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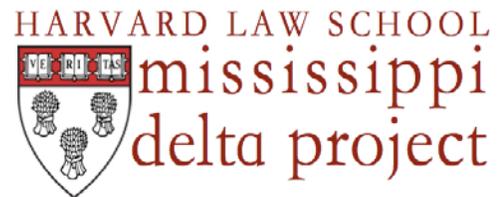
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Health Law and Policy Clinic of
Harvard Law School



Legislative and Regulatory Recommendations to Allow Home- Processing of Low-Risk Foods in Mississippi

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Introduction

With the recent growth in farmers markets and the demand for local, fresh foods there has been a push to allow individuals to produce and sell foods made in their homes.¹ This report will explain why Mississippi should follow the trend set by over 30 states to allow in-home production and sale of certain low-risk or non-potentially hazardous foods like baked goods, jams, jellies, and dried herbs. This report will lay out current Mississippi law regarding the processing of such non-potentially hazardous foods in home kitchens; compare Mississippi law to the laws employed in other states; and make recommendations for Mississippi's adoption of new regulations or legislation that would permit home processors to sell their non-potentially hazardous foods to the public.

¹ This report was prepared by Harvard Law School students in the Health Law and Policy Clinic and the Harvard Law School Mississippi Delta Project under the supervision of Emily Broad, Senior Fellow in the Harvard Law School Health Law and Policy Clinic. Special thanks to Tareah Ikharo and Vanessa Assae-Bille for research and drafting, and to Jared Knicley for preparing the map.

Overview of In-Home Food Production Laws in Mississippi and Around the United States

Background on Food Safety Laws

At many local markets around the country, vendors sell not just fruits and vegetables, but also candy, jams, jellies, and various baked goods. Many of these items, however, are covered by complex national and state laws that create burdensome requirements for their production and sale. Because these laws are often unclear, and because many small producers lack resources for legal research, they may forego even legal sales for fear of inadvertently breaking the law.

The U.S. Food and Drug Administration Food Code (“FDA Code”) is a model code and reference document for state and local governments on food safety laws. The FDA does not require states to adopt the code, but many states have chosen to do so because the code reflects the expertise and attention of dozens of food safety experts. Importantly, the FDA Code itself is not law; it only becomes binding when states adopt it by statute or regulation, and states typically add their own modifications by statute or regulation.

Mississippi has adopted the FDA Code with modifications, made by both statute and regulation.² Because the FDA Code was voluntarily adopted by Mississippi, making changes to the state’s food safety law does not require rejecting the FDA Code or even adopting a new version. Instead, further changes to Mississippi’s adoption of the FDA Code can be made by legislation or by regulation. Regulatory authority for the FDA Code is shared by the Department of Health and the Department of Agriculture and Commerce, with primary authority for food safety resting with the Department of Health.³ As mentioned above, almost all states have adopted some version of the FDA Code, but most states included modifications in their adoption of the Code. Allowing in-home production of certain food items is an example of a modification that has been adopted in more than 30 states.

Regulating “Food Establishments”:

Subject to a few exceptions, Mississippi law designates all locations where food is produced or sold for pay as “food establishments.”⁴ Once a location is considered a “food establishment,” it is subject to a host of rules including the requirement that the establishment have a “sink with at least 3 compartments” and a “test kit” for measuring sanitizing fluids.⁵ These are just two of the hundreds of requirements imposed on such certified kitchens. The establishment must also be inspected and

² 15-375-002 Miss. Code R. § 102 (Weil 2009). For purposes of these recommendations, only the Mississippi adoption of the FDA Code is relevant, as the other federal food safety law, the Federal Food, Drug, and Cosmetic Act, is not implicated by the proposals noted below.

³ See Miss. Code Ann. § 41-3-15(4)(f) (2009) (granting primary authority over cafés, restaurants, and other food establishments to the Department of Health) and § 69-1-18 (charging the Department of Agriculture and Commerce with overseeing all “retail food establishments” that are not supervised by the Department of Health under its primary authority). While under § 69-1-18(1)(b)(iv) the Department of Agriculture explicitly does not have regulatory authority over “food establishments” as defined by the Department of Health, exempting in-home food processors from the definition of a “food establishment” would not in itself grant the Department of Agriculture authority, as the statutory definition of “retail food establishment” only includes establishments “where food and food products are offered for sale to the ultimate consumer and intended for off-premise consumption.” The recommendations in this paper only address in-home production and do not implicate any establishments where food is actually offered for sale. Therefore, no additional action by the Department of Agriculture would be required for these recommendations to take effect.

⁴ FDA 2009 Food Code 1-201.10.

