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Docket #99-029P
U.S. Department of Agriculture
Food Safety and Inspection Service
Room 102, Cotton Annex
300 12th St, SW
Washington, DC 20250-3700

99-029P
99-029P-3
Charlotte Christin

Re: Sharing Recall Information With State and Other Federal Government Agencies; Proposed Rule; 65 Fed. Reg. 56503 (Sept. 19, 2000)

The Center for Science in the Public Interest (CSPI) appreciates this opportunity to comment on the Food Safety and Inspection Service's (FSIS) proposed rule, "Sharing Recall Information with State and Other Federal Government Agencies." CSPI is a nonprofit consumer group that focuses primarily on nutrition and food-safety issues and has more than 850,000 member-subscribers to its *Nutrition Action Healthletter*.

A. Improved Communications About Food Recalls Will Benefit Consumers.

Each year approximately 76 million U.S. consumers suffer from foodborne illnesses and 5,000 die from these illnesses, according to estimates from the Centers for Disease Control and Prevention. Timely and comprehensive recalls are an important strategy for reducing the incidence of foodborne illnesses. One major problem in recalls has been the lack of communication between the recalling entities and their distributors, as well as between FSIS and state regulators and other

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federal agencies. For example, state officials very often receive inquiries from consumers and media about a food recall, even if those officials are not involved in the decision to recall. Moreover, state officials are more likely to have ongoing contact with retail establishments, restaurants and institutions than federal officials are.

In the past, FSIS's policy of "quiet recalls"[1] failed to adequately protect consumers. As a result, the 1998 FSIS Recall Policy Working Group recommended that the agency improve its communications with state and other federal officials to better ensure the effectiveness and timeliness of recalls.[2] This proposal makes important strides toward that end.

Although CSPI approves of the proposed regulation on sharing recall information, we urge FSIS to press on for further reforms. Specifically, we recommend the following:

B. FSIS Should Require Full Disclosure of Recalls To Enable Traceforward of Product To Consumers' Homes.

The FSIS current proposal does not fully solve the problem of "quiet recalls." Press reports reveal that consumers are disturbed to learn that FSIS does not identify specific recipients of recalled product, even if the product involves health hazards that may cause serious illness or death.[3] Consumers expect -- and rightfully so -- that the agency will keep the public informed of potential

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[1] Under the previous recall policy, FSIS only issued press releases for recalls of brand name products that were available in grocery stores. Other products were subject to "quiet recalls." That is, FSIS would not tell state or local officials, the public or the media about recalled foods that were served in restaurants, on airplanes or by some other food service provider, due to the agency's concerns about protecting "confidential" distribution information Similarly, foods believed to have remained with warehouses and suppliers were subject to a "quiet recall."

[2] Food Safety and Inspection Service, *Improving Recalls At the Food Safety and Inspection Service: Report of the Recall Policy Working Group,* (Aug. 1998) [hereinafter cited as *Recall Policy Working Group*].

[3] Alison Young and Jeff Taylor, "Contaminated Food: You're the last to know," *Detroit Free Press* (March 5, 1999).

contaminants in the food supply. However, FSIS has promised not to release this information to the public or the media because the agency views distribution lists to be "confidential commercial information" that is exempt from release under the Freedom of Information Act (FOIA).[4]

This interpretation reads FOIA exemption 4[5] too broadly. In fact, distribution lists have been released under FOIA[6] when it was determined that their disclosure would not cause "substantial competitive harm."[7] FSIS has not presented any evidence to demonstrate that telling consumers which establishments have received recalled product would create "substantial competitive harm" to the recalling company.[8] 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. In fact, in a recent meeting of the National Advisory Committee on Meat and Poultry Inspection, some members of industry downplayed concerns about release of

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[4] 5 U.S.C. § 552. See also *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974); Department of Justice, *Freedom of Information Act Guide*, (2000), p. 2.

[5] 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).

[6] See, e.g., *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).

[7] *National Parks*, 498 F.2d at 770. The leading standard for determining whether information that was compelled by the agency is "confidential" was set out in the *National Parks* decision: "To summarize, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* (Although the courts apply a different standard to information that is voluntarily released to the agency, as discussed below in Subsection D., we join the 1998 Recall Policy Working Group in urging FSIS to require companies to provide their distribution lists to the agency.)

[8] The agency withholding the information must present objective evidence from which a court can conclude that the submitting company is likely to suffer substantial competitive injury. Robert G. Vaughn, "Consumer Access to Product Safety Information and the Future of the Freedom of Information Act," *Admin. L. J.* 5:673 (Fall, 1991). The burden under the Act is clearly on the agency that seeks to vindicate the company's interests. *Id.*

distribution lists. One representative was quoted as saying that distribution lists are not huge secrets because most people have a good idea of who is doing business with whom.[9]

Moreover, the courts have emphasized that the "substantial competitive harm" must come from the "affirmative use of proprietary information by competitors," rather than "any injury to competitive position, as might flow from customer or employee disgruntlement."[10] Information regarding product hazards does not convey the type of competitive advantage that the exemption was designed to protect.[11] In this instance, it seems likely that the companies are more interested in protecting themselves from disgruntled customers than they are from their competitors. Industry should not be allowed to use FOIA exemptions to shield themselves from the consequences of introducing potentially adulterated foods into the food supply. We urge the agency to hold a public meeting to discuss ways to release information to the public about recalls consistent with the intent and purposes of the FOIA.

