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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
CHICAGO REGIONAL OFFICE

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COMMISSION AUTHORIZED

December 12, 1990

Ms. Linda Carey
FSIS Hearing Clerk
Food Safety and Inspection Service
United States Department of Agriculture
Washington, D.C. 20230

Re: Processing, Distribution, Storage, and
Retail Handling of Ready-To-Eat, Uncured,
Perishable Meat and Poultry Products
Packaged in Sealed Containers
9 C.F.R. Parts 308, 318, 320 and 381
[Docket No. 89-007N]

Dear Ms. Carey:

The staff of the Federal Trade Commission's Chicago Regional Office, Bureau of Consumer Protection, and Bureau of Economics ("the staff") are pleased to comment on whether the Food Safety and Inspection Service of the Department of Agriculture ("FSIS") should propose new regulations regarding chilled, ready-to-eat, perishable meat and poultry products which are packaged in a variety of sealed containers bearing label statements such as "Perishable, Keep-Refrigerated."¹ In the Advance Notice of Proposed Rulemaking (ANPR) the FSIS notes that many regulatory and public health officials believe that these products may pose certain unique risks to consumers.² The staff understands that the FSIS intends to use the information developed during the comment period to determine whether additional regulatory actions, such as formal rulemakings, might be warranted.

According to the ANPR the FSIS is considering two general issues: (1) whether measures should be taken to further ensure that these products are microbiologically safe when sold to consumers; and (2) whether the potential health risks that arise when consumers mishandle these products after purchase warrant regulatory action. This comment addresses only the second question.³

Regulatory alternatives currently being considered by the FSIS for dealing with potential mishandling by consumers include (1) requiring appropriate labeling to inform consumers of steps that they must take to ensure product safety, and/or (2) banning the use

¹ These comments are the views of the staff of the Chicago Regional Office, Bureau of Consumer Protection, and Bureau of Economics of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

² 55 Fed. Reg. 19888 (May 14, 1990).

³ By implication, this comment assumes throughout that the products are safe when sold to consumers.

of certain packaging (such as glass or rigid metal containers) that consumers may associate with nonrefrigerated shelf stable products.

The staff believes that, if the FSIS finds significant evidence that consumers are not aware of the proper handling needs of these products, the FSIS should consider taking steps to help ensure that appropriate information reaches consumers (e.g., labeling disclosures). In the staff's view, labeling disclosures providing consumers with adequate information about the appropriate handling of products are typically the least costly way to protect consumers from misuse. The alternative approach suggested in the ANPR -- banning certain packaging materials altogether -- in our view should be avoided unless FSIS finds a basis for concluding that (1) the packaging material itself is a major or significant cause leading consumers to misunderstand proper handling instructions and (2) revised labeling disclosures (and other informational remedies such as advertising disclosures and in-store displays) are insufficient to correct these misunderstandings or impose costs on consumers and sellers greater than those that might be expected from banning certain packaging materials. In considering whether to ban certain packaging alternatives, therefore, the staff recommends that information be collected that would help resolve these questions. The staff's concern is that if categories of packaging are banned without support of this type, sellers might be forced to forego packaging options that are more efficient than the alternatives that remain available to them. This in turn could result in consumers paying higher prices for these products without receiving compensating benefits since equally high safety levels presumably could be achieved through the alternative of labeling disclosures.

I. INTEREST AND EXPERIENCE OF THE STAFF OF THE FEDERAL TRADE COMMISSION

The staff of the FTC has a longstanding interest in food standards and labeling stemming from the Federal Trade Commission's general statutory obligations to promote competition and to prevent false and deceptive advertising. Under Sections 5 and 12 of the Federal Trade Commission Act,⁴ which prohibit false, deceptive or unfair practices in or affecting commerce, the FTC has jurisdiction over the advertising of food, and has concurrent jurisdiction with FDA and USDA over the labeling of food. The FTC also has statutory authority to enforce a number of laws that mandate disclosure,⁵ and has itself

⁴ 15 U.S.C. §§ 41 et seq.

