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THE GOOD EGG PEOPLE ®

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May 1, 2019

TO: CAVet@cdfa.ca.gov
From: Rose Acre Farms

RE: Comments on Developing Regulations for Prop 12.

Rose Acre Farms, the largest family owned egg laying operation in the United States and an active provider of eggs to California, appreciates this opportunity to provide our comments and thoughts regarding the regulations being developed around the recently enacted Proposition 12, that is now law in California as it relates to shell and liquid eggs sold in California.

First, Rose Acre Farms wants to take this opportunity to applaud the California Department of Agriculture in being proactive in developing regulations on this subject by actively seeking comments from producers and other stakeholders on specific situations they face in providing eggs to California that meet the requirements of Prop 12. By doing so the California Department of Agriculture will be able to develop regulations that not only meet the requirements of Prop 12 but also will work in real life.

Rose Acre Farms has the following comments and concerns about the proposed regulations:

1) In the definition of "Egg-laying hen" it states, "means any female domesticated chicken…kept for the purpose of egg production." We believe the intent of this definition, and the law, is to have the regulations and law apply to those chickens that lay eggs. As such we request that this definition be tighten to add into the definition "sexually mature" to make clear that those are the chickens the regulation is mean to apply. So the definition would be as follows: ""Egg-laying hen" means any sexually mature female domesticated chicken… kept for the purpose of egg production.

2) In relation to "Confined in a Cruel Manner" there is a phase-in time with chickens being required after December, 31, 2019 having space of 144 square inches of space and then after December 31, 2021 meeting the 2017 UEP Cage-free Housing guidelines.

   Rose Acres wants to make sure the regulations do not cause an unexpected problem in having the requirements starting January 1, 2020 being more restrictive than the requirements starting January 1, 2022. In other words, we propose the regulations state that starting January 1, 2020 that chickens either be required to have 144 square inches OR meet the 2017 UEP Cage-free guidelines. This way, for those producers already meeting the 2017 UEP Cage-free guidelines

there will be no confusion on anyone's part that the producer is in fact meeting the requirements starting January 1, 2020.

3) Also, in relation to "Confined in a Cruel Manner" we understand the law states ramps cannot be counted as part of the calculation in floor space. Rose Acre Farms suggests the regulation allow solid ramps that are of a certain incline be included in the calculation of total floor space. We understand that ramps made of wire, or are of such an incline that the chickens cannot use that space as part of where they stand. However, there are cage-free systems out there currently constructed that have solid ramps and the ramps are of such a slight incline the chickens do in fact use them to stand, etc. We are also aware of several certification organizations that consider such solid ramps as part of the floor space calculation. Since the 2017 UEP guidelines for Cage-free chickens do not mention ramps in their calculation of floor space, and the 2017 UEP Cage-free guidelines meet the requirements of the regulation, and several certification organizations, of which UEP accepts their certifications as meeting the 2017 UEP Cage-free guidelines, that the California regulations should also allow such ramps to be considered as part of the floor calculation. The regulation should be limited to those ramps that are solid and of such an incline that the chickens do in fact use them like floor space. And the regulation should also be limited to those ramps that certifying organizations, whose certifications are accepted by UEP as meeting their guidelines, also consider the ramps as part of the floor space calculations. Rose Acre Farms can provide more detail on this proposal if so desired.

4) The Department seeks comments on inspection processes. As stated above, starting January 1, 2022 egg-laying chickens must meet the UEP Cage-free guidelines. There are several certifying organizations which also certify cage-free standards of which UEP accepts their certifications as meeting the UEP guidelines. For instance, UEP accepts the certification of both the American Humane Association and also the Humane Farm Animal certification as to cage-free as meeting their requirements. Rose Acre Farms proposes the regulations allow certifications approved by UEP also be accepted. Administratively this could be accomplished by having UEP provide to the Department a list of certifying organizations they accept as also meeting their cage-free requirements. A producer providing the Department such certifications would thereby be deemed as meeting the UEP cage-free requirements.

5) Rose Acre Farms is concerned about when a sale is considered to have been made in California. It appears to us the proposal is that when eggs are delivered to a customer in California the Department will consider those eggs as having been sold in California and therefore required to have met the California standards. This presents several problems.

   First, numerous retail grocery chains have warehouses in California. These warehouses are used to not only supply eggs to its stores in California but also to stores in states such as Arizona, Nevada and Utah, for example. If all eggs delivered to this warehouse are required to meet the California requirements those eggs will become uncompetitive in the other states. This puts not only the warehouse owner in a bad position but also the producer. Since the producer has to deliver to that warehouse, and those eggs become uncompetitive in the other states, the

warehouse owner will simply stop buying the eggs needed in the other states from that producer, thereby economically harming that producer.

Second, for those eggs that are to be exported, they should not be required to meet the California requirements, even though they may well be delivered to a business that sells those eggs, just not in California.

It appears to Rose Acres the intent of the law is to have those eggs sold to end-user customers, be it individuals at retail or to commercial end users, to be the ones intended to have eggs in conformance with the California law and regulations. Not those end user customers outside of California. In accordance with this Rose Acre Farms proposes the regulations make clear the regulation applies to those intending to sell the eggs to end-users, be it individuals or commercial end-users, in California. In other words, make clear the regulation applies to those eggs sold to end-users in California. Appropriate penalties can be established to punish those that bring eggs into California stating the eggs are not intended for final sale to California end-users and then sell eggs not meeting California requirements to end-users in California.

6) Rose Acre Farms agrees the final regulation should make clear that not only are liquid eggs sold in the State are covered by the regulation but that "liquid eggs: includes egg white and egg yolks that either, or together, also may include such items as sugar, salt, water, seasoning, coloring, flavoring, preservatives, stabilizers or other food additives.

7) Rose Acre Farms also agrees that "liquid eggs" should not include combination foods like cake mixes, pizza, ice cream, cookies, or other processed or prepared foods.

8) The Departments requests comments on farm inspection frequency and also on how such inspections should take place. Rose Acre Farms believes the procedures established under Prop 2 work well for in determining whether the California standards have been met by a producer. Specifically, the Department, upon request, inspects a facility that desires to ship eggs to, or within, California, for sale to an end-user. After that inspection, the Department may conduct an inspection via conference, email, phone or a combination of these to determine whether the producer has maintained the proper certifications that meet the California requirements.

Rose Acre Farms appreciates the opportunity provided by the California Department of Agriculture to provide these comments. We look forward to working with you in implementing these regulations. If Rose Acre Farms may provide any other information please let us know.

Thank you for this opportunity to submit these comments.

Sincerely,

Joseph A. Miller
General Counsel

Grillo, Nancy@CDFA

From: McCarthy, Kimberly@CDFA
Sent: Wednesday, May 15, 2019 11:11 AM
To: Beam, Stephen@CDFA
Subject: FW: Grain Fed Veal and Dairy raised Veal.
Attachments: matauri-new-zealand-view-of-young-calves-cattle-raised-for-veal-meat-on-the-grass-in-a-farm-in-new-zealand-PHKBCR.JPG; 250px-Cow_calf_dsc06512.jpg

Kimberly McCarthy
AHFSS/CDFA
916.900.5300 |Direct
916.900.5000 |Main

From: mlemler@nagleveal.com <mlemler@nagleveal.com>
Sent: Wednesday, May 15, 2019 10:39 AM
To: CDFA State Veterinarian@CDFA <CAVet@cdfa.ca.gov>
Subject: Grain Fed Veal and Dairy raised Veal.

These veal calves are not raised in stalls. If it's a moderate climate these calves are in barns and are able to be inside or roam outside.
These calves need to be exempt from prop 12. Furthermore, how can California regulate how other states raise their livestock. We have USDA inspection that monitors and regulates safe handling.
Attached are a couple of examples. The New Zealand veal is my main product.

CALIFORNIA FARM BUREAU FEDERATION
GOVERNMENTAL AFFAIRS DIVISION
1127-11TH STREET, SUITE 626, SACRAMENTO, CA 95814 · PHONE (916) 446-4647

May 30, 2019

Via Email
CAVET@cdfa.ca.gov

Dr. Annette Jones, State Veterinarian
California Department of Food and Agriculture
Animal Health and Food Safety Services
1220 N Street
Sacramento, CA 95814

Re: Notice of Request for Information on Implementation of Proposition 12

Dear Dr. Jones:

The California Farm Bureau Federation (Farm Bureau) appreciates the opportunity to provide input on the development of regulations for the eventual implementation of *Proposition 12, The Prevention of Cruelty to Farm Animals Act,* which was approved by California voters last year. Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 36,000 members across 56 California counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

In these comments, Farm Bureau will focus on several components including: labeling and marketing requirements; the registration process for identifying and tracking animal production facilities; enforcement protocols and varying degrees of violations; producers' right-to-remedy; appropriate notice and inspection procedures for California Department of Food and Agriculture (CDFA) inspectors; and the ongoing costs related to compliance.

Marketing and Labeling of Shell Eggs

Existing California law and regulation [Food and Agricultural Code (FAC) §27521(a) and California Code of Regulations (CCR) Title 3 §1350] establishes food safety and compliance standards for shell eggs pursuant to Proposition 2 (2008). The *California Shell Egg Food Safety Compliant (CA SEFS)* labeling requirement has been utilized by California's egg producers since January 1, 2015. Farm Bureau believes that the multiplicity of labels already found on egg cartons serve only to confuse and overwhelm California consumers. An additional labeling requirement specifically acknowledging *Animal Welfare Compliant, Proposition 12 Compliant*, or any related variant is unnecessary. Prioritizing health and safety disclosures on egg cartons over other types of disclosures, including methods of production, is preferable in this instance. Rather than impose

a new labeling regime, we recommend CDFA amend the existing regulations related to *CA SEFS* to include the new enclosure requirements established by Proposition 12.

Registration of Animal Production Facilities

Pursuant to existing California law (FAC §27541) any person engaged in the production, sale or handling of shell eggs or egg products in California must be registered with CDFA. Specifically, the registration and inspection activities required are conducted via the Egg Safety and Quality Management (ESQM) Program. Pursuant to CDFA's solicitation for comment under the Request for Information, there is intention to create a registration process for identifying and tracking the location of production facilities. Farm Bureau agrees with CDFA's assertion that a registration process is foundational for effective regulatory compliance; however, we must impress upon CDFA that it should utilize existing regulatory programs to ensure in-state compliance. The development of a stand-alone Proposition 12 compliance program will prove too costly for the shell egg industry to bear.

The least burdensome alternative for compliance audits/inspections with Proposition 12 is to increase the regulatory duties for ESQM. While the FY 2019-20 Budget provides $4.5 million General Fund and 14 positions to perform the initial first-year program development and implementation, CDFA will have less than 3 months to complete a regulatory process that normally takes, at a minimum, one year to complete. Under this truncated timeline, Farm Bureau members have expressed serious concerns relative to the ability of CDFA to conduct educational workshops, draft adequate regulations and accompanying documentation, conduct an economic impact of the regulation, and provide adequate time for legal review and agency approval. Furthermore, there is concern that the public comment and associated hearings will be limited to meet the compliance deadline of September 1, 2019. In-state and out-of-state egg production facilities will also need to be certified as compliant according to the newly drafted regulations and prior to December 31, 2019, if shell or liquid eggs are to be sold in California. As we witnessed following the implementation of Proposition 2 (2008), we anticipate the very real potential that California residents and commercial markets may experience a drastic shortage in Proposition 12 compliant eggs beginning on January 1, 2020.

We are certain that CDFA is aware of these challenges, and in response we implore CDFA to not create a new regulatory inspection and registration program for in-state producers but utilize existing programs similar in design to allow for the uninterrupted sale of eggs in California as of January 1, 2020.

Enforcement Protocols, Violations and Producers' Right-to-Remedy

Health and Safety Code §25993, added by Proposition 12, specifies that any individual who violates the initiative is guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine not to exceed $1,000 or by imprisonment in a county jail. The initiative also provides for the levying of civil penalties for commercial sale violations under the Business and Professions code.

Given the expedited timeframe to develop regulations, and the possibility that educational workshops may be inadequate, the rigidity of enforcement mechanisms as provided by the initiative will prove particularly punitive. The enforcement provisions of the initiative fail to provide agricultural producers with any degree of flexibility to remedy "non-serious" violations before the filing of criminal charges. Likewise, the initiative does not establish a process by which penalties or fines may be commensurate with the severity of a violation. Under this enforcement protocol, in-state and out-of-state producers will not be issued a notice of violation (NOV) by an inspector, nor be afforded a clearly delineated appeal process or right-to-remedy. Instead, all violators will face criminal prosecution and criminal penalties, potentially for even the most minor occurrences of non-compliance. This heavy-handed approach to enforcement is not in the best interest of CDFA, California's agricultural industries, or the local district attorneys responsible for prosecution.

