

June 24, 2011

Mr. Alfred V. Almanza,  
Administrator  
Food Safety and Inspection Service (FSIS)  
U.S. Department of Agriculture  
Room 350–E  
Whitten Building  
1400 Independence Avenue, SW  
Washington, DC 20250–3700

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

**Re: Food Safety and Inspection Service: Mandatory Inspection of Catfish and Catfish Products – Proposed Rule, Docket FSIS-2008-0031**

Dear Administrator Almanza::

In accordance with the February 24, 2011 *Federal Register* notice of the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture (USDA) (*Proposed Rule*, 76 Fed. Reg. 10434), please find below the comments of the Emergency Committee for American Trade (ECAT) on the proposed rule regarding mandatory inspection of catfish and catfish products.

ECAT is an association of the chief executives of leading U.S. business enterprises with global operations and was founded more than four decades ago to promote economic growth through expansionary trade and investment policies. Today, ECAT's members represent all the principal sectors of the U.S. economy – agriculture, finance, high technology, manufacturing, merchandising, processing, publishing and services. The combined exports of ECAT companies run into the tens of billions of dollars. The jobs they provide for American men and women – including the jobs accounted for by suppliers, dealers and subcontractors – are located in every state and cover skills of all levels. Their annual worldwide revenue totals over \$2.7 trillion, and they employ more than 6.2 million persons. ECAT companies are strong supporters of negotiations to eliminate tariffs, remove non-tariff barriers and promote trade liberalization and investment worldwide, all of which promote America's economic growth and prosperity, create good-paying jobs and help increase the standard of living for all Americans.

As discussed below, ECAT is highly concerned that the proposed mandatory catfish inspection rule will violate U.S. international commitments and lead other countries to adopt even more restrictive import programs to the detriment of U.S. agricultural and other exporters. ECAT strongly urges that the rule be thoroughly reviewed and revised in a manner that does not undermine the United States' international engagement.

## **Highly Restrictive Proposed Rule Would Likely Violate U.S. International Commitments**

Section 11016(b) of the Food, Conservation, and Energy Act of 2008 (P.L. No. 110-246) moved jurisdiction over “catfish” from the Food and Drug Administration (FDA) to the FSIS and requires the inspection of catfish, including the facilities where it is prepared and processed, as well as the conditions under which the catfish was raised and transported.

More than two-and-a-half years after enactment of that legislation, FSIS is now proposing to apply in total its FSIS inspection rules that apply to meat, poultry and processed eggs to domestic and foreign catfish, and the associated producers, processors and importers. In order for foreign countries to continue to ship catfish to the United States during the first phase of implementation (starting 90 days after the final rule is published), they will have to document that they have laws or other legal measures already in place to provide authority to regulate catfish and ensure compliance with the FSIS requirements. The proposed rule then lays out requirements for phases two through four, which will require foreign governments to have implemented their own inspection systems that are fully equivalent with the U.S. inspection program to enable their catfish to enter the United States. In phases three and four, USDA clearly proposes mandatory enforcement of all or a part of FSIS regulations. The proposed rule, however, provides no information on how long these phases will run and whether they will provide adequate time for other countries to move towards compliance.

The effect of these regulations, if finalized as proposed, would place a huge restraint on imports of catfish. Currently, the United States imports significant quantities of fish that might be covered under this rule from China, Thailand and Vietnam.<sup>1</sup> Under this rule, these countries would have to adopt and document to the United States that they can meet the U.S. requirements in the first phase and then (in a timeframe as yet unspecified) demonstrate full equivalency with the FSIS rules. It is widely expected that such documentation in the first instance and demonstration would entail years, not weeks or even months, meaning that the FSIS rules would effectively bar imports from these and any other catfish-exporting nations.

Such a result would appear to violate the United States’ commitments in the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). While Article 2.1 of the SPS Agreement absolutely affirms each country’s right to regulate to protect human, animal and plant life and health, there are certain disciplines imposed by the SPS Agreement to avoid abuse of such regulations, including for protectionist reasons. Among the most relevant portions of the SPS Agreement are Articles 2 and 5.

