

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 663 Cottage Food Operations
SPONSOR(S): Regulatory Reform Subcommittee, Salzman and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1294

FINAL HOUSE FLOOR ACTION: 90 Y's 28 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 663 passed the House on April 4, 2021. The bill was amended in the Senate on April 28, 2021, and returned to the House. The House concurred in the Senate amendment and subsequently passed the bill as amended on April 30, 2021.

Cottage foods are certain food products which have been determined by the Department of Agriculture and Consumer Services (DACCS) to be safe for production at a person's residence. Examples of permissible cottage foods are breads, honey, cakes, and popcorn. Food products containing meats and fresh fruits and vegetables or those that require temperature control are generally prohibited cottage foods.

Current law allows a cottage food operation to sell cottage foods without conforming to state food and building permitting requirements if the annual gross sales of such products do not exceed \$50,000. Certain local, state and federal operating standards must be followed, including those governing methods of sale, delivery, labeling, and storage.

DACCS is authorized to investigate complaints regarding food safety violations involving cottage foods.

The "Home Sweet Home Act":

- Allows the sale and delivery of cottage food products by United States Postal Service or commercial mail delivery service.
- Increases the gross annual sales limitation from \$50,000 to \$250,000.
- Revises the definition of a "cottage food operation" to clarify that an operator is allowed to have business partners.
- Preempts the regulation of cottage food operations to the state, and prohibits local laws, ordinances, or regulations that prohibit a cottage food operation or regulate the preparation, processing, storage or sale of cottage food products.
- Requires cottage food operations to comply with the conditions for the operation of a home-based business.

The bill may have a positive fiscal impact on the private sector.

The bill was approved by the Governor on June 29, 2021, ch. 2021-211, L.O.F., and became effective on July 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Cottage Foods

The Department of Agriculture and Consumer Services (DACS) is responsible for the administration and enforcement of the Florida Food Safety Act.¹ The act is intended to:

- Safeguard the public health and promote the public welfare by protecting the consuming public from injury from intrastate commerce in food.
- Provide legislation conforming with the Federal Food, Drug, and Cosmetic Act, the Agriculture Marketing Act of 1946, and Federal Trade Commission Act, to the extent that it expressly prohibits the false advertisement of food; and
- Promote uniformity of state and federal laws and their administration and enforcement throughout the United States (U.S.) and in the states.²

State and local governments have primary authority over food production. Therefore, states, and not the federal government, have the ability to decide whether or not in-home food productions are allowed in that state and what foods qualify for such in-home production.³ The act allows such operations under certain circumstances.⁴

Current law defines “cottage food products” (cottage foods), as not a potentially hazardous food as defined by DACS rule, and which are sold in accordance with cottage food operating requirements.⁵ Like many other states, DACS adopts the U.S. Food & Drug Administration (FDA) food code.⁶ The food code/DACS rule defines “Potentially Hazardous Food/Time/Temperature Control for Safety Food” (PHF/TCS) as food that requires time/temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation.⁷

Although DACS has not adopted a rule on cottage food operations, DACS has published guidance defining foods that are, and those that are not, considered cottage food products. These examples include the following:⁸

Permitted Cottage Foods:

- Loaf breads, rolls, and biscuits;
- Cakes, pastries, and cookies;
- Candies and confections;
- Honey;
- Jams, jellies, and preserves;
- Fruit pies and dried fruits;
- Dry herbs, seasonings, and mixtures;

¹ See ch. 500, F.S.

² S. 500.02, F.S.

³ Christina Rice, Emily Broad Leib, *Cottage Food Laws in the United States*, Harvard Law School Food Law and Policy Clinic (FLPC) (August 2018), https://www.chlpi.org/wp-content/uploads/2013/12/FLPC_Cottage-Foods-Report_August-2018.pdf (last visited Feb. 19, 2021).

⁴ S. 500.80, F.S.

⁵ S. 500.03(1)(k), F.S.

⁶ U.S. Food & Drug Administration, *2017 Food Code*, <https://www.fda.gov/media/110822/download> (last visited Feb. 21, 2021).

⁷ R. 5K-4.0010(9), F.A.C.

