



April 5, 2018

San Francisco Department of the Environment
1455 Market Street, Suite 1200
San Francisco, CA 94103

Attn: Antibiotics Use Ordinance, San Francisco Department of the Environment

**Re: San Francisco Department of the Environment Draft Regulation SFE-18-01-AUIFA
Proposed Regulations Implementing the Antibiotic Use in Food Animals Ordinance**

Dear Sir or Madam,

On October 24, 2017, the Antibiotic Use in Food Animals Ordinance (Ordinance No. 204-17, San Francisco Environment Code Chapter 27) was signed by the Mayor and became effective on November 23, 2017. The Ordinance requires certain retailers of raw meat and poultry to report the use of antibiotics in such products to the Department of the Environment (DOE), and requires City departments to report the use of antibiotics in raw meat and poultry purchased by the City to the Department of the Environment, as codified in Municipal Code: Environment Code, Chapter 27. The Antibiotic Use in Food Animals Ordinance requires that Grocers report to the Department, on a form prescribed by the Director, the Antibiotics Use Policy for each Product Group sold in the City of San Francisco during the previous year. FMI appreciates the opportunity to comment on the draft regulations to implement the Ordinance.

Food Marketing Institute proudly advocates on behalf of the food retail industry, which employs nearly 5 million workers and represents a combined annual sales volume of almost \$800 billion. FMI member companies operate nearly 33,000 retail food stores and 12,000 pharmacies. FMI membership includes the entire spectrum of food retail venues; single owner grocery stores, large multi-store supermarket chains, pharmacies, online and mixed retail stores. Through programs in public affairs, food safety, research, education, health and wellness and industry relations, FMI offers resources and provides valuable benefits to almost 1,000 food retail and wholesale member companies and serves 85 international retail member companies. In addition, FMI has almost 500 associate member companies that provide products and services to the food retail industry. For more information, visit www.fmi.org and for information regarding the FMI Foundation, visit www.fmifoundation.org.

FMI Believes the Ordinance and Proposed Regulations should be reconsidered

FMI opposed the Ordinance and has serious and significant concerns with the both the Ordinance and the proposed regulations to carry out the mandate as well as the practice of municipalities putting burdens in place that are either duplicative or inconsistent with USDA policy. While the

Board of Supervisors' intent behind the ordinance may be aimed at monitoring antibiotic use during livestock production, the unintended consequences of the proposed rule will harm food retailers who already are committed to the safety and quality of their fresh meat and poultry products sold to San Francisco consumers. Not only will the reporting requirements under the Ordinance be an additional burden on grocers in this geographic region, it will cause significant disruption in our supply chain, and it is inconsistent with the existing system of federal laws and regulations concerning meat and poultry products:

- Currently, retailers and producers do not have access to the information the Department is seeking. Expecting retailers to rewrite potentially long-standing contracts in an attempt to capture this data for multiple product lines ignores both the nature of the commercial relationship with producers and the reality that information is simply not tracked in the required format and cannot easily be converted into it;
- In the rare cases where the data could potentially be gathered, the costs for gathering, retaining and reporting the data would be prohibitively expensive. San Francisco consumers ultimately will pay the price of the program because it makes meat more expensive in stores required to report this information. Considering the uncertain benefits to the program, it is simply unfair to ask consumers to bear this burden;
- At a minimum, the Ordinance's requirements should not apply to products clearly labeled as USDA Certified Organic or "antibiotic-free." To do otherwise will place additional burdens on certified organic or antibiotic-free products compared to other meat and poultry products sold at chain restaurants or other retail outlets not subject to the requirements of the Ordinance. Ironically, the Ordinance will add a layer of unnecessary cost and potential confusion regarding these products that are already certified organic (and therefore antibiotic-free) or those specifically labeled "antibiotic-free";
- The Department seeks to extend its authority to demand information from producers outside the City of San Francisco.

As stated above, FMI urges the Department to consider these implementation challenges and reconsider both the proposed regulation and the Ordinance. We also urge the Department to continue working with food retailers to better understand the practical implications of the proposed reporting requirements.

Background

FMI members' top priority is food safety, and the supermarket industry stands by the safety, health, quality and production of the food it sells. While operating on a one to two percent profit margin (on average), FMI members also strive to provide healthy, affordable food that is accessible to customers of all income levels. To do otherwise not only would nullify the trusting relationship food retailers seek to maintain with their shoppers but also would constitute a violation of the federal Food, Drug & Cosmetic Act.