C. FSIS Needs Better Monitoring and Verification of Company Recalls.

Each day that a recall is delayed, more consumers are at risk of food poisoning. A recent Government Accounting Office (GAO) report criticized FSIS for failing to systematically track companies' activities to ensure that recalls, particularly of foods that may cause serious adverse health consequences, are initiated and carried out without delay.[12] As GAO pointed out, FSIS's

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[9] Allison Beers, "USDA should share sensitive recall information, says NACMPI," *Food Chemical News*, (Nov. 6, 2000), pp. 3-4.

[10] *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291, n.30 (D.C. Cir. 1983).

[11] Vaughn, *supra* note 8.

[12] Government Accounting Office, *Food Safety: Actions Needed by USDA and FDA to Ensure That Companies Promptly Carry Out Recalls*, (Aug. 2000), p. 19 [hereinafter cited as *GAO Report*].

guidance allows companies to give notice of recalls involving potentially life-threatening contaminants such as *Listeria monocytogenes* through U.S. mail.[13] To remedy this problem, the GAO recommended that FSIS provide specific guidance to companies on time frames for quickly initiating and carrying out food recalls that involve potentially serious adverse health risks, including procedures to expeditiously notify their distribution chains and alert the public.[14] CSPI agrees.

Moreover, GAO found that FSIS only performs selective checks to verify recall effectiveness.[15] Yet the Recall Policy Working Group acknowledged that FSIS's responsibility is "one of verifying that the establishment is fulfilling its obligation and, if the establishment is not doing so, of acting to ensure that the establishment does."[16] To resolve weaknesses in the FSIS recall program, the GAO recommended that the agency modify existing recall databases as necessary to include information on the timeliness of companies' recall activities to determine whether there was any delay in initiating and carrying out recalls.[17] We support this GAO suggestion as well.

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[13] *GAO Report,* p. 16. See Food Safety and Inspection Service, Directive 8080.1, Rev. 3, (Jan. 19, 2000).

[14] *GAO Report,* pp. 19-20.

[15] *GAO Report,* p. 14.

[16] *Recall Policy Working Group* ("The Agency's activities should include verifying that the firm has identified the proper product, verifying that the firm is making the appropriate contacts through its distribution channels, and verifying the adequacy of the establishment's notification to consignees and the public.")

[17] *GAO Report,* p. 20 ("The information should, at a minimum, include the dates a company (1) finds out about the problem warranting a recall, (2) initiates the recall, (3) notifies the distribution chain, (4) notifies the public, and (5) completes the recall. In addition, the database should track the methods the company used to notify its distributors and the public, and the date(s) on which the agencies requested the company to initiate a recall.")

D. FSIS Should Require Recall Plans and Recordkeeping.

Additionally, both the FSIS Recall Policy Working Group and the Association of Food and Drug officials have recommended that FSIS require entities handling meat, poultry, or egg products to maintain records that will enable them to trace all product from its entry into their facilities to its further distribution.[18] Such records are necessary to help determine the scope and depth of the recall. For example, the Recall Policy Working Group reported that product identification was hampered in the Beef America recall of 1997 because the consignees did not keep the records necessary to trace the product forward through the distribution system.[19]

The Working Group also recommended that the rulemaking require establishments to have a written plan that defines how they will conduct a recall.[20] The recall plan envisioned by the Working Group would be similar to the sanitation standard operating procedures and the Hazard Analysis and Critical Control Point (HACCP) plan and would "define[] how the establishment will respond should a situation that requires a recall arise."[21] To date, the agency has not initiated these rulemakings. We urge FSIS to promptly do so.

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[18] *Recall Policy Working Group*; Association of Food and Drug Officials (AFDO), Comments on *Report of the Recall Policy Working Group*, (Oct. 5, 1998) (AFDO stated: "The manufacturer, the wholesaler, and the retailer need to have record keeping systems and coding which can readily identify where product has been shipped, and how much has been sold, in order for tracebacks to be effective.").

[19] *Recall Policy Working Group.*

[20] *Recall Policy Working Group.*

[21] *Recall Policy Working Group.*

E. FSIS Should Continue to Pursue Mandatory Recall Authority.

Improvements in the existing FSIS voluntary recall system are only half-measures. Until FSIS has been granted statutory authority to conduct mandatory recalls, optimal consumer protection cannot be achieved. Just last month, for example, a poultry processor refused to comply with FSIS's voluntary recall request after *Listeria monocytogenes* contamination was discovered in barbecued chickens through routine sampling.[22] In the end, FSIS was forced to issue a press release warning the public that nearly 8,000 pounds of potentially adulterated chicken were in the food supply but could not be recalled.[23] FSIS needs the power to get contaminated food off the market. The agency should continue to vigorously pursue this authority in Congress.

Sincerely,

Charlotte Christin

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[22] While the company subsequently asked its distributors not to ship the product, it never asked consumers or its distributors to return the product. T. Cosgrove, *House of Raeford Denies FSIS 'Refusal to Comply' Allegation*, The MeatingPlace Daily News Story (Oct. 12, 2000), available at *http://www.meatingplace.com/meatingplace/DailyNews/News.asp?ID=6216.*

[23] U.S. Department of Agriculture, Food Safety and Inspection Service, "USDA Warns Public of Barbecued Chicken with Possible *Listeria* Contamination," Press Release, (Oct. 6, 2000).