

§ 93.916 Special provisions.

(a) *Slaughter.* Live VHS-regulated fish from VHS-regulated regions may be imported directly for slaughter under the following conditions:

(1) An import permit has been obtained under § 93.912 and all conditions of the permit are observed.

(2) An APHIS representative at the port seals the means of conveyance with official seals.

(3) The shipment is moved directly from the port of entry to a slaughtering establishment that meets the following conditions:

(i) The slaughtering establishment discharges its waste water to a municipal sewage system that includes waste water disinfection sufficient to neutralize any VHS virus or to either a non-discharging settling pond or a settling pond that disinfects, according to all applicable local, State, and Federal regulations, sufficiently to neutralize any VHS virus.

(ii) Offal, including carcasses, from the slaughtering establishment is either rendered or composted.

(4) An APHIS representative will unseal the vehicle upon arrival at the slaughtering establishment.

(5) Any water used to transport the fish is disposed to a municipal sewage system that includes waste water disinfection sufficient to neutralize any VHS virus or to either a non-discharging settling pond or a settling pond that disinfects, according to all applicable local, State, and Federal regulations, sufficiently to neutralize any VHS virus.

(b) *Research or laboratory use.* Live VHS-regulated fish may be imported from a VHS-regulated region for research or laboratory use under the following conditions:

(1) An import permit has been obtained under § 93.912 and all conditions of the permit are observed.

(2) The laboratory or research facility disposes of effluent to a municipal sewage system that includes waste water disinfection sufficient to neutralize any VHS virus or to either a non-discharging settling pond or a settling pond that disinfects, according to all applicable local, State, and Federal regulations, sufficiently to neutralize any VHS virus.

(3) Carcasses must be rendered or composted.

(4) Any water used to transport the fish is disposed to a municipal sewage system that includes waste water disinfection sufficient to neutralize any VHS virus or to either a non-discharging settling pond or a settling pond that disinfects, according to all applicable local, State, and Federal regulations, sufficiently to neutralize any VHS virus.

Done in Washington, DC, this 4th day of September 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

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DEPARTMENT OF AGRICULTURE**Food Safety and Inspection Service****9 CFR Parts 317, 381, and 442**

[Docket No. FSIS-2008-0015]

RIN # 0583-AD17

Determining Net Weight Compliance for Meat and Poultry Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending its regulations to reference the most recent version of the National Institute of Standards and Technology (NIST) Handbook 133 that contains standards for determining the reasonable variations allowed for the declared net weight on labels of immediate containers of meat and poultry products; the procedures to be used to determine the net weight and net weight compliance of meat and poultry products; and related definitions. The Agency is also consolidating the separate net weight regulations for meat and poultry products in a new CFR part, applicable to both meat and poultry products.

This final rule does not incorporate by reference sections in Handbook 133 that concern the “wet tare” method for determining net weight. The “wet tare” method does not include free-flowing liquid as part of the product but as part of the tare weight. The Agency regards any solutions that are added to meat or poultry to be part of the product and considers free-flowing liquids to be an integral component of these products, and therefore uses the “dry tare”, not the “wet tare” method.

DATES: *Effective Date:* This regulation is effective October 9, 2008. The incorporation by reference of the NIST Handbook 133, Fourth Edition, is approved by the Director of the Federal Register as of October 9, 2008.

FOR FURTHER INFORMATION CONTACT:

Charles Gioglio, Director, Labeling and Program Delivery Division, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250-3700; (202) 205-0010.

SUPPLEMENTARY INFORMATION:**Background**

FSIS administers the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601-695), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451-470), and the regulations that implement these Acts. The FMIA and the PPIA require that packages of meat and poultry products bear an accurate statement of the quantity of their contents in terms of weight, measure, or numerical count (21 U.S.C. 601(n)(5) and 453(b)(5)). The FMIA and PPIA also provide the Secretary of Agriculture with the authority to prescribe standards of fill of containers for such articles (21 U.S.C. 607(c)(2), 457(b)(2)) that are not inconsistent with any such standards established under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392). In implementing regulations, FSIS has elected to adopt the relevant NIST standards established for determining compliance with the net weight contents statement of packaged goods that are enumerated in NIST Handbook 133. Consequently, FSIS has incorporated by reference certain NIST standards in the Federal meat and poultry inspection regulations.

