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Submitted via the Federal eRulemaking Portal

U.S. Department of Agriculture
Food Safety & Inspection Service
1400 Independence Avenue SW
Washington, DC 20250

Re: Petition for Accurate Labeling of Meat Processed with Added Nitrates and Nitrites (Aug. 29, 2019), Docket No. FSIS-2019-0022

Public Justice’s Food Project (PJ Food Project) and the Animal Legal Defense Fund (ALDF) submit these comments to the Food Safety and Inspection Service (FSIS) in support of the Center for Science in the Public Interest and Consumer Reports’s Petition to label meat and poultry products accurately. We urge FSIS to grant the petition and prohibit companies from using “No Added Nitrate or Nitrite” claims on any meat products containing added nitrate and nitrite.¹ FSIS’s current rules enable companies to use “no added nitrate or nitrite” claims on the labels of meat products containing added nitrate and nitrite from natural sources, so long as companies include the disclaimer “except for those naturally occurring [nitrates or nitrites] in [the added natural sources].”² As we discovered from industry documents and testimony acquired in the course of litigation,³ companies rely on this regulatory “loophole” to mislead consumers.⁴ Thus, FSIS should amend its rules to protect consumers and ensure fair competition in the meat marketplace.

¹ We use the term “meat products” in these comments to refer to both meat and poultry that have been preserved, altered, or otherwise processed or manufactured to enhance color and flavor, including bacon, hotdogs, deli meats, and similar products.

² FSIS, *Part 1 of 3: Use of Celery Powder & Other Natural Sources of Nitrite as Curing Agents, Antimicrobials or Flavorings* (last updated on Aug. 29, 2019), https://askfsis.custhelp.com/app/answers/detail/a_id/2029/%7E/part-1-of-3%3A-use-of-celery-powder-and-other-natural-sources-of-nitrite-as.

³ The PJ Food Project and ALDF filed the documents and testimony referenced herein as exhibits in support of Plaintiff ALDF’s motion for summary judgment in *ALDF v. Hormel Foods Corp.*, No. 2016CA47444B (D.C. Super. Jan. 11, 2019). These exhibits are publicly accessible pursuant to Order at 41, ¶¶ 12-13, *supra*, (Apr. 8, 2019) (granting Plaintiff ALDF’s unopposed motion to unseal court filings). For convenience, we have attached the public records referenced herein as exhibits with highlighting added to help the agency identify the key language.

⁴ Hormel Outline, at 1982 (explaining that Hormel’s “Natural Choice” ham products “say the [percent] solution [of natural juices] add[ed] because *celery powder gives a loophole in the naming of ham*”) (emphasis added) [attached hereto as **Exhibit A**].

I. Background

PJ Food Project and ALDF are nonprofit legal advocacy organizations dedicated to promoting ethical and equitable practices in industrial animal agriculture through litigation, legislation, and public education. Public Justice’s Food Project is the only legal organization in the country focused solely on dismantling corporate control and consolidation in the animal agriculture industry. ALDF works to protect the lives and advance the interests of animals through the legal system, in part by combatting and educating the public about the cruelty and other social ills inherent in industrial animal agriculture and thereby encouraging consumers to choose products that are more ethical.

Through PJ Food Project and ALDF’s collective efforts to end misleading advertising claims in industrial meat production, we have discovered information that reinforces the need for the regulatory reform set forth in the Petition. Specifically, PJ Food Project and ALDF sued Hormel Foods Corporation, a Fortune 500 company with numerous brands of processed meat,⁵ for misleadingly using “no added nitrates or nitrites”—along with “natural,” “no preservatives,” “no artificial ingredients,” and other related claims—to advertise its Natural Choice line of meat products, which contain nitrates, preservatives, and other additives.⁶

In the course of litigation, we obtained testimony and documents from Hormel detailing how the company relied on a “loophole” in FSIS’s current rules to feature “no added nitrate or nitrite” claims on products containing added nitrates and nitrites from strategically selected sources.⁷ Hormel’s own statements also establish how companies exploit such claims to make products more appealing to the growing number of consumers seeking more healthful products.⁸

⁵ See FORTUNE 500, *Hormel Foods*, <http://fortune.com/fortune500/2019/hormel-foods> (last visited Dec. 4, 2019) (noting that Hormel has been on the Fortune 500 List for over 65 years); HORMEL FOODS, *Our Brands: Meat & Proteins*, <http://www.hormelfoods.com/brands/?group=Meat+%26+Proteins> (last visited Dec. 4, 2019) (indicating that Hormel owns several well-known brands (e.g., SPAM, Jennie-O Turkey Store) and “natural” meat brands (e.g., Applegate, Valley Fresh)).

