
December 17, 2021

Dr. Elizabeth Cox
Program Manager
Animal Care Program
California Department of Food & Agriculture
1220 N Street
Sacramento California 95814

Re – Department of Food and Agriculture; Animal Health and Food Safety Services; Proposed Regulations; Animal Confinement; Proposed Modified Text; December 2, 2021.

Dear Dr. Cox:

The North American Meat Institute (NAMI or the Meat Institute) submits these comments regarding the Modified Proposed Regulatory Text (modified rules) as provided on the California Department of Food & Agriculture (CDFA or the agency) Proposition 12 (Prop 12 or the law) website on December 2, 2021. The Meat Institute is the nation’s oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat and poultry products. NAMI member companies account for more than 95 percent of the United States’ output of these products. Many NAMI members sell pork and veal to customers in California and several NAMI members own and raise hogs and veal calves in various states across the country. For those reasons the Meat Institute has a substantial interest in how CDFA implements Proposition 12.

Several changes in the modified rules are to be applauded because they account for the complexities in the supply chain or they bring the proposal more in line with the law. Unfortunately, many parts of the May 2021 proposed rules remain intact; flaws NAMI identified in its July comments and during the August public hearing that still need to be addressed.

The Proposed Time Extensions are Necessary and Should be Broadened

The agency’s proposed extension of the timetable for self-certification recognizes the complexities in the supply chain, particularly in the midst of a pandemic. But the proposed extensions do not go far enough. For example, the proposal to allow pork distributors to self-certify before January 1, 2024, does not

adequately address the severe limitations in pork producer and distributor access to accredited certifying agencies or the logistical limitations in having a third party on site at facilities created by COVID-19 circumstances or other biosecurity reasons. The complexity of the requirements for certifying agents alone is likely to hinder the number of agents that ultimately seek accreditation to be a certifying agent with CDFA. But, even if enough agents pursue accreditation, the process to become a certifying agent and mechanisms of accreditation are complex, time consuming, and resource intensive. It will take a significant period of time for both in-state and out-of-state distributors to acquire third-party certifications. The regulations should therefore be amended to provide a sufficient time for ramp up of third-party certification processes; at the least until January 1, 2025.

CDFA should provide a mechanism to allow pork distributor and producer certification if ongoing COVID-19 disruptions prevent third party agencies from being on-site for an inspection or record audit required for certification. For example, the regulations should allow for remotely conducted site inspections (1) in the event of travel bans caused by COVID-19, (2) to prevent animal disease transmission, or (3) similar circumstances. Extending the period for self-certifications to January 1, 2025, would also address some of the logistical challenges likely to be posed by the ongoing pandemic.

The above is just one example of why more time is needed. Until CDFA publishes final rules, no one can adequately prepare to comply with a law with criminal sanctions and that authorizes civil litigation. Rather than apply “band aids” to address some challenges, NAMI suggests CDFA go further and afford everyone in the supply chain, from hog producers all the way to foodservice and retail entities, the 28-month preparation time the law, and the voters, contemplated before enforcing any aspect of Prop 12 or its regulations.¹

Some Proposed Modifications Provide Clarity and Assist Compliance.

NAMI applauds the agency for some of the proposed modifications. The modified proposal reinforces the concept that sales at a federally inspected establishment, where the buyer physically possesses the product at the establishment, would be exempt. And by deleting several terms, *i.e.*, “offer for sale,” “expose for sale,” and “possesses for sale” from the definition of “commercial sale” the agency brings the proposal more in line with the law and clarifies that a sale

¹ Failing a 28-month extension of enforcement CDFA should affirmatively state on its website, and as soon as possible and in a final rule, that whole pork meat in the supply chain before January 1, 2022, and whole pork meat derived from hogs born before that date are not subject to Prop 12. Put simply, CDFA, in a more public facing manner, needs to reinforce the policy the agency articulated in its March 2, 2021, [Frequently Asked Questions](#) document, expressed in the question 7’s answer, “Per the Proposition 12 statutes, the definition of ‘confined in a cruel manner’ changes at the end of the day on December 31, 2021 for breeding pigs. Therefore, covered product and animals in inventory would be considered compliant if born before this effective date.”

