



March 23, 2012

Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
Patriots Plaza 3
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Room 8-163A
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Re: Docket No. FSIS-2009-0026; *Electronic Export Application and Certification Charge; Flexibility in the Requirements for Export Inspection Marks, Devices, and Certificates; Egg Products Export Certification; Proposed Rule; 77 Fed. Reg. 3159 (January 23, 2012).*

The American Meat Institute (AMI) submits these comments regarding the Food Safety and Inspection Service's (FSIS or the agency) above-referenced proposed rule, *Electronic Export Application and Certification Charge; Flexibility in the Requirements for Export Inspection Marks, Devices, and Certificates; Egg Products Export Certification, 77 Fed. Reg. 3159 (Jan. 23, 2012)*. AMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. AMI member companies account for more than 95 percent of United States' output of these products. Moreover, AMI member companies export meat and poultry products and utilize the export application process every day. Accordingly, the proposed rule will have a significant impact on AMI member companies.

Although the proposed rule would eliminate certain regulatory requirements, thereby streamlining and harmonizing a somewhat cumbersome process affecting meat and poultry exports, it also seeks to assess a user fee for entities that wish to use the soon to be developed electronic export application and certification system that will be a component of the agency's Public Health Information System (PHIS). AMI objects to the proposed fee for several reasons, but primarily because assessing such a fee conflicts with the provisions of the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) (hereinafter the Acts). A more detailed discussion of AMI's objections to the proposed fee follows.

The Proposed User Fee Conflicts with the Acts' Provisions that the Cost of Inspection be Borne by the Federal Government, as well as the Relevant Regulations.

On its face, the proposed rule would assess a user fee to every inspected establishment, and others, that chooses to utilize the “new” electronic export certificate system that FSIS is developing. This, the agency may not do.

The FMIA provides that:

The cost of inspection rendered on and after July 1, 1948, under the requirements of laws relating to Federal inspection of meat and meat food products shall be borne by the United States except the cost of overtime pursuant to section 394 of title 7. (Emphasis added)¹

Likewise, the PPIA provides that:

The cost of inspection rendered under the requirements of this chapter, shall be borne by the United States, except that the cost of overtime and holiday work performed in establishments subject to the provisions of this chapter at such rates as the Secretary may determine shall be borne by such establishments. (Emphasis added)²

In short, both Acts explicitly provide that, unless overtime is involved, the cost of inspection must be borne by the United States.

That requiring and providing export certificates is part of inspection is evident from the Acts' statutory and regulatory language. For example, the FMIA has specific provisions pertaining to: (1) inspecting meat products intended and offered for export (§615); (2) providing an official certificate stating the condition of the meat inspected (§616); (3) generally prohibiting meat products from leaving port without such a certificate being issued (§617); and (4) designating where the official certificates should be delivered (§618).³

¹ 21 U.S.C. §695.

² 21 U.S.C. §468.

³ See 21 U.S.C. §§ 615-618. Indeed, Title I of the FMIA is identified as *Inspection Requirements; Adulteration and Misbranding*.

Moreover, FSIS has longstanding regulations that discuss in even greater detail the requirements and duties attendant to exporting meat and poultry. In that regard, 9 CFR §322.2(a), *Export certificates; instructions concerning issuance*, addresses the exporter's application for a certificate and authorizes the inspector-in-charge "to issue official export certificates for shipments of inspected and passed product to any foreign country." Subsection (b) includes the specifications for issuing certificates, while other subsections of section 322 address other details -- e.g., subsection (c), only one certificate shall be issued for each consignment, and subsection (d), identifying who receives the original certificate. Likewise, section 322.4, *Clearance of vessels and transportation without certificate prohibited; exceptions*, prohibits exporting meat products "unless and until an official export certificate covering the same has been issued and delivered as provided in this part; ..." (Emphasis added)⁴

Given the statutory and regulatory language cited above, absent overtime circumstances, the United States is required to bear the cost of inspection, which includes applying for and issuing export certificates.

