



# Animal Welfare Institute

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*Submitted via regulations.gov*

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Food Safety and Inspection Service  
U.S. Department of Agriculture  
1400 Independence Avenue SW  
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**Re: Comments on FSIS Guideline on Substantiating Animal-Raising or Environment-Related Labeling Claims (Docket No. FSIS-2024-0010)**

Dear Assistant Administrator Edelstein:

The Animal Welfare Institute (AWI) appreciates the opportunity to submit comments on the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service’s (FSIS) *Guideline on Substantiating Animal-Raising or Environment-Related Labeling Claims* (Guidelines).<sup>1</sup> AWI is a nonprofit organization whose mission is to reduce animal suffering caused by people, including by promoting higher-welfare farms and calling attention to deceptive food labeling practices.

We are disappointed with FSIS’s updated Guidelines. As the agency acknowledges, it decided to make only a few “minor changes”<sup>2</sup> from the 2019 version. While we appreciate FSIS making some incremental improvements—such as incorporating a more meaningful definition of “pasture raised,” and “strongly encouraging” producers to use third-party certification organizations to substantiate claims—these changes do not go far enough to ensure animal-welfare and animal-raising claims on meat and poultry products are accurate and not misleading, as required by law. In the comments that follow, we explain our concerns and offer recommendations for strengthening “humanely raised,” “free range,” “pasture raised,” and negative antibiotic use claims and their equivalents.

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<sup>1</sup> See Availability of FSIS Guideline on Substantiating Animal-Raising or Environment-Related Labeling Claims, 89 Fed. Reg. 73,253 (Sept. 10, 2024) (hereinafter 2024 Federal Register Notice); USDA FSIS *Guideline on Substantiating Animal-Raising or Environment-Related Labeling Claims* (Aug. 2024) (hereinafter 2024 Guidelines).

<sup>2</sup> 2024 Federal Register Notice at 73,256.

## I. Legal Background

### A. Federal Meat Inspection Act and Poultry Products Inspection Act

The Federal Meat Inspection Act (FMIA) was enacted, in part, to ensure meat products are “properly marked, labeled, and packaged.” 21 U.S.C. § 602. The law prohibits the sale or transport of any product that is “misbranded” (*id.* § 610(c)), meaning “its labeling is false or misleading in any particular.” *Id.* § 601(n)(1). The Act’s findings explain that misbranded meat products impair their effective regulation, are injurious to the public welfare, destroy markets for properly labeled and packaged meat products, and result in losses to livestock producers and injury to consumers. *Id.* § 602.

To ensure products are not misbranded, the FMIA authorizes the Secretary of Agriculture to withhold the use of labels when they are believed to be false or misleading. *Id.* § 607(e). If a product is falsely or misleadingly labeled, it may not be sold into interstate commerce. *Id.* § 607(d); 601(h). Labels that are not false or misleading and are approved by the Secretary are permitted. *Id.* § 607(d). The Act directs the Secretary to “make such rules and regulations as are necessary for the efficient execution of the provisions of” the FMIA. *Id.* § 621.

### B. Poultry Products Inspection Act

Similar to the FMIA, the goal of the Poultry Products Inspection Act (PPIA) is, in part, to ensure poultry products are “properly marked, labeled, and packaged.” 21 U.S.C. § 451. Like the FMIA, the PPIA prohibits any person from selling, transporting, or offering for sale in interstate commerce any misbranded poultry product. *Id.* § 458(a)(2). The law authorizes the USDA Secretary to withhold misleading labels, *id.* § 451, and to approve those which are not misleading. *Id.* § 457(c). It also permits the Secretary to “promulgate such other rules and regulations as are necessary to carry out the provisions of” the PPIA. *Id.* § 463(b). The PPIA and FMIA explain that regulating meat and poultry products in interstate commerce is “appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.” *Id.* § 451; 21 U.S.C. § 602.

