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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 381

[Docket No. 96–007F]

RIN 0583–AC17

Use of Two Kinds of Poultry Without Label Change

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the poultry products inspection regulations by adding a provision to permit manufacturers of poultry products to interchange the amounts and kinds of poultry, within specified limits, in a product without requiring that each such formulation change have a separate label. The provision applies in situations where two kinds of poultry make up at least 70 percent of the poultry and poultry ingredients used in the product formulation and neither of the two kinds of poultry used constitute less than 30 percent of the poultry and poultry ingredients used. In these situations, one label with the word ''and'' instead of a comma between the names of each of the kinds of poultry in the ingredients statement, and in the product name, indicates to consumers that the order of predominance of the two kinds of poultry may be interchanged. This action is designed to provide consistent provisions for meat and poultry products.

EFFECTIVE DATE: May 8, 1998.

FOR FURTHER INFORMATION CONTACT: Robert Post, Director, Labeling and Compounds Review Division, Office of Policy, Program Development, and Evaluation, FSIS, (202) 418–8900.

SUPPLEMENTARY INFORMATION:

Background

FSIS, in response to a petition by Judith Quick and Associates dated March 25, 1995, published in the **Federal Register** on December 27, 1996, a proposed rule to amend the poultry products inspection regulations (61 FR 68167). FSIS proposed to permit the interchange of the amounts of two kinds of poultry within specific limits so that poultry product manufacturers would not have to modify the product label if they change the product formulation within those limits. When adopted, this change will make the poultry regulations and the meat regulations more consistent.

Presently, the Federal meat inspection regulations provide that when two red meat species comprise at least 70 percent of the meat and meat byproduct ingredients of a product formulation, and when neither of the two red meat species constitutes less than 30 percent of the total weight of the meat and meat byproducts used, the red meat species may be interchanged in the product formulation without a change being made in the label ingredients statement, provided that the word ''and'' in lieu of a comma is inserted between the declaration of the red meat species in the ingredients statement (9 CFR 317.2(f)(1)(v)). (Meat byproduct ingredients are any parts of a meat animal carcass that are capable of use as human food other than meat.) This provision for red meat was promulgated in response to an industry request to allow red meat processors to utilize different amounts of meat ingredients without having to develop and maintain a large inventory of labels with different ingredients statements. This flexibility of ingredients permits processors to utilize whatever species of red meat is least expensive at the time they are producing the product. At the time, USDA did not include poultry in the coverage of this provision because the poultry industry was not producing further processed poultry products using different poultry kinds on a very widespread scale. Conditions have changed in the poultry industry, however, and FSIS is now extending this labeling flexibility to poultry and poultry ingredients. (Poultry ingredients include such products as giblets, skin, or fat in excess of natural proportions and Mechanically Separated (Kind of Poultry))(MS(K)).

Discussion of the Effect of the Rule

Although the action that FSIS is announcing in this final rule is simple, it is easy to misunderstand. Section 381.118(f), which the Agency is adopting, applies to a poultry product in which, first, at least 70 percent of the poultry (e.g., chicken, turkey, chicken meat, turkey meat) and poultry ingredients (such as giblets, skin and fat in excess of natural proportions and mechanically separated (kind)) consists of two kinds of poultry, exclusive of poultry ingredients; and, second, when neither of the two kinds of poultry, exclusive of poultry ingredients, constitute less than 30 percent of the poultry and poultry ingredients.

As an example, let us consider a simplified product consisting of 29 percent chicken, 28 percent turkey, 22 percent mechanically separated chicken (i.e., a poultry ingredient), and 21 percent peas. The peas can be disregarded, since the rule applies only to the poultry and poultry ingredients. The chicken and turkey together comprise 57/79 of the total of the poultry and poultry ingredients. This is approximately 72 percent. Because the two kinds of poultry (chicken and turkey) are over 70%, the product meets the first requirement. The chicken is approximately 37 percent of the poultry and poultry ingredients and the turkey is approximately 35 percent. Hence, they both meet the second requirement of being greater than 30 percent of the poultry and poultry ingredients. Therefore, this product could be named ''Chicken and Turkey with Peas'' and the ingredient statement would read, in order of predominance as required: ''Chicken and turkey, mechanically separated chicken, and peas.''

As mentioned above, the poultry ingredients are included in the total amount of poultry and poultry ingredients. However, poultry ingredients must constitute no more than 30 percent of this amount, since 70 percent must be the two kinds of poultry. In addition, all the poultry ingredients must be listed separately in the ingredients statement, including the mechanically separated (kind) in accordance with the November 3, 1995, regulatory change in the poultry products inspection regulations (9 CFR 381.117(e)), (60 FR 55962).

In poultry products, the two kinds of poultry that are most often used are

chicken and turkey. Because chicken is generally less costly than turkey, the use and applicability of this rule by poultry processors is limited. But it will be useful in the management of stock on hand to assure that inventory is used in a rational manner without numerous label adjustments. It should also protect the integrity of labeling and assure the consumer of a reasonable standard of consistency in the product name and list of ingredients.

