2007) (last accessed Nov. 8, 2008, 2008).

<sup>106</sup> Menu Foods, *Menu Foods Income Fund Concludes Sale of Plant, Restructures Operations and Updates on Status of Recall*, <http://menufoods.com/ir/docs/MF%20concludes%20sales%20of%20plant%20restructures%20operations%20and%20updates%20on%20status%20of%20recall.pdf> (Oct. 10, 2007) (last accessed Nov. 8, 2008, 2008). Menu's employees, however, will suffer far more dearly: the company's workforce will be reduced by ten to fifteen percent. Menu recently sold its North Sioux City, South Dakota, plant in order to "right size" the company as a result of the recall. The plant employed 14 percent of the company's total workforce. *Id.*

<sup>107</sup> Bell, *supra* n. 105; Gina Spadafori, *Why Does Menu's Paul Henderson Still Have a Job?*, PetConnection.com <http://www.petconnection.com/blog/?s=paul+henderson> (Oct. 11, 2007) (last accessed Nov. 8, 2008, 2008).

<sup>108</sup> *China Executes Former Watchdog Chief*, *supra* n. 103.

<sup>109</sup> *Id.*

<sup>110</sup> Levick & Grabowski, *Contaminant at the Gate*, *supra* n. 13.

<sup>111</sup> *Id.*

2008]

*SEE SPOT EAT, SEE SPOT DIE*

13

numerous recalls of Chinese products in 2007 alone.<sup>112</sup>

American legislators blamed the domestic regulatory system, calling the FDA “broken.”<sup>113</sup> As Washington Representative Jay Inslee said, “it simply beggars belief that during a food-borne illness outbreak, the government’s hands are tied and we must rely on industry to recall the product.”<sup>114</sup>

In February, two Chinese business and ChemNutra were indicted by a federal grand jury in Kansas City, Missouri.<sup>115</sup> In addition, federal indictments were brought against the American importer of the contaminated gluten and two Chinese companies. “Millions of pet owners remember the anxiety of last year’s pet food recall,” Kansas City U.S. Attorney John F. Wood said.<sup>116</sup> “These indictments are the product of an investigation that we began in the wake of that recall.”<sup>117</sup> The owners of one Chinese business were charged with thirteen felony counts based on introducing the adulterated food into interstate commerce and thirteen felony counts of introducing misbranded food into interstate commerce.<sup>118</sup> ChemNutra and its owners were charged with twenty-six misdemeanor counts of introducing adulterated and misbranded food into interstate commerce, and one felony count of conspiracy to commit wire fraud.<sup>119</sup> The misdemeanor charges against ChemNutra and its owners are each punishable by up to one year in prison, and the felony charge can carry a five-year sentence.<sup>120</sup> The felony charges against the Chinese businesses carry up to three years of jail time each. However, as the U.S. and China do not have an extradition treaty, the U.S. indictments carry little weight.<sup>121</sup>

#### IV. CHANGES RESULTING FROM THE RECALL

When compared to the drastic reaction to food safety problems in China, the United States has implemented relatively few changes to fix the causes of the 2007 recall.

First, a new position was created within the FDA to deal with food

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<sup>112</sup> See e.g., *China and Food Safety*, Washington Post D1 (Dec. 12, 2007) (discussing concerns about the safety of food and products from China); Levick & Grabowski, *Contaminant at the Gate*, *supra* n. 13 (same). The 2007 pet food recall was not the end of China’s melamine problem: Four Chinese babies died, and 54,000 got sick from melamine-tainted milk in 2008, and countries world-wide detected the tainted milk in products they had imported. David Lazarus, Op Ed, *FDA’s Lax Approach to China Comes Back to Bite Us*, LA Times (Oct. 15, 2008) (available at <http://www.latimes.com/news/columnists/la-fi-lazarus15-2008oct15,0,6037514.column>) (last accessed Nov. 8, 2008, 2008).

<sup>113</sup> Weise, *‘Broken’ FDA Can’t Keep Food Safe*, *supra* n. 49.

<sup>114</sup> *Id.*

<sup>115</sup> David Twiddy, *3 Companies Indicted in Pet Food Case*, Associated Press (Feb. 6, 2008) (available online at [http://www.usatoday.com/money/economy/2008-02-06-1784540301\\_x.htm](http://www.usatoday.com/money/economy/2008-02-06-1784540301_x.htm)) (last accessed Nov. 8, 2008, 2008).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Twiddy, *3 Companies Indicted in Pet Food Case*, *supra* n. 115.

safety and food defense. David Acheson was assigned to be the Assistant Commissioner for Food Protection.<sup>122</sup> This position was a positive step, showing the FDA's increased focus on food safety.<sup>123</sup>

Second, on April 24, 2007, the FDA announced, that it would test human food for melamine.<sup>124</sup> The FDA made the testing decision after hogs in three states tested positive for the industrial chemical.<sup>125</sup> No evidence of melamine contamination was found in human food during 2007.<sup>126</sup>

Third, as to the loophole that allows importers to “lab shop” to get a favorable test result,<sup>127</sup> Acheson announced that the FDA will set new standards for imported food tested in laboratories.<sup>128</sup> But the details are fuzzy. “Acheson couldn't say whether the standards would include that laboratories submit all test results.”<sup>129</sup> He did say “[w]e need to do a better job of assuring that if there is a hole there, we plug it . . . .”<sup>130</sup> Michigan Representative Bart Stupack sees this as a “gaping hole” and would require laboratories to report all test results to the FDA.<sup>131</sup>

Fourth, Congress also stepped up to correct the problem, giving the FDA more money and a mandate to add more inspectors.<sup>132</sup> Congress approved a \$513 million food-safety budget for the FDA in 2008, up \$56 million from 2007.<sup>133</sup>

Fifth, Congress enacted the FDA Amendments Act of 2007 (Amendments Act) to amend the FFDCA.<sup>134</sup> The Amendments Act requires the Secretary of Health and Human Services and AAFCO to establish ingredient standards for pet food, processing standards, and updated standards for pet food labeling within two years.<sup>135</sup> The Amendments Act

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<sup>122</sup> USFDA, *FDA Commissioner Announces New Food Protection Position*, <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01622.html> (May 1, 2007) (last accessed Nov. 8, 2008).

