



## **2010 Priority Issues**

### **Legislative Issues**

- Employee Free Choice Act
- Interchange
- Health Care Reform
- Food Safety
- Paid Sick Leave
- Organized Retail Crime (ORC)
- Last-In-First Out Accounting (LIFO)
- WIC Reauthorization
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### **Regulatory Issues**

- Food Safety Legislation Implementation
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- Nutrition Labeling (USDA)
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- Greenhouse Gases (EPA)
- SNAP (Food Stamps)
- Health IT

## **2010 Priority Issues**

### **Legislative Issues:**

#### **Employee Free Choice Act**

The Employee Free Choice Act (H.R. 1409 – S. 560) would eliminate the right of employees to vote by secret ballot on the important decision of whether to form a union. In place of a federally supervised secret ballot election, EFCA calls for a “card check” scheme which would allow a union to organize the workplace if a simple majority of employees sign a card. In addition, this ill-conceived legislation short circuits collective bargaining efforts between a newly formed union and the employer by mandating binding arbitration if the employer and the union fail to reach an agreement on a contract within 120 days. Terms of a new contract, such as wages, benefits and work rules, would be dictated by federal government arbitrators and would be binding for two years. After some initial fanfare when the so-called “card check” legislation was first introduced, there has been no movement on either proposal. EFCA has stalled out for two key reasons. The legislation has taken a back seat to Health Care Reform, and Senate Democrats have failed to muster up the 60 votes needed to break up a Republican led filibuster and pass the legislation. FMI and the supermarket industry is adamantly opposed to EFCA and any alternative compromises that may be offered. FMI serves on the steering committees of the Coalition for a Democratic Workplace (CDW) and the Workforce Fairness Institute (WFI) which are spearheading efforts among employer groups in opposition to EFCA.

#### **Health Care Reform**

On a party line basis, both the House and Senate approved comprehensive health care reform legislation by the end of 2009. In the House, the Affordable Health Care for America Act (H.R. 3962), passed by a vote of 220 to 215 on November 7th. The Senate passed the Patient Protection and Affordable Care Act (H.R. 3590) by a 60-39 vote on December 24th. FMI opposed both bills based on the provisions that provide for insufficient waiting periods, restrictions on the consumers’ ability to purchase over-the-counter medications with their Flexible Spending Account dollars, broad menu-labeling requirements and extensive new taxes and fees on businesses of all sizes.

The Democrat leadership has currently chosen to forgo a formal conference process and will negotiate the differences between the House and Senate on their own. Major differences that will need to be reconciled are the public option, abortion, revenue raisers, low-income subsidies, Medicaid carve outs and employer responsibilities. FMI continues to advocate on the priority issues previously communicated to both the House and Senate and will work with other employer groups to promote and recommend current provisions in the Senate bill that will help preserve the framework of ERISA and limit the overall impact on current plans that businesses are offering.

### **Interchange**

After a multi-year FMI-led advocacy and lobbying campaign, we are in the best position to date to move legislation during the second half of the 111th Congress. The Chairman of the Senate Banking Committee, Christopher Dodd (D-CT), has indicated he will introduce legislation to “substantially modify” interchange. FMI continues to work with his staff as they draft legislation, and we anticipate the Senate Banking Committee will address interchange fees in the first half of this year. We also anticipate movement of the Credit Card Interchange Fees Act in the House Financial Services Committee and the Credit Card Fair Fee Act in the House Judiciary Committee early this year. The Banking and Financial Services lobbies remain strong despite troubled times on Wall Street, and we’re going to need your strong grassroots and lobbying support in the coming months as these bills begin to move.

### **Food Safety: User Fees, Traceability, 3rd Party Certification**

The U.S. House of Representatives passed the Food Safety Enhancement Act of 2009 (H.R. 2749) on July 30, 2009 and the Senate Health, Education, Labor and Pensions (HELP) Committee unanimously reported the bipartisan FDA Food Safety Modernization Act (S. 510) on November 17, 2009 and is currently awaiting action on the Senate floor. Both bills received letters of support from FMI prior to passage.

