

In December 2018, the Texas Department of Agriculture proposed rules to implement the federal Produce Safety Rule under the Food Modernization Act (FSMA). The proposed rule did not simply adopt and implement the federal standards, as had been anticipated. Rather, it created new requirements, differing standards, and high penalties. The Farm and Ranch Freedom Alliance (FARFA) submitted comments objecting to these additional and confusing provisions. In March, the agency withdrew its proposed rule. FARFA and several other organizations met with agency staff in April to discuss our concerns in more depth. In June, TDA issued a new proposed rule. The new proposed rule addresses a couple of the concerns, but contains many of the same problematic provisions as the December 2018 version. Below is a chart comparing the original proposed rule to the revised proposal, based on the concerns FARFA and other organizations raised.

*Dated: June 28, 2019*

Issue	Topic	Dec 2018 proposal	June 2019 proposal	Notes
Exempt farms (those grossing <\$25K annually)	Registration	Annual "Farm Inventory Survey" required these farms to register with the agency each year	Provision for survey removed	TDA has addressed our concern
Qualified exempt farms	Registration	Annual "Farm Inventory Survey"	Provision for survey removed.	Although the survey provision is deleted, <b>qualified exempt farms are still effectively required to register</b> given the provisions for pre-assessment review and biennial verifications.
	Pre-assessment review	"TOPS shall conduct a pre-assessment review to determine whether a farm is covered by the Produce Safety Rule and/or eligible for a Qualified Exemption"	"TOPS <b>may</b> conduct..." (remainder is identical)	The change benefits TDA, not the producers. The agency is relieved of the responsibility to conduct a review on every farm – yet it continues to require every farm to submit documentation and be subject to such review at TDA's discretion.
	Verification	"Verification of eligibility" conducted annually	"Verification of exemption" conducted every other year, otherwise identical	Problems: 1) Qualified exempt farms are not required to submit documentation to the agency on a proactive basis under FSMA, and TDA should not add the requirement 2) The proposed rule contains NO guidance as to what the farmers will have to submit. HOW will they "affirm" their eligibility? What documents will be required? We raised these specific concerns with TDA, and the agency has made no changes to address them

	Inspection authority	“At any time”, TOPS reserves the right to schedule an on-site visit to verify whether a farm is exempt, covered, or eligible for Qualified Inspection	Identical	<p>This provision is appropriate – and because of this authority, TDA does NOT need to have every farm affirmatively submit documentation.</p> <p>At our meeting in April, an agency staffer suggested a compromise under which the agency would only seek documentation from those farms that it had some reason to believe were not exempt. We agreed that would be reasonable – and this provision is all that is needed to implement that solution.</p>
	Burden shifting	Failure to return a qualified exemption verification form “shall result in a presumption by TOPS that the farm is subject to all requirements of the Produce safety Rule and this chapter”	Identical	<p>This provision is an illegal attempt to shift the burden to farmers simply for failing to submit paperwork (that they should not be required to submit in the first place). Conducting an inspection of an exempt farm under the presumption that the farm has to comply with all the provisions of the Produce Safety Rule will inevitably lead to citations and fines (because the rule’s requirements are so broad and costly that no exempt farm is going to comply with all of them).</p>
“Egregious conditions”	Definition	The provisions for stop sales defined an egregious condition” as “a practice, condition or situation on a farm or in a covered location that is reasonably likely to lead to: (1) serious adverse health consequences to, or death of, a human from the consumption or exposure to covered produce; or (2) an imminent public health hazard if correction action is not taken immediately.”	Definitions section defines egregious condition as “a practice, condition or situation on a covered farm or in a packing facility that is undertaken as part of a covered activity that is reasonably likely to lead to: (1) serious adverse health consequences or death from the consumption of or exposure to covered produce; or (2) an imminent public health hazard.”	<p>Our objection was to the vague, broad definition that leaves too much discretion to individual inspectors and the agency.</p> <p>Using effectively the same words and shifting it to the “definitions” section does not address that concern at all.</p> <p>As we discussed with TDA, this is not a term found in FSMA or in any FDA regulation, but only the informal documents addressing on-site consultations. Making it a regulatory term, with significant consequences, creates both new burdens and greater ambiguity.</p>

Right of entry	General inspections	TDA can enter farms, including qualified exempt farms, during normal business hours, to examine records or to conduct inspections	This provision has been split into two parts, but the substance remains the same	We agree that TDA should be able to inspect the records and location of a qualified exempt farm <b>in order to confirm that it is exempt</b> . Broader inspections are not provided for under FSMA, and the TDA's provisions are too broad.
	Egregious conditions	TDA may enter any farm, including exempt and qualified exempt farms, "at any time" if there are egregious conditions	No substantive change (minor re-ordering of the words)	This is not included in FSMA and is beyond the agency's authority. It is also confusing and unnecessary, since FSMA has provisions for how to deal with emergency situations
Penalties	General	Very high penalties, including for actions that don't pose a public health risk	More reasonable penalties.	The agency addressed most of our concerns about the penalty structures, except for the provision mentioned next.
	Failure to allow inspections	1 <sup>st</sup> offense for "failure to allow" was a warning; 1 <sup>st</sup> offense for "refusal to allow" was \$1,000	Only addresses "failure to allow". 1 <sup>st</sup> offense is a fine of up to \$500.	Abolishing the distinction between a "failure to allow" and a "refusal to allow" an inspection is a positive step that addressed one aspect of our concerns.  But making it a \$500 penalty for the very first failure -- especially when the agency is claiming authority to inspect even qualified exempt farms at any time -- is still too high and potentially abusive. Many smaller farms may have a reasonable basis believe that the agency does not have authority to come onto their property at any time or to conduct inspections of the day to day operations, yet not allowing such an inspection at the very first request of the agency would not mean being subject to fines.
Appeals		No mention	No mention	We requested that TDA outline procedures for farmers to appeal, particularly the vague and subjective findings of an egregious condition. The agency has done nothing to address this concern.