### C. FMIA and PPIA implementing regulations and guidelines

FSIS is “the Agency in USDA responsible for ensuring that meat or poultry product labels are truthful and not misleading or misbranded.”<sup>3</sup> Under FMIA and PPIA regulations, FSIS has the power to rescind or refuse approval of false or misleading labels. 9 C.F.R. § 500.8(a). A label is any “display of any printing, lithographing, embossing, stickers, seals, or other written, printed, or graphic matter upon the immediate container (not including package liners) of any product.” *Id.* § 317.2(a).

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<sup>3</sup> 2024 Guidelines at 6.

Except for generically approved labels (labels that bear mandatory labeling features like product name, ingredients statement, and nutrition labeling, but do not contain any special statements), all labels must be approved by FSIS. *Id.* § 412.1(a); 412.2(b). That includes labels bearing “special statements and claims,” such as “claims regarding the raising of animals.” *Id.* § 412.1(e). Establishments must submit requests for label approval to FSIS labeling and program delivery staff (LPDS), using Form 7234-1, *Application for Approval of Labels, Marking, and Devices*. *Id.* § 412.1(a).

To implement its label approval process for claims concerning the living conditions of animals (such as “humanely raised,” “free range,” and “pasture raised”), FSIS has developed a set of instructions that specify the documentation needed to substantiate these claims. The most recent version of the instructions is the newly released 2024 Guidelines. According to the agency, the Guidelines “do not have the force and effect of law and are not meant to bind the public in any way.”<sup>4</sup>

## **II. The Updated Guidelines Fail to Ensure that Animal-Welfare and Animal-Raising Claims Will Be Truthful and Not Misleading**

### **A. The latest changes to the Guidelines will not prevent fraudulent use of animal-welfare claims like “humanely raised.”**

The updated Guidelines are inadequate to prevent deceptive use of holistic animal-welfare claims like “humanely raised,” “thoughtfully raised,” and “ethically raised” because neither the Guidelines nor FSIS regulations define these claims.<sup>5</sup> Instead, companies and producers are permitted to define such claims themselves, so long as “a statement is provided on the label showing the name of the entity that established the standard and includes additional terminology explaining the meaning of the claim for consumers.”<sup>6</sup> In other words, companies can essentially define the claims however they want, as long as they print the definition on the package.

This is problematic for several reasons. First, a single claim, such as “humanely raised,” could mean something different for every one of the hundreds or thousands of products on which it is displayed. Consumers could easily be misled into thinking that different meat or poultry products, all labeled “humanely raised,” were derived from animals raised with the same level of care. But in reality, some of those animals may have experienced vastly different treatment than others. The fact that the label contains a definition of the claim—typically in tiny print—does not resolve this concern. Shoppers may not see the definition or understand its meaning or purpose. Indeed, a federal court recently found that a food label’s written representations do not necessarily constitute an “easy means” for consumers to gain information and alleviate their

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<sup>4</sup> 2024 Guidelines at 3.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

uncertainty. *Animal Legal Def. Fund, Inc. v. Vilsack*, 111 F.4th 1219, 1229-1230 (D.C. Cir. 2024).

Permitting companies to self-define terms like “humanely raised” also means that consumer expectations about what such claims represent may significantly diverge from the animal’s lived experience. For example, one of the Guidelines’ illustrations of a compliant label shows a package of frozen chicken breasts displaying the claim “humanely raised” and defining the phrase as “fed all vegetarian diet with no animal by products.”<sup>7</sup> This definition may offer some information to the consumer about what the chicken was given to eat, but it says nothing about any other aspects of how the animal was raised. That includes whether the bird was subjected to painful procedures like beak trimming, how quickly the animal was genetically bred to grow, or how the chicken was handled, transported, and slaughtered. A consumer expecting “humanely raised” to mean a higher standard of care applied across all facets of the animal’s life may, in this case, be deceived.