That FSIS is attempting to charge a fee for inspection, however, cannot be disputed in that the formula the agency proposes to calculate the annual per application fee cites, among other elements, direct inspection labor costs. Specifically, the proposed formula includes

The labor costs (*i.e.*, direct inspection labor cost for inspection personnel + technical support provided to users of the export component + export library maintenance), + the Information Technology (IT) costs (*i.e.*, on-going operations + maintenance of the system cost + authentication cost), divided by the number of export applications⁵

Indeed, in discussing the proposed fee for 2012, FSIS cites "the direct inspection personnel labor costs at the 2012 basetime rate (\$54.24/hour), at an estimated 15 minutes (\$54.24/4 or \$13.56) per application."⁶ The agency does not even attempt to assert that this charge relates to overtime, citing the basetime rate only. In short, contrary to the plain language of the Acts, FSIS proposes to charge a fee for inspection. This, the agency may not do.

⁴ 9 CFR §322.4. Export regulations for poultry can be found at 9 CFR §§381.104-107.

⁵ 77 *Fed. Reg.* 3161-3162. (Emphasis added.)

⁶ *Id.* at 3162. (Emphasis added.)

Not only is FSIS prohibited from charging for the “direct inspection labor cost for inspection personnel,” it also may not seek to recover the cost associated with the other elements of the formula because they are necessary for inspection. Just as FSIS may not recover the costs associated with “technical support” or IT costs (e.g. the cost of laptops, desktops, *etc.*) associated with supporting thousands of inspectors, compliance personnel, and supervisors, FSIS also may not single out the costs attendant to the export system.⁷

The Preamble Contains Admissions that the Proposed Fee is Contrary to Law.

In the preamble FSIS asserts that “when exporters request certification that is in addition to the basic export certification of wholesomeness required by regulation, FSIS charges and collects fees from exporters that request this service.”⁸ FSIS also asserts that the PHIS export component will provide “new” service options to exporters, enabling them to “electronically submit, track, and manage their export applications and certificates.” Apparently, the agency is asserting that offering exporters the chance to “submit, track, and manage” export certificates electronically moves the program outside the agency’s duties and obligations and is akin to the additional services it provides pursuant to 9 CFR Part 350.

This conclusion is wrong for several reasons. First, as discussed above and as FSIS admits, the fee is intended to allow FSIS to recover “the Agency’s costs for providing the electronic export application and certification service” and that the fee “is for application for the basic export certificate.”⁹ Even the most cursory review of the formula FSIS proposes demonstrates that the proposed fee will cover costs that are related to inspection. Indeed, components of the formula include direct inspection labor cost for inspection personnel, the technical support provided to users of the export component, export library maintenance, as well as the information technology attendant to the new system. With the exception of the new electronic system, all of those costs are properly covered today by FSIS. In short, under no rational interpretation of the formula can FSIS contend it is not assessing a fee for inspection, which the Acts prohibit.¹⁰

⁷ For example, FSIS has not proposed to charge plants regarding their access to other elements of the PHIS system, e.g. the ability to respond to non-compliance records electronically. Nor does FSIS charge plants for the support and maintenance of the AskFSIS system. The agency does not charge for these because it cannot by law.

⁸ *Id.* at 3161. (Emphasis added.)

⁹ *Id.* Additional certifications imposed by an importing foreign country will be charged as a certification service, as is currently provided for in the regulations. (Emphasis added.)

¹⁰ See the *Export Requirements for Meat, Poultry, and processed Egg Products* page on the FSIS website, http://www.fsis.usda.gov/Regulations_&_Policies/Index_of_Import_Requirements_by_Country/index.asp

Second, the FSIS proposal to assess a fee for the export application fails based on the agency's own admissions in the preamble. Specifically, in the preamble FSIS states that it currently charges exporters who "request certification that is in addition to the basic export certification of wholesomeness required by regulation."¹¹ However, because this charge will apply to all applications it is not triggered by a request for additional certification to meet a requirement imposed by an importing foreign country. Indeed, the agency admits that fact only two paragraphs later, when it states that "[T]he proposed fee is for application for the basic export certificate."¹² Thus, it is clear that the proposed fee is not for the additional services that certain countries might require. Indeed, the agency follows that statement with another admission that those additional services are different from what the proposed user fee will cover: "[A]ny additional certifications that are imposed by the importing foreign country will be charged as a certification service."¹³

