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FSIS Docket Clerk  
Docket No. 99-029P  
U.S. Department of Agriculture  
Food Safety and Inspection Service  
300 12<sup>th</sup> Street, SW, Room 102  
Washington, DC 20250-3700

(6)

99-029P  
99-029P-6  
Tim Hammonds

**Re: Proposed Rule on Sharing Recall Information with State and Other Federal Government Agencies; Docket No. 99-029P**

Dear Sir or Madam:

The Food Marketing Institute (FMI) is pleased to respond to the request of the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) for comments on the agency's proposed rule for sharing recall information with state and other federal government agencies. 65 Fed. Reg. 56503 (Sept. 19, 2000). As discussed more fully below, FMI generally supports the proposed exchange of information, which should facilitate recalls and, thus, enhance public health, provided that the receiving party provides written confirmation of their authority and commitment to retain the confidentiality of the information received. We expect that the actual implementation of the regulation may present some additional issues and our recommendations in this regard are set forth below.

FMI is a non-profit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries. Our membership includes food retailers and wholesalers, as well as their customers, in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of \$300 billion, which accounts for more than half of all grocery sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. Our international membership includes 200 members from 60 countries.

**A. Background**

USDA has proposed to amend the agency's Freedom of Information regulations to permit FSIS to disclose "confidential commercial information" to state and federal agencies during a recall of meat and poultry products without vitiating the confidential status of the information under the Freedom of Information Act (FOIA). Proposed 9 CFR § 390.9. Before providing information to other agencies, FSIS would first be

required to determine that disclosure would be in the interest of public health. Proposed 9 CFR § 390.9(a)(2).

In addition, FSIS would be required to obtain the following assurances from the state agencies that received the information: (1) a written statement establishing that the state has the authority to protect confidential commercial information from public disclosure and (2) a written commitment not to disclose the information provided by FSIS. Proposed 9 CFR § 390.9(a)(1). The proposed regulation would authorize only the disclosure of “confidential commercial information,” but not “trade secret information.” Proposed 9 CFR § 390.9(b). Finally, the rule specifically states that disclosures made under the regulation would not waive any FOIA exemption protections. Proposed 9 CFR § 390.9(c).

## **B. Comments**

Although we generally agree that exchanging information should increase cooperation and, thus, the effectiveness of meat and poultry recalls, the following implementation issues should be considered and addressed to ensure that the process works as intended.

First, we recommend that FSIS amend Section 390.9(a)(2) of the proposed regulations to require the agency to specify particular confidential commercial information that would be in the interest of public health to disclose. Given the potential breadth of the “confidential commercial information” category, care should be taken in limiting the information that is disclosed to only that which is essential to protect public health.<sup>1</sup>

Second, we recommend that FSIS utilize a two-part agreement process with states that would like to receive confidential commercial information in the event of a recall. As an initial matter, FSIS should enter into blanket agreements with as many states that are interested as soon as possible to establish the essential legal elements and conditions under which the information exchange may take place. The broad agreements should specifically establish each state’s authority to retain the confidentiality of commercial information received from the federal government and the state’s commitment to do so. A given state’s authority in this regard may not be clear so it would be helpful for the state to research and establish a position on the issue before being confronted with a public health crisis. The broad agreement should also identify a limited number of specific individuals within each state that are authorized to receive the confidential information and the individual responsible for maintaining the information’s

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<sup>1</sup> We note that the proposed regulation is more broadly written than the description provided by agency officials at the recent National Advisory Committee for Meat and Poultry Inspection meetings on October 31-November 1, 2000. Specifically, on October 31, agency officials repeatedly asserted that the proposed regulation was limited to “recall distribution data.” In that case, the final regulation should be revised to reflect the specific scope of the agency’s intentions.

confidentiality. These agreements should also commit the state to share all information relevant to the recall with the federal government.

Then, when a recall situation arises, the specific information that FSIS determines should be shared with a state in the interest of public health may be accompanied by a second, shorter agreement. To ensure that all parties clearly understand their obligations, the shorter agreement could reference the initial agreement and then identify the specific information that is subject to proposed Section 390.9 and obligate the state to maintain the confidentiality of the specific information received.

The foregoing process will allow states to undertake a complete review of the appropriate laws and regulations to ensure that the state can and will maintain the confidentiality of any commercial information received from FSIS without the pressure of an ongoing meat or poultry recall. Utilizing a second agreement will ensure that the receiving agency understands exactly which information must be kept confidential and that the agency agrees to do so.

Finally, penalties must attach in the case of an unauthorized disclosure of confidential commercial information by a state agency just as they do in the case of an unauthorized federal disclosure. Toward that end, we recommend that the blanket agreement with each state specify the penalties that would apply in the case of an unauthorized disclosure and that such penalties be reiterated in the shorter agreement that would accompany specific disclosures at the time of a recall.

\* \* \*

We appreciate the opportunity to comment on the proposed recall information sharing regulation. If you have any questions regarding our comments, or if we may be of assistance in any other way, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Hammonds", with a long horizontal flourish extending to the right.

Tim Hammonds  
President and CEO