⁶ See, e.g., Deena Shanker, *What’s ‘All Natural’ Meat? Hormel Is About to Find Out*, BLOOMBERG (Jun. 30, 2016), <https://www.bloomberg.com/news/articles/2016-06-30/what-s-all-natural-meat-hormel-is-about-to-find-out>; see also Complaint, *Hormel Foods* (Jun. 29, 2016).

⁷ See Michael Forbes Dep. at 53 (Aug. 23, 2018) (as Hormel’s Rule 30(b)(6) designee) [attached hereto as **Exhibit B**].

⁸ See Jeremy Zavoral Dep. at 106-07 (Jul. 27, 2018) (as the Natural Choice Brand Manager) [attached hereto as **Exhibit C**]; Burson-Marsteller, *Hormel® Natural Choice®: Media Guidance*, at 2 (May 8, 2015) [attached hereto as **Exhibit D**].

As explained further below, this evidence demonstrates that FSIS’s current rules enable meat companies use such labeling claims to mislead consumers. Accordingly, FSIS must amend the rules to fulfill its statutory duties to prevent misleading meat and poultry labeling under the Federal Meat Inspection Act, 21 U.S.C. §§ 601-95, and the Poultry Products Inspection Act, 21 U.S.C. §§ 451-72.⁹

II. Meat companies use “no added nitrate or nitrite” claims on product labeling to attract health-conscious consumers.

Hormel’s testimony and documents confirm that it and other processed meat sellers use “no added nitrate or nitrite” claims to make products “stand out” to consumers seeking “healthy and natural” meat products.¹⁰ For example, Hormel’s Natural Choice brand used such claims on product labeling and in advertising to target “health conscious” and “wellness seek[ing] consumers.”¹¹ As market research and Hormel’s own consumer study revealed, health-conscious consumers will often look for “no added nitrate or nitrite” claims on product labeling to determine which natural meat brands are “authentic.”¹² Hormel was also following industry-wide recommendations to “[e]xtend . . . all-natural claims” with “no added nitrate or nitrite” claims.¹³ That is, Hormel included “no added nitrate or nitrite” claims because consumers are more likely to regard a product as “clean” when a “no added nitrate or nitrite” claim appears together with an

⁹ See 9 C.F.R. § 300(a), (b)(1)-(2) (authorizing and requiring FSIS to implement the Federal Meat Inspection Act and the Poultry Products Inspection Act).

¹⁰ Ex. D, Media Guidance, at 2, 5; Hormel Natural Choice POV, at 102 [attached hereto as **Exhibit E**]; Jeremy Zavoral Dep. at 103 (Aug. 22, 2018) (as Hormel’s Rule 30(b)(6) designee) (explaining that Hormel used labeling terms to make products “stand out” to “consumers [who] are looking for [natural products]”) [attached hereto as **Exhibit F**].

¹¹ Ex. D, Media Guidance, at 5; Amy Sand Dep. at 15 (Jul. 26, 2018) (as the Senior Brand Manager for Natural Choice) [attached hereto as **Exhibit G**]; Effie Award Entry Form, Executive Summary, at 4-5 (2017) (stating that Hormel’s Natural Choice line targeted “women who seek better-for-you options”) [attached hereto as **Exhibit H**].

¹² See SPINS, Navigating the Growing Consumer Demand for Natural & Organic Meat, Presentation at Ann. Meat Conference (Feb. 22, 2015), at 882, 864 (noting that “[c]onsumers seek ‘authentic’ brands,” and “nitrate/nitrite free” claims make companies appear more transparent) [attached hereto as **Exhibit I**]; *id.* at 864 (demonstrating that “nitrate/nitrite free” claims were the second most lucrative health claim in 2015, generating \$720 million in retail sales); Def. Hormel Foods’s Redacted Resp. to Pls.’ R. 56 Statement in Support of Pls.’s Opp. Mot. for Summ. J., *Hormel Foods*, at 104, 106 (Jan. 25, 2019) (revealing that 52 percent of consumers considered “no nitrates or nitrates added” claims to be “important . . . in [their] decision to buy a natural meat”), available at <https://www.publicjustice.net/wp-content/uploads/2019/03/2019.01.30-Hormel-REDACTED-RSUMF.pdf>.

¹³ Ex. I, SPINS Presentation, at 885, 895.

