



BUILDING A FOOD RECALL SYSTEM

That Really Protects Consumers



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IV

BUILDING A FOOD RECALL SYSTEM

Executive Summary

A company that recalls food because of dangerous bacterial contamination or unlabeled allergens is required to notify each commercial customer in its supply chain. A general press release serves as the primary notice to consumers. Many releases, however, never make the news, meaning consumers may not get warned about food that can make them sick or even kill them if eaten.

While the federal government posts information about recalls on its websites, the recall system from the consumer's perspective is largely privatized and voluntary.

This privatized system for warning consumers has proven inadequate. News media may or may not publicize recalls, and consumers may or may not see a recall notice on a government or company website. As a result, those most at risk of illness and death more often than not don't learn about recalls.

In 2010, Congress addressed shortcomings in the recall system with a provision in the Food Safety Modernization Act (FSMA) that directs the Food and Drug Administration (FDA) to establish a better consumer notification system. Yet five years after FSMA was signed into law, consumers are still exposed to unreasonable risks from an inadequate recall system.

What Needs To Happen

FDA should:

- Require food processors and distributors to provide the agency with consumer-friendly information about food they are recalling,
- Use that information to prepare an easy-to-understand recall notice in a standardized format for consumers, and
- Make the notice available to grocery stores that sold the recalled food.

Grocery Stores should:

- Promptly post recall notices in conspicuous locations in the store about recalled products they sell, and
- Use information gathered from their customers through membership and customer loyalty programs to directly alert consumers about a recall.

Consumers should:

- Keep watch for recall notices and take them seriously,
- Either safely dispose of or return recalled products, and
- Ensure that grocery stores with membership or customer loyalty programs have their accurate contact information.

Introduction

An inescapable truth about food recalls is that the people who most need to know about them are likely the last to learn about them. Even though we cannot change the fact that consumers are at the end of the food supply chain, we can improve the recall system's efficiency at alerting people that dangerous foods may be lurking in their kitchens.

Consumers are often surprised to learn that most food recalls are “voluntary,” meaning that the government cannot, except under special circumstances, order a company to recall food.

What might shock consumers even more is knowing that after a food recall is initiated, the system for notifying them is largely privatized. It relies primarily on voluntary actions by manufacturers and retailers. The government plays a supporting role in alerting the public and conducts effectiveness checks after the recall is over.

Deep-seated problems plague this privatized recall system. Press releases prepared by the company that is conducting the recall sometimes include self-serving language that can confuse consumers about the seriousness of the danger. And, more often than not, warnings simply do not reach the consumers who are at risk of injury.

Frequently, the first sign that a recall is needed comes when people get sick. Waiting until then is the worst-case scenario for recalling food especially if the warning goes out after the food has already been consumed.

Mary Varvel, for example, had no way of knowing why she was sick until she heard a news broadcast about recalled peanut butter (see box). The jar of tainted peanut butter, meanwhile, sat on her kitchen shelf capable of infecting others in her family.

Ideally, a recall system should function proactively to alert consumers at the earliest confirmed notice that a food poses a risk to their health. A system set up after Mary's illness, the Reportable Food Registry, provides an avenue for doing just that.

More recently, the Food Safety Modernization Act (FSMA) included a provision that would put information in the Reportable Food Registry to work for consumers by alerting them by means of notices placed where they would most likely see them: in their neighborhood grocery store. While a survey found that most of the largest grocery stores already post recalls in this way, the U.S. Food and Drug Administration (FDA), which enforces FSMA, has not implemented the requirement.

Josh Kaye's story illustrates how waiting for illnesses to strike before issuing recalls can result in tragedies (see box). A healthy, active child, Josh died within two weeks of eating tainted hamburger meat.

Perhaps there will always be breakdowns in the system, but posting recall notices in places where the public is most likely to see them makes sense. Simply issuing a press release is useful, but is not sufficient.

Many grocery stores make responsible efforts to protect their customers from dangerous foods. Many already post notices in the store and almost all of them include a recall notice on their websites. The most proactive are using information they gather through membership programs and customer loyalty programs to alert shoppers through phone calls, emails and post cards about recalls of food they purchased.

Why Consumers Need Better Recall Notifications

Case Study: Mary Varvel

Before Mary Varvel of Texas ate from a new jar of peanut butter in February 2007 she was a healthy, active 34-year-old, a triathlete, and mother, raising one daughter while expecting a second. She thought of peanut butter as the perfect food, packed with protein and just the right fat.

“I used to love peanut butter, just crave it, love it. You know when I was doing track runs it was always my favorite food,” she said.

Today, Mary suffers from frequent illness and “awful arthritis” for her age that keeps her from many physical activities. “The only thing I can really do, if I have time and I can do it, is swim. I can’t walk well. I can’t run anymore. I certainly can’t bike. I’ve got really bad arthritis in my cervical and lumbar areas, so I look at my triathlon pictures and say, ‘Nooooo.’ I miss it. I really miss it.”