**User Fees:** H.R. 2749 contains new registration fees of \$500 per facility with a cap of \$175,000 a year. Warehouses and production facilities would be required to pay the fee, retail store locations would not. This amount is a reduction from \$1,000 per facility with no cap. S. 510 does not contain any registration fees – fees can be charged to a facility that caused a recall or is subject to a re-inspection in the bill. FDA Commissioner Hamburg has testified that additional revenue to the FDA through a fee system is among their top priorities.

**Traceability:** H.R. 2749 contains a provision that mandates FDA create a new tracing system but does not provide specifics in the mandate. In a subsequent “study” section, there is an outline of the steps FDA should take when creating a system such as perform pilot projects, study “full-pedigree”, look at existing technologies, work with stakeholders, etc. Legislation contains a carve out for direct sales from farms to retail stores for tracing requirements. S. 510 contains pilot projects for produce and packaged goods and FDA would use results to propose future rulemaking on establishing standards for tracing.

**Accredited 3rd Party Certification Programs:** Both H.R. 2749 and S. 510 contains provisions that would provide FDA the ability to use these programs to assist in their inspections and risk based assessments. FMI will continue to work to amend this section to ensure that all terminology is consistent with internationally recognized language and terms and maintains the structure of the third party certification system as a voluntary, independent overview of an organization’s food safety system.

### **Paid Sick Leave**

A number of major initiatives have been introduced in both the House and Senate that would require employers with 15 or more employees, to provide paid sick leave. The late Senator Edward Kennedy (D-MA) and Congresswoman Rosa DeLauro (D-CT) are sponsoring the Healthy Families Act (S. 1152 – H.R. 2460). This legislation calls for employers to provide one hour of paid sick leave for every 30 hours worked, to a maximum of 56 hours (seven days) per year to care for themselves and their family’s medical needs. Congressman George Miller (D-CA) has introduced a similar proposal (H.R. 3991) entitled “The Emergency Influenza Containment Act”, that would require employers to provide five job-protected paid sick leave days in a 12-month period for workers who have a contagious illness, such as the H1N1 flu. The Miller bill would not pre-empt existing state laws on paid sick leave, and would become effective 15 days after enactment without regulatory guidance to help employers comply. FMI is not opposed to paid sick leave programs, but cannot support a rigid “one size fits all” mandate that would hinder the supermarket industry’s ability to design leave programs, such as Paid Time Off (PTO) to meet the needs of its employees.

### **Organized Retail Crime**

Organized Retail Crime or ORC is a nationwide problem that translates into an estimated \$30 billion in losses for the retail community. FMI and the supermarket industry continue to press for enactment of federal legislation that would make ORC type crimes a federal felony and discourage the sale of stolen merchandise over internet auction sites. So far in the 111th Congress, four separate initiatives have been introduced. They are the E-Fencing Enforcement Act of 2009 (H.R. 1166) sponsored by Representative Bobby Scott (D-VA), the Organized Retail Crime Act of 2009 (H.R. 1173) introduced by Representatives Brad Ellsworth (D-IN) and Jim Jordan (R-OH), the Combating Organized Retail Crime Act of 2009 (S. 470) sponsored by Senator Richard Durbin (D-IL) and the Organized Retail Crime Prevention and Enforcement Act of 2009 (H.R. 4011), jointly introduced by Representatives Lamar Smith (R-TX) and Bob Goodlatte (R-VA). The House Judiciary Crime Subcommittee held an oversight hearing on November 5th focusing on the role of federal law enforcement in combating ORC. FMI is supportive of all four bills.

### **LIFO**

The use of last-in-first-out (LIFO) inventory accounting goes back more than 70 years and is an important tool protecting retailers from sudden price shocks and inflation. Under LIFO, the most recently acquired inventory is accounted as the first to be sold, while older product is carried on the books as inventory. Critics have tried to paint this as a tax loophole employed by big business, but it is firmly grounded in economic theory and widely used by both small and mid-sized companies. Since its repeal is estimated to generate more than \$60 billion in revenue over a ten-year period, LIFO is a perennial target for legislators in search of a “pay-for”.