Comments

FSIS received seven comments in response to the proposed rule—two from industry members and five from trade associations. Overall, the comments were in full support of the flexibility provided by the proposal. However, all but one suggested changes that they thought would make the rule more effective.

Most of the comments agreed that the 70/30 flexibility permitted by this rule (denoted by the use of the word ''and'') was needed in the product name as well as the ingredients statement. Otherwise, they pointed out, no benefit would be achieved with this regulatory change.

The Agency agrees with the comments, and thus it has provided in § 381.118(f) for the use of ''and'' in the product's name as well as in the ingredient statement.

Several comments stated that mechanically separated (kind) (MS(K)) poultry (i.e., a poultry ingredient) should be permitted as part of the two kinds of poultry. One comment suggested that, at the time of the petition for this rule change, the standard of identity had not been established for MS(K). Therefore, the petitioner would not have had reason to request the explicit inclusion of MS(K) in the petition. Further, it was suggested that the exclusion of MS(K) would undermine the original intent of the petition and limit the application of this provision so severely that the goals of the petition would not be achieved. Several other comments wanted clarification in the final rule whether MS(K) was permitted as part of the two kinds of poultry.

The purpose of the rule is to make the meat and poultry regulations parallel with regard to this 70/30 provision. Inasmuch as mechanically separated (species) (MS(S)), the red meat food product equivalent to MS(K), cannot be used to fulfill the red ''meat'' requirements under current regulations, MS(K), a poultry food product, cannot be used to fulfill the ''poultry'' requirement. In the proposed rule, FSIS specifically used MS(K) as an example of ''poultry ingredients'' (December 13, 1996, 61 FR 68167, 68168). Because MS(K) is a poultry food product and not ''poultry,'' it cannot be used to fulfill the poultry kind requirement.

Many of the comments suggested that rule permit the use of kinds of poultry and red meat species so that both meat and poultry, e.g., ''beef and chicken'' could be used in the 70/30 combination. The original petitioner did not request the flexibility to vary the amounts of meat species *and* poultry kinds in a product. Thus, this request is outside the scope of the proposed rule and this final rulemaking. Furthermore, the Agency has no information as to consumer expectations for this suggested type of flexibility using both meat and poultry without requiring each formulation change to have a separate label. Lastly, this type of flexibility could affect the appropriateness of the meat or poultry inspection legend on the label and raise standard questions and requirements as to temperatures for specific meat and poultry products. Thus, this type of suggested flexibility will need to wait for further integration of the meat and poultry regulations.

Some commenters requested that the lower level of poultry kind be changed to 20 percent and some requested the change be expanded to 80 percent/20 percent flexibility. The 20 percent lower level suggestion was obtained from FSIS Policy Memos 029 and 030A entitled ''Labeling Poultry Products Containing Livestock Ingredients,'' and ''Labeling Meat Products Containing Poultry Ingredients,'' respectively. The purpose of the policy memos was to distinguish between when a ''species'' or ''kind'' identification is needed as part of the product name as opposed to being used as a product name qualifier. The use of 20 percent of one kind of poultry either in a 70/20 flexibility or in an 80 percent/20 percent flexibility, could disrupt the order of predominance of the ingredients in the ingredient statement and could confound consumer expectations, since the Agency has no data on that subject and none were submitted to support this change.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule. Executive Order 12866 and the Regulatory Flexibility Act.

This rule has been determined to be not significant under Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

The Administrator has made an initial determination that this rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). The rule will provide flexibility in the amount and kinds of poultry that may be used in a formulation without having to change product labels.

Paperwork Requirements

Any paperwork requirements are approved under OMB Control No. 0583–0092.

List of Subjects in 9 CFR Part 381

Food labeling, Meat inspection, Poultry and poultry products.

For the reasons discussed in the preamble, part 381 of the poultry products inspection regulations (9 CFR 381) is amended as follows:

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 450; 21 U.S.C. 451–470; 7 CFR 2.18, 2.53.

2. Section 381.118 is amended by adding a new paragraph (f) to read as follows:

§ 381.118 Ingredients statement.

* * * * *

(f) Establishments may interchange the identity of two kinds of poultry (e.g., chicken and turkey, chicken meat and turkey meat) used in a product formulation without changing the product's ingredient statement or product name under the following conditions:

(1)(i) The two kinds of poultry used must comprise at least 70 percent by weight of the poultry and the poultry ingredients [e.g. giblets, skin or fat in excess of natural proportions, or mechanically separated (kind)] used; and,

(ii) Neither of the two kinds of poultry used can be less than 30 percent by weight of the total poultry and poultry ingredients used;

(2) The word ''and'' in lieu of a comma must be shown between the declaration of the two kinds of poultry in the ingredients statement and in the product name.

Done at Washington, DC, on March 2, 1998.

Thomas J. Billy,

Administrator.

[FR Doc. 98–5987 Filed 3–6–98; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 575

[98–23]

RIN 1550–AB04

Mutual Holding Companies

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its mutual holding company regulations to permit a mutual holding company (MHC) to establish a subsidiary stock holding company that would hold all of the stock of a savings association subsidiary. The final rule permits the establishment of intermediate stock holding companies (SHCs) that will be subject to restrictions that are substantially similar to those currently applicable to MHCs.