“all-natural” claim than if the “all-natural” claim appeared on its own.¹⁴ Thus, companies use “no added nitrate or nitrite” claims to “reinforc[e] the cleanliness of [their products],”¹⁵ and to convince consumers that their products are “healthy and natural.”¹⁶

III. FSIS’s current rules enable meat companies to use “no added nitrate and nitrite” claims on products containing added nitrate or nitrite.

Hormel and other companies are able to use “no added nitrate or nitrite” claims in this manner because FSIS’s current rules enable companies to employ such claims on products that contain purposefully added nitrates or nitrites, so long as companies include a disclaimer on the label. For example, Hormel was able to gain the advantage of using “no added nitrate or nitrite” claims on Natural Choice products because Hormel strategically replaced synthetic nitrites with other nitrate- and nitrite-containing additives that allowed Hormel to maintain the products’ appearance and taste.

Specifically, Hormel “intent[ionally]” added two ingredients during the manufacturing process¹⁷—an ingredient naturally high in nitrates (e.g., celery juice powder),¹⁸ and an ingredient to reduce those nitrates into nitrites (e.g., lactic acid starter)¹⁹—into the product as two separate ingredients or as a premixed “solution” that had already undergone the conversion process (e.g., “cultured celery juice powder”).²⁰ This allowed Hormel’s meat products to undergo the same

¹⁴ See Ex. E, POV, at 102; Ex. F, Zavoral Dep. at 103-05.

¹⁵ Ex. E, POV, at 102.

¹⁶ Ex. D, Media Guidance, at 5.

¹⁷ Ex. B, Forbes Dep., at 31-32, 50, 53 (noting that “Natural Choice product[s]” are not “nitrate free” because the company “added the solution of lactic acid starter culture and the celery juice powder”); Hormel Resp., *supra* note 12, at 296 (“Hormel Foods admits that it uses celery juice powder or cultured celery juice powder as an ingredient in certain Natural Choice® deli meats, including some ham, chicken and turkey deli meats.”).

¹⁸ Ex. B, Forbes Dep., at 31-32, 48, 50, 53 (noting that Hormel “add[ed] . . . celery juice powder” with “the intent . . . to introduce some nitrate that convert[s] [into nitrite] to achieve th[e] conversion process used to cure meat[s]”).

¹⁹ *Id.* at 32 (noting that the culture’s “function” is “to reduce th[e] natural nitrates [in celery] to nitrites”).

²⁰ *Id.* at 31-33, 50.

chemical reaction as occurs with products containing synthetic nitrate and nitrite.²¹ The “end result” also looks and tastes the same to consumers.²² Nonetheless, because Hormel induced this result with so-called “naturally occurring” nitrates, FSIS’s current rules allow it to use “no added nitrate or nitrite” claims. Natural Choice products, and other meat products processed with nitrate and nitrite from natural sources, *are* made with “added nitrates and nitrites,” despite what their labels claim.

IV. FSIS’s current rules contribute to consumer confusion and deception.

Hormel’s own statements and independent research demonstrate that meat companies use this regulatory “loophole” to further and exploit consumer misunderstanding about the meaning of “no added nitrate or nitrite” claims. According to a consumer survey, “[n]early two-thirds of consumers think a ‘No Nitrates’ label means no nitrates at all, whether from an artificial or natural source.”²³ Hormel expressly acknowledged that some of its customers “frequently” purchased products with “no added nitrate or nitrite” claims under the assumption that the products were completely “nitrate/nitrite free.”²⁴ Consumers often connect “no added nitrate or nitrite” claims with positive attributes (e.g., cleanliness) because they misunderstand what the claim conveys.

Nonetheless, although Hormel was aware that consumers were confused about the meaning of “naturally occurring nitrites,”²⁵ Hormel continued to rely on the “words given to [it] by the [FSIS] about what [it] can and cannot claim.”²⁶ As the brand manager for Hormel Natural

²¹ *See id.* at 35 (defining “[c]uring” as “taking a meat or poultry product” and using “nitrates and nitrites” to “generat[e] the cured color [and] flavor” of processed meat); *id.* (explaining that the “conventional” process of curing meat requires “traditional curing agents such as sodium nitrate,” rather than “alternative natural ingredients.” to achieve the same result); *id.* at 45 (noting that the curing “process . . . keeps happening [until] you eventually have nitric oxide, which . . . give[s] you those [cured] colors”).

²² *Id.* at 35, 45, 50.

²³ CONSUMER REPORTS NATIONAL RESEARCH CENTER, FOOD LABELS SURVEY: NATIONALLY REPRESENTATIVE PHONE SURVEY 3 (Apr. 6, 2016).

