



## I. Introduction and Summary

On September 9, 1988, the Food Safety and Inspection Service ["FSIS"] of the Department of Agriculture invited comments on its Notice of Proposed Rulemaking ["NPRM"] that would amend the Federal meat inspection regulations by excepting, under certain specified instances, Mechanically Separated (Species) ["MS(S)"] from the requirement that the list of ingredients on the labels of meat food products show the common or usual names of all ingredients.<sup>1</sup>

The staff of the Bureau of Economics of the Federal Trade Commission ["the FTC staff"] submits the following analysis in response to the NPRM. Although we support the FSIS in its ongoing reconsideration of its MS(S) disclosure requirement, we can take no position on the merits of the proposed regulatory change without the development of further evidence. The purpose of our comment is instead to suggest an analytical framework for determining whether consumers are likely to benefit from changes in the current rule. To employ this analytical framework, the FSIS should examine specific market and consumer survey information in order to identify the effects of the current disclosure requirement and the proposed regulatory change.<sup>2</sup> In

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<sup>1</sup> See 53 Fed. Reg. 35089 (Sept. 9, 1988).

<sup>2</sup> In addition, despite its past determination that MS(S) is generally nutritional and nonhazardous, the FSIS may wish to investigate any new arguments or evidence that may have been advanced to support allegations that MS(S) may be in some way unsafe.

1986, approximately \$9.2 billion of meat food products that are affected by this regulation were sold.<sup>3</sup> Consequently, the potential impact of this proceeding on consumers may be substantial.

The regulations governing the disclosure of MS(S) in meat products have evolved over the last decade to lessen the regulatory burdens facing meat processors that attempt to market meat food products containing MS(S). Not only have the disclosure requirements been reduced, but the nomenclature of the ingredient itself has been changed from "mechanically de-boned meat" to "mechanically processed (species) product" to the current term "mechanically separated (species)". Since 1982, the FSIS regulations have required only that the term appear in the ingredient list.<sup>4</sup>

In 1986, four meat processors<sup>5</sup> petitioned the FSIS for permission to delete the term "mechanically separated (species)" from the ingredient list whenever MS(S) constitutes no more than 10% of the meat (and poultry) portion of the meat food product.

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<sup>3</sup> This represents consumer expenditures on frankfurters, sausages, sausage products and cold cuts. Supermarket Business Magazine (September 1987).

<sup>4</sup> In addition, the calcium content of the meat food product must be declared whenever MS(S) contributes 20 mg or more of calcium to a serving of the product, unless (1) the contribution is not different from that which would be declared if the product contained only hand de-boned ingredients, or (2) the calcium content of a serving of the product containing only hand de-boned ingredients would be 20% or more of the U.S. RDA.

<sup>5</sup> Bob Evans Farms, Inc., Odom Sausage Company, Sara Lee Corporation, and Owens Country Sausage.

Instead, the meat processors proposed disclosing in the ingredient list only the species from which the MS(S) is derived.<sup>6</sup> Two arguments were offered to support the proposed regulatory change: (1) that consumer perceptions of the term "mechanically separated (species)" have made it unprofitable to use this ingredient in meat food products,<sup>7</sup> and (2) that meat food products are subjected to an unjustifiably stricter standard than the one applied to poultry food products (which do not have an ingredient disclosure requirement for "mechanically separated poultry" ["MSP"]). In reviewing the public comments filed in response to this petition, the FSIS concluded that there is both merit in the petitioners' arguments and public support for granting the petition. Accordingly, the FSIS is now proposing to adopt the regulatory change suggested by the petitioners.

In Section II we explain the FTC staff's interest in this matter and experience in related matters. Then, in Sections III and IV, we discuss the two arguments that have been advanced in support of the proposed regulatory change. Our conclusions are summarized in Section V.

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<sup>6</sup> In addition, the petitioners proposed that the calcium content of the meat food product be declared on the label, irrespective of the amount.

<sup>7</sup> In the Notice of Proposed Rulemaking, two assertions of the petitioners were cited, namely: (1) "the unwarranted negative connotations of the term MS(S) which is required on labels of finished products containing this ingredient . . . cause consumers to refrain from purchasing such products"; and (2) "that the labeling requirements imposed on products containing MS(S) have effectively thwarted its use". See 53 Fed. Reg. at 35091-2.

## II. FTC Staff Interest

The FTC staff's interest in food standards and labeling stems 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,<sup>8</sup> 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,<sup>9</sup> has itself promulgated disclosure rules,<sup>10</sup> and enforces several laws relating to standard-setting.<sup>11</sup> In implementing its responsibilities, the FTC staff 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 the market may fail to provide adequate

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<sup>8</sup> 15 U.S.C. 41 et. seq.

<sup>9</sup> E.g., the Federal Cigarette Labeling and Advertising Act, the Truth in Lending Act, and the Energy Policy and Conversation Act (appliance labeling).