In addition to being simplistic, the above definition of “humanely raised” may also be false. Feeding chickens a vegetarian diet does not inherently benefit animal welfare; in fact, it may suggest the opposite, given that chickens are naturally omnivores.<sup>8</sup> In such ways, when companies are given free rein to develop their own arbitrary definitions of animal welfare, labels may be rendered more misleading than if there were no definition at all. It is no wonder that an AWI survey conducted in 2021 showed that 84% of consumers agreed that broad, holistic claims such as “humanely raised” should be based on meaningful, measurable standards, and 78% of respondents agreed that, for such claims, producers should not be allowed to set their own definition.<sup>9</sup>

In its notice announcing the availability of the updated Guidelines, FSIS argues against codifying definitions of animal raising claims because consumer expectations of what such claims mean “consistently evolve.”<sup>10</sup> The agency contends, “[f]or example, producer and consumer understanding of the animal welfare claim ‘humanely raised’ have changed over time.”<sup>11</sup> FSIS cites no source to substantiate this assertion, and it is belied by AWI polling data gathered over nearly a decade. Four surveys conducted by AWI between 2013 and 2021 show that during that time, at least 80% of consumers consistently believed the phrase “humanely raised” should not be displayed on meat or poultry product labels unless the producers using the claim exceed minimum industry animal care standards.<sup>12</sup> Even if public perceptions of animal welfare claims do evolve over time, that does not relieve FSIS of its obligation to take any necessary steps to ensure those claims are not misleading.

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<sup>7</sup> 2024 Guidelines at 17.

<sup>8</sup> K. C. Klasing, *Poultry Nutrition: A Comparative Approach*, 14 J. Applied Poultry Rsch. 426, 426 (2005).

<sup>9</sup> Animal Welfare Institute, *Survey of Consumer Attitudes About the Claim “Humanely Raised”* 2-3 (Oct. 2021), <https://awionline.org/sites/default/files/uploads/documents/survey-consumer-attitudes-claim-humanely-raised.pdf> (hereinafter *Humanely Raised Survey*).

<sup>10</sup> 2024 Federal Register Notice at 73,255.

<sup>11</sup> *Id.*

<sup>12</sup> *Humanely Raised Survey* at 1.

Another reason the Guidelines fail to ensure claims such as “humanely raised” are accurate is that FSIS does not review or adequately assess all labels. In its notice, FSIS assures the public that it “comprehensively evaluates . . . label applications on a case-by-case basis.”<sup>13</sup> However, that does not seem to be the case. In 2023, AWI published a report about research we conducted regarding FSIS’s label approval program.<sup>14</sup> As the report explains, AWI submitted Freedom of Information Act requests to FSIS for label approval files for 97 claims (mostly “humanely raised” and similar claims) appearing on the packaging of dozens of meat and poultry products.<sup>15</sup> Our findings were alarming.

For nearly half of the claims (48), FSIS was unable to provide any application submitted by the producer.<sup>16</sup> That means either FSIS lost the file or the producer never submitted an application for use of the claim. Further, for 34 claims, an application was submitted with either no relevant substantiation (6) or (based on AWI’s analysis) insufficient substantiation (28).<sup>17</sup> In sum, AWI determined that 82 of the 97 claims (85%) lacked sufficient substantiation.<sup>18</sup>

When it comes to claims like “humanely raised,” the best way for FSIS to ensure that consumer expectations are met, all claims are reviewed and rigorously assessed, and label deception is minimized, is to adopt a requirement—either in the Guidelines or, preferably, in regulations—that such claims must be verified by an independent third-party certification organization. Crucially, to meet consumer expectations, producers must be required to obtain third-party certification to a standard that exceeds conventional industry production practices.<sup>19</sup> In addition, it is important that producers be required to comply with 100 percent of the certification standards and be audited at least every 15 months to ensure that they remain in compliance with the standards.

In 2014, AWI submitted a rulemaking petition to FSIS asking that it require independent third-party certification to approve animal welfare and environmental stewardship claims on meat and poultry products.<sup>20</sup> In 2019, FSIS denied the petition.<sup>21</sup> In its response letter, FSIS said it had concluded that “it would not be economically feasible for many small and very small

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<sup>13</sup> 2024 Federal Register Notice at 73,255.

