



WHITE PAPER

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Consumer Groups File Petition Urging the USDA to Change Meat Labeling Requirements

For years, natural sources of nitrates and nitrites have been used to cure meats as an alternative to traditional synthetic sources. The United States Department of Agriculture (“USDA”) requires companies that cure meats using these natural ingredients to label a product as “uncured” with “no nitrates or nitrites” and to include a disclaimer that identifies the natural source of nitrates and nitrites. A petition by two consumer groups now claims that these products have about the same amount of residual nitrates and nitrites as those that use synthetic sources and urges the USDA to change its labeling regulations to avoid consumer confusion.

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INTRODUCTION

There is controversy over whether companies relying on natural sources of nitrates and nitrites in processed meats should be allowed to label their products “uncured” and “no nitrates or nitrites added.” Consumer Reports and the Center for Science in the Public Interest have petitioned the USDA’s Food Safety and Inspection Service to require a label that states that the product includes added nitrates and nitrites even when natural sources of nitrates and nitrites are used.

Controversy and litigation surrounding food labeling continues to rise.¹ Companies should pay close attention to these proposed changes in labeling laws, as it could trigger new requirements for companies that manufacture and label processed meat. If the USDA changes the label requirements, any new regulations would not go into effect until January 2022 at the earliest so companies have time to adjust their procedures.² Failure to adhere to any new labeling requirement after it goes into effect, however, would violate the Food, Drug, and Cosmetic Act and the Federal Meat Inspection Act. Consequences for violations range from written notices for minor violations to injunctions, monetary penalties up to \$10,000, and even criminal penalties. (21 U.S.C. § 331–333; 676).

THE ISSUE

On August 29, 2019, Consumer Reports and the Center for Science in the Public Interest jointly filed a citizen petition with the USDA requesting that the agency change the labeling requirements for processed meats that use natural sources of nitrates or nitrites.³ The petition claims that products that use natural sources contain residual levels of nitrates and nitrites similar to those found in products that use synthetic sources. The organizations claim that permitting manufacturers to label a product with natural nitrates or nitrites as “uncured” and “no nitrates or nitrites” confuses consumers. The USDA accepted comments on the petition until December 12, 2019⁴, and is currently considering the petition and responsive comments. There is no required time period by which the USDA must reach a decision, so companies should stay alert for any updates, as a change to the current regulations could require significant label revisions for affected products.

BACKGROUND

Nitrates and nitrites are chemical compounds that often are used to preserve processed meats, such as hot dogs, bacon, deli meats, and salami.⁵ They can be derived naturally, usually from vegetables, or synthetically. This preservation process is called curing, and synthetic nitrates and nitrites have been used to cure meat products since the beginning of the 20th century.⁶ Demand for processed meats without nitrates or nitrites grew after studies in the late 1960s highlighted potentially negative health effects from consuming cured products.⁷

In 1979, the USDA passed a rule that allowed companies to sell processed meats with no nitrates or nitrites under the same traditional names as their cured counterparts, but required them to use a label that stated “uncured” and “no nitrates or nitrites” on products that consumers would normally expect to be cured. (9 CFR § 319.2; 9 CFR § 317.17). These labels were intended to alert consumers to the fact that nitrate-free products would not have the same antibacterial properties as products that were cured with nitrates or nitrites and would, therefore, spoil more quickly. This rule led to litigation over whether nitrate-free meats should still be allowed to use the same names as traditionally cured meats. At least one court, the Eighth Circuit Court of Appeals, decided that it was lawful to allow these products to keep the same name, as long as the meat products included the newly mandated USDA labels.⁸ Under that ruling, bacon and turkey with no nitrates or nitrites could still be called bacon and turkey, as long as they were also labeled “uncured” and “no nitrates or nitrites added.”

In the 1990s, scientists discovered that natural sources of nitrates and nitrites, such as celery powder, could be used to cure the meats and achieve a similar taste to products that used synthetic nitrates and nitrites.⁹ These natural sources of nitrates and nitrites were treated as flavoring agents rather than curing agents by regulators. Consequently, companies who used natural sources were still required to include the “no nitrate or nitrite added” and “uncured” labels.¹⁰ The USDA also added the requirement that companies include a disclaimer on the label that states “other than those naturally occurring in [the natural source of nitrates or nitrites]” so that the products were not considered misbranded under other regulations.¹¹

(9 CFR § 319.2; 9 CFR § 317.17; 9 CFR § 317.8). For example, under the current regulatory regime, if a manufacturer uses celery powder to preserve bacon, the package should be labeled as “uncured” and “no nitrate or nitrite added” with the disclaimer “other than those naturally occurring in celery powder.” These label claims are considered “special claims” and, therefore, the proposed label must be submitted to the Label and Program Delivery Staff within the USDA for approval.¹² (9 CFR 412.1(c)(3)).

THE PETITION

The petition filed by Consumer Reports and Center for Science in the Public Interest urges the USDA to change labeling requirements for meats with natural sources of nitrates and nitrites and argues that these products should not be labeled in the same manner as products that don't have nitrates or nitrites at all. The studies cited in the petition claim that meats that use natural sources of nitrates and nitrites have similar residual levels of nitrates and nitrites as those that use synthetic sources.¹³ Further, it claims that it is misleading to the consumer to require a label that states “no nitrates or nitrites” and “uncured” when the product uses natural sources and that the combination of the label and disclaimer on these products causes consumer confusion. It leads people to think, they argue, that a product labeled as “uncured” and “no nitrates or nitrites added” is actually uncured and contains no, or at least a lower level of, nitrates and nitrites than products without this label.¹⁴