⁵ FDA 2009 Food Code 4-301.12 and 4-301.14.

permitted by the Department of Health, and any individuals preparing food in the establishment must undergo annual food service safety certification and/or food service manager certification.⁶ According to the FDA Code, home kitchens used for household food preparation cannot be certified kitchens, so anyone wishing to prepare food for sale must have access to a separate certified kitchen outside the home.⁷

One of the few exceptions to the rule is the exemption for charity bake sales and religious events. Mississippi law permits individuals to produce food at home so long as (a) the food will be sold at functions “such as a religious or charitable organization’s bake sale” and (b) the food is not “potentially hazardous.”⁸ This exemption allows individuals to prepare for sale foods identified as non-potentially hazardous, such as baked goods, jellies, jams, granola, popcorn, coffee, and tea, when those foods are being sold at a charity bake sale or similar function.

This exception was not created by Mississippi. Instead, the exemption is in the 2009 FDA Code, which is evidence that the FDA itself has deemed home production of foods to be safe when those foods are not “potentially hazardous.” This exception provides a model for applying the same logic to sales of non-potentially hazardous foods in other locations, such as farmers markets. Indeed, many states have taken a small step to extend the exemption for the sales of homemade non-potentially hazardous to farmers markets by simply adding the words “farmers markets” after “charity organization’s bake sale” in the language adopted from the FDA Code.

What is a “Potentially Hazardous” Food?

The most important part of the exemption discussed above is the term “potentially hazardous.” The definition in the FDA Code is detailed and technical, referring to the acidity of a given food to determine whether it is considered potentially hazardous.⁹ The focus of the definition is on whether a particular item is likely to develop bacteria or viruses that carry disease. In the language of the FDA Code, the question is whether the food supports “pathogenic microorganism growth or toxin formation.”¹⁰ Meat, dairy, and shellfish are all examples of potentially hazardous foods. However, less obvious foods such as low-sugar jams, cooked vegetables, and low-acidity pickles and salsa are also considered potentially hazardous because they can support viral or bacterial growth if not properly stored. In effect, if the food has the potential to cause harm to consumers when not kept under proper temperature and storage conditions, the food is considered “potentially hazardous.”¹¹

In order to clarify which items are considered potentially hazardous and which are not, we have compiled the following table based on the 2009 FDA Code:¹²

⁶ Miss. State Department of Health, “Food Code and Food Facility Permits,” available at: http://msdh.ms.gov/msdhsite/_static/30,0,77.html.

⁷ FDA 2009 Food Code 6-202.111. Note that in some states, one modification allowing for in-home production merely allows the Health Department to certify home kitchens for production of some food items.

⁸ FDA 2009 Food Code 1-201.10.

⁹ The definition of “potentially hazardous” in FDA 2009 Food Code 1-201.10 essentially defines non-potentially hazardous foods as those having a pH of 4.6 or lower.

¹⁰ FDA 2009 Food Code 1-201.10. Note that the FDA Code does not give specific examples of non-potentially hazardous foods, so we derive our list of non-potentially hazardous foods by negative implication from the items listed as potentially hazardous.

¹¹ Generally, potentially hazardous foods are subject to strict requirements on storage conditions and temperature controls. Non-potentially hazardous foods are not subject to these storage conditions or temperature controls, yet under Mississippi law, they must still be prepared in a certified kitchen. Thus, Mississippi law prohibits individuals producing potentially hazardous foods at home under all circumstances but, as noted above, authorizes home production of non-potentially hazardous foods when they are produced for charity bake sales and religious events.

¹² FDA 2009 Food Code 1-201.10. Some of these items are listed directly in the Food Code while others are based on the standards established by the Food Code.

Potentially Hazardous	Non-Potentially Hazardous
<ul style="list-style-type: none"> · Meat, poultry, and eggs · Fish and shellfish · Cooked vegetables · Dairy products · Mushrooms · Cut melons · Unmodified cut tomatoes or mixtures of cut tomatoes · Untreated garlic-in-oil mixtures · Baked goods subject to spoilage (such as cream-filled pastries or others that must be refrigerated) · Reduced sugar jams and jellies · Pickles and salsas · Raw seed sprouts 	<ul style="list-style-type: none"> · Jams, jellies, and preserves · Sweet sorghum syrup · Fruit butter · Fruit pies · Baked goods that are not subject to spoilage · Granola · Coffees/teas · Dried Herbs

Comparison of Food Safety Laws in Other States

This section analyzes the various ways in which other states have allowed food to be produced in a home kitchen for public sale. Balancing public health concerns with the opportunity to encourage small time food producers to make a profit without incurring significant startup costs, 31 states have carved out exemptions, through either legislation or regulation, allowing for the sale of non-potentially hazardous foods processed in home kitchens, either without obtaining a permit or at least without undergoing traditional permitting requirements.