Appropriate Notice and Inspection Procedures

Farm Bureau agrees with CDFA's assertion that certification of a facility should be based on direct field verification audits. While the frequency of such inspections will likely be subject to much discussion, we ask CDFA consider, to the extent feasible, combining inspection scheduling to limit interruptions to agricultural operations, and assist our operations in limiting exposure from outside disease and illness. Additionally, California egg, pork and veal producers could benefit from guidance on how to comply with Proposition 12, including through opportunities such as *On-Farm Readiness Review(s).*

As CDFA determines the appropriate Standard Operating Procedures (SOP) for a compliance audit or inspection program we have the following suggestions:

- Producers should be notified in advance of an inspector's visit to an operation;
- CDFA should disseminate as much information as possible to identify the inspector(s) and provide said inspector(s) with some recognizable CDFA-issued credential/identification;
- CDFA should not conduct inspections or audits of facilities under an animal health quarantine;
- CDFA inspector(s)/auditor(s) should take all necessary actions to not contaminate or cross contaminate environments;
- CDFA inspector(s)/auditor(s) must follow a facility's biosecurity procedures;
- CDFA inspector(s)/auditor(s) must conduct an in-person exit interview with the draft inspection report;
- CDFA should take all necessary steps to make the SOP for an-onsite compliance audit or inspection publicly available for all producers and prior to inspections;
- Modifications to any procedures relating to on-site inspections or audits be publicly noticed and provided an opportunity for public comment.

Ongoing Program Costs

Ongoing costs related to enforcement of Proposition 12 should not be borne by any of the initiative's covered animal agricultural producers, or by related agricultural or commercial industries. Proposition 12 compliance and enforcement will be a massive bureaucratic undertaking; requiring the creation or modification of programs that not only apply to production agriculture but also the retail food sectors in California. While Governor Newsom's proposed

2019-20 Budget provides $4.5 million from California's General Fund, ongoing funding will be needed to continue enforcement.

To the extent that CDFA requires ongoing funding for the provisions enacted by Proposition 12, Farm Bureau objects to any shifting of enforcement and program related costs to the agricultural industry. Current law does not provide CDFA with the authority to levy fees to support Proposition 12. To this end, cost for enforcement should be equitably borne by the voters who approved the initiative, and by extension, the state's General Fund.

We look forward to working with CDFA in the coming months to develop a robust and effective regulatory program to ensure compliance with Proposition 12. It is our intention to be an active participant in the stakeholder process and represent the interests of our membership. Thank you for considering these comments and recommendations. If you have any questions, please contact Robert Spiegel at (916) 446-4647 or rspiegel@cfbf.com.

Sincerely,

Robert Spiegel

Robert Spiegel
Government Affairs Advocate
California Farm Bureau Federation

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June 3, 2019

Karen Ross
Secretary
California Department of Food & Agriculture
1220 N Street
4th Floor
Sacramento California 95814

Dr. Annette Jones
Director/State Veterinarian
Animal Health and Food Safety Services Division
California Department of Food & Agriculture
1220 N Street
Sacramento California 95814

Re: Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Dear Secretary Ross and Dr. Jones:

The American Farm Bureau Federation (AFBF) appreciates this opportunity to offer comments on the California Health and Food Safety Services Division of the California Department of Food and Agriculture's (CDFA or the Agency) above-referenced notice of request for information (RFI), which was published on April 2, 2019. The RFI states that CDFA "is seeking input from stakeholders to inform the development of an implementation approach [for Proposition 12 (Prop 12)] that is consistent with requirements of the law, is effective at ensuring prevention of farm animal cruelty as defined under the initiative and avoids unnecessary burdens upon the industry." AFBF is extremely concerned that Prop 12 and the implementing regulations will infringe on the ability of farmers across the country to run their farms and will force farmers to choose between untenable compliance costs and the loss of interstate markets.

AFBF is a federation of state and county Farm Bureau organizations nationwide, with a state Farm Bureau organization in every state, including California. Under this federated structure, AFBF focuses on national policy, while state and local Farm Bureau organizations advocate on state and local policy.[1] As the nation's largest general farm organization, AFBF

[1] AFBF is commenting here to address the impact of Prop 12 and its implementing regulations on producers nationwide. The California Farm Bureau Federation is filing separate comments on behalf of California producers.

regularly represents its members' interests before Congress, regulatory agencies, and the courts. AFBF's members produce a variety of commodities grown or raised commercially in the United States. Many AFBF members produce eggs, pork, and veal that is eventually sold in California. Therefore, AFBF has a substantial interest in how CDFA implements Prop 12.

Given the unprecedented impact that Prop 12 will have upon producers throughout the country, AFBF urges CDFA to grant a waiver of Prop 12's requirements for at least two years to allow time for farmers to become educated on Prop 12 and, for those desiring to produce Prop 12 compliant products, to make necessary changes to their operations.

AFBF offers the following comments on specific aspects of Prop 12 and the RFI, as well as the constitutional flaws in the law.

I. Prop 12 Presents Several Constitutional Problems

A. Prop 12 Regulates Conduct Occurring Wholly Outside of California and Interferes with Interstate Commerce.

Proposition 12 unconstitutionally dictates to farmers across the United States how they should operate their businesses. It is indisputable that Prop 12 reaches beyond the confines of California's borders, thereby challenging the sovereignty of every other state and effectively regulating every other state's poultry and livestock farmers. Through Prop 12, California has sought to prescribe how farmers in Iowa, Nebraska, Minnesota, and every other state raise the livestock that yield meat products that are eventually sold – even if only in part – in California. Under our Nation's system of federalism, that is not California's prerogative. Prop 12 thus conflicts with our federalist system, which is underpinned by constitutional requirements of due process and full faith and credit.

Prop 12 also violates the Commerce Clause. First, it is a per se violation of the Commerce Clause because it regulates extraterritorially. The Supreme Court has said that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that state's borders is invalid under the Commerce Clause."[2] And yet, that is what Prop 12 does – by using the "hook" of an in-state sale, California will "project its legislation" into other states by prescribing production practices for farms outside California's borders and even thousands of miles away.

Second, it violates the Commerce Clause under a balancing test. As we explain below, Prop 12 imposes enormous costs on the agricultural sector and infringes the sovereignty of other states, yet provides little or no benefit to California or its residents.

B. Prop 12 Offers Little to No Benefit to the State or its Residents.

Even more problematic is the absence of any real benefit from Prop 12 to Californians. Pursuant to Section 2 of Prop 12, the purpose of the law is twofold: prevent animal cruelty and reduce the risk of foodborne illness. Neither claim withstands scrutiny.

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[2] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989).

Regarding pork, for example, Prop 12's provisions apply only to a breeding pig. But consumers do not eat breeding pigs – they eat the offspring of breeding pigs. Prop 12 is unsupported by any credible link between the freedom of movement of breeding pigs and the safety of meat produced from their offspring. Further, because California is a designated state pursuant to the Federal Meat Inspection Act, every slaughterhouse and meat packing or processing facility in the state is inspected by the United States Department of Agriculture's Food Safety and Inspection Services (FSIS), and any meat product shipped into California – including whole pork and whole veal – is inspected by FSIS. In short, no meat product may bear the mark of inspection, leave a federally inspected establishment, and enter commerce in California unless inspected and determined by FSIS to be suitable for human consumption.

California's other stated rationale, animal welfare, is equally spurious. There is absolutely no scientific basis for the arbitrary square footage requirements in Prop 12 – which in fact are not used anywhere else in the world. Moreover, any purported cruelty associated with smaller square footage housing occurs *outside* of California. California cannot regulate commerce outside of California just because its citizens may feel better about conforming out-of-state businesses to their standards of animal care (or, for example, workplace safety or minimum wage requirements).

C. Prop 12 Will Impose a Heavy Economic Burden on Producers, Consumers, and Interstate Commerce.

The burden upon interstate commerce will be tremendous. It is estimated that at least 95 percent of swine breeding farms in the United States currently do not meet Prop 12's housing square footage requirements. For these farms to produce piglets that can be raised into hogs that ultimately yield pork salable in California, they must either reduce their inventory by approximately 20 percent (to meet the 24 square feet requirement) or make substantial capital investments if they wish to retain production capacity. This added capital investment or decreased piglet production due to a lower inventory will impose a financial hardship on breeding farms. In addition, the breeding animals that remain will be less productive because group housing often leads to additional injuries caused by mixing sows at a vulnerable time, further threatening the financial viability of the swine breeding operation.

Finishing farms that wish to raise hogs for pork salable, even in part, in California also will suffer financial hardship because they must procure piglets (feeder pigs) from a Prop 12 compliant breeding farm. As costs for both types of producers materially increase, they will pass those costs down the supply chain to packer processors and, ultimately, consumers. Under Prop 12, the cost of pork production will increase and availability of pork will decrease, harming consumers, swine farmers, and everyone in the supply chain in between.

Prop 12 will also affect the price of "non-covered" products in all 50 states. This impact occurs because, even though a significant portion of almost every hog will end up in products sold outside of California, the added cost associated with producing a Prop 12-compliant hog (or calf) is still there. The retail costs of non-covered products, such as sausages, links, patties, cured hams, hot dogs, pulled pork, salami, *etc.* will go up as the input (hog) costs go up.

II. Issues and Questions Raised by CDFA

A. CDFA Must Protect the Privacy Rights of Farmers.

The RFI states that CDFA's "current thinking is that certification of a facility would be based on verification of compliance through direct field verification audits." The RFI further states that it is considering a penalty regime. It is imperative that CDFA not allow any individual farmer's business information to become public, whether CDFA is engaging in certification inspections, leveling a penalty, or any other component of implementing Prop 12. Private farm information includes, among other things, a farm's location, size, ownership, and operational information. Prop 12 must not become a tool to circumvent farmers' privacy rights.

B. The CDFA Regulations Should Recognize that Farmers Who Do Not Certify Their Products as Prop-12 Compliant Are Not Subject to Inspections, Audits, or Enforcement Actions.

Given the costs associated with changing farming operations or procuring Prop 12 compliant feeder pigs, some swine farmers may choose not to produce pork salable in California. Yet it is entirely possible that, through no fault of such a producer, some non-Prop 12-compliant pork originating from that producer may end up in California. CDFA should specify that farmers who do not certify their products as Prop-12 compliant are not subject to inspections, audits, or enforcement actions by the state or by private attorneys general.

C. CDFA Must Consider the Complexity, Dangers, and Challenges Associated with Audits, Certification, and Penalties.

CDFA should be mindful of certain considerations as it contemplates compliance and enforcement. First, CDFA officials undoubtedly know the biosecurity measures routinely taken on livestock production sites.[3] Swine are susceptible to numerous contagious diseases and given heightened awareness about diseases such as African Swine Fever (ASF), biosecurity concerns have never been more pressing.

Ever concerned about animal health, swine farmers have taken many measures over the last few decades to stop or slow the spread of disease. Many breeding farms were intentionally constructed in remote areas, far from other farms. A critical biosecurity measure is limiting access to farms by people (and their vehicles, tools, clothing, *etc.)* who have recently visited other hog farms. Many farrowing facilities require all visitors to "shower in and shower out" of facilities and wear special clothing to avoid spreading disease to the farm. Other farrowing facilities will not allow a person on site if that person has visited another swine farm within the last 72 hours.[4]

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[3] The CDFA website has substantial information on that topic. *See, e.g.* https://www.cdfa.ca.gov/ahfss/Animal_Health/BioSpecies/BioSwineSheepGoat.html.

[4] The current spread of ASF in China and elsewhere demonstrates how critical biosecurity is. ASF spreads quickly and kills animals. Experts estimate ASF will affect as many as 150-200 million hogs in China alone, resulting in a very significant drop in hog production.

Any regulatory requirements from CDFA must account for those biosecurity concerns and animal health. It would be arbitrary and capricious for CDFA to implement a law purportedly aimed at animal welfare in a manner that actually increases the risk of animal distress, discomfort, and disease.

Setting aside biosecurity, the sheer number and geographic scope of farms likely to produce hogs that ultimately yield meat sold in California make it unlikely that CDFA could carry out an inspection program of any meaningful scale. There are approximately 60,000 hog producers in the United States, many with multiple production locations. Iowa alone has more than 6,000 hog farms and it seems unlikely CDFA has the resources to inspect even a small fraction of these farms.

Importantly, Prop 12 does not direct CDFA to develop an inspection or certification program. Rather, it simply provides that a certificate obtained in good faith is a defense to any public or private enforcement action. Given the magnitude of the pork industry and significant biosecurity concerns, swine farmers should be permitted to self-certify and all downstream supply chain participants – packers, processors, further processors, distributors, warehouses, retailers, foodservice operators, *etc.* – should be able to rely upon that certification as a defense. Should CDFA conclude some program is needed beyond the producer's own certification, CDFA should create a certification standard, which swine farmers can use with auditors. Such an approach is consistent with how some producers submit to periodic animal welfare audits required or requested by processors or other downstream entities.

