

June 11, 2006

U.S. Department of Agriculture  
Food Safety and Inspection Service  
Docket Clerk  
300 12<sup>th</sup> Street, S.W.  
Room 102 Cotton Annex  
Washington, DC 20250

**RE: Availability of Lists of Retail Consignees During Meat or Poultry  
Product Recalls Docket No. FSIS-2005-0028**

The Center for Science in the Public Interest (CSPI) appreciates this opportunity to comment on the United States Department of Agriculture's (USDA) proposed rule on the availability of lists of retail consignees during meat or poultry product recalls. CSPI is a non-profit consumer advocacy and education organization that focuses largely on food safety and nutrition issues. It is supported principally by the 900,000 subscribers to its *Nutrition Action Healthletter* and by foundation grants.

**Summary**

USDA's Food Safety Inspection Service (FSIS) is responsible for ensuring that meat and poultry products are safe, wholesome and accurately labeled. The Federal Meat Inspection Act and the Poultry Products Inspection Act require federal inspection of meat and poultry prepared for distribution in commerce for use in human food. Because USDA lacks mandatory recall authority, when a product is believed to be adulterated or misbranded, USDA will request that the firm that introduced the products into commerce

recall them. USDA assists this process by issuing a press release that includes a description of the food being recalled, the reason for the recall, the name of the producing establishment, and the recall classification. However, this information is not always sufficient to tell consumers if meat they have already purchased is part of a recall.

Currently, USDA has a policy of not providing consumers with critical information on where potentially contaminated meat or poultry was distributed and sold during a recall. This policy protects the industry at the expense of public health and effectively acts as a gag order on state public health officials.

This policy has impacted numerous states. In the summer of 2002, public health officials in Colorado and California were barred from obtaining ConAgra's distribution lists from USDA, even though the Denver plant distributed widely in those states.<sup>1</sup> On December 23, 2003, FSIS announced a voluntary recall of 10,410 pounds of raw beef that may have been exposed to tissues containing the infectious agent that causes mad cow disease. This meat was distributed to several states, including California. However, the California Department of Health was barred from disclosing where the tainted meat was distributed and sold to consumers.<sup>2</sup> On April 24, 2006 at the public meeting on this proposed rule, Under Secretary for Food Safety, Dr. Richard Raymond admitted that he was barred from getting retail consignee lists as Director of the Nebraska Health Department. Whether it's California, Colorado or Nebraska, consumers deserve to have as much information as possible to protect them selves and their families from the risks associated with contaminated meat and poultry.

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<sup>1</sup> David Migoya, "Colorado unable to obtain list of where recalled meat sold," *Denver Post*, (Aug. 4, 2002).

<sup>2</sup> Marjie Lundstrom, "Government secrecy agreement over tainted meat unacceptable," *Pasadena Star-News* (January 22, 2004).

USDA requires states to sign a memorandum of understanding prohibiting them from disclosing retail consignee lists to third parties in order to receive information on where tainted meat or poultry was sold in their state for verification purposes. In the past, USDA has contended that retail consignee lists is protected under the Freedom of Information Act (FOIA) “business records” exception. However, this interpretation applies the FOIA business records exemption too broadly.<sup>3</sup> In fact, retail consignee lists have been released under FOIA<sup>4</sup> when it was determined that their disclosure would not cause “substantial competitive harm.” Since recalls are limited in their depth and scope, it is questionable whether the release of the names of specific recipients of specific product at a specific time would be of any use to competitors. The Department has also claimed that this policy is appropriate because otherwise companies would not share this information under the voluntary recall policy. From a consumer perspective, however, this approach seems counter-intuitive, as the public may urgently need to know if the meat in their refrigerator or freezer came from the implicated product. A compelling public health interest should take precedent over a companies business records during a meat or poultry recall.

Now USDA has decided to change their policy on sharing retail consignee lists. In the March 7, 2006, *Federal Register* notice, FSIS stated that it has the authority to disclose consignee lists that are compiled during meat and poultry recalls. Furthermore, the Agency has concluded that is appropriate to disclose these lists in order to enhance

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<sup>3</sup> Specifically, exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4).

<sup>4</sup> *Greenberg v. FDA*, 803 F.2d 1213, (D.C. Cir. 1986); *Ivanhoe Citrus Assn. v. Handley*, 612 F. Supp. 1560, 1566 (D.D.C. 1985); *Braintree Elec. Light Dept. v. Dept. Of Energy*, 494 F. Supp. 287, 290 (D.D.C. 1980).

the efficiency of recalls. CSPI supports FSIS's change in position. This information will not only assist with the efficiency of recalls but also help protect public health.