Tennessee and Louisiana, Mississippi’s neighbor states, have passed legislation allowing in-home food production. Tennessee’s legislation defines non-potentially hazardous foods—jams, jellies, and baked goods that are not classified as potentially hazardous—then states that those foods may be prepared in a home kitchen and sold at a farmers market.¹³ Louisiana’s legislation permits low-risk foods produced in home kitchens to be sold at “recognized outdoor Louisiana festivals” and other public gatherings, with a few limitations. Louisiana limits the gross annual sales from home processing to \$5,000, and limits the type of foods that can be sold.¹⁴

Alabama, on the other hand, allowed in-home food production through a Health Department regulation. Their regulation modifies the FDA Code to clarify that the definition of “food establishment” exempts home-processed foods sold at state-sanctioned farmers markets.¹⁵ A number of states have chosen to allow home processing in this way, as it is the easiest modification to the law, can be done by regulation, and still leaves discretion in the hands of the agency tasked with enforcing food safety laws. Some states, such as Michigan and Ohio, have created an entire legal regime for “cottage food production operations,” a common title for home-processed goods. Just recently, in December 2010, Michigan Governor Jennifer Granholm signed two cottage food operation bills into law, allowing for the

¹³ Tenn. Code Ann. § 53-8-117 (2010); Tenn. Comp. R. & Regs. 0080-4-11-.02 (2010).

¹⁴ La. Rev. Stat. Ann. §40:5.5 (E)(2) (2010); La. Rev. Stat. Ann. § 4.4 (2010); La. Rev. Stat. Ann. § 40:4.9 (2010); La. Admin. Code tit. 51 § 23.1103 (2010); La. Admin. Code tit. 51 § 23.4129 (2010).

¹⁵ Ala. Admin. Code r. 420-3-22-.01(8) (2009).

Figure 2: Fifty-State Review of Home-Processor Laws

STATE	ALLOWED? Y or N	LEGISLATION or REGULATION	LEGAL CONDITIONS:
Alabama	Y	R	(2). (5). (6).
Alaska	Y	R	(7).
Arizona	N		
Arkansas	N		
California	N		
Colorado	N		
Connecticut	N		
Delaware	Y	R	(5). (7).
District of Columbia	N		
Florida	N		
Georgia	N		
Hawaii	N		
Idaho	N		
Illinois	N		
Indiana	Y	L	(2). (6).
Iowa	Y	L	(1). (2). (3). (7).
Kansas	N		
Kentucky	Y	L	(2). (3). (7).
Louisiana	Y	L	(3). (5).
Maine	Y	L	(1). (4). (5).
Maryland	Y	L	(4). (6). (7).
Massachusetts	Y	R	(2). (4). (7).
Michigan	Y	L	(2). (3). (5).
Minnesota	Y	L	(2). (3). (5). (6).
Mississippi	N		
Missouri	Y	R	(2). (7).
Montana	Y	L	(5). (6).
Nebraska	Y	L	(1). (2). (5).
Nevada	Y	L	(4). (7).
New Hampshire	Y	L	(3). (4). (5). (7).
New Jersey	N		
New Mexico	Y	R	(2). (4). (6). (7).
New York	Y	R	(2).
North Carolina	Y	R	(5).
North Dakota	N		
Ohio	Y	L	(2). (7).
Oklahoma	Y	R	(1). (2). (4). (6).
Oregon	Y	L	(4).
Pennsylvania	Y		(4). (7).
Rhode Island	Y	L	(2). (4). (5). (6). (7).
South Carolina	N		
South Dakota	Y	L	(5).
Tennessee	Y	L	(2). (4). (5).
Texas	N		
Utah	Y	L	(2). (4). (7).
Vermont	Y	L	(3). (5).
Virginia	Y	L	(1). (2). (6).
Washington	N		
West Virginia	N		
Wisconsin	Y	L	(2). (3). (5). (6).
Wyoming	Y	L	(1). (5). (6). (7).

KEY: (1) Exempt from "food establishment"; (2) Labeling requirement; (3) Sales limit; (4) License/Permit requirement; (5) Limit on types of food sold; (6) Limit on where sold (farmers market only); (7) Other

Why Mississippi Should Follow Suit

Allowing non-potentially hazardous foods produced in the home to be sold at farmers markets and in similar locations is especially important in rural states like Mississippi. Doing so presents significant opportunities for economic benefits to be reaped by the state of Mississippi and its residents, and expands access to locally grown, fresh foods, a public health benefit that cannot be overstated.

Direct Economic Benefits:

Ultimately, one of the most beneficial aspects of farmers markets and similar venues to purchase local foods is that the money stays in the local economy. Shoppers at farmers markets are able to buy local produce for less than they would at a grocery store, and the money goes into the hands of their neighbors rather than to grocery store chains and supermarkets that are based out-of-state. By spending this money locally, farmers and vendors in turn support local businesses and keep money in the local economy. This is particularly important in rural areas of Mississippi, where there are limited opportunities for economic development and thus allowing individuals to start businesses from their homes with relatively low startup costs could have a huge economic impact.