The petition proposes that the USDA prohibit the use of the “no nitrates or nitrites added” label when natural sources are used and add a requirement that all foods with any added nitrates or nitrites, regardless of whether a synthetic or natural compound is used, include a label stating “nitrates or nitrites added.”¹⁵ Additionally, it proposes that the USDA add natural sources of nitrates and nitrites to the regulatory list of curing agents. They argue that the natural sources are, in effect, curing the products, and the list of curing agents should reflect this. Lastly, the petition proposes that the USDA require manufacturers to identify the natural source as a nitrate or nitrite in the ingredients list and take further steps to minimize levels of nitrates and nitrites in processed meats by “setting maximum concentrations and requirements” for the use of various cure accelerators when nitrites or nitrates are used.¹⁶

OTHER CONTROVERSIES SHED LIGHT ON THE ISSUE

This is not the first time that cured meats have come under the scrutiny of consumer groups. In July 2019, the USDA denied a petition from Center for Science in the Public Interest that asked for a warning on processed meats that frequent consumption of these products could increase the risk of cancer.¹⁷ The USDA determined that the scientific studies cited in the petition were insufficient to warrant a warning and that the proposed warning could itself cause consumer confusion.¹⁸ The USDA stated, “[a]lthough some of the studies cited in the petition state that cooking certain processed meat and poultry products at high temperatures can cause carcinogenic compounds to form, the studies and the petition acknowledge that the mechanisms giving rise to the purported increased cancer risk are currently unknown.”¹⁹

The FDA has taken a different approach than the USDA concerning the labeling of preservatives in packaged foods. Preservatives such as citric acid, which can be both naturally and synthetically derived, are defined as preservatives regardless of the source.²⁰ And if a company uses citric acid as a preservative in a product, even if naturally derived, it may not include a “no preservatives” label. For instance, Barilla, a pasta sauce company, is currently defending class action litigation arising from its use of a “no preservatives” claim for products that list citric acid as an ingredient.²¹ The plaintiffs have asserted fraud, deceptive business practice, and false advertising claims under various state laws.²²

Although the labeling of products containing nitrates and nitrites has remained largely untouched since the 1970s, if the Consumer Reports and Center for Science in the Public Interest petition is granted, it would mean a change in current labeling law. As a result, companies are in a state of limbo. With the fast-changing pace of labeling requirements and upward trend in labeling litigation, companies should keep a close eye on the USDA's decision and potential new regulations.

MOVING FORWARD

The USDA recently extended the comments period deadline from November 12, 2019, to December 12, 2019. Requests for a 90-day extension to the comments period have been filed by

various meat associations but have not yet been approved.²³ If the USDA does change the labeling requirements, companies may need to change labels as soon as January 2022, and noncompliance could lead to consequences, such as written notices, injunctions, monetary fines up to \$10,000 and even criminal penalties. (21 U.S.C. § 331–333; 676). There is no required timeframe by which the USDA must complete its review, and final decisions have been rendered in as few as two months and as many as six years from the date previous petitions were filed.²⁴

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ENDNOTES

- 1 Amy-Lee Goodman, A “Natural” Stand Off Between the Food and Drug Administration and the Courts: The Rise in Food-Labeling Litigation & the Need for Regulatory Reform, 60 B.C. L. Rev. 271, 287 (2019).
- 2 83 Fed. Reg. 235 (Dec. 7, 2018).
- 3 *Petition to Require Accurate and Non-Misleading Labeling on Meat Processed with Non-Synthetic Nitrates and Nitrites*, Consumer Reports and Center for Science in the Public Interest (2019).
- 4 *FSIS Seeking Comments on CSPI Petition on Nitrate/Nitrite Labeling*, United States Department of Agriculture Food Safety Inspection Service (2019).
- 5 *Petition to Require Accurate and Non-Misleading Labeling on Meat Processed with Non-Synthetic Nitrates and Nitrites* 5–6.
- 6 *Nat’l Pork Producers Council v. Bergland*, 631 F.2d 1353, 1356 (8th Cir. 1980).
- 7 *Id.*
- 8 *Id.* at 1363.
- 9 *Id.*
- 10 Jessie Hirsch, “Why is Celery Powder So Controversial?,” *The New Food Economy* (2019).
- 11 *Use of Celery Powder and Other Natural Sources of Nitrite as Curing Agents, Antimicrobials or Flavorings*, United States Department of Agriculture Food Safety Inspection Service (2019).
- 12 *FSIS Compliance Guideline for Label Approval*, United States Department of Agriculture Food Safety Inspection Service (2017).
- 13 *Id.* at 26–28.
- 14 *Petition to Require Accurate and Non-Misleading Labeling on Meat Processed with Non-Synthetic Nitrates and Nitrites* at 13.
- 15 *Id.* at 17.
- 16 *Id.*
- 17 *FSIS Final Response to Petition Submitted by Center for Science in the Public Interest*, United States Department of Agriculture Food Safety Inspection Service (2019); *Petition 16-07*, Center for Science in the Public Interest (2016). 18 *FSIS Final Response to Petition Submitted by Center for Science in the Public Interest* at 1–3.
- 19 *Id.*
- 20 *Overview of Food Ingredients Additives & Colors*, Food and Drug Administration (2010).
- 21 *Kubilius v. Barilla America Inc.*, 1:18-cv-06656 (N.D. Ill. filed Oct. 1, 2018).
- 22 Complaint at 16–23, *Kubilius v. Barilla America Inc.*, 1:18-cv-06656 (N.D. Ill. filed Oct. 1, 2018).
- 23 *FSIS Seeking Comments on CSPI Petition on Nitrate/Nitrite Labeling*, United States Department of Agriculture Food Safety Inspection Service (2019).
- 24 *Petitions*, United States Department of Agriculture Food Safety Inspection Service (2019).

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