**I. Disclosing retail store names during meat and poultry product recalls will increase consumer protection.**

The proposed rule will improve the recall verification process while also empowering consumers during these recalls. The list of retail consignees that sell recalled meat or poultry is very useful to both consumers and retailers. Typically, during a recall, consumers return more and different types of products than are actually necessary. Disclosing specific retail consignees will increase consumer's ability to identify the specific products subject to a recall. If consumers know the name of a retail consignee that sold recalled meat or poultry, they can simply go their refrigerator and look for the specific package. This will improve the recall process by enabling consumers to return the product to the retail outlet in question while also helping to prevent foodborne illnesses.

The meat industry contends that this information would give consumers a false sense of security. On the contrary, the proposed rule would give consumers additional information that will enable them to protect their families and reduce the potential health risks associated with a recall. Naming retail stores will also act as an extra incentive to retailers to remove potentially contaminated meat or poultry from commerce as soon as possible to avoid the potential economic impact.

Although the proposed rule is a welcome change in policy, USDA should consider improving it by including some additional elements. The proposed rule states

that FSIS will post the retail consignee lists on its website. But this is not adequate for consumer notification. We recommend the following:

- The retail consignee lists should be published in all recall materials like press releases (updated as necessary) and notification of recall reports either in the form of a web link or the list in its entirety when possible.
- The retail consignee list should be “prominently” displayed on FSIS’s website along with the usual recall information published by the Agency.
- The retail consignee list should identify the retail consignee by the physical location where the contaminated product is sold.

**II. Publishing of a retail consignee during a meat or poultry recall will benefit consumers even where some names are delayed.**

At present, FSIS has not committed to a time frame for publishing the list of retail consignees during a recall. We urge the agency to publish the names as soon as they become available. Many in the meat industry argue that partial information is worse than no information. However, consumer ignorance is not a deterrent to foodborne disease. Denying consumer partial information simply because complete information is not yet available would be like not recalling any meat, because products other than that being recalled might be contaminated. From a public health perspective, it just doesn't make sense. Removing any amount of contaminated product from a consumer's home might prevent an illness or save a life. And every illness or death from food weakens consumer confidence in the food supply and government food safety programs.

Clearly having a timely and complete list of retail consignees is preferable when dealing with a recall. But given the long time that meat or poultry is kept in the

refrigerator or freezer, all information regarding retailers is very valuable to consumers. FSIS should post the names of the retail consignees that sell recalled meat or poultry as soon as they become available from the district offices.

**III. FSIS should publish retailers as soon as they become known.**

If FSIS is unable to find all of the retail consignees of a meat or poultry product subject to a recall, it should publish a list of those consignees whose information it was able to obtain. The information should be posted on FSIS's website along with a disclaimer explaining that the retail list may not be complete. The Agency should continue to update the information as the retailers become known and tell consumers to continue to check the FSIS website and other sources of recall information. The disclaimer should make it clear that the retail lists are a supplement and not a substitute for the traditional information that FSIS distributes during a recall.

**IV. FSIS should modify the definition of "retail consignee" to include restaurants for the purposes of this rule.**

Lastly, the current proposed rule applies only to retail consignees as defined by FSIS Directive 8080.1 Revision 4. It does not apply to food service establishments like restaurants and institutions.<sup>5</sup> Every day millions of families around the country go out to restaurants for breakfast, lunch or dinner. They eat at schools, hospitals and nursing homes. They purchase and consume meat and poultry served by these establishments. As a result, consumers are put at risk if these establishments received tainted meat or poultry. Food service establishments are an important link in the recall verification chain and

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<sup>5</sup> Food Safety Inspection Service Directive 8080.1 Revision 4 defines "user level" as hotels, restaurants, and other food service institutional consignees.

including them in the definition of retail consignees would provide consumers greater protection from the risks associated with tainted meat or poultry.

**Conclusion**

Consumers rely on the USDA to ensure that the food they purchase and consume is safe. They deserve to know where potentially contaminated meat is distributed and sold. The proposed rule on the availability of lists of retail consignees during meat and poultry products recalls should be adopted promptly with the improvements mentioned above. This information would strengthen the recall process while also providing additional protection to consumers.

Respectfully submitted,

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