must occur for there to be a violation. Similarly, NAMI commends CDFA for clarifying that sales made directly to federal agencies, made on federal lands, or made on tribal lands are not subject to Prop 12, *e.g.*, products sold directly to the United States Department of Agriculture under the National School Lunch Program would be exempt. CDFA should go the next step, however, and make clear that purchases subsidized through funds provided by the federal government – particularly, for money given to any school, university or institution – also are exempt.

Likewise, several modifications to the language on shipping documents were changed and made simpler, *e.g.*, for whole pork meat “Pork CA Prop 12 Compliant” and for products not intended for sale in California, *e.g.*, “For Export,” “For Transshipment,” and “Not Prop 12 Compliant.” This updated language needs clarification because it could be interpreted to mean that “Not Prop 12 Compliant” could be used for any of these sales. Alternatively, a manufacturer could use the more specific language as appropriate (*i.e.* “For Export” or “For Transshipment”). Additional clarification would be helpful. The agency failed, however, to address the overly burdensome requirement to include these declarations on all shipping documents and the problems it would create regarding products to be processed at a federally inspected establishment.

The modified proposal removes the January 1, 2022, shipping documentation requirement date, as the regulations will not be implemented by this date. However, CDFA is silent on a different effective date. CDFA should provide a new effective date.

The modified proposal’s insistence that product going to a federally inspected establishment bear the statement “Only for use at [identify the establishment number]” and include the prefix “G” or “M” is problematic because CDFA continues to ignore that product originally going to one federally inspected establishment occasionally may be diverted to another federally inspected establishment or be shipped through a distributor, broker, or via less-than-truckload (LTL) shipments where the products are shipped to multiple establishments. Prop 12 is not applicable at any federally inspected establishment and the wording should be changed to read “Only for use at a federally inspected establishment” or something similar. Additionally, “Not Prop 12 Compliant” should be an option for these sales. And as NAMI demonstrated in its earlier comments, requiring inclusion of the “M” as part of the establishment number is problematic because establishments’ marks of inspection do not include “M.” Indeed, the marks required by 9 CFR 312.2 do not include “M.”²

² 9 CFR 312.2

The Modified Proposal Does not Address Serious Deficiencies in the May 2021 Proposal.

NAMI submits these comments that address serious deficiencies not addressed in the modified proposal.

Articles 2 and 3 Comments

Definitions

The definition of “audit trail” would impose onerous requirements, especially on distributors. Requiring a distributor to have documents regarding “the identification, source, supplier, transfer of ownership, transportation, storage, segregation, handling, packaging, distribution” is overly broad. Distributors can be several steps removed from where calves are raised or breeding pigs (sows) are housed. Section 25993.1 of the law provides:

It shall be a defense to any action to enforce subdivision (b) of Section 25990 that a business owner or operator relied in good faith upon a written certification by the supplier that the whole veal meat, whole pork meat, shell egg, or liquid eggs at issue was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner.

This same approach should be applied throughout the supply chain. For example, a distributor should be required to have information from its supplier that the product offered is Prop 12 compliant. That distributor should not be required to have on file the names, addresses, *etc.* of the hog or veal calf producers who supplied hogs or calves to a packer. Nor should a distributor have to keep records showing how the packer who harvests the hogs segregates the carcasses (if necessary), transports the pork, *etc.* It should be sufficient for a supplier to certify the animal or product it is providing is Prop 12 compliant.