Mary was one of 628 victims of the 2006-07 Peter Pan Peanut Butter outbreak. Insanitary conditions in a Sylvester, GA, peanut butter plant led to contamination with *Salmonella* Tennessee, which infected people in 47 states before the company issued a recall on February 14, 2007.

Almost a month after her illness, she learned about the recall from a Fox News broadcast. In that time, the peanut butter sat on a kitchen shelf where it could have caused more illnesses had others in her family eaten it. Fortunately, neither her parents nor her daughter cared for peanut butter.



Mary’s story is typical of how consumers learn about food recalls. The Food Marketing Institute (FMI), the supermarket industry’s largest trade association, reported that 73 percent of people surveyed in 2015 said they typically learned about a food recall from television.¹

Mary was caught in a disconnect between how people are informed about food recalls and how they want to be informed. When consumers are asked how they would most like to be informed of a food recall, 58 percent prefer email notices, and 40 percent express a preference for posting recall notices in the store.²

Yet a company that shipped potentially contaminated food is only required to directly notify the distributors and retailers who handled the product. The only public notice is a press release that is posted on a government website. Grocery stores may use the notices provided by their suppliers to post information on their websites, as well. Of course, precious few consumers know about and actively check government or corporate websites for recall information.³

Surveys demonstrate that posting notices on websites, an action that requires consumers to search out information about a recall, is not effective.⁴ FMI found that only 5 percent of those surveyed learned about recalls from government or supermarket websites.⁵ Moreover, grocery stores may not post all recalls on their websites. Often stores will include a disclaimer that states that not all recalls are listed.

More than half of Americans get their news from television,⁶ but relying on television has its drawbacks. News outlets typically cover only large-scale or deadly recalls, while smaller recalls and ones involving regional or local products are less likely to get coverage, according to the Rutgers Food Policy Institute.⁷

The current recall notification system has other drawbacks that keep it from being a truly effective means of alerting consumers to a recall. For example, recall notices for foods regulated by FDA are written by the company that is recalling the food and may use euphemistic terms like “voluntary recall” or “precautionary recall” that downplay the riskiness of the recalled item.⁸

Some companies might even include a promotional blurb in the recall notice, as in a Texas grocery store’s press release from November 20, 2015, that began by noting the store is “committed to high-quality products” before explaining its “precautionary recall” of some of those products because they might contain metal fragments.⁹ Such distracting practices could lower a consumer’s sense of urgency about the recall.¹⁰

The Rutgers Food Policy Institute recommends that messages be detailed enough to provide the essential information that lets consumers recognize the product being recalled and avoid eating it.¹¹ Alerting consumers that a recall applies to them is already difficult enough due to “optimistic bias” that occurs because people tend to believe bad things happen to other people, not them.¹² When the information is ambiguous people are more likely to assume it isn’t relevant to them and ignore the recall warning, according to the Institute.¹³

The government could do more to make recall information accessible to the public, and, in fact, did at one time. As smartphones became more common, the Recalls.gov app met a need for better public notice. The app not only listed all product recalls by categories, but it included an important feature that empowered consumers with a method for quickly learning if food was safe to eat. A barcode/QR reader in the app made it possible to scan these ubiquitous symbols on food packaging to see if a recall notice had been issued for that item.

To understand the importance of that small feature one needs do no more than try identifying a food item from the lengthy lists that populate government recall websites. The recent recall of CRF frozen foods, for example, involved more than 400 different products, presenting consumers with a nearly impossible task of finding particular brand names, use-by dates, and production codes to compare with items in their freezers. That process is

Case Study: Joshua Kaye

Andy and Melissa Kaye never had a chance to learn that their local grocery store had recalled contaminated ground beef before their son Josh fell ill. Federal inspectors had linked a cluster of illnesses to the ground beef as early as June 26, 2014, one day after their son began showing symptoms, but the store did not issue a recall until August 15. By that time, Josh, age 8, had been dead for over a month.

“Had they acted quicker, done a recall sooner, and had there been notification put out sooner, before our son was included in the cluster, we would have been put on high alert,” Melissa said. That may have resulted in earlier and more effective treatment.

The Kayes’ ordeal began when Josh complained of not feeling well on Wednesday. By Thursday, he was too sick and weak to get up without help.

“He wasn’t downbeat about being sick. He was kinda, ‘I’m not feeling well so I’m just going to hang out.’ So I thought, okay he’s a big boy now and he’s just lounging on the couch. He’s got a fever now but he’s doing okay,” Melissa said.

On Friday his condition seemed to be improving, but by Friday night Josh had extremely bad diarrhea that by Saturday morning had turned bloody. Seeing that, the Kayes decided against waiting for the pediatrician’s appointment they had made and rushed Josh to the emergency room. From there he was transferred to another hospital and diagnosed with hemolytic uremic syndrome caused by an *E. coli* infection. He went into cardiac arrest the following Friday, was put on life support, and died two days later without regaining consciousness.

