

Comments of the Animal Legal Defense Fund, People for the Ethical Treatment of Animals, and Compassion Over Killing in Opposition to the Food Safety Inspection Service’s Compliance Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission, FSIS-2016-0021-0001

The Animal Legal Defense Fund (ALDF), People for the Ethical Treatment of Animals (PETA), and Compassion Over Killing (COK) submit these comments in response to the Food Safety Inspection Service (FSIS) Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission (the “Guideline”), as proposed by FSIS. 81 Fed. Reg. 68933-68934 (Oct. 5, 2016). ALDF, PETA, and COK oppose the Guideline because it violates FSIS’s statutory mandate under the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 607(e), and the Poultry Products Inspection Act (PPIA), *id.* § 457(d), by failing to prevent the dissemination of labeling that is “false and misleading in any particular.”¹

I. The Guideline’s General Approach for Animal Raising Claims Violates FSIS’s Statutory Mandate

In 2008, when FSIS first initiated public review of its policies regarding approval of animal raising claims, its objective was “to ensure that the policies for evaluating and approving [such] claims create a level playing field for companies that want to use these claims in marketing their products and that will allow consumers to use animal raising claims information to assist their purchasing decisions.”² Though FSIS has not defined the characteristics of a label meeting that objective of a level playing field, Consumer Reports, a nonprofit organization dedicated to consumer-oriented research, helps to provide a clear and well-researched definition. Consumer Reports defines a “good” label as one that is (1) backed by a set of meaningful and verifiable standards, (2) consistent (i.e., a label used on one product should have the same

¹ See also 21 U.S.C. § 607(d) (FMIA providing that “No article subject to this subchapter shall be sold or offered for sale by any person, firm, or corporation, in commerce, under any name or other marking or labeling which is false or misleading”); *id.* § 457(c) (PPIA providing that “No article subject to this chapter shall be sold or offered for sale by any person in commerce, under any name or other marking or labeling which is false or misleading”).

² Product Labeling: Use of the Animal Raising Claims in the Labeling of Meat and Poultry Products, 73 Fed. Reg. 60,228-01, 60,229 (Oct. 10, 2008).

meaning if it is used on other products), (3) transparent, (4) independent, and (5) subject to public input.³

Nevertheless, despite FSIS's previous acknowledgement of the need for uniformity (i.e. "a level playing field"), the Guideline that it now proposes would allow companies to provide their own *varying* definitions for animal-raising claims such as "humanely raised," "free-range," and "pasture-raised." As a result, the Guideline fails to satisfy *every single one* of the Consumer Reports criteria and, as detailed further below, allows for the use of misleading and deceptive labels in direct violation of both the FMIA and PPIA.⁴

The allowance of such misleading labels with respect to animal raising claims is particularly problematic because studies show that such claims are highly material to the purchasing decisions of most American consumers. Numerous recent surveys show that a vast majority of consumers are highly concerned about the welfare of animals raised for their food.⁵ Due to these strongly-held concerns, label representations concerning animal welfare can dramatically increase marketability. Animal welfare (or perceived animal welfare) is a key influencer in consumer purchasing decisions,⁶ ranking as the most important food label, over

³ *What Makes a Good Label*, Consumer Reports, <http://greenerchoices.org/2016/03/08/make-another-good-label>.

⁴ 21 U.S.C. § 601(n)(1) (FMIA prohibiting labeling of meat or meat products that is "false or misleading in any particular"); *id.* § 453(h)(1) (PPIA prohibiting labeling of poultry products that is "false or misleading in any particular").

⁵ For example, nearly 95% of participants in a national survey conducted by American Humane said they are "very concerned" about the welfare of farm animals. See *2014 Humane Heartland Farm Animal Welfare Survey*, Am. Humane Ass'n (2014), <http://www.americanhumane.org/app/uploads/2016/08/2014-humane-heartland-farm-survey.pdf>. Similarly, in a survey conducted for the ASPCA, 77% of consumers said they are concerned about the welfare of animals raised for food. Memorandum from Lake Research Partners to Interested Parties (June 29, 2016), https://www.aspc.org/sites/default/files/publicmemo_aspc_labeling_fi_rev1_0629716.pdf; *see also* Press Release, ASPCA, *New Research Finds Vast Majority of Americans Concerned about Farm Animal Welfare* (July 7, 2016), <http://www.aspc.org/about-us/press-releases/new-research-finds-vast-majority-americans-concerned-about-farm-animal>. Consumer Reports' Dec. 2015 Natural Food Labels Survey found that better living conditions for farm animals is viewed as "very important" to 52% of consumers and "important" to an additional 32%, in a survey conducted by Opinion Research Corporation. See *Natural Food Labels Survey*, Consumer Reports Nat'l Research Ctr. (Jan. 2016), http://www.consumerreports.org/content/dam/cro/magazine-articles/2016/March/Consumer_Reports_Natural_Food_Labels_Survey_2015.pdf.

⁶ Roughly two-thirds (69%) of American adults said, in a survey conducted by ORC International, that they prioritize animal welfare as a significant factor in deciding what foods to buy. See Press Release, Cone

“organic” and “natural.”⁷ Consumers are willing to pay significantly more for products from animals they believe are raised “humanely.”⁸

At the point of purchase, consumers must rely on product labels in an attempt to address their concerns. Where such labels are unverified (and therefore potentially false),⁹ or not subject to a uniform definition, it is inevitable that consumers will be misled into purchasing products made from animals raised under conditions that are materially different from the consumer’s reasonable understanding of what the labels actually mean.