The modified proposal does not adequately address the extent to which the audit trail effectively imposes information collection and recordkeeping obligations on distributors that are federally-regulated facilities. Many federally-regulated facilities sit in the middle of the supply chain and maintaining an unbroken audit trail from producer to end user will require the collection and transfer of sufficient data through those facilities. Although the modified proposal exempts federally-regulated facilities from its recordkeeping obligations, it provides no similar exemption for such facilities’ customers or other downstream parties in the supply chain. In fact, it places the burden on obtaining sufficient records and information from federally-regulated facilities on those facilities’ counterparties. This amounts to a *de facto* information collection and recordkeeping obligation on federally-

regulated facilities, and such indirect regulation of federally-regulated facilities implicates the same preemption concerns that led CDFA to exempt those facilities from most of Prop 12's administrative obligations. CDFA should revise and clarify the Prop 12 audit trail requirements to ensure they do not create an excessive administrative burden on federally-regulated facilities.

The definition of "commercial sale" is overly broad. Section 25991(o) of the law provides that a "commercial sale" excludes any "sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 et seq.)" The law also provides "[F]or purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990." (Emphasis added)

Although CDFA addressed some infirmities in the initial proposal, the modified proposed "commercial sale" definition still would include products further processed or simply repacked before being sold to an out of state or out of country customer. This approach should be abandoned. It is inconsistent with the law and it is bad policy. CDFA concedes Prop 12 will raise the cost of products subject to the law, which Californians agreed to endure when enacting the law. For CDFA to impose those additional cost burdens on citizens in other states, however, is unacceptable and impermissible. Whatever the merits of the purported justifications for Prop 12, the food safety and animal welfare issues do not apply to products received into California, further processed or just repackaged, and then sent to another state, *e.g.*, Nevada. Prop 12 should not apply to those products.

The proposed "commercial sale" definition also should highlight that pork shipped to a federally inspected establishment in California and subsequently shipped out of state or out of the country is not subject to Prop 12. The proposed rule also should be broadened to capture facilities with voluntary inspection provided by the Food Safety and Inspection Service (FSIS).

CDFA's decision to exempt sales to federal agencies, on federal lands, or on tribal lands is sound. The agency should expand the exemption to any school, university, or institution. The state has acknowledged Prop 12 will cause prices of covered products to rise. It is bad enough that individual consumers will bear those costs, but schools, governments, prisons, *etc.* should not be so encumbered.

CDFA should add in the "Document of title" definition the words "but are not limited to" after the word "include" in the examples sentence to help ensure certifying agents know the list provided is not all inclusive.

The definition of "takes physical possession" also should be updated to clarify that, regarding sales taking place outside California and for which the seller does not arrange delivery to California, taking physical possession will be the state

where the buyer or its agent first physically possesses the product. Otherwise, FOB origin shipments outside California (when a seller often has no knowledge of where the product is destined) could be classified as a commercial sale into California by a seller. Such an overreach is beyond California's ability to regulate and must be amended.

Although CDFA clarified several definitions, it failed provide clarity on the definition of "whole pork," which includes exemptions, such as ready-to-eat and ground and comminuted products. As drafted, however, the modified proposal does not expressly exclude several products that should be exempt from the definition of whole pork, such as trim and sausage products. CDFA should provide greater clarity as to what products are excluded from the definition of whole pork meat, and include an express provision excluding trim and sausage products from the definition.

Distributor Registration.

CDFA should reconsider the distributor registration section given the burdens it would place on distributors. Requiring annual certification will overload the certification system. Annual certification is unnecessary given CDFA would require distributors to provide the agency with "any change in ownership, business name, business location, business closure, or change in contact information of a registered facility must be reported to the agency within 30 business days of such change."³

Distributor Recordkeeping

The distributor recordkeeping requirements could prove exceptionally problematic. It is one thing for a distributor to keep records showing its supplier, *i.e.*, a packer or another distributor, provided evidence the product was Prop 12 compliant. It is another matter altogether, and would be exceptionally burdensome, to require the distributor to have records proving all the way back to the veal calf or hog producer the product is Prop 12 compliant. These products may exchange hands several times before landing with a distributor. Requiring the distributor to have all the records, which would have to travel with the product, would be problematic and jeopardize the confidentiality of business transactions throughout the supply chain.