The Kayes are certain they would have seen a recall notice had it been posted because they did see one in the meat counter for rib-eye roasts and asked about it. “We are in the store multiple times a week. We do all our shopping there,” Andy related. “So, you would see a tiny white card saying there was a recall and you’d inquire about it.”



simplified if they can use a smart phone to simply scan the barcode or QR code on each package to see if the food item is recalled.

So what happened? The government ceased supporting the app because it could not get access to a complete list of all recalls and suffered a lack of funding support for maintaining the app from the various government agencies with recall authority.¹⁴

That decision left consumers with a choice of privately developed apps that turn out to have many deficiencies, not the least of which is an absence of the barcode/QR reader feature that had made the Recalls.gov app so useful to consumers.

Point-of-purchase notices are an effective way to notify consumers about food recalls, but, as the Kayes' experience highlights, messages need to be timely.

They also need to be clear as to the danger. One way to stop businesses from downplaying the seriousness of a food recall and/or issuing ambiguous messages would be to standardize the content.

In 2004, the U.S. Government Accountability Office (GAO) recommended that Congress give FDA and the Food Safety and Inspection Service (FSIS), the part of the U.S. Department of Agriculture that oversees meat and poultry safety, authority to establish requirements for providing recall information to consumers.¹⁵ FSIS did not wait on Congress before changing its recall policies, and FSIS now writes all the recall notices that are posted on its website. FDA, meanwhile, continues to rely on the company that is recalling the food to write and issue a press release.

Congress responded to the 2004 GAO report in 2010 by passing FSMA. Included in that landmark legislation is a provision that requires FDA to prepare recall notices that grocery chains larger than 15 stores must post in conspicuous locations. In 2011 and 2014 FDA sought information on how to implement the notification requirement, but as of June 2016 the provision continued to languish.

How FSMA Could Fix Our Broken Recall System

FSMA establishes a system for notifying consumers about Class I recalls. These are recalls of foods that can cause serious injury, illness, or death.

Under FSMA, a manufacturer that reports a food safety incident to the Reportable

Food Registry would need to supply consumer-oriented information to FDA if consumers might be exposed to the food. FDA must then prepare a one-page recall notice that grocery stores can download for the purpose of notifying consumers. Grocery chains that operate in 15 or more locations must display the notices within 24 hours of its release and keep it posted for 14 days.

FDA is also supposed to provide grocery stores with a list of conspicuous locations and manners that the grocery store can select from in posting the notice. Locations specified in FSMA are at the check-out register, on the shelf where the recalled food was located, and handed to shoppers with their receipt. The agency can also specify other prominent and conspicuous locations and manners utilized by grocery stores as of the date FSMA was signed into law.

The Reportable Food Registry serves as an early warning system of potential risks in the food supply by requiring food manufacturers and distributors that discover food is contaminated with dangerous allergens, chemicals, or pathogens to report that to FDA. Ideally, the registry process catches problems before they land on grocery store shelves.

In 2013, FDA reported an instance in which the Reportable Food Registry was used to identify and recall processed onions that had been distributed to 14 states. The agency noted that, "...potentially dangerous products were removed from the marketplace, human illnesses were avoided, and the public was informed of the possible *Listeria monocytogenes* contamination of the product.... No associated illnesses were reported."¹⁶

That outcome illustrates the value of an early warning system that can detect dangerous foods *before* people get sick. Too, often an outbreak has occurred before the problem food can be identified for a recall. That means a recall notice comes too late for many people.

The outbreak due to contaminated peanut butter that sickened Mary Varvel had been going on for more than six months when she fell ill. A review of 30 outbreaks

Recall Classifications

Recalls are divided into three classes, according to the level of hazard involved:

- **Class I:** Dangerous or defective products that predictably could cause serious health problems or death. Examples include: food found to contain botulinum toxin or undeclared allergens.
- **Class II:** Products that might cause a temporary health problem, or pose only a slight threat of a serious nature. Examples include: the presence of a foreign substance such as glass that may cause injury, or an undeclared substance such as wheat that may cause allergic reactions in sensitive people.
- **Class III:** Products that are unlikely to cause any adverse health reaction, but that violate government labeling or manufacturing laws. Examples include: a minor container defect or lack of English labeling in a retail food.

Source: FDA and FSIS

caused by FDA-regulated food from 2009 to 2014 found that it took an average of 85 days from the first illness to the initial recall.

One strength of linking the in-store notification system to the Reportable Food Registry is the potential for warnings to reach consumers before they've eaten a dangerous food and are sickened.

FSMA System Not Perfect, But a Big Step Forward

The in-store notification system, while a good step forward, has its flaws. For example, it does not apply to recalls of meat and poultry products. That means it would not have alerted Andy and Melissa Kaye to the recall of ground beef, which is regulated by FSIS. Even though FSIS already writes the recall notices that are posted on its website, grocery stores are not required to display the government prepared notice.