In February 2009, President Obama included repeal of LIFO in his annual budget, but the proposal never generated any traction in Congress. This is due in large part to a proactive campaign against repeal launched by the business community, including FMI. Despite a climate where Congress searched desperately for funding sources to pay for their legislative priorities, there was no serious discussion of including LIFO repeal in any legislation offered during the first session, which is a major victory for the industry.

However, the revenue situation of the U.S. government has worsened and there are a number of big-ticket items on the agenda in 2010 that will require significant funding sources. In addition, a number of the 2001 and 2003 Bush tax cuts have expired, and House Ways and Means Chairman Charlie Rangel (D-NY) has expressed a desire to renew them within the framework of a larger round of tax reform. In 2007, Chairman Rangel put forth a major tax reform proposal that included LIFO repeal, and there is the possibility it will remain on the table during this year's debate. FMI continues to oppose the repeal of LIFO and will work in 2010 to make sure that it is not included either as a "pay for" on another piece of legislation nor as a component of the tax reform debate.

### **Data Security**

An information compromise has the potential to impact not only your company, but also your customers who become more at risk for identity theft. With thieves constantly finding new ways to extract personally identifiable data from networks across the globe, protection of sensitive consumer data continues to be scrutinized by lawmakers and regulatory authorities, and adequate disclosure given the breach of such sensitive data remains a priority. FMI is inclined to support, or at least not oppose, a pre-emptive national breach notification standard as long as it contains a realistic timeline and options for contacting affected consumers, holds all businesses that store or transmit data to the same minimum requirements, and requires that a "reasonable risk" of identity or harm exists from the compromise of that data. The House has passed the Data Accountability and Trust Act (H.R. 2221) and the Senate Judiciary Committee has passed the Personal Data Privacy and Security Act of 2009 (S. 1490). Many jurisdictional issues regarding data security still exist as the Commerce, Judiciary, Financial Services, and Homeland Security Committees all have some purview over the issue, so it is unlikely that legislation will move quickly barring another large scale breach.

### **OSHA Reform - "Protecting America's Workers Act"**

Congresswoman Lynn Woolsey (D-CA) has introduced "The Protecting America's Workers Act" (H.R. 2067). The measure would extend OSHA protections to federal, state and local government workers and others not currently covered, increase both civil and criminal penalties and adjust the amounts of fines for inflation. The bill would also expand whistleblower protections and remove the requirement for a workplace death before criminal penalties can be initiated. H.R. 2067 would further hold any responsible corporate officer criminally liable for certain violations that occur at a worksite. A companion bill (S.1580) has been introduced by the late Senator Edward Kennedy (D-MA). Hearings have

been held on both bills under the theme that OSHA penalties may not be adequate enough to ensure workplace safety, and House Education and Labor Chairman George Miller (D-CA) has vowed to move an OSHA bill along the lines of H.R. 2067 in this Congress. FMI is a member of the OSHA Fairness Coalition that is opposing this type of legislation as currently drafted.

### **WIC Reauthorization**

In 2009, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) was up for reauthorization. Instead of passing a broad reauthorization bill, Congress extended the program for one year, and is poised to take up a broader reauthorization bill early this year that will likely include a WIC EBT (electronic benefit transfer) mandate with a realistic phase-in period. FMI believes the creation of standard operating rules, technical messaging standards, and a functional UPC database of eligible products are critical components to ensuring a smooth transition to electronic WIC, and we are working closely with USDA on these issues. FMI and members of the WIC Task Force will also continue to work with Congressional leaders on the House Education and Labor Committee and Senate Agriculture Committee to promote efficiency and standardization throughout the WIC program.

### **Gift Cards**

Gift cards have recently come under increased Congressional scrutiny. This November, the Federal Reserve issued proposed gift card rules to implement the gift card provisions of the Credit CARD Act, which became law in May 2009. The proposed rule covered both closed-loop retail store gift cards and open-loop network branded cards, but did not cover pre-paid debit products. Congress may consider legislation this year calling for further examination of prepaid products. Additionally, gift cards appear to be covered in the House-passed financial regulatory reform bill under the Consumer Financial Protection Agency (CFPA), and they could potentially be covered in the Senate bill, as well. FMI realizes that gift cards are a valuable tool for merchants and consumers, and we will support policies that alleviate additional burdens on retailers who sell these products. FMI recently submitted comments on the Federal Reserve's proposed gift rules.

