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McDERMOTT, WILL & EMERY

December 13, 2002

Mr. Philip Derfler
Deputy Administrator
Office of Policy and Program Development
Food Safety and Inspection Service
Room 350-E, Jamie L. Whitten Bldg.
14th & Independence Avenue, S.W.
Washington, DC 20250

02-045N
02-045N-3
Robert G. Hibbert

Dear Mr. Derfler:

I am writing as a follow-up to the point I raised at the close of your recent meeting on the FSIS recall process.

In this regard I would reiterate my request that FSIS reinstate its longstanding policy of allowing companies which are participating in a voluntary product recall to review and comment upon any final draft of an FSIS (or any other USDA) press release pertaining to the recall prior to its public issuance.

Such a policy is consistent with both common sense and basic concepts of fairness. In my experience (I would estimate that I have been involved in close to a hundred recall situations on behalf of various clients over the past 15 years), the initiation of a recall is, of necessity, the outcome of a cooperative information exchange between agency professionals and representatives of private companies. To achieve its goal -- the issuance of a document which provides clear and accurate information to the public about products it should not consume -- the agency must rely upon information such as production records, labeling files and other materials voluntarily provided by the company involved. Of necessity such materials are assembled and reviewed by all of the parties involved under tight deadlines and under inherently stressful conditions. It defies logic for FSIS to work its way toward the work product of this exercise while refusing to allow the very parties who have been its source of the information to review the document for accuracy and to provide appropriate comment to FSIS prior to its issuance. As a direct consequence of your current policy, I have been involved in recall situations where press releases have contained errors which in all likelihood would have been detected if just such a review had taken place.

As you will recall, I did request at the public meeting whether any agency or Departmental representative could articulate any rationale for the current policy. None was placed on the record. This in and of itself tends to confirm its questionable validity.

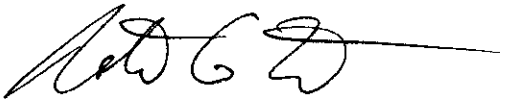
From what I have been able to piece together from informal conversations on this topic with a variety of individuals, both inside and outside the Department, there may be two possible underpinnings for the current policy. The first seems to flow from a political determination made at some point by representatives of a prior Administration that any such reviews constituted some form of inappropriate "negotiation" with private parties on a public health issue. The second concern seems to be that such a pre-issuance review could be (and perhaps at least occasionally in the past has been) used by an individual company reluctant to initiate a recall as a delaying tactic.

If my information is accurate, both of these concerns can readily be addressed. The "negotiation" issue reflects a basic misunderstanding of the mechanics of the recall process reached, in all probability, by individuals who have had no direct experience with it. Any pre-issuance review of such a press release by the involved party is, in no sense of the word, a "negotiation." At the end of the day FSIS can, should and will maintain control over what it states in its public issuances. One would logically assume, however, that your agency wants such information to be accurate and would therefore want to be responsive to any suggestions toward this end

Your agency is in a similar strong position regarding issues of potential delay. While it is inconsistent with my own experience, it is certainly not inconceivable that in a given case a company might attempt to introduce unnecessary delay into the process. The obvious answer to this is that FSIS is in a position to cut such behavior off. Particularly in view of the virtually instantaneous communication which occurs via e-mail, fax or other means during most recalls, it is very simple for FSIS, as circumstances might dictate, to require that any such review be conducted within specified time frames.

I hope that this clarifies my request in a useful fashion. I also hope that FSIS is in a position to promptly deal with this issue, thereby strengthening its current recall process. Your consideration of this request, as well as your broader efforts to obtain various views on how to improve the recall process, are greatly appreciated. If you would like to discuss this matter in any further detail, please do not hesitate to contact me.

Sincerely,



Robert G. Hibbert
Counsel to Eastern Meat Packers Association

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