Another problem is that the law's mandate to display an in-store notification may not apply to a recall that was not initiated by a report to the Reportable Food Registry. FDA has asked for public comments on whether it should nonetheless prepare a notice in cases where it obtains information about a contaminated food by a means other than through the Reportable Food Registry.¹⁷ When GAO proposed giving FDA and FSIS the power to approve the content of recall notices, it expected that to extend to all notices. If FDA determines it can legally only require stores to post notices about recalls prompted by a Reportable Food Registry report that linkage may mean stores would not have to supply the same quality of notification for all recalls.

These flaws are not a reason to forgo establishing the recall system. It would improve efficiency by standardizing the information consumers receive about recalls, while building on practices grocery stores already employ to alert consumers to recalled foods.

CSPI Survey Finds In-Store Notification a Common Practice

The Center for Science in the Public Interest surveyed 21 major supermarket and dollar-store chains. We quickly discovered that one of the issues FDA must resolve as it implements the in-store notification system is how to define “grocery stores.” Groceries may be sold in convenience stores and drug stores, among other places, not just supermarkets or what people might think of as traditional grocery stores.

How we selected the stores for our survey

To be included in this survey, the retailers were selected from *Supermarket News*' 2015 ranking of the top food retailers and wholesalers in the United States and Canada. Retailers had to be based in the United States and derive at least 70 percent of their sales from consumables (food, and health and beauty aids). We made an exception and included Walmart. Companies could not be cooperatives serving independent stores.

Large grocery marketers that were not included in the survey because they support multiple independent stores include C&S Warehouse, Wakefern, Associated Wholesale Grocers, and SpartanNash.

Information about the chains' recall practices came from several sources:

- Store websites
- Responses to a mail survey
- Telephone calls and chat lines on their websites

If a retailer merely linked to a government-operated recall website, we did not credit that chain with having a website.

The stores selected for the survey are taken from the 2015 Top 75 U.S. & Canadian Food Retailers & Wholesalers list compiled by *Supermarket News*. (See sidebar for more details.) To be included in our survey, stores had to be based in the United States or operated through a subsidiary based here. We did not include wholesalers who serviced independent grocery chains because they do not exercise corporate control over recall policies at the store level. In the case where a corporate headquarters controlled multiple chain stores, we selected one of the chains for purposes of this survey. For example, Southeastern Grocers operates BI-LO, Harvey's, and Winn-Dixie stores. We reviewed Winn-Dixie. We narrowed the list further by eliminating stores that derived less than 70 percent of their revenues from the sale of food and other consumables (health and beauty aids). That had the effect of eliminating Walmart from the survey. Walmart, however, with \$237 billion in revenue from the sale of food and other consumables,¹⁸ is the 800-pound gorilla in the food retail sector, so we included it in the survey.

We found that 15 out of 16, or 94 percent, of the stores that supplied information already use

in-store notices in all their stores (see Table on page 12). However, the placement of the notices within the store varied. Of nine stores that provided information, three placed notices near the entrance to the store, four placed them where the product had been shelved, and four placed them in various locations, such as at the checkout register. (The numbers don't add to nine because three stores post notices at more than one location.)

Consumers picking up a shopping cart at a Publix are confronted by a recall board that provides a centralized area where recall information is accessible. But the store also recognizes that consumers may not notice that information, so for high-profile recalls, particularly ones involving pathogens, the store may also post a notice where the product had been shelved.

Four chains—Giant Food Stores, Costco, Hy-Vee, and Food Lion—told us that each store’s manager decides where a notice will be posted. Other policies affecting where and when notices are posted included only providing them for recalled produce, or limiting the use of in-store notices to products made on the premises.

These industry practices provide an answer to another key issue FDA must resolve in implementing the in-store notification system. Where

are the conspicuous locations and manners for posting notices in grocery stores? Most grocery stores are already posting notices in areas they believe will capture the attention of their customers. Also, posting notices where the product is shelved in the store was supported by 40 percent of consumers asked about this option and 26 percent supported notices at the checkout register.¹⁹ Since grocery stores are only required to select one location from the list FDA is to provide, it is unlikely that many stores would have to change their current policies.