⁵ E.g., the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq., the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., and the Energy Policy and Conservation Act, 42 U.S.C. §§ 6201 et seq., see Rules for Using Energy Costs and Consumption Information Used in Labeling and Advertising for Consumer Appliances under the Energy Policy and Conservation Act ("appliance labeling"), 16 C.F.R. Part 305.

promulgated disclosure rules.⁶ Furthermore, the FTC enforces several laws relating to standard-setting,⁷ and has developed expertise on the possible anticompetitive effects of standard-setting.⁸ The staff of the FTC has developed considerable expertise in understanding the roles of advertising and labeling in providing consumers with reliable product information and in the roles that might be played by disclosure standards in situations where an unregulated market may fail to provide adequate information.⁹ In 1987, the FTC staff submitted comments when the FSIS was considering amending its standard of identity for frankfurters and similar cooked sausages.¹⁰ In 1988, the FTC staff submitted comments to the FSIS on a proposal to except certain processed meat products from the requirement that the common or usual names of all ingredients be on the products' labels.¹¹ In 1990, the FTC staff submitted comments to the Food and Drug Administration ("FDA") regarding a proposal to allow truthful, substantiated health claim messages on food labels.¹²

⁶ E.g., Octane Posting and Certification, 16 C.F.R. Part 306, Labeling and Advertising of Home Insulation ("R-value Rule"), 16 C.F.R. Part 460, and Care Labeling of Textile Wearing Apparel and Certain Piece Goods as amended, 16 C.F.R. Part 423.

⁷ E.g., the Wool Products Labeling Act, 15 U.S.C. §§ 68 et seq., and the Magnuson-Moss Warranty - FTC Improvement Act, 15 U.S.C. §§ 2301 et seq.

⁸ J. Mooney, R. Schroeder, D. Graybill, W. Lovejoy, "Standards and Certification: Proposed Rule and Staff Report" (1978).

⁹ Research conducted by the staff of the FTC includes: P. Ippolito & A. Mathios, "Health Claims in Advertising and Labeling: A Study of the Cereal Market" (1989); J. Calfee & J. Pappalardo, "How Should Health Claims for Food Products be Regulated? An Economic Perspective" (1989); and W. Jacobs et al., "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising" (1984).

¹⁰ Comments of the staff of the Bureau of Economics, Consumer Protection, and Competition of the Federal Trade Commission on Proposal to amend the Cooked Sausage Standard, submitted to the Food Safety and Inspection Service, U.S. Department of Agriculture, Docket No. 85-009F, June 22, 1987, [Final Rule, 9 C.F.R. Part 319] (Comment of June 22, 1987).

¹¹ Comments of the staff of the Bureau of Economics on the Labeling of Meat Food Products, Under Certain Circumstances, That Contain Mechanically Separated (Species), submitted to the Food Safety and Inspection Service, U.S. Department of Agriculture, 9 C.F.R. Part 317 [Docket No. 86-049P] (Comment of November 8, 1988).

¹² Comments of the staff of the Bureau of Consumer Protection and Economics submitted to the Food and Drug Administration, 54 Fed. Reg. 32610 [Docket No. 89N-0226] (Comment of January 5, 1990).

II. CONSIDERATIONS FOR CHILLED MEAT AND POULTRY PRODUCTS

The products covered by this request for comment consist of or contain perishable meat or poultry products. They are commonly pasteurized, hermetically sealed in the packaging for sale to consumers and require additional refrigeration after purchase to prevent spoilage. These products include soups, sauces, pastas, salads and entrees.¹³ As the FSIS recognizes, the market for these kinds of chilled food products is growing.¹⁴ Published reports have estimated that demand is expected to increase by 60% per year over the next decade.¹⁵ We understand that some of the larger food corporations are entering this market.

