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June 24, 2011

Dr. Elisabeth Hagan
Under Secretary
Food Safety and Inspection Service
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250-3700.

Submitted via www.regulations.gov

Re: Docket Number: FSIS-2008-0031 – “Mandatory Inspection of Catfish and Catfish Products”

Dear Dr. Hagan:

In response to the Federal Register Notice of February 24, 2011, please find below the comments of the Retail Industry Leaders Association (RILA) in response to the Department of Agriculture’s Proposed Rule regarding the mandatory inspection of catfish and catfish products. While RILA commends the Food Safety and Inspection Service (FSIS) for its efforts in preparing the Proposed Rule, RILA has significant concerns that this rule would reduce the available supply of catfish and other whitefish, drive up prices for American seafood consumers, and lead to additional efforts to expand FSIS jurisdiction over seafood that is currently regulated by the Food and Drug Administration. RILA therefore urges adoption of the narrowest possible rule in these circumstances.

RILA is the trade association of the world’s largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA proudly represents nine of the top ten U.S. retailers and six of the top ten American importers. RILA members provide affordable goods and services to millions of American consumers every year. To be successful, RILA member companies must be able to capitalize on efficient and comprehensive supply chains that include suppliers in America and around the world who can provide produce high-quality products at affordable prices, nimbly adjust sourcing policies, and take other steps to be continuously responsive to consumer demand.

It is in that context that the FSIS rule is of concern to RILA. The Proposed Rule would implement Section 11016 of the 2008 Farm Bill by creating a system of continuous inspection for “catfish,” as defined by the Department of Agriculture (USDA).¹ That system would apply directly to domestic producers and indirectly, through the existing FSIS “equivalence” system, to foreign producers. The Proposed Rule states that the Department proposes to adapt existing inspection regulations under the Federal Meat Inspection Act to the catfish industry.² The FSIS catfish inspection program would be phased in via a four-step process of indeterminate length.³ Upon issuance of a final rule, FSIS jurisdiction would displace that of FDA, to the extent of the FSIS program.

¹ Food, Conservation and Energy Act of 2008, Section 11016(b) (Pub. L. No. 110-246).

² 76 Federal Register 10440.

³ 76 Fed. Reg. 10452-53.

Because the Proposed Rule does not define “catfish,” the scope of the FSIS program is not yet resolved. The Department offers two different definitions and seeks comment on them. The first definition is limited to fish of the ictaluridae family, a definition that covers North American channel and other catfish and the related Chinese catfish. The second definition is much more expansive and includes over several thousand species of the order siluriformes, including pangasius, basa, tra, and swai, whitefish that U.S. grocers and other retailers generally import from abroad.

RILA urges the Department to adopt the narrower, first definition of catfish in the final rule. Seafood-exporting nations will take many years to earn equivalency determinations from FSIS for whatever species is covered by the final rule. FSIS equivalency under the Federal Meat Inspection Act has proven elusive for many nations seeking to export commodities to the United States, as demonstrated by the experiences of Australia (which has been seeking equivalence for egg products since 1998), Sweden (2006 – poultry), Poland (2005 – poultry), Korea (2000 – poultry), and Singapore (2006 – meat and poultry).⁴ Whatever the reasons these determinations take as long as they do, it is clear that equivalence, even for close allies and trading partners of the United States, requires many years and in some cases decades. Moreover, it is reasonable to assume that such determinations would take longer in this instance, given that FSIS has no experience regulating seafood safety and that the agency will be launching its oversight with respect to domestic producers and foreign nations simultaneously.

Critically, the rule makes no provision for seafood producers abroad to continue to export under the current FDA regulatory system as they wait for their home country regulators to obtain an FSIS equivalency determination. This is the case no matter how FSIS fills in the details of the four-step phase-in process identified in the Proposed Rule. Indeed, the Conference Report to the 2008 Farm Bill states the conferees’ intent “that catfish be subject to continuous inspection and that imported catfish inspection programs be found to be equivalent under USDA regulations before foreign catfish may be imported into the United States.”⁵ Thus, during the pendency of the equivalence process for any one nation, that nation’s “catfish” exports will be refused entry into the United States, regardless of whether those exporters are in full compliance with the Hazard Analysis and Critical Control Points seafood program administered by FDA and regardless of the exporter’s track record of meeting food safety requirements more broadly.