<sup>123</sup> *After the Pet Food Contamination*, *supra* n. 72. The FDA's main focus is normally on regulating drugs and medical devices.

<sup>124</sup> Richard Davis, *FDA to Test Human Food Supply for Melamine*, <http://money.cnn.com/2007/04/24/news/economy/fda/index.htm> (April 24, 2007) (last accessed Nov. 8, 2008).

<sup>125</sup> *Id.*

<sup>126</sup> Linda Wilson Fuoco, *Q&A: Feeding Your Pet Safely*, Pittsburgh Post-Gaz. D1(May 2, 2007).

<sup>127</sup> Schmit, *Loophole*, *supra* n. 39 and accompanying text. The loophole at issue currently allows importers to “shop around,” by getting a failing result at one lab and a passing result at another—without reporting the failed test to the FDA.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Ellyn Ferguson, *Sen. Kohl Pushes For More Food Safety Money*, Gannett News Service ARC (Aug. 8, 2007).

<sup>133</sup> Julie Schmit, *FDA to Get Only Slight Increase in Food-Safety Funding*, USA Today, (available at [http://www.usatoday.com/money/industries/food/2007-12-18-fda-food-safety\\_n.htm](http://www.usatoday.com/money/industries/food/2007-12-18-fda-food-safety_n.htm)) (Dec. 18, 2007) (last accessed Nov. 8, 2008).

<sup>134</sup> H.R. 3580 110th Cong. (¶ 1) (Sept. 27, 2007).

<sup>135</sup> H.R. 3580 110th Cong. § 1002(a). As far as Amendments Act implementation goes, the FDA has thus far held a public meeting on May 13, 2008, to gather input on whether the ingredient standards and definitions and processing standards in the Act should include all

2008]

*SEE SPOT EAT, SEE SPOT DIE*

15

also establishes an early warning system for future pet food recalls to monitor pet food adulteration and notify veterinarians during a recall.<sup>136</sup> Further, the Amendments Act calls for more effective communication during a recall, probably a direct result of the lack of communication during the 2007 recall.<sup>137</sup> However, some pet owners are not satisfied with the FDA's current implementation of the Amendments Act. They claim the FDA is relying on a dated plan to meet the requirements of the Amendments Act instead of seriously working toward reform.<sup>138</sup>

In addition, AAFCO has "been pressing for, and has drafted model language designed to enhance the process control requirements and inspections for non-medicated feed, which includes specific process control points for plants which manufacture pet food and specialty pet foods."<sup>139</sup> On January 1, 2008, the FDA and CVM signed an agreement with AAFCO that allows the FDA to recognize AAFCO's list of safe ingredients for animal feed.<sup>140</sup> By recognizing the AAFCO's compilation of safe ingredients, the FDA will finally have an exclusive catalog of what is and what is not safe to put in pet and livestock food.<sup>141</sup> The formal recognition by the FDA will help advance an AAFCO goal of developing an Animal Feed Safety System (AFSS).<sup>142</sup> The AFSS would provide "[regulatory] oversight . . . at levels commensurate with risk to humans and animal health."<sup>143</sup> The System, originally envisioned in 2003, was supposed to be up and running by 2007,<sup>144</sup> but will not have its third draft of proposed regulations ready for public comment until 2008.<sup>145</sup>

The AFSS Framework Document that guides the AFSS calls for a more

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animal feeds and not just pet food. 69 Fed. Reg. 21,337 (April 21, 2008). The FDA had a thirty-day public comment period after that meeting. For a current FDA schedule for Amendments Act implementation, see [http://www.fda.gov/oc/initiatives/advance/fdaaa/implementation\\_chart.html](http://www.fda.gov/oc/initiatives/advance/fdaaa/implementation_chart.html) (last accessed Nov. 8, 2008).

<sup>136</sup> H.R. 3580 110th Cong. § 1002(b).

<sup>137</sup> H.R. 3580 110th Cong. § 1003.

<sup>138</sup> See Susan Thixon, *FDA Says "Dog Ate Homework,"* <http://www.americanchronicle.com/articles/65434> (June 18, 2008) (last accessed Nov. 8, 2008) (saying the FDA is using the excuse of "my dog ate my homework" by passing off a five-year-old plan as a way to meet the Amendments Act requirements). These claims seem to have a basis in fact when considered in light of the FDA's reaction to the Amendments Act: "FDA is concerned that certain new requirements. . . would be impractical to implement, difficult to enforce, and would not effectively provide the safety enhancements intended by FDAAA."

<sup>139</sup> Syverson, *How Pet Food is Regulated*, *supra*, n. 50.

<sup>140</sup> American Veterinary Medicine Association (AVMA), *FDA, Feed Control Officials Sign Agreement on Ingredient List*, JAVMA News, <http://www.avma.org/onlnews/javma/jan08/080101z.asp> (Jan. 1, 2008) (last accessed Nov. 8, 2008).

<sup>141</sup> *Id.* USFDA, *FDA, AAFCO Sign Agreement on Feed Ingredient Listing*, [http://www.fda.gov/cvm/CVM\\_Updates/AAFCO\\_MOU.htm](http://www.fda.gov/cvm/CVM_Updates/AAFCO_MOU.htm) (Nov. 19, 2007) (last accessed Nov. 8, 2008).

<sup>142</sup> AVMA, *Feed Control Officials Sign Agreement on Ingredient List*, *supra* n. 140.