### **Drug Pedigree/Wholesaler Regulations**

Legislation did not advance in the 110th Congress, though we fully anticipate debate to continue on this issue as Congress moves beyond health care reform. FMI supports the goal of helping secure the drug supply chain. Specifically, we support the adoption of a peer-to-peer drug traceability system that is efficient, cost-effective and complements current business operations. Benefits of this traceability system include 1) creating a system that will allow traceability of drug products at the steps in the supply chain from manufacturer to wholesaler to dispenser, 2) providing an efficient means to determine the source of prescription drug products, 3) providing data security within each company, with company ability to provide data on demand to approved authorities without the need for

external databases, and 4) preventing security breach risks associated with central databanks.

We support increased requirements for licensure of wholesale drug distributors. These requirements would provide appropriate layers of security to assure that state licensed wholesale drug distributors meet all criteria to be licensed to operate in a state. We also support federal preemption of state laws and new authority for the FDA to seize and destroy adulterated drugs.

#### **Average Manufacturers Price (Medicaid pharmacy reimbursement)**

Both the House and Senate health care reform bills would make welcome changes to Medicaid AMP, though overall we support the Senate provisions. The Senate legislation defines average manufacturer price (AMP) in a manner that will result in a more accurate approximation of retail pharmacy's acquisition costs. The legislation uses the weighted average AMP rather than the lowest AMP to set federal upper limits (FULs), as does the House bill. The Senate bill also reverts back to the pre-DRA policy of waiting until there are three equivalent drug products before setting an FUL. We also strongly prefer the "multiplier" in the Senate provision that sets FULs at "no less than" 175% of the weighted average AMP, providing CMS with the flexibility to set FULs based on a higher multiplier if necessary. This flexibility is critical, especially given the extremely low dispensing fees set by state Medicaid programs. Both bills include a provision ensuring that only weighted average AMPs are publicly posted, rather than individual AMPs. Because AMPs can vary significantly from month to month and in some cases can be negative values, public posting of individual AMPs would result in the public disclosure of flawed, inaccurate and therefore misleading data.

We are concerned with one related provision in the Senate language. In addition to the posting of weighted average AMP, the Senate bill requires the public posting of retail survey price (RSP). This requirement is more expansive than the Deficit Reduction Act, which called for RSP data to be shared only with state Medicaid agencies. We believe distribution of RSP data beyond state Medicaid agencies is unnecessary, and could have the unintended consequence of increasing prescription drug costs. As a result, on the public posting provision, we prefer the House bill, which limits public posting to weighted average AMPs.

#### **Respect Act**

The Re-Employment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act would dramatically alter the definition of a "supervisor" under the National Labor Relations Act (NLRA). The legislation would establish a new standard for a "supervisor" that states that a majority of that person's time must be spent on activities relating to hiring, firing, disciplining and evaluating employees. As such, the RESPECT Act would essentially impact every business covered by the NLRA, and if enacted into law, would de-classify some 8 million workers from their supervisory status

making these individuals eligible for unionization. FMI believes that most management and supervisory positions in the supermarket industry, both retail and wholesale, could not meet the new “supervisory” definition of the RESPECT Act. To date, the RESPECT Act has not been introduced in Congress, and FMI has expressed concerns about the legislation’s potential impact on grocery stores directly to Congressman Rob Andrews (D-NJ), author of the legislation in the previous Congress.

### **FSA OTC**

The House and Senate-passed healthcare bills eliminate the ability of consumers to purchase over-the-counter (OTC) medications using a flexible health spending account unless they have obtained a prescription from a physician. This change in current law represents a new tax on consumers who currently make OTC treatment purchases using their FSA funds and would limit consumer choice and access to affordable OTC treatments using flexible health spending account funds. OTC medicines are extremely important to the prevention, treatment, and relief of minor illnesses and ailments, and consumers depend on having access to these medicines to help reduce time-consuming and costly visits to the doctor. Maintaining the current level of access to and affordability of these preventative medicines is critical to keeping costs low in America’s overall healthcare system. FMI will continue to look at ways to address this issue until a final agreement is reached on healthcare.