NIST was established by Congress in 1988 to assist industry in the development of technology to improve product quality, to modernize manufacturing processes, to ensure product reliability, and to facilitate rapid commercialization of products based on new scientific discoveries. NIST's basic functions include developing, maintaining, and retaining custody of the national standards of measurement and providing the means and methods for comparing standards used in science, engineering, manufacturing, commerce, industry, and education with the standards adopted or recognized by the Federal Government.

NIST Handbook 133 is a procedural guide for compliance testing of net content statements on packaged goods. FSIS has elected to make mandatory the NIST standards in Handbook 133 regarding the determination of the reasonable variations allowed from the declared net weight on labels of immediate containers of meat and poultry products, the procedures to be used to determine net weight and net weight compliance for meat and poultry products, and related definitions.

Consequently, FSIS currently incorporates by reference the NIST standards from Handbook 133 in its meat and poultry regulations. The Agency first incorporated NIST Handbook 133 by reference in

November 1990 (FR 55 49826) as instructions to inspection personnel for determining net weight compliance. In January 2005, NIST published a revised edition of Handbook 133.

On March 28, 2006, FSIS published a proposed rule in the **Federal Register** to amend the Federal meat and poultry products inspection regulations to reference the most recent version of NIST Handbook 133, which contains standards for determining reasonable variations allowed for the declared net weight on labels of immediate containers of meat and poultry products; the procedures used to determine the net weight and the net weight compliance of meat and poultry products; and related definitions (71 FR 15340). The Agency also proposed to consolidate the separate net weight regulations for meat and poultry products in a new CFR part applicable to both meat and poultry products. On April 19, 2006, FSIS published a technical correction to the proposed rule to reference the NIST Handbook 133 dated January 2005 (71 FR 20041). The proposed rule incorrectly referenced the NIST Handbook 133 dated January 2002.

This final rule is consistent with the proposed rule. However, the rule proposed to incorporate by reference tare procedures and definitions in NIST Handbook 133 that concern the “wet tare” method. After considering the comments on the proposed rule, FSIS has decided not to incorporate by reference sections in Handbook 133 that concern the “wet tare” method for determining net weight. As explained below, these sections are not relevant to how FSIS enforces the FMIA and the PPIA, and therefore there is no reason to incorporate them. Also in response to comments, 9 CFR 442.3 has been modified to refer to scales used to determine the net weight of meat and poultry products. FSIS made this change to clarify the regulations.

Comments and Responses

FSIS received 5 comments in response to the March 28, 2006, proposed rule. Four comments were from meat and poultry trade associations. One of those comments was jointly submitted by six trade associations. One comment was from an individual. The trade associations, in general, supported the incorporation of the NIST Handbook 133 by reference and combining and consolidating the meat and poultry net weight provisions into one part. The comment from the individual opposed using any standards referenced in another document.

Comment: One comment stated that while the proposed rule was intended to simply update the regulations to incorporate the current edition of the NIST Handbook 133, FSIS should take the opportunity to underscore the guidance that the Agency has communicated concerning how to account for free-flowing liquid that is contained within the packaging of meat and poultry products.

Three comments, including two petitions that the Agency is treating as comments, stated that by referencing the NIST Handbook 133 “wet tare” procedures, the Agency is continuing to incorporate inconsistencies and should remove the conflicting reference.

Response: FSIS agrees that the regulations should be modified to remove references to the “wet tare” method for determining net weight compliance.

The “tare weight” is “the weight of a container, wrapper, or other material that is deducted from the gross weight to obtain the net weight.” FSIS regards any solutions that are added to meat or poultry, or into which the meat or poultry is placed for flavoring, seasoning, or tenderizing, to be part of the product. Similarly, FSIS considers free-flowing liquids in packages of meat and poultry products to be integral components of these products. Therefore, when FSIS inspectors determine net weight compliance in official establishments, inspectors include any free flowing liquid contained in the packaging. This method of determining net weight is called a “dry tare” method. When net weight is determined based on a dry tare method, the gross weight of the product includes free-flowing liquid and excludes the dry or dried packaging material.