Indirect Economic Benefits:

Home food production or “cottage food” production can also serve as a business incubator, reducing some of the start-up barriers for fledgling entrepreneurs. For example, in New York, one bakery in Rochester began as a baked goods stall at the Rochester Public Market. The products were so popular that the vendor opened a standalone store in town.¹⁸ In another case, a pet food company got its start when the owner began baking pet treats at home and selling them at the market.¹⁹ Such stories of success would likely not be possible if the state imposed stringent licensing requirements on small processors before they were able to get their businesses off the ground.

Community Benefits:

Cottage food production provides residents greater access to fresh, locally produced foods. The produce sold at farmers markets typically travels less than 60 miles, compared to the 1,500 miles traveled by most fruits and vegetables sold at grocery stores.²⁰ As was noted by Michigan State Representative Pam Byrnes, allowing the production of cottage foods is “a win-win situation—residents looking to launch a startup business will have an easier time setting up shop, and consumers looking for delicious homemade items for their families will have more options.”²¹

Further, it is no small secret that some residents of Mississippi, unaware that home processing and sale of baked goods is against the law, have been unknowingly violating the Mississippi food code. Such confusion about the law presents the potential that hazardous foods will also be produced in-home and sold as well. It would be great to address this issue affirmatively, by permitting non-potentially hazardous foods to be sold, educating residents on differences between those foods that are permitted

¹⁸ See Farmers Market Federation of New York, “The Value of Farmers Markets to New York Communities,” available at: http://www.nyfarmersmarket.com/pdf_files/FarmersMarketsCommunityDev.pdf.

¹⁹ *Id.*

²⁰ Based on a survey of local and conventionally grown produce in Iowa. See Andrew Benjamin and Rich Pirog, Iowa State Univ. Leopold Ctr. For Sustainable Agriculture, “Checking the food odometer: Comparing food miles for local versus conventional produce sales to Iowa institutions,” July 2003, available at: http://www.leopold.iastate.edu/pubs/staff/files/food_travel072103.pdf (2003).

²¹ Heritage Newspapers, “Granholm Signs Cottage Food Operations Bill into Law,” July 2010, available at: <http://www.heritage.com/articles/2010/07/12/heritagewest/news/doc4c3b698fa1b80714001632.txt> (2010).

to be produced in-home and those that are not, and conserving Health Department resources to deal with the unsafe food sales and food safety complaints.

Small Businesses Are Not the Problem:

The FDA Code was, to some extent, a means of regulating large wholesalers, whose food products travel far and wide, and who were responsible for serious food-borne illness outbreaks. Unfortunately, when the FDA Code is simply adopted by states wholesale, small businesses, who cannot afford the licenses, inspections and appliances required by the FDA Code, are the ones who suffer most. Small businesses produce foods that do not get into the larger food stream and thus are not responsible for large food outbreaks. In addition, consumers often have a lower expectation of food safety from foods they know were produced in an uncertified home kitchen. Everyone who has ever purchased food at a bake sale or church event—which includes most of the population—would know to expect the same level of food safety for foods that are labeled to indicate that they were produced in a home and may not have been subject to the same food safety standards as commercially produced foods.

Recommendations

This section lays out the various ways in which Mississippi can permit in-home food production, provides sample language for each recommendation, tells whether each recommendation could be done by either legislation or regulation or both, and explains various limitations the state can place on home processors while still permitting the burgeoning “cottage food” industry to flourish in the state of Mississippi.

Of the below recommendations, we advise Mississippi to either add “farmers markets” after “charity bake sales” in the state’s definition of food establishment (*Recommendation #1*) or craft new definitions for home processors and then exempt them from the definition of food establishment (*Recommendation #2*), as these would accomplish the goal of allowing for in-home food processing and would be the easiest changes to make.

Alternatively, the state could create a new “cottage food production operation” regime, though this would be more comprehensive and it would require legislation and would probably take longer to achieve (*Recommendation #3*). The weakest recommendation, which would provide some opportunity for in-home production but might prove prohibitively expensive to producers, is to allow home processors to sell to the public so long as their home kitchen is certified in the same way that commercial food establishments are certified, which is currently not allowed (*Recommendation #4*). In the event that Mississippi has remaining public health concerns, the state can choose to limit the extent of home-processing using one or a series of reasonable limitations, including limits on the types of food that can be sold, limits on annual sales, or limits on the location of food sales, all of which have been implemented by various other states (*Limitations*).

Recommendation #1 (regulation):

Add “farmers markets” after “charity bake sales” in Mississippi’s definition of “food establishment” and make clear that home processors are exempt from the definition of “food establishment.”