⁸ DACS Division of Food Safety, *Cottage Food Operations*, <https://www.fdacs.gov/Business-Services/Food/Food-Establishments/Cottage-Foods> (last visited Feb. 19, 2021). The United States Food and Drug Administration (FDA) model food code includes a definition for such foods; DACS formed a definition that is similar. FDA Food Code §1-201.10 (2017).

- Homemade pasta;
- Cereals, trail mixes, and granola;
- Coated or uncoated nuts;
- Vinegar and flavored vinegars; and
- Popcorn and popcorn balls.

Prohibited Cottage Foods:

- Fresh or dried meat or meat products including jerky;
- Canned fruits and vegetables, chutneys, vegetable butters and jellies, flavored oils, hummus, garlic dip, salsas, etc.;
- Fish or shellfish products;
- Canned pickled products such as corn relish, pickles, and sauerkraut;
- Raw seed sprouts;
- Bakery goods which require any type of refrigeration, such as cream, custard, or meringue pies and cakes or pastries with cream cheese icings or fillings;
- Milk and dairy products including hard, soft, and cottage cheeses and yogurt;
- Cut fresh fruits and/or vegetables;
- Juices made from fresh fruits or vegetables;
- Ice and/or ice products;
- Barbeque sauces, ketchups, and/or mustards; and
- Focaccia-style breads with vegetables and/or cheeses.

Cottage Food Operating Requirements

In Florida, a “cottage food operation” is defined as a natural person who produces or packages cottage foods at his or her residence and is exempt from food and building permitting requirements⁹ if he or she sells such products in accordance with the cottage food operating requirements.¹⁰

A cottage food operation must comply with the following requirements in order to operate:

- **Sales Limit:** Annual gross sales of cottage foods may not exceed \$50,000;¹¹
- **Internet Sales:** In order to sell, offer for sale, and accept payment for cottage food products over the Internet, such products must be delivered in person directly to the consumer or to a specific event venue.
- **Delivery:** A cottage food operation is prohibited from offering for sale or delivering cottage food products by mail order.
- **Wholesale Sales:** A cottage food operation is prohibited from offering cottage food products at wholesale.
- **Labeling:** Cottage foods must be sold prepackaged with a label affixed containing the following information:
 - Name and address of the cottage food operation;
 - Name of the cottage food;
 - Ingredients of the cottage food, in descending order of predominance by weight;
 - Net weight or net volume of the cottage food;
 - Allergen information as specified by federal labeling requirements;
 - If any nutritional claim is made, appropriate nutritional information as specified by federal labeling requirements; and

⁹ See s. 500.12, F.S.

¹⁰ S. 500.03(1)(j), F.S.

¹¹ S. 500.80(1)(b), F.S. This includes all sales of products from any location, regardless of the types of products sold or number of persons involved in any operation. Documentation of sales must be available to DACS for verification.

- A statement printed in at least 10-point font and in a color that provides clear contrast to the background of the label which reads “Made in a cottage food operation that is not subject to Florida’s food safety regulations;”¹²
- Storage: Only cottage foods that are stored on the premises of the cottage food operation may be sold;
- State and Federal: A cottage food operation must comply with applicable state or federal tax laws, rules, regulations, or certificates;
- Local Government: A cottage food operation must comply with applicable county and municipal laws and ordinances regulating the preparation, processing, storage, and sale of cottage foods by a cottage food operation or from a person’s residence.¹³

Some local governments throughout the state place additional requirements on cottage food operations. For example, many counties and cities require a cottage food operation, like any other business endeavor, to obtain a business tax receipt¹⁴ prior to commencing his or her production.¹⁵

Enforcement

DACS may enter and inspect the premises of a cottage food operation to determine compliance with the cottage food operations requirements only upon receipt of a complaint, which alleges that a cottage food operation has violated any of the cottage food operating requirements. If a cottage food operation refuses to permit DACS to enter the premises or to conduct the inspection, he or she is subject to disciplinary action.¹⁶

Recent Trends

Sales Limits

A study conducted by the Harvard Law School Food Law and Policy Clinic provides the following data regarding annual gross sales limits for cottage food operations in other states:

