



January 9, 2012

Submitted Electronically

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

RE: Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions; Proposed Rule¹

Docket No. FSIS-2010-0012

On July 27, 2011, the U.S. Department of Agriculture Food Safety and Inspection Service (“FSIS” or “the Agency”) published in the Federal Register a proposed rule entitled Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions (the “Proposed Rule”).² The Food Marketing Institute (“FMI”) appreciates the opportunity to comment on the Proposed Rule.

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.

¹ 76 Federal Register 44855 (July 27, 2011).

² Id.

Introduction

The Proposed Rule would require raw meat and poultry products with added solutions that do not meet standard of identity regulations to have a common or usual name which includes an accurate description of the raw meat or poultry component, the percentage of added solution incorporated into the raw meat or poultry product, and individual ingredients or multi-ingredient components in the solution listed in the descending order of predominance by weight. FSIS is also proposing that the print for all words in the common or usual name appear in a single font size, color, and style of print and that the name appear on a single-color contrasting background among other things.

FMI has significant concerns about the burden the Proposed Rule would impose on the supermarket industry. Aspects of the Proposed Rule would be unworkable at the retail level and as FMI explains later in these comments, **we believe that retail level activities (i.e. marinating) should be exempt from the Proposed Rule.**

The Proposed Rule impacts retailers directly in three key ways:

- 1. Not Feasible to Calculate Marinade Absorption Rates at Retail Level**
- 2. Challenges in Retail Signage**
- 3. Redesign of Private Brand Labels**

We believe the total cost of the Proposed Rule on the public will exceed USDA's estimate of \$73 million, indeed it will be greater than \$100 million as explained later in these comments. As such the Proposed Rule is a significant rule under Executive Order 12866 and should be subject to formal review by the Office of Management and Budget.

Impacts on Food Retailers

- 1. Not Feasible to Calculate Marinade Absorption Rates at Retail Level**

Many food retailers take raw, single-ingredient meat and poultry products within the store and place them in various marinades for the convenience of the consumer. For instance, a meat department employee may take single-ingredient raw chicken breasts, place them in a teriyaki marinade and offer them for sale as "Teriyaki-Marinaded Chicken Breast." Retail stores do not operate the same standardized manner as processing plants and it is critical that the Agency contemplate this fact. Marinade absorption rates depend on time, temperature and the composition of the marinade itself among other things. It is simply not feasible for retailers to determine with precision the absorption level of a marinade. **Retail-level marinating should not be subject to the Proposed Rule.**

In essentially all circumstances where solutions are added to raw meat and poultry products in a retail store, the raw items are being placed in a marinade that is readily apparent to the consumer on visual inspection and furthermore are marketed as such. In these circumstances consumers can clearly distinguish these marinated products from single-ingredient raw meat and poultry products.

FMI believes raw meat and poultry marinated within a retail store should not be subject to the Proposed Rule as added marinade solution is not only clearly visible to the consumer, but the items are marketed as marinated products. The purported problem which FSIS seeks to address in this rulemaking: “that some labels may not clearly and conspicuously identify that the raw meat or poultry products contain added solution”³ is not an issue with store-marinated products. Indeed the consumer is buying them precisely because they are marinated, the marinade is plainly visible to the consumer and the products are marketed as marinated items.

2. Challenges in Retail Signage

The Proposed Rule would require retail signage to be altered. Signs within the full service meat case would have to be changed to reflect the new requirement. The typical sign designating an item within a full service meat case is small—generally 4-6 inches—and it would be virtually impossible to fit the common or usual name under the Proposed Rule along with the price information without shrinking the text size to the point where it would be barely legible. The Proposed Rule would most likely require retailers to increase the size of the signage which could pose significant problems within the tight confines of a full service meat case.

3. Redesigns of Private Brand Labels

The Proposed Rule would require food retailers to redesign thousands of labels at a very significant cost. The typical label redesign costs retailers approximately \$2,500. When all staff time is considered, the costs can be significantly higher. It is important to contemplate that label changes must be run by several departments within a retailer. For example, within many retailers, labels must be approved by the merchandising department, the legal department, the procurement department, the advertising department, the quality assurance department and often the vendor. The vast majority of new or redesigned labels require multiple series of reviews. One retailer mentioned that 90 percent of labels have one or more changes to the initial design circulated.

The Proposed Rule marks a very significant change which would consume a large amount of space on the principal display panel. These changes would require major alterations to many other elements of existing packaging. We believe that USDA’s estimate of \$1,557 per label⁴ is too low. The cost is more likely to be \$2,500 per label. As FSIS has estimated that 46,990 labels are

³ Id. at 44856.

⁴ Id. at 44862.

covered, we believe the cost of the Proposed Rule exceeds \$100 million (46,990 * \$2,500 = 117,475,000).⁵ As such the Proposed Rule is a major rule pursuant to Executive Order 12866⁶ and subject to formal review by the Office of Management and Budget.

Executive Order 12866

E.O. 12866 requires agencies to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Furthermore, “each agency shall tailor its regulations to impose the least burden on society.”

We believe there is simply no way the Proposed Rule can pass muster under E.O. 12866. It will require the food industry to redesign labels on tens of thousands of items to essentially just increase the font size of a statement about added solutions that is already required to be labeled prominently on the principal display panel under existing FSIS policy.

Products that contain added solutions are currently labeled prominently with a statement that they contain such solution. This must be displayed on the principal display panel in prominent type. For raw bone-in poultry products “The statement must be contiguous to the product name and printed in a style and color as prominent as the product name. The statement of the manner and amount of addition must be one-fourth the size of the most prominent letter of the product name....” (Policy Memo 42)⁷ For boneless and red meat products with added solutions the requirements are virtually identical.⁸

The statement on the content of added solutions is clearly visible to consumers on the principal display panel. Requiring the font size of this statement to be increased is unlikely to result in any benefit to the public. Indeed FSIS has failed to quantify any benefits of the Proposed Rule despite the fact that the Agency is compelled to under E.O. 12866.

Conclusion

We believe that retail marinating should not be subject the scope of the regulation; that FSIS more fully assess the costs of the Proposed Rule and that the Agency reconsider the Proposed Rule in light of the fact that the costs vastly outweigh any purported benefits.

⁵ Id. at 44863.

⁶ Exec. Order No. 12866 (September 30, 1993).

⁷ http://www.fsis.usda.gov/OPPDE/larc/Policies/Policy_Memos_082005.pdf

⁸ Id.

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FMI greatly appreciates your consideration of these matters. Please contact me at (202) 220-0614 or elieberman@fmi.org if you have any additional questions or need further information.

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