The NIST Handbook 133 describes “Tare Procedures,” in Chapter 2, Section 2.3 “Basic Test Procedure.” In this section there are two methods for determining the dry tare of products, the “used” and “unused” methods. The “used dry tare” method considers the actual packaging material the product was removed from to be tare. The “unused dry tare” method is used for testing packages in retail store locations where they are packaged and allows samples of the packaging material available in the store to be considered tare. FSIS inspectors use the used dry tare method, but both dry tare methods are consistent with FSIS’ position concerning product net weight. In determining net weight of meat or poultry products, both dry tare methods include the free flowing liquids in product packages.

The Tare Procedures section of Handbook 133 also describes the “wet tare” method for determining net weight compliance. The “wet tare” method does not include free-flowing liquids as part of the product but as part of the tare weight. As stated previously, FSIS considers free-flowing liquid part of the product and does not use the “wet tare” for determining net weight compliance.

After considering the comments received, FSIS agrees that it makes little sense to incorporate a method that it does not use. Doing so only creates confusion and ambiguity about what method is used by FSIS. Consequently, FSIS is modifying the regulations so that the references to the “wet tare” method for determining net weight compliance in NIST Handbook 133 are *not* incorporated by reference. As previously stated, the Agency considers the free-flowing liquids in packages of meat and poultry products, including single-ingredient, raw poultry products, to be integral components of these products.

Although State and county government officials have concurrent authority to enforce net weight requirements for meat and poultry products at the local level, they must do so in a manner that does not conflict with Federal requirements. Under 21 U.S.C. 678 and 476e, marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under the FMIA or PPIA may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection. To be consistent with this final rule, State and local officials must determine net weight compliance for meat and poultry products, including single-ingredient, raw poultry, in a manner that includes the free flowing liquids as part of the product and not part of the tare weight.

Comment: One comment requested that the regulation pertaining to scale requirements, 9 CFR 442.3(a), be amended to clarify the definition and intent of “all scales” to say “scales used to weigh meat and poultry products in compliance with NIST Handbook 133.” The comment also requested that the scale testing regulation be amended to clarify that “any repairs, adjustments, or replacements” that require reinspection and retesting are those “repairs, adjustments, or replacements” affecting the accuracy of the scale. In addition, the comment requested clarification as to the identity of the “USDA official” who would be authorized to reinspect and retest a repaired scale.

Response: FSIS agrees that 9 CFR 442.3 should be clarified to refer to the

scales that are used to weigh meat and poultry products for net weight compliance. Therefore, FSIS has amended the regulation (9 CFR 442.3(a), (b), and (c)) to refer to "scales used to determine the net weight of meat and poultry products."

Regarding the comment to clarify that only repairs, adjustments, or replacements that affect accuracy need to be reinspected and retested before the scale can be used, FSIS cannot adequately specify in the regulations that repairs, adjustments, or replacements will or will not affect accuracy. If a scale needs a battery replacement, computer program upgrade, or new cord installation, there is no way to determine whether the repairs, adjustments, or replacements affect the accuracy of the scale without retesting or reinspecting the scale. Therefore, FSIS is not amending 9 CFR 442.3(a) in response to the comment.

FSIS also is not amending the regulations to specify which USDA officials are authorized to reinspect and retest a scale that has been found inaccurate, repaired, adjusted, or replaced. The Agency requires flexibility in determining who is available and qualified to reinspect and retest scales used to weigh meat or poultry products at federally inspected establishments.

Comment: Two comments agreed with the proposed changes and requested that FSIS use this opportunity to provide a more complete explanation as to the procedural nature of NIST Handbook 133, and that it cannot serve as a compliance document.