- Sales limits differ among the states, ranging from \$10,000 to no limit at all.
- About half of the states place a limitation on the amount of income a cottage food operation can earn in a year.
- In those states, once a cottage food operation exceeds the cap, typical food establishment requirements and permitting rules kick in.
- South Carolina only allows \$15,000 in annual gross sales.
- Other states like Texas limit the sale of cottage foods to \$50,000 per year.
- More than half of states, including Georgia, Massachusetts, New York, North Carolina, and Tennessee, do not place a sales limit on cottage food operations or have no limit on at least some types of cottage food operations.¹⁷

¹² Cottage food products must be labeled in accordance with the requirements as outlined in s. 500.80(3), F.S., and U.S. Code of Federal Regulations Title 21, Part 101.

¹³ S. 500.80(1)-(6), F.S.

¹⁴ Chapter 205, F.S., allows counties and cities to impose taxes for the privilege of engaging in or managing any business, occupation, or profession within its jurisdiction. This tax is administered through the issuance of a local business tax receipt. In order to impose this tax, the local government entity must adopt an ordinance, which outlines the amount of the tax, method of computation, and other requirements.

¹⁵ Examples include City of Miramar and St. John’s County. City of Miramar, *Business Tax (Occupational Licenses)*, <http://www.miramarfl.gov/201/Business-Tax-Occupational-Licenses> (last visited Feb. 19, 2021); and County of St. John’s Tax Collector, *Business Tax FAQs*, <http://www.sjctax.us/BusinessTaxFAQ.aspx> (last visited Feb. 19, 2021).

¹⁶ S. 500.08(7)(a)-(b), F.S.

¹⁷ Christina Rice, Emily Broad Leib, *Cottage Food Laws in the United States*, Harvard Law School Food Law and Policy Clinic (FLPC) (August 2018), https://www.chlpi.org/wp-content/uploads/2013/12/FLPC_Cottage-Foods-Report_August-2018.pdf (last visited Feb. 19, 2021).

According to the study, sales limits “limit the scale of operations that are allowed to sell without full food safety precautions in place... sales limits also prevent cottage food operators from scaling up and generating a livable income from their business.”¹⁸

According to an Institute for Justice article on cottage food laws, “the national trend line is moving toward more food freedom. More laws pass every year, expanding the right to sell homemade food.”¹⁹

Florida’s gross annual sales limit is \$50,000.²⁰ It was raised from \$15,000 to \$50,000 in 2017.²¹

Business Partnerships

According to the Internal Revenue Service (IRS) Partnerships webpage, “a partnership is the relationship between two or more people to do trade or business. Each person contributes money, property, labor or skill, and shares in the profits and losses of the business.”²²

Florida partnership law is governed by ch. 620, F.S. The law sets forth requirements for anyone wanting to establish a new partnership in the state of Florida. Under these rules are specific requirements regarding all types of partnerships, including the following:

- Limited partnerships;
- General partnerships;
- Limited Liability partnerships; and
- Foreign limited partnerships.

All partnerships must be registered with the Florida Department of State and follow all requirements found within ch. 620, F.S., which include the creation of the business, the paperwork and fees associated with creation, and the ongoing upkeep and maintenance of such partnerships.²³

According to an American Express online article on advantages and disadvantages of business partnerships, for those considering a business partnership as a way to grow a company, a partnership can offer the following benefits:

- Bridging the Gap in Expertise and Knowledge: access to a wider range of expertise, additional knowledge and experience, and complementary skills.
- More Cash: infusion of cash into the business, more strategic connections, and enhanced borrowing ability to finance growth.
- Cost Savings: shared financial burden for expenses and capital expenditures needed to run the business, and more substantial savings.
- Better Work/Life Balance: shared labor, lightened workload, allowing time off when needed, knowing that there's a trusted person in charge, and positive impact on personal life.
- Moral Support: ability to brainstorm or debrief on important issues, support when setbacks are encountered, and help coping with everyday frustrations.
- Potential Tax Benefits: does not pay income tax, instead, "passes through" profits or losses to its partners. Each partner reports their share of the partnership's income or loss on their

¹⁸ Rice, Leib, *Supra* note 17, at 14.