<sup>14</sup> Animal Welfare Institute, *Deceptive Consumer Labels: How the USDA’s Failure to Oversee Its Label Approval Program Allows the Meat Industry to Co-Opt Humane and Sustainable Claims* (Mar. 2023), <https://awionline.org/sites/default/files/uploads/documents/Deceptive-Consumer-Labels-2023.pdf>.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> AWI views the Global Animal Partnership program at Step 2 as potentially providing guidance to the USDA on acceptable minimum animal care standards. See Global Animal Partnership, *Our Standards*, <https://globalanimalpartnership.org/standards/> (last visited Nov. 11, 2024).

<sup>20</sup> Animal Welfare Institute, Petition to USDA for Third-Party Certification for the Approval of Animal Welfare and Environmental Stewardship Claims 4 (May 2014), <https://awionline.org/sites/default/files/uploads/documents/AWI-FA-FSISFoodLabelRulemakingPetition-05062014.pdf>.

<sup>21</sup> USDA FSIS Response Letter to Dena Jones (Feb. 22, 2019), [https://www.fsis.usda.gov/sites/default/files/media\\_file/2020-08/14-01-FSIS-Final-Response-022219.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/14-01-FSIS-Final-Response-022219.pdf).

establishments to incur the additional cost of independent third-party certification because of their low sales volumes.”<sup>22</sup> Notably, however, in its notice announcing the availability of the updated Guidelines, FSIS did not repeat that conclusion. On the contrary, the agency said it was “exploring options to determine whether there are lower-cost third-party certification programs, including those offered by the Agricultural Marketing Service (AMS), that meet the recommended criteria for third-party certifiers included in the revised guideline.”<sup>23</sup> FSIS must follow through on this research and, to the extent such options are available, require that claims such as “humanely raised” made by smaller producers be third-party certified. In any case, such a requirement should apply to claims made by medium- and larger-sized producers.

FSIS must rectify the serious shortcomings described above pertaining to “humanely raised” and equivalent claims. Failure to do so would mean that the agency’s ongoing approval of such claims will continue to result in consumer confusion and deception, violating the agency’s legal obligations under the FMIA and PPIA.<sup>24</sup>

**B. The updates to the Guidelines will not prevent consumer deception resulting from “free range” and similar claims.**

*1. AWI’s efforts to strengthen “free range” claims and FSIS’s responses.*

AWI has long urged FSIS to strengthen the Guidelines’ provisions concerning “free range” and equivalent claims. In January 2016, we submitted a rulemaking petition that asked the agency to adopt a more specific definition of “free range” and require more robust documentation.<sup>25</sup> The petition described AWI’s review of label approval files associated with 88 poultry products labeled “free range” or “range grown.”<sup>26</sup> Of those, 17 were approved by FSIS despite the producers submitting no evidence to substantiate them.<sup>27</sup> Another 44 were approved though they were accompanied by only brief affidavits.<sup>28</sup> Several more were approved because they were certified under Global Animal Partnership (GAP) Steps 1 or 2, though neither step level requires outdoor access.<sup>29</sup> The petition warned that FSIS’s “free range” definition and insufficient substantiation requirements may lead to product misbranding, harming both farmers and consumers.

At the time, FSIS’s guidelines defined “free range” as animals having “continuous, free access to

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<sup>22</sup> *Id.* at 1.

<sup>23</sup> 2024 Federal Register Notice at 73,256.

<sup>24</sup> Approving misleading label claims, and failing to approve labels containing animal raising claims, may also constitute final agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

<sup>25</sup> Animal Welfare Institute, Petition to Amend Labeling Regulations under the *Poultry Products Inspection Act* to Define “Free Range” and Amend the Approval Process for the Free Range Claim (Petition No. 16-01) (Jan. 1, 2016), [https://www.fsis.usda.gov/sites/default/files/media\\_file/2020-08/16-01-AWI-Petition-012016.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/16-01-AWI-Petition-012016.pdf).