The easiest way to allow homemade foods to be sold farmers markets is to make it clear that home kitchens producing non-potentially hazardous foods for sale at farmers markets are exempt from the definition of food establishment and thus exempt from the requirements of a food establishment. This change would entail the Mississippi Department of Health simply passing a regulation that would add a new modification to the Department of Health’s interpretation of the FDA Code at 103.01 Chapter 1, Subpart 1-201.10 (B) This modification would include farmers markets as an exempt location at which home processors could sell non-potentially hazardous foods. Mississippi could adapt similar language used in administrative code of Alabama.²² The new section would read:

103.01 Chapter 1, Subpart 1-201.10 (B)

²² Ala. Admin. Code r. 420-3-22-.01 (2009). The Alabama language reads as follows:

8. "Food establishment" means both food service establishments and retail food stores, along with the lower risk priority categories in either designation. The term does not include: ... A kitchen in a private home if only food that is not potentially hazardous (time or temperature control required for safety) food is prepared for sale or service at a function such as a charitable, religious, civic, or not-for-profit organizations' food sale, or at a state sanctioned farmer's market, and if the consumer is informed by a clearly visible label, tag, or placard displayed in a prominent and conspicuous manner at the sales or service location that the food is prepared in a kitchen that is not inspected by a regulatory agency. This exclusion shall not be construed as allowing the sale of low acid foods in a hermetically sealed container (i.e. such as home-canned vegetables) when such food is not prepared in a permitted establishment; and

Food Establishment

(3) "Food establishment" does not include:

- (a) An establishment that offers only prepackaged foods that are not potentially hazardous (time/temperature control for safety) foods;
- (b) A produce stand that only offers whole, uncut fresh fruits and vegetables;
- (c) A food processing plant; including those that are located on the premises of a food establishment
- (d) A kitchen in a private home if only food that is not potentially hazardous (time/temperature control for safety) food, is prepared for sale or service at a function such as a religious or charitable organization's bake sale, farmers market, [roadside stand, community event, or other similar function], ~~if allowed by law~~ and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority;
- (e) An area where food that is prepared as specified in Subparagraph (3)(d) of this definition is sold or offered for human consumption;
- (f) A kitchen in a private home, such as a small family day-care provider; or a bed-and-breakfast operation that prepares and offers food to guests if the home is owner occupied, the number of available guest bedrooms does not exceed 6, breakfast is the only meal offered, the number of guests served does not exceed 18, and the consumer is informed by statements contained in published advertisements, mailed brochures, and placards posted at the registration area that the food is prepared in a kitchen that is not regulated and inspected by the regulatory authority; or
- (g) A private home that receives catered or home-delivered food.

Note that the language in brackets after farmers market (roadside stand, community event, or other similar function) would broaden the definition to include sales of such non-potentially hazardous foods at other locations frequently used by small growers or home-based producers, will still keeping a limit on the types of locations in which such food could be sold.

Such a regulatory change would not prove disruptive to Mississippi's adoption of the 2009 Food Code, as it would only require that the Health Department add a clarifying regulation on the definition of "food establishment." This recommendation is the easiest—it is a regulation rather than a law, so the Mississippi Department of Health, within its statutorily derived authority, can pass it much more quickly than a law would be passed in the legislature, yet still accomplish the same outcome. Note that a modification of this sort could alternatively be adopted by legislation instead of regulation, but since the FDA Code was adopted by regulation of the Department of Health in the first place, any change made by the legislature would require adding a new law regarding home production to the Mississippi Code, Title 75, Chapter 29 Sale and Inspection of Food and Drugs. The language in Recommendation #2 would be best suited for such a legislative change.

Recommendation #2 (legislation or regulation):

Define “home-processed foods,” “home kitchens,” and “farmers markets,” and then allow home-processed foods to be sold at farmers markets.

Similar to Recommendation #1, this language would allow for foods prepared in a home kitchen to be sold at farmers markets and/or other locations in the state. This process would entail further defining home-processed foods, home kitchens, and farmers markets to clarify what is allowed.

Thus, this would be a more complex addition than Recommendation #1 described above. However, this recommendation would also allow for more flexibility in the structure that Mississippi chooses for its home-processed goods, as this would allow the legislature or the Department of Health to define the key terms. For example, the sample language below is based on allowing the sale of home-processed goods at farmers markets, but it could also be tailored to allow the sale of home-processed goods in all venues by using more blanket language like “home processed foods may be sold throughout the state.”