<sup>143</sup> *Id.*

<sup>144</sup> USFDA, *Animal Feed Safety System (AFSS)*, <http://www.fda.gov/cvm/AFSS.htm> (last updated Aug. 6, 2008) (last accessed Nov. 8, 2008).

<sup>145</sup> USFDA, *FDA's Animal Feed Safety System (AFSS) Project Plans Update # 3*, <http://www.fda.gov/cvm/UpdateIII.htm> (last updated July 3, 2007) (last accessed Nov. 8, 2008).

comprehensive animal-feed safety program.<sup>146</sup> AFSS was not set up in response to the pet food recall<sup>147</sup> and, to date, is still in the research and development phase.<sup>148</sup> The AFSS “has begun to write process control regulations” on the manufacture and distribution of pet food and feed ingredients.<sup>149</sup> The group’s fourth meeting, in May 2007, occurred “by coincidence” as the recall wound down.<sup>150</sup> The AFSS did not stray from its Framework agenda during the “turmoil,” and continued to focus on creating a system to rank contaminants in animal feed based on their danger to animal and human health, a goal it had set out some time before the recall.<sup>151</sup>

Proactive steps were also taken in China. The Chinese government cooperated with the federal investigation into Chinese companies responsible for melamine contamination and shut down all involved factories.<sup>152</sup> Government officials have also signed an agreement to increase the number of inspections.<sup>153</sup> But a more drastic step was taken when the Chinese government took the owner of one involved company into custody after the factory was shut down.<sup>154</sup>

Changes were also made at Menu Foods. In September 2007, the company appointed Gale Prince, a food safety expert, to its Board of Trustees and Board of Directors.<sup>155</sup> Prince, past president of the International Association for Food Protection, will serve as Chair of the Board of Directors’ Food Safety and Quality Assurance Committee.<sup>156</sup> Menu has also pledged to test for melamine, conduct additional tests on wheat gluten, implement the recommendations of the Pet Food Institute<sup>157</sup> and work with the FDA to prevent future “occurrences of this type.”<sup>158</sup> Further,

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<sup>146</sup> *Id.*

<sup>147</sup> USFDA, *FDA Holding Meeting to Discuss Animal Feed Safety System*, [http://www.fda.gov/cvm/CVM\\_Updates/AFSSmtg.htm](http://www.fda.gov/cvm/CVM_Updates/AFSSmtg.htm) (July 28, 2003) (last accessed Nov. 8, 2008).

<sup>148</sup> USFDA, *FDA’s Animal Feed Safety System (AFSS) Project Plans Update #5*, <http://www.fda.gov/cvm/AFSSprojplan5.htm> (last updated Aug. 6, 2008) (last accessed Nov. 8, 2008).

<sup>149</sup> USFDA, *Project Plans Update # 3*, *supra* n. 145.

<sup>150</sup> *Id.*

<sup>151</sup> USFDA, *Animal Feed Safety System (AFSS) 2007 Public Meeting*, <http://www.fda.gov/cvm/AFSS052007PM.htm> (last updated May 18, 2007) (last accessed Nov. 8, 2008).

<sup>152</sup> See e.g. Embassy of the People’s Republic of China in Canada, *Press Release 2007/08/29*, <http://www.chinaembassycanada.org/eng/xw/t356674.htm> (last accessed Nov. 8, 2008) (following the pet food recall, the Chinese government discovered that several Chinese companies used melamine in wheat gluten and evaded inspections utilizing illegal means); CNN, *Fish Meant for Humans Fed Tainted Food*, <http://www.cnn.com/2007/HEALTH/05/08/fish.food/index.html> (discussing investigations) (last accessed Nov. 8, 2008).

<sup>153</sup> Twiddy, *3 Companies Indicted in Pet Food Case*, *supra* n. 115.

<sup>154</sup> *Id.*

<sup>155</sup> Menu Foods, *Food Product Safety Pioneer Appointed Trustee of Menu Foods Income Fund*, <http://menufoods.com/ir/docs/press%20release%20Food%20Product%20Safety.pdf> (Sept. 24, 2007) (last accessed Sept. 28, 2008).

<sup>156</sup> *Id.*

<sup>157</sup> The PFI, a trade association, is the voice of the United States pet food manufacturers. See <http://www.petfoodinstitute.org/whatispfi/htm> (last accessed Nov. 8, 2008) (stating that the PFI is the definitive group representing pet food manufacturers).

<sup>158</sup> H.R. Subcomm. on Oversight and Investigations of the Comm. of Energy & Comm., *Safety*

2008]

*SEE SPOT EAT, SEE SPOT DIE*

17

the company will now only use wheat gluten made from wheat grown in Kansas.<sup>159</sup>

## V. CHANGES THAT SHOULD BE IMPLEMENTED

Menu Foods made several mistakes during the recall, such as employing ineffective communication methods and putting the blame on other involved parties. At the same time, federal regulatory bodies have failed to make all the necessary changes to avoid a future similar recall.

### A. *What Should Have Been Done During the Recall*

The decisions a company makes before, during, and after a recall determine the company's reputation.<sup>160</sup> In this case, Menu Foods did not handle the recall properly. Instead of dealing with the contamination problem in a straightforward, honest manner, Menu Foods took a backdoor approach to informing the public. First, Menu Foods issued several recall-related press releases on Fridays and Saturdays.<sup>161</sup> In fact, the initial "precautionary recall" was announced on a Friday, even though company officials knew several days prior of a potential link between its products and renal failure in pets.<sup>162</sup> Second, Menu Foods did not make a list of affected products available until six the next morning, Saturday, March 17.<sup>163</sup> The company offered no explanation as to why the list was not publicized at the time of the recall, or why it did not make the announcement sooner.<sup>164</sup>

Sending out press releases about adverse events on the weekend or after business hours is considered a "smart" public-relations practice.<sup>165</sup> By releasing bad news at off hours, companies hope the news will receive less attention.<sup>166</sup> The announcement that Menu Foods would pay for recall-related medical costs, perhaps one of the most important releases made

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*of Food Supply*, 110th Cong. (Apr. 24, 2007) (statements of Paul Henderson, Menu Foods CEO), available at <http://menufoods.com/recall/US%20House%20of%20Representatives%20%20Paul%20Henderson%20Written%20Testimony%204-24-07.htm> (last accessed Nov. 8, 2008).