A. The Guideline Allows for Opaque Producer-Defined Claims that are Meaningless and Inconsistent

No legal definitions exist for terms like “welfare,” “humane,” “care,” or “sustainable,” nor has FSIS ever defined any set of standards for the use of animal raising claims, with the exception of “free-range” and “free-roaming.”¹⁰ Instead of defining them, the Guideline would permit producers to use terms like “humanely raised,” “raised with care,” “animal compassionate,” “animal friendly,” “raised in a humane environment,” or “raised in a stress free environment,” by making up their own definitions of them. This lack of uniform definitions results in two interrelated problems: *First*, such terms could be used on products that do not exceed standard industry practices in any meaningful way and, *second*, each company’s

Communications, Three-Quarters Of Americans Say Sustainability Is A Priority When Making Food Purchasing Decisions, According To New Cone Communications Research, <http://www.prnewswire.com/news-releases/three-quarters-of-americans-say-sustainability-is-a-priority-when-making-food-purchasing-decisions-according-to-new-cone-communications-research-250089721.html>.

⁷ *Frequently Asked Questions*, Am. Humane Ass’n, <http://humaneheartland.org/faqs>.

⁸ When asked, “what is the most you are willing to pay for high quality, humanely raised products,” 34% of respondents to a 2013 survey conducted by American Humane said 10-20% more, while 28% of respondents said they would pay 20-30% more. See *Humane Heartland Farm Animal Welfare Survey*, Am. Humane Ass’n (2013), <http://www.americanhumane.org/app/uploads/2013/08/humane-heartland-farm-animals-survey-results.pdf>. Fifty-seven percent of consumers responding to a Context Marketing survey said they would be willing to pay 1% to 10% more “for food that promises to be produced to higher ethical standards.” Twelve percent were willing to pay 10% more. *Ethical Food: A Research Report on the Ethical Claims that Matter Most to Food Shoppers and How Ethical Concerns Influence Food Purchases*, Context Marketing (Mar. 2010).

⁹ This is a risk for *all* labels approved under the Guideline as FSIS is not purporting to verify anything beyond determining whether the claim matches the information submitted by the applicant.

¹⁰ As explained further below, FSIS’s requirement for this claim falls far short of preventing consumer deception.

definition of these terms could be totally different from the others. Consumers would have little to no insight into what the terms actually mean, nor any meaningful ability to distinguish between product labels using the same terms to signify entirely different standards. In essence, this system will confuse consumers and allow producers to take advantage of their desire to purchase animal products produced with higher welfare standards—*i.e.*, it will encourage consumer fraud.

With respect to the first problem, FSIS could approve and has approved the use of animal-raising claims that are essentially meaningless because “support” consists only of compliance with standard industrial confinement practices. *See* discussion of FreeBird products *infra* § I(C). Such standards include, for example, broiler chickens being maintained at an exceedingly high density of only eight-tenths of a square foot per bird, and egg-laying hens being confined in battery cage systems that afford as little as sixty-seven square inches per bird or in non-cage systems that provide as little as one square foot per bird.¹¹ For pigs, the average stocking density at pork finishing facilities is a mere 7.2 square feet per pig, with a range of 6.8 to 8.0 square feet per pig and, for sows, gestation and farrowing crates are commonly utilized housing systems.¹² Standard industry practices further include forcing both broiler and egg-laying to spend their entire lives indoors, and removing one-third to one-half of hens’ beaks without anesthesia using a hot blade or infrared tool (a practice known as “beak-trimming”).¹³

¹¹ *See Animal Welfare for Broiler Chickens*, National Chicken Council, <http://www.nationalchickencouncil.org/industry-issues/animal-welfare-for-broiler-chickens/>; *Animal Husbandry Guidelines for U.S. Egg Laying Flocks*, United Egg Producers, <http://www.unitedegg.org/information/pdf/UEP-Animal-Welfare-Guidelines2016.pdf> at 21.

¹² *Space Allocation Decisions for Nursery and Grow-Finish Facilities*, Pork Information Gateway, <http://old.pork.org/filelibrary/factsheets/pigfactsheets/newfactsheets/09-02-06g.pdf>; *Current Status of Housing and Penning Systems for Sows*, Texas Tech University Laboratory of Animal Behavior, Physiology, and Welfare, <http://www.depts.ttu.edu/animalwelfare/research/sowhousing/overview.php>.

¹³ *See Animal Husbandry Guidelines for U.S. Egg Laying Flocks*, at 27; *Animal Welfare for Broiler Chickens* (describing “growout houses”); *Laying Hen Welfare Fact Sheet*, USDA-ARS-MWA Livestock Behavior Research

Likewise, tail-docking, i.e. amputating a portion of a pig's tail, is routine on commercial swine farms.¹⁴

Animal-raising claims based on industry standards are false and misleading because they imply that animals raised under such claims are treated better and differently than is typical in the industry, when in fact they are not. Indeed, surveys show that consumers believe that animal welfare claims represent a meaningfully higher standard of care than that of conventional industry practices.¹⁵ In one survey, more than 95% of respondents said that “humanely raised” labels signified better treatment of animals.¹⁶ In another, 85% of respondents said that the claim “humanely raised” meant that animals should have adequate space, exercise areas and social interaction with other animals, and 86% said producers should not be able to use the term unless they exceed minimum industry animal care.¹⁷ These surveys show that when consumers read these claims, they do not discount them as meaningless fluff, but rather give them considerable weight.

As to the second problem, the Guideline will also allow for producers to use the same claims as each other, but with different definitions and differing support. FSIS itself has

Unit (Fall 2010), <https://www.ars.usda.gov/ARSTUserFiles/50201500/Beak%20Trimming%20Fact%20Sheet.pdf> at 1-2.

¹⁴ See Mhairi A. Sutherland & Cassandra B. Tucker, *The Long and Short of It: A Review of Tail Docking in Farm Animals*, 135 *Applied Animal Behavior Science* 179 (2011), <http://dx.doi.org/10.1016/j.applanim.2011.10.015>.

¹⁵ In a survey commissioned by Consumer Reports, a large majority of respondents exhibited false expectations of the claim “humanely raised.” “For example, 92% of consumers said the claim should mean the farm was inspected to verify the claim; 90% said the term should mean the animals had adequate living space; 88% said the term should mean animals were humanely slaughtered; and 79% said the claim should mean the animals went outdoors,” *Consumer Reports Aims to Ban ‘Natural’ Label*, MeatPoultry.com (June 16, 2014), http://www.meatpoultry.com/articles/news_home/Trends/2014/06/Consumer_Reports_aims_to_ban_n.aspx?ID=%7BC49A9FD4-0039-4C4A-B9F3-F45492ECE987%7D—none of which are necessarily true, as USDA has no definition for the claim and allows producers to determine what the claim means to them.