In designing these certifications CDFA should be mindful of the burden audits impose and establish reasonable time periods for re-certification of a facility. Given the very many farms and the small number of third-party inspectors, a reasonable, practical time frame for re-certification is no more than once every four (4) years. CDFA also should be flexible regarding the form used for certification and not require an attestation under oath, notarization, or other formalities. The law requires no specific form or formalities, and CDFA should strive to make certification practical for farmers.

Certification should not be limited to a specific product or load of pigs or calves; rather, it should attach to a facility and time period. A producer should be allowed to have his or her farm certified as meeting Prop 12 requirements and have that certification cover all animals raised at that farm going forward for a period of years or until its re-certification, whichever is earlier. This approach is consistent with models used for other purposes – such as programs for food safety, animal welfare, organic, *etc.* Although an audit necessarily captures a snapshot in time, compliance should be established through that snapshot.

When considering compliance with the space requirements, CDFA needs to recognize the importance of "free choice crates" in the hog industry. These crates were originally developed and used to protect sows from being "bullied" by other sows in open pens. As producers shift to group sow housing, other options are necessary to protect sows from becoming subjects of aggression. An increasingly popular innovation is the free choice crate system. In that system sows are kept in pens but have the option of voluntarily entering an area – similar to a crate – to avoid other sows. Although the free choice crate typically does not allow the sow to turn around freely, the sow can easily exit the crate back into the pen when she wishes. CDFA should

recognize in its regulations that using crates in free choice systems does not result in animals who are "confined in a cruel manner" so long as sows may enter and exist these crates voluntarily. Rather than being "cruel," these systems are safer for both the sows and people handling the sows.

Sow barns and veal calf barns come in different shapes, sizes, types, designs, *etc.* As part of its certification efforts, CDFA should provide guidance about how to calculate usable floorspace per sow or per calf in these various configurations. Doing so will help producers understand whether their barns comply and will also inform whether and how producers may wish to build or renovate facilities.

CDFA should recognize that not all pens are the same and allow producers the option to calculate usable floorspace based on total floorspace of all pens within a barn. Such an approach would allow the square footage from the free-choice crates to be included when determining square footage because it is usable space accessible to the sows.

D. CDFA Should Specify How Prop 12 Impacts Imported Products.

CDFA should also clarify Prop 12's impact on imported products and imported livestock. The U.S. imports a significant number of pigs, feeders in particular, from Canada. CDFA needs to explain how Prop 12 applies, if at all, to meat from pigs born outside the U.S. Similarly, a significant amount of veal is imported from New Zealand, Australia, and Canada. CDFA should consider and explain how livestock farms in foreign countries will be certified, inspected, and audited for compliance.

* * * * *

AFBF appreciates the opportunity to submit these comments. AFBF again reiterates its request that CDFA grant a waiver of the Prop 12 requirements for an additional two years. Providing such a waiver will help mitigate the adverse impact the law undoubtedly will have on consumers, producers, and the supply chain.

Sincerely,

Paul Schlegel
Vice President, Public Affairs

Information for CDFA for June 3 Request

Prepared by Cargill, Inc.

Impacts or challenges related to product labeling and advertising

The timeline between when final rules will be issued by CDFA (September 1, 2019) and when industry must comply (after December 31, 2019) is very tight for liquid egg products labeling. The process to change a liquid egg products label can take approximately 18 to 24 weeks. The current timeline only gives industry **21 weeks**. However, it is manageable to provide products that comply to the space per bird requirements. Thus, we wanted to offer background on the labeling process and recommend ways to mitigate the very tight timeline on labeling.

Background on the labeling process: If sellers are required to have California specific label text (such as CA Compliant), that label artwork will need to be changed. This requires a seller to seek USDA approval on the new artwork which take approximately 8-10 weeks. If multiple sellers are seeking approval, this could lead to a backlog at USDA and that process could take longer. Once label artwork is approved, plates need to be created which can take 4-6 weeks. After that, there is a 6-8 week lead time needed to print the packaging.

Recommendations to mitigate the tight labeling timeline:

- CDFA should provide its initial thinking on labeling as early as possible. Draft rules shared by August 1, 2019 would provide sufficient time for label approval and production.
- Alternatively, CDFA should allow sellers a 6-month grace period on labeling provided they can prove through an auditable record-keeping system the egg inside the carton is complaint. To be clear, there would be no grace period on ensuring produce originated from hens that meet the housing requirements. This would also lessen the environmental impact as old packaging would not need to be discarded but could be used up.

Comments on the written certification by suppliers regarding conformance to requirements, approaches to ensuring validity of such documents, and input on CDFA's potential role in that process.

We recommend that if a seller of pasteurized liquid egg products is currently selling its products using an official United States Department of Agriculture (USDA) cage-free label that has been source verified as originating from a farm complying with the 2017 edition of the United Egg Producer's Animal Husbandry Standards for U.S. Egg Laying Flocks: Guidelines for Cage-Free Housing that no additional labeling for California should be needed.

To bear the USDA cage-free label, USDA Agriculture Marketing Service (AMS) requires a written and implemented segregation and traceability plan detailing how the company maintains the identity of the eggs from production through storage, transport, processing and packaging (source citation below in *).

USDA AMS verifies that only shell eggs sourced from cage-free flocks are packaged into cartons bearing a USDA Cage-Free Grade Shield.

With respect to liquid egg products, the final cage-free liquid product must be produced with tankers that contain cage-free egg. Those cage-free liquid egg tankers received at the further processing facility are verified by USDA and must conform to the requirements that were specified in the original label claim and label approval from USDA FSIS.

The original label claim must specify what third-party cage-free egg certification the farms have. These can include certifications by United Egg Producers, American Humane Association, Humane Farm Animal Care, etc. All three of those have the same space requirement for hens as the 2017 edition of the United Egg Producer's Animal Husbandry Standards for U.S. Egg Laying Flocks: Guidelines for Cage-Free Housing. So a cage-free label based on this approved label claim will automatically meet Proposition 12 standards.

This methodology would have several benefits, including:

- CDFA could leverage an existing, federal government, source-verified process and avoid unnecessary and costly duplication. Any company audited by CDFA could supply its USDA-AMS labeling protocol so CDFA can confirm compliance.
- This would allow sellers of pasteurized liquid egg products to more easily and quickly supply the State of California with compliant, cage-free products. Sellers could deliver cage-free products from existing supply chains and would not have to produce special cage-free products with a California label just for California. This could be particularly helpful for California consumers during times of industry shortages, such as an outbreak of Avian Influenza, when supply lines may need to change.

*Source citation: https://www.usda.gov/media/blog/2016/09/13/usda-graded-cage-free-eggs-all-theyre-cracked-be.

Impacts or challenges related to product labeling and advertising

We recommend a general "California Compliant" label for egg originating from hens raised with 144 degrees and could provide documentation at the audit. If a "California Compliant" statement is required, we recommend that industry be allowed to inkjet or apply a secondary label with the statement on an already approved, existing case label or carton label.

Definitions not included in the law that might be needed for clarity of requirements, compliance or enforcement

Section 25991, Part E (4) states that after December 31, 2019, hens may not be confined with less than 144 square inches of usable floor space per hen. We recommend CDFA provide further clarity on this provision, specifically around:

- Is the 144 square inches per cage or house average?

- Is the requirement that birds be housed at 144 square inches after December 31, 2019, or at the start of the flock's placement in the layer house?

Information on marketing, distribution, transportation, interstate commerce, and points of sale that may be relevant to compliance and enforcement of provisions related to the sale of products from covered animals.

To give industry stakeholders complete clarity, we recommend CDFA state:

- Proposition 12 requirements apply to the covered products sold in California, and do not apply to transshipments through the state to points of commercial sale outside of California or for export purposes. This clarification was provided in previous guidance documents on similar regulations and was helpful to ensure compliance. See https://www.cdfa.ca.gov/ahfss/mpes/pdfs/EggSafetyRuleQA.pdf as an example. Specific examples of transshipment include but are not limited to: 1) Eggs shipped to a warehouse in California for use in a neighboring state 2) Eggs that are exported to Hawaii or another country but pass through California 3) Eggs that are supplied to cruise lines and consumed at sea but travel through California.
- Proposition 12 requirements do not apply to egg sold to military bases in California where eggs are a commodity purchase using federal rules and consumed on federal groups. This clarification was provided in previous guidance documents on similar regulations as noted above.
- Whether Proposition 12 requirements apply to eggs and egg products purchased for the school lunch program in California, a program governed by federal rules and purchased with federal dollars.
- The law applies to products shipped into California after December 31, 2019. Products which are on a retail shelf, in a restaurant or in a warehouse in California prior to December 31, 2019, are not subject to this law. Sellers and purchasers of egg would need to provide documentation, if audited, as to when those pre-existing products shipped.

Greater specificity or clarity needed for types of meat products or egg products potentially subject to provisions of the law.

The ballot initiative text, and now subsequent law, makes clear that the law covers shell egg and liquid egg products as stated in Section 3(b)(3-4). However, there are some egg users who would prefer even greater clarity so we recommend CDFA expressly list additional products that DON'T apply, including hard-boiled eggs, pre-cooked scrambled eggs, pre-cooked egg patties and pre-cooked omelets.

Similarly, using the liquid egg definition in Section 25991, Part L (see below), one would conclude that a liquid egg product that contains vegetables would not be covered by this law. However, we recommend CDFA expressly clarify that.

Additionally, we would like further clarity as to whether dried egg is covered by this law.

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June 3, 2019

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Director/State Veterinarian
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RE: Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Dear Secretary Ross and Dr. Jones:

The California Pork Producers Association (CPPA) supports the attached comments submitted by the National Pork Producers Council (NPPC) in response to the California Department of Food & Agriculture's (CDFA) April 9, 2019 request for information on implementing Proposition 12 (Prop 12), the so called "Prevention of Cruelty to Farm Animals Act."

CPPA is the catalyst for California pork industry stakeholders to collectively and collaboratively build a socially responsible, sustainable, and economically viable pork industry through information, promotion, and education.

Thank you for the opportunity to submit these comments.

Respectfully,

Erica Sanko

Erica Sanko
Executive Director

June 3, 2019

Submitted via electronic mail to CAVET@cdfa.ca.gov

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Re: Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Dear Secretary Ross and Dr. Jones:

The National Pork Producers Council (NPPC) submits these comments in response to the California Department of Food & Agriculture's (CDFA) April 9, 2019 request for information on implementing Proposition 12 (Prop 12), the so called "Prevention of Cruelty to Farm Animals Act." NPPC is an association of 42 state pork producer organizations that serves as the global voice for the nation's pork producers. The U.S. pork industry represents a significant value-added activity in the agriculture economy and the overall U.S. economy. Nationwide, more than 60,000 pork producers marketed more than 120 million hogs in 2017.

These comments address the devastating and unconstitutional impact of Prop 12 on the production of pork in the United States and its eligibility for sale in California. NPPC, and the nation's pig farmers, object to Prop 12 in the strongest terms possible because:

- Prop 12 is an unconstitutional regulation imposed by California on livestock production practices in other states and imposes extraordinary burdens to interstate commerce while providing no actual benefit to California;
- Prop 12 sets arbitrary standards that lack any scientific, technical or agricultural basis. It provides no actual improvement to the welfare of pigs. These standards were drafted by activists whose goal is the elimination of pork (and ultimately all animal protein) from U.S. diets and who lack any expertise or experience raising pigs;
- Prop 12 will impose staggering, destructive costs on the U.S. pork industry (and rural communities across America), an industry that has virtually no presence in the state of California;

- Prop 12 is an environmental disaster. It sets the efficiency of the US pork industry back decades and will significantly increase the industry's environmental footprint and cause increases in greenhouse gas and other emissions;

- Prop 12 is a human disaster. It will dramatically reduce the supply of wholesome, affordable and nutritious pork available to California increasing the costs Californians have to pay for pork. California, the state with the nation's highest poverty rate, is now set to impose these staggering costs on its most at risk citizens, including the over 4 million Californians who receive assistance purchasing food and the shockingly high 18.1% of California children who live in poverty[1].

NPPC appreciates the opportunity to submit these initial comments on CDFA's plans to implement Prop 12, its efforts to engage impacted stakeholders in the implementation of Prop 12 and gain a better understanding of the US Pork industry. As an industry, and despite our strong and absolute objections to Prop 12, pork producers nevertheless look forward to working cooperatively with CDFA to help it better understand the dynamics and structure of the pork industry, and design implementing regulations that will minimize harm to farmers and the marketplace for pork.