<sup>159</sup> Wegmans, *Wegmans Wet Cat Food and Bruiser Wet Dog Food Returns to Shelves*, <http://www.wegmans.com/webapp/wcs/stores/servlet/PressReleaseDetailView?langId=-1&storeId=10052&catalogId=10001&productId=399591> (Sept. 17, 2007) (last accessed Nov. 8, 2008).

<sup>160</sup> Levick & Grabowski, *Contaminant At the Gate*, *supra* n. 13.

<sup>161</sup> Menu Foods Income Fund, *Press Releases*, <http://menufoods.com/recall/> (last accessed Sept. 28, 2008).

<sup>162</sup> *How Pet Food Recall Unfolded*, *supra* n. 57.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* Later, Henderson created a timeline of the events leading up to the recall and "put this situation in context" by citing Menu Foods' large-scale food production and the many possible sources of contamination. H.R. Subcomm. on Oversight and Investigations of the Comm. of Energy & Comm., *supra* n. 158 (statements of Paul Henderson, Menu Foods CEO).

<sup>165</sup> Gina Spadafori, *Friday Night Dump-and-run Recall Releases*, <http://www.petconnection.com/blog/?s=friday+press+release> (July 10, 2007) (last accessed Nov. 8, 2008).

<sup>166</sup> *Id.*

during the recall, was made on a Friday.<sup>167</sup> As one blogger stated a year after the recall,

[Any] company can make a mistake, and any product can cause a problem. My problem is when companies don't try to fix those problems, by not recalling product or by doing their best to hide news of a recall. Remember the late-Friday night pet-food recall announcements? Shame on companies that don't react responsibly and immediately to protect our families, two-legged or four-legged.<sup>168</sup>

Adding to the problem, the FDA and Menu Foods ignored the importance of the Internet during the recall. Pet owners, on the other hand, understood its importance and used it to share information and count fatalities.<sup>169</sup> Menu Foods should have followed the advice of Richard Levick and Gene Grabowski, president and vice president of Levick Strategic Communications, which specializes in protecting companies during crises who advise:

During a recall, anxious consumers will likely go online for the latest information . . . . The home page is ground zero, leading consumers to all your approved recall updates. A prominent 'Click Here for Information on the XYZ Recall' is simple enough but it eloquently demonstrates your concern and eagerness to disclose.<sup>170</sup>

This was not recognized by pet food officials. The FDA had several problems with the content of its Internet site regarding recalled food. "[A] page titled 'FDA Update and Synopsis' stated that, quote 'All the contaminated wheat gluten has been traced.' But a few clicks away, in a Frequently Asked Questions section, the FDA states, quote, 'We are still tracing the contaminated wheat gluten.'"<sup>171</sup> The Director of the CVM admitted he had trouble finding the list of recalled foods on the FDA Web site,<sup>172</sup> despite insisting that consumers use the website to check for recalled foods.<sup>173</sup>

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<sup>167</sup> Ben Huh, *Menu Foods Announces They Will "Take Financial Responsibility,"* <http://www.itchmo.com/go/tagged/pet-food-product-recall/page/33/> (March 23, 2007) (post no longer available). Because Menu Foods announced it would pay for medical costs on a Friday several days after the recall, many pet owners did not keep the proper documentation to be reimbursed for the medical costs.

<sup>168</sup> Gina Spadafori, *Dog Toy Recalled: About Time, Folks!*, Pet Connection, <http://www.petconnection.com/blog/2008/08/29/dog-toy-recalled-about-time-folks/> (Aug. 29, 2008) (last accessed Nov. 8, 2008).

<sup>169</sup> See Sen. Subcomm. of the Comm. of Appropriations, *supra* n. 25 at 4–5 (Apr. 12, 2007) ("Blogs and nonprofit web sites have sprouted up as the best way to share information on [the Menu Foods'] contamination. It's a voluntary effort of pet owners that is spreading more information quickly than our Government.").

<sup>170</sup> Levick & Grabowski, *Contaminant At the Gate*, *supra* n. 13.

<sup>171</sup> Sen. Subcomm. of the Comm. on Appropriations, *supra* n. 25 at 1 (Apr. 12, 2007) (statement of Senator Herb Kohl).

<sup>172</sup> *Id.* at 16 (statement of Dr. Stephen Sundlof).

<sup>173</sup> *Id.* at 9.