Third, the agency admits that the fee would only be assessed to those who utilize the electronic system. Companies that elect to continue using the "paper based" system that has been in effect for many years would not be assessed a fee unless 9 CFR 350.3(b) is triggered.¹⁴ That is, FSIS is proposing to charge Company X a fee of \$27.91 if it chooses to export a product to Canada using the new electronic system but FSIS would not assess a fee of \$27.91 on Company Y, which produces and intends to export the same amount of the same product to Canada because Company Y elects to use the "traditional" paper based certificate system.

In that regard, the agency ignores the plain language of section 350.3(b), which provides that at "the request of a purchaser, supplier, exporter, or others, inspectors may make certification regarding livestock products for human food purposes (including casings), to be exported, as meeting conditions or standards that are not imposed or are in addition to those imposed by the regulations in parts 301 through 331 of this chapter and the laws under which such regulations were issued" (Emphasis added). That is, the proposal wrongly attempts to lump together the services contemplated by section 350.3(b) and the export requirements set forth in Part 322.

¹¹ 77 *Fed. Reg.* at 3161. (Emphasis added.)

¹² *Id.* (Emphasis added.)

¹³ *Id.*

¹⁴ 9 CFR 350.3(b) allows FSIS to charge a fee if an inspector makes a "certification regarding livestock products for human food purposes (including casings), to be exported, [that meet] conditions or standards that are not imposed or are in addition to those imposed by the regulations in parts 301 through 331 of this chapter and the laws under which such regulations were issued."

Indeed, according to FSIS nothing more than submission of the application is necessary to trigger assessment of the fee. Given these facts, FSIS cannot rely on a theory that in some way the use of the electronic system is beyond that necessary to fulfill the requirements found in part 322.

The Proposal Inappropriately Relies on the Agricultural Marketing Act to Assess a Fee.

FSIS attempts to obfuscate the issue by citing the Agricultural Marketing Act (AMA) and the fees it collects under the limited circumstances provided in 9 CFR Part 350. The agency seemingly tries to justify the proposed fee because, according to agency, the export component will “provide new service options to exporters enabling them to electronically submit, track, and manage their export applications and certificates.”¹⁵ However, any contention that the ability of exporters to track and manage their certificates can be assessed a fee fails for several reasons.

First, the agency incorrectly asserts that it may assess a fee because the electronic system will be a service that FSIS will provide to exporters to allow them to “submit, track, and manage export applications and certificates more efficiently and effectively than is possible under the current system.”¹⁶ The agency ignores the fact that 9 CFR 350.3(b) is limited. Specifically, that regulation provides that

inspectors may make certification regarding livestock products for human food purposes (including casings), to be exported, as meeting conditions or standards that are not imposed or are in addition to those imposed by the regulations in parts 301 through 331 of this chapter and the laws under which such regulations were issued.¹⁷

That is, the agency may collect a fee for a certification that pertains to a livestock product being exported and the certification is that the product meets a condition or standard not imposed by the FMIA.¹⁸ Here, in contrast, FSIS is attempting to assess a fee for what it considers to be a service that allows exporters to track and manage documents. Even if the electronic system is a service, it is not one within the scope of 9 CFR 350.3(b) and therefore FSIS may not assess a fee for its use.

¹⁵ 77 *Fed. Reg.* at 3159.

¹⁶ 77 *Fed. Reg.* at 3159.

¹⁷ 9 CFR 350.3(b)

¹⁸ Similar language applies to poultry in 9 CFR 362.2(b).

Second, that this new “service” will allow exporters to track certificates electronically does not mean that it something “additional,” as contemplated in the fee for service regulations. Indeed, FSIS admits that the charge is assessed for the same service that FSIS provides in the paper based system -- “[T]he proposed fee is for application for the basic export certificate.”¹⁹ As such, this new found “ability” for exporters is not one that is imposed and is in addition to the requirements of the FMIA and its regulations.