If this change were adopted by regulation, it would take the form of the addition of new definitions to the modifications of the Department of Health’s interpretation of the FDA Code at 103.01 Chapter 1, Subpart 1-201.10 (B). Similarly, this could be adopted by legislation, which would include adding a new section to the Mississippi Code in Title 75, Chapter 29 Sale and Inspection of Food and Drugs. The new definitions could either be part of Article 1 Adulterated and Misbranded Food or added as a new article on home-processing. Whether adopted as regulation or legislation, the new definitions would read as follows (adapted from the New York Administrative Code and the Tennessee Code). The definition of “farmers market” comes from Mississippi Department of Agriculture regulations:²³

[Sale of Home-processed Foods]

(a) Definitions

(1) “Home-processed food” means any food processed in a private home or residence using only the ordinary kitchen facilities of that home or residence which are also used to prepare food for the owner thereof, his family, and nonpaying guests, but shall exclude potentially hazardous foods as defined by rules adopted by the Department of Health pursuant to Sections 41-3-15(4) and Section 41-3-17.

(2) “Home kitchen” means a kitchen in a private home or residence that an individual uses to produce home-processed foods. A home kitchen, as here defined, does not include a kitchen in which food is produced for retail sale other than home-processed food.

(3) “Farmers market” means a place, structure or building that is used by 2 or more Mississippi growers on a frequent basis for the direct sale of their on-farm produce and/or food products to consumers.

(b) Home-processed food may be sold at farmers markets [and other similar locations] located in this state by the preparer of such food, and neither the farmers market nor any operator thereof shall be required to obtain any permit or attend any training

²³ N.Y. Comp. Codes R. & Regs. tit. 1, § 276.3(b)(3); 276.4(b) (2010); Tenn. Code Ann. § 53-8-117 (2009); Mississippi Department of Agriculture and Commerce, “Certified Farmers Market Program Criteria,” 2010.

related to the production or sale of such food, including, but not limited to training conducted by the Department of Health or any other department of state government, provided that the following conditions are met:

(1) All finished product containers are clean and sanitary and are labeled to show:

(i) the name and address of the home processor;

(ii) the common or usual name of the food;

(iii) if the food is fabricated from two or more ingredients, the common or usual name of each ingredient in their order of predominance; except that spices, flavorings and colorings may be designated as spices, flavorings and colorings without naming each, and spices and flavorings may be designated together as flavorings; and

(iv) the net weight, standard measure or numerical count.

(2) All home-processed foods produced under this exemption are neither adulterated nor misbranded.

Note again that this language could be tailored to broaden or limit the types of foods that can be sold as well as the potential venues for sale.

As mentioned above, Recommendations #1 and #2 are the easiest changes that would allow home processors to sell their non-potentially hazardous food products to the public. They would require only that the Mississippi Department of Health pass regulations adopting some variation of the suggested language, or that a legislator in the Mississippi House of Representatives or Senate sponsor a bill with language from Recommendation #2.

Recommendation #3 (regulation):

Pass comprehensive cottage food legislation.

The most comprehensive and far-reaching response to allow for in-home production of certain non-potentially hazardous food items would be legislation creating a new legal framework for “cottage food production operations.” Since this would entail a bigger legal change, this would most likely need to be addressed via legislation, and would require that a member of the Mississippi House of Representatives or Senate introduce a bill to with some version of the language recommended below. The language below is based off of Utah’s “cottage food production operation” law with some additions from the Michigan cottage food laws.²⁴ The new section would be inserted into the Mississippi Code Title 75, Chapter 29 Sale and Inspection of Food and Drugs. Potential language would read:

Cottage Food Production Operations

(1) For purposes of this chapter:

(a) "Cottage food production operation" means a person, who in the person's home, produces a food product that is not a potentially

²⁴ Utah Code Ann. § 4-5-9.5 (2010); Mich. Comp. Laws § 289.4102 (2010).

hazardous food or a food that requires time/temperature controls for safety.

(b) "Home" means a primary residence:

(i) occupied by the individual who is operating a cottage food production operation; and

(ii) which contains:

A. a kitchen designed for common residential usage; and

B. appliances designed for common residential usage.

(c) "Potentially hazardous food" or "food that requires time/temperature controls for safety" are as defined in the FDA Food Code at 103.01 Chapter 1, Subpart 1-201.10 (B) as adopted by the Mississippi Department of Health

(2) The Department of Health may adopt rules pursuant to Sections 41-3-15(4)(f)(i) and 41-3-17 of the Mississippi Code of 1972, Annotated, as necessary to protect public health and ensure a safe food supply.

(a) Rules adopted pursuant to this Subsection (2) shall provide for:

(i) the labeling of products from a cottage food production operation as "Made in a home kitchen that has not been

inspected by the Mississippi Department of Health";

(ii) the labeling of any ingredients or allergens included in the food products; and

(iii) other exceptions to the chapter that the department determines are appropriate and that are consistent with this section.

