



AAFCO

Association of American Feed Control Officials

December 4, 2018

Ref: NIST 2.37 Pet Treats or Chews

Dear Dr. Copan,

Board of Directors

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*On November 29, 2018, the State of New Jersey issued a **\$7,000 fine** and demanded that pet treat products be removed from the shelves of a retailer in New Jersey for violating NIST 2.37 (see below). These treat products presented no danger to human or animal health.*

This is the second incident AAFCO is aware of where New Jersey has issued a severe fine in advance of a new NIST regulation scheduled to take effect on January 1, 2019.

The Association of American Feed Control Officials Board of Directors appreciates this opportunity to share our thoughts on a new method of sale we've recently been made aware of. This method of sale has been adopted by the National Council on Weights and Measures (NCWM) based on NIST Handbook 130, and it is slated to take effect on January 1, 2019. States are already issuing punitive fines on industry for current inventory labeled in the legally correct manner. There has been no notice to industry issued by either NCWM or NIST on this new regulation.

Since September 1909, AAFCO has actively promoted a set of model state feed/pet food laws and rules in concert with the U.S. Food and Drug Administration. While AAFCO does not legislate, we work in the areas of language for legislation through these model bills, feed labeling, and ingredient definitions with the goal of assisting industry and state governments to enact animal feed and pet food laws that are consistent throughout the US.

Throughout our history, AAFCO has worked with stakeholders including the Food and Drug Administration, United States Department of Agriculture, universities, consumers, and industry to create a national set of definitions and laws/rules throughout the U.S. There is not another nation in the world that has such a uniform set of feed/pet food laws/rules.

We are writing today to express our concerns as an organization in response to the National Council of Weights and Measures (NCWM) newly adopted method of sale requirements for pet food treats to be added to the 2019 NIST Handbook 130.

"2.37. Pet Treats or Chews – Digestible chews, rawhides, bones, biscuits, antlers or similar type products shall be sold by weight."

This language, if not contested by CVM along with AAFCO and other interested agencies, is already being enforced by state weights and measures officials in the form of fines levied on current inventories. These fines may be construed as punitive in the amount of the fine when applied to current inventory.



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On January 1, 2019, when the newly adopted method of sale is slated to take effect, the fines will be assessed on current inventory as well as distribution. We anticipate the financial burden for industry will be significant if this measure is not repealed. The National Council of Weights and Measures (NCWM) perhaps should have conferred with AAFCO and industry to understand the packaging reprinting process. Very few companies will be in a position to comply with this method of sale requirement if it is allowed to continue.

Our analysis of this method of sale requirement reveals these violations of laws and regulations:

(1) This is in clear violation of federal law found in the Code of Federal Regulations 21 CFR 501.8 Subpart A - general provisions for animal food labeling.

“Sec. 501.8 Labeling of animal food with number of servings.

(a) The label of any package of a food which bears a representation as to the number of servings contained in such package shall bear in immediate conjunction with such statement, and in the same size type as is used for such statement, a statement of the net quantity (in terms of weight, measure, or numerical count) of each such serving; however, such statement may be expressed in terms that differ from the terms used in the required statement of net quantity of contents (for example, cupsful, tablespoonfuls, etc.) when such differing term is common to cookery and describes a constant quantity. Such statement may not be misleading in any particular. A statement of the number of units in a package is not in itself a statement of the number of servings.

(b) If there exists a voluntary product standard promulgated pursuant to the procedures found in 15 CFR part 10 by the Department of Commerce, quantitatively defining the meaning of the term serving with respect to a particular food, then any label representation as to the number of servings in such packaged food shall correspond with such quantitative definition.”

(2) This is in clear violation of federal law found in 16 CFR 500, generally referred to as the Fair Packaging and Labeling Act.

Here's the net contents declaration:

§ 500.6 Net quantity of contents declaration, location.

(a) The label of a consumer commodity shall bear a declaration of the net quantity of contents separately and accurately stated on the principal display panel.