¹⁶ Am. Humane Ass’n, Humane Heartland, *Farm Animal Welfare Survey*, <http://www.americanhumane.org/app/uploads/2013/08/humane-heartland-farm-animals-survey-results.pdf> at 12.

¹⁷ Animal Welfare Inst., Petition to FSIS To Amend Labeling Regulations under the FMIA and the PPIA to Require Third-Party Certification for the Approval of Animal Welfare and Environmental Stewardship Claims, at 33, <http://www.fsis.usda.gov/wps/wcm/connect/5bdab0ca-8072-480b-9bd9-c9bc04b56531/Petition-AWI-Labeling-0514.pdf?MOD=AJPERES> [hereinafter “AWI Petition”].

acknowledged that its approval process allows for such inconsistent definitions, explaining at a 2008 public meeting on animal raising claims that “[a]nimal producers and certifying entities may have different views on the specific type of practices that qualify a product to bear a raising claim on its label. So the result is that *the same animal raising claims may reflect different animal raising practices* depending on how an animal producer or certifying entity defines the basis for the claim.”¹⁸ These vast inconsistencies are inherently misleading.

Further, even if a regulated entity elects to use a label created by a third party certifier, without an exorbitant amount of independent research, consumers will not be reasonably able to differentiate between numerous third party-certified claims that require producers to meet concrete standards of varying stringency, and opaque, producer-defined standards that are not audited by any entity. *See also infra* § II (discussing third party certification standards).

B. The FSIS Guideline Relies on the Unilateral Representations of Regulated Entities and Essentially Guarantees Approval of Misleading Labels

The FSIS label approval process set forth in the Guideline would be a far cry from a true verification process. FSIS does not regulate animal food production. Its staff does not have the capacity to go into farms or slaughterhouses to observe production practices and determine if producers are in compliance with the claims that they are seeking to put on their labels. FSIS acknowledges these limitations result in a lack of transparency: “Because we don’t regulate food animal production, we’re not on the farm, we may not always have relevant information needed to properly evaluate the animal raising practices described in a producer’s animal production protocol.”¹⁹

¹⁸ See Transcript of Record at 15:7- 14, FSIS, Animal Raising Claims (Oct. 14, 2008), http://www.fsis.usda.gov/wps/wcm/connect/50bdbb61-f293-4e4c-90d5-ac819a16ca03/Animal_Raising_Claims_101408.pdf?MOD=AJPERES.

¹⁹ *Id.* at 15:1-6.

In approving labels addressed in the Guideline, the FSIS plans to rely solely on information provided by producers. To support an animal raising claim, a producer would only need to submit its own definition of the claim, a signed and dated description of how the animals are raised to support the claim, and descriptions of tracing conforming and non-conforming product. If a third party certifies a claim, the producer will submit a copy of the certificate. FSIS itself does absolutely nothing to verify the accuracy of this information. The producers' label claims are transparent only to producers themselves, who are interested in promoting their products in the most marketable manner possible. Because there is no agency oversight, the producers have little incentive to have rigorous claims or even to meet their own standards.

FSIS states only that the producers' descriptions must be "detailed." However, a producer could provide such a "detailed" description of a factory farming operation that it no way met consumer expectation for a "humane" product (as described above), yet did meet FSIS's procedural requirements as stated in the Guideline. Consumers would never discover these facts because the Guideline affords no transparency and has no published standards for such claims. Likewise, FSIS would have no way of determining whether a producer had provided a description of its practices that, although sufficiently "detailed," was entirely false. Thus, the level of "detail" the submissions contain is irrelevant and will do nothing to prevent consumer deception—FSIS's chief (and only) task in approving labels.

Indeed, evidence from Freedom of Information Act (FOIA) requests illustrates the inadequacy of FSIS's proposal. For example, the supporting documentation a producer offered for a "humanely raised on sustainable family farms" claim consisted of an affidavit containing two sentences: "All turkeys past the age of approximately 35 days are allowed outdoors access to range areas (range environment)" and "All our turkeys are humanely raised on our sustainable

family farms.”²⁰ This “description” consists of a bare restatement of the claim itself and an ambiguous statement about range “access,” providing no transparency, nor any guarantee that consumers would consider such a product “humane.” The proposed guideline in no way rectifies issues like these.

Moreover, because FSIS cannot verify on-farm conduct and third party certification (however inadequate) is not required, there is no oversight to determine whether the “detailed” descriptions accurately describe the applicant’s facilities. Time and time again, investigations have revealed routine neglect and cruelty on farms, including: pigs intentionally injured with herding canes, gate rods, clothespins, electric prods, and herding boards and by kicking, punching, and poking them in the eyes;²¹ injured pigs dragged by their snouts, ears, and legs, beating pigs with metal gate rods, and gouging their eyes;²² and ducks kicked, thrown, slammed against walls, and kept in isolation for weeks.²³

C. Animal Raising Claims Cannot Be Sufficiently Defined on a Label

FSIS recognizes that consumers may be deceived by certain producer-defined animal-raising claims. In an effort to prevent this, the Guideline explains that such claims, in general, can only be approved if “a statement is provided on the label . . . including an explanation of the meaning of the claim for consumers.” However, such an abridged version of company’s definition for the claim on label is ineffective at best and deceptive at worst.

Claims like “humanely raised,” “raised with care,” or “raised with environmental stewardship” cannot be sufficiently defined or described within a few words or a sentence on a

²⁰ See AWI Petition, at 17.

²¹ *Mother Pigs and Piglets Abused by Hormel Supplier*, PETA, <https://secure.peta.org/site/Advocacy?cmd=display&page=UserAction&id=1131>.

