



June 24, 2011

Submitted Electronically

Docket Clerk
U.S. Department of Agriculture
FSIS
Room 2-2127
George Washington Carver Center
5601 Sunnyside Avenue
Beltsville, MD 20705

RE: Mandatory Inspection of Catfish and Catfish Products

Docket No. FSIS-2008-0031

On February 24, 2011, the U.S. Department of Agriculture Food Safety and Inspection Service published a proposed rule entitled Mandatory Inspection of Catfish and Catfish Products.¹ The Food Marketing Institute² (“FMI”) appreciates the opportunity to comment on the proposed rule.

Section 11016(b) of the Food, Conservation and Energy Act of 2008 (FCEA) directs USDA to take over regulation of “catfish” from the Food and Drug Administration (FDA).³ In the proposed implementing rule, FSIS would develop a system of continuous inspection applicable to U.S. and foreign producers and processors of catfish and catfish products. The requirements of the rule, as USDA notes, are largely based on existing FSIS regulations derived from the Federal Meat Inspection Act.⁴ Those regulations include an FSIS mandate that all imported products subject to the final rule must come from nations whose food safety regulatory systems have been deemed equivalent to FSIS’s system by USDA itself.⁵

¹ 76 Federal Register 10434 (February 24, 2011).

² FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI’s members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three-quarters of all retail food store sales in the United States. FMI’s retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than 50 countries. FMI’s associate members include the supplier partners of its retail and wholesale members.

³ Public Law No. 110-246.

⁴ 76 FR 10440.

⁵ 76 FR 10447-48.

The FCEA leaves it to USDA to define what a catfish is for purposes of FSIS oversight and regulation. The Proposed Rule proposes two different definitions. The first definition would limit the scope of the FSIS inspection program to fish of the family Ictaluridae, a definition that would cover North American channel and other catfish and related Chinese catfish now imported to the U.S. The second definition would be far broader and would include over 2,500 species of the order Siluriformes, including pangasius, a whitefish that is primarily imported into the United States.⁶

FMI urges USDA to opt for the first definition and limit the scope of coverage of the final rule to fish of the family Ictaluridae. FMI and its member companies view food safety and consumer choice as two of the cornerstones of the industry's responsibilities. A rule that expands the definition of catfish to cover the entire order of Siluriformes does little to promote either one of these goals and could, in fact, harm the consumer by leading to higher prices.

The Proposed Rule does not point to significant problems with the existing system of FDA risk-based regulation, and does not identify a pathogen that poses a particular threat for catfish consumption. USDA focuses on Salmonella in the rule and accompanying risk assessment but this does not appear to be predicated on any documented findings of a substantial food safety risk. The rule itself states that, since FDA HACCP was implemented for seafood in 1997, no cases of Salmonellosis can be attributed to catfish nationwide. That is no doubt why both FDA and the Centers for Disease Control regard catfish of any definition as a low risk food.⁷ Further, CDC's data about the full range of illnesses that were or may have been caused by catfish is quite modest, with only a few dozen illnesses since 1991.⁸

We do not believe there is evidence to justify a dramatic regulatory shift of the type contemplated by the Proposed Rule. The current food safety regime for catfish is not the portrait of a food item requiring immediate and dramatic regulatory scrutiny. Moving forward with an expanded definition of "catfish" based upon food safety concerns is simply not justified.

The expanded definition of catfish will create some serious consequences in the area of consumer choice. Every year, grocery retailers work to offer the American consumer the widest possible selection of safe, wholesome and affordable products from every food category. Since 2002, retailers have marketed catfish and pangasius as different fish, as mandated by Congress and FDA.⁹ Pangasius is typically sold at retail as swai or striped pangasius. As a result of different retail

⁶ 76 FR 10435-36.

⁷ 76 FR 10438.

⁸ 76 FR 10439 & Table 2.

⁹ Farm Security and Rural Investment Act of 2002, Section 10806, Public Law No. 107-171; and FDA Guidance for Industry: Implementation of Section 403(t) of the Federal Food, Drug, and Cosmetic Act Regarding the Use of the Term "Catfish," (Dec. 2002)

(<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Seafood/ucm071379.htm>)

marketing and sales approaches, swai and striped pangasius are now among the most popular fish in the United States.¹⁰ Catfish also remains among the ten most consumed fish.¹¹ Retailers have successfully marketed these fish differently, to the benefit of all consumers.

For example, under frequent market condition, many FMI members who sell catfish cannot find supply. Catfish frozen fillets, which in recent years have sold for about \$3.00/lb, now sell for \$4.07/lb.¹² This steep price increase has forced many retailers to identify alternative sources to meet customer demands. Pangasius is a just such an alternative.

