

Date: January 21, 2018

VIA ELECTRONIC MAIL

Ethan Bogren  
Chair, Laws and Regulations Committee  
National Conference on Laws & Measures  
1135 M Street, Suite 110  
Lincoln, Nebraska 68508

Re: L&R Committee Agenda Item POL-1 (*Section 2.6.17. Methods of Sale for Packages of Consumer Commodities – Federal Trade Commission and Acceptable Common or Usual Declarations for Packages of Food – Food and Drug Administration*)

Dear Mr. Bogren,

I am writing regarding item POL-1 (*Section 2.6.17. Methods of Sale for Packages of Consumer Commodities – Federal Trade Commission and Acceptable Common or Usual Declarations for Packages of Food – Food and Drug Administration*) on the agenda of the Laws and Regulations Committee (L&R Committee). We appreciate this opportunity to provide the following comments on the proposed listing of methods of sale for FDA-regulated foods in NIST Handbook 130:

1. The proposed listings need to be reviewed to ensure they are updated consistent with current established practices and applicable legal standards.
2. The proposed listings need to be revised for consistency, clarity, and appropriate use of factual product descriptors.

We urge the L&R Committee to maintain this proposal as a Developing item and not move it forward as Voting to allow adequate time for the work that is needed. As explained below, much of the food-related information proposed to be included in the Handbook is taken from FDA guidance that is many decades old and to best of our knowledge, has not been readily accessible for many years. As a result, each type and method of sale proposed to be listed in the Handbook requires review to confirm that the recommendation is still appropriate.

**1. The Proposed Listings Require Review to Ensure Updates in Line with Established Practices and Applicable Legal Standards.**

The proposal appears to seek to codify Section 7699.2 of the Fair Packaging & Labeling Manual (the Manual), which was published in June 1978 (nearly 40 years ago). We believe the manual has been out of print for many years. For example, it is not currently included the list of active guidance documents on FDA's website. See <https://www.fda.gov/RegulatoryInformation/Guidances/>.

Because the Manual is dated, and because corresponding FDA regulations provide inherent flexibility with respect to methods of sale, it will be very important to review each listing to ensure it reflects current practices.

FDA's regulations in 21 CFR § 101.7(a) provide for methods of sale to be established by numerous means and to change over time: "If there is a firmly established general consumer usage and trade custom of declaring the contents of a liquid by weight, or a solid, semisolid, or viscous product by fluid measure, it

may be used.” This approach also is followed in the Uniform Weights and Measures Law (§ 17) and the Uniform Packaging and Labeling Regulation (§ 6.4).

This flexibility is why the listing of methods of sale in the FPLA Manual is followed by the statement, “This compilation will be revised from time to time as may be required by changes in consumer understanding, administrative opinion or court decisions.” Accordingly, the information from the 1978 manual requires careful review to confirm accuracy before it is republished.

From a high level review of the methods of sale in the FPLA Manual, we found that some of the information no longer appears to reflect current trade customs. For example, a non-exhaustive review of products for sale today revealed the following:

- “Oysters, canned” are listed by drained weight, but all canned oysters we saw are all sold by net weight.
- Sauces are listed as sold by volume, but numerous sauces are currently sold by net weight – there appears to be significant diversity in the sauce category.
- “Syrup” is listed by “Volume & Net Weight,” but the syrups we found on the market are all sold only by volume.
- “Soups, canned (liquid single strength)” are listed by net volume and “Soups, canned (condensed ad semi-condensed)” are listed by net weight, but our limited review found a diversity of practices.

This does not indicate that products in these categories are out of compliance, but rather suggests the potential for a change in the general consumer usage and trade customs. It also illustrates why the chart proposed to be added by item POL-1 needs to be reviewed and updated, as appropriate, before it is published in Handbook 130. It also would be prudent to consult with FDA to determine whether the agency’s position has changed for any of the listed methods of sale since the last publication of the FPLA Manual.

## **2. The Proposed Listings Need to Be Revised for Consistency, Clarity, and Appropriate Use of Factual Product Descriptors**

A cursory, high-level review of the chart proposed to be added by item POL-1 identifies a number of other issues to consider when reviewing the chart, so as to ensure consistency, clarity, and appropriate use of factual product descriptors.

For example:

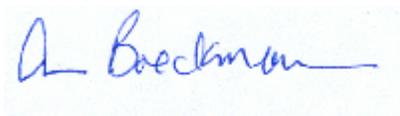
- The common or usual declaration for “cake (decorations)” is “No markings,” which seems inconsistent with the regulation in 21 CFR § 101.7(a). This is worthy of further discussion as to what kinds of products fit this category.
- The declaration for “corn on cob (canned)” could create confusion because it may be mistaken for canned corn kernels, and should be clarified per additional FDA guidance in CPG 585.325.
- The chart includes “Chicken, canned,” which is confusing because the heading references FDA, and chicken is regulated by USDA.
- There are inconsistencies within the recommendations that are not immediately clear. For example:
  - Some sauces (e.g., “Cocktail sauce”) are listed by net weight, but others (e.g., “Sauces, Hot”) are listed by volume. Because there is such a diversity in the sauce category, more discussion is needed to ensure dividing lines are clear and substantiated.

- Similarly, some seafood products (“Fish, Canned”) are listed by net weight, but others (e.g., “Lobster meat in brine (cooked),” “Shrimp, canned (wet)”) are listed by drained weight.
- There are redundancies, such as the listing of both “Tomato sauce” and “Spaghetti sauce.”
- Factual names should be used to describe product categories rather than listing registered trademarks – for example, in the entry for sauces (“Sauces, Hot, Tabasco, A-1, etc.”), TABASCO and A-1 are brands, not factual product descriptors.
- It would be helpful to regulators and industry to add citations to the basis for each recommendation in the chart, to explain the basis for the listed methods of sale.

In summary, we encourage the L&R Committee to move this proposal forward as a Developing item so as to allow for additional review and refinements. Each item identified in the chart should be confirmed as currently accurate before it is published in the Handbook. We note that during the regional meetings held last fall, there were similar comments provided by state regulators.

Thank you for your consideration of our comments. Please do not hesitate to contact me if I can be of assistance to the L&R Committee as it considers this proposal.

Respectfully submitted,



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Chief Counsel, Food Law

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