<sup>10</sup> E.g., Octane Rating, R-value Rule, and Care Labeling.

<sup>11</sup> E.g., the Wool Products Labeling Act and the Magnuson-Moss Warranty - FTC Improvement Act.

information without regulation.<sup>12</sup> In 1987, the FTC staff submitted comments when the FSIS was considering amending its standard of identity for frankfurters and similar cooked sausages.<sup>13</sup>

### III. Potential Consumer Harm Due to Imperfect Information

Proponents of the current disclosure requirement argue that, to the extent that MS(S) is, or is perceived to be, an inferior ingredient, consumers would be harmed if they unknowingly purchased a product containing MS(S). Proponents of the proposed regulatory change argue that the current disclosure rule effectively misinforms consumers as to the nature of MS(S), and that the resulting negative public perception makes it difficult or impossible for firms to use MS(S) as an ingredient. However, since some form of required disclosure has been in place since

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<sup>12</sup> FTC staff's research in this area includes: W. Jacobs et al., "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising" (1984); R. Bond et al., "Effects of Restrictions on Advertising and Commercial Practice in the Professions: the case of Optometry" (1980); Bureau of Consumer Protection, FTC, "Drug Product Selection" (1979); A. Masson and R. Steiner, "Generic Substitution and Prescription Drug Prices: Economic Effects of State Drug Substitution Laws" (1985); M. Frankena et al., "Alcohol Advertising, Consumption, and Abuse" (1985); M. Lynch et al., "Experimental Studies of Markets with Buyers Ignorant of Quality Before Purchase: When Do 'Lemons' Drive Out High Quality Products?" (1986).

<sup>13</sup> Comments of the Bureaus of Economics, Consumer Protection, and Competition of the Federal Trade Commission, Standard for Frankfurters and Similar Cooked Sausages, Food Safety and Inspection Service, U.S. Department of Agriculture, Docket No. 85-009F, June 22, 1987, [Final Rule, 9 CFR Part 319].

the development of the MS(S) process, there is no experience from which to determine whether an unregulated market would fail to provide information sufficient to prevent the inadvertent consumption of MS(S).<sup>14</sup> At issue in this proceeding is whether the potential harm to consumers from a lack of information about the inclusion of MS(S) in meat food products outweighs the potential harm resulting from any misperceptions conveyed by the disclosure.

We cannot discern from the currently available information which of the alternatives--the existing disclosure requirement, the proposed changes to it, or even the absence of regulation--would best serve consumers. The record developed in this proceeding does suggest that, despite the FSIS determination that MS(S) is "as safe and wholesome as the species from which it is derived,"<sup>15</sup> products containing MS(S) have not been successfully marketed (or, they have been marketed only on a limited

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<sup>14</sup> For example, suppose consumers are aware of what MS(S) is, but are unable to detect its presence in meat food products. If there is no required disclosure of MS(S), meat processors would have an incentive to include MS(S) in their product in order to reduce costs. However, if sufficient consumers have a subjective aversion to the ingredient, then suppliers would also have an incentive to produce and market a more expensive product clearly labeled, for example, "Contains No MS(S)" or "Contains Only Hand-Carved Meat". Presumably, enforcement of existing laws against deceptive advertising and labeling would prevent meat processors from including MS(S) in these higher priced products. In this way, the market would provide both a lower-priced, MS(S)-containing product and a higher-priced product.

<sup>15</sup> 53 Fed. Reg. at 35092. Despite the determination of FSIS on this issue, others have continued to express concerns as to the safety of the product.

scale).<sup>16</sup> However, this fact can be used to support either the current disclosure requirement or the proposed change.

Advocates of the current requirement could argue that the failure of producers to market products containing MS(S) accurately reflects consumer preferences, that is, that the number of consumers willing to purchase a MS(S)-containing product has been insufficient to assure its production. However, this argument presumes that consumers are fully informed as to the nature of MS(S) and prefer not to consume products containing MS(S), placing a relatively low value on any cost savings and the added calcium and mineral content of such products.

Conversely, advocates of the regulatory change could explain the absence of MS(S)-containing products from the market by arguing that consumers are not well informed as to the nature of MS(S), and that the required disclosure of MS(S) conveys misperceptions, perhaps by raising questions as to whether MS(S) is nutritional, or even hazardous.<sup>17</sup>

We understand from conversations with FSIS staff that there

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<sup>16</sup> In the Notice of Proposed Rulemaking, the petitioners were cited as claiming "that to their knowledge no meat processor was presently producing MS(S) . . . despite the fact that it was safe and wholesome." See 53 Fed. Reg. at 35091-2.