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(b) The declaration of net quantity shall appear as a distinct item on the principal display panel, shall be separated (by at least a space equal to the height of the lettering used in the declaration) from other printed label information appearing above or below the declaration and, shall not include any term qualifying a unit of weight or mass, measure, or count such as “jumbo quart,” “giant liter,” “full gallon,” “when packed,” “minimum,” or words of similar import. The declaration of net quantity shall be separated (by at least a space equal to twice the width of the letter “N” of the style of type used in the net quantity statement) from other printed label information appearing to the left or right of the declaration. However, the “e” mark shall not be considered to be a qualifying word or phrase and may be used as part of the statement of the net quantity of contents where warranted. When used, the “e” mark shall be at least 3 millimeters (approximately 1/8 in) in height. The declaration of net quantity of contents shall be placed on the principal display panel within the bottom 30 percent of the area of the label panel in lines generally parallel to the base on which the package or commodity rests as it is designed to be displayed: *Provided*, that:

(1) On consumer commodities having a principal display panel of 5 square inches (32.2 cm²) or less, the requirement for placement within the bottom 30 percent of the area of the label panel shall not apply when the declaration of net quantity of contents meets the other requirements of this part, and

(2) The requirements as to separation, location, and type size, specified in this part are waived with respect to variety and combination packages as defined in this part.

(3) And then this section relating to net quantity of contents:

§ 500.7 Net quantity of contents, method of expression.

The net quantity of contents shall be expressed in terms of weight or mass, measure, numerical count, or a combination of numerical count and weight or mass, size, or measure so as to give accurate information regarding the net quantity of contents thereof, and thereby facilitate value comparisons by consumers. The net quantity of contents statement shall be in terms of fluid measure if the commodity is liquid, or in terms of weight or mass if the commodity is solid, semi-solid, or viscous, or a mixture of solid and liquid. If there is a firmly established general consumer usage and trade custom of declaring the contents of a liquid by weight or mass, or a solid, semi-solid, or viscous product by fluid measure, numerical count, and/or size, or (as in the case of lawn and plant care products) by cubic measure, it may be used, when such declaration provides sufficient information to facilitate value comparisons by consumers. The declaration may appear in more than one line of print or type



(4) In addition, the language proposed in the 2019 NIST Handbook 130 is not congruent with language found in many state laws which are patterned after language found in the AAFCO Model Bill.

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Specifically, the AAFCO Model Bill and Regulations PF2(a)(3).

“Quantity statement, as defined in Section 3(s) of this Act and Regulation 3(a)(8) of the Model Regulations, by weight (pounds and ounces, and metric), liquid measure (quarts, pints and fluid ounces, and metric) or by count, on the principal display panel;”

The consequence of this method of sale requirement being so far out of agreement with state laws creates an unnecessary burden on state government regulators as well as legislators, in addition to AAFCO. These agencies, charged with maintaining uniform regulations to facilitate interstate commerce, have no time to consider or respond on this issue before January 1, 2019.

The financial burden on states to enforce this method of sale is expected to be compensated by the agency passing the method of sale regulation, in this instance, the National Council on Weights and Measures. In the absence of any such financial arrangements or appropriate training of regulatory staff, states are hesitant to enforce new regulations. The consequence is that a federal agency has issued this language which is unenforceable in US State and Federal laws. A quagmire of legal cases and lawsuits could result as a consequence of this measure, which again places a further burden on industry, regulators, and ultimately consumers who are expected to pay the high price of this method of sale.

Our organization is very concerned over the attempt at alteration or passing over of federal and state laws, as well as the significantly increased costs of doing business for industry and the costs of pet treats that consumers will pay. We believe federal law found in 21 CFR 501.8, 500.6, and 500.7 should be enforced and ask that CVM contact NCWM/NIST and insist that regulation 2.37 concerning pet treats and chews be immediately withdrawn before it results in any more disruption of fair commerce and financial burden for industry and consumers.

Thank you for your consideration of this letter. We are available for more information if you need it, and we'd like to hear from you regarding your plan of action on this issue before significant disruption of interstate commerce and harm to consumers occurs.

Sincerely,
Susan M. Hays
Susan M. Hays
Executive Director

Cc: Don Onwiler, NCWM