



National Grocers Association

June 9, 2006

Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
300 12th Street SW
Room 102 Cotton Annex
1400 Independence Avenue, SW
Washington, DC 20250

RE: Availability of Lists of Retail Consignees During Meat or Poultry Product Recalls

Docket No. 04-006P

Dear Sir or Madam:

The National Grocers Association (N.G.A.) welcomes this opportunity to comment on the Proposed Rule issued by the Food Safety and Inspection Service (FSIS or the Agency) to amend the federal meat and poultry products inspection regulations to provide that the Agency will make available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled by a federally inspected meat or poultry products establishment if product has been distributed at the retail level. 71 Fed. Reg. 11326 (March 7, 2006) (the "Proposed Rule"). N.G.A. appreciates the openness of FSIS in holding a public meeting on April 24, 2006 to discuss the Proposed Rule (the "Public Meeting").

N.G.A. is the national trade association that represents exclusively the interests of independent community-focused grocery retailers and wholesalers. An independent, community-focused retailer is a privately owned or controlled food retail company operating in a variety of formats. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing. A few are publicly traded, but with controlling shares held by the family and others are employee owned. Independents are the true entrepreneurs of the grocery industry and dedicated to their customers, associates, and communities. N.G.A. members include retail and wholesale

grocers and their state associations, as well as manufacturers and service suppliers. N.G.A. retail and wholesale members accounted for \$200 billion of U.S. grocery sales last year.

N.G.A. believes that nothing could be more important than the health and safety of consumers. N.G.A. is committed to working with FSIS to create the most effective recall procedures possible. Timely and accurate FSIS communications with consumers in the event of product recalls are critical. FSIS states it is proposing this action because it believes that the efficiency of recalls will be improved if there is more information available as to where products that have been recalled were sold. By providing consumers more information about the locations where recalled products have been sold, FSIS believes that consumers will be more likely to identify and return such products to those locations or to dispose of them.

N.G.A. does not believe that the Proposed Rule in making public the lists of retail consignees with recalled meat and poultry will improve the efficiency of the current recall procedures. Rather, we believe the Proposed Rule will inhibit the efficiency of the current recall procedures. In 2002 the Agency considered making such information public but ultimately decided it would not enhance the efficiency as discussed further in these comments. For this reason and others, we urge FSIS reconsider implementing this rule.

N.G.A. has five major concerns with the Proposed Rule:

- 1. The Proposed Rule will inhibit the efficiency of current recall procedures.**
- 2. FSIS has not sufficiently justified its authority to make available to the public lists the Agency has compiled during recalls of the retail consignees of meat and poultry products subject to recall.**
- 3. FSIS has failed to show that the Proposed Rule will not have a significant economic impact on small entities as is required by the Regulatory Flexibility Act. An Initial Regulatory Flexibility Analysis should be completed.**
- 4. The distribution of this information to the public is not necessary for the proper performance of the functions of the Agency and as such OMB should deny approval of the Proposed Rule under the Paperwork Reduction Act.**
- 5. The distribution of this information contradicts the principals articulated in USDA's Quality of Information guidelines pursuant to the Information Quality Act.**

1. The Proposed Rule will inhibit the efficiency of current recall procedures.

Current FSIS recall procedures work and provide consumers with an optimal level of information. Through its press releases and Recall Notification Reports, FSIS provides the public with information about meat and poultry recalls. This information includes: A description of the food being recalled, any identifying codes, the reason for the recall, the name of the producing establishment, the level of product distribution (e.g., wholesale; retail) to which the recall is to extend, and the appropriate contact persons for FSIS and the recalling company. FSIS also lists those states to which recalled product was shipped if fewer than 13 states were involved in the recall. If the recall extends to more than 13 states, it is considered to be a nationwide recall. In addition, FSIS sends recall information to several media and constituent list-servers. As stated in the Proposed Rule, “the current process is effective” *Id.* at 11327. The recall information provided to consumers is optimal because it encourages consumers to check the product itself. It gives consumers the information required to identify the product and determine if it is subject to recall. Recall procedures should encourage consumers to check the product itself and not provide additional unnecessary—or inaccurate—information. The information the Agency is proposing to distribute will be extraneous, untimely and inaccurate.

In establishing an optimal recall procedure, the Agency must create a procedure that encourages consumers to check the lot number or code on the package to the greatest extent possible. If the lists of retail consignees of recalled product are published consumers are likely to focus on the retail name more so than the identifying codes. Consequently, much more product may be returned to stores than was actually recalled. It is important to consider this fact when evaluating the efficiency of recall procedures.