(3) Rules adopted pursuant to Subsection (2):

(a) may not require:

(i) the use of commercial surfaces such as stainless steel counters or cabinets;

(ii) the use of a commercial grade:

(A) sink;

(B) dishwasher; or

(C) oven;

(iii) a separate kitchen for the cottage food production operation; or

(iv) the submission of plans and specifications before construction of, or remodel of, a cottage food production operation; or

(v) inspection of cottage food production kitchen prior to operation; and

(b) may require:

(ii) an inspection of a cottage food production operation:

(A) if the department has reason to believe the cottage food production operation is operating:

(I) in violation of this chapter or an administrative rule adopted pursuant to this section; or

(II) in an unsanitary manner;

(4) Notwithstanding relevant provisions of the FDA Code, a local health department:

(a) does not have jurisdiction to regulate the production of food at a cottage food production operation operating in compliance with this section, as long as the products are not offered to the public for consumption on the premises; and

(b) does have jurisdiction to investigate a cottage food production operation in looking into the cause of a food borne illness outbreak.

(5) A food service establishment as defined in the FDA Code may not use a product produced in a cottage food production operation as an ingredient in any food that is prepared by the food establishment and offered by the food establishment to the public for consumption.

As noted previously, cottage food laws have the benefit of being more permanent than an agency regulation and being vetted heavily by both houses of the Mississippi legislature, at the cost of taking much longer to enact. The exemptions permitted by cottage food laws tend to be more generous than regulatory permissions (they tend not to include permit requirements or restrictions on the locations of sales). Another benefit of cottage food laws is that they serve as a testament to the value the state places on the burgeoning cottage food industry.

Recommendation #4 (legislation or regulation):

Allow in-home production contingent upon certification of the home kitchen

Allowing people wishing to prepare foods in their home kitchen to get their kitchen certified under the same qualifications as any certified kitchen is the weakest change to the law, and thus would have the least impact on home-based food production. It would be prohibitively expensive for small producers to certify their home kitchens, and unnecessarily laborious considering the small scale of operations in which they are likely to engage. However, some states have allowed home production in this way, and Mississippi could adapt similar legislation or regulations. The easiest way to make this change would be for the Mississippi Department of Health to pass a regulation that would add a new modification to the Department of Health's interpretation of the FDA Code at 6-202.111 *Private Homes and Living or Sleeping Quarters, Use Prohibition*. This modification would eliminate the language prohibiting a private home from serving as a food establishment, as follows:

6-202.111 Private Homes and Living or Sleeping Quarters, Use Prohibition.

~~A private home, a room used as living or sleeping quarters, or an area directly opening into a room used as living or sleeping quarters may not be used for conducting food establishment operations.~~

Using a similar approach, Nevada has allowed for home kitchens to be certified as food establishments. The Nevada law offers some additional flexibility, as the state gives the Health Department the authority to exempt food establishments from the permitting requirement if it determines that the foods produced there do not constitute a potential hazard to the public health.²⁵ The following language, adapted from Nevada law, can be enacted by Mississippi either by regulation or by legislation. The regulation would be enacted as a new regulation of the Department of Health; if adopted by legislation,

²⁵ Nev. Rev. Stat. 446.870 (2010).

this would be included as a new section of the Mississippi Code Title 75, Chapter 29 Sale and Inspection of Food and Drugs.

Prohibited acts: Operation of food establishment without valid permit issued by health authority; sale, offer or display for consideration of food prepared in private home without valid permit issued by health authority; exemptions.

(1) Except as otherwise provided in this section, it is unlawful for any person to operate a food establishment unless the person possesses a valid permit issued to him or her by the health authority.

(2) The health authority may exempt a food establishment from the provisions of this chapter if the health authority determines that the food which is sold, offered or displayed for sale, or served at the establishment does not constitute a potential or actual hazard to the public health.

(3) Except as otherwise provided in Department of Health regulations, food that is prepared in a private home must not be sold, or offered or displayed for sale or for compensation or contractual consideration of any kind, unless the person preparing the food possesses a valid permit issued to him or her by the health authority for that purpose.

As mentioned above, Recommendation #4 is the weakest change to the law and would still pose hefty barriers to individuals hoping to sell non-potentially hazardous foods prepared in a home kitchen. However, this would at least present the possibility for individuals to sell foods prepared in a home kitchen, as it would allow the home kitchen to be certified, rather than requiring individuals to use a separate certified kitchen at a high additional cost.

Additional Limitations

Should the state find it necessary to take additional steps to protect the public safety, it can impose various limitations on home processors, as some states have opted to do.²⁶ We believe that by allowing only non-potentially hazardous goods to be prepared in a home kitchen and by requiring a label noting that the foods were not prepared in a certified kitchen (both of which are included in the above recommendations), Mississippi would already be imposing limits that mirror those of most other states to reasonably balance the feasibility of in-home production with protection of the public safety. Thus, we believe that no further limitations are necessary.

