

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: Docket No. 04-041P; FDMS Docket Number FSIS-2005-0032: Determining Net Weight Compliance for Meat and Poultry Products; 71 Fed. Reg. 15340 (March 28, 2006)

Dear Sir or Madam:

On behalf of the American Frozen Food Institute (AFFI), the American Meat Institute (AMI), the Food Marketing Institute (FMI), the Food Products Association (FPA), and the Grocery Manufacturers Association (GMA), the National Meat Canners Association (NMCA), and the National Turkey Federation (NTF) (the "Associations") we are pleased to jointly submit comments concerning the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service's (FSIS) proposal to amend the Federal meat and poultry products inspection regulations to reference the revised, current version of the National Institute of Standards and Technology (NIST) Handbook 133. The Associations collectively represent a substantial portion of the food manufacturing and processing industry in the United States. In this capacity, the Associations and its members have a significant interest in the incorporation of and revisions made to NIST Handbook 133. [1/](#)

[1/](#) AFFI is the national trade association representing frozen food manufacturers, their marketers and suppliers. AFFI's more than 500 member companies are responsible for approximately 90 percent of the frozen food processed annually in the United States, valued at more than \$60 billion. AFFI members are located throughout the country and are engaged in the manufacture, processing, transportation, distribution, and sale of products nationally and internationally.

AMI is the national trade association representing companies that process 70 percent of U.S. meat and poultry and their suppliers throughout America. Approximately 1,100 companies are AMI members. AMI closely follows legislation, regulation and media activity that impacts the meat and poultry industry and conducts scientific research through its Foundation designed to help meat and poultry companies improve their plants and their products.

[Footnote continued]

The Associations commend the Agency for keeping its regulations current and recognize that this is a ministerial action intended to facilitate and promote uniform, good inspection practices. At the same time, it is useful and appropriate for FSIS to take this opportunity to reinforce the utility and role of Handbook 133, namely, that Handbook 133 is a “good inspection” procedural document that promotes uniform inspection practices and is not intended, nor can it serve, as a compliance document. The determination of whether a product is misbranded due to an inaccurate statement of net weight is a legal determination that must be guided by all relevant facts and be consistent with binding, uniform federal law. To ensure a national uniform net weight policy, as required by federal law, it is important that the role and utility of Handbook 133 is clear.

[Footnote continued]

FMI conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI’s U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of \$340 billion — 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. Its international membership includes 200 companies from 50 countries.

FPA, the principal scientific and technical trade association for the food industry, provides leadership and value to its member companies on food safety, processing, and health and nutrition. FPA member companies produce the incredible variety of foods available at retail including: processed and packaged fruits and vegetables, meat and poultry, seafood, cereals, dairy products, drinks, juices, snacks, confections, cut and packaged fresh produce, and other specialty items. FPA members also provide supplies and services to food manufacturers.

GMA is the world’s largest association of food, beverage and consumer product companies. With U.S. sales of more than \$500 billion, GMA members employ more than 2.5 million workers in all 50 states. The organization applies legal, scientific and political expertise from its member companies to vital food, nutrition and public policy issues affecting the industry.

NMCA is the national trade association representing manufacturers of shelf stable meat and poultry products. Companies whose primary or secondary businesses lie in sterile processed meat products comprise the association’s membership.

NTF is the advocate for all segments of the U.S. turkey industry, providing services and conducting activities, which increase demand for its members’ products and protect and enhance the ability to effectively and profitably provide wholesome, high quality, nutritious turkey products.

I. BACKGROUND

USDA administers the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA), which require that packages of meat and poultry products bear an accurate statement of the quantity of their contents in terms of weight, measure, or numerical count. ^{2/} FSIS has incorporated, by reference, the NIST Handbook 133 inspection procedures in the Federal meat and poultry inspection regulations. ^{3/}

The federal standard recognizes reasonable variation from the declared weight caused by gain or loss of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices. Citing FSIS guidance and related documents, one federal court held: “Thus, federal regulations direct manufacturers to aim to have the average weight of the packages of a production lot equal the weight stated on the label.” ^{4/} In this fashion, FSIS ensures that reasonable variation is recognized as directed by statute.