The Proposed Rule states:

FSIS has concluded that making information identifying the retail consignees available to the public will improve the efficiency of recalls by helping consumers to identify and focus on the products that are recalled. In addition, making this retail consignee information available will, we believe, help make clear that other, similar products are not being recalled, and that there is no such reason to be concerned about such similar products. The Agency's experience with recalls over time has shown that in many recalls, much more product is returned than has actually been recalled. Often products are returned that were not produced by the recalling company or that were produced at different times or locations than the recalled product. *Id.*

N.G.A. disagrees. Rather than reducing returns of non-recalled product, providing consumers with the lists of potential retail locations will lead to more returns of product that has not been recalled—exactly the result FSIS is intending to avoid. Greater levels of return of non-recalled product will increase costs for grocers in terms of both consuming staff time and acceptance of non-recalled product. FSIS has provided no data in support of its conclusion that making such information public will improve recall efficiency.

Under the current system, when a recall is initiated the recalling firm notifies its consignees and FSIS. When wholesalers or self-distributing retailers receive the notice, they promptly send it out to all possible retail locations where the product could have been distributed which invariably includes more retail outlets than have actually received the recalled product. Upon receiving the notice at the individual store level, employees will check the shelves to see if the product is displayed, and remove it accordingly. FSIS concurrently conducts effectiveness checks to verify that the recall action is being conducted in an effective manner and provides the public with the information necessary to identify the product. As stated in the Proposed Rule, “the current process is effective” Id. N.G.A. believes the current process works and that implementing the Proposed Rule will reduce efficiency.

The Proposed Procedures Will Hamper Efficiency

For the below listed reasons, making available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled will hamper recall efficiency:

A. Inaccuracy

The grocery distribution system operates in such a way that N.G.A. believes the information FSIS is proposing to distribute to the public will be of little use as it will not accurately reflect individual retail locations which have received recalled product. FSIS requests from firms conducting recalls that they provide the Agency with a list of consignees to whom the recalled products were distributed. FSIS also obtains lists from the consignees of all entities to which they distributed the product. N.G.A. does not believe FSIS will be able to accurately pinpoint individual retail outlets which received recalled product based on this information. The lists most certainly will be incomplete as FSIS does not conduct verification activities for all potential retail consignees in larger recalls—nor does it possess the capabilities to do so. FSIS’s current effectiveness check procedures are based on statistical sampling. According to the FSIS Directive 8080.1, Revision 4 (May 24, 2004), statistical sampling is done to verify effectiveness. In the case of larger Class I recalls involving an illness or outbreak (the most serious category) only a very small proportion of consignees are checked. For recalls involving 35,001 to 500,000 retail consignees, only 800

effectiveness checks are made. For recalls involving 500,001 retail consignees or more, only 1,250 checks are conducted—less than 0.2%.

During the Public Meeting, Assistant Administrator of the Office of Policy, Program and Employee Development of FSIS, Philip Derfler posed the question, “Does the possibility of incomplete lists undercut the usefulness of the list?” Transcript at 26.

N.G.A. believes the answer to this question is yes. We are concerned that consumers will get the impression that recalled product was not carried at a retail outlet if the store was not included on the list and consequently not concern themselves with checking the information on the product itself—something the current procedures encourage them to do. Under current procedures, USDA lists the states in which the recalled product was shipped if fewer than 13 states were involved—otherwise the recall is considered national. This the optimal level of distribution information to be given to the public as it can be disseminated with reasonable degree of certainty and encourages consumers to check the product package itself.

Giving consumers inaccurate or overly general information will almost certainly increase the likelihood that many more products beyond those being recalled will be returned to the retail establishment. Consumers will focus on the retail venue rather than the product codes and this will result in needless mass return. A comment made during the Public Meeting, by Patricia Buck of Safe Tables Our Priorities (STOP) supports this contention: “The current system baffles consumers with long lists of case/lot numbers to which they do not have easy access and creates an unnecessary barrier.” Transcript at 33. This statement implies consumers would simply focus on the retail establishment without checking the product itself. Finding a lot number is as simple as examining the product itself—the most important step for consumers to take to determine if they possess recalled product. Additionally consumers may not distinguish between different retail locations sharing the same banner and may assume all stores with the same banner received recalled product.

The current recall FSIS recall procedures provide consumers with precisely the information they need to accurately identify the product itself and ascertain if it is subject to recall.

B. Untimeliness

It will likely take FSIS a substantial amount of time to trace product to particular retail locations. In the latest FSIS directive, the recommended timeframe for reporting verification activities for Class I recalls is within 13 days following the initiation of a recall. FSIS Directive 8080.1, Revision 4. As stated previously, FSIS will not likely be able to ascertain with any degree of precision which particular retail outlets are carrying recalled product. By the time the

information is made public—expected to be several weeks from the initiation of the recall—most product will be off of the shelf. As the lists of retail consignees of recalled product are not likely to be compiled in a timely fashion, the information will be of little use to consumers.

As Mr. Derfler stated in during the Public Meeting, in the Proposed Rule, “FSIS proposed to make publicly available on its website, the list of names and locations of the retail consignees of the recalled meat or poultry products that the Agency’s EIAOs compile in the trace forwards that they conduct.” Transcript at 23. He also stated that “The process of tracing the product forward to retail is, as I’ve said, very time consuming, often taking weeks to complete.” Transcript at 20.

Mr. Derfler continued: “FSIS is not committing to a particular time frame for posting consignee lists. Under the proposal, the Agency will post them as soon as they are compiled, which, as I stated, could be weeks after the recall is announced.” Transcript at 25.

Releasing such information to the public weeks after the initiation of a recall will not improve the efficiency of current recall procedures.

C. Consumer Apathy and Accessibility Concerns

When recalls become larger and needlessly involve consumers who do not own recalled product, consumers may become apathetic to recalls and ignore notices. The information provided should be specific and relevant and limited to that which identifies the product—without needlessly confusing consumers. If consumers attempt to return product that was not recalled, they may become discouraged and no longer heed recall notices.

Additionally USDA should consider that many Americans do not have access to the Internet or are not sufficiently computer literate to navigate federal government websites. Patricia Buck emphasized this point during the public meeting: “expecting consumers or journalists to go to the FSIS website to find the list of retail providers associated with the recall is not user friendly . . . the majority of consumers either do not own a computer or they are not familiar with finding specific information on the Internet.” Transcript at 34-35.

The means by which FSIS is proposing to distribute the information will not be accessible to all consumers. As the information FSIS is proposing to distribute will likely lead consumers to return product that is not being recalled, they may become apathetic to recall notices.

2. FSIS has not sufficiently justified its authority to make available to the public lists the Agency has compiled during recalls of the retail consignees of meat and poultry products subject to recall.

FSIS states in the Proposed Rule that “it has authority to make available lists the Agency has compiled during recalls of the retail consignees of meat and poultry products that have been recalled.” 71 Fed. Reg. 11326. The proposal, however, provides no rationale for its conclusion regarding such authority, nor how publishing such lists will enhance recall efficiency.

Indeed, the agency’s assertion is a clear deviation from the longstanding and relatively recently affirmed agency position that such information is confidential commercial information, as defined by the Freedom of Information Act (5 U.S.C. § 552), and is exempt from disclosure under that Act: “distribution lists . . . are protected from mandatory public disclosure by exemption 4 of the FOIA.” 67 Fed. Reg. 20010 (April 24, 2002). Furthermore, as FSIS stated in 2002, making public such information would hamper recall effectiveness.

Distribution information is confidential commercial information that is valuable to a firm and to its competitors. FSIS recognized that if it made the information regularly available to the public, firms would be unwilling to voluntarily share this information with the Agency. The Agency’s ability to verify that recalls were proceeding effectively would be significantly hampered as a result, and the public health would consequently suffer. *Id.*

The retail name will not serve in any way to differentiate products, as asserted in the Proposed Rule. The current FSIS recall procedures provide consumers with precisely the information they need to accurately identify the product itself and ascertain if it is subject to recall. In order to justify the Agency’s change in the position that distributions lists are confidential commercial information, FSIS needs to provide a rational explanation supporting its conclusion rather than stating an unsupported assertion that such a publication would help in product identification and recall efficiency.

3. FSIS has failed to show that the Proposed Rule will not have a significant economic impact on small entities as is required by the Regulatory Flexibility Act. An Initial Regulatory Flexibility Analysis should be completed.

N.G.A. has a substantial number of small business members that would face a significant economic impact by the Proposed Rule—in terms of accepting non-recalled product returns and increased time spent by employees in dealing with unnecessarily returned product. Many N.G.A. members meet the criterion for small business size standards set by the U.S. Small Business Administration

which is currently \$25 million in average annual receipts. In fact, there are over 34,600 supermarkets in the U.S. that fit this criterion. Thus, N.G.A. believes that an Initial Regulatory Flexibility Analysis (IRFA) is required.

The Proposed Rule states:

If consumers use such information and are better able to identify and return recalled meat and poultry products to the stores where they purchased them, the recall process will be more timely and effective. Although the benefits of the proposed action are not quantified, it is reasonable to conclude that they are equal to or exceed the costs of the rule, because costs are expected to be minimal . . . The Agency has concluded that the rule will not have a significant economic impact on a substantial number of small entities. Consequently an initial regulatory flexibility analysis is not required. 71 Fed. Reg. 11327, 11328.

This conclusion is not reasonable. The information FSIS is proposing to distribute to the public will inhibit recall efficiency as it will provide consumers with extraneous, inaccurate and irrelevant information which would lead to more non-recalled product being returned than under existing recall guidelines. Retailers generally accept products customers wish to return in good faith, even if they are not subject to recall.

Furthermore, the Regulatory Flexibility Act requires that any agency certification of no impact be accompanied with a statement providing the factual basis for such certification. 5 U.S.C. § 605(b). FSIS has failed to provide an adequate factual basis for its conclusion that the rule will have no significant impact on a substantial number of small entities.

The Office of Advocacy at the U.S. Small Business Department has also contacted FSIS and suggested that the Agency should consider completing an IRFA. N.G.A. agrees.

4. The distribution of this information to the public is not necessary for the proper performance of the functions of the Agency and as such OMB should deny approval of the Proposed Rule under the Paperwork Reduction Act.

The distribution of the lists of retail consignees of recalled meat and poultry constitutes "collection of information" under the Paperwork Reduction Act ("PRA"). "Collection of information" is defined as "requiring disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for . . . (i) . . . identical reporting or recordkeeping requirements imposed on, ten or more persons . . ." 44 U.S.C. § 3502.

Under 44 U.S.C. § 3508:

Before approving a proposed collection of information, the Director [of the Office of Management and Budget] shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information.

The collection of this information is unnecessary—and as such, the Director of OMB should deny FSIS's request to collect it. This information is not necessary for the proper performance of the functions of the Agency—the current recall procedures provide an optimal level of information to the consumer. It does not have practical utility. As stated earlier it will hamper recall efficiency by providing a discrete group of consumers with inaccurate, untimely and extraneous information, therefore, OMB should deny approval of FSIS's request to collect information.

5. N.G.A. believes the distribution is noncompliant with USDA's Quality of Information Guidelines pursuant to the Information Quality Act

The Information Quality Act ("IQA") (44 U.S.C. 3504(d)(1) and 3516) requires that federal agencies (a) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency and (b) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a).

Under the quality of information guidelines USDA is to follow in developing and reviewing regulatory information and disseminating it to the public, the agency will:

"Use reasonably reliable and reasonably timely data and information."
http://www.ocio.usda.gov/qi_guide/regulatory.html (visited May 4, 2006).

For the reasons listed under section 1 of these comments, the information will not be reasonably reliable or timely.

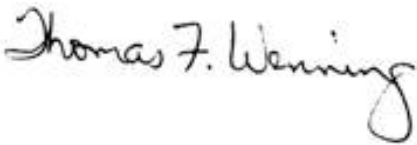
N.G.A. also has concerns that USDA's administrative mechanisms allowing for correction of information under the IQA will not permit retailers to correct information in a timely enough manner as to mitigate economic damage suffered from inaccurate data distributed to the public. Under USDA's IQA guidelines, a

request for correction of information will be responded to “normally within 60 calendar days of receipt.” http://www.ocio.usda.gov/qi_guide/corrections.html (visited May 4, 2006). If FSIS makes a mistake by identifying the wrong retail outlets that have received recalled product, the retailers impacted by the mistake should have an opportunity to correct it as soon as possible.

Conclusion

N.G.A. and its members believe that nothing could be more important than the health and safety of consumers and we are committed to working with FSIS to create the most effective recall procedures possible. N.G.A. appreciates this opportunity to comment on the Proposed Rule. Current recall procedures work and provide consumers with an optimal level of information—precisely the information they need to accurately identify the product itself and ascertain if it is subject to recall. The Proposed Rule will inhibit rather than improve the efficiency of current recall procedures by providing consumers with inaccurate, untimely and extraneous information. FSIS should justify its authority to implement the Proposed Rule as it marks a clear deviation from the Agency's longstanding position. An IRFA should be conducted for the Proposed Rule as it will have a significant impact on a substantial number of small entities. As the Proposed Rule hampers, rather than helps recall efficiency OMB should deny the Agency's request to distribute this information under the PRA since it is not necessary for the proper performance of the functions of the Agency. The Proposed Rule also contravenes USDA's quality of information guidelines. N.G.A. urges FSIS to reconsider implementing the Proposed Rule.

Sincerely,



Thomas F. Wenning
Senior Vice President and General Counsel



Erik R. Lieberman
Director of Governmental Affairs