However, the almost total absence of pork production in California and what appears to be a lack of any significant experience by CDFA with pork or the raising of pigs is concerning. The US Pork industry neither looks nor operates in any manner like the egg or dairy industries (both of which CDFA has extensive experience with). As such, NPPC urges CDFA to dedicate the time to fully understanding the industry, by leaving California and visiting pig farms and speaking directly to pig farmers, before developing regulations. NPPC would be happy to help work with CDFA to arrange these visits.

Indeed, while the timelines in Prop 12 themselves are far too aggressive already (as a practical matter, producers who intend to retrofit or build new barns to be Prop 12 compliant by the December 31, 2021 deadline would have needed to already start that process in early 2019), Prop 12 contemplated that it would take more time for the pork industry to come into compliance than the egg industry. In light of this, NPPC respectfully suggests the CDFA consider granting a waiver of Prop 12's requirements for at least an additional two years until January 2024. Such a waiver would provide a more realistic time frame for CDFA to educate itself on the pork industry, to communicate with farmers, and for those farmers who wish to continue

[1] https://www.cbpp.org/research/food-assistance/a-closer-look-at-who-benefits-from-snap-state-by-state-fact-sheets#California

doing business in California to make the necessary changes to their farm and then to breed Prop 12 compliant breeding pigs.

Proposition 12 is Unconstitutional because it is an Extraterritorial Intrusion on Livestock Production Practices in Other Sovereign States and because it Imposes Extraordinary Burdens on Interstate Commerce with Little to no Benefit to California.

Proposition 12 is merely the most recent action taken by California that dictates to people and companies across the United States how they should live and operate their businesses. That Prop 12 reaches beyond the confines of California's borders and challenges the sovereignty of numerous other states regarding agricultural production in those states is indisputable. Through Prop 12, California has concluded it gets to decide how farmers in Iowa, Minnesota, North Carolina, Ohio, and numerous other states raise the livestock that provide pork to be sold in California.

Prop 12 threatens the economic mayhem that comes if states are free to ban each other's products based on a desire to control production methods or practices. Through Prop 12 California tries to "project its legislation" into other states by prescribing production practices to be used in those other states and uses the "hook" of an in-state sale to dictate farming practices thousands of miles away. The Supreme Court has said that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause" and yet, that is what Prop 12 does.[2]

It is no answer to say that companies can avoid California's overreach by simply withdrawing from the California market. Such an argument defeats one of the very purposes of the Commerce Clause, which was to prevent economic isolationism and the establishment of barriers to trade. The point has always been that the regulating state has no power under the Commerce Clause to foist its preferred practices on producers in other States.

Prop 12 also violated the Commerce Clause because it imposes enormous economic and operational burdens on pork producers who wish to sell pork meat into California that far outweigh any benefits of the law. There is no scientific basis to believe that either animal welfare or human health is served by Prop 12's arbitrary requirements for pork production.

Issues and Questions Raised by CDFA

Analyzing hog production today, the law will require the farms where more than 99 percent of the nation's swine breeding herd is housed to dramatically alter their current farm design and capacity should the pork products from hogs birthed on those farms eventually find their way to California. Hog producers who have already made a significant investment in developing open pens and group housing will now be required not only to reduce their

[2] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989).

inventory of animals in most cases by 20 – 30 percent to meet the arbitrary 24 square foot requirements of Prop 12, but will likely also have to make significant capital investments if they wish to retain production capacity. This added capital investment or decreased piglet production due to a lower inventory will impose a financial hardship on pork producers and the consumer marketplace.

In addition, the breeding animals that remain will be less productive because open pen group housing often leads to additional injuries caused by mixing sows at a vulnerable stage of production, further threatening the financial viability of the swine breeding operation. With Prop 12, the cost of pork production will increase and availability of pork will decrease, harming both consumers, hog producers, and everyone in the supply chain in between.

Prop 12's Application Should Be Limited to Retail Consumer Sales of Uncooked Pork. Ready-to-Eat Products and Pork Sold Through Foodservice Entities Should be Exempt from Proposition 12.

CDFA asked for suggestions regarding "greater specificity or clarity needed for types of meat products or egg products potentially subject to provisions of the law." "Whole pork meat" is uncooked pork and the definition exempts "processed or prepared food products."[3] In the context of meat products the term "processed" typically means the product has been substantially transformed such that it is ready-to-eat (RTE). This distinction between products that consumers must cook for food safety reasons, *i.e.*, those that are non-RTE, versus those products a consumer may heat for organoleptic or other purposes (*e.g.* hot dogs, luncheon meat, *etc.*) is important.

Given the examples included in the law, it is evident Prop 12 is not intended to apply to RTE products. CDFA should clarify that "uncooked" means non-RTE, as FSIS uses that term. Likewise, not all RTE products are cooked. For instance, prosciutto may not have been "cooked" but it was processed, dried, and cured in such a way that it is RTE. Smoked products often are similarly RTE. The regulations should clarify that these products are not covered by the law.

CDFA should also clarify that products sold at or for foodservice are exempt. This approach is consistent with the law's definitions. An important part of the definition is its recognition that "Whole pork meat"

> does not include combination food products (including soups, sandwiches, pizzas, hot dogs, or similar processed or prepared food products) that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. (Emphasis added)

[3] Subsection 25991(u) of the California Health and Safety Code.

The law's reference to "processed or prepared" products means CDFA through its regulations must give life to the term "prepared" in Prop 12.

A fundamental canon of statutory construction provides that two words in the same statute or law should not be interpreted to have the same meaning because to do so one word would be rendered superfluous or redundant.[4] Here, "processed" and "prepared" in the whole pork meat definition cannot have the same meaning. Because "prepared" must have a different meaning, the term should apply to products that are or are prepared for consumption by a consumer at a restaurant, cafeteria, or other foodservice establishment, where the product or meal is prepared for consumption by an individual. Such an interpretation is also consistent with subsection 25991(u)'s limitation that whole pork meat is "uncooked." A whole pork meat product sold at a restaurant or other foodservice facility is not sold uncooked. The transaction at the restaurant or other foodservice entity should not be subject to Prop 12 because the pork is no longer "uncooked." It has been prepared as part of a meal or snack. To apply Prop 12 to products destined for foodservice is consistent with the "uncooked" exemption embedded in the definition.[5]

Following that reasoning to its logical conclusion sales of products to foodservicve establishments also should be exempt. This interpretation is consistent with the Prop 12 provision that exempts sales "undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act...." For example, a sale to a foodservice company that purchases whole pork meat or whole veal meat at a federally inspected establishment is exempt based on the limiting language in 25991(o). It would be an incongruent result and reading of the law to exempt the final consumer sale at a restaurant but insist that simply because the packer delivered the product to the foodservice distributor or restaurant, where it will be "prepared," the sale is now subject to Prop 12[6]. CDFA should interpret the term "prepared" in the definition so pork products sold through foodservice channels, *i.e.*, restaurants, cafeterias, hospitals, *etc.* are outside the scope of the "whole pork meat" definition.[7]

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[4] "In determining the ordinary meaning of a statute effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant."

[5] To interpret the definition otherwise would create an inconsistent application of the law in which a case of pork chops is purchased by a foodservice entity at a federally inspected establishment is exempt from the claws of Prop 12 while another case of pork chops processed at the same federally inspected establishment but acquired at a distribution center or from a broker is subject to Prop 12. See section 25991(o), which includes an exemption regarding "any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act."

[6] To subject these sales to application of Prop 12 will simply mean the loss of the meat distribution business in California as food service establishments will ensure they purchase and take possession of any pork just over the state line.

[7] *Id.* (Emphasis added).

The federally inspected establishment provision and the fact the whole pork definition exclude RTE products suggests Prop 12 was not intended to cover business-to-business sales that yield an exempt product. For example, if Company A sells a pork shoulder product to Company B (in California), which uses the pork shoulder to make fully-cooked pulled pork products for retail sale, the sale from Company A to Company B should not be a covered sale. Likewise, Company A selling uncooked pork cuts to Company B, which processes/cooks the pork cuts and uses them to create a hot dog or sausage also should be exempt.

CDFA Should Follow FSIS's Approach regarding Seasonings, Additives, *et. al.*

The definition of "whole pork meat" provides a product be "comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives." The definition therefore excludes products to which a food ingredient was added, other than specifically enumerated additive categories. Prop 12 applies to the sale of whole pork meat to which only those most basic additives are added, which consumers are used to seeing in fresh whole, unprocessed pork meat products. Combining the pork meat with other food ingredients, such as breads, breading, textured vegetable protein, sauces, marinades, casings, broths or stocks, vegetables, cheese or other milk/dairy products, pasta, grains, legumes, binders, extenders, or similar ingredients renders the product not a "whole pork meat." Similarly, adding meat or fat from another animal to an otherwise-covered pork meat product removes it Prop 12's purview.

Regarding the term "similar meat additives," the only other meat additives that could be "similar" to those enumerated additives are processing aids. CDFA should confirm that "similar meat additives" only includes those processing aids and incidental additives identified by FSIS in Directive 7120.1. CDFA also should look to FSIS regulations defining the terms "seasoning," "curing agents," "coloring," flavoring," and "preservatives" as guidance.

- "Seasoning"-- FSIS identifies "seasoning" in its definition of "spices." (9 CFR 317.2(f)(1)(i)(A)). FSIS views the terms "spices" and "seasonings" as identical and therefore CDFA should state that "seasonings" means "spices," as defined by FSIS.
- "Curing agents" -- as defined by FSIS under 9 CFR 424.21(c).
- "Coloring" -- means those coloring agents – whether natural or artificial – defined by FSIS under 9 CFR 424.21(c).
- "Flavoring" -- means "flavor" or "flavoring" as defined by FSIS under 9 CFR 317.2(f)(1)(i)(B).
- "Preservatives": means chemical preservatives as defined by FDA under 21 CFR 101.22(a)(4), and as adopted by FSIS.

Finally, the definitions of "pork," "veal," and "liquid eggs," all include the phrase "intended for use as human food." The CDFA regulations must clarify that Prop 12 is not applicable to human grade pet food. Although such products are safe for human consumption they are not "intended for use as human food."

CDFA Must Consider the Complexity, Dangers, and Challenges Associated with Audits and Certification.

In its request for information, CDFA stated that its "current thinking is that certification of a facility would be based on verification of compliance through direct field verification audits." CDFA should be mindful of certain considerations as it contemplates compliance and enforcement issues. First, unlike CDFA's experience with eggs, there are approximately 60,000 hog producers in the United States, many with multiple production locations. CDFA approach to / inspection of egg facilities, through onsite verification activities as part of the Proposition 2 AB 1437 process will be met with stiff resistance by pork producers. As stated earlier, the pork industry is vastly different than the egg industry and CDFA should not feel compelled to try to force a regulatory program designed for a few fully vertically integrated egg producers on the robust and diverse US Pork industry.

CDFA officials undoubtedly know the biosecurity measures routinely taken on livestock production sites. The CDFA website has substantial information on that topic.[8] Hogs are susceptible to numerous contagious diseases and given heightened awareness about diseases such as African Swine Fever (ASF), biosecurity concerns have never been more pressing.

Ever concerned about animal health, hog producers have taken many measures over the last few decades to stop or slow the spread of disease to hog barns. Many sow farms were intentionally constructed in remote areas, far from other farms. A critical biosecurity measure is limiting access to farms of people (and their vehicles, tools, clothing, *etc.)* who have recently visited other hog farms. Many farms (and nearly all commercial sow farms) require all visitors to "shower in and shower out" of facilities and wear special clothing, to avoid spreading disease to the farm. Most will not allow a person on site if that person has visited another hog farm within the last 72 hours.

The current spread of ASF in China and elsewhere demonstrates how critical biosecurity is. ASF spreads quickly and kills animals. Experts estimate ASF will affect as many as 150-200 million hogs in China alone, resulting in a very significant drop in hog production. Just the threat of ASF will make U.S. hog producers unwilling to allow any inspectors onto their farms, fearing losing their herds to the disease.

Any regulatory requirements CDFA contemplates implementing must consider those biosecurity concerns and animal health. It would be catastrophically ironic if CDFA promulgated regulations necessitated by Prop 12's purported concerns about animal welfare that instead resulted in introducing an animal disease outbreak. Given these concerns CDFA must consider alternative enforcement mechanisms.

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[8] See, *e.g.* https://www.cdfa.ca.gov/ahfss/Animal_Health/BioSpecies/BioSwineSheepGoat.html

Setting aside biosecurity, the sheer number of sow farms that produce piglets that *might* yield meat that *might* be sold in California is enormous. Iowa alone has more than 6000 hog farms and it seems unlikely CDFA has the resources to inspect even a small fraction of these farms – beyond the obvious legal issues involved with a California state government official attempting to gain access to a farm in Iowa, Missouri, Minnesota, or North Carolina. In addition, many piglets born on farms outside the US are shipped to US farms for finishing. CDFA needs to contemplate how it will certify and inspect those farms. Finally, while the U.S. is the worlds leading exporter of pork, a significant amount of pork is also imported into the U.S. That pork, raised on farms around the world, will also need to be certified as Prop 12 compliant and inspected.