The effect, then, of the Department’s proposal would be to ban seafood imports to the United States for several years. Such a ban, especially if applied to whitefish species such as pangasius, basa, and swai, would harm American consumers in several ways without necessarily improving food safety.

Most obviously, the elimination of a substantial amount of seafood from the domestic market would increase wholesale prices for the similar products that remain available and would reduce the seafood choices that RILA’s grocery retailers can offer their customers. Last year, Americans consumed about 125 million pounds of pangasius and another 12 million pounds of “Chinese catfish,” and one or both of those offerings would be expected to disappear from store shelves following issuance of a final rule. The lack of available product would be expected to cause instantaneous price increases for RILA’s grocery

⁴ “Status of Initial Equivalence,” FSIS webpage, viewed June 13, 2011 (http://www.fsis.usda.gov/regulations/Status_of_Initial_Equivalence/index.asp).

⁵ Quoted in Geoffrey S. Becker, “Food Safety Provisions of the 2008 Farm Bill,” Congressional Research Service, at 3 (July 1, 2008).

members and their customers. Seafood consumers are among the most price-sensitive food shoppers, and significant price increases – especially in a time of economic hardship – may drive many of them away from seafood entirely.

In addition, a ban on imported catfish would cause the supply chain that has been built up in support of those imports to fall away. RILA members, as noted above, depend on a highly efficient international supply chain to meet their customers' demands. The U.S. employers that currently help bring those imports to market would have fewer seafood products to handle, and so ports, logistics firms, processors, railroads, trucking companies, wholesalers, value-added seafood firms and retailers would watch as their seafood business diminishes, not because of failure to meet consumer demand or react to the competition, but because of government policy to exclude an entire category of food from the United States without justification. Implementation of a broad rule will harm U.S. workers and consumers alike.

Nor does the proposed rule appear to improve food safety. The FDA and the Centers for Disease Control both regard catfish (of any definition) as a low risk food. (76 Fed. Reg. 10439 n.18.) And the risk assessment published concurrently with the proposal concludes that it is not clear whether the FSIS inspection program will even be effective at reducing the number of foodborne illnesses. There is no showing in the rule -- and certainly no congressional finding in connection with the 2008 Farm Bill -- that current regulation of catfish imports has endangered American consumers. To the contrary, the proposed rule confirms that, since the existing FDA "HACCP" system was put in place in 1997, "no cases of salmonellosis linked to catfish have been reported." (76 Fed. Reg. 10440.) The seafood HACCP regulation authorized mandatory recalls over domestic and imported seafood long before similar authority was extended to other foods in the recent Food Safety Modernization Act, and today gives FDA a wealth of enforcement tools, ranging from targeted inspections and warning letters to import alerts and country designations. This is a record worth building on, not diminishing through piecemeal fragmentation of the overall Federal food safety function.

In addition to these immediate objections, RILA has a longer-term concern that the Proposed Rule would invite a shift of additional seafood to FSIS from FDA. If, as the Congressional Research Service concluded, Section 11016 was supported by the U.S. catfish industry as a way to protect against competition from foreign catfish producers, then it stands to reason that further efforts would be made to protect that industry from other whitefish imports. Tilapia, now one of the most popular seafood items in the nation, is just such an import, with over 425 million pounds of annual U.S. consumption. If the Department in this case chooses to broadly define the scope of the FSIS catfish inspection program, then further expansion of the program to include additional competitors may well be irresistible to those who supported Section 11016 in the first place. Such an expansion, if it is similar in critical respects to the Proposed Rule, would further restrict the choices of American seafood consumers and impede supply chain job creation to an even greater extent than implementation of the Department's catfish inspection program would do here.

It has been noted many times during the current economic downturn that American consumers represent two-thirds of the nation's economy, and therefore any sustained recovery must involve the return of consumer confidence and consumer spending. That type of recovery cannot occur if government interventions delay and distort the myriad consumer decisions that force product innovation and compel efficiencies in the United States and abroad.

⁶ Becker, CRS Report, at 3.

RILA accordingly urges the Department to adopt the narrow version of the Proposed Rule. If you have any questions or concerns, please contact Stephanie Lester, Vice President, International Trade at (stephanie.lester@rila.org) or 703.600.2046.

Sincerely,

A handwritten signature in black ink that reads "Stephanie Lester". The signature is written in a cursive style with a horizontal line at the end.

Stephanie Lester
Vice President, International Trade