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IS LIMITED TO MATTERS AND PROCEEDINGS
BEFORE FEDERAL COURTS AND AGENCIES

MEMORANDUM

March 24, 2020

BY ELECTRONIC MAIL

FROM: Olsson Frank Weeda Terman Matz PC

RE: FSIS Announces Temporary Allowances on Labels on Food Service Products Re-routed to Retail Sales

On March 23, 2020, the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS, or the Agency) published a [Constituent Update](#) announcing the Agency's plans to exercise enforcement discretion to accommodate allowing products labeled for hotels, restaurants, and similar institutions (HRI) to be re-routed to retail sales (the Constituent Update). The Constituent Update addresses a major concern of the meat and poultry industry as food service sales have dramatically decreased while retail sales have surged in the wake of the COVID-19 outbreak.

The Constituent Update describes three scenarios where FSIS will exercise enforcement discretion with respect to nutrition labeling and limiting statements. The Agency will exercise enforcement discretion with respect to meat and poultry packaged for HRI for sixty (60) days (until **May 22, 2020**). Although the Constituent Update indicates that the three scenarios only apply to product already in commerce and does not apply to new production, we understand that the first scenario below will apply to new production. We also understand that the agency is reconsidering whether the second two scenarios should also apply to new production and plan to issue some additional clarification as early as tomorrow. We will advise you when this additional clarification is available.

Below is a summary of the Constituent Update supplemented by information provided by FSIS officials.



Labeling at a Federal Establishment

If an establishment applies modified labels to HRI products to allow the products to be sold at retail locations, the establishment will not be required to include a nutrition facts panel so long as the product label bears no nutritional claims. The modified label would be required to bear all mandatory label features, including the USDA mark of inspection. If the product does not qualify for an exemption for including a nutrition facts panel per 9 C.F.R. §§ 317.8 or 381.129, FSIS will not require establishments to seek temporary approval to forego including a nutrition facts panel.¹ The Agency is not exercising enforcement discretion with respect to products that make nutritional claims.

The Constituent Update states that the Agency's exercise of enforcement discretion only applies to products packaged on or before March 23, 2020. However, OFW has received confirmation from an FSIS official that establishments can continue to using labels without nutritional information (both existing packages and future production) during the period of enforcement discretion.

Labeling at Retail for Bulk Product Already in Commerce

FSIS is allowing bulk product, even if it is labeled for HRI (e.g., Child Nutrition product, “for HRI only”) to be distributed to retailers for portioning, repackaging, and labeling at the retailer's store. The retailer's label will be required to include all required label elements except for the USDA mark of inspection. FSIS will also not require that the retail packaged product bear nutrition labels unless the label bears nutritional claims.² FSIS will not object to bulk product being distributed to retailers in a manner that is inconsistent with statements of limited use on the outer box, such as “for school foodservice use only.” Although the agency indicated in the Constituent Update that this option is not available to new production, we understand that FSIS is reconsidering this position.

Labeling at Retail for Product in Unlabeled Protective Coverings Already in Commerce

FSIS is allowing fully labeled containers with meat or poultry products in unlabeled protective coverings to be distributed to a retailer for labeling. FSIS will not object to the retailer applying a label to the protective covering so that product can be sold at retail, which is normally not allowed under 9 C.F.R. §§ 317.1 and 381.115. For these products, the label can be an insert printed by an FSIS-inspected establishment or the retailer.

¹ The absence of a nutrition label normally requires an establishment to seek temporary approval pursuant to 9 C.F.R. § 412.1(f)(1).

² The Constituent Update is not clear as to whether the temporary exercise of discretion would excuse otherwise required nutritional facts on retail packaged products. However, OFW contacted a senior FSIS official and received confirmation that the enforcement discretion applies to nutrition facts panels on retail packaged products so long as the label does not bear nutritional claims.



The label applied to protective coverings at retail must still contain all of the required labeling elements except the USDA mark of inspection. FSIS will also not require nutrition information to be included on these product labels even if an exemption from nutrition labeling does not apply. As noted above, although the agency has indicated that this option is not applicable to new production, FSIS is currently reconsidering that position.

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We trust this information is useful. Please let us know if you have any questions.