EFFECTIVE DATE: April 1, 1998.

FOR FURTHER INFORMATION CONTACT: James H. Underwood, Special Counsel (202/906–7354), Dwight C. Smith, Deputy Chief Counsel (202/906–6990), Business Transactions Division, Chief Counsel's Office; Gary Masters, Financial Analyst (202/906–6729) Corporate Activities Division; Office of Thrift Supervision, 1700 G Street, NW., Washington, D.C. 20552.

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I. Background of the Proposal

Responding to inquiries from MHCs and mutual savings associations concerning the formation of second-tier stock holding companies, OTS issued an Advance Notice of Proposed Rulemaking (ANPR) soliciting comment on issues raised by the existence of SHCs.[1] On June 5, 1997, OTS published a notice of proposed rulemaking (NPR) proposing to amend its regulations to permit the establishment and operation of federally chartered mid-tier holding companies.[2] The purpose of the proposed amendment was to enhance the organizational flexibility of the MHC structure and to enable MHCs to compete more effectively in the marketplace. Additionally, permitting the formation of SHCs will allow MHCs, through the SHCs, greater flexibility in structuring stock repurchase programs.

Under current 12 CFR part 575, a mutual savings association may reorganize into a MHC structure where the MHC owns at least a majority of the stock of a subsidiary savings association. Depositors of the mutual savings association continue to maintain a depositor-creditor relationship with the stock savings association subsidiary, while retaining their other indicia of ownership, *e.g.*, voting and liquidation rights, with the MHC. This structure permits the balance of the shares (up to 49.9%) of the stock savings association subsidiary to be sold to the public in one or more offerings when the MHC is formed, or later.

The final rule will permit the MHC to form an SHC to hold all of the shares of the stock savings association subsidiary. The SHC, like the stock savings association subsidiary under the current rule, will be required to issue at least a majority of its shares to the MHC and may issue up to 49.9% of its shares to the public. Under the final rule, the SHC will be required to hold 100% of the shares of the savings association subsidiary. The final rule, like the NPR, provides that the SHC structure may not be used to evade or frustrate the purposes of 12 CFR part 575 or related provisions of 12 CFR part 563b that govern mutual-to-stock conversions by savings associations. OTS' guiding principle with respect to MHC conversion rules is that the substantive and procedural limitations applicable to such transactions should mirror those for a mutual-to-stock conversion of a savings association. This is so insiders or minority shareholders do not get a windfall by achieving something (*e.g.*, a greater ownership interest) through an MHC reorganization and subsequent conversion to stock form that they cannot accomplish through a direct mutual-to-stock conversion of the savings association.

II. General Discussion of the Comments

Eleven commenters responded to the NPR proposal: one savings bank; one mutual holding company; two individuals; three trade groups; and four law firms. All but one of the commenters generally supported the concept of SHCs. The one commenter who did not support the formation of SHCs was opposed to any changes to OTS' rules governing mutual holding companies. Most of the commenters argued for greater flexibility and fewer restrictions on SHCs than set forth in the proposed rule. Two of the trade groups that commented, however, were generally supportive of the rule as proposed.

The final rule is substantially similar to the proposed rule. Specific comments addressing various sections are discussed in the description of the revisions to 12 CFR part 575 set forth below.

III. Analysis of Final Rule

A. Federal Charter and Bylaws for SHCs

OTS proposed that SHCs must be federally chartered. The final rule continues this requirement and defines a SHC as a mutual holding company for purposes of section 10(o) of the Home Owners' Loan Act (HOLA). As a MHC, the SHC is subject to the exclusive jurisdiction of OTS. OTS consistently has interpreted section 10(o) and its legislative history as demonstrating Congress' intent that section 10(o) expressly preempts state law with regard to the creation and regulation of MHCs.[3]

Two commenters questioned whether OTS has the statutory authority to charter SHCs. OTS believes that it has authority under section 10(o) to charter SHCs. Section 10(o)(10)(A) of HOLA defines a mutual holding company as ''a corporation organized as a holding company under [section 10(o) of HOLA].'' Given this broad definition, coupled with the explicit statutory revisions and legislative history expressing Congress' intent that OTS have exclusive authority to charter and regulate MHCs, OTS believes there is a clear statutory basis for OTS to charter a SHC as a mutual holding company.

As indicated in the preamble to the final rule adopting 12 CFR Part 575 in 1993, the mutual holding company provisions were amended by the Financial Institutions Reform, Recovery, And Enforcement Act of 1989, Public L. 101–73, 103 Stat. 183 (1989), to expressly provide that mutual holding companies would be chartered and subject to regulations prescribed by the

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[1] 61 FR 58144 (November 13, 1996).

[2] 62 FR 30778 (June 5, 1997).

[3] *See* 58 FR 44105, 44106–44107 (August 13, 1993) (discussion of OTS' exclusive authority to charter and regulate MHCs).