### **Estate Tax**

The 2001 and 2003 Bush tax cuts set the stage for a gradual decrease in the estate tax and its eventual repeal in 2010. To comply with budget rules, the repeal lasts for only a single year, with the estate tax roaring back to 55% in 2011. It was widely expected that the Democratic majority would act to prevent this from happening during the first session of the 111th Congress by permanently locking in the 2009 rate of 45% with a \$3.5 million exemption. However, this did not happen. On January 1, 2010 the estate tax expired for a single year, until January 1, 2011 when it returns to 55% and \$1 million exemption without Congressional action. Despite knowing this was coming for the entire session, the Senate ultimately failed to act to prevent the tax from expiring due to political disagreements about an alternative rate.

In December, the House of Representatives voted to permanently extend the 2009 estate tax rate and exemption level (45 percent, \$3.5 million) with the passage of the Permanent Estate Tax Relief for Families, Farmers, and Small Businesses Act (H.R. 4154). But that bill could not garner 60 votes to pass the Senate. An alternative approach, sponsored by Senators Blanche Lincoln (D-AR) and Jon Kyl (R-AZ), that would have created a 35% and \$5 million exemption seemed likely to garner a majority of Senate votes, but also ultimately fell short of hitting the 60 vote threshold. With both sides of the issue firmly entrenched, Senate leadership had no choice but to sit by and watch the one-year repeal enter into force.

One of three possible scenarios now seems possible. The first is that the stalemate could remain in effect and prevent any Congressional action this year. Because of the snapback to the 55% rate, this is not a desirable approach for our industry. The second is for Majority Leader Harry Reid to exert the political muscle necessary to bring his caucus into line and garner the 60 votes necessary to permanently extend the 2009 rate and exemption level (45 percent, \$3.5 million). Senate Finance Committee Chairman Max Baucus has said this is his preferred approach and that he would like to see the rate applied retroactively to the first of the year. The third option is a compromise that brings us closer to the Lincoln-Kyl approach of 35% and \$5 million exemption indexed for inflation. FMI continues to support full repeal first and then certainty that will prevent the 55% rate from going back into effect, and will work toward this goal in 2010.

### **Ergonomics**

Although it remains unclear whether the 111th Congress will consider drafting legislation addressing issues related to ergonomics, the Obama Administration is gearing up to more aggressively enforce numerous labor laws and programs relating to the workplace and worker safety. The recently approved 2010 Labor, HHS Appropriations bill contains \$1.6 billion of dedicated funding to support 600 new, full-time enforcement and compliance personnel for the Department of Labor (DOL), including an additional 130 Occupational Safety and Health Administration (OSHA) inspectors and investigators who will focus on worker protection initiatives. OSHA is expected to make a new push on the ergonomics front in the coming months that likely will focus on problems in certain industries such as nursing homes and wholesalers plus establishments or industries that have high injury or fatality rates. Additionally, OSHA may consider resurrecting rulemaking on repetitive-motion injuries. FMI is closely watching developments from OSHA and DOL.

### **Food Stamps (USDA)**

The most recent numbers from September 2009 indicate the largest number of participants in the history of the program with 37.2 million, or 1 in 8 Americans, on SNAP/food stamps. All states reported an increase in caseloads over the past year with 18 states reporting an increase of more than 30%. We expect that the increases will continue until the economy improves. Increased use of the program raises significant operational and policy issues for stores and consumers. At a time when so many Americans need the assistance available through SNAP (Food Stamps), FMI believes it is more important than ever that policies promote benefit adequacy and access, and as such, we are members of a coalition to preserve food choice in SNAP.

## **2010 Priority Issues**

### **Regulatory Issues:**

#### **Food safety legislation implementation (FDA)**

Congress is expected to enact new food safety legislation in the first quarter of 2010. Regulatory implementation will necessarily depend on the final legislative language, but is likely to include traceability (see below), increased recordkeeping, third party certification, and food safety plans for warehouses. Other potential issues include sanitary transportation of food and extension of reportable food registry requirements to grocery stores.