<sup>26</sup> *Id.* at 11.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* at 12.

the out-of-doors for over 50 percent of their lives.”<sup>30</sup> AWI’s petition proposed the following, more detailed definition and substantiation criteria that better matched consumer expectations and reduced the risk of deception:

1. All poultry products labeled with a free range, free roaming, or range grown marketing claim must be derived from birds that have been raised in a manner that meets the following conditions:

(a.) Birds must be provided the continuous opportunity to go outdoors during daylight hours for at least 51 percent of their lives.

(b.) The number and size of exits must be sufficient to allow all birds ready, unhindered access to the outdoors.

(c.) Outdoor areas must provide natural and/or artificial shelter as protection against adverse weather conditions and overhead predators, and provide shade.

(d.) The areas to which birds have access must be mainly covered with living, palatable vegetation.

(e.) The minimum outdoor space allowance per bird shall be 5 sq. ft. for chickens and 20 sq. ft. for turkeys, ducks, and geese.

2. Meat from a bird having access to the outdoors for less than 51 percent of their life, due to adverse weather or any other condition, shall not be labeled free range, free roaming, or range grown.

3. Applications for free range, free roaming, and range grown labels must be accompanied by a signed affidavit, along with an animal care protocol and photographs that a) apply to all operations where birds are raised and (b) document compliance with all conditions described in 1 (a) – (e).<sup>31</sup>

In September 2016,<sup>32</sup> and again in December 2019,<sup>33</sup> FSIS issued updated versions of the Guidelines. Also in December 2019, the agency provided an interim response to the petition.<sup>34</sup> FSIS’s response, and its notice of availability of the 2019 Guidelines, indicated that the agency

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<sup>30</sup> *Id.* at 8-9.

<sup>31</sup> *Id.* at 19.

<sup>32</sup> USDA FSIS *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions* (Sept. 2016) (hereinafter 2016 Guidelines).

<sup>33</sup> Food Safety and Inspection Service *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission*, 84 Fed. Reg. 71,359 (Dec. 27, 2019) (hereinafter 2019 Federal Register Notice); USDA FSIS *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions* (Dec. 2019) (hereinafter 2019 Guidelines).

<sup>34</sup> Food Safety and Inspection Service, *Interim Response to Petition to Amend Labeling Regulations under the Poultry Products Inspection Act to Define “Free Range” and Amend the Approval Process for the Free Range Claim* (Dec. 30, 2019), [https://www.fsis.usda.gov/sites/default/files/media\\_file/2020-08/16-01-response-123019.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/16-01-response-123019.pdf).

had updated the Guidelines by adding further information about the documentation needed to substantiate “free range” claims on poultry products.<sup>35</sup> However, neither the response nor the notice—nor the section of the 2019 Guidelines explaining what changes had been made from the previous version<sup>36</sup>—explained exactly what those changes were. It appears that the only information added to the 2019 Guidelines specific to free range claims was a requirement that the documentation submitted by producers “must describe the housing conditions for the birds.”<sup>37</sup> Further, with little explanation, FSIS actually *removed* the requirement that had existed in the earlier 2016 version of the Guidelines that “free range” claims “require additional terminology to define their meaning on the label.”<sup>38</sup>

As discussed above, in August 2024, FSIS again updated the Guidelines.<sup>39</sup> It also issued a final response to AWI’s 2016 free range petition.<sup>40</sup> In its response and notice, FSIS explained that it would not be adopting AWI’s proposed definition of “free range.”<sup>41</sup> Nor would it be requiring—either in its guidance or in its regulations—label applications to include a signed affidavit, a detailed animal care protocol, or photographs demonstrating compliance with required conditions.<sup>42</sup> Among other things, the agency said that codifying the definitions of “continuously developing” animal-raising claims would be “impractical,” that it could “hinder the development of new or improved animal production practices,” and that it could “limit the types of products available to consumers.”<sup>43</sup>

FSIS indicated it did make three changes to the 2024 Guidelines relevant to free “range claims:” 1) producers were “strongly encouraged” to substantiate “free range” claims using third-party certification programs; 2) producers using a third-party certification program were required to provide a copy of the current certification; and 3) producers must demonstrate continuous, free access to the outside during not just “winter months,” but all “extreme weather conditions.”<sup>44</sup> In addition, FSIS recommended that third party organizations be “independent of the establishment paying for the certification,” that the organization should “routinely audit, validate, and verify claims on the label,” and that it should have “written measures to protect against conflicts of interest with the entities they are certifying.”<sup>45</sup>

2. *FSIS’s Guidelines remain inadequate to ensure that “free range” claims are not deceptive.*

Despite the minor improvements made by FSIS in 2019 and 2024, the Guidelines remain grossly

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<sup>35</sup> *Id.* at 2; Federal Register Notice at 71,365.