These chilled food products bear labels containing statements such as "Perishable, Keep Refrigerated." Unlike nonrefrigerated shelf stable packaged foods, these foods are processed in a way that does not destroy certain heat resistant bacteria. Nonetheless, they are generally processed and packaged in a manner that extends the products' refrigerated shelf life. Even when these products are safe when purchased, safety concerns would be raised if consumers fail to treat them so as to ensure that the food remains safe until consumed. For example, consumers may store the products at room temperature rather than refrigerate them.

In light of the potential health risks from mishandling these products, consumers need adequate, truthful handling information. The staff believes, therefore, that the key issues for this proceeding are whether consumers currently have such information, and, if not, what additional regulatory actions might be warranted.

The staff believes it would be useful for the FSIS to determine first whether current sellers of these products provide adequate handling information absent a regulatory mandate to do so. Quite apart from duties arising from regulations, sellers have significant incentives to provide consumers with adequate information about proper handling procedures. Among other things, sellers rely to a great extent on repeat purchases and value highly their reputations. With new products, particularly ones that require treatment different from more familiar shelf stable products, a supplier jeopardizes both its reputation for producing quality products and its ability to sustain business through repeat purchases if consumers are not provided with adequate care information.

¹³ Spaghetti sauce, for instance, has traditionally been heat treated, packaged in cans or glass jars, and placed on grocery shelves at room temperature. Alternatively, the sauce could be pasteurized, hermetically sealed, and displayed in a refrigerated section at the grocery instead. Products of this latter type are the concern of this proceeding.

¹⁴ 55 Fed. Reg. 19888 (May 14, 1990).

¹⁵ See "New Trends Make Food A Challenging Game," 35 Packaging, p. 44 (January 1990).

The staff recognizes that private incentives might be insufficient to ensure provision of adequate information to consumers.¹⁶ If, for example, the need for refrigeration is not disclosed, or if disclosures are not sufficiently prominent to bring them to the attention of the purchaser, it might be reasonable to conclude that the potential for health risks does exist and is significant. Alternatively, potential health risks may exist if disclosures cannot prevent consumers from mistakenly concluding that products, either chilled or shelf stable, sold in a particular type of packaging (e.g., glass jars) can be handled identically.

To determine whether the information currently available to consumers is adequate, the staff recommends that the FSIS gather information on whether consumers have mishandled perishable, ready to eat, uncured meat and poultry products. Although the ANPR does not discuss documented instances of health risks resulting from improper usage or handling of these products, hopefully the comments submitted will help form a base for determining whether health hazards have been created in the past, how likely they are to occur again, and whether regulatory action would effectively address those risks.¹⁷

In the event that the FSIS finds that a significant risk of improper handling has arisen or is likely to arise and is likely to continue, several alternatives are available to address those problems. Two are posed in the ANPR: labeling disclosures and banning types of packaging, such as glass or rigid metal containers, that consumers may normally

¹⁶ The Commission reached this conclusion in some of its own regulatory proceedings. See, e.g., *supra*, note 6. In the case of these products private incentives to provide complete handling information might be diminished if it were difficult for consumers to determine whether the product had spoiled or to determine whether one of these food products, or some other, was responsible for a particular episode of gastrointestinal irritation.

¹⁷ FSIS staff indicated informally to us that they were aware that consumers sometimes purchase food items that are shelf stable and then refrigerate them. They suggested that the converse was also a possibility -- that consumers may purchase refrigerated items but store them at room temperature. FSIS staff, however, were not aware of any documented instances of this type of consumer conduct. In addition, a recent report on this issue states that: "Evidence suggests that consumers have difficulty distinguishing the differences between various food label instructions and their relationship to product safety." See Recommendations of the Meat and Poultry Working Group of the National Advisory Committee on Microbiological Criteria for Foods for Refrigerated Foods Containing Cooked, Uncured Meat or Poultry Products that are Packaged for Extended Refrigerated Shelf Life and that are Ready-To-Eat or Prepared with Little or No Additional Heat Treatment (Adopted January 1990) ("MPWG Report") at 19. The MPWG Report does not indicate, however, whether it is referring to labels for the products at issue here. No citation to this evidence is provided.