<sup>17</sup> Meat processors could of course collectively embark on a program to educate consumers as to the merits of MS(S). While the credibility of the meat processors may be questioned due to their vested interest in MS(S), the FSIS has gone on record citing the nonhazardous and nutritional attributes of MS(S). We are aware of nothing that would prevent meat processors from conveying this fact in consumer education messages or even on meat food product labels.



is little evidence in the record to date about either the actual consumer perceptions of current MS(S) disclosures, or the strength of consumer preferences for products containing or not containing MS(S). Thus, the FSIS may wish to consider obtaining additional information that would help provide answers to the following questions:

- 1) To what extent are consumers aware of:
  - a) the contents of meat food products?
  - b) the meaning of "mechanically separated meat"?
  - c) the nutritional and safety aspects of meat food products with and without MS(S)?
- 2) What connotations do consumers attach to the disclosure of MS(S) on a meat food product ingredient list, and how would those connotations affect their purchase decisions?
- 3) What proportion of consumers, if fully informed as to the true nature of MS(S), would be less inclined to purchase a meat food product containing MS(S)? [In this regard, the FSIS may wish to examine any new arguments or evidence that may have been advanced to support allegations that MS(S) may be in some way unsafe or not wholesome.]
- 4) What is the expected cost savings for a meat food product that contains 10% MS(S)? [For comparison, it would be useful, but admittedly more difficult, to obtain (as part of #3 above) an estimate of the approximate price differential that would make informed consumers indifferent to products with and without MS(S).]
- 5) What would the likely mix of products be if the current disclosure rule were not in effect? [For example, it would be useful to know what range of products are supplied in those countries (if any) that do not have comparable disclosure requirements. Alternatively, since there is apparently no disclosure rule for mechanically separated poultry in poultry food products, it may

be of value to determine whether products are supplied both with and without mechanically separated poultry.<sup>18]</sup>

To the extent information concerning 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 the corresponding international product markets. If the information indicates that an unregulated market cannot reasonably be expected to provide MS(S) ingredient information, some form of MS(S) disclosure regulation may be justified. The same information will also provide the basis for a meaningful examination of the consumer effects of the proposed regulatory change, if it were to be adopted. On the other hand, if FSIS believes it has sufficient evidence to conclude that MS(S) ingredient information would be provided by an unregulated market, then FSIS should consider rescinding the current disclosure regulation entirely.<sup>19</sup>

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<sup>18</sup> For the poultry product experience to be relevant, it would be necessary to first determine whether the nutritional and health characteristics of mechanically separated meat and mechanically separated poultry are comparable, and if so, ascertain that well informed consumers would view the two ingredients similarly on subjective grounds.

<sup>19</sup> In our view, evidence of market failure should generally be a precondition for regulation.

#### IV. Nonuniform Regulatory Treatment of Meat and Poultry Food Products

A second justification for relaxing the disclosure requirement for MS(S) is the alleged preferential regulatory treatment accorded Mechanically Separated Poultry ["MSP"]. Currently, no disclosure of MSP is required when it is used as an ingredient in either poultry food products or meat food products.<sup>20</sup> The FSIS staff has indicated to us that this difference in treatment results at least in part from the different legislative acts establishing the regulation of meat and poultry products. This difference may, however, be justified if MS(S) is relatively less wholesome than MSP, or if consumer attitudes toward MS(S) and MSP are in fact different.

If meat food products are reasonable substitutes for poultry food products,<sup>21</sup> then regulations that impose unjustifiably high costs on producers of one food product necessarily harm consumers by raising the cost of producing one product relative to the other. If no valid justification exists for the current differential regulation, consumers could be expected to benefit (e.g., through lower prices) from a more uniform regulatory treatment of the two meat processing industries.

This prescription does not, however, necessarily translate into support for the proposed rule. Rather, it leads to the

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<sup>20</sup> The maximum calcium content of MSP is, however, regulated.

<sup>21</sup> For example, consumers may switch between bologna and turkey bologna depending upon their relative prices.

conclusion that, if all relevant aspects of MS(S) and MSP are roughly comparable, then one or both of the regulatory schemes is inappropriate.<sup>22</sup> Depending upon the evidence collected in the course of this proceeding, the FSIS may wish to consider a unified regulatory approach to meat and poultry food products.

## V. Conclusion

The FTC staff supports the FSIS in its reconsideration of its MS(S) disclosure requirements. Our comment also identifies information that the FSIS may wish to consider prior to resolving the issues raised by the Notice of Proposed Rulemaking. Specifically, we recommend the consideration of market and consumer survey information to analyse the rationales underlying the proposed regulatory change and the disclosure requirements that are in place today.

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<sup>22</sup> For example, while it is conceivable that there is no compelling need for requiring disclosure of either MS(S) or MSP, it is also possible that a potential market failure can be found to justify imposing the current MS(S) regulatory scheme on MSP. Yet another alternative is that the disclosure rules for MS(S) may deserve to be relaxed while new rules for MSP may need to be promulgated.