²² *Charges Filed After Investigation Reveals Torture of Pigs*, PETA, <https://secure.peta.org/site/Advocacy?cmd=display&page=UserAction&id=697>.

²³ *Ducks Kicked, Slammed Against Walls for Meat and Down*, PETA, <http://investigations.peta.org/ducks-meat-down-culver/>.

product label. There are numerous aspects of animal welfare, including: feed and water, facility design, floors and bedding, lighting, space allowance, air quality and ventilation, environmental enrichment, access to range and pasture, handling methods, health care practices, protection from pests or predators, emergency euthanasia, transportation, and slaughter.

It is inconceivable that a company could adequately describe their “humane” practices in these areas in a single sentence or even two. Instead, the actual and allowed “explanations” are often little more than flowery elaboration on the original claim, with little to no concrete information. These are not “explanations” but merely additional animal raising claims that tell consumers nothing about the actual conditions under which the animals are raised and the treatment they received.

For example, FreeBird brand chicken makes the label claim “Humanely Raised**” linked to the “explanation”: “**Humanely raised on family farms in a stress-free environment.”²⁴ This supposedly explanatory statement claims that, in addition to being “humanely raised,” FreeBird’s chickens are raised on family farms and raised in a stress free environment, but it provides no additional, concrete information explaining FreeBird’s meaning of “humane” or, for that matter, its meaning of “family farms” or “stress-free.” Presumably, FSIS approved this label. However, the agency was unable to locate any supporting documentation whatsoever in response to AWI’s FOIA request, let alone documentation proving that FreeBird’s “humane” chicken met any reasonable consumer’s expectation for that term.²⁵

As another example, Applegate Natural’s salami makes the label claim “Humanely Raised***” linked to the explanation “***Pork raised on sustainable family farms in a stress-free environment that promotes natural behavior and socialization.” Again, this supposedly

²⁴ See, e.g., FreeBird, <http://freebirdchicken.com/wp-content/uploads/2013/08/Screen-shot-2013-08-30-at-9.15.57-AM.png>

²⁵ See AWI Petition, at Exhibit 3.

explanatory statement instead offers additional claims and provides no concrete information explaining Applegate's meaning for any of them.²⁶

Furthermore, producers' requisite "explanations" are permitted to appear absolutely anywhere on the label. They can be on the front of the pack, next to the claim itself, or they can be on the back of the pack and connected to the original claim only through an asterisk. They can be in the same font, size and prominence as the original claim, or they can be in fine print. In fact, producers can simply *direct consumers to their website* for the elusive definition of the claim.²⁷ Consumers must follow the trail of breadcrumbs to have any chance of learning the details of the claim, and even then will likely come up short.²⁸

II. FSIS Must Ensure that Animal Welfare Claims Are Truthful and Align with Consumer Expectations

If FSIS moves forward with the proposed label guideline, it should do so in the manner that is most likely to satisfy its statutory obligations under the FMIA and PPIA to ensure that labels are truthful and that they are not misleading.²⁹ Without direct access to farms, the *sole* method by which FSIS would be able to assess whether a label regarding on-farm treatment of animals is truthful or non-misleading is to rely upon on-farm inspections performed by reputable third party certifiers. *See also supra* § I(B) (explaining that the Guideline relies on the unilateral representations of producers).

²⁶*Id.*

²⁷ FSIS's Guideline specifically provides the following example: "[T]he claim 'TMB Ranch Humanely Raised*' on the PDP should be linked by an asterisk to a statement elsewhere on the PDP explaining the meaning of the claim; the statement it is linked to could be, '*Cattle are grass fed on our family farms according to our strict animal welfare practices (weblink to animal welfare practices).'"

²⁸ Few producers make their detailed practices or standards publically available on their websites, and the Guideline announces no intention of making producers' documentation public.

²⁹ *See* 21 USC § 607(d) (FMIA providing that "No article subject to this subchapter shall be sold or offered for sale by any person, firm, or corporation, in commerce, under any name or other marking or labeling which is false or misleading"); *id.* § 457(c) (PPIA providing that "No article subject to this chapter shall be sold or offered for sale by any person in commerce, under any name or other marking or labeling which is false or misleading")

Any label provided or authorized by a third party certification entity, however, must be in line with consumer expectations as to its meaning. *See also supra* § I(A) (explaining that consumers believe that animal welfare claims represent a meaningfully higher standard of care than that of conventional industry practices). If a label reflecting third party certification does not align with consumer expectations, it risks misleading consumers and FSIS's reliance upon it would contravene the relevant provisions of the FMIA and PPIA.

As discussed above, survey evidence indicates that consumers believe products bearing animal-welfare labels like “humanely raised” or “pastured-raised” exceed standard industry practices in meaningful ways. Yet third party certifications are far from equal in the standards that they enforce, and the vast majority of them do not even come close to meeting such consumer expectations.

Perhaps the most egregious example of a third party certifier “humane-washing” meat and poultry products is the American Humane Association’s “American Humane Certified” label, which in essence codifies standard, industry-wide practices. It allows beak-trimming of birds without anesthesia and tail-docking of pigs (*i.e.*, amputating a portion of the beak and tail, respectively), painful procedures that are highly distressing to the animals.³⁰ Further, it does not require that broiler or egg-laying hens, beef cattle, or pigs be given any access to the outdoors.³¹

In addition to the “American Humane Certified” label, other potentially misleading certifications include:

³⁰ See *Layers Cage Free Full Standards.pdf* at 24, *Layers Enriched Colony Housing Full Standards.pdf* at 14, *Layers Free Range & Pasture Full Standards.pdf* at 24, and *Swine Full Standards.pdf* at 20, 74, 105, available for download at http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements (last visited November 20, 2016).

³¹ See *id.*; *Beef Cattle Full Standards.pdf*, available for download at http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements (last visited November 20, 2016).