In addition, Prop 12 does not direct CDFA to develop an inspection or certification program. Rather, it simply provides that a certificate obtained in good faith is a defense to any public or private enforcement action. Given the magnitude of the pork industry, hog producers should be permitted to self-certify and all downstream supply chain participants – packers, processors, further processors, distributors, warehouses, retailers, foodservice operators, *etc.* – should be able to rely upon that certification as a defense. That is all that the law requires.

Nevertheless, should CDFA ultimately conclude some program is needed beyond the producer's own certification, CDFA should take the time to work closely with the pork industry to create a certification standard that works for producers, packers, and retailers. Certification should not be limited to a specific product or load of pigs or calves; rather it should attach to a facility and – absent significant modifications to the farm - provide coverage over the useful life of the barns. A producer should be allowed to have its facility certified as meeting Prop 12 requirements and have that certification cover all animals born at that farm. This approach is consistent with models used for other purposes – such as programs for food safety, animal welfare, organic, *etc.* Although an audit like that is a snapshot in time, compliance should be able to be determined through that snapshot.

When considering compliance with the space requirements CDFA needs to recognize the importance of "free choice stalls" in the hog industry. These pens were originally developed and used to protect sows from being "bullied" by other sows in open pens. As producers shift to group sow housing protective systems or options are necessary to protect sows from becoming subjects of bullying. An increasingly popular innovation is the free choice stall system. In that system sows are kept in pens but have the option of voluntarily entering an enclosed private, individualized stall, to avoid other sows. Although the free choice stall typically does not allow the sow to turn around freely, the sow can easily exit the stall back into the larger pen when she wishes. CDFA should recognize in its regulations that using these stalls in free choice systems does not result in animals who are "confined in a cruel manner" so long as sows may enter and exist these stalls voluntarily. Rather than being "cruel," these systems are safer for both the sows and people handling the sows

Hog barns come in different shapes, sizes, types, designs, *etc.* As part of its certification efforts, CDFA should provide guidance about how to calculate usable floorspace per pig in these various configurations. Doing so will help producers understand whether their barns comply and will also inform whether and how producers may wish to build new or renovate facilities.

Barns typically are designed as a mixture of pens and areas between, known as alleys. Because alleys are used for holding and moving animals an alley's floorspace should be included in calculating usable floorspace. Similarly, areas within a barn used for animal husbandry or veterinary purposes are similarly usable floorspace and should be counted toward the Prop 12 standard. CDFA should recognize that not all pens are the same and allow producers to calculate usable floorspace based on total floorspace of all pens within a barn. Such an approach would allow the square footage from the free-choice stalls to be included when determining square footage because it is usable space the hogs may use.

CDFA asked for information on marketing, distribution, transportation, interstate commerce, and points of sale that may relate to compliance and enforcement of provisions related to the sale of products from covered animals.

Prop 12 establishes arbitrary dates prohibiting the sale of pork from a covered animal confined in a cruel manner for a breeding pig and the meat from offspring after December 31, 2021. CDFA must ensure the Prop 12 regulations are clear that the sales prohibition applies to pork and market hogs born after those dates, e.g., pork derived from market hogs birthed by a breeding pig on December 31, 2021, is not be subject to Prop 12. Further, CDFA should make clear that sows merely need to be in Prop 12 compliant housing by December 31, 2021 and that CDFA won't require a review of that breeding pigs housing prior to that date.

Prop 12 regulate "commercial sales" and states that this is "deemed to occur at the location where the buyer takes physical possession of" a covered item. This language raises several questions, which CDFA must address. For example, a broker typically does not take physical possession of a product. A broker in California who sells a potentially-covered product to a customer in another state or country would not have made a "sale" under Prop 12 because the broker never took physical possession. CDFA should clarify this fact through rulemaking or other guidance.

Many retailers, distributors, and foodservice companies use distribution centers to store product before it is sent to retail establishments or restaurants. For example, a pork processor may sell and ship a pork butt product to a foodservice distributor in California and that distributor subsequently may send the product to restaurant owners in adjoining states, *e.g.*, Arizona, Nevada, Oregon. Because the product is not sold to California consumers, it should not be a covered sale. CDFA should define "commercial sale" so that it clearly exempts these sales. If CDFA does not exempt such sales, the agency should be aware it will drive distribution centers out of California to neighboring states. Other examples of exempt transactions include:

- products shipped to a warehouse in California for use in a neighboring state;
- products supplied to cruise lines and consumed at sea but travel through California;
- products sold to military bases in California where the product is a commodity purchase using federal rules and consumed on federal groups; and
- products purchased for the school lunch program in California, a program governed by federal rules and purchased with federal dollars.

Further, Prop 12 should not be used to regulate sales of product to customers in other countries. The regulations should clarify that the sale of an otherwise covered product to a customer for export is not a covered "sale." Failing to exempt sales of product for export will drive export business for products away from California ports and result in ports elsewhere on the west coast being used for such exports (*e.g.* sales of pork intended for China, Japan, South Korea or Vietnam that might currently ship out of the ports of Long Beach/San Pedro, Los Angeles, or Oakland will instead take place in, and employ longshoremen in, another port in Washington or Oregon). In short, CDFA should promulgate regulations confirming Proposition 12's requirements apply only to covered products sold in California and destined for use in California.

CDFA also should clarify Prop 12's impact on imported products. The U.S. imports a significant number of pigs, feeders in particular, from Canada and CDFA needs to explain how Prop 12 applies, if it does, to the sows giving birth to those Canadian feeder pigs. CDFA should consider how animal production facilities in foreign countries will be identified and audited for compliance.

CDFA is Preempted from Requiring Product Labeling Regarding Prop 12.

CDFA asked about the "impacts or challenges related to product labeling or advertising." The agency should not expend resources developing a mandatory labeling rule because, with respect to veal, pork, and liquid eggs, any such rule would be preempted by the express preemption provisions found in the FMIA and the Egg Products Inspection Act.[9] This area of law is well settled so CDFA may not require a labeling statement or icon on meat product labels or labeling.[10]

[9] 21 U.S.C. 678.
[10] See *NMA v. Harris, AMI v. Leeman, et al*

Although voluntary labeling might be a mechanism to demonstrate compliance FSIS likely would consider such an approach as a special labeling statement and therefore subject to pre-approval. Requiring pre-approval would cause an even larger backlog of labels for FSIS to review – especially for products such as case-ready fresh pork where most products have generically-approved labels.

Proposition 12 Will Impose a Heavy Economic Burden on Producers and Consumers

The economic impact of Prop 12 will be felt not only by Californians but other consumers and livestock producers. Prop 12's requirements will mean hog producers who wish to raise calves or hogs to provide pork for the California market will need to make either significant capital investments or raise considerably fewer hogs in the same space. The cost of raising hogs will go up materially as a result and producers will attempt to pass those costs on to packer processors and consumers.

Prop 12 also will force many processors to create two supply chains for products destined for California versus the other 48 states and foreign markets. Segregation and differentiation in processing creates inefficiencies. These inefficiencies slow the process and create additional costs for processors, which ultimately will be passed on to consumers. Whether processors can pass those costs on to all consumers or whether California consumers will bear the brunt of these added costs is difficult to determine.

Prop 12 will also affect "non-covered" products, in all 50 states. This impact occurs because, even though a significant portion of almost every hog will end up in a product not subject to the sale prohibition, the added cost associated with raising a Prop 12-compliant hog is still there. The retail costs of non-covered products, such as sausages, links, patties, cured hams, hot dogs, pulled pork, salami, *etc.* will go up as the input (hog) costs go up.

Thank you for the opportunity to submit these comments. If you have questions about these comments or anything else regarding Prop 12 please do not hesitate to contact me at formicam@nppc.org or by phone at 202-347-3600.

Respectfully submitted,

Michael C. Formica
Asst. VP and Legal Counsel, Domestic Policy
National Pork Producers Council

NORTH AMERICAN MEAT INSTITUTE

June 3, 2019

Karen Ross
Secretary
California Department of Food & Agriculture
1220 N Street
4th Floor
Sacramento California 95814

Dr. Annette Jones
Director/State Veterinarian
Animal Health and Food Safety Services Division
California Department of Food & Agriculture
1220 N Street
Sacramento California 95814.

Re – Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Dear Secretary Ross and Dr. Jones:

The North American Meat Institute (NAMI or the Meat Institute) submits comments in response to the above-referenced notice of request for information (RFI). The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. NAMI member companies account for more than 95 percent of the United States' output of these products. Many NAMI members sell pork and veal to customers in California and several NAMI members own and raise hogs and veal calves in various states across the country. The Meat Institute has a substantial interest in how the California Department of Food & Agriculture (CDFA or the agency) implements Proposition 12 (Prop 12 or the law).

NAMI appreciates CDFA's openness and willingness to invite and receive information from affected businesses. Proposition 12 imposes radical changes on the pork and veal industries that in many instances cannot be mitigated through additional guidance from the agency. The industry cannot comply with the law as enacted and provide enough product to California.

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To comply with the law's rigid specifications, approximately 95 percent of swine breeding operations in the United States must make excessive capital investments to materially alter their current production designs or dramatically reduce their production inventory. In addition, the breeding animals will be less productive because evidence suggests that group housing can lead to increased injuries from mixing animals at vulnerable stages of gestation. The result of Prop 12 compliance will be significantly higher production costs coupled with a less efficient supply chain meaning some companies will either choose to, or be required to, discontinue servicing California. For that reason, Prop 12 will have a dramatic effect on consumers, who will pay more money for pork, veal, and egg products and will have less choice in the marketplace, including the possibility of empty store shelves in the short term in some places.

Given these outcomes and the relatively short window for compliance, NAMI respectfully requests CDFA postpone implementation of Prop 12 indefinitely for at least two years and longer as necessary to facilitate conversations among the agency, the industry, and consumers about the law's economic impact and to encourage fact-based education concerning the alleged rationales underlying Prop 12.

Besides its threshold objections to the law and its compliance timetable, NAMI also wishes to highlight the significant constitutional infirmities of Prop 12 that inevitably will mire the law in judicial challenges for years to come. Not only will these challenges prove costly to all interested stakeholders, they also will cause industry uncertainty, consumer confusion, and impose a strain on the already-stretched California judiciary.

Proposition 12 is Unconstitutional because it is an Extraterritorial Intrusion on Livestock Production Practices in Other Sovereign States and because it Imposes Extraordinary Burdens on Interstate Commerce with Little to no Benefit to California.

Proposition 12 is the most recent action taken by the State of California that dictates to people and companies across the United States how they should live and operate their businesses. That Prop 12 reaches beyond the confines of California's borders and challenges the sovereignty of numerous other states regarding agricultural production in those states is indisputable. Prop 12 is unconstitutional because it is a wholesale extraterritorial intrusion on livestock production practices in other sovereign states and because it imposes extraordinary burdens on interstate commerce with little to no benefit to California.

Through Prop 12, California has unilaterally and impermissibly concluded that it may dictate how farmers in Iowa, Nebraska, Minnesota, and other states raise the livestock, using the "hook" of an in-state sale to dictate farming practices thousands of miles away. The Supreme Court said that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause" and yet, Prop 12 does that.[1]

It is no answer to say that companies can avoid California's overreach by simply withdrawing from the California market. Such an argument ignores one of the very purposes of the Commerce Clause, which was to prevent economic isolationism and the establishment of barriers to trade. The point has always been that the regulating state has no power under the Commerce Clause to foist its preferred practices on producers in other States and the sheer size of the California market highlights this problem. Simply put, Prop 12 threatens the economic mayhem that the Founding Fathers feared would occur if states were unilaterally free to legislate beyond their borders.

California's attempt to impose these requirements on out-of-state production is especially problematic given the absence of any real, demonstrable benefits the law provides to Californians. The sweeping, generalized assumptions about animal welfare and increased health risks associated with *Salmonella,* which were part of the justifications underlying Proposition 2, are inappropriate in the context of Prop 12. Although leading to the November 2018 election Prop 12's proponents touted the food safety and animal welfare benefits of the law, a careful review of Prop 12 shows its provisions will not promote animal welfare or improve food safety.

Regarding animal welfare, Prop 12's "confined in a cruel manner" provision applies only to a breeding pig, which is defined as a "covered animal." The offspring of breeding pigs, *i.e.*, conceivably every market hog in the United States, however, is not a covered animal.[2] This glaring omission severely undercuts the notion that Prop 12 is necessary to promote animal welfare. That the square footage requirements in Prop 12 are not used anywhere in the world highlights the fact there is no scientific basis or body of literature to support the notion that these arbitrary sizes for confinement space will improve or enhance animal welfare. Studies indicate that providing additional square footage contributes to an increased incidence of injuries to piglets by their mothers.