However, it may be helpful to note that in addition to the aforementioned limitations, states have adopted a range of other limitations on home food products, including labeling requirements, location limitations, enumerated lists of the types of food that can be produced in a home kitchen, annual income caps on home production, and permitting requirements. Note that most states include only one or two of these limitations, and no states include all of the possible limitations, as increasing the barriers to home production begin to chip away at the feasibility of starting and maintaining such an operation.

Labeling Requirements:

Most states with home-processing laws impose some type of labeling requirement, including some or all of the following information: the name and full address of the food processor; notice that the foods have been produced in a kitchen that was not inspected by the department of health; a list of ingredients in the food product; and a list of potential allergens in the food product.²⁷

Location Limitations:

Many states identify the specific venues in which home-processed foods can be sold. If the state includes location limitations, the most common locations would include farmers markets, roadside stands, community fairs, or similar local events.²⁸ Some states include language specifying that food processed in a home kitchen can only be sold directly by the producer to the consumer,²⁹ or noting that food produced in a home kitchen cannot be later used in a certified food establishment,³⁰ thus limiting the potential for any foodborne illness to be exposed to the broader population.

Enumerated List of Food Items:

Some states only allow home processing in the case of certain enumerated non-potentially hazardous food items. Ohio law provides a good example of this. The Ohio Administrative Code provides a list of food items that may be prepared and sold under the cottage food regime.³¹ According to the list, the following food items are allowed to be prepared in a home kitchen:

“(1) Non-potentially hazardous bakery products; (2) Jams; (3) Jellies; (4) Candy; (5) Fruit butters; (6) Granola, granola bars, granola bars dipped in candy; (7) Popcorn, flavored popcorn, kettle corn, popcorn balls, caramel corn; (8) Unfilled, baked donuts; (9) Unfilled,

²⁶ Eight states have imposed annual income caps; eight states limit where food can be sold; 10 states require a permit; 12 states have a labeling requirement; 13 states limit the type of non-potentially hazardous food that can be sold.

²⁷ See, e.g., Ala. Admin. Code r. 420-3-22-.01(8) (2009); Mich. Comp. Laws § 289.4102 (2010); Minn. Stat. Ann. § 28A.15(9) and (10) (2010).

²⁸ See, e.g., Ala. Admin. Code r. 420-3-22-.01(8) (2009); Ind. Code Ann. § 16-42-5-29 (2010); S.D. Codified Laws § 34-18-35 (2010).

²⁹ See, e.g., Mich. Comp. Laws § 289.4102 (2010).

³⁰ See, e.g., Utah Code Ann. § 4-5-9.5 (2010).

³¹ Ohio Admin. Code § 901:3-20-04 (2010).

baked donuts; [sic] (10) Pizzelles; (11) Dry cereal and nut snack mixes with seasonings; (12) Roasted coffee, whole beans or ground; (13) Dry baking mixes in a jar, including cookie mix in a jar; (14) Dry herbs and herb blends; (15) Dry seasoning blends; and (16) Dry tea blends.”³²

Annual Income Caps:

A few states have imposed annual sales caps on sales of food produced in a home kitchen. These caps range from \$5,000 to \$35,000 in the states in which they are imposed.³³

Permitting Requirements:

A few states require some sort of permitting scheme, though a less arduous scheme than that required of commercial operations, for home kitchens. This is in contrast with the states following Recommendation #4, above, which just allows for home kitchens to be certified under the normal kitchen certification process. Instead, some states have created a separate and less onerous permitting process for home kitchens but a process which still requires the home kitchen operation to register with the Department of Health.³⁴

³² *Id.*

³³ *See, e.g.*, Ky. Rev. State. Ann. § 217.115 (2010); Mich. Comp. Laws § 289.4102 (2010); Minn. Stat. Ann. § 28A.15(9) and (10) (2010).

³⁴ *See, e.g.*, R.I. Gen. Laws § 21-27-6.1 (2010); 01-001-345 Me. Code R. § (1)(E) (2010).

Conclusion

The food safety laws that govern in-home production of non-potentially hazardous foods for Mississippi were written with commercial food entities in mind. Although these laws are well-suited to governing wholesalers and mass producers of food products, they fail to achieve a proper balance when it comes to individuals who wish to sell on a local or small-scale basis at farmers markets or similar venues. As noted above, Mississippi already allows the sale of home-processed non-potentially hazardous foods at charity bake sales. Extending this exemption to farmers markets and similar venues using one of the recommendations included in this report would encourage an important and economically viable element of Mississippi communities, and still promote the goal of ensuring the safety of all foods sold within the state.

By enacting one of the suggested regulatory or legislative amendments, Mississippi will provide consumers a greater choice of local food options, promote local food production, and stimulate local economies. At the same time, the full food safety regulations will continue to govern the sale of potentially hazardous foods at all venues, ensuring that public health will be protected.