The overall lack of communication from the pet food industry frustrated consumers. One consumer, whose cat Sophie died after eating recalled food, spent hours on the phone, trying to use a hot line set up by Menu Foods.<sup>174</sup> “It is insult to injury, not being able to communicate with these companies,” Bob Norkus said.<sup>175</sup> “You hear about the number of animals that have died, and I feel like her number has been left off a list.”<sup>176</sup> Operators also reportedly called pet deaths an “inconvenience,” and didn’t show sympathy for pet owners.<sup>177</sup>

Menu Foods also put the blame solely on Chinese companies.<sup>178</sup> In announcing the May 2008 settlement agreement, which would resolve some one hundred lawsuits against Menu Foods, CEO Paul Henderson said: “We feel that the pet owners, along with Menu and other pet food producers, were victims of a terrible fraud committed by a company in China.”<sup>179</sup> Henderson’s company is already shelling out \$24 million to pet owners.<sup>180</sup> There is no point in the CEO continuing to point the finger at the Chinese companies. In addition, Menu Foods phased out ingredients from China,<sup>181</sup> a knee-jerk reaction that may not have been the best strategy. According to Levick and Grabowski, “that tempting strategy inflames public distrust in a way that can only aggravate the overall problem for everyone.”<sup>182</sup> The president of the Pet Food Institute also recognized Menu Food’s error saying, “rather than ‘shut the door’ on Chinese products . . . better procedures are needed to ensure quality.”<sup>183</sup> Menu Foods should have shouldered some of the blame while assuring consumers that the problems inside and outside the company would be rectified. Blaming Chinese companies shows that Menu Foods has missed the bigger point—that safety is a global concern and companies have a responsibility to rebuild confidence in the marketplaces and not just in their own brands. This reaction appears especially misguided in light of China’s drastic reactions to export safety. In addition to executing the former head of the State Food and Drug Administration, the Chinese government also shut down all factories involved in the contamination, signed an agreement increasing the number of inspections, and took the president of a responsible company into custody shortly after discovery of the contamination.<sup>184</sup> Menu Foods and

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<sup>174</sup> Katie Zezima, *Pets’ Owners Angered by Delays in Response*, N.Y. Times (March 22, 2007) (available online at <http://www.nytimes.com/2007/03/22/us/22petfood.html?n=Top/Reference/Times%20Topics/Subjects/P/Pet%20Food%20Recall>) (last accessed Nov. 8, 2008).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Henderson, *Remarks*, *supra* n. 74, at 6.

<sup>179</sup> Menu Foods, *Settlement Agreement*, *supra* n. 85.

<sup>180</sup> *Id.*

<sup>181</sup> Julie Schmit & Elizabeth Weise, *Pet Firms Suspend China Business: Import Scrutiny Up After Recalls*, USA Today B1 (May 21, 2007) (available at [http://www.usatoday.com/printedition/money/20070521/1b\\_china\\_pet\\_food21.art.htm](http://www.usatoday.com/printedition/money/20070521/1b_china_pet_food21.art.htm)) (last accessed Nov. 8, 2008).

<sup>182</sup> Levick & Grabowski, *Contaminant At the Gate* *supra* n. 13.

<sup>183</sup> Schmit & Weise, *Pet Firms Suspend China Business*, *supra* n. 181.

<sup>184</sup> Twiddy, *3 Companies Indicted in Pet Food Case*, *supra* n. 115.

Henderson should have accepted their partial responsibility for the recall.<sup>185</sup>

During the recall, Menu Food's first concern should have been the victims. Menu Foods wrote a letter to affected pet owners, but it was buried on the company's Web site; owners could find the letter only after following a link for recall information and then a link labeled only "U.S. Residents." However, the letter does not show the kind of conspicuous or heartfelt sympathy pet owners expected from a company selling a deadly product.<sup>186</sup>

Thank you for your interest in Menu Foods. Menu Foods wants to express sympathy to those pet owners whose pets have become sick or died, and to assure you that we are doing everything we can to address your concerns. It has always been our desire to compensate pet owners for reasonable expenses that we can identify as being caused by contamination of Menu Foods' products.<sup>187</sup>

Menu Foods had more than one instance of bad behavior: The company reportedly harassed affected pet owners who had obtained their own legal counsel.<sup>188</sup> A District Court Judge in Camden, New Jersey, ordered Menu Foods to stop making "aggressive" calls to pet owners, and prohibited the company from contacting affected owners unless their lawyers are involved.<sup>189</sup> The company used an automated calling system to pester pet owners, trying to get them to sign releases to waive their right to legal counsel.<sup>190</sup> "It seems to me that Menu Foods is out to do whatever Menu Foods wants to do in a way that could adversely impact the rights of possible members of the class action suit," Judge Noel Hillman said.<sup>191</sup> On its Web site, Menu makes it seem like the court is unfairly restricting the company's communication with pet owners for no good reason. "In light of the order, we regret that we cannot communicate with [potential claimants] at this time. As soon as the court permits, we intend to resume efforts to resolve claims directly with pet owners."<sup>192</sup> While little could have been done to prevent Menu Foods' unsympathetic behavior from a legal standpoint, the

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<sup>185</sup> Or Henderson should have at least taken his own advice: "However, we cannot turn back the clock, so now we must analyze what happened and how it happened and consider the steps that the pet food industry and government agencies should take to try to prevent things like this from happening in the future." H.R. Subcomm. On Oversight and Investigations of the Comm. of Energy & Comm. *supra* n. 156 (statements of Paul Henderson, Menu Foods CEO). Henderson also notes that this was the first time that Menu purchased wheat gluten from ChemNutra. *Id.* at 2.

<sup>186</sup> Ben Huh, *Opinion: Menu Foods' Latest PR is Offensive*, <http://www.itchmo.com/go/tagged/pet-food-product-recall/page/35/> (Mar. 19, 2007) (site no longer available).

<sup>187</sup> Ltr. from Menu Foods to U.S. Residents, *Recall Information* (May 24, 2007) (available online at <http://www.menufoods.com/recall/US%20Residents.htm>) (last accessed Nov. 8, 2008).