#### **Traceability, Lot Code Tracking & Grinding Logs (FDA/USDA)**

FDA and USDA have already begun work on changing the requirements for the food industry to track food as it moves through the distribution system and to retail stores. On December 9-10, FDA and USDA held a joint public meeting to consider the issue. Over the course of the two days, the meeting hosted more than 10 panels of government, industry and consumer speakers as well as two public comment sessions. FMI's statement explained the magnitude of the current food distribution industry and the challenges of capturing certain information during the receiving and selection processes. The most concerning comments were issued by USDA leadership charging that lack of adequate "grinding logs" at retail stores were the primary problem that the agency encountered in conducting "trace back" investigations. USDA indicated that they would be proposing regulations in this area. Retailer loyalty card programs were also alluded to as a potential, untapped source of information that could be used to assist in identifying adulterated foods that had inadvertently entered the food supply. FMI cautioned that "grinding logs" would not address the concerns raised by USDA and that, although some retailers have robust loyalty card programs that are used effectively to notify consumers, some consumers choose not to participate in (and some retailers choose not to offer) these programs.

#### **WIC (USDA)**

WIC legislative reauthorization is likely to occur in early 2010, which will require some regulatory implementation relevant to retailers, including standard operating rules, technical messaging standards, and a functional UPC database of eligible products.

Although the WIC food packages interim final rule took effect on February 4, 2008, the Agency has been accepting comments on its implementation. The comment period closes February 1, 2010.

#### **Nutrition labeling -- front of package (FDA, FTC)**

The Obama Administration has been scrutinizing the ways in which nutritional information is being provided to consumers through a number of different avenues. Of particular relevance to retailers, FDA published a "Letter to the Industry" last October that laid out

the Agency's concerns that some of the current front of package and retail store shelf labeling dietary guidance programs did not comply with the Federal Food, Drug & Cosmetic Act. (Shortly thereafter, the SmartChoices program essentially folded.) The Letter also indicated that FDA was developing a proposed regulation that would define the nutritional criteria that would have to be met by manufacturers (or retailers) making broad claims regarding the nutritional quality of food. FDA is also considering enforcement action. FMI leadership met with FDA in early January and expects to work with the Agency as FDA moves forward.

#### **Nutrition labeling -- single ingredient/ground meat & poultry (USDA)**

The USDA nutrition labeling rule for meat and poultry products has been in process for nearly a decade but may finally be nearing resolution. USDA planned to publish a final rule in November, but withdrew the final rule and issued a supplemental rule instead. The key elements of the supplemental proposal are as follows: (1) required nutrition labeling for whole muscle cuts of meat and poultry, which may be provided either on-pack or at point of sale; (2) required on-pack nutrition labeling for ground product; and (3) regulatory permission to utilize %fat/%lean statements on ground product. The new rule will have operational impacts on retailers. Comments are due by February 16, 2010.

#### **Regulation of GHG's (EPA)**

The anvil against which the Congressional activity on "cap and trade" legislation is pounding is EPA's regulatory activity on greenhouse gases. Over the course of 2009, EPA began three significant rulemaking relevant to the regulation of GHG's under the Clean Air Act. Although none appears to impact retailers or distribution centers directly, the actions propose a very aggressive interpretation of the statute that, once codified in regulation, could far more easily be applied to FMI members.

#### **ADA rules (DoJ)**

The federal government has been working to update the Americans with Disabilities Act regulations regarding accessibility of public accommodations for many years. The Department of Justice proposed regulations to implement the recommendations of the Access Board in 2008 but was unable to promulgate final rules before the change of Administrations. DoJ has now signaled that the final rules will be issued in the first quarter of 2010. The rules may impact shelf placement of products, service counters, and things like whether chimpanzees and segways will be allowed in grocery stores. A key aspect of the rules will be the extent to which compliance with the earlier standards for existing facilities will be "grandfathered" under the new rules.

#### **Workplace safety enforcement (OSHA)**

OSHA received increased enforcement funding from Congress this year and is expected to utilize the results of a recent government study on the adequacy of injury and illness reporting data to increase inspections and enforcement of workplace safety requirements. This week, OSHA also requested an extension of its authority to collect workplace injury

and illness reports from more than 100,000 employers. This may well have an impact on food distribution centers in 2010.