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[1] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989).
[2] "Covered animal" does not include barrows and gilts, *i.e.*, market hogs.

Likewise, Prop 12's Section 2 also asserts, without any scientific explanation, there is a food safety link between the "confinement" of breeding pigs and the safety of the meat derived from them. Even more inexplicably, given the sales prohibition, Prop 12 also asserts there is a link between breeding pig confinement and the safety of the meat from the market hogs that are the offspring of those breeding pigs. For at least the two reasons discussed below, neither asserted link exists.[3]

How a breeding sow is confined is wholly unrelated to the safety of the meat derived from its offspring. Once born, piglets spend approximately three weeks nursing. From the farrowing barn they go to a nursery, or to a "wean to finish" barn (different barn), where they may remain for about 6-8 weeks. The pigs may remain there or go elsewhere for finishing for another 16-17 weeks. Prop 12 offers nothing to support an assertion that, because the breeding pig that birthed a market hog was confined in a certain manner, the meat derived from that market hog is less safe. Prop 12 offers no explanation because there is none, and there is no explanation because no breeding pigs, or veal calves, are raised in conditions that satisfy the at least 24 square feet or more or 43 square feet or more for breeding pigs and veal calves respectively.

A second reason the food safety claim will fail in a judicial challenge is grounded in the depth and breadth of the Federal Meat Inspection Act (FMIA). California is a designated state, which means every slaughterhouse and meat packing or processing facility in the state is inspected by the United States Department of Agriculture's Food Safety and Inspection Service (FSIS). The FMIA also provides that any meat product (including whole pork and whole veal as defined by Prop 12) shipped into California is inspected by FSIS. Whether produced in a plant in California, Nebraska, or Pennsylvania, the same rigorous food safety standards administered by FSIS apply. No meat product may bear the mark of inspection, leave a federally inspected establishment, and enter commerce anywhere (including California) unless inspected and determined by FSIS to be not adulterated. The FSIS food safety standards are rigorous and apply whether a breeding pig is afforded 18, 20, 22, 24, or 26 square feet of space. The same exacting standards apply to the market hogs that are the offspring of covered breeding pigs. Thus, the federal framework already ensures the safety of veal and pork. Imposing minimum confinement space requirements on an already robust process does nothing to advance food safety.

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[3] CDFA likely knows this fact given the agency's role in ensuring food safety in the state.

Issues and Questions Raised by CDFA.

1. Ready-to-Eat Products sold Through Foodservice Channels Are Exempt from Proposition 12.

CDFA asked for suggestions regarding "greater specificity or clarity needed for types of meat products or egg products potentially subject to provisions of the law." "Whole pork meat" is defined as uncooked pork and excludes "processed or prepared food products."[4]

The law's exclusion of "processed or prepared" products from the definition of "whole pork meat" means CDFA, through its regulations, must give clarity and unique meaning to both excepted categories. By including both terms with an "or" between the two, it is apparent the terms are not intended to be synonymous with one another.

A. Processed

In the context of meat products, the term "processed" typically means the product has been substantially transformed so it is ready-to-eat (RTE). This distinction between products that consumers must cook for food safety reasons, *i.e.*, those that are non-RTE, versus those products a consumer may heat for organoleptic or other purposes (*e.g.* hot dogs, luncheon meat, *etc.*) is important. Given the examples included in the law, it is evident Prop 12 is not intended to apply to RTE products. CDFA should clarify that "uncooked" means non-RTE, as FSIS uses that term. Likewise, not all RTE products are cooked. For instance, prosciutto may not have been "cooked" but it was processed, dried, and cured in such a way it is RTE. Smoked products often are similarly RTE. Any implementing regulations should make this intent clear by expressly defining "processed" to include RTE and to also clarify that "whole pork meat" means non-RTE products, as FSIS uses that term.

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[4] Subsection 25991(u) of the California Health and Safety Code.

B. Prepared

CDFA should also clarify that products sold into foodservice channels are excluded. This approach is consistent with the law's definitions. An important part of Prop 12's definition is its recognition that "Whole pork meat"

> does not include combination food products (including soups, sandwiches, pizzas, hot dogs, or similar processed or prepared food products) that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.[5] (Emphasis added)

A fundamental principle in interpreting statutes such as Prop 12 is that two words in the same statute or law should not be interpreted to have the same meaning because to do so would render one word superfluous or redundant. Here, "processed" and "prepared" in the whole pork meat definition cannot have the same meaning. Because "prepared" must have a different meaning than "processed," the former should apply to products prepared for consumption by an end use consumer at a restaurant, cafeteria, or other foodservice establishment. Such an interpretation is consistent with subsection 25991(u)'s limitation that whole pork/veal meat is "uncooked." A whole pork meat product sold at a restaurant or other foodservice facility is not sold uncooked to the consumer. The transaction at the restaurant or other foodservice entity should be excluded from Prop 12 because the pork is no longer "uncooked" at the point of sale to the end-use consumer. Such a reading is consistent with the spirit of the law and principles of statutory interpretation.

This interpretation also is consistent with the Prop 12 provision that exempts sales "undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act...." For example, a sale to a foodservice company that purchases whole pork meat or whole veal meat at a federally inspected establishment is exempt based on the limiting language in 25991(o). It would be an incongruent result and an absurd reading of the law to exempt that sale but insist that simply because the packer delivered the product to the foodservice distributor or restaurant, where it will be "prepared," the sale is now subject to Prop 12. CDFA should expressly define the term "prepared" so pork or veal products sold through foodservice channels, *i.e.*, restaurants, cafeterias, hospitals, *etc.* are outside the scope of the "whole pork meat" definition.

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[5] The same limitation exists for veal.

The federally inspected establishment provision and the fact the whole pork and whole veal definitions exclude RTE products also suggests Prop 12 was not intended to cover business-to-business sales that yield an exempt product. For example, if Company A sells a pork shoulder product to Company B (in California), which uses the pork shoulder to make fully-cooked pulled pork products for retail sale, the sale from Company A to Company B should not be a covered sale. Likewise, Company A selling uncooked pork cuts to Company B, which processes/cooks the pork cuts and uses them to create a hot dog or sausage also should be exempt.

Finally, the agency should conclude raw, comminuted pork and veal are not subject to the law. It defies common sense to contend a ground product is "whole pork meat" or "whole veal meat." To subject those products to the law's provisions will only add to the confusion about its applicability.

2. **CDFA Should Follow FSIS's Approach regarding Similar Additives.**

The definition of "whole pork meat" provides a product be "comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives."[6] The definition therefore excludes products to which a food ingredient was added, other than specifically enumerated additive categories. Prop 12 applies to the sale of whole pork meat to which only those most basic additives are added, which consumers are used to seeing in fresh whole, unprocessed pork meat products. Combining the pork meat with other food ingredients, such as breads, breading, textured vegetable protein, sauces, marinades, casings, broths or stocks, vegetables, cheese or other milk/dairy products, pasta, grains, legumes, binders, extenders, or similar ingredients renders the product not a "whole pork meat." Similarly, adding meat or fat from another animal to an otherwise-covered pork meat product removes it Prop 12's purview.

The term "similar meat additives," is left to interpretation under Prop 12. However, the only other meat additives that logically could be "similar" to those enumerated additives are processing aids. CDFA should confirm by regulation that "similar meat additives" only includes those processing aids and incidental additives identified by FSIS in Directive 7120.1. CDFA also should look to FSIS regulations defining the terms "seasoning," "curing agents," "coloring," flavoring," and "preservatives" as guidance. The following is instructive and should be followed by CDFA.

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[6] The same applies to veal.

- "Seasoning"-- FSIS identifies "seasoning" in its definition of "spices." (9 CFR 317.2(f)(1)(i)(A)).
- "Curing agents" -- as defined by FSIS under 9 CFR 424.21(c).
- "Coloring" -- means those coloring agents – whether natural or artificial – defined by FSIS under 9 CFR 424.21(c).
- "Flavoring" -- means "flavor" or "flavoring" as defined by FSIS under 9 CFR 317.2(f)(1)(i)(B).
- "Preservatives": means chemical preservatives as defined by FDA under 21 CFR 101.22(a)(4), and as adopted by FSIS.
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3. **Human Grade Pet Food Should be Excluded.**

Finally, the definitions of "pork," "veal," and "liquid eggs," all include the phrase "intended for use as human food." The CDFA regulations must clarify that Prop 12 is not applicable to human grade pet food. Although such products are safe for human consumption they are not "intended for use as human food."

4. **CDFA Must Consider the Complexity, Dangers, and Challenges Associated with Certification.**

In the RFI CDFA said its "current thinking is that certification of a facility would be based on verification of compliance through direct field verification audits." CDFA should be mindful of certain considerations as it contemplates compliance and enforcement issues. First, unlike CDFA's experience with eggs, there are approximately 60,000 hog producers in the United States, many with multiple production locations. NAMI understands CDFA engaged in onsite verification activities as part of the Proposition 2 process. Such an approach is likely to be met with stiff resistance regarding Prop 12, particularly regarding hog operations.

CDFA officials undoubtedly know the biosecurity measures routinely taken on livestock production sites. The CDFA website has substantial information on that topic.[7] Hogs are susceptible to numerous contagious diseases. Given the heightened awareness about catastrophic diseases such as African Swine Fever (ASF), biosecurity concerns have never been more pressing.

[7] See, *e.g.* https://www.cdfa.ca.gov/ahfss/Animal_Health/BioSpecies/BioSwineSheepGoat.html

Hog producers have taken many measures over the last few decades to stop or slow the spread of disease in their herds. Many farms were intentionally constructed in remote areas, far from other farms. A critical biosecurity measure is limiting access of people and equipment who have recently visited other hog farms. Many farrowing facilities require all visitors to "shower in and shower out" of facilities and wear special clothing, to avoid possibly spreading a disease to the farm. Farrowing facilities often will not allow a person on site if that person has visited another hog farm within the last 72 hours and with the threat of ASF in some cases the waiting time is longer.

The current spread of ASF in China and elsewhere demonstrates the critical nature of biosecurity. ASF spreads quickly and decimates animal populations. Experts estimate ASF will affect as many as 150-200 million hogs in China alone, resulting in a very significant drop in worldwide hog production. The threat of ASF alone will make U.S. hog producers unwilling to allow any inspectors onto their farms.

Any regulatory requirements CDFA contemplates implementing must consider those biosecurity concerns and animal health. It would be catastrophically ironic if CDFA promulgated regulations that encouraged activities likely to jeopardize animal welfare. Given these concerns CDFA must consider alternative enforcement mechanisms.

Setting aside biosecurity concerns, the sheer number of farms that produce hogs that might yield meat that might be sold into California is enormous. CDFA should not devote resources to inspections of even a small fraction of farms in sovereign states outside its jurisdiction.

And Prop 12 does not direct CDFA to develop an inspection or certification program. Rather, it simply provides that a certificate obtained in good faith is a defense to any public or private enforcement action. Given the magnitude of the livestock and meat industry, producers should be permitted to self-certify and all downstream supply chain participants – packers, processors, further processors, distributors, warehouses, retailers, foodservice operators, *etc.* – should be able to rely upon that certification as a defense. If a more stringent program is needed beyond the producer's own certification, CDFA should work closely with the industry to create a certification standard that balances the agency's and industry's concerns. Such an approach is consistent with how some producers submit to periodic animal welfare audits required or requested by processors or other downstream entities.

In designing a program CDFA should be mindful of the burden audits and certifications impose and should establish reasonable time periods for re-certification of a facility. Given the large number of farms a reasonable, practical time frame for re-certification is no more than once every four (4) years. CDFA also should be flexible regarding the form used for certification and not require an attestation under oath, signature, or other formalities. The law requires no specific form or formalities, neither should CDFA.

Certification also should not be required on a specific product or load basis; rather it should attach to a facility and a period. A producer should be allowed to have its facility certified, which covers all animals raised at the facility and for a period of years. This approach is consistent with models used for other purposes – such as programs for food safety, animal welfare, organic, *etc.*

CDFA also needs to provide guidance about calculating usable floorspace per animal. Hog barns and veal calf barns come in different shapes, sizes, types, designs, *etc.* As part of its certification efforts, CDFA should provide guidance about how to calculate usable floorspace per pig or per calf in these various configurations. Doing so will help producers understand whether their barns comply and will also inform whether and how producers may wish to build new or renovate facilities.

For example, barns typically are designed as a mixture of pens and areas between, known as alleys. Because alleys are used for holding and moving animals, an alley's floorspace should be included in calculating usable floorspace. Similarly, areas within a barn used for animal husbandry or veterinary purposes are similarly usable floorspace and should be counted toward the Prop 12 standard. CDFA should recognize that not all pens are the same and should allow producers to calculate floorspace based on total usable floorspace of all pens within a barn. Providing flexibility and clarity will help producers understand whether their barns comply as constructed and will also aid in future decisions about new and renovated facilities.