<sup>188</sup> Elizabeth Weise, *Court: Menu Foods Harassed Pet Owners*, USA Today (available online at [http://www.usatoday.com/news/nation/2007-05-26-menu-foods-harassment\\_N.htm](http://www.usatoday.com/news/nation/2007-05-26-menu-foods-harassment_N.htm)) (updated May 26, 2007) (last accessed Nov. 8, 2008).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Menu Foods, *FAQ's for Consumers*, [http://www.menufoods.com/recall/FAQ\\_Consumers\\_052907.htm](http://www.menufoods.com/recall/FAQ_Consumers_052907.htm) (last accessed Nov. 8, 2008).

company should have considered its response and the effect it may have had on potential litigants. If the company had treated pet owners with respect, it could have appeased some of the potential litigants and would have faced a slightly less vengeful class in court. As Levick points out, “a potent current flows between courts of law and the court of public opinion. The vital long-term interest of most industries requires equally vigilant management on both fronts.”<sup>193</sup>

The aftermath of this recall is not likely to play out well for Menu Foods. “Time and again, how companies handle product recalls proves to have a huge effect on the longevity and credibility of their brands.”<sup>194</sup> Menu Foods’ credibility already has been, and likely will continue to be, impacted very negatively by the company’s response to the product problems and recall.<sup>195</sup> Following any of the strategies recommended by Levick and Grabowski may have partially saved the company’s public image.

### *B. Changes That Should Be Made In Light of the Recall*

While the actual recall could have been handled in a more positive, effective manner, changes should be made both in the industry and the regulatory bodies to prevent such a wide-scale, deadly problem from happening again. In cases like this, prevention is the key.<sup>196</sup> “Certainly, the better way for companies to avoid import crises is to place strict controls and regulations on the foreign manufacturers who want their business. Working with foreign companies that have a history of producing products that meet or exceed U.S. standards is the key.”<sup>197</sup> Menu Foods should adjust its business plan to work with such companies and should implement a plan to improve communications during a recall. It appears, from Menu Foods’ presentation before Congress, that this has been done.<sup>198</sup> The company has stopped purchasing wheat gluten from ChemNutra and has pledged to “implement more rigorous testing and supervision of new suppliers.”<sup>199</sup> Also, the company has promised to test wheat gluten for melamine.<sup>200</sup>

Further, the company should be prepared to release recall information

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<sup>193</sup> Levick, *Run To The Crisis*, *supra* n. 26.

<sup>194</sup> Levick & Grabowski, *Contaminant at the Gate*, *supra* n. 13.

<sup>195</sup> *Id.*

<sup>196</sup> Susan Thixton, *Tips to Avoid the Next Pet Food Recall*, <http://www.americanchronicle.com/articles/65199> (June 18, 2008) (last accessed Nov. 8, 2008).

<sup>197</sup> *Id.*

<sup>198</sup> H.R. Subcomm. on Oversight and Investigations of the Comm. of Energy & Comm., *supra* n. 158 (statements of Paul Henderson, Menu Foods CEO).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* But this might not be enough because, as Henderson notes, melamine was previously unheard of as a potential contaminant for wheat gluten. Perhaps the company needs to implement tests for a broader range of contaminants or foreign ingredients, so as not to be caught unaware by contamination again. As Henderson said, “Melamine is not something that had ever been heard of before in connection with wheat gluten. To our knowledge, no pet food or human food manufacturer tested wheat gluten for melamine prior to this incident.” *Id.* When another recall from an unexpected contaminant comes up, Menu Foods will almost be able to cut-and-paste this language into the next set of press releases.

at the earliest possible date and should not make such a release on a weekend. The company should also make a list of recalled products available on the first possible day, preferably a weekday, so the list gets maximum exposure. This way consumers can dispose of tainted products as soon as possible, and pet owners can retain documentation related to any pet illness that may have been caused by the contamination.

From a regulatory standpoint, the FDA must be given the authority to evaluate the safety of pet food, both domestically and abroad. "Congress needs to give the FDA authority to evaluate food safety systems and factories in foreign lands that export food to this country."<sup>201</sup> In addition, the FDA should be given the authority to issue recalls on dangerous food, not just on drugs.<sup>202</sup> Such a need is illustrated by a spinach recall in 2007. The 2007 *E. coli* contamination killed three people and sickened more than two hundred.<sup>203</sup> However, the FDA had known of problems with the responsible growers as early as 1995.<sup>204</sup> If the FDA had the authority to issue a recall, instead of having to rely on the self-policing efforts of the industry, those deaths and illnesses may have been avoided. Similarly, the agency may have averted animal deaths by issuing a pet food recall.

The FDA must have adequate legal authority, funding, and inspectors to ensure food safety.<sup>205</sup> The Administration has lost 230 inspectors in the last four years.<sup>206</sup> The editorial staff of the *New York Times* suggested that the FDA should be given the same power that the Agriculture Department has in its regulatory arena, and in particular argued that the FDA should be given the authority to check the adequacy of regulatory systems in foreign countries.<sup>207</sup> To do so, it would surely need to increase its staff. "You can't ensure safety of the food supply with a skeleton crew of inspectors," said Chris Waldrop, food policy director at Consumer Federation of America.<sup>208</sup> Even Henderson has noted the FDA's lack of resources for plant inspections.<sup>209</sup>

Representative John Dingell proposed a solution when he sponsored an amendment to improve the safety of imported food products.<sup>210</sup> The proposed legislation, the Food and Drug Import Safety Act of 2007 (FDISA) would amend the FFDCA.<sup>211</sup> The amendment would help solve the FDA's

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<sup>201</sup> *After the Pet Food Contamination, supra* n. 73.

<sup>202</sup> See Levick, *Run to the Crisis, supra* n. 26 (discussing the importance of recalls).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Schmit & Weise, *Pet-food Death Toll Unlikely to be Known, supra* n. 31. The FDA devoted four hundred employees to handling the pet food recall—a "huge number" for the agency. *Id.*

<sup>206</sup> Ferguson, *supra* n. 132.

<sup>207</sup> *After the Pet Food Contamination, supra* n. 73.

<sup>208</sup> Ferguson, *supra* n. 132.