associate with nonrefrigerated shelf stable goods.¹⁸ In the remainder of this comment, we consider these alternatives, and then pose some questions that may assist the FSIS in gathering and weighing evidence.¹⁹

A. Labeling

One alternative suggested by the FSIS for addressing problems from improper consumer handling is to require adequate labeling for products of this type. Along these lines, the MPWG Report suggests that "packages carry a uniform standardized label statement and corresponding logo" providing:

*** IMPORTANT *
MUST BE KEPT
REFRIGERATED**

Several questions would need to be addressed in formulating a labeling proposal. First, what is known about any deficiencies in current labeling? As noted, this would include an analysis of the current state of disclosure and, hopefully, evidence about how consumers respond to it.²⁰ Second, how can current labels be revised to ensure that important safety information is sufficiently conspicuous that consumers will notice it and react appropriately?

Third, and finally, how can a mandatory labeling proposal account for the variety in packaging types and shapes? This variety suggests that labeling regulations need to be flexible to accommodate these various packaging options. The staff believes that a requirement that any mandatory disclosures be "clear and conspicuous" would provide consumers with the information they need without unduly limiting the sellers' packaging options.

B. Banning Certain Types of Packaging

The second alternative identified in the ANPR is aimed to reduce consumer confusion about proper handling of these products by banning certain types of packaging that consumers traditionally associate with nonrefrigerated shelf stable products. This is one of the recommendations contained in the MPWG Report. Such a measure might

¹⁸ Both of these options are also suggested in the MPWG Report cited in the ANPR.

¹⁹ The MPWG Report also recommends an additional avenue for addressing potential consumer confusion: consumer education. See MPWG Report at 20.

²⁰ It seems likely that consumers would draw some conclusions about the need to refrigerate a product from the fact that it is chilled when purchased. On the other hand, busy or distracted shoppers may not focus on this characteristic at the time of purchase and the product may be at or near room temperature by the time it is unpacked at home.

include banning the use of glass and rigid metal containers, as well as certain other containers, for packaging these products.

As noted above, one method of addressing information shortfalls is to ensure that labels contain appropriate storage and handling information. If labeling disclosures are effective remedies, no other action would seem necessary. Thus before concluding that a ban on particular packaging materials is called for, the staff believes FSIS should gather information sufficient to demonstrate that (1) consumers mistakenly believe that all products distributed in certain types of packaging (e.g., glass jars) can be handled identically, notwithstanding differences in how the products are displayed at the store (i.e., some of these products are refrigerated, others are at room temperature) and in the handling instructions currently contained on labels; and (2) revisions in the handling instructions on product labels would fail to correct these mistaken beliefs.

The staff does not know whether studies have been done that provide empirical evidence that packaging materials alone create significant consumer confusion. Consumers undoubtedly draw on several different signals in deciding how to handle a product. This would include (1) the material used for packaging and consumer knowledge about how products packaged in the material can generally be treated; (2) whether the product is purchased from a refrigerated unit at the retail outlet; and (3) information about proper handling communicated in advertising, on any in-store displays, and on labels.

Some inferences might be drawn from other markets in which both nonrefrigerated and refrigerated items are available. For example, salad dressings have traditionally been sold in nonrefrigerated shelf stable glass containers. Newer varieties of salad dressings, however, can be found in the refrigerated produce sections of many grocery stores. These are not shelf stable and may require refrigeration. If evidence indicates that consumers have not mishandled chilled salad dressings (or other relevant examples), less reason would exist to conclude that certain types of packages for chilled meat and poultry products with shelf-stable alternatives should be banned.

