



JERRY JEROME, *Chairman*
NICK WEAVER, *Vice Chairman &*
Secretary-Treasurer
STUART E. PROCTOR, JR., *President*

FSIS Docket Clerk
Docket 99-029P
U. S. Department of Agriculture
Food Safety and Inspection Service
Room 102, Cotton Annex
300 12th Street, S.W.
Washington, D.C. 20250-3700

④

99-029P
99-029P-4
Alice L. Johnson

11/20/00

The National Turkey Federation (NTF) respectfully submits these comments in response to the proposed rule to permit the Food Safety and Inspection Service (FSIS) to share an establishment's confidential commercial information with federal and state agencies in a recall situation.

NTF represents more than 95 percent of the U.S. turkey industry, including processors, growers, breeders, hatchery owners, and allied industry. It is the only national trade association representing the turkey industry exclusively.

NTF wishes to make clear at the outset -- our members are dedicated to the production of safe, wholesome and properly labeled products. If there is evidence that a distributed product needs to be taken off the market, it is our goal to remove the product as quickly and effectively as possible. Hence, our goal and that of the agency is the same.

We can understand how the controlled dissemination of certain confidential commercial information to other federal agencies and state officials may facilitate product removal. However, because the nature of the information is confidential, any such dissemination should only occur if the public interest outweighs the establishment's right to have the information kept confidential.

To assist FSIS we are suggesting several improvements, discussed below, which we strongly urge be incorporated in the final rule so that the competing needs of dissemination and confidentiality are more appropriately balanced.

First, we strongly recommend that the type of confidential information to be shared be expressly stated in the final regulation.¹ We understand the purpose for which FSIS wishes to share the information is to "enable FSIS staff to verify that adulterated, unhealthful, or misbranded products are removed from consumer channels quickly and

¹ We support proposed subsection (b) that the information shared would not encompass trade secret information. The inspection acts prohibit FSIS from disseminating trade secrets. However, for clarity, we request that FSIS identify in any final rule preamble the types of trade secrets clearly outside the scope of the regulation, such as an establishment's HACCP plan and related documents.



efficiently and to protect the public health."² In light of this purpose, we envision that the information intended to be shared is distribution data, since sharing that information would allow representatives of other federal agencies and states to determine where product has been shipped and then determine if the product has been removed.

Accordingly, we recommend the phrase "confidential commercial information" be removed wherever it appears and replaced with the phrase "confidential customer sales list and other distribution information."

Second, we strongly urge the dissemination of the information be limited to those other federal agencies or state officials which can assist FSIS in "verifying the removal of products." In other words, the information should only be given to the government officials whose responsibilities in the specific recall situation comport with the duties of FSIS compliance officers. Likewise, the dissemination should be limited in terms of geographic scope to those areas where the product was distributed. For example, no public purpose would be served in providing an establishment's confidential information to officials in Maine when the product was distributed exclusively in California and Arizona. Hence, we recommend that the following clause be inserted in subsection (a) immediately before the term "provided": "to verify the removal of the recalled product"

In conjunction with this change, we would recommend the agreement with the state governments include a specific provision restricting the dissemination to those officials charged with verifying product removal. To be most effective, this should be done through an amendment to subsection (a)(1) by inserting the clause: ", restricting disclosure to those officials charged with assisting in product removal," immediately after the term "disclosure".

The last related change relates to the necessary assurances the state must give FSIS. Since each recall is unique, we strongly recommend that the assurances be specific to each individual recall and not be of a continuing basis. This can be achieved by inserting the phrase: "in each recall incident" immediately after the phrase "written commitment" in subsection (a)(1).

Third, we agree with subsection (a)(2) of the proposal that the confidential information be disclosed following a "determination that disclosure would be in the interest of public health." However, we are deeply concerned that such a determination may be made when there are no true public health issues. For example, in the section of the preamble quoted above, the agency speaks of removing "*misbranded*" products. We respectfully disagree that a simple misbranding, such as an incorrect net weight statement, rises to a level which would justify the dissemination of an establishment's confidential information.

² 65 Fed. Reg. 56505, col. 1 (September 19, 2000).

Accordingly, we recommend the subsection be amended by adding the following before the term "Administrator":

- (2) The recall involves a health hazard situation where there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death and the. . . .

In other words, only permit the dissemination in those situations where there is a clear public health interest -- Class I recalls.

Fourth, we submit this proposed section should not apply to instances where the state agency initially requested the establishment conduct a recall. In those situations, the state or local authority request is based on information acquired at the retail level. Consequently, the state already knows of the distribution and disseminating information already known to the recipient invites the unnecessary risk of accidental public disclosure.

Accordingly, we recommend a new subsection (a)(3) be inserted as follows:

- (3) The state agency did not request the recall itself.

Fifth, we believe that in reviewing the adequacy of the written commitment not to improperly release the confidential information, FSIS should require that such commitment include a clause expressly permitting the establishment to file suit in the event of improper disclosure to prevent further dissemination of the confidential information and to seek damages, actual or liquidated, from the state.

Accordingly, we recommend a new subsection (a)(4) be inserted as follows:

- (4) The written commitment provided by the state under subsection (a)(1) shall include a provision consenting to suit by the establishment for injunctive and other relief, in the event of any disclosure contrary to the commitment and this section.

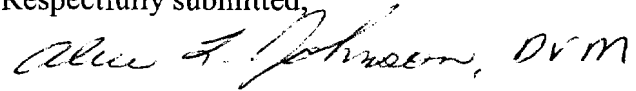
Conclusion

We appreciate the opportunity to comment on this proposal and to assist the agency in adopting fair rules which balance the needs of the public and the rights of the individual establishment. We are attaching revised subsection (a) to show the changes suggested above.

Page 4
Recall Sharing Comments

We look forward to working with the agency further on this and other regulatory initiatives.

Respectfully submitted,

A handwritten signature in black ink that reads "Alice L. Johnson, DVM". The signature is written in a cursive style with a large, stylized initial 'A'.

Alice L. Johnson, DVM
Vice President of Scientific and Regulatory Affairs
National Turkey Federation

§309.09 Communications with State and other Federal government agencies.

(a) The Administrator of the Food Safety and Inspection Service (FSIS) or designee, may authorize the disclosure of ~~confidential commercial information~~confidential customer sales list and other distribution information submitted to FSIS, or incorporated into agency-prepared records, to State and other Federal government agencies as part of a recall of meat or poultry, to verify the removal of the recalled product provided that:

(1) The State agency has provided both a written statement establishing its authority to protect ~~confidential commercial information~~ confidential customer sales list and other distribution information from public disclosure and to restrict disclosure to those officials charged with assisting in product removal and a written commitment in each recall incident not to disclose any such information provided by FSIS without the written permission of the submitter of the information or written confirmation by FSIS that the information no longer has confidential status. Federal government agencies must provide a written commitment not to disclose the information, but to refer the ~~confidential commercial information~~ confidential customer sales list and other distribution information to FSIS in order for FSIS to respond to the request for information; and

(2) The recall involves a health hazard situation where there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death and the Administrator of FSIS or designee determines that disclosure would be in the interest of public health;

(3) The state agency itself did not request the recall; and

(4) The written commitment provided by the state under subsection (a)(1) shall include a provision consenting to suit by the establishment for injunctive and other relief, in the event of any disclosure contrary to the commitment and this section.