²⁴ Hormel Resp., *supra* note 12, at 126.

²⁵ Hormel Slide Presentation, at 2054 (indicating that one of the “[m]ost [c]ommon [q]uestions” Hormel received about its Natural Choice line was “[w]hat are naturally occurring nitrites?”) [attached hereto as **Exhibit J**].

²⁶ Ex. B, Zavoral Dep., at 105-107 (noting that “celery powder or cherry powder isn’t considered a[n] [added nitrate]” under existing regulations).

Choice explained, companies have an interest in “blur[ing] the lines” because confusion may lead consumers “to assume [products] have benefits beyond [what they] claim[.]”²⁷

This consumer confusion is particularly harmful because FSIS’s current rules can expose consumers to carcinogens they sought to avoid by purchasing meat products with “no added nitrate or nitrite” claims on the label.²⁸ Any meat processed with nitrite can contain a carcinogen called nitrosamine.²⁹ As a result, meats processed with nitrite derived from natural nitrate can contain the same carcinogen as those processed with synthetic nitrite.³⁰ Because FSIS permits companies to use “no added nitrate or nitrite” claims on meats processed with nitrite derived from natural nitrate, the agency’s current rules not only facilitate consumer deception, but also create genuine and unanticipated health risks.

V. FSIS’s current rules also prevent consumers from making informed choices.

Further, FSIS’s current rules undermine fair competition and consumer choice in the marketplace. As the brand manager of Hormel’s Natural Choice line explained, consumers rely on “packaging and branding” to distinguish natural meat brands.³¹ However, because FSIS’s current rules are so open to manipulation, Hormel acknowledged that companies who add nitrate or nitrite to products have found ways to use the same claims as “all of the other products in the [natural meat] category.”³² Therefore, by allowing larger and more established companies like Hormel to attract more consumers with misleading labeling claims,³³ FSIS’s current loose rules prevent companies who are selling truly nitrate/nitrite-free meat products from gaining their rightful advantage in the marketplace.

²⁷ Hormel Resp., *supra* note 12, at 112 (discussing confusion about “natural” claims).

²⁸ See CONSUMER REPORTS, *supra* note 23, at 3 (finding that two-thirds of consumers are aware “that some processed meats can increase the risk of cancer”).

²⁹ See INTERNATIONAL AGENCY FOR RESEARCH ON CANCER, RED MEAT & PROCESSED MEAT, 114 IARC MONOGRAPHS 1, 53 (2018), <https://publications.iarc.fr/564>.

³⁰ See Ex. B, Forbes Dep., at 31-32, 48, 50, 53 (noting that Hormel intentionally added ingredients “to achieve th[e] conversion process used to cure meat,” which “keeps happening [until] you eventually have nitric oxide”).

³¹ Ex. C, Zavoral Dep., at 74-75; see also Ex. F, Zavoral Dep., at 103 (explaining that Hormel used the term “natural” on labels “to differentiate [its] products [from] some of [its] competitors”); Ex. H, Effie Form, at 3-4 (noting that Hormel used labeling to “re-energize sales” and compete with “other big brands” entering the natural meat market).

³² Ex. C, Zavoral Dep., at 107 (noting that Hormel used the same “words [and] phrasing” as “all of the other products in the [natural meats] category that make th[e] same claim”).

³³ See Hormel Resp., *supra* note 12, at 104, 106 (revealing that “no added nitrate or nitrite” attributes were “important” to most consumers of natural meat).

CONCLUSION

FSIS's current rules enable industrial meat companies to attract consumers with deceptive "no added nitrate or nitrite" claims on meat products made with added nitrates and nitrites that perform the same chemical function in the meat as their synthetic counterparts. The rules thus expose consumers to carcinogens they sought to avoid by purchasing meat with "no added nitrate or nitrite" claims on the label. The rules also stifle fair competition and consumer choice in the natural meat market by preventing consumers from identifying and purchasing truly nitrate/nitrite-free meat products, or by fraudulently inducing consumers to buy processed meat when they might otherwise seek to avoid it altogether. Accordingly, FSIS must close the regulatory loophole to prohibit companies from using "no added nitrate or nitrite" claims on meat products that do, in fact, contain added nitrates or nitrites.

Respectfully submitted,

David Muraskin, Food Project Senior Attorney
Leah Nicholls, Senior Attorney
Kristina Sinclair, Food Project Fellow
Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036

Kelsey Eberly, Staff Attorney
Animal Legal Defense Fund
525 E Cotati Avenue
Cotati, CA 94931