



4

655 15TH STREET, N.W., SEVENTH FLOOR
WASHINGTON, D.C. 20005-5701
TELEPHONE: 202/452-8444
FAX: 202/429-4519
E-MAIL: FMI@FMI.ORG
WEBSITE: WWW.FMI.ORG

February 3, 2000

Docket No. 99-055R
c/o FSIS Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
Room 102 Cotton Annex
300 12th Street, SW
Washington, DC 20250-3700

99-055R-4
99-055R
George Green

RECEIVED
FSIS RECEIPT ROOM
00 FEB -4 AM 10: 22

**Re: Exemption of Retail Operations from Inspection Requirements;
Docket No. 99-055R**

Dear Sir or Madam,

The Food Marketing Institute (FMI) is pleased to provide comments on the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) interim final interpretative rule entitled, "Exemption of Retail Operations from Inspection Requirements." 65 Fed. Reg. 201 (Jan. 4, 2000). As discussed more fully below, we believe that USDA's interim rule is based on a sound interpretation of the statutes and, therefore, support the Department's intention to exclude the value of "pass through" products in determining whether food retailers meet the regulatory definition of a "retail store" that is eligible for exemption from the continuous inspection requirements.

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 \$220 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. Regulation of Meat/Poultry Offered for Sale at Retail Facilities

The Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) (collectively, the Acts) prohibit the sale or transportation of meat and poultry products that are adulterated or misbranded. 21 U.S.C. § 601, et seq.; 21 U.S.C. § 451, et

seq. Meat and poultry products are subject to the adulteration and misbranding requirements of the Acts, regardless of their location along the production/ distribution continuum. See 21 U.S.C. §§ 458, 610.

The Acts also impose separate continuous inspection requirements on facilities that slaughter, process, or prepare meat or poultry. The PPIA defines “processed” as “slaughtered, canned, salted, stuffed, rendered, boned, cut up, or otherwise manufactured or processed.” 21 U.S.C. § 453(w). The FMIA defines “prepared” as “slaughtered, canned, salted, rendered, boned, cut up, or otherwise manufactured or processed.” 21 U.S.C. § 601(l). The continuous inspection requirement does not apply to establishments at which the defined activities do not occur.

The Acts include an explicit exemption from the continuous inspection requirements for retail facilities. Specifically, the Acts state that continuous inspection will not apply to “operations of types traditionally and usually conducted at retail stores and restaurants, when conducted at any *retail store* or restaurant or similar retail-type establishment for sale in normal retail quantities or service . . . to consumers at such establishments . . .”¹ 21 U.S.C. § 454 (c)(2) (emphasis added); see, also 21 U.S.C. § 661(c)(2). The statutory exemption from the continuous inspection requirement is generally referred to as the “retail exemption.”

USDA’s regulations further explain the scope and applicability of the retail exemption. With respect to the types of operations that may be conducted at a retail facility, the regulation lists a variety of techniques, including cutting up, slicing, trimming, grinding, curing, cooking, smoking, breaking bulk shipments, and wrapping or rewrapping products. 9 C.F.R. § 303.1(d)(2)(i)(a)-(e). USDA’s regulations also set forth six criteria to be used in determining whether an establishment is a “retail store” within the meaning of the Acts. 9 C.F.R. § 303.1(d)(2)(iii)(a)-(f). Among other things, at least 75 percent (in terms of dollar value) of total sales of product must represent sales to household consumers; the total dollar value of sales or products to consumers other than households must not exceed a limit set by USDA. 9 C.F.R. § 303.1(d)(2)(iii)(b); see also 9 C.F.R. § 381.10(a).

B. Value of “Pass-Through” Should Not Be Considered in Determining Eligibility for Retail Exemption

Essentially, the issue at hand is whether USDA must consider the value of “pass through” meat and poultry products in determining whether an establishment is a retail store for the purposes of Section 303.1(d)(2)(iii)(b). Although not specifically defined, the Agency discusses “pass through” as meat and poultry products that have not

¹ Despite the fact that the express exemption appears in the provisions of the Acts that authorize USDA to “designate” states and thereby apply federal standards to those establishments producing and selling products only intrastate, the consensus that the exemption applies to all retail facilities has been ratified by the U.S. Circuit Court of Appeals for the District of Columbia. See *The Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 888 (D.C. Cir. 1999).

undergone any processing or handling other than storage and activities incidental to storage; prepackaged bacon and cans of poultry stew are cited as examples.


The Agency notes that, historically, USDA did not consider sales of products that “pass through” an establishment in addressing the question of whether or not an establishment was excused from the continuous inspection requirement under the statutory retail exemption. 65 Fed. Reg. at 202. USDA’s rationale was that selling “pass through” to non-household consumers was a traditional and usual operation for retail stores. The Agency attempted to codify the interpretation, but, in the absence of evidence to support the rationale, USDA withdrew the proposed rule in 1976. 65 Fed. Reg. at 202.

Although we believe that the sale of prepackaged meat and poultry products to non-household consumers has been a longstanding retail practice, USDA here relies on the Agency’s interpretation of the scope of the FMIA and PPIA requirements for inspection. 65 Fed. Reg. at 202. Specifically, since “pass through” product is not processed or prepared at retail, it would not be subject to the continuous inspection requirement, regardless of whether the retail exemption applied. The sale of a product that is not required to be inspected should not impose an inspection requirement on a seller that is otherwise exempt from inspection. Accordingly, the value of “pass through” products sold to non-household consumers should not be considered in determining whether a facility meets the regulatory “retail store” definition and, therefore, should be exempt from continuous inspection, provided, of course, that all other criteria are met.

* * *

We appreciate the opportunity to provide comments on this matter. In the interim, if we may provide any further information in this regard, please do not hesitate to contact us.

Sincerely,



George Green
Vice President
General Counsel