CDFA should also reconsider the two-year recordkeeping requirement. Notwithstanding what was said during the days leading to the vote in 2018, Prop 12 is unrelated to food safety. As CDFA knows, all veal and pork consumed in California is subject to federal inspection. No one has suggested that, should product be found noncompliant with Prop 12, it should be subject to recall or market

³ Statement of Reasons at 48.

withdrawal. A one-year recordkeeping requirement is more than sufficient to determine compliance. For example, the Agricultural Marketing Service requires records be kept for one year for mandatory country-of-origin labeling.⁴

Inspection of Conveyances.

The several elements of the inspection conveyance section reflect regulatory overreach not authorized by the law. Section 25991(o) provides “[F]or purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990.”⁵ It is inappropriate for the state to assert it has the authority to stop a truck, inspect paperwork and maybe even the cargo on the side of the road, and then deny entry or divert a truck absent a sale in California.

If no sale has occurred, there can be no violation of the law, and absent a violation, the state cannot justify stopping the truck, denying entry, forcing diversion, *etc.* The proposed provisions are inappropriate because there is no threat to the public health or welfare from the covered products. Enforcement should occur where the buyer takes possession, not at the state line. And the Statement of Reasons (Statement) offers no statutory support for the state’s assertion that inspection of cargo and ultimately even diversion of the truck. The law offers remedies to the state if there is evidence of a violation.

Ironically, although a purported justification for enacting Prop 12 was food safety, the proposed articles, if adopted, could jeopardize food safety. Cargo inspections conducted to verify compliance with a paperwork requirement jeopardize several federal requirements (*e.g.*, the FSIS HACCP/Pathogen Reduction Rule, FSMA Sanitary Transport Rule, and FSMA Intentional Adulteration Rule). Products subject to Prop 12 are refrigerated during transport. Opening refrigerated containers on the side of the road in a California summer, or winter, is an unacceptable food safety practice that could cause product spoilage or bacterial growth. More practically, containers may be sealed as part of the chain of custody and to prevent intentional adulteration, and these seals are often required by FSIS (and FDA). California officials would need to be trained in how to maintain the chain of custody and carry seals to reseal containers to prevent loads from being rejected by receivers.

The proposal also ignores the challenges associated with truck drivers likely not being well versed regarding Prop 12 requirements. Given the pressures associated with on-time delivery and complying with federal Department of Transportation rules for drive time, CDFR should reconsider these sections.

⁴ 7 CFR 65.500(e)(4).

⁵ Section 25990(o) (Emphasis added).

Tagging and Seizure of Meat

These sections would allow a warning tag or notice to be applied to documents or containers of pork and veal “produced, packaged, stored, labeled, marked, identified, transported, delivered, or sold in violation” of Prop 12. Similarly, CDFA would allow enforcing officials to “seize and hold any containers, sub-containers, lots or loads” they “have reasonable suspicion to believe is in violation of the provisions of sections 25990-25992 of the Health and Safety Code, or the provisions of this Article.”⁶ Prop 12, however, does not authorize CDFA to take these proposed actions. The words “seizure,” “tag,” and “detain” are not found in Prop 12’s text. The remedies available for violating the law are the criminal penalties the state may pursue and the civil relief available to entities put at a competitive disadvantage. In short, the law does not authorize CDFA to take the actions in sections 1321/2.7 or 1321/2.6 and those sections should be removed.

Written Certification.

These sections would be overly burdensome on retailers and other suppliers.⁷

Denial, Suspension, or Revocation of Distributor Registration.

This proposed section also results in overreach because it would allow denial, suspension, or revocation of a distributor registration for violating a regulation that could have resulted in the sale of non-compliant product. Such a draconian action should, at minimum, be reserved for when a violation is proven to have occurred.

Article 4. Confinement Standards Exceptions.