Packaging bears some resemblance to advertising in the sense that both may convey express and implied information to consumers. Before banning packaging, therefore, FSIS may find it useful to determine what messages consumers are receiving from packaging materials. In the advertising context, the FTC attempts to determine what messages consumers could reasonably draw from an advertisement by looking at the overall, net impression made by an ad.²¹ The FTC will examine the advertisement itself, evidence about how consumers interpret the advertisement, or both. A similar analysis could be used to examine whether particular packaging can reasonably be interpreted to convey a message that a food product is shelf stable, even if the product's label states that the

²¹ Thompson Medical Company, 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

product is perishable and must be kept refrigerated. The staff believes that evidence, such as consumer surveys and copy tests, might be a valuable tool in determining what messages the type of packaging conveys to consumers.²²

Finally, from the standpoint of consumers and competition, banning certain types of packaging could have important implications. The total cost of supplying a product includes the costs from production, packaging, distribution, and marketing. For various packaging alternatives, these costs will vary, perhaps significantly for some products. If certain packaging alternatives are unnecessarily banned from the chilled meat and poultry market, some sellers could be forced to use less efficient, more costly packaging alternatives. These costs would likely be passed on as higher prices to consumers who, in this instance, would not receive any additional benefits in return for a higher price. In addition, if future cost-saving innovations are developed for the banned packaging alternatives, these savings could not be incorporated into the costs of supplying chilled meat and poultry products. Once again, consumers could be forced to pay higher prices for these products without receiving any offsetting benefits.

C. Factual Issues Pertinent to this Proceeding

The FSIS might find it useful to obtain additional information about consumer understanding about the post-purchase handling needs of the food products at issue. The FSIS may wish to explore several questions before determining whether action is necessary to provide consumers with additional or particular label information or to ban the use of particular packaging materials. Among these questions are:

1. Do the products at issue currently have labels containing handling information which, if followed, are sufficient to avoid health risks? Is the label information clear and conspicuous? To what extent are consumers aware of the potential health risks from not following these labels?
2. What do consumers understand "ready-to-eat" and similar label statements to mean?

²² The FSIS has the regulatory authority to prohibit the use of containers the size or form of which is false or misleading. 9 C.F.R. § 381.130.

Although the issue in this proceeding is not framed as one involving whether certain types of packaging are or can be deceptive, false or misleading, this comment suggests an analysis that considers this question. In analyzing deception, the FTC determines what representations (both express and implied) are being made, whether the representations are likely to mislead consumers acting reasonably in the circumstances, and whether the representations are material. See FTC Policy Statement on Deception, appended to the Commission's decision in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, statement beginning at 174 (1984).

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3. Do consumers confuse shelf stable food products with similar food products that are perishable because of the packaging materials used? Could any confusion be remedied by appropriate revisions in labeling?
4. To what extent do consumers fail to store and to prepare chilled refrigerated foods properly? To determine whether consumers understand that chilled perishable products should be handled differently from shelf stable products, it may be useful to examine the experiences of domestic markets in which both shelf stable and chilled products currently exist (e.g., salad dressings) and foreign markets in which chilled meat and poultry products are already available.

If information helpful to answering these questions is not contained in the comments filed in this proceeding, the FSIS may wish to consider obtaining this information through the use of copy tests, consumer surveys, and examination of relevant domestic and foreign markets. The FSIS should then be in a better position to determine whether consumers currently have the information they need to treat refrigerated perishable meat and poultry products appropriately, or whether particular regulatory action is appropriate.

IV. CONCLUSION

The staff of the FTC share the FSIS's concern about the potential health risks that consumers may face from chilled, perishable meat and poultry products. This comment identifies information that we believe would assist the FSIS in deciding how to address this concern. The staff suggests that FSIS consider market and consumer survey information to determine what information consumers currently receive concerning the proper handling of these products. This would provide a basis for deciding whether additional steps are needed to ensure that consumers are provided with adequate information on how to handle and store chilled meat and poultry products of this type, and in light of the information gathered, whether banning certain packaging would be a useful course.

Sincerely,



C. Steven Baker,
Regional Director
Chicago Regional Office