### **CPSIA regulations (CPSC)**

The Consumer Product Safety Commission continues to wrestle with implementation of the Consumer Product Safety Improvement Act, which requires manufacturers and importers to take steps regarding certain toys and children's products. CPSC is expected to continue to issue regulations and guidance documents well into 2010 to implement CPSIA. Companies that import products that fall within the scope of the CPSIA should be aware of and compliant with the developing requirements.

### **Food Stamps (USDA)**

As required by the Farm Bill of 2008, USDA intends to publish a proposed rule in mid-2010 to give the Agency greater authority and flexibility when sanctioning retail or wholesale food stores that violate SNAP rules. Specifically, under the 2008 law, USDA is authorized to assess a civil penalty and to disqualify a retail or wholesale food store authorized to participate in SNAP -- previously, USDA could only issue one of these sanctions. In addition, USDA will be identifying additional administrative retail violations and the associated sanction that would be imposed. For example, the proposed rule would codify the requirement that retail and wholesale food stores key enter EBT card data in the presence of the actual EBT card and will identify sanctions that would be imposed for failure to do so. USDA will also propose rules regarding the use of and standards for EBT as the sole method of benefit delivery.

### **Privacy (FTC)**

The Obama Administration Federal Trade Commission is clearly interested in issues having to do with consumer privacy. A December roundtable on the "risks and benefits of information-sharing practices, consumer expectations regarding such practices, behavioral advertising ... and the adequacy of existing legal and self-regulatory frameworks" is likely to set the stage for increased regulatory activity in this arena in 2010. Retailers that utilize electronic media to obtain information about their consumers should follow the FTC's activities in this area.

### **Diacetyl exposure (OSHA)**

Both the federal and California Occupational Safety and Health Administrations expressed significant interest in worker exposure to diacetyl in 2009. The substance is produced in the manufacture of flavorings. Retail bakeries may be impacted by spillover from the regulatory activity related to manufacturing plants that is expected to continue well into 2010.

### **Health information technology (HHS)**

The privacy provisions of the HITECH Act build upon existing federal privacy laws and regulations already in effect under the Health Insurance Portability and Accountability Act

(HIPAA). Though the Food Marketing Institute supports efforts to promote greater use of information technology to enhance healthcare while ensuring the privacy of sensitive patient information, we will be watching closely as regulations are proposed to implement several provisions of the Act.

As HHS addresses implementation of the HITECH Act we will express the need for an appropriate balance between protections for patient health information and the delivery of important pharmacy services to patients. Specifically, we support the continued ability of patients to choose not to participate in a pharmacy messaging program through an opt-out mechanism. The HITECH Act expressly allows sponsored communications to continue without a patient authorization – “opt in” where the communication describes only a drug or biologic that is currently being prescribed for a recipient of the communication and such payment is "reasonable". The HITECH Act requires HHS to establish by regulation what constitutes a “reasonable” payment in connection with sponsored communications about currently prescribed drugs. To help guide the rulemaking process, FMI has commissioned a study through Avalere Health to design a methodology to estimate the total costs - both direct and indirect costs - incurred by pharmacies involved in patient messaging programs that will be used in our comments to the Agency. Lastly, FMI believes that there should be transparency of sponsorship with an acknowledgement of funding from all commercial and nonprofit organizations. Proposed rules are expected in early 2010.

#### **Tobacco regulation implementation (FDA)**

The Family Smoking Prevention and Tobacco Control Act (the “Tobacco Act”) gave FDA the authority to regulate tobacco products, such as cigarettes. The new law is primarily aimed at manufacturers, but includes important provisions for retailers. FMI responded to FDA’s general request for comments on implementing the new law in the following areas: (1) retailer training programs; (2) penalties imposed on retailers and distributors for mislabeled products; (3) equal enforcement against all retailers (including internet sales and Indian reservations); (4) limitation of fines; (5) adequate due process; and (6) recordkeeping. FDA issued a separate request for comments on the “approved vendor training program;” comments are due this month.