<sup>36</sup> 2019 Guidelines at 4.

<sup>37</sup> *Id.* at 11.

<sup>38</sup> 2016 Guidelines at 10.

<sup>39</sup> 2024 Guidelines; 2024 Federal Register Notice.

<sup>40</sup> Food Safety and Inspection Service, Final Response to Petition to Amend Labeling Regulations under the *Poultry Products Inspection Act* to Define “Free Range” and Amend the Approval Process for the Free Range Claim (Aug. 28, 2024), [https://www.fsis.usda.gov/sites/default/files/media\\_file/documents/16-01-Final-Response-08282024.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/documents/16-01-Final-Response-08282024.pdf) (hereinafter Final Response Letter).

<sup>41</sup> *Id.* at 4; 2024 Federal Register Notice at 73,255.

<sup>42</sup> *Id.*; Final Response Letter.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.* at 3; 2024 Guidelines at 16-17.

<sup>45</sup> *Id.* at 27.



insufficient to protect consumers from being misled by “free range” claims. FSIS’s refusal to more clearly define or codify “free range” means that consumer expectations may differ dramatically from on-the-ground reality. For example, a consumer might reasonably expect “free range” on a given label to mean the birds on the source farm have unfettered access to large grassy fields. Indeed, in a 2015 survey conducted by AWI:

- 70% of respondents felt that the claim “free range” on a poultry product label should mean “[a]ll birds have the opportunity to go outside during daylight hours on a regular basis;”
- 65% believed it should mean “[t]here is enough space outside for each bird to be out during daylight hours every day;” and
- 61% thought it should mean “[t]he outdoor space is at least partially covered with grass or other vegetation.”<sup>46</sup>

The reality, however, may be that “free range” birds are crammed indoors with a small exit to a patch of outdoor concrete devoid of vegetation. Nothing in FSIS’s current Guidelines requires more.

The risk of consumer confusion is exacerbated by FSIS’s unwillingness to require—rather than merely encourage—producers to substantiate “free range” claims through the use of third-party certification. FSIS’s recommendations about what criteria third-party certification organizations should meet afford little benefit to consumers or animals if producers are free to choose not to become certified in the first place.

As mentioned above, FSIS’s final response lamented that codifying the definitions of claims would be “impractical,” that it could “hinder the development of new or improved animal production practices,” and that it could “limit the types of products available to consumers.”<sup>47</sup> These arguments miss the point. FSIS’s statutory mandate is not to regulate only when it is convenient, or to promote new production methods, or to guarantee boundless products for consumers. It is to prevent misbranding. Codifying a more detailed definition of such a widely used and misunderstood claim as “free range” is a necessary step toward fulfilling that legal responsibility.

Further, FSIS’s response offered no explanation for why it declined to adopt AWI’s recommendation to require photographs to help substantiate “free range” standards. Photos or video would seem to be an easy, effective way for producers to portray to FSIS exactly what their production facilities and methods look like and a useful tool to help FSIS gauge whether the operations faithfully represent “free range” production. Requiring such imagery would make particular sense given FSIS’s assertion that on-farm verification of standards is “outside FSIS jurisdiction.”<sup>48</sup> If FSIS does not believe it can physically visit farms to verify labeling claims,

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<sup>46</sup> Animal Welfare Institute, Survey on Free Range and Humanely Raised Label Claims (Nov. 2015), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-FreeRangeHumanelyRaised-Poll-Dec2015.pdf>.

<sup>47</sup> Final Response Letter at 4.

