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MEMORANDUM

From: Gary Jay Kushner
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Re: USDA to Initiate Rulemaking for “Made in USA” Claims on Meat and Poultry Products

In response to two petitions, the U.S. Department of Agriculture’s (USDA’s) Food Safety and Inspection Service (FSIS) has announced that it intends to conduct rulemaking to change its policy toward “Product of USA” claims for meat and poultry products, with an apparent objective of limiting the scope of products eligible for the claim.¹

Recently, FSIS announced that the Agency had completed its review of two Petitions submitted on behalf of the U.S. Cattlemen’s Association (USCA) (the USCA Petition) and the Organization for Competitive Markets (OCM) and American Grassfed Association (AGA) (the OCM/AGA Petition). The USCA, OCM, and AGA are national organizations representing the cattle industry, farmers and consumers in the agricultural markets, and grassfed meat producers, respectively. Both the USCA and OCM/AGA Petitions requested that FSIS amend its policy to limit voluntary “Product of USA” claims on beef products to only products made from cattle that have been born, raised, and slaughtered in the U.S. In response, FSIS concluded that its current labeling policy “may be causing confusion in the marketplace, particularly with respect to certain imported meat products” and indicated it would initiate a rulemaking to define voluntary “Product of USA” claims.” Although FSIS technically denied the Petitions, the promise of future rulemaking appears aimed at satisfying the Petitioners’ core requests.

This memorandum briefly summarizes the petitions and FSIS’s planned rulemaking. FSIS has not yet issued a proposed rule and has not indicated when it plans to do so.

¹ Letter from Rachel A. Edelstein, Acting Assistant Administrator, Office of Policy and Program Development, Food Safety and Inspection Service, to Elizabeth Drake, Counsel for Petitioner, Schagrin Associates (March 26, 2020) <https://www.fsis.usda.gov/wps/wcm/connect/dba58453-e931-4c1d-9b4e-fb36417049ce/19-05-fsis-final-response-032620.pdf?MOD=AJPERES>; Letter from Rachel A. Edelstein, Acting Assistant Administrator, Office of Policy and Program Development, Food Safety and Inspection Service, to Joe Maxwell, Executive Director, Organization for Competitive Markets, and Carrie Balkom, Executive Director, American Grassfed Association (March 26, 2020) <https://www.fsis.usda.gov/wps/wcm/connect/5e3ff6b0-717b-47f7-90b5-414c312daa85/18-05-fsis-final-response-032620.pdf?MOD=AJPERES>.

Background and the Petitions

Current FSIS Policy

FSIS currently defines its policy on “Product of USA” claims in its *Food Standards and Labeling Policy Book*, allowing the statement as a voluntary claim either (1) for exported products, when the destination country requires this phrase, or (2) when “the product is processed in the U.S. (i.e., is of domestic origin).”² Historically, FSIS has applied this policy liberally to permit the claim on products produced at a U.S. establishment, even if manufactured using imported meat or poultry ingredients. In this sense, the FSIS policy is more lenient than policies the Food and Drug Administration and the Federal Trade Commission (FTC) apply to products and advertising under their jurisdictions.³

USCA and OCM/AGA Petitions and Requests

The two Petitions requested that FSIS amend the “Product of USA” entry in the *Food Standards and Labeling Policy Book* to clarify that the statement may be used on beef products only when the products were made using cattle that have been born, raised, and slaughtered in the U.S. The petitions requested similar albeit slightly different articulations of policy.

The USCA Petition requested FSIS to clarify the “Product of USA” definition (and similar claims) within the *Food Standards and Labeling Policy Book* by adopting the FTC’s “all or virtually all” standard for “Made in USA” claims. Under FTC’s policy, the claim “Made in the USA” made be made only when the advertiser can substantiate “that the product is all or virtually all made in the United States.”⁴ USCA requested that FSIS adopt this policy and, when an animal is born, raised, or harvested outside the U.S., require that any U.S. origin claims be qualified to disclose foreign product content.

The OCM/AGA Petition requested FSIS to revise the “Product of USA” entry in the *Food Standards and Labeling Policy Book* by changing paragraph 2 of the entry to state that labeling may bear the phrase “Product of USA” under one of the following conditions: “If it can be determined that significant ingredients having a bearing on consumer preference such as meat, vegetables, fruits, dairy products, etc., are of domestic origin (minor ingredients such as spices and flavorings are not included). In this case, the labels should be approved with the understanding that such ingredients are of domestic origin.”⁵

Overall, the petitions assert a shared view that current beef labeling practices are likely to cause consumer confusion in the marketplace, and both cite market surveys and other evidence to support their positions.

FSIS’s Response

In response to both Petitions, FSIS indicated it will conduct rulemaking to define the conditions under which meat products may bear “Product of USA” when used as a voluntary product claim. Although FSIS technically denied both petitions, the denial was for technical reasons—FSIS proposed to

² FSIS, *Food Standards and Labeling Policy Book*, “Product of USA.”

³ FSIS also requires country of origin labeling for imported finished products and maintains detailed policy on geographic origin claims, neither of which were at issue in the Petitions.

⁴ FTC Enforcement Policy on U.S. Origin Claims (Dec. 1, 1997) <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.

⁵ See OCM/AGA Petition, pg. 3 (June 12, 2018) <https://www.fsis.usda.gov/wps/wcm/connect/195183b8-d436-4914-8b73-449fd0a5a623/18-05-American-Grassfed-Association-061818.pdf?MOD=AJPERES>.

conduct rulemaking rather than amend the *Food Standards and Labeling Policy Book*—and FSIS suggests that it may agree to an extent with the Petitioners’ core concerns.

In responding to the Petitions, FSIS stated that, “[a]fter considering the issues raised in the petition and all public comments, FSIS has decided to initiate rulemaking to limit ‘Product of USA’ and certain other voluntary U.S. origin statements to the labeling of meat products from livestock that were slaughtered and processed in the United States. The Agency has determined that a voluntary U.S. meat product origin labeling policy that focusses on where the product is made, i.e., where the livestock are slaughtered and processed, without regard to where the source animals were born, may more accurately reflect what ‘origin’ means with respect to meat products processed in the United States and will thus result in labels that are truthful and not misleading.” Although the Petitions and the response letters specifically address beef, FSIS indicates it will address claims for both meat and poultry in the rulemaking. FSIS did not announce a timeline for when industry could expect a proposed rule.

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We will continue to monitor the FSIS country of origin labeling requirements. Companies marketing meat and poultry products as being “Product of USA” may wish to evaluate their supply chains and product sourcing to determine how the anticipated proposed rule may affect their claims. Should you have any questions, please do not hesitate to contact us.