5. **CDFA asked for Information on Marketing, Distribution, Transportation, Interstate Commerce, and Points of Sale that May Relate to Compliance and Enforcement of Provisions Related to the Sale of Products from Covered Animals.**

Prop 12 establishes arbitrary dates prohibiting the sale of pork and veal derived from a covered animal, or its offspring, confined in a cruel manner – for veal after December 31, 2019, and for a breeding pig and the meat from offspring after December 31, 2021. CDFA must ensure the Prop 12 regulations are clear that the sales prohibition applies to pork and veal derived from calves and market hogs born after those dates, *e.g.*, product derived from market hogs birthed by a breeding pig on December 31, 2021, is not be subject to Prop 12.

Prop 12 provides a product sale is "deemed to occur at the location where the buyer "takes physical possession of" a covered item. This language raises several questions, which CDFA must address. For example, a broker typically does not take physical possession of a product. A broker in California who sells a potentially-covered product to a customer in another state or country would not have made a "sale" under Prop 12 because the broker never took physical possession. CDFA should clarify this fact through rulemaking or other guidance.

Many retailers, distributors, and foodservice companies use distribution centers to hold product before it is sent to retail establishments or restaurants. For example, a pork processor may sell and ship a product to a foodservice distributor in California and that distributor subsequently may send the product to restaurant owners in adjoining states, *e.g.*, Arizona, Nevada, Oregon. Because the product is not sold to California consumers, it should not be a covered sale. If CDFA does not exempt such sales, the agency should be aware it will drive distribution centers out of California to neighboring states. Other examples of exempt transactions include:

- products supplied to cruise lines and consumed at sea but travel through California;
- products sold to military bases in California where the product is a commodity purchase using federal rules and consumed on federal groups; and
- products purchased for the National School Lunch Program in California, a program governed by federal rules.

Prop 12 also should not be interpreted to regulate sales of products to customers in other countries. The regulations should clarify that the sale of an otherwise covered product to a customer for export is not a covered "sale." Failing to exempt sales of products for export will drive export business for products away from California ports and result in diversion to ports in other states. CDFA should promulgate regulations confirming Proposition 12's requirements apply only to covered products sold in California and destined for use in California.

CDFA also should clarify Prop 12's impact on imported products. The United States imports a significant number of pigs (feeders in particular) from Canada. CDFA needs to explain, for example, that Prop 12 applies to the sows giving birth to those Canadian feeder pigs. Similarly, a significant amount of veal is imported from New Zealand, Australia, and Canada. CDFA should consider if and how animal production facilities in foreign countries will be identified and audited for compliance.

6. **CDFA is Preempted from Requiring Product Labeling Regarding Prop 12.**

CDFA asked about the "impacts or challenges related to product labeling or advertising." The agency should not expend resources developing a mandatory labeling rule because, regarding veal, pork, and liquid eggs, any such rule would be preempted by the express preemption provisions found in the FMIA and the Egg Products Inspection Act.[8] This area of law is well settled and CDFA may not require a labeling statement or icon on meat product labels or labeling.[9]

7. **The CDFA Regulations Should Recognize that only Intentional Violations of the Law are Subject to Enforcement Action.**

Prop 12 is unique and imposes requirements pending in only one other state, a state on the other side of the country and without California's economic clout.[10] Given the size of the United States, some hog producers may choose not to meet Prop 12's provisions. With perhaps a few exceptions, a production facility likely will not be "dedicated" to California supply. Rather, some facilities will likely continue to process products for sale in the other 48 states and foreign markets and use a segregation program with specific production set-aside for California. This cumbersome practice will require segregating Prop 12 compliant hogs from others, and also the products derived from those hogs. As the pork and veal industries learned from mandatory country of origin labeling, segregating livestock and products is burdensome and costly and some level of error is almost certain. Non-Prop 12 hogs may occasionally be processed and their meat sent to California due to segregation errors. Similarly, a downstream processor or distributor may occasionally "mix up" whole pork meat destined for California with product for other states.

The discussion earlier demonstrated there is no legitimate connection between Prop 12's space requirements and food safety. Given that fact and recognizing the likelihood of occasional mix ups, CDFA should exempt from enforcement actions – by the state and by private action – instances in which inadvertent errors occur involving the sale of veal or pork products. Enforcement actions should only be sought in when there is evidence of willful and intentional violations of the law. CDFA also should elaborate through its regulations what constitutes a "violation" of the law subject to punishment. Imposing a financial fine or imprisonment for every single transaction would be unduly punitive.

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[8] 21 U.S.C. 678.

[9] See *NMA. v. Harris*, 131 S.Ct. 3083 (2012); *AMI v. Leeman*, 80 Cal.App.728 (2009), *cert denied* (2010).

[10] Massachusetts has in place but not yet in effect a law almost identical to Prop 12.

The regulations also should provide that California cannot require a processor or any downstream customer to remove any accidentally, non-compliant product from the market, whether by market withdrawal, recall, or otherwise. Because failure to comply with Prop 12 is neither a food safety issue nor a labeling issue these extreme remedies should not apply. The law includes no such provision and requiring withdrawal or destruction of such product would be wasteful.

8. **Proposition 12 Will Impose a Heavy Economic Burden on Producers and Consumers**

The economic impact of Prop 12 will be felt not only by Californians but other consumers and livestock producers. Prop 12's requirements will mean veal and hog producers who wish to raise calves or hogs to provide veal or pork for the California market will need to raise considerably fewer hogs in the same space, make significant capital investments in existing facilities or build new facilities, or the above. The cost of raising hogs or calves will go up materially as a result and producers will attempt to pass those costs on to packer processors and consumers. What is certain is the price California consumers pay for pork and veal products will rise, and likely by a considerable amount. And those price increases will attach to all pork and veal products and not just for those products directly subject to the sale prohibition. Prices will rise for exempt products because, even though they are not subject to the sale prohibition, they are derived from sows or market hogs that are now costlier to raise.

Prop 12 also will force many processors to create two supply chains for products destined for California versus the other 48 states and foreign markets. Segregation and differentiation in processing creates inefficiencies. These inefficiencies slow the process and create additional costs for processors, which ultimately will be passed on to consumers. Whether processors can pass those costs on to all consumers or whether California consumers will bear the brunt of these added costs is difficult to determine.

Prop 12 will also affect "non-covered" products, in all 50 states. This impact occurs because, even though a significant portion of almost every hog will end up in a product not subject to the sale prohibition, the added cost associated with raising a Prop 12-compliant hog (or calf) is still there. The retail costs of non-covered products, such as sausages, links, patties, cured hams, hot dogs, pulled pork, salami, *etc.* will go up as the input (hog) costs go up.

* * * * *

The Meat Institute appreciates the opportunity to submit these comments. NAMI wishes to repeat its request that CDFA postpone implementing Prop 12 for at least two years and longer as necessary to ensure conversations and a common understanding among the agency, the industry, and consumers about the law's economic impact and the alleged rationales underlying Prop 12.

Please contact me if you have questions about this request or anything else regarding this matter. Thank you for your consideration.

Respectfully submitted,

Mark Dopp
Senior Vice President
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and General Counsel

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June 3, 2019

California Department of Food & Agriculture
Animal Health and Food Safety Services
1220 N Street
Sacramento, California 95814

RE: Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Clemens Food Group, a privately held, vertically coordinated pork and food processor has operated for over 120 years. Clemens is committed to our team members, the environment, animal welfare, our customers, and community, while following our core values of Ethics, Integrity and Stewardship. Animal welfare is a top priority for Clemens, and we have always taken a serious, proactive, and comprehensive approach to ensure the proper care and well-being of our animals. As an industry leader in animal care, Clemens Food Group has been researching group housing gestation systems for over 10 years. At this present time, 75% of our company-owned breeding pigs are using the group housing gestation system. Of that, 82% of the breeding pigs are housed in a manner that allows them to turn around freely; except for, 5 days prior to expected date of giving birth, any day that the breeding pig is nursing, and up to 7 days leading up to and during estrus. Our long history with breeding pigs in group housing systems has equipped us for providing comment on the Request for Information regarding Implementation of Proposition 12.

Through our transition, we continue to closely monitor the effect the group housing systems have on the well-being of our animals and safety of our team members. The current language in the Health and Safety Code sections 25990 through 25994 is unclear in the requirement for the period immediately following weaning until the breeding pig is confirmed pregnant with the next litter. In our experience, this is a critical time to the well-being of the breeding pig, the embryos in early gestation, and the safety of the animal caretakers.

In less than a week after the piglets wean, a breeding pig will return to estrus. During estrus of the breeding pig, one of the normal behaviors is of the animal to attempt to mount or actually ride other breeding pigs that may be either in or approaching estrus. This is a safety concern for the animal caretakers, as breeding pigs in group housing systems will seek out animal caretakers similarly to how they seek out other breeding pigs when in estrus. Research has shown that mixing after weaning resulted in higher levels of stress than mixing after insemination when the breeding pigs were out of standing estrus[1]. They measured stress through cortisol levels and body

[1]*Rault JL, Morrison RS, Hansen CF, Hansen LU, Hemsworth PH; Effects of Group Housing after Weaning on Sow Welfare and Sexual Behavior; J Anim Sci. 2014 Dec;92(12):5683-92. doi: 10.2527/jas.2014-8238. Epub 2014 Nov 17. PMID: 25403200*

condition scoring for one week post weaning. These metrics are an indication of the well-being of the breeding pig during this period. Clemens appreciates your consideration of the animal caretaker safety and breeding pig well-being in the implementation of the updated code.

We respect that the California Department of Food & Agriculture has a large undertaking in developing the implementation and verification program for the Health and Safety Code sections 25990 through 25994. Since 2013, the USDA Agriculture Marketing Service (AMS) has approved a Clemens Process Verified program for Free To Roam® label claim. Under this program claim, breeding pigs are housed in a manner that allows them to turn around freely; except for, 5 days prior to expected date of giving birth, any day that the breeding pig is nursing, and up to 42 days post weaning to allow for confirmation of pregnancy of the next litter. The approval process includes an extensive desk verification of written programs, annual field observation of breeding pig housing systems, and traceability of their immediate off spring throughout growth to harvest into pork product leaving the establishment. All pork products sold under the USDA AMS Process Verified program has the shield on the label or box to demonstrate compliance to the program in the marketplace. Additionally, USDA AMS has a publically available online pdf Official Listing of the Approved USDA Process Verified Programs. We encourage CDFA to consider the USDA Process Verified program as a conduit for implementation and verification of the Health and Safety Code sections 25990 through 25994.

Clemens appreciates the opportunity to comment on the code and look forward to future opportunities to work with CDFA on implementation of Proposition 12.

Sincerely,

Jessica Risser

Jessica Risser, DVM
Clemens Food Group
Animal Health & Welfare Manager

Information for CDFA for June 3 Request

Prepared by Cargill, Inc.

Impacts or challenges related to product labeling and advertising

The timeline between when final rules will be issued by CDFA (September 1, 2019) and when industry must comply (after December 31, 2019) is very tight for liquid egg products labeling. The process to change a liquid egg products label can take approximately 18 to 24 weeks. The current timeline only gives industry **21 weeks**. However, it is manageable to provide products that comply to the space per bird requirements. Thus, we wanted to offer background on the labeling process and recommend ways to mitigate the very tight timeline on labeling.

Background on the labeling process: If sellers are required to have California specific label text (such as CA Compliant), that label artwork will need to be changed. This requires a seller to seek USDA approval on the new artwork which take approximately 8-10 weeks. If multiple sellers are seeking approval, this could lead to a backlog at USDA and that process could take longer. Once label artwork is approved, plates need to be created which can take 4-6 weeks. After that, there is a 6-8 week lead time needed to print the packaging.

Recommendations to mitigate the tight labeling timeline:

- CDFA should provide its initial thinking on labeling as early as possible. Draft rules shared by August 1, 2019 would provide sufficient time for label approval and production.
- Alternatively, CDFA should allow sellers a 6-month grace period on labeling provided they can prove through an auditable record-keeping system the egg inside the carton is complaint. To be clear, there would be no grace period on ensuring produce originated from hens that meet the housing requirements. This would also lessen the environmental impact as old packaging would not need to be discarded but could be used up.

Comments on the written certification by suppliers regarding conformance to requirements, approaches to ensuring validity of such documents, and input on CDFA's potential role in that process.

We recommend that if a seller of pasteurized liquid egg products is currently selling its products using an official United States Department of Agriculture (USDA) cage-free label that has been source verified as originating from a farm complying with the 2017 edition of the United Egg Producer's Animal Husbandry Standards for U.S. Egg Laying Flocks: Guidelines for Cage-Free Housing that no additional labeling for California should be needed.

