



JAN 24 2006

George B. Watts, President
National Chicken Council
1015 15th Street, NW
Suite 930
Washington, DC 20005-2622

Dear Mr. Watts:

The Food Safety and Inspection Service (FSIS) has completed its review of the petition submitted by the National Chicken Council (NCC) and other industry trade associations requesting that the Agency amend the meat and poultry products inspection regulations to eliminate the "wet tare" method of inspection for determining compliance with the net weight labeling requirements for meat and poultry products regulated by FSIS. As noted in the petition, FSIS' net weight regulations incorporate by reference the National Institute of Standards and Technology (NIST) Handbook 133 (Third Edition), which includes, among other methods that are standardized according to the criteria of NIST, a wet tare inspection method. The petition requests that FSIS amend the net weight regulations to incorporate by reference the recently published NIST Handbook 133, Fourth Edition, except for the references to "wet tare" in section 2.4, pages 13 and 18, and the definition of "wet tare" in Appendix C. For the reasons discussed below, FSIS has determined that it is not necessary to amend the references to NIST Handbook 133 to address the issues raised in the petition. Therefore, we are denying your petition as moot.

As noted in the petition, when the wet tare method of inspection is used, all free-flowing liquids in the package and the packaging weight are deducted from the gross weight of the packaged product to determine the net weight of the product. The petition asserts that, because all free-flowing liquid is discarded, the wet tare method, in practice, fails to count a portion of a meat or poultry product when that portion is a marinade, flavoring, or other liquid. As stated in the petition, this has the effect of lowering the product's net weight. According to the petition, several state and local jurisdictions use the wet tare inspection method to sanction product that contains permitted free-flowing liquid within the packaging. The petition contends that, while the wet tare method is only used by a very small number of jurisdictions, the net result for manufacturers in those jurisdictions is that they are forced to abandon uniform packing practices and routinely over-pack product to avoid legal sanctions. The petition also alleges that maintaining the wet tare method of inspection invites local enforcement of net weight compliance that conflicts with federal law, thereby imposing an undue burden on interstate commerce.

Although the petition requests that FSIS amend the regulations to eliminate the wet tare method of inspection, based on the issues raised, the real problem that the petition

appears to be requesting that FSIS address is to ensure that State and local authorities use a method for determining net weight compliance of enhanced (i.e., solution-containing) meat and poultry products that is consistent with Federal law. As noted in the petition, FSIS has previously clarified its position on determining the net weight of federally inspected, case-ready meat and poultry products labeled as enhanced or marinated with solutions. In a letter dated April 5, 2004, to the American Meat Institute, the Administrator of FSIS stated that, in the case of enhanced products, the solutions that are added to the meat or poultry, or into which the meat or poultry is placed for flavoring, seasoning, and tenderizing, are intended to be part of the product. Thus, the solutions are required to be identified as part of the product names and are considered as part of the product whether the solution is incorporated into the product or is free-flowing. As such, it is expected that the labeled net weight applied at the Federal establishment will represent the weight of the entire food product minus the packaging.

As noted in the petition, although State and county government regulatory officials have concurrent authority to enforce net weight requirements at the local level, they must do so in a manner that is consistent with Federal law. Thus, State and county government regulatory officials are preempted from imposing requirements for determining the net weight of enhanced products that conflict with those established by FSIS. Based on the outcome of the July 2004 meeting of the National Conference on Weights and Measures (NCWM), the Agency believes that State and local jurisdictions understand that they must use a method for determining net wet compliance of enhanced products that is consistent with the method used by FSIS, which is one that recognizes that the free-flowing liquids are a portion of the products.

At the July 2004 meeting of the National Conference on Weights and Measures (NCWM), the issue of determining the net wet of "enhanced" meat and poultry products was raised and discussed by a roundtable panel included FSIS representation. The report of the proceedings of the meeting (available at the NIST website at <http://www.nist.gov/>) states that the issue (Item 270-1 W), which was brought to the Conference in 2001 by the Central Weights and Measures Association, was withdrawn by the agreement of the Laws and Regulations Committee after the discussion at that meeting. In addition, on August 2, 2004, following the conclusion of the panel at the NCWM meeting, the California Department of Food and Agriculture (CDFA) issued Division of Measurement Standards (DMS) Notice QC-04-3 (see <http://www.cdfa.ca.gov/dms/pdfs/QC-04-3.pdf>), which publicly accepted the FSIS position on determining the net weight of enhanced meat and poultry products described above. The Notice also reminded CDFA weights and measures officials of the prevailing aspect of Federal preemption.


For the reasons discussed above, FSIS has determined that it is not necessary to amend the net weight regulations to address the issues raised in your petition. Therefore, we are denying the petition as moot. With regard to the additional request that FSIS provide guidance that confirms that the free-flowing liquid within a fresh poultry package is part

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of the poultry product, and that inspectors must confirm the net weight inspection and enforcement practices accordingly, the regulations on net weight in 9 CFR 381.121 and retained water in 9 CFR 441.10 continue to apply. The Agency will explore a mechanism to ensure that the appropriate method for determining that net weight compliance of enhanced meat and poultry products is conveyed to field employees.

Sincerely

A handwritten signature in cursive script, appearing to read "Philip S. Derfler".

Philip S. Derfler
Assistant Administrator
Office of Policy, Program,
and Employee Development