The supermarket industry has supported FDA's actions and will continue to support work to address unnecessary food animal production use of antimicrobials. We continue to see a reduction in their use. In addition, FMI supports increased veterinary oversight for the therapeutic uses of such drugs to preserve animal health as is jointly-administered by the U.S. Food & Drug Administration, Environmental Protection Agency, and U.S. Department of

Agriculture through the National Residue Program. In the case of veterinary drugs, FDA sets residue standards and USDA monitors for antimicrobial residues in all meat and poultry products. FMI fully supports these standards and adheres to the levels set in the products being sold.

For consumers who seek products from animals raised without the use of antibiotics, FMI members, including those in the San Francisco market, sell USDA certified organic products and products labeled as “Raised without Antibiotics,” or an approved variation of that nomenclature. The USDA organic regulations prohibit the use of any antimicrobials or animal drugs in the raising of livestock, according to 7 CFR 205.238. For products not certified as organic, the USDA Food Safety Inspection Service requires documentation to support the label claim at the time of the label pre-approval submission, per 9 CFR 412.1. Consumers can be assured that certified organic products and products containing labeling claims regarding antibiotics are from animals that have not been treated with antimicrobials and retailers therefore should not be required to provide an additional submission on these products. An additional requirement for a retailer to report annually that the raw meat and poultry is organic or antibiotic free is redundant, expensive and creates an unnecessary paperwork exercise.

The Ordinance Discriminates Against Grocery Stores with 25 or more Locations

The Ordinance misplaces the regulatory burden of documenting antibiotic use during animal production on grocery stores with 25 or more locations. While these entities currently adhere to product safety, information and claims requirements—including those related to antibiotic use—under the U.S. code, grocers should not be required to report, maintain, document and/or be held liable for information they do not possess and cannot validate. The recordkeeping burden alone could cause packers to elect to abandon the San Francisco market, harming consumers not only by making meat and poultry product more expensive, but also by limiting choice and availability. Not only will the Ordinance and proposed regulations raise prices and limit availability for all fresh meat and poultry in covered San Francisco grocery stores, but it also does not purport or articulate how this information will benefit the public or whether it will be made available. The Ordinance also puts producers and retailers selling or operating a store in the City of San Francisco at a competitive disadvantage to restaurants and their counterparts in a neighboring locality.

In addition to the practical realities of complying with the proposed regulation, the Department has not articulated how they intend to publish this information, implement policy measures to protect private and proprietary business information, and more importantly, how they intend to educate customers in San Francisco with regard to the data. Simply publishing the information as required by the Ordinance will surely confuse customers.

If the Department has yet to articulate or explain the reporting requirements how is an employee in a grocery store going to be equipped to answer very technical and complicated questions with regard to antimicrobial residue? Simply publishing complicated information such as the “weighted average of antibiotic use” will misrepresent how antibiotics are used in food producing animals and the fact that virtually all meat and poultry products do not contain antibiotic residues. Before moving forward with this process FMI asks that the City and County of San Francisco to conduct a regulatory analysis to evaluate:

- The impact of this Ordinance on grocery stores compared to the impact of the Ordinance on antibiotic use in animal production;
- The economic impact on fresh meat availability and customer prices, including in lower income neighborhoods; and
- Changes to any other laws, regulations or ordinances made necessary by the new Ordinance to ensure that grocery stores actually have the right to access information from their fresh meat and poultry suppliers to comply with the Ordinance.

The Proposed Form is Unworkable

The proposed form is unworkable and fails to recognize the practical realities of today's complicated supply chain. Undoubtedly, the form and the Ordinance set grocers up to fail because the information the City seeks is unrealistic and is currently not available. Further, grocers do not have access to the information the Department seeks and will simply not be able to comply with the proposed regulations within the timeframe.

The proposed rule requires each individual grocer to provide information to the City on an annual basis regarding the use of antibiotics for each of its raw meat and poultry products. FMI members have real concerns with placing a mandate on individual grocery stores operating within the City. Who does the City expect to submit the form at store-level? At store-level it is highly unlikely that a store manager or other employee in charge would have access to the type of information the Department is seeking. Requiring a responsible individual within a grocery store to report their name and take on the legal responsibility for providing accurate information is simply unreasonable. It would also increase training and compliance costs with no additional benefit to the public. Despite the fact that FMI members do not have access to this information for each product they sell, FMI urges the Department to consider a corporate-wide reporting requirement rather than an incredibly burdensome and unnecessary store-level reporting mandate. A grocer subject to the Ordinance would still be responsible for providing the information under the rule; however this would allow a company to manage compliance at the corporate level.

