



May 26, 2006

Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
300 12th Street, S.W.
Room 102, Cotton Annex
Washington, D.C. 20250

Re: Determining Net Weight Compliance for Meat and Poultry Products; Docket No. 04-041P; Food Safety and Inspection Service; Comment on Proposed Rule (March 28, 2006)

Dear Sir or Madam:

The National Chicken Council welcomes the opportunity to comment on the above-referenced proposed rule. NCC is the national trade association representing integrated chicken producer-processors, the companies that produce, process and market chickens. Member companies of NCC account for approximately 95 percent of the chicken sold in the United States. NCC members must label their products in accordance with the net weight regulations administered by USDA's Food Safety and Inspection Service. Therefore, NCC members are directly affected by the proposed rule.

We understand that the proposed rule is intended simply to update FSIS regulations by incorporating reference to the current edition of Handbook 133. It is not intended to result in any change in the reach and scope of federal net weight labeling requirements. To ensure that this limited and appropriate objective is accomplished, we urge FSIS to take this opportunity to memorialize and underscore guidance communicated by the Agency in the past several years concerning how inspectors must take into account free-flowing liquid that is contained within the packaging of meat and poultry products.

As the Agency has stated many times, inspectors must count free-flowing liquid contained in fresh, single-ingredient or enhanced poultry toward the product weight in making net weight determinations to ensure that ultimate compliance decisions are consistent with uniform federal law mandated by Congress. It is important that this FSIS policy be set forth clearly and

unequivocally in either the language of the final regulation or its preamble so that state and local net weight enforcement officials act in accordance with federal law.

Background

In 2005, NCC was joined by several other trade associations in petitioning FSIS to expressly eliminate “wet tare” as a permissible inspection method. The Agency determined that rulemaking was unnecessary, and did not act on the petition, because the underlying issue was viewed as involving the proper application of federal law by state and local jurisdictions. That is, FSIS determined that the federal net weight compliance standard is well-established such that no change in regulations was warranted. ^{1/}

The NCC industry petition was prompted by concern over the practice of a handful of jurisdictions that routinely employ a wet tare method of inspection through which they deduct free-flowing liquids in the package and the tare weight from the gross weight of the package in determining net weight. As a result, poultry processors selling in these jurisdictions have been forced to over-pack by a substantial amount to avoid citations. Compliance determinations that rest upon these flawed wet tare inspections are in direct conflict with federal law, as FSIS has recognized. In effect, requiring companies to pack differently to satisfy local enforcement practices results in labeling that is different from labeling pursuant to federal regulations and is preempted by federal law.

NCC commends FSIS for its leadership in working cooperatively with the National Conference on Weights and Measures to ensure a single, national uniform standard regardless of where or who performs an inspection. NCC believes that consumers, industry and FSIS are well-served by incorporating this important guidance into the final rule or its accompanying preamble. In this manner, the Agency can advance Handbook 133 as a procedural guide to good inspection practices that promote uniform enforcement consistent with binding federal law.

Proper Accounting of “Free Flowing Liquid”

Enhanced and single ingredient, poultry and meat products typically contain some amount of free-flowing liquid within the enclosed package depending

^{1/} Letter to George B. Watts, National Chicken Council from Philip S. Derfler, Assistant Administration, Office of Policy, Program and Employee Development, FSIS (January 24, 2006).

upon the product's storage and handling conditions during distribution. FSIS has considered the proper evaluation of product net weight and labeling under such circumstances several times and has consistently reached the same result.

Following a lengthy dialogue at a forum sponsored by NCWM in which FSIS participated, the Agency issued an April 15, 2004 letter related to free-flowing liquid lawfully found in enhanced products. ^{2/} FSIS advised that solutions added to the product or into which the product is placed for flavoring, seasoning or tenderizing "are intended to be part of the product." ^{3/}

FSIS subsequently confirmed the proper treatment of free-flowing liquid found in fresh, single-ingredient poultry products in a March 24, 2006 letter from Dr. Robert Post to NCC counsel Steven Steinborn. The Agency advised that it would consider "any free-flowing liquid in the package to be part of the product at the time it is weighed in the Federal establishment." ^{4/} The Agency explained that, as is the case with enhanced products, "it is expected that the labeled net weight applied at the Federal establishment will represent the weight of the entire food product minus the packaging." ^{5/}

The Agency further explained that uniform adherence to this practice, regardless of the inspection method employed, is essential to maintenance of a national uniform federal net weight requirement. Dr. Post's March 24, 2006 letter stated: "Although state and county government regulatory officials have concurrent authority to enforce net weight requirements at the local level, they must do so in a manner that is consistent with Federal law." ^{6/} Citing explicit federal preemption established by Congress, the letter concludes: "Thus State and county government regulatory officials must use a method for determining net weight compliance of fresh, single-ingredient poultry products that is consistent with the method used by

^{2/} Letter to Mark D. Dopp, American Meat Institute from Dr. Barbara J. Masters, then-Acting Administrator, FSIS (April 5, 2004).

^{3/} *Id.* At 2.

^{4/} Letter to Steven B. Steinborn, Hogan & Hartson L.L.P. from Robert C. Post, Director, Labeling and Consumer Protection Staff, FSIS (March 24, 2006).

^{5/} *Id.*

^{6/} *Id.*

Docket Clerk
May 26, 2006
Page 4

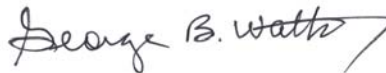
FSIS, which is one that recognizes the free-flowing liquids are a portion of the product.” ^{7/}

Conclusion

Consistent with incorporating the current version of Handbook 133 by reference in the federal regulation, FSIS should take this opportunity to incorporate the guidance memorialized in the referenced correspondence as well. By so doing, the Agency can directly advance uniform inspection practices in all jurisdictions through the present rulemaking. Concurrent jurisdiction has long been a hallmark of net weight compliance among federal state and local jurisdictions. By restating FSIS policy as part of the final regulation or its preamble, the Agency can foster consumer protection and fairness in the marketplace by application of national, uniform requirements that all packages bear an accurate statement of net weight

Thank you for your consideration.

Sincerely,



George B. Watts
President

^{7/} *Id.*