<sup>48</sup> 2024 Guidelines at 27; 2024 Federal Register Notice at 73,254.

then it should require the next best thing—photographic or video evidence.

It is not clear if FSIS’s decision to not adopt or even respond to AWI’s proposal to require photographic evidence is connected to FSIS’s misguided policy that “photos, colors, and graphics used on packaging are not considered labeling claims and do not make the product label false or misleading.”<sup>49</sup> It is important to note, however, that a federal court recently held that a consumer who was misled by the “graphic depiction of [chickens] roaming outside” on a Perdue Farm chicken breast label “suffered a concrete injury.”<sup>50</sup> This suggests that it would behoove FSIS to require photographic substantiation of “free range” and other animal living claims, so that the agency may compare the imagery on the proposed label with actual images of on-farm production methods, to ensure the two align.

AWI appreciates the few minor improvements FSIS made to the Guidelines relevant to “free range” claims, described above. However, those improvements were counteracted by FSIS’s decision to withdraw the 2016 Guidelines’ requirement that “free range” claims must be accompanied by additional terminology on the label itself. FSIS should, at a minimum, reinstate that requirement to help consumers better understand what the claim “free range” means and determine if it matches their expectations and values.

In sum, the current 2024 Guidelines fail to ensure meat and poultry products bearing the claim “free range” are properly “marked, labeled, and packaged,” and not misbranded, as required by the PPIA and FMIA. To comply with its statutory and regulatory obligations, FSIS must adopt a more detailed definition of “free range” that aligns with consumer expectations, require sufficient documentation to adequately assess label approval applications, and approve only those applications that clearly demonstrate that producers’ on-farm practices meet the definition’s standards.

### **C. The revisions to the Guidelines regarding “pasture raised” claims are insufficient to prevent consumer deception.**

As with the changes made to “humanely raised” and “free range” claims, the updates regarding “pasture raised” claims fall short of ensuring against consumer deception. In March 2023, Perdue Farms submitted a rulemaking petition requesting that FSIS: 1) amend the Guidelines to distinguish between “free range” and “pasture raised” claims; and 2) define “pasture raised” claims to mean the animals “spend the majority of their lives physically on ‘pasture,’” with pasture defined as “a majority of rooted-in-soil vegetative cover.”<sup>51</sup> AWI submitted comments expressing support for the petition and Perdue’s proposed definition.<sup>52</sup>

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<sup>49</sup> *Animal Legal Def. Fund, Inc. v. Vilsack*, 111 F.4th 1219, 1224 (D.C. Cir. 2024) (internal quotation marks omitted).

<sup>50</sup> *Id.* at 1227.

<sup>51</sup> Perdue Farms Inc., Petition to Amend Labeling Compliance Regulations Under the *Poultry Products Inspection Act* to Remove “Pastured-Raised” from “Free Range” Synonymous Claims and to Define “Pasture-Raised” 7 (Petition No. 23-03) (Mar. 16, 2023), [https://www.fsis.usda.gov/sites/default/files/media\\_file/documents/23-03-Purdue-03162023.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/documents/23-03-Purdue-03162023.pdf).

<sup>52</sup> Animal Welfare Institute, Comment Letter in Support for Perdue Farms LLC Petition (Apr. 24, 2023), [https://www.fsis.usda.gov/sites/default/files/media\\_file/documents/23-03-AWI-Comments-04242023.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/documents/23-03-AWI-Comments-04242023.pdf). In our

FSIS granted the petition and revised the Guidelines to incorporate essentially the same definition of “pasture raised” that Perdue had proposed.<sup>53</sup> Inexplicably, however, the Guidelines do not require producers seeking approval to use “pasture raised” or similar claims to provide documentation to substantiate that their operations meet the new definition. Instead, the Guidelines “strongly encourage” producers to provide such documentation.<sup>54</sup> This diverges from the Guidelines’ requirement that, to substantiate “free range” claims, producers “*must* describe the housing conditions for the birds and demonstrate continuous, free access to the outside throughout their normal growing cycle.”<sup>55</sup> It is not clear why FSIS would, on the one hand, *require* documentation to verify “free range” claims while, on the other, *strongly encourage* documentation to verify “pasture raised” claims.