Third, the novel concept advanced by FSIS that it may charge a fee for allowing companies to track and manage information if done electronically flies in the face of the agency’s practices and procedures with respect to other elements of PHIS, e.g., companies are not assessed a fee, nor should they be, because PHIS affords them the ability to manage and respond to non-compliance records electronically.

Finally, assessing a fee in this circumstance ignores the fact that not only will benefits flow to the industry but to the agency as well. Indeed, the agency acknowledged that fact in its discussion of the expected benefits of the proposed rule:

“The proposed electronic export application and certification system, is expected to reduce the exporter and inspection personnel workload and paperwork burden by eliminating the physical handling and processing of applications and certificates. ... The PHIS export component facilitates the electronic government-to-government exchange of export applications and certifications, which will assist in the resolution of allegations of fraudulent transactions, such as false alterations and reproductions. The PHIS is designed to ensure authenticity, integrity, and confidentiality.”²⁰

The Electronic PHIS System must be Compatible with Industry Needs

It is critical that, as FSIS develops the electronic system, the agency work closely with exporters to ensure that the system is compatible with industry needs. Such a system needs to ensure that it requires minimal manual input. In effect, FSIS needs to develop a system that has “computer-to-computer” application. FSIS cannot create a system requires exporters to manually rekey all required shipping details to get the required documents issued. Accordingly, FSIS needs to work closely with exporters as this system is created.

¹⁹ *Id.* (Emphasis added.)

²⁰ *Id.* at 3163

The Proposal would make Several Changes that Streamline and Improve the Export Regulations

Many of the current regulations have not been updated for quite some time and several of the proposed amendments would streamline the meat and poultry regulations and better reflect the current and future business practices. In that regard, AMI favors the following proposed changes to the meat and poultry regulations:

- Deleting the phrase “upon request” in the poultry regulations;
- Deleting certain specific certificate requirements, *e.g.*, signature by a program employee and bearing a letterhead and the USDA official seal;
- Deleting references to “triplicate” and “duplicate” forms and allowing “copies” of the export certificate to be distributed to the required parties and to accompany the product;
- Deleting provisions that require filing a copy of the export certificate with Customs within four (4) business days of the clearance of the vessel at the time of filing the complete manifest;
- Making parallel the meat and poultry export regulations, to the extent possible; and
- Allowing exporters to mark product containers with a unique identifier that must link the product to the export certificate issued by inspection personnel.

Additional Changes Would Improve the Export Process.

FSIS should consider additional changes to the export process. In that regard, the agency should consider providing greater flexibility with respect to export stamping. Requiring facilities to place export stamps on every single case of product that ships overseas is quite costly and has little practical value. For example, in one location the annual costs to stamp each case in a processing plant amounted to approximately \$657,000. When extrapolated across the entire industry millions of dollars could be saved annually each year without this costly exercise.

In the proposal FSIS suggests a change that will allow for the use of "either a mark that contains a unique identifier that corresponds to the export certificate or an official mark with the" export stamp. The corresponding sections, §322.1 and §381.105, refer to marking “the outside container of any inspected and passed product for export....with an export inspection mark...” The FSIS proposal to amend certain regulations offers an excellent opportunity to provide an option for whole pallet stamping as opposed to stamping every container on a pallet. The individual

cases could be alternatively identified with the "unique identifier that corresponds to the export certificate" on which the unique identifier (*i.e.*, lot number or similar production identification) could be referenced. Under such a system, the export stamp would still accompany the shipment and each case in the shipment would be properly identified on the export certificate, which would maintain shipment integrity and traceability, as appropriate. This change would streamline immeasurably the export preparation process and save millions of dollars, helping to make U.S. meat and poultry products more competitive in the export market.

Summary

Because the Acts impose certain requirements for export and provide that the "cost of inspection ... under the requirements of laws relating to Federal inspection of meat [poultry] and meat food [poultry] products shall be borne by the United States," the agency may not assess a user fee on those who obtain export certificates through the use of the electronic system.

Thank you for providing this opportunity to submit comments regarding this important matter. I would be happy to discuss in more detail these comments and AMI's position regarding same.

Respectfully submitted,



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