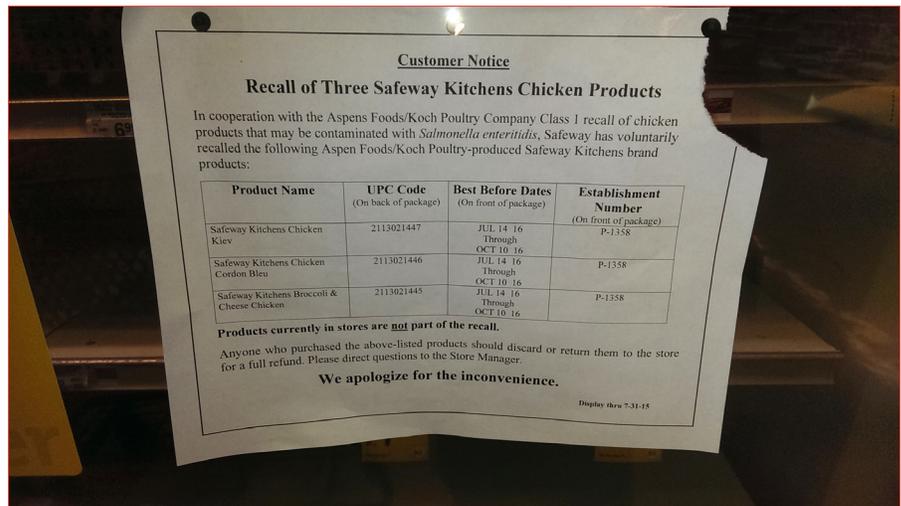
Notifying customers about food recalls is one of the least costly aspects for a grocery store conducting a recall. Stores are ordinarily reimbursed by their suppliers for the cost of recalled products that they return to their suppliers, but may bear other costs associated with a recall. Customer notification represents only 6 percent of the recall costs. The majority of the costs (53%) is in removal of product from shelves and its destruction.²⁰

We looked at two other methods stores use for notifying customers about recalls. In addition to in-store notices, grocery stores may use their corporate websites to post recall notices, or use their customer loyalty card programs to directly contact customers.

Other Ways Stores Notify Consumers

Posting Recalls on the Corporate Website

Of the grocery stores we surveyed, only one, Winn-Dixie, did not post on its website recall notices specific to products sold in the store. Instead, clicking on the “Product Recalls” link from the Winn-Dixie home page takes a user to the Recalls.gov website. While the government-run website lists all food recalls, it does not distinguish between foods sold at Winn-Dixie and foods sold elsewhere. Because all the other store websites we visited only listed food actually sold in the store, we judged Winn-Dixie’s website as failing to provide useful information to its customers.



In addition, two chains did not provide a clearly marked link from their home pages to the recall page. Whole Foods puts its recall information on its “Food Safety” page. Albertson’s also does not provide a direct link from its home page to recall notices. Customers must first go to the “Consumer Information” page to find a link to product recalls.

Two other chains rely on drop down menus that can make the recall link hard to find. Trader Joe’s provides a recall link under the “Announcements” menu at the top of its home page. Hy-Vee has a link to its recall listings under the “Company” menu at the top of its home page and also provides a link to a list of recalls through the “Press Room” link at the bottom of its home page.

The information that stores present and how they present it can vary greatly as well. In most cases, the stores follow the same format of listing the names of recalled products with a link to more detailed information. Safeway is the only chain that provides all of the information about the recall on the same page. Content can also vary greatly with stores like Kroger using a “just the facts” approach of posting notices that identify the product, detail the stores affected, the reason for the recall, and the date of the recall. H-E-B’s recall page, meanwhile, lists the date of the recall and name of the product with a “Read More” link to a recall notice issued by the company that is recalling product.

Customer Loyalty/Membership Programs

Customer loyalty programs, at their most basic level, are used by grocery stores to encourage return business. A customer gives the store personal contact information, which the store uses to target advertising back to the consumer. The consumer benefits by receiving a small discount and targeted information about products he or she may buy. The store benefits from additional business generated by the advertising and better management of its inventory.

Some stores, such as Costco and BJ’s, use membership programs that have customer contact information to encourage repeat business, but also are used to proactively alert customers to recalls.

Notifying consumers directly can be highly effective. A study by the Grocery Manufacturers Association found that direct notification reaches 80 percent of contactable customers within two to 48 hours.²¹ The method for contacting customers varies. Because the programs track the products that consumers purchased, they can be used to print recall information on a sales receipt. Stores also use mailing addresses, email addresses, and phone numbers to quickly alert customers that they had purchased recalled products. However, as one store official explained to us, loyalty programs might capture the names and addresses of less than half of a store’s customers, which would mean many shoppers might not find out about a recall if the only means of communicating is an email or telephone call.

Both Mary Varvel and the Kayes said they agree that stores have a responsibility to notify their customers about potentially serious problems with a food item.

“I feel strongly about how most corporate grocery chains could do a more effective job,” Mary said.

In fact, a recent court case found that grocery stores that collect information about their customers may be under a duty to use that information to warn them about recalled food they may have purchased.

In our survey, nine stores had customer loyalty programs. Of those, eight currently use the information gathered by the program to alert customers to food recalls affecting products they purchased (see middle column of the Table). The notifications may go out in the form of email messages, robo-calls, or post cards.

Stores that have customer-loyalty programs use a variety of communication methods to contact consumers. The most frequent form of communication was by telephone (Costco, Giant Eagle, Meijer, Wegmans, and occasionally BJ’s), email (Giant Food Stores, BJ’s, Kroger, and Meijer), or a physical letter to the customer’s address (Giant Food Stores, Costco and sometimes BJ’s). Kroger was the only company that would sometimes send a text to its customers, as well as put a notification on the customer’s receipt. While some stores alert all customers to a recall even if they didn’t purchase the product (BJ’s, Kroger, and Meijer), others (Giant Food Stores, Costco, Giant Eagle, and Wegmans) targeted notices to the purchaser of the recalled product.