- Food Alliance’s “Food Alliance Certified” label, which reflects standards that contain very minimal space and natural light requirements, but do not contain a requirement that all animals be provided with access to the outdoors.³² The standards also allow beak trimming and tail docking without anesthesia.³³ Moreover, certification under this program is based upon a farm’s achievement of a satisfactory *average* score as determined by review of several criteria. Thus, failure to achieve a high score on a single element of the standard does not necessarily preclude the use of the label.³⁴
- Humane Farm Animal Care’s “Certified Humane” label, which likewise sets forth very minimal space requirements,³⁵ and mandates that environmental enrichment be provided, but also allows, under certain circumstances, for beak-trimming of turkeys and egg-laying hens and tail-docking of pigs, and does not require that chickens, turkeys, or pigs be given access to the outdoors.³⁶

³² See, e.g., *Poultry Evaluation Tool* and *Pork Evaluation Tool*, Food Alliance, available for download at <http://fadocsstyle.wpengine.com/livestock-producers/> (last visited Nov. 23, 2016). Poultry raised for meat must be maintained on a normal daylight cycle and egg-laying hens may be given up to 16 hours of light per day. *Poultry Evaluation Tool* at 2. Space requirements vary according to “level,” i.e. score. For example, for egg-laying hens, level 1 standards contain no specific space requirements at all, other than that the producer comply with the law and satisfy “industry standards”; level 2 standards dictate a maximum stocking density of 1 bird per a mere 1.5 square feet; and level 3 standards have a maximum stocking density not higher than 1 bird per 1.75 square feet. *Id.* at 9-11.

³³ *Id.* at 12; *Pork Evaluation Tool* at 11.

³⁴ See *Food Alliance Producer Certification Program Standards and Procedures Manual* at 14, Food Alliance, available for download at <http://fadocsstyle.wpengine.com/livestock-producers/> (last visited Nov. 21, 2016).

³⁵ For example, pigs are to be given “[s]ufficient space to allow all pigs to lie down at the same time.” *Pigs.pdf* at 7, available for download at <http://certifiedhumane.org/how-we-work/our-standards/> (last visited November 21, 2016). Egg-laying hens “must have sufficient freedom of movement to be able, without difficulty, to stand normally, turn around, and stretch their wings” and “sufficient space to be able to perch or sit quietly without repeated disturbance.” *LayingHens.pdf* at 7, available for download at <http://certifiedhumane.org/how-we-work/our-standards/> (last visited November 21, 2016).

³⁶ See *LayingHens.pdf*, *ChickenBroilers.pdf*, *Turkeys.pdf* and *Pigs.pdf*, available for download at <http://certifiedhumane.org/how-we-work/our-standards/> (last visited November 21, 2016).

- Labels reflecting certification under Steps 1 through 4 of the Global Animal Partnership (“GAP”) multi-tiered certification program.³⁷ Certification at these levels still allows certain physical alterations of animals including, for example, beak trimming of egg laying hens is allowed at steps 1 through 3.³⁸ The lower steps also allow for crowding at nearly the same density that is standard on factory farms, without enrichment, and without any outdoor access. Indeed, at step 1, broiler hens may be stocked at a density of seven pounds per square foot and, at step 4, the space is increased to only 5.5 pounds per square foot,³⁹ when the average market weight of a broiler hen, according to the National Chicken Council, is 6.1 pounds.⁴⁰ The standards also allow for animals to be handled in a highly distressing manner, and for many animals to suffer from lameness and die prematurely. For example, at Step 1, lameness is permitted in up to twenty out of a hundred broiler hens, up to and including two percent of a herd of beef cattle at

³⁷ See *5-Step® Animal Welfare Rating Standards for Beef Cattle v1.0.pdf*, *5-Step® Animal Welfare Rating Standards for Chickens Raised for Meat v2.0.pdf*, *5-Step® Animal Welfare Rating Standards for Pigs v2.2*, *5-Step® Animal Welfare Rating Standards for Turkeys v2.0*, and *DRAFT 5-Step® Animal Welfare Rating Pilot Standards for Laying Hens*, Global Animal Partnership, available for download at <http://www.globalanimalpartnership.org/5-step-animal-welfare-rating-program/standards> (last visited Nov. 20, 2016). In fact, an investigation of a Step 2-rated pig farm that produces “humanely raised pork,” revealed that pigs spent almost all their time crammed into crowded sheds on concrete floors and were never given the opportunity to touch the farm’s lush green grass. The only time the pigs were ever outside was when they were trucked from one shed to another, put on a scale to be weighed, or sent to slaughter. GAP’s labeling claims that these pigs live in an “enriched environment,” which typically amounted to some straw strewn over the concrete flooring and, on occasion, 200 pigs were provided with a few chains or rubber hoses to play with, which GAP standards specifically list as “not ... acceptable enrichments” because they are not “valuable/satisfying to the pigs,” as “extensive research” demonstrates. The standards call for “thermal comfort” for all pigs at all times, yet during hot weather, hundreds of pigs had access to just one water sprinkler. The investigation also revealed obviously sick and injured pigs’ condition worsen for days or even weeks. One pig whose apparent neurological ailments caused her to go lame was left for eight days until she was shot, and seven pigs with grotesque rectal prolapses were left with these often-painful conditions for up to 24 days. *Whole Foods ‘Happy Meat’ Supplier Exposed*, PETA, <http://investigations.peta.org/whole-foods-humane-meat-exposed/>.

³⁸ *DRAFT 5-Step® Animal Welfare Rating Pilot Standards for Laying Hens* at 15.

³⁹ *5-Step® Animal Welfare Rating Standards for Chickens Raised for Meat v2.0.pdf* at 15.