Response: FSIS' net weight regulations (9 CFR 317.18–317.22 and 381.121a–381.121e) state that the procedures set forth are for determining "net weight compliance." This final rule incorporates the relevant parts of the latest edition of the NIST Handbook 133 into FSIS regulations. Therefore, the incorporated provisions of NIST Handbook 133 do not serve merely as compliance guidance but are in fact made part of the meat and poultry products inspection regulations.

Comment: One comment objected to the use of standards that are not specifically listed in the regulation but are in a referenced publication that is not publicly available.

Response: FSIS does not agree with this comment. The NIST Handbook 133 is available to the public via the National Institute of Standards and Technology Web site <http://ts.nist.gov/WeightsAndMeasures/h1334-05.cfm>.

In addition, the regulations provide that a notice of any change in the

Handbook cited therein will be published in the **Federal Register**.

Executive Order 12988

This final rule has been reviewed under the Executive Order 12988, Civil Justice Reform. Under this final rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no retroactive proceedings will be required before parties may file suit in court challenging this rule.

Executive Order 12866 and the Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

There are no costs associated with this final rule. The intent of this final rule is to amend the meat and poultry inspection regulations to incorporate by reference the relevant standards in revised Handbook 133, which are not substantively changed from those in the version of Handbook 133 that is currently reflected in FSIS' meat and poultry inspection regulations regarding the procedures to be used to determine the net weight of, and net weight compliance for, meat and poultry products. In addition, this final rule consolidates the meat and poultry net weight regulations into a new 9 CFR part 442 which will be applicable to both meat and poultry products.

Effect on Small Entities

FSIS has determined that this final rule would not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The final rule reflects an updated version of the NIST Handbook 133 standards for determining net weight compliance for meat and poultry products.

Paperwork Reduction Act

This final rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or recordkeeping requirements. The information collection was approved under OMB number 0583–0094. This proposed rule contains no other paperwork requirements.

Government Paperwork Elimination Act (GPEA)

FSIS is committed to compliance with the GPEA, which requires Government

agencies, in general, to provide the public the option of communicating electronically with the government to the maximum extent possible. The Agency will ensure that all forms used by the establishments are made available electronically.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this final rule, FSIS will announce it online through the FSIS Web page located at http://www.fsis.usda.gov/regulations_&_policies/2008_Interim_&_Final_Rules_Index/index.asp. FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at http://www.fsis.usda.gov/news_and_events/email_subscription/. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

List of Subjects

9 CFR Part 317

Food labeling, Meat inspection.

9 CFR Part 381

Food labeling, Poultry and poultry products.

9 CFR Part 442

Food labeling, Incorporation by reference, Meat inspection, Poultry and poultry products.

■ For the reasons discussed in the preamble, FSIS is amending 9 CFR Chapter III as follows:

licensed scale repair firm or person, and it must meet all accuracy requirements as specified in NIST Handbook 44. If a USDA inspector has put a "Retain" tag on a scale, the tag can only be removed by a USDA inspector. As long as the tag is on the scale, it shall not be used.

§ 442.4 Testing of scales.

(a) The operator of each official establishment that weighs meat or poultry food products will cause such scales to be tested for accuracy in accordance with the technical requirements of NIST Handbook 44, at least once during the calendar year. In cases where the scales are found not to maintain accuracy between tests, more frequent tests may be required and verified by an authorized USDA program official.

(b) The operator of each official establishment shall display on or near each scale a valid certification of the scale's accuracy from a State or local government's weights and measures authority or from a State registered or licensed scale repair firm or person, or shall have alternative documented procedures showing that the scale has been tested for accuracy in accordance with the requirements of NIST Handbook 44.

§ 442.5 Handling of failed product.

Any lot of product that is found to be out of compliance with net weight requirements upon testing in accordance with the methods prescribed in § 442.2 of this subchapter shall be handled as follows:

(a) A lot tested in an official establishment and found not to comply with net weight requirements may be reprocessed and must be reweighed and remarked to satisfy the net weight requirements of this section in accordance with the requirements of this part.

(b) A lot tested outside an official establishment and found not to comply with net weight requirements must be reweighed and remarked with a proper net weight statement, provided that such reweighing and remarking will not deface, cover, or destroy any other marking or labeling required under this subchapter, and the net quantity of contents is shown with the same prominence as the most conspicuous feature of a label.