<sup>209</sup> H.R. Subcomm. on Oversight and Investigations of the Comm. of Energy & Comm., *supra* n. 158 (statements of Paul Henderson, Menu Foods CEO). "Some people have noted that Menu's Emporia plant had not been inspected by the FDA. That is true, but not surprising given Menu's excellent performance record and reputation and the FDA's limited resources." *Id.*

<sup>210</sup> GovTrack.us, *H.R. 3610: Food and Drug Import Safety Act of 2007*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3610> (last accessed Nov. 8, 2008).

<sup>211</sup> Dingell's proposed legislation is similar to a bill introduced by Sen. Durbin on July 12,

2008]

*SEE SPOT EAT, SEE SPOT DIE*

23

budget crisis by imposing a user fee on shipments of imported food and drugs.<sup>212</sup> Those fees would be used to hire additional inspectors to work domestically and abroad to regulate import safety.<sup>213</sup> The FDISA “[deems] a food, drug or device to be misbranded if its labeling fails to identify the country of origin.”<sup>214</sup> In addition, the FDISA adds civil penalties for manufacturers and importers of adulterated food products, but caps the penalty at one million dollars for “all such violations adjudicated in a single proceeding.”<sup>215</sup>

The proposed FDISA legislation would also require all food importers to agree to guidelines set up by the FDA.<sup>216</sup> Further, it would grant the FDA authority to issue a recall if it found the imported food posed a health risk.<sup>217</sup> The Administration would first have to issue a cease distribution order to the offending company and hold an informal hearing on the problem, but it could then amend the order to announce a recall.<sup>218</sup> The ability to issue a recall would give the FDA much more authority than it currently possesses and the FDA would no longer need to rely on the sometimes lax self-policing methods of manufacturers.

While other legislators and interested groups have proposed alternative solutions, such as the National Pet Food Commission’s recommendations to the Pet Food Institute,<sup>219</sup> the proposed FDISA plan offers the most comprehensive and complete set of answers to the overall food safety problem. In contrast to the Amendments Act, the proposed FDISA legislation actually lays out mechanisms to increase company accountability and FDA authority and funding—concrete methods that could lower the risk of another deadly recall.

In addition, the creation of rapid response teams to deal with recalls would help ensure consumer safety. Senator Herb Kohl proposed that eleven million dollars of the FDA’s 2008 funding be used for such teams.<sup>220</sup> Revenue from the proposed FDISA plan to impose user fees could be allocated to

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2007. Both pieces of legislation would impose a user fee on importers, but Dingell’s allocates a higher percentage of those fees to inspecting food. H.R. 3610, 110th Cong. §3(a)(3) (Sept. 20, 2007); Sen. 1776, 110th Cong. §2(a)(3) (July 12, 2007). Dingell’s legislation also goes further in that it increases civil liability and changes the standard for misbranded products. H.R. 3610 §3(a)(3) (Sept. 20, 2007).

<sup>212</sup> H.R. 3610 §3(a)(3) (Sept. 20, 2007). That fee would be based on the number of line items in a shipment, with the maximum fee set at \$50 per line item.

<sup>213</sup> John D. Dingell, *Toy and Food Safety*, <http://www.house.gov/dingell/recall.shtml> (last accessed Nov. 8, 2008).

<sup>214</sup> GovTrack.us, *H.R. 3610: Food and Drug Import Safety Act of 2007*.

<sup>215</sup> H.R. 3610, 110th Cong. §8 (Sept. 20, 2007).

<sup>216</sup> *Id.* at § (a)(1).

<sup>217</sup> *Id.* at § 10.

<sup>218</sup> *Id.* at § 10(b)(1).

<sup>219</sup> See Paul K. Henderson, *Menu Foods Annual General Meeting Remarks* 10, [http://www.menufoods.com/ir/docs/Menu%20AGM%20speech%20FINAL%20for%20WEB%20JULY%203\\_%202007.pdf](http://www.menufoods.com/ir/docs/Menu%20AGM%20speech%20FINAL%20for%20WEB%20JULY%203_%202007.pdf) (July 29, 2007) (stating that the NPFC formed in order to “provide oversight and direction in establishing increased safeguards.”).

<sup>220</sup> Senator Herb Kohl, *Press Release: Kohl Increases Funding for Food Safety Inspections, Directs Funding to New FDA Rapid Response Teams*, <http://www.senate.gov/~kohl/press/07/07/2007719A30.html> (June 19, 2007) (last accessed Nov. 8, 2008).

such teams if there is not money in the current budget.<sup>221</sup> While Kohl's plan, which included four to six regional teams, focused on reducing harm caused by contaminated produce, it may help during a pet food recall as well.<sup>222</sup> Kohl's proposed teams would work to quickly identify the cause of the contamination, and prevent distribution of the harmful product.<sup>223</sup> When not working on a recall, the teams would be used to ensure processors and manufacturers meet FDA guidelines.<sup>224</sup>

Despite the FDISA's strong points the bill languished after its initial committee hearing on September 26, 2007.<sup>225</sup> With the passage of the Amendments Act, this promising piece of legislation has gone largely ignored.

While Congress did increase funding for the FDA in response to 2007's problems, that increase "is a drop in the bucket for what the agency really needs," according to Caroline Smith DeWaal, food safety director for the Center for Science in the Public Interest.<sup>226</sup> Half of the fund increase will be used on annual cost increases such as pay raises.<sup>227</sup> If members of Congress truly intend to increase food import safety, as they say they do,<sup>228</sup> the FDA must be given money to hire an adequate staff of inspectors to prevent and identify the source of recalls.