⁴⁰ See U.S. Broiler Performance, National Chicken Council, <http://www.nationalchickencouncil.org/about-the-industry/statistics/u-s-broiler-performance/>.

any given time, and up to and including five percent of a herd of pigs.⁴¹ Also at step 1, for layer hens, a mortality rate of up to six percent (i.e. 6,000 birds in a flock of 100,000) from the time the birds are placed on the laying farm through the end of the first laying cycle is acceptable.⁴² At steps 1 through 3 for broiler chickens, on a farm of 100,000 chickens, up to 500 animals could die *per day* and the facility would still be entitled to certification.⁴³

Indeed, only two labels now in use appear to align to any significant degree with consumer expectations. *See supra* § I(A). The first of these labels is overseen by the Animal Welfare Approved certification program. It prohibits, among other things, the use of confinement and/or caged systems for birds, beak or bill trimming and other mutilation of poultry animals, and tail docking for pigs and cattle.⁴⁴ The second of these labels reflects certification under Steps 5 and 5+ of the GAP multi-tiered certification program.⁴⁵ Certification at these levels of GAP's

⁴¹ See *5-Step® Animal Welfare Rating Standards for Beef Cattle v1.0.pdf* at 8, *5-Step® Animal Welfare Rating Standards for Chickens Raised for Meat v2.0.pdf* at 17, *5-Step® Animal Welfare Rating Standards for Pigs v2.2* at 20.

⁴² *DRAFT 5-Step® Animal Welfare Rating Pilot Standards for Laying Hens* at 17.

⁴³ *5-Step® Animal Welfare Rating Standards for Chickens Raised for Meat v2.0.pdf* at 12.

⁴⁴ See *Laying Hen Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/layinghens-2015/> (last visited Nov. 23, 2016); *Meat Chicken Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/meat-chicken-2015/> (last visited Nov. 23, 2016); *Turkey Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/turkey-2015/> (last visited Nov. 23, 2016); *Duck Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/duck-2015/> (last visited Nov. 23, 2016); *Pig Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/pig-2015/> (last visited Nov. 23, 2016); *Beef Cattle and Calves Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/beef-cattle-2015/> (last visited Nov. 23, 2016); *Dairy Cattle and Calves Standards*, Animal Welfare Approved, <http://animalwelfareapproved.org/standards/dairy-cattle-2015/> (last visited Nov. 23, 2016). It likewise requires, with limited exception, the use of pain killers for the disbudding of calves. See *List of Standards and Beef Cattle and Calves Standards*.

⁴⁵ See, e.g., *5-Step® Animal Welfare Rating Standards for Beef Cattle v1.0.pdf*, *5-Step® Animal Welfare Rating Standards for Chickens Raised for Meat v2.0.pdf*, *5-Step® Animal Welfare Rating Standards for Pigs v2.2*, *5-Step® Animal Welfare Rating Standards for Turkeys v2.0*, and *DRAFT 5-Step® Animal Welfare Rating Pilot Standards for Laying Hens*, Global Animal Partnership, available for download at <http://www.globalanimalpartnership.org/5-step-animal-welfare-rating-program/standards> (last visited Nov. 20, 2016).

standards prohibits cages, crates, and physical alteration of animals, and requires that animals be given both meaningful access to the outdoors and environmental environment.⁴⁶

Because only these two certification programs come anywhere near approximating consumer expectations, FSIS should (if it proceeds to approve labels regarding on-farm animal welfare) require certification exclusively by one or more of these entities—and with regard to GAP, only at its highest levels of certification of Steps 5 and 5+—in order for animal welfare-related labels to be approved. Reliance upon third party certifications like AHA in essence guarantees that consumers will be misled because the substance of the standards completely fails to align with consumer expectations.

III. FSIS’s Proposal for Living and Raising Conditions Claims Fails to Ensure that Labels Are Truthful and Non-Misleading

In addition to claims regarding general animal welfare and sustainability, FSIS also intends to approve labels regarding living and raising conditions. FSIS’s current proposal for evaluating these claims fails to ensure that labels bearing such claims are truthful and not misleading. *See* 21 USC § 607(d); *id.* § 457(c). Again, as stated *supra*, FSIS’s proposal to allow companies to self-define claims such as cage- or crate-free, free range, pasture-raised, and free roaming, and to “explain” their meaning to the consumer through additional terminology on the label, will only engender greater consumer confusion and fall far short of meeting statutory obligations. As previously explained, consumers will be left in the dark as to whether the company’s unique definition of “free range” or “pasture-raised” conforms to their reasonable expectations for those descriptors.

Indeed, FSIS faces similar—if not greater—challenges in assuring the truthfulness of these living and raising claims as those it faces in auditing animal welfare claims. As with

⁴⁶ *Id.*

welfare and “humane” certifications, the third party certifications that purport to verify, through on-farm audits, the living and raising claims for animals raised for poultry and egg products⁴⁷ also fall short of consumer expectations for these terms. For example, American Humane Association-certified “pasture-raised” egg producer Handsome Brook Farm has faced criticism that only a small percentage of the farms in its supply chain are audited under AHA’s standards.⁴⁸ Similarly, AHA-certified liquid cage-free egg seller Abbotsford Farm, owned by egg giant Michael Foods,⁴⁹ received an abysmal “1-egg” rating from consumer watchdog The Cornucopia Institute—meaning the eggs are “generally produced on industrial-scale egg operations that grant no meaningful outdoor access.”⁵⁰ FSIS specifically approved Abbotsford Farm’s AHA certification and “cage-free” claims, and presumably would continue to do so under its proposed Guidance.

Moreover, the combination of allowing self-definitions, failing to perform on-farm audits, and inadequate third party auditing or oversight of living and raising claims enables companies to label as “free range” or “pasture-raised” meat, poultry, and egg products that do not meet consumer expectation for these claims. Currently, FSIS has defined or set standards only for two such terms—“free-range” or “free-roaming” for poultry— stating that “Producers

⁴⁷ Several “free-range” and “pasture-raised” certifications exist for egg-laying hens. See, e.g., *Consumer’s Guide to Humane Egg Choices*, American Humane Association, <http://www.humaneheartland.org/eggs; LayingHens.pdf> at 11-13, Certified Humane, available for download at <http://certifiedhumane.org/how-we-work/our-standards/> (last visited November 21, 2016). Only Certified Humane has audited standards for “free-range” and “pasture-raised” poultry. See “Free Range” and “Pasture Raised” officially defined by HFAC for Certified Humane® label, <http://certifiedhumane.org/free-range-and-pasture-raised-officially-defined-by-hfac-for-certified-humane-label>.