In principal part, Article 2 provides:

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5 [on a provisional basis].

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<sup>1</sup> The proposed rule leaves open the question of whether catfish will be defined as belonging to the family Ictaluridae, which is proposed primarily by the United States and China, or the broader category of Siluriformes, which would also catch fish from Thailand and Vietnam. Notably, Congress modified the ability of producers to use the term catfish to identify non-Ictaluridae fish in 2002. At a minimum, FSIS should choose the narrower definition for this rule to limit the adverse impacts it will have on U.S. international engagement.

3. . . . Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 5 provides in relevant part:

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks of human, animal or plant life or health, taking into account risk assessment techniques developed by international organizations.  
. . . .
5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Members shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. . . .  
. . . .
6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve the appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

ECAT certainly recognizes the importance of food safety and our government's appropriate regulation of foods products, both foreign and domestic. Here, however, FSIS indicates that the FDA and Centers for Disease Control and Prevention (CDC) "consider commercially raised catfish to be a low-risk food." *Proposed Rule*, 76 Fed. Reg. at 10438. The FSIS analysis of the potential food-safety hazards that might be presented by catfish indicates that where unapproved chemicals or pathogens have been found in shipments, the FDA has rejected them. Indeed, what little is provided in the way of a risk assessment fails to justify or even conclude that the proposed rule will effectively reduce food borne illness or measurably advance health protection. As a result, we believe that the proposed rule, if finalized, will likely contravene Articles 2.2, 2.3 and 5.1.

FSIS is also imposing a highly onerous inspection system on one type of fish – catfish – while all other types of fish remain under the purview of the FDA. While we recognize the legislative origins of this difference, FSIS' action is arbitrary and would likely be considered a disguised restriction on trade, contrary to Article 5.5 of the SPS Agreement.

Finally, by effectively blocking imported product from entering the U.S. market for potentially years, the proposed rule would violate Article 5.6 of the SPS Agreement, given that it is certainly not the least trade-restrictive approach to achieve the desired health outcome. Rather, if FSIS wanted to proceed in a manner that was in fact least trade-restrictive, it could have been discussing these issues with the exporting nations since the original legislation was passed more than two-and-a-half years ago, rather than issuing a proposed rule and potentially quickly imposing massive new obligations on these countries with little consultation or preparation.

## **Imposing Highly Onerous Proposed Rule Would Invite Retaliation and Copy-Cat Actions**

Adoption of the proposed rule would also send precisely the wrong message to our trading partners, from which the United States government and U.S. industry are seeking greater market openness. By taking a highly trade-restrictive approach, without scientific justification, the United States is weakening its own ability to convince other countries to drop their trade-restrictive and non-scientific-based approaches that restrict U.S. imports. Each of the major countries potentially caught under this rule (China, Thailand and Vietnam) represent important markets for U.S. agricultural and manufactured goods and services, which in turn support economic growth and jobs here in the United States. Shutting the door to their imports through this regulatory approach can only lead to greater trade restrictions on U.S. goods and services, whether through WTO-sanctioned retaliation, if the United States is challenged and found out of compliance with its WTO obligations, or in a copy-cat manner that also adversely impacts U.S. industry and the U.S. economy. At a time of economic distress throughout the world, the United States should be leading the world of out protectionism, not into it. Notably, the United States and Vietnam are engaged with seven other countries in the Trans-Pacific Partnership (TPP) negotiations, through which the United States is seeking to expand U.S. access and economic engagement in the Asia-Pacific region. China is the United States' third-largest merchandise trading partner and the third-largest destination for U.S. merchandise exports. Implementing this proposal without substantial modification would undermine U.S. economic engagement with these major U.S. partners, as well as other catfish-exporting nations.

### **Conclusion**

For all of the reasons above, ECAT strongly urges FSIS to review and revise its proposed regulations on catfish to ensure consistency with U.S. international commitments and to set an example of risk- and science-based regulation for other countries that are adopting and maintaining SPS and similar regulations in their own markets. Please do not hesitate to contact me if you require additional information.

Respectfully,



Calman Cohen  
President