But in order to provide consumers with this level of choice, the U.S. grocery industry is dependent on an efficient, highly integrated supply chain. To provide the widest possible range of fresh foods to a growing population, FMI members must increasingly reach beyond the United States, especially when it comes to a product, such as seafood, that often is not found abundantly within our borders. Disruptions in international food supplies have an almost immediate effect on grocery consumers looking for seafood. FMI members take seriously their obligation to maintain sourcing reliability for seafood and other essential foods that our customers choose. Tilapia (426 million pounds imported annually), pangasius (125 million pounds imported annually), and other whitefish are just such foods, i.e., they are increasingly popular, predominantly imported proteins in the U.S. market.

FMI is concerned that the USDA catfish inspection program – particularly if defined to encompass the entire order of Siluriformes - will harm consumers by limiting their choices in these types of proteins. USDA will require an equivalency determination for the nations and seafood producers that want to export “catfish” to the United States. As the Proposed Rule is structured, there is no provision to allow those nations to continue exporting under the aegis of FDA regulations while each such nation works through the equivalency process with FSIS. With respect to commodities such as beef and poultry, for which FSIS is a veteran regulator, an individual equivalency certification can take at least five years. Because FSIS has no experience in regulating the seafood supply chain – and because major seafood exporting nations may well show up on FSIS’s doorstep in close progression – the process can be expected to take even longer. The likelihood of tightened government budgets in the near future makes significant delays and resource shortages even more probable. In the interim, FMI members will be without the pangasius and other so-called catfish that they have come to rely on.

It is inescapable that a tighter, more limited supply means higher prices. When product scarcity increases, so do wholesale prices, and that pricing pressure drives lower-income shoppers away

¹⁰ Presentation of Prof. Terry Hanson to Catfish Farmers of America (Feb. 17-19, 2011).

¹¹ http://www.aces.edu/dept/fisheries/aquaculture/pdf/Catfish%20Industry%20Situation%202002_19_11%20v8.pdf

¹² <http://catfishnews.com/markets.htm> (citing USDA data).

from the high-value proteins that USDA itself has urged Americans to consume more often.¹³ That is particularly true, of course, in the current fragile economic environment. The end result is not good for consumers, retailers, or producers. Moving forward with a more limited definition of catfish could help minimize supply shocks and help limit the resources FSIS would need to implement the rule.

In addition to issues concerning food safety and consumer choice, the Proposed Rule is also problematic with respect to international trade. The United States, of course, is subject to the full range of obligations under World Trade Organization and General Agreement on Tariffs and Trade agreements, notably the Sanitary and Phytosanitary Agreement and the GATT Trade in Goods Agreement. Those agreements generally oblige our country to ensure that regulations are tailored to documented food safety threats, and that the regulations in question are the least intrusive means of effectively addressing the threat that is identified.¹⁴

WTO Members “have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.”¹⁵ The very next section of the SPS Agreement directs Members to ensure that “any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence.” Further, Article 2.3 of that Agreement directs Members not to apply such measures “in a manner which would constitute a disguised restriction on international trade.”

In the case of the Proposed Rule, FMI believes that it may run afoul of these provisions. The risk profile of catfish of the Order Siluriformes is low, and the Risk Assessment published with the rule casts doubt on the prospects that FSIS regulation will improve on the job FDA is already doing.¹⁶ These deficiencies create an argument that the Proposed Rule, if implemented, violates Article 2.2 and is in fact an effort to obstruct catfish imports in violation of Article 2.3. Should one of our trade partners raise a challenge to the final rule in response to an inability to export catfish, the United States may have difficulty defending the FSIS program from such assertions. And because of the reciprocal nature of our international trade – and particularly our international commodities trade – American consumers may end up paying higher costs for all kinds of food products.

In light of this, FMI believes that the narrow definition of “catfish” found in the Proposed Rule is far preferable to the much broader version. That version of a final rule would present the fewest problems under international trade law. It would also allow all but one comparatively small portion

¹³ See the 2011 Dietary Guidelines for Americans (Jan. 31, 2011).

¹⁴ SPS Agreement Preamble, http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

¹⁵ SPS Agreement, Art. 2.1.

¹⁶ Risk Assessment at 40-41.

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of the seafood trade to continue without interruption, to the benefit of American food wholesalers, retailers, and consumers. In a time of significant economic stress, American consumers need the best value and highest nutrition foods they can get. FMI urges USDA to keep those consumers in mind in implementing the FSIS catfish inspection program.

FMI appreciates the opportunity to comment on this important matter and looks forward to working with FSIS on this issue. Please contact me at 202-220-0614 or elieberman@fmi.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is fluid and cursive, with the first name "Erik" being the most prominent.

Erik R. Lieberman
Regulatory Counsel