An exception needs to be added to allow sows to be housed in non-compliant enclosures during periods of emergency. For example, flooding could occur forcing a producer to move sows to enclosures on higher ground and these enclosures may not meet Prop 12’s requirements. It is not always possible to obtain a veterinarian’s recommendation prior to such movement. Given the law’s purported purpose, enhancing animal welfare, this should be a common-sense exception.

Article 5. Certification and Accredited Certifiers.

Article 5 would create a bureaucratic morass that will result in less pork and veal being shipped to California; by increasing prices Californians must pay for those goods. The burdens attendant to the recordkeeping requirements and onsite inspection, coupled with the annual renewal component, will drive producers away from supplying Prop 12 compliant livestock. And the labyrinthian process one

⁶ Section 1321.7 and Section 1322.7

⁷ See discussion about audit trail, p. 2-3.

would have to go through to become accredited to certify producer operations and distributors will be a significant disincentive and to the extent it is not, it will result in those entities that get accredited charging exorbitant fees when providing certification services.

Recordkeeping by Certified Operations.

Not addressed in the modified proposal is whether a distributor must (1) have documents from its supplier asserting the products provided are Prop 12 compliant records or (2) have records from every participant through the supply chain showing the product is compliant, including the name of the veal calf or hog producer. The former approach allows the certifying or enforcement entity to contact the distributor's supplier to confirm compliance and follows the law. The latter approach, requiring onsite documents regarding "the identification, source, supplier, transfer of ownership, transportation, storage, segregation, handling, packaging, distribution, and sale of covered products" would place an enormous recordkeeping burden on a distributor. That the section would require these documents be kept for two years only worsens the burden.

Subsection 1326.2(b)(5) would require a distributor to have records for the "preceding two-year period pertaining to the production, processing, handling, packaging, storage, transportation, or sale of covered animals or covered products sold, intended for sale in California or identified or represented as compliant with the confinement requirements of the Act and this Chapter." It is unclear how CDFA expects a distributor to have information about many of these activities, *e.g.*, pork production, processing, or packaging. For example, how would a warehouse or distribution center have access to documents about production and processing that occurred at a federally inspected slaughter establishment or further processing facility? Also unclear, and the Statement does not explain, what CDFA means by production or processing (for example) and why CDFA or a certifying entity needs to see documents about production or processing.

On-site Inspections.

Whether certification is required by January 1, 2023 or 2024, with almost 20,000 distributors and producers to be certified, section 1326.5's will create a never-ending cycle that prevents timely certification. That section states that "[A]n on-site inspection must be conducted at least once every 12 months thereafter for each certified operation that produces or distributes covered animals or covered products for the purpose of determining whether to approve the request for certification or whether certification of the operation should continue." For this reason alone certification renewal should be required not more than every three years.

On-site inspections of each production unit would be difficult, if not impossible, for many swine operations. Setting aside cost considerations (certifying entities will charge, and charge dearly, for services), CDFA undoubtedly knows the biosecurity concerns and challenges facing the hog industry. Porcine Reproductive and Respiratory Syndrome pose a significant threat to pork production units; foreign animal diseases, such as African Swine Fever, are also serious threats. The proposal's allowance for inspections, "announced and unannounced" would create significant biosecurity problems for producers who wish to be certified. For biosecurity reasons, an individual person working for a certifying agent and conducting an on-site inspection generally cannot visit an operation more than once every five days. Simple math shows the administrative burden and logistics associated with proposed annual inspection is impractical and infeasible. Unannounced visits also create the possibility that the necessary personnel are not on site to ensure an inspection can be properly conducted.

The irony is, annual recertification is unnecessary because compliance is largely a function of facility design. As the industry has made abundantly clear, redesigning facilities is costly and time consuming. It is unnecessary for a certifying entity to make an annual trek to each production location. Given the absence of a legitimate food safety or public health concern, CDFA should require on site visits far less frequently, *e.g.*, every five years.⁸

Rather than require annual on-site inspections it would be more efficient for the agency to require certified entities to advise the certifying agent of any noteworthy changes. Such an approach facilitates the process, saving certified entities and CDFA resources.