Without sufficient evidence to determine whether an agricultural operation meets the new definition of “pasture raised,” it will be impossible for FSIS to ensure meat and poultry products displaying that claim are labeled accurately and not “false or misleading in any particular,” as required by law. FSIS must require, not merely encourage, producers to demonstrate that their on-farm practices match the “pasture raised” representations on their product labels.

**D. FSIS’s changes to the Guidelines are inadequate to ensure the veracity of negative antibiotics claims.**

Finally, the amendments to the 2024 Guidelines are insufficient to ensure negative antibiotics claims such as “no antibiotics ever” are not false or misleading. In its notice, FSIS explains that, in September 2023, it began working with the USDA’s Agricultural Research Service (ARS) to conduct “exploratory sampling to assess whether antibiotics residues are detected in cattle intended for the raised without antibiotics market.”<sup>56</sup> FSIS and ARS collected liver and kidney samples from 189 cattle at 79 slaughter plants in 34 states, and ARS analyzed them. The ARS’s test results “found residues of antibiotic drugs in the liver or kidney of 37 raised without antibiotic cattle (equivalent to 20% of the total number of animals sampled) originating from 27 slaughter establishments.”<sup>57</sup>

In response to these findings, FSIS notified the slaughter plants about the positive test results, explained that they may have produced misbranded products, and “recommended that the establishments take action to prevent further misbranded product from entering commerce.”<sup>58</sup> The agency also updated the Guidelines to “strongly encourage” slaughter establishments to

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comments, AWI also made a number of additional recommendations related to “pasture raised” and equivalent claims, which FSIS did not adopt. AWI hereby renews its request that those additional provisions be incorporated into the Guidelines.

<sup>53</sup> 2024 Guidelines at 17.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 16 (emphasis added).

<sup>56</sup> 2024 Federal Register Notice at 73,255.

<sup>57</sup> *Id.* at 73,256.

<sup>58</sup> *Id.*

support their negative antibiotics claims by conducting sampling programs and obtaining third-party certification.<sup>59</sup>

AWI appreciates FSIS and ARS carrying out the sampling program and sharing the results with the public. FSIS's response to the positive test results, however, was egregiously inadequate. The agency did not penalize or otherwise hold accountable the slaughter plants that had sold beef products labeled as antibiotic-free—while actually containing antibiotic residue—to unwitting consumers. Moreover, despite discovering that an eye-opening *one-fifth* of the study samples contained antibiotic drugs, FSIS chose not to *require* slaughter plants using negative antibiotics claims to conduct their own testing or use third-party certification to verify their products contained no antibiotic residues. Instead, it *strongly encouraged* them to do so. This failure to enforce the law or take meaningful action to protect consumers flies in the face of the agency's legal responsibilities.

FSIS should revise the Guidelines to require regular testing for all negative antibiotic use claims and prohibit the use of such claims on products from animals that test positive for antibiotics. In addition, FSIS should require producers whose products test positive for antibiotics to demonstrate how they have adequately addressed the problem.

### **III. Conclusion**

Despite marginal improvements, the changes made to the updated 2024 Guidelines are disappointing and inadequate in multiple respects. To fulfill its statutory and regulatory obligations, FSIS should require producers wishing to display high-value, holistic claims such as “humanely raised” to use independent, third-party certification organizations to substantiate them. In addition, the agency should adopt a more meaningful definition of “free range,” and require “pasture raised” claims to be accompanied by sufficient documentation to demonstrate compliance with the new definition. Photographic or video evidence should be mandatory. Further, FSIS must ensure that negative antibiotics claims are reliable, not merely aspirational. Finally, these conditions should be codified into legally binding regulations, rather than incorporated into Guidelines the agency views as not having “the force and effect of law.”

Thank you for considering our comments.

Sincerely,

Zack Strong  
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Farmed Animal Program  
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<sup>59</sup> *Id.*; 2024 Guidelines at 18-19.