

MEMORANDUM

From: Maile G. Hermida
Gary Jay Kushner
Brian D. Eyink
Leigh G. Barcham

Date: March 24, 2020

Re: FSIS Announces Temporary Allowances for Foodservice Labels Going to Retail

The U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) issued a Constituent Update announcing the Agency temporarily is exercising enforcement discretion to provide labeling flexibilities for redirecting to retail meat and poultry products originally intended for food service. ^{1/} Importantly, FSIS's enforcement discretion applies only to food that already has been produced. FSIS continues to expect all food currently being produced to meet all requirements. This memorandum describes the circumstances under which product may be moved to retail with certain labeling deviations.

Temporary Allowances for Labels Going to Retail

FSIS's Constituent Update addresses temporary allowances under three scenarios: labeling product at a federal establishment, labeling at retail for bulk product already in commerce; and labeling at retail for product in unlabeled protective coverings already in commerce.

- **Labeling at a Federal Establishment:** Product produced at a federal establishment typically intended for distribution to hotels, restaurants, or similar institutions (HRI) may have modified labels applied by the federal establishment to allow the products to be sold at retail. The label will be required to bear all required features. However, FSIS will not object to the use of labels without nutrition labeling (which otherwise would ordinarily be required), so long as the product label does not bear any "nutrition claims." For the next sixty days, if the only deficiency is the absence of nutrition labeling, FSIS will not require the establishments to submit for temporary approval. If the proposed label has other deficiencies from FSIS labeling requirements (e.g., formulation changes not reflected in the ingredients statement), establishments must still submit the label for temporary approval for an evaluation on a case-by-case basis.

^{1/} FSIS, [Constituent Update: Special Alert, Temporary Allowances for Labels Going to Retail](#) (March 23, 2020).

- **Labeling at Retail for Bulk Product Already in Commerce:** Bulk product, even if labeled for HRI, may be distributed to retail where the retailer may repackage the product into smaller consumer size packages and apply a label. The label applied to the repackaged product will need to bear all required features, except that a retail-applied label cannot bear the USDA mark of inspection. For the next 60 days, beginning on March 23, FSIS will not object to products being distributed in a manner that is inconsistent with a statement of limited use on the outer box. For instance, a box labeled “for school foodservice use only” now can temporarily be distributed to a retail outlet for repackaging and labeling. Aside from bearing an inapplicable statement of limited use, products shipped under this temporary exemption must comply with all other labeling requirements.
- **Labeling at Retail for Product in Unlabeled Protective Coverings Already in Commerce:** A fully labeled container with meat or poultry products in unlabeled protective coverings may be distributed to a retailer for labeling. The container may have a statement of limited use that would normally indicate that the product is for HRI only. For 60 days beginning March 23, FSIS will not object to the container being distributed to retail and the retailer applying a label to the protective covering so that the product may be sold at retail. The label the retailer applies may be an insert label supplied by the federal establishment that produced the product, or it could be a label that the retailer printed. In either case, the label should duplicate the label on the incoming container (except the USDA mark of inspection). The labels retailers apply are expected to bear all required features, except the USDA mark of inspection and nutrition labeling.

Although not addressed in the Constituent Update, companies taking advantage of this enforcement discretion should consider ways to document their actions in anticipation of future scrutiny and should ensure they can maintain traceability in the event of a product recall or other market action.

* * *

These temporary allowances run for 60 days, starting March 23. FSIS-regulated companies distributing products for HRI should evaluate whether they can take advantage of any of these flexibilities. Food companies may also wish to evaluate whether there are other temporary labeling deviations that federal regulators should consider under current circumstances.

We will continue to monitor closely developments related to COVID-19 and the food industry. Please contact us if you have any questions.