To bear the USDA cage-free label, USDA Agriculture Marketing Service (AMS) requires a written and implemented segregation and traceability plan detailing how the company maintains the identity of the eggs from production through storage, transport, processing and packaging (source citation below in *).

USDA AMS verifies that only shell eggs sourced from cage-free flocks are packaged into cartons bearing a USDA Cage-Free Grade Shield.

With respect to liquid egg products, the final cage-free liquid product must be produced with tankers that contain cage-free egg. Those cage-free liquid egg tankers received at the further processing facility are verified by USDA and must conform to the requirements that were specified in the original label claim and label approval from USDA FSIS.

The original label claim must specify what third-party cage-free egg certification the farms have. These can include certifications by United Egg Producers, American Humane Association, Humane Farm Animal Care, etc. All three of those have the same space requirement for hens as the 2017 edition of the United Egg Producer's Animal Husbandry Standards for U.S. Egg Laying Flocks: Guidelines for Cage-Free Housing. So a cage-free label based on this approved label claim will automatically meet Proposition 12 standards.

This methodology would have several benefits, including:

- CDFA could leverage an existing, federal government, source-verified process and avoid unnecessary and costly duplication. Any company audited by CDFA could supply its USDA-AMS labeling protocol so CDFA can confirm compliance.
- This would allow sellers of pasteurized liquid egg products to more easily and quickly supply the State of California with compliant, cage-free products. Sellers could deliver cage-free products from existing supply chains and would not have to produce special cage-free products with a California label just for California. This could be particularly helpful for California consumers during times of industry shortages, such as an outbreak of Avian Influenza, when supply lines may need to change.

*Source citation: https://www.usda.gov/media/blog/2016/09/13/usda-graded-cage-free-eggs-all-theyre-cracked-be.

Impacts or challenges related to product labeling and advertising

We recommend a general "California Compliant" label for egg originating from hens raised with 144 degrees and could provide documentation at the audit. If a "California Compliant" statement is required, we recommend that industry be allowed to inkjet or apply a secondary label with the statement on an already approved, existing case label or carton label.

Definitions not included in the law that might be needed for clarity of requirements, compliance or enforcement

Section 25991, Part E (4) states that after December 31, 2019, hens may not be confined with less than 144 square inches of usable floor space per hen. We recommend CDFA provide further clarity on this provision, specifically around:

- Is the 144 square inches per cage or house average?

- Is the requirement that birds be housed at 144 square inches after December 31, 2019, or at the start of the flock's placement in the layer house?

Information on marketing, distribution, transportation, interstate commerce, and points of sale that may be relevant to compliance and enforcement of provisions related to the sale of products from covered animals.

To give industry stakeholders complete clarity, we recommend CDFA state:

- Proposition 12 requirements apply to the covered products sold in California, and do not apply to transshipments through the state to points of commercial sale outside of California or for export purposes. This clarification was provided in previous guidance documents on similar regulations and was helpful to ensure compliance. See https://www.cdfa.ca.gov/ahfss/mpes/pdfs/EggSafetyRuleQA.pdf as an example. Specific examples of transshipment include but are not limited to: 1) Eggs shipped to a warehouse in California for use in a neighboring state 2) Eggs that are exported to Hawaii or another country but pass through California 3) Eggs that are supplied to cruise lines and consumed at sea but travel through California.
- Proposition 12 requirements do not apply to egg sold to military bases in California where eggs are a commodity purchase using federal rules and consumed on federal groups. This clarification was provided in previous guidance documents on similar regulations as noted above.
- Whether Proposition 12 requirements apply to eggs and egg products purchased for the school lunch program in California, a program governed by federal rules and purchased with federal dollars.
- The law applies to products shipped into California after December 31, 2019. Products which are on a retail shelf, in a restaurant or in a warehouse in California prior to December 31, 2019, are not subject to this law. Sellers and purchasers of egg would need to provide documentation, if audited, as to when those pre-existing products shipped.

Greater specificity or clarity needed for types of meat products or egg products potentially subject to provisions of the law.

The ballot initiative text, and now subsequent law, makes clear that the law covers shell egg and liquid egg products as stated in Section 3(b)(3-4). However, there are some egg users who would prefer even greater clarity so we recommend CDFA expressly list additional products that DON'T apply, including hard-boiled eggs, pre-cooked scrambled eggs, pre-cooked egg patties and pre-cooked omelets.

Similarly, using the liquid egg definition in Section 25991, Part L (see below), one would conclude that a liquid egg product that contains vegetables would not be covered by this law. However, we recommend CDFA expressly clarify that.

Additionally, we would like further clarity as to whether dried egg is covered by this law.

Grillo, Nancy@CDFA

From: Justin <justin@calcattlemen.org>
Sent: Monday, June 3, 2019 3:53 PM
To: Beam, Stephen@CDFA
Cc: Jones, Annette@CDFA
Subject: Notice of Request for Information - Proposition 12

Importance: High

Dr. Beam,

Thank you for the opportunity to submit comments pursuant to the Notice of Request for Information regarding the implementation of Proposition 12. Although Proposition 12 does not directly impact beef cattle producers, CCA finds it important to submit comments to assist CDFA in drafting a more refined definition of a veal farm to ensure beef cattle producers in all segments of the production chain are not the subject of regulatory or enforcement actions in the future.

Proposition 12 clearly intends to regulate the size of confinement areas for veal calves, breeding pigs and egg-laying hens. Proposition 12 provides three written definitions related to veal in the text of the initiative. Defining "calves raised for veal", "veal meat" and "whole veal meat" is important but the initiative lacks a specific definition for a veal farm or facility. As CDFA develops regulations to implement Proposition 12 over the coming months, we believe it is important to take this opportunity and specifically identify a veal farm or facility that is subject to the confinement standards of 43 square feet of usable floor space. Further clarification will provide certainty to livestock producers that raise cattle in confinement, particularly dairy calves for beef feeder cattle or replacement heifers, but that are not marketed or intended to be sold as veal.

As such, we submit the following definition for your consideration and inclusion in any draft regulatory package released by CDFA in the near future.

A veal facility is a farm exclusively engaged in marketing calves less than 500 pounds or 22 weeks of age or younger for the sole purpose of producing the food product described as veal. A veal facility does not include other livestock facilities raising bovine animals in confinement at any age or weight, including those facilities that are not marketing bovine animals directly for slaughter, or for any other product other than veal meat.

If you have questions or would like to discuss this matter in more detail, please let me know and I will be happy to facilitate a call with our leadership team.

Sincerely,

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June 3, 2019

VIA E-Mail
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Re – Response to -- Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Dear Secretary Ross and Dr. Jones:

The American Veal Association (AVA) has provided the responses below requested from our small family businesses and farm family members. Members of the AVA include family farmers, small family owned meat packers, and small family owned feed manufacturers dedicated to producing wholesome and humane veal for the finest retailers and restaurants.

The AVA appreciates the California Department of Food and Agriculture's (CDFA) Notice of Request for Information (RFI) from industries affected by Health and Safety Code sections 25990 through 25994—the statutes drafted to implement Proposition 12 (Prop 12) ("the Law")—the Law that is intended to and will have sweeping changes on meat producers in the United States and beyond. These changes have already had an adverse impact on the veal sector of the meat industry and the expectation for the future is dire. We believe that the Law impermissibly violates the Commerce, Due Process, Equal Protection and Contract Clauses of the Constitution of the United States, is arbitrary and capricious, void for vagueness and violates international treaties.

Through Prop 12, California has determined that certain livestock have the right not to be confined in a "cruel manner" which the State proscribes in the Law. While not conceding that California's provisions are necessary to afford farm animals' humane care, to avoid unequal treatment, the Law should be applied to all farm animals in the State. Notably, based on the statutory definition of "veal," the Law should apply to dairy, beef, and replacement milk cow calf production in California instead of only imposing onerous, arbitrary and capricious requirements to out-of-state calf producers.

There are substantial issues of practical, legal and economic concern that should be considered before the Law is enforced. AVA requests that CDFA delay its implementation of the Law for veal calves and relevant products until at the earliest December 31, 2021.

Responses to the RFI follows.

REQUEST NO. 1

Definitions not included in the law that might be needed for clarity of requirements, compliance or enforcement.

ANSWER 1

The existing definition of veal in the Law is vague and ambiguous. USDA identifies four classes of veal in the USDA Data Veal Production: (1) Bob Veal; (2) Milk-Fed Veal; (3) Non-milk Fed Veal; and (4) Heavy Calves. The 2017 USDA Veal Slaughter numbers indicate that about 40% of all veal calves are Milk-Fed Veal or Non-milk Fed Veal and 53% are Bob Veal. The majority of veal meat consumed today—76%—is derived from Milk-Fed Veal. Milk-Fed Veal are surplus animals from dairy operations and are raised outside of California. The dairy calves produced in California as Bob Veal, Heavy Calves, replacement dairy heifers, or beef are raised in production systems no different than Milk-Fed Veal production facilities, except on farms in California where calves are often raised in pens with less than 14 square feet per animal. Using the USDA classification system, all farms in California raising any USDA classified calf should be required to comply with the Law, regardless of its final use. Further, if California has determined that it is cruel to confine breeding pigs, egg-laying hens and calves raised for veal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely, equal treatment should be afforded to all farm animals raised in California, including dairy cows.

Between 30 and 35% of the Milk-Fed Veal consumed in the US is imported from Canada, New Zealand, Australia, the Netherlands, and France. Veal meat from these countries and as currently produced throughout the US is produced from calves raised in housing that may not provide each calf with 43 square feet of space. There are no science-based national or international standards for veal housing that requires 43 square feet for a calf at any time during its life—from the time it is born to slaughter, a weight range of 400 plus pounds. International treaties, including the General Agreement on Tariffs and Trade 1947 (GATT) and the World

Trade Organization Agreements adopt farm housing standards based on science, as promulgated by subject-matter experts. USDA inspects and approves veal meat irrespective of the size of veal housing. Whether raised in housing required by the Law or otherwise, the resulting veal meat are all "like products" under federal law. Banning "like products" from other countries is considered impermissibly discriminatory pursuant to international treaties.

REQUEST NO. 2

Any greater specificity or clarity needed for types of meat products or egg products potentially subject to provisions of the law.

ANSWER 2

We believe to be equitable the State should regulate all farm animals in California based on its self-imposed standards to allegedly prevent cruel confinement. Less than 7% of the US calf population is harvested as veal, 2% of which are milk-fed veal. As described above, all calves in the State should be housed as required in the Law and all farm animals in the State should be housed, at least as required in Section 25991 (e)(1). Attempts to regulate farm animals outside of the State is an impermissible violation of the Commerce Clause of the Constitution and, as drafted, a violation of international treaties.

REQUEST NO. 3

Comments on the applicability of specified exemptions for establishments at which mandatory inspection is provided or maintained under the Federal Meat Inspection Act, or the Federal Egg Products Inspection Act.

ANSWER 3

No issues with the specified exemptions; but meat and egg production outside of California should be included as a specified exemption.

REQUEST NO. 4

Comments or information regarding any greater clarity needed on exceptions for medical research, veterinary purposes, transportation, animal husbandry or other activities as listed in HSC section 25992.

ANSWER 4

The proposed exceptions are reasonable.

REQUEST NO. 5

Information on marketing, distribution, transportation, interstate commerce, and points of sale that may be relevant to compliance and enforcement of provisions related to the sale of products from covered animals.

ANSWER 5

In addition to information above, a majority of veal from New Zealand and Australia is imported directly into California and thereafter processed and distributed within the State. Regulation of products from other countries, as required by the Law violates international treaties. Furthermore, AVA does not understand how the State can effectively audit the farms in foreign countries to ensure compliance with the Law. Domestic veal farmers already meet national and international standards. The cost of segregated production and processing is impractical and prohibitively high.

REQUEST NO. 6

Information regarding needs or challenges of written certification by suppliers that products were not obtained from a covered animal confined in a cruel manner as defined by the statute.

ANSWER 6

The cost of producing veal under Section 25991(e)(2) is estimated to be 20-30% more than current production costs, which creates a financial risk to farmers and suppliers, who have existing contracts with each other and their financers based on existing, voluntary housing standards. The contracts provide for Milk-Fed Veal production based on those standards. The Law, if imposed, would create an impermissible barrier for compliance with both the contracts and the Law which constitutes a violation of the Contracts Clause of the Constitution of the United States.

Further, the Law exempts any commercial sale "undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act . . ." which applies to a majority, if not all, veal meat produced from Milk-Fed Veal in the US. As such, any downstream sales would not be in privity to the original farmer and such certification could not be obtained.

REQUEST NO. 7

Comments on the written certification by suppliers regarding conformance to requirements, approaches to ensuring validity of such documents, and input on CDFA's potential role in that process.

ANSWER 7

In addition to the issues previously discussed, the majority of Milk-Fed Veal farmers in the US are Amish