⁴⁸ See *Egg Distributor Dealing with Litigation after Obtaining Injunction*, Legal NewsLine (Nov. 16, 2016), <http://legalnewslines.com/stories/511034497-egg-distributor-dealing-with-litigation-after-obtaining-injunction> (referencing *Organic Consumers Ass’n v. Handsome Brook Farm*, No. 1:16-cv-1906 (D.D.C.))

⁴⁹ See Abbotsford Farm Retail Cage-Free Eggs, <http://www.abbotsfordfarms.com/retail/>.

⁵⁰ As Cornucopia further explains, “‘Outdoor access’ on these operations generally means a covered concrete porch that is barely accessible to the chickens. Means of egress from the buildings are intentionally small to discourage birds from going outside, and make it possible for only a small percentage of birds to have ‘access’ to the outdoors. No producers in this category were willing to participate in The Cornucopia Institute’s project, and none shared their production practices with Cornucopia researchers.” See The Cornucopia Institute Organic Egg Scorecard, <https://www.cornucopia.org/organic-egg-scorecard/>.

must demonstrate to the Agency that the poultry has been allowed access to the outside.”⁵¹

However, in reality poultry labeled “free-range” can come from birds raised indoors, in crowded sheds, and given only the most minimal “access” to the outdoors. Indeed, this can be as little as five minutes each day or a briefly opened door on one side of a barn with thousands of birds inside.⁵²

This is a far cry from consumers’ expectations that “free range” birds forage on open pastures or at least have the opportunity to breathe fresh air and peck around a yard.⁵³ A 2015 poll conducted by Harris Research further demonstrated that consumer expectation for the term “free range” far exceeds agency requirements and current practices. Respondents strongly believed that the label on poultry should stand for more than it currently does. Seven out of ten reported it should mean: that the “[f]arm is inspected to verify that the birds are raised free range”; that “[a]ll birds have the opportunity to go outside during daylight hours on a regular basis”; and that “[t]here is enough space outside for each bird to be out during daylight hours every day.” Over 60% believed this claim should mean that: “[t]he outdoor space is at least partially covered with grass or other vegetation” and that “[w]hen outdoors, all birds have access to shade and protection from weather or predators.” Likewise, only 19% of respondents found it acceptable for producers of “free range” labeled chicken and turkey products to provide screened and covered porches for the birds instead of outdoor space, and only 10% found it acceptable for

⁵¹ See *Meat and Poultry Labeling Terms*, http://www.fsis.usda.gov/wps/wcm/connect/e2853601-3edb-45d3-90dc-1bef17b7f277/Meat_and_Poultry_Labeling_Terms.pdf?MOD=AJPERES

⁵² See “Free Range” and “Pasture Raised” Officially Defined by HFAC for Certified Humane Label, <http://certifiedhumane.org/free-range-and-pasture-raised-officially-defined-by-hfac-for-certified-humane-label/> (“USDA considers five minutes of open-air access each day to be adequate for it to approve use of the ‘Free Range’ claim on a poultry product. ‘Free range’ claims on eggs are not regulated at all.”)

⁵³ For example, a May 2014 survey commissioned by pastured egg producer Vital Farms found that half of consumers actively seek out “free-range” and “cage-free” egg products. However, when asked to describe these claims, “most respondents described pasture-raised eggs, imagining hens roaming and feeding on open pastures.” See Certified Humane, *New Research Shows Egg Labels Scramble the Minds of Consumers* (June 24, 2014), <http://certifiedhumane.org/new-research-shows-egg-labels-scramble-minds-consumers/>.

producers to provide a dirt lot that does not have sufficient space to accommodate all birds at one time.⁵⁴

As the conditions allowed by the agency are far from what reasonable consumers understand “free range” to be,⁵⁵ FSIS’s “verification” of a free-range claim by such a producer thus violates the agency’s statutory mandate to prohibit false and misleading labeling. Producers of products derived from animals raised in standard, indoor industrial conditions should not be allowed to use living and raising claims like “free-range,” when animals are given minimal (or no) meaningful access to the outdoors. Yet FSIS’s current Guideline not only does nothing to prevent this deception, but instead provides it with a seal of approval.

As inadequate as the agency’s free-range definition is, FSIS has *no* standard for “pasture-raised” or “pasture-grown,” potentially allowing companies to label products with these claims with no regard to what consumers understand them to mean or why they seek them out. Indeed, a 2008 survey of Michigan residents found that high percentages of consumers seek out pasture-raised animal products, and that a large majority of them do so because of their perception that such products come from animals raised more humanely, that animals are not routinely treated with hormones or antibiotics, and that they are produced in a more environmentally friendly manner.⁵⁶ Allowing conventional, industrial producers to label products as “pasture-raised” when, for example, the animals spend the majority of their time indoors would frustrate informed consumer choice and mislead consumers into buying products that do *not* have the attributes they seek out, taking away market share from companies that do require true pasture-raised

⁵⁴ See Animal Welfare Inst., *Poll on Free Range and Humanely Raised Label Claims*, <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-FreeRangeHumanelyRaised-Poll-Dec2015.pdf>

⁵⁵ *Id.*

⁵⁶ Approximately two thirds of respondents pointed to these attributes of pasture-raised animal products as being “very important,” with another quarter reporting that they were somewhat important. See Conner, Campbell-Arvai, and Hamm, *Consumer Preferences for Pasture-Raised Animal Products: Results from Michigan*, at 17, <http://ageconsearch.umn.edu/bitstream/55972/2/Connor.pdf>.

conditions. *See supra* § I(A)-(B) (explaining that a producer could provide a “detailed” description of a farming operation that employed standards that in no way exceeded conventional farming practices and failed to meet met consumer expectation, yet the producer’s disclosure could still satisfy FSIS’s procedural requirements as stated in the Guideline). FSIS’s failure to police such claims through clear and consistent standards will do nothing to prevent and will exacerbate such deception, and thus will flout the agency’s statutory mandate.