General Requirements for Accredited Certifying Agents.

That private entities, indeed all entities, that wish to be accredited need to be qualified for that role is understood. However, the number of accredited entities and what they must do to become accredited could become a chokepoint for products entering the state. If the number of accredited entities is limited, the cost of their services will rise – costs ultimately borne by California consumers. The fewer the number of accredited entities, the longer the wait for hog and veal calf operations to become certified and the more problematic recertification becomes should CDFA insist on annual certification.

⁸ Indeed, FDA inspects production facilities subject to its jurisdiction for food safety purposes on average every 7-10 years. Requiring annual recertification is simply setting up everyone, including CDFA, for failure.

Section 1326.10(a)(1) requires a private certifying entity to have “sufficient expertise” but there is no discussion in the Statement as to what term means. That requirement is repeated in 1326.13, again without explanation. “Sufficient expertise” will likely be a difficult requirement to meet because Prop 12 introduces new standards not previously implemented or evaluated.

Applicant Information for Accreditation as a Certifying Agent

A significant problem with the proposed rules is the extensive information a certifying agent would have to provide. It is understandable that CDFFA needs information such as the certifying agent’s business name, primary office location, mailing address, *etc.* Unclear is why CDFFA needs to know a lot of the other information required, *e.g.*, the names of people responsible for a certifying agent's day-to-day operations, an applicant's fee schedule for services provided, and “documentation showing the entity's status and organizational purpose, such as Articles of incorporation and by-laws or ownership or membership provisions, and its date of establishment.”

The more onerous the agency makes the application process, the fewer the number of entities willing to become a certifying agent; and the fewer the number of those agents, the more difficult it will be to get distributors and producer operations certified. CDFFA needs to make the accreditation process simpler to encourage more companies to apply.

Evidence of Expertise and Ability

Section 1326.13 highlights why some entities may choose not to be accredited. The provision in section 1326.13(a) that would require a certifying entity to provide the names of all auditors and similar employees, *etc.* is unduly burdensome and does not recognize the ebb and flow of the workforce. Employees come and go and the provision will impose administrative costs on the certifying entity, then the operations, and ultimately the consumer. Likewise, section 1326.13(d) would require a certifying agent candidate to provide evidence of other certifying activities. Given the “uniqueness” of Prop 12’s requirements, other certifying activities a candidate conducts are likely irrelevant to its ability to operate under Prop 12.

On-site Evaluations

Section 1326.16’s requirement that CDFFA representatives conduct site evaluations of accredited certifying agents is inexplicable and will become another chokepoint that keeps covered products out of the state. It is difficult to imagine CDFFA has the staff to review all the paperwork required of a candidate for accreditation, or one already accredited, much less staff who can travel throughout

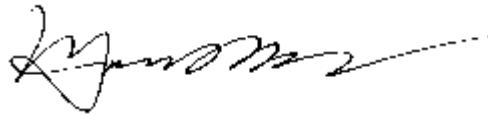
the country, or to other countries, to perform an onsite evaluation of proposed certifying agents. The on-site evaluation requirement also presents a problem, because officials may not travel to certain locations given the state's travel restrictions to certain states. For example, can CDFA officials travel to Texas to conduct a site evaluation for a certification candidate or one already accredited? If not, how can a potential certifying organization in those states become accredited?

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The Meat Institute appreciates the opportunity to submit these comments. NAMI repeats its request that CDFA postpone implementing Prop 12 until at least 28 months after final rules are published to ensure conversations and a common understanding among the agency, the industry, and consumers about the law's economic impact and the alleged rationales underlying Prop 12.

Please contact me if you have questions about this request or anything else regarding this matter. Thank you for your consideration.

Respectfully submitted,



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