¹⁹ Institute for Justice, *Defending Your Right to Sell Homemade Food*, <https://ij.org/issues/economic-liberty/homemade-food-seller/> (last visited Feb. 22, 2021).

²⁰ S. 500.80(1)(a), F.S.

²¹ Ch. 2017-32, Laws of Fla.

²² Internal Revenue Service, *Tax Information for Partnerships*, <https://www.irs.gov/businesses/partnerships> (last visited Feb. 22, 2021).

²³ Ch. 620, F.S.

personal tax return. This may allow partners to deduct any business losses from their individual tax return.²⁴

Some disadvantages include liabilities, loss of autonomy, personal conflicts, future selling issues, and lack of stability. However, in analyzing advantages and disadvantages of a partnership, the advantages may outweigh the disadvantages, and some of the disadvantages of a partnership may be overcome with due diligence.²⁵

Current law does not appear to specifically allow cottage food operators to participate in partnerships. The law defines a “cottage food operation” as a natural person who produces or packages cottage food products at his or her residence and sells such products in accordance with s. 500.80, F.S.²⁶ The definition appears to limit the operation to one person.²⁷ In addition, DACS guidance on cottage food operations provides that a cottage food operation must be a single-family domestic residence in order to qualify as a cottage food business.²⁸

Mail Orders

There are many laws that provide the basic framework for ensuring safety of foods in the U.S., including mail order foods. These laws include, but are not limited to, the Food Drug and Cosmetic Act (FDCA),²⁹ the Federal Meat Inspection Act (FMIA),³⁰ and the Poultry Products Inspection Act (PPIA).³¹ These laws prohibit the sale or distribution of adulterated foods. Foods can be deemed adulterated for many reasons including if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

The FMIA specifically prohibits adulteration during transportation, where adulteration means any act while being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.³²

The U.S. Postal Service (USPS) classifies most nonperishable food items asailable domestically if properly packaged. The USPS defines “Perishable Matter” as anything that can deteriorate in the mail and thereby lose value, create a health hazard, or cause an obnoxious odor, nuisance, or disturbance, under ordinary mailing conditions. USPS allowsailable Perishable Matter to be sent at the mailer’s own risk when it is packaged as required and when it can be delivered within appropriate and reasonable time limits to prevent deterioration. USPS provides guidelines for shipping perishable matter, including specific instructions and listings for hazardous materials, restricted matter, perishable matter, international mail, and air transportation requirements.³³

According to the National Mail Order Association (NMOA), “Mail Order Selling” and “Direct Marketing” are terms that encompass many different methods and mediums of soliciting and/or selling products or

²⁴ American Express Trends and Insights, *What Are the Advantages and Disadvantages of a Partnership?*, <https://www.americanexpress.com/en-us/business/trends-and-insights/articles/what-are-the-advantages-and-disadvantages-of-a-partnership/> (last visited Feb. 22, 2021).

²⁵ American Express, *supra* note 23.

²⁶ S. 500.03(1)(j), F.S.

²⁷ Email from Carlos Nathan, Deputy Legislative Affairs Director, DACS, RE: Cottage Foods, (Dec. 18, 2021). According to DACS, the “definition itself seems to imply that a ‘cottage food operation’ is a single, natural person rather than a business entity that multiple people can own.”

²⁸ DACS Division of Food Safety, *Cottage Food Operations*, <https://www.fdacs.gov/Business-Services/Food/Food-Establishments/Cottage-Foods> (last visited Feb. 19, 2021).

²⁹ 21 U.S.C. ch. 9.

³⁰ 21 U.S.C. ch. 12.

³¹ 21 U.S.C. ch. 10.

³² 21 U.S.C. § 610(d).