Done in Washington, DC, on August 13, 2008.

Alfred V. Almanza,
Administrator.

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 318, 381, and 439

[FSIS Docket No. 03-020F; FDMS Docket No. 2005-0023]

RIN # 0583-AD09

Accredited Laboratory Program

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is revising, editing, and consolidating provisions of the standards and procedures for the accreditation of non-Federal analytical chemistry laboratories. Laboratories in the Accredited Laboratory Program (ALP) are accredited to analyze official meat and poultry samples for (1) specific chemical residues or classes of chemical residues, and (2) moisture, protein, fat, and salt. In particular, FSIS is amending its current regulations regarding the accreditation of non-Federal analytical chemistry laboratories to accommodate the adoption of newer methods for analyzing chemical residues and to correct some data. In addition, FSIS is making editorial changes to its accredited laboratory regulations to reflect Agency reorganizations and program changes and to improve the clarity and consistency of application for all laboratories participating in the ALP. Finally, FSIS is consolidating the accredited laboratory regulations from 9 CFR 318.21 of the meat inspection regulations and 9 CFR 381.153 of the poultry products inspection regulations into a single new part, 9 CFR part 439.

DATES: This rule will be effective October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Eugene Vickers, Chief of the ALP, Office of Public Health Science, FSIS, at (202) 690-6407 or fax (202) 690-6632, or by writing to the ALP, Box 17 Aerospace Center, Room 377, 901 D Street, SW., Washington, DC 20024.

SUPPLEMENTARY INFORMATION:

Background

On January 17, 2006, FSIS proposed to amend the Federal meat and poultry products inspection regulations by revising, editing, and consolidating provisions of the standards and procedures for the accreditation of non-Federal analytical chemistry laboratories (71 FR 2483).¹ This final

rule is consistent with the proposed rule, except for the following technical revisions. First, FSIS had proposed to codify the Internet and mailing addresses for obtaining information on the ALP and minimum proficiency levels. In the final rule, FSIS is not codifying this address information because it is subject to change. However, Internet and mailing addresses for obtaining information are included in this preamble.

In addition, FSIS had also proposed to establish a new § 439.60 that would have consolidated all references to "violations of law" contained in §§ 318.21(d)(4), 318.21(f), 318.21(g)(4), 381.153(d)(4), 381.153(f), and 381.153(g)(4). These regulations prescribe the conditions under which a laboratory will have its accreditation denied, suspended, or revoked. FSIS had proposed to consolidate references to violations of law to eliminate duplicative provisions within the regulations. The Agency did not intend to propose substantive changes to these regulations.

However, when developing this final rule, FSIS determined that, as proposed, § 439.60 did not adequately delineate the circumstances in which the Agency would deny, suspend, or revoke a laboratory's accreditation for reasons associated with certain violations of law. Therefore, instead of consolidating all references to violations of law into new § 439.60 as proposed, this final rule describes the reasons that FSIS will deny, suspend, or revoke a laboratory's accreditation under separate sections that include specific paragraphs that contain provisions for violations of law.

Thus, under this final rule, instead of providing a cross-reference to § 439.60 as proposed, § 439.50(c) describes the conditions under which FSIS will refuse to provide an accreditation to a laboratory for reasons associated with violations of law. In addition, instead of providing a cross-reference to § 439.60 as proposed, § 439.52 of this final rule provides a complete description of the reasons that FSIS will suspend a laboratory's accreditation. Finally, instead of providing a cross-reference to § 439.60 as proposed, § 439.53(c) of this final rule describes the conditions under which FSIS will revoke a laboratory's accreditation for reasons associated with violations of law. This final rule also removes proposed § 439.60, which proposed to consolidate the provisions for violations of law, and re-designates proposed § 439.70, the provisions for notification and hearings, as § 439.60.

¹ FSIS laboratories are not part of the ALP. FSIS laboratories are ISO17025 accredited. The methods

that FSIS laboratories use are found on the FSIS Web site.