Interestingly, the best course of action for Menu Foods now may be to call for the FDA to be issued more authority, while at the same time taking its own steps to increase the safety of its products. As Levick suggests, "[b]y calling on the FDA to do more, the industry [would] itself [be] taking a leadership role and becoming part of the solution. The dual message, coupling its own self-policing efforts with pressure to strengthen the FDA, is all the more persuasive as a result."<sup>229</sup> In this situation, Menu Foods will have to be as persuasive as possible to win over a disappointed public. Menu Foods has taken steps in the right direction by saying it will support development of additional protective measures by the FDA, and that it will cooperate fully in government measures to improve pet food safety.<sup>230</sup>

Labeling regulations should also be enforced to ensure that pet owners know the sources of their pet food. The FDA currently requires pet food

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<sup>221</sup> Currently, ninety percent of the fees would be used for inspection and ten percent would be used for research.

<sup>222</sup> Ferguson, *supra* n. 132.

<sup>223</sup> *Id.*

<sup>224</sup> Senator Herb Kohl, *supra* n. 220.

<sup>225</sup> Lib. Cong., *THOMAS: H.R. 3610*, [http://thomas.loc.gov/home/bills\\_res.html](http://thomas.loc.gov/home/bills_res.html), *select* Search Bill Summary, Status; *select* 110 Congress; *select* Bill Number; *search* "h.r. 3610" (last accessed Nov. 8, 2008).

<sup>226</sup> Schmit *FDA To Get Only Slight Increase in Food-Safety Funding supra* n. 133.

<sup>227</sup> *Id.*

<sup>228</sup> See e.g. Senator Herb Kohl, *supra* n. 220 (Senator Kohl "included substantial funding increases" for FDA as part of the Agriculture Appropriations Bill); Congressman John D. Dingell, *supra* n. 214 (Congressman Dingell is the author of the Food and Drug Import Safety Act that will create more funds for FDA).

<sup>229</sup> *After the Pet Food Contamination, supra* n. 73.

<sup>230</sup> H.R. Subcomm. on Oversight and Investigations of the Comm. of Energy & Comm., *supra* n. 158 (statements of Paul Henderson, Menu Foods CEO).

2008]

*SEE SPOT EAT, SEE SPOT DIE*

25

labels to include the name and location of the manufacturer,<sup>231</sup> and the Amendments Act requires the FDA to update its labeling regulations within two years.<sup>232</sup> But pet owners are asking that the labeling requirements be clarified so that it is easy for consumers to quickly identify who made the pet food and where it was manufacture. In at least one suit,<sup>233</sup> the litigation could have been avoided if the food had been labeled in a manner by which consumers can readily identify the manufacturer's identity and location. Also, enforcing such a requirement would have ended anxiety for pet owners confused about which pet foods were affected by the recall.<sup>234</sup> More than 4,600 pet owners signed an online petition calling for such legislation to be enacted.<sup>235</sup>

Pet owners are also calling for Congress to enact a statute that would hold pet food manufacturers liable for medical costs relating to contaminated food.<sup>236</sup> Such legislation would "create a financial motive for pet food makers and marketers to set higher standards for pet food."<sup>237</sup> Manufacturers have the choice whether to pay for medical costs, and Menu Foods has said it is willing to pay for medical costs, but only for owners who can "trace their pets' illnesses to the company's products."<sup>238</sup> However, many pets fell ill before the recall was announced, and pet owners may not have kept sufficient veterinary records, store receipts, or product labels to link the illness to the products.<sup>239</sup> If such a statute were enacted, pet owners would have notice of the manufacturer's liability and may be more likely to keep such documentation when a pet suffers from an illness with an unknown cause. The proposed FDISA legislation may be a step in the right direction on this issue, in that it will impose civil penalties for the distributors of dangerous food products.<sup>240</sup>

## VI. CONCLUSION

Unless further changes are made from within the FDA and the pet food industry—both to regulate food safety and prepare for recalls—pet food owners will likely be subject to another bout of pet deaths and agonizing guilt.<sup>241</sup> Much of the heartache and frustration caused by this recall<sup>242</sup> could

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<sup>231</sup> 21 C.F.R. § 501.5(a) (2006).

<sup>232</sup> Pub. L. No. 110-85 §1003, 121 Stat. 823, 963 (2007).

<sup>233</sup> *Snell v. Dick Van Patten's Natural Balance Pet Foods Inc.*, No. 6:07cv00066.

<sup>234</sup> *Petition to Require Pet Food Companies to be Held Accountable for Damages*, <http://www.itchmo.com/petfoodpetition/> (last accessed Oct. 12, 2008) (site no longer available).

<sup>235</sup> *Id.*

<sup>236</sup> *Petition, supra* n. 234.

<sup>237</sup> *Id.*

<sup>238</sup> *See id.* (Uninsured pet owners suffer the "double whammy" of burdensome veterinary bills.); David Kerley & Dan Childs, *Pet Food Maker To Take Financial Responsibility for Pet Deaths from Poisoning*, ABC News (available at <http://abcnews.go.com/US/story?id=2975912&page=1>) (March 23, 2007) (last accessed Nov. 8, 2008).

<sup>239</sup> Huh, *Menu Foods Announces They Will "Take Financial Responsibility," supra* n. 167.

<sup>240</sup> H.R. 3610 110th Cong. § 8(2) (Sept. 20, 2007).

<sup>241</sup> *See Lazarus, FDA's Lax Approach to China Comes Back to Bite Us, supra* n. 112 ("[w]e need an FDA with both the resources and the wherewithal to keep consumers safe" and

have been avoided, both by effective regulation of the industry and proper handling of the public relations fallout from the recall. While some changes have been made to help prevent a future catastrophe, the real test comes when the public eye is taken off the disaster.

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implying that, without one, more and more problems are going to arise).

<sup>242</sup> See Bob Holmes, *Review: Pet Food Politics: The Chihuahua in the Coal Mine* by Marion Nestle; *Does a pet food contamination crisis spell trouble for the safety of our own food?* *The New Scientist* 45 (Aug. 30, 2008) ("Every North American pet owner no doubt shudders at the memory of The Great Pet Food Recall of 2007.").