In sum, if FSIS is to review these claims at all, the agency should adopt a single, clear, consistent definition for each living and raising claim that meets consumer expectation as demonstrated by FSIS research and independent consumer surveys. These definitions should set the floor for the minimum standards producers must meet to use the claim.

Finally, FSIS must discontinue the practice of allowing companies to use claims that suggest the product stands apart from and above the rest of the industry when in reality the product just conforms to standard industry practices. There is no more egregious example of this than allowing poultry producers to call their broiler and turkey products “cage-free,” which FSIS’s current proposal for living standards claims permits.⁵⁷ Attracting humane-minded consumers with claims of “cage-free” chicken and turkey is inherently misleading. While broilers and turkeys are rarely if ever caged prior to being sent to slaughter, and are instead raised cage free as a rule, the “cage-free” claim implies that other, “conventional” products come from birds raised in cages. This can lead consumers to pay a premium for standard, industrially-produced chicken labeled “cage-free,” on the mistaken belief that it is more humane. Allowing producers to use this claim, then, takes unfair advantage of consumer desire to purchase higher-

⁵⁷ Meat production of poultry differs starkly from poultry raised for egg production. The vast majority of hens in egg production are confined in battery cages, unless otherwise specified (i.e. raised “cage-free”). The Humane Society of the U, *Cage-Free vs. Battery-Cage Eggs*, http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html.

welfare products and flouts FSIS's mandate to prohibit false and misleading labeling. FSIS must prohibit it.

IV. FSIS Must Implement Uniform Antibiotics Labeling in Order to Prevent Consumer Deception

With respect to the use of antibiotics in meat and poultry production, FSIS's Labeling Guidance proposal for "raised without antibiotics" claims is inadequate to protect consumers from false and misleading labeling and to foster informed consumer decision-making on a subject of critical importance. FSIS must instead adopt a uniform labeling standard for *all* meat and poultry, to disclose whether animals were fed antibiotics.

Antibiotics claims on meat and poultry should be set apart from other animal raising claims, because the abuse of antibiotics in conventional animal agriculture has unique and far-reaching human health consequences that make label clarity in this sphere critical. Overuse of these life-saving drugs on farms—feeding 29.9 million pounds of antibiotics to farm animals in 2011 compared to 7.7 million pounds to treat sick people⁵⁸—has helped propel a global public health crisis and garnered warnings of a post-antibiotic era from institutions like the World Health Organization.⁵⁹ Yet despite labels providing the surest way for consumers to choose no-antibiotics products and avoid contributing to this crisis, meat and poultry producers currently do not have to disclose antibiotic use to consumers. This failure to reveal uniquely material facts about antibiotic use prevents consumers from making informed purchasing choices that could otherwise diminish demand for harmful products and thereby prevent a clear and potentially devastating threat to public health.

⁵⁸ See Pew Charitable Trusts, *Record-High Antibiotic Sales for Meat and Poultry Production* (Feb. 6, 2013), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2013/02/06/recordhigh-antibiotic-sales-for-meat-and-poultry-production>.

⁵⁹ See World Health Organization, *Antibiotic Resistance Fact Sheet* (Oct. 2016), <http://www.who.int/mediacentre/factsheets/antibiotic-resistance/en/>.

FSIS's Labeling Guidance allows producers to make a number of voluntary claims—"No Antibiotics Administered," "No Antibiotics Administered the last 150 days," "Raised Without Sub-therapeutic Antibiotics," "Raised Without Antibiotics," and "No Added Antibiotics Ever"—but requires no disclosure for producers who *use* antibiotics. This plethora of voluntary label claims only leaves consumers scratching their heads. This is because, as with other claims, the wording of antibiotics claims may be defined in varying ways by various companies,⁶⁰ and consumers may not understand the meaning of such claims. This is borne out by survey evidence and case precedent.⁶¹

To carry out its statutory duty, then, FSIS must adopt a single, clear labeling regime that discloses whether animals were fed antibiotics, to replace the myriad "no antibiotics"-type claims. The agency's failure to impose such uniform antibiotics labeling standards is contrary to its obligation to prevent the dissemination of false and misleading labeling.

⁶⁰ For example, one company's "Raised Without Sub-therapeutic Antibiotics" claim could indicate many things to different companies: (1) that the company used antibiotics routinely for "disease prevention" rather than growth promotion; (2) that the company used routine antibiotics but not those deemed critically important to human medicine; (3) that the company used no antibiotics at all. Major restaurant chains and meat companies have made media-grabbing commitments to phase out or change their use of antibiotics, *see, e.g.,* NPR, *McDonald's Now Serving Chicken Raised Without Antibiotics — Mostly*, Aug. 2, 2016, <http://www.npr.org/sections/thesalt/2016/08/02/488285374/mcdonalds-now-serving-chicken-raised-without-antibiotics-mostly>; NPR, *Perdue Goes (Almost) Antibiotic-Free*, Oct. 7, 2016, <http://www.npr.org/sections/thesalt/2016/10/07/497033243/perdue-goes-almost-antibiotic-free>, yet these commitments often differ dramatically and the devil is in the details. Thus, there is no practical way for FSIS to prevent consumer deception and compel companies to disclose their unique definitions for such antibiotics-related terms on product labels under the current regime.

⁶¹ *See* Consumer Reports, *Decoding the Labels on Meat Packages*, <http://www.consumerreports.org/food/decoding-the-labels-on-meat-packages/>; *see also* Consumer Reports, *Making the World Safe from Superbugs*, http://www.consumerreports.org/cro/health/making-the-world-safe-from-superbugs/index.htm?utm_source=hootsuite; *see also* *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 720 (D. Md. 2008) (finding that "the qualified language approved by the USDA for use on labels, 'Raised Without Antibiotics that impact antibiotic resistance in humans,' is false and misleading to the consumer when used in advertisements.").

V. Conclusion

For the foregoing reasons, FSIS's proposed Guideline is inconsistent with its statutory obligations under the FMIA and PPIA to ensure that labels are truthful and that they are not misleading, and it must therefore be retracted.