³³ U.S. Postal Service, *Publication 52, Hazardous, Restricted, and Perishable Mail*, <https://pe.usps.com/text/pub52/welcome.htm> (last visited Feb. 21, 2021).

services at a distance where the potential customer is not physically present at a store or other location to see the product or to place an order.³⁴

Twenty eight states allow cottage food businesses to sell online to buyers within state limits, 18 states allow sales through retail outlets, and several states allow delivery by mail order.³⁵ In New Hampshire, “homestead food operations” (cottage food operators) can sell to “restaurants or other retail food establishments, over the Internet, by mail order, or to wholesalers, brokers, or other food distributors who will resell the product,” if they obtain a Homestead License.³⁶

In Florida, sales by cottage food operations must be person-to-person, which means from the producer to the actual consumer. Cottage food products must be delivered and distributed directly to the consumer or the consumer’s private event venue by the cottage food operator.³⁷ A cottage food operation is prohibited from selling, offering for sale, or delivering cottage food products by mail order.³⁸

Local Regulations

Cottage food operations in Florida are required to comply with all applicable county and municipal laws and ordinances regulating the preparation, processing, storage, and sale of cottage food products.³⁹ Local governments throughout the state have created regulations for cottage food operations. Several of these regulate cottage food operations via home occupation ordinances. For example, the City of Orlando prohibits home occupations from “food processing and handling,”⁴⁰ which appears to prohibit cottage food operations.

Other local governments restrict the amount of space in the home that can be used for a cottage food business. Suwannee County prohibits the use of more than twenty percent of the first floor area of the residence.⁴¹ The City of Jacksonville prohibits the use of more than 250 square feet or ten percent of the gross floor area of the dwelling unit.⁴² According to the Miami-Dade County home occupation webpage, it restricts the use of a cottage food operation to the kitchen area only.⁴³

Other local ordinances prohibit the sale of cottage food products from the residence directly to consumers. Miami-Dade County prohibits sales of products or goods on premises.⁴⁴ The City of Jacksonville also prohibits retail sales on the premises of a home occupation.⁴⁵ These ordinances appear to conflict with state guidance and regulations that indicate cottage food operators are allowed to sell cottage food products from their residence directly to the consumer.⁴⁶

Effect of the Bill

The bill allows for the sale and delivery of cottage food products by United States Postal Service or commercial mail delivery service.

³⁴ The National Mail Order Association, About the NMOA, <http://www.nmoa.org/Membership/membinf.htm> (last visited Feb. 22, 2021).

³⁵ Rice, Leib, *supra* note 17, at 26-59.

³⁶ Rice, Leib, *supra* note 17, at 11.

³⁷ DACS Division of Food Safety, *Cottage Food Operations*, <https://www.fdacs.gov/Business-Services/Food/Food-Establishments/Cottage-Foods> (last visited Feb. 19, 2021).

³⁸ S. 500.80(2), F.S.

³⁹ S. 500.80(1)-(6), F.S.

⁴⁰ Sec. 58.939., City of Orlando City Code.

⁴¹ S. 4.19.31(5), Suwannee County Land Development Regulations.

⁴² City of Jacksonville Municipal Code § 656.401(n)(1)(ix).

⁴³ Miami-Dade County, *Regulatory & Economic Resources, Home Occupation*, <https://www.miamidade.gov/zoning/district-home-office.asp#:~:text=Cottage%20food%20operation%20must%20be, square%20feet%20of%20the%20home> (last visited Feb. 21, 2021).

⁴⁴ Sec. 33-25.1.(A)7., Miami-Dade County Code of Ordinances.

⁴⁵ S. 656.401(n)(1)(iv), City of Jacksonville Municipal Code.

⁴⁶ DACS Division of Food Safety, *Cottage Food Operations*, <https://www.fdacs.gov/Business-Services/Food/Food-Establishments/Cottage-Foods> (last visited Feb. 19, 2021).

The bill increases the maximum annual gross sales limitation from \$50,000 to \$250,000.

The bill revises the definition of “cottage food operation” to allow a person or an entity to have an ownership interest in a cottage food operation, clarifying that an operator is allowed to have business partners.

The bill preempts the regulation of cottage food operations to the state, and prohibits local laws, ordinances, or regulations that prohibit a cottage food operation or regulate the preparation, processing, storage or sale of cottage food products.

The bill requires cottage food operations to comply with the conditions for the operation of a home-based business under s. 559.955, F.S., and links the bill with the passage of HB 403, which is the home-based business bill. The bill takes effect on the same date that HB 403 or similar legislation takes effect.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Indeterminate.

2. Expenditures:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have an indeterminate positive impact on the private sector.

D. FISCAL COMMENTS:

The bill may have an insignificant impact on local governments.