The Recordkeeping Requirements in the Proposed Rule is Overly Burdensome

In the proposed rule, the Department provides that grocers must maintain documentation regarding each meat and poultry producer's antibiotics use for five (5) years from filing a report. FMI sees no reason why each individual grocery store should be required to maintain records for five years. The ordinance does not provide for recordkeeping and certainly does not mandate an overly burdensome and unnecessary timeframe. FMI members do not believe there is a need to keep records for more than one year to demonstrate the prior year's reporting requirements.

Under the United States Department of Agriculture's (USDA's) Final Rule, "Records to be Kept by Official Establishments and Retail Stores that Grind Raw Beef Products" retail stores are only required to keep records for one year. Even USDA acknowledges the costs associated with the recordkeeping requirements and an overly burdensome five year record maintenance requirement serves little to achieve the objective of the ordinance. The Department would still receive the information they are seeking under the rule so why require retailers to keep that documentation at store-level for five years? That seems incredibly expensive and redundant with no

corresponding benefit to the Department or the public. Further, the maintenance of paper-based records requires time, space and imposes additional costs.

Exception for Grocers with Storewide Policy

Where a Grocer has a storewide policy prohibiting medically-important antibiotics use, instead of submitting one Form per Product Group, the Grocer may submit one Form per retail banner included under the policy. The Grocer must provide documentation that evidences the policy and the method used to enforce the policy. The Director will review the Grocer's documentation. If a determination that the Grocer's storewide policy prohibits medically-important antibiotics use cannot be made, the Grocer will have up to 30 days beyond the filing deadline to provide additional evidence of the policy or to submit completed Forms for every Product Group sold by Grocer.

FMI urges the Department to provide additional information on the type of documentation they are seeking under this proposal. For example, the Department could offer a template for retailers to ensure they understand the expectations for a corporate-wide policy. Additionally, the specifications that retailers have in place for their suppliers constitute proprietary information. FMI has real concerns that the Department is seeking proprietary information that if released could be used by competitors to their advantage. FMI urges the Department to outline how they intend to protect the confidential and proprietary information of FMI members.

The Department should make Waivers Publicly Available

A Grocer may request a waiver of specific elements of the Form by submitting a petition to the Department of the Environment. In the petition, the Grocer must demonstrate, based on substantial evidence, that reporting the specific information for which a waiver is sought for a Product Group is not feasible without significant hardship.

Given the fact that Grocers do not currently have access to any of the information the Department is seeking, FMI members will need to submit waivers for a variety of Product Groups. In many cases, the information the Department is seeking is simply not available. Producers have not been keeping this information for the previous year because there was no requirement to do so. Imposing a retroactive mandate does not change that fact. In most cases, a producer who does not have access to the information sought will not be in a position to provide the information to any of their customers. Therefore, the proposed requirement which would require each individual retailer to submit a waiver demonstrating significant hardship is unnecessary and redundant for both the submitter and the Department. FMI urges the Department to consider waivers based on Product Group rather than for individual grocers. FMI also has serious concerns with the Department requesting information on confidential business contracts between a retailer and their supplier. If the Department grants a waiver, the waiver should be available to the public so each retailer has the same benefit of the waiver based on significant hardship.

Conclusion

FMI and our member companies share the City's and County of San Francisco Board of Supervisors' interest in the safe, appropriate production of fresh meat and poultry products that are wholesome and affordable to the customers and neighborhoods we serve. We seek your

consideration and willingness to work constructively with FMI to address grocery stores' concerns with the Ordinance and proposed regulations.

The Ordinance as currently drafted will impose significant and unnecessary costs and disruptions in the supply chain and will penalize products that are already certified as "antibiotic-free." In short, the regulations set retailers up to fail and opens individual stores operating in the City of San Francisco to significant fines and liabilities for the failure to report information that they do not have access to.

Thank you for your consideration in this matter. I am available to answer any questions you might have at sbarnes@fmi.org or (202) 220-0614.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Barnes".

Stephanie K. Barnes
Chief Regulatory Officer & Legal Counsel