While direct communication about recalls is the most effective way to notify consumers, it cannot replace posting in-store notices. That is because customers may not sign up, or the contact information may be wrong.

FDA’s Reluctance to Implement FSMA’s In-Store Notification System

On a typical day 32 million Americans shop in a grocery store.²² FDA’s failure to use the authority Congress gave it to implement an in-store notification system makes little sense given the potential to reach a large audience with a public health warning and the lack of resistance by industry to doing so.

Far from seeking to delay or block the system, the supermarket industry endorses posting recall notices. FMI advises grocery stores to notify their customers any time they have sold food that is the subject of a Class I recall.²³ Six out of 10 examples cited

Voluntary Recalls

Until 2011, the government could only ask, not order, a company to recall food that presented a serious risk of injury or illness. For that reason, companies termed recalls “voluntary,” because the company had voluntarily agreed to recall the food. The Food Safety Modernization Act gave FDA authority to mandate a recall in certain circumstances. FSIS, which oversees the safety of meat and poultry products, still cannot order a recall, however.

Table. Recall Notification Practices by the 21 Leading Supermarkets and Dollar Stores

SN Rank*	Chain	Posted on Website	Direct to Consumer	Posted in Store
1	Walmart	Y	Y	Y
2	Kroger	Y	Y	Y
3	Costco	Y	Y	Y
5	Safeway	Y	†	Y
6	Publix	Y	X	Y
7	Giant Food Stores	Y	Y	Y
9	Albertsons	Y	NR	NR
10	H-E-B	Y	X	Y
13	Food Lion	Y	NR	Y
14	Cub Foods	Y	NR	Y
15	Meijer	Y	Y	Y
18	Dollar General	Y	NR	NR
19	Whole Foods	Y	NR	NR
21	Trader Joe's	Y	X	Y
22	Winn-Dixie	N	NR	Y
25	Aldi USA	Y	X	NR
26	Giant Eagle	Y	Y	N
27	BJ's	Y	Y	Y
28	Hy-Vee	Y	NR	Y
31	Family Dollar Stores	Y	X	NR
32	Wegmans	Y	Y	Y

(Y) Yes. (N) No. (NR) No Response. (X) No Customer Loyalty Program.
 * *Supermarket News* (See, "How we selected the grocery stores for our survey")
 † In process of starting an email notification program

by FMI of current practices used by retailers involve posting in-store notices.²⁴ Comments that FMI and the National Grocers Association, the two largest organizations representing grocers, filed in response to FDA's 2014 proposed rule provided helpful advice for implementing it. Moreover, at least 69 percent of retailers surveyed by Deloitte in 2010 reported already using in-store signage to notify customers as part of their recall process.²⁵

Consumers certainly believe that stores have a duty to notify them about recalls. "I think any store that is selling a product needs to be responsible for sharing any kind of safety information for that product. If there is a recall, there should be a notice," Melissa Kaye said.

As common as the practice of posting notices is, continuing to rely on voluntary action may leave consumers exposed to recalled food. One problem is caused by grocery stores not receiving timely notices of recalls through their national headquarters. A 2009 report by the Inspector General of the Department of Health and Human Services, “Review of the Food and Drug Administration’s Monitoring of Pet Food Recalls,” found that one large national chain had delayed notifying its stores of a major pet food recall for almost four weeks after the manufacturer first issued a recall.²⁶ As a result, recalled product remained on the shelf and in homes and available to consumers and their pets.

A 2011 New York survey found that 15 percent of store managers in that city were unaware that products sold in their stores had been recalled.²⁷ More troubling was the discovery that 22 percent of the stores in which the city conducted a follow-up inspection had not removed recalled products from their shelves.²⁸

There are other indications that voluntary action may leave gaps. For example, the Aspen Foods’ recall of frozen and raw stuffed and breaded chicken products that began in July 2015 was not listed on Walmart’s website even though the chain carried the product nationwide.²⁹ Because frozen chicken has a long shelf life, the recall remained active into 2016. The Aldi grocery store chain, in contrast to Walmart, was continuously listing the recall as late as January 2016.

By making it legally binding on grocery stores to regularly check FDA’s Website and print relevant recall notices, the in-store notification system, if adhered to by store managers, should overcome these kinds of problems that can be caused by ineffective store procedures.

What Government Should Do to Improve Recalls

FDA needs to fully implement the grocery store notification system. FSMA called on the agency to begin requiring food processors and distributors to provide the agency with consumer-friendly information about a food it is recalling within 18 months of FSMA's enactment. Five years later, FDA has made little, if any progress on this requirement.

The information supplied was to be used by FDA to prepare an easy-to-understand recall notice in a standardized format for consumers. Instead, the current system places this task on the company issuing the recall. While FDA provides guidance for preparing the notices, many of them include confusing and self-serving information.

Finally, FDA needs to start providing the recall notices as the law requires to grocery stores with 15 or more physical locations that have sold recalled food. The current voluntary system for making consumers aware of recalls varies from store to store, and not all stores post notices. That exposes consumers to unreasonable hazards because they have few means of learning about recalls short of hearing about them when a tragedy, or potential for tragedy, makes the recall newsworthy.

Unlike FDA, FSIS initiated a practice of identifying grocery stores that handled recalled products. This means that a person can check to see if a recall affects food they may have purchased from their local store. However, the list, which shows up on the FSIS website's recall notice under the link "Distribution List PDF," is published as a static Adobe PDF file. It would be more useful to consumers if FSIS indexed the store name to the recall so that by typing in the name and address of a grocery store any meat or poultry recalls associated with it would be displayed.

Finally, both FDA and FSIS should collaborate to relaunch the Recalls.gov app for smartphones and tablets that includes a QR and barcode scan feature. The ability to simply scan the label on food packaging would make it possible for worried consumers to quickly check items on their shelves and so avoid eating a recalled food. That would do more to simplify the recall process, but it wouldn't eliminate the need for other improvements of the recall system. Not everyone has a smartphone and those that do may not download or use the app. Where it would be especially advantageous would be as a way for parents or caregivers to check the status of food they are preparing for vulnerable people, such as very young children and very old adults.

What the Food Industry Should Do to Improve Recalls

Grocery stores, regardless of size, need to establish policies for checking on a daily basis the FDA and FSIS websites for notices about recalled products they sell and promptly posting the warnings at conspicuous locations within the store. Many stores already do that, and those that don't shouldn't wait for FDA to implement FSMA's in-store notification system.

Stores that have customer loyalty or membership programs that collect contact and/or sales information about their customers should proactively alert consumers by email, phone, or mail about recalls of food they purchased. That kind of notification is most likely to capture the attention of busy consumers who might miss a news broadcast or fail to see a website or in-store notice. It is the method of notification that consumers, when asked, state they would most prefer. Also, at least one federal district court recently held that grocery stores may have a post-sale duty to notify customers directly of Class I recalls where such notice is feasible, such as by email.

What Consumers Should Do With a Recalled Product

Effectively notifying consumers about dangerously contaminated products is one thing. Equally challenging is educating consumers on what to do when they learn they have a recalled product. People tend to view food recalls as something that is important to others, but not particularly relevant to themselves. Only one in six consumers reported ever looking for a recalled product in their home, and, surprisingly, 12 percent of people surveyed said they have eaten food after learning it was part of a recall.³⁰

When a consumer sees a recall notice, the best reaction is to take it seriously, and:

- 1. Identify the Product.** If you see a notice posted in your grocery store indicating that a food you bought was being recalled, take down any information that identifies the recalled product such as brand name, use-by dates, and manufacturer or UPC codes and compare that to what you may have purchased. Recalls are usually very specific.
- 2. Check Your Shelves, Refrigerator, and Freezer.** Compare products in your kitchen to the description of the recalled item. If you have already opened and thrown away its packaging, the safest thing to do is dispose of the food.
- 3. Don't Eat the Food.** You should not assume the food can be made safe to eat, or that nothing will happen to you if you eat it.
- 4. Don't Open the Food.** There is no reason to open the package of a recalled item since the bacteria that cause foodborne illnesses can be present even though

the food does not look, smell, or taste spoiled. Opening a container of recalled food increases the risk of contaminating surfaces in your kitchen and/or cross-contaminating other food.

5. Wash Your Hands. If you handle the product, wash your hands with warm, soapy water afterwards.

6. Follow the Instructions on the Recall Notice. Most recalls include instructions to properly dispose of the food or return it to the store for a refund. Don't feed it to your pets, compost it, or put it out for wild animals to eat.

Consumers who participate in customer loyalty programs or join a store membership program should ensure the store has an accurate street address, telephone number, and email address. Some shoppers may fudge this information, thinking that doing so protects their privacy while giving them access to discounts. The downside of a store's having false or outdated address information, however, is that the store can't send a personalized warning about dangerously contaminated food.

Conclusions

There is no perfect system for alerting consumers that a food is being recalled. But in carrying out FSMA, FDA should not let the perfect be the enemy of the good. FDA continues to drag its feet on implementing a consumer notification system more than five years after it was directed to do so by Congress.

Currently, consumer notification may be haphazard and depend on many independent actors taking particular actions. Food manufacturers must directly notify everyone in their supply chain except consumers about a food recall. That means consumers can be left to search for information in stores or on government and grocery store websites except in the rare instances when recalls are covered in the news.

The problem with the current system is its presumption that consumers are prescient about risks from food and, so, constantly seek out recall information. In fact, consumers lead busy lives and almost no one sees the need or has time to scan websites to protect themselves from a potentially risky food. They need the same kind of active notice that is provided to others in the food supply chain.

The one location where consumers go, think about food, and would likely see and respond to a recall notice is at their neighborhood grocery store. Many, but not all, grocery stores already post recall notices in conspicuous locations within the store. Stores also may use other methods to advise their customers of recalls. The most effective is using contact information that is linked to a customer's purchases to directly notify that customer about recalled food in his or her home. The main flaw in that system is that customers who didn't participate in loyalty programs would not be notified.

What is needed is overlapping systems anchored to the consistent form of notice that would be provided by the grocery store notification system envisioned in the Food Safety Modernization Act. FDA needs to implement the new law to ensure that consumers are notified as quickly and effectively as possible whenever a recall is ordered.

Notes

- 1 Food Marketing Institute, *U.S. Grocery Shopper Trends 2015*, 70, (2015) (hereinafter “Shopper Trends 2015”).
- 2 *Id.* (Other options were: notice posted at checkout counter (26%), text messages (22%), U.S. Mail (17%), social media (15%), smartphone app (9%), and phone call (8%).)
- 3 William K. Hallman, Cara L. Cuite, & Neal H. Hooker, *Consumer Responses to Food Recalls: 2008 National Policy Survey Report*, Food Policy Institute, 11, April 14, 2009 (hereinafter “Consumers Responses”).
- 4 Diminished Capacity: Can the FDA Assure the Safety and Security of the Nation’s Food Supply?: Hearing before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, 110th Cong. 61 (2007)(statement of Lisa Shames, Acting Director, Natural Resources and Environment, Government Accountability Office).
- 5 Shopper Trends 2015, *supra*.
- 6 In Changing News Landscape, Even Television is Vulnerable, Pew Research Center on U.S. Politics and Policy, Sept. 27, 2012, <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/> (last accessed Jan. 4, 2016).
- 7 William K Hallman & Cara L. Cuite, *Food Recalls and the American Public: Improving Communications*, Food Policy Institute, 9, March 15, 2009 (hereinafter “Hallman”).
- 8 *Id.* at 17.
- 9 Press Release, Mi Tienda Issues Precautionary Recall: Recall Affects Masa and Tostadas Purchased ONLY at Mi Tienda #1 Located at 1630 Spencer Highway, South Houston, TX (Nov. 20, 2015) at <http://www.fda.gov/Safety/Recalls/ucm474086.htm> (Last accessed Dec. 15, 2015).
- 10 FDA warns against including irrelevant information or promotional materials in a recall notice. See, FDA, Guidance for Industry – Using Electronic Means to Distribute Certain Product Information, 2006, at <http://www.fda.gov/RegulatoryInformation/Guidances/ucm125164.htm> (last accessed Jan. 25, 2016).
- 11 Hallman, *supra* at 2-3.
- 12 Neil D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 J. of Personality and Social Psychology 806, (1980).
- 13 Hallman, *supra* at 13.
- 14 Email message from David Kaufmann, USA.gov.
- 15 GAO, *USDA and FDA Need to Better Ensure Prompt and Complete Recalls of Potentially Unsafe Food*, 29, October 2004.
- 16 The Reportable Food Registry: Targeting Inspection Resources and Identifying Patterns of Adulteration Third Annual Report, Food and Drug Administration, 6 (May 1, 2013).
- 17 Implementation of the Food and Drug Administration Food Safety Modernization Act Amendments to the Reportable Food Registry Provisions of the Federal Food, Drug, and Cosmetic Act, 79 Fed. Reg. 16698, 16704, March 26, 2014.
- 18 Walmart, Supermarketnews.com at <http://supermarketnews.com/retailers/walmart> (last accessed Jan. 15, 2016).
- 19 Shopper Trends 2015, *supra*.
- 20 Recall Execution Effectiveness: Collaborative Approaches to Improving Consumer Safety and Confidence, Deloitte, Grocery Manufacturers Association, Food Marketing Institute, GS1 US, 48 (2010) (hereinafter “Deloitte”)

21 Recall Execution Effectiveness: Collaborative Approaches to Improving Consumer Safety and Confidence, Grocery Manufacturers Association, 2010.

22 Jack Goodman, *Grocery Shopping: Who, Where and When*, The Time Use Institute (Oct. 2008).

23 Guidance for Retailers: Product Recalls, FMI Center for Retail Food Safety and Defense, 14 (July 2012).

24 *Id.* at 14.

25 Deloitte, *supra*.

26 Daniel R. Levinson, *Review of the Food and Drug Administration's Monitoring of Pet Food Recalls*, Office of the Inspector General, Dept. of Health and Human Services, 13 (2009).

27 Heather Hanson, et al., *Evaluating the Effectiveness of Food Recalls in Retail Establishments in New York City*, 74 J. of Food Protection 111, 112, (2011).

28 *Id.* at 113.

29 The retail consignees list for the Aspen Foods recall on the FSIS website includes Walmart and Aldi as carrying the recalled items in all their stores. We viewed the recall webpages for Walmart from July 26, Aug. 4 and Sept. 3, 2015, using the Internet Archive website at <https://archive.org/>.

30 Consumer Responses, *supra* at 10.



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