This comment addresses the preamble to the proposed rule and offers several modifications that should be reflected in the preamble accompanying the planned final regulation. We do not anticipate that any changes to the proposed rule itself are necessary to address the concerns expressed in this comment. The Associations encourage FSIS to utilize the present rulemaking as a logical and effective vehicle to reinforce the role and limitations of Handbook 133 as part of a state or local net weight compliance program that is fully compatible with federal law.

II. CLARIFICATION OF THE ROLE OF HANDBOOK 133 AND FEDERAL NET WEIGHT COMPLIANCE STANDARD

Over time, a limited number of jurisdictions have mistakenly viewed one or more “failed” inspections conducted according to the procedures laid out in Handbook 133 as per se evidence that a product’s net weight statement is inaccurate, rendering the product misbranded. While following the procedures in Handbook 133 provides a measure of reliability and consistency in undertaking a valid inspection, it is not itself a basis for reaching legal compliance decisions. The

^{2/} 21 U.S.C. § 601(n)(5) and 21 U.S.C. § 453(b)(5).

^{3/} 9 C.F.R. § 317.19 and 9 C.F.R. § 381.121b.

^{4/} *Kraft Foods North America, Inc. v. Rockland County Dept. of Weights and Measures*, 2003 WL 554796 at *6 (S.D.N.Y. Feb. 26, 2003).

critical legal determination is whether the net weight derived from a single inspection yields data sufficiently representative of the production lot and permitted variation.

In most instances, a Handbook 133 inspection typically does not yield sufficient results from which to make a compliance determination. ^{5/} The Southern District of New York has found that specific inspections, even if fully consistent with Handbook 133 procedures, “statistically fail to account for fluctuations in package weight during the manufacturing process.” ^{6/} Considering the high line speeds run by most national packers, small retail inspection lots only represent a minute fraction of a given production run. It is only through a series of properly conducted Handbook 133 inspections, and consideration of all relevant facts (including any reliable data from the packer) that a jurisdiction can make a reasoned judgment as to compliance with the federal net weight requirement.

Of particular concern are numerous references in the preamble to Handbook 133’s role in determining net weight compliance. For example, FSIS repeatedly borrows from the text of Handbook 133, whereby the document is described as both a “procedural guide” and for “compliance testing.” As discussed above, Handbook 133 is not a legal compliance document. The manner in which FSIS characterizes Handbook 133 throughout the proposed rule could misinform the reader as to the role and utility of the Handbook. While this “compliance” language has been used in the past, the Associations urge FSIS to modify its terminology and provide a more complete explanation as to the procedural nature of Handbook 133. This direction, fully consistent with long-standing Agency policy and practice, will facilitate proper understanding and use of Handbook 133 as a good inspection practices, procedural guide and not itself a means by which net weight compliance can be ascertained.

^{5/} Indeed, Section 1.1 of Handbook 133 notes that “Generally, retail package testing is not conducive to checking large quantities of individual products of any single production lot. Therefore, follow-up inspections of a particular brand or lot code number at a number of retail and wholesale outlets, and ultimately at the point-of-pack are extremely important aspects in any package-checking scheme.”

^{6/} *Kraft Foods North America, Inc. v. Rockland County Dept. of Weights and Measures*, 2003 WL 554796 at *7 (S.D.N.Y. Feb. 26, 2003).

III. CONCLUSION

The Associations urge FSIS to use this opportunity to provide clarity regarding the utility and role of Handbook 133. The procedures found in Handbook 133 are meant to be technically sound and represent good inspection practices, but are not for the purpose of determining compliance. A legal determination of net weight compliance must be consistent with binding, uniform federal law and can only be made by reviewing all relevant facts, which typically cannot be determined by one or more inspections if the packages checked are not sufficiently representative whereby one can determine if observed variation from the declared net weight is permissible under the terms of the federal meat and poultry standards. By clarifying this distinction in the preamble to the final rule, FSIS will be providing useful guidance to state or local net weight compliance programs as to the utility and proper use of Handbook 133.

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AFFI, AMI, FPA, and GMA appreciate FSIS's consideration of these comments, and would be pleased to discuss the information and points provided herein upon request. Please contact any of the undersigned if you would like additional information concerning the issues addressed in this submission.

Respectfully submitted,

American Frozen Food Institute

American Meat Institute

Food Marketing Institute

Food Products Association

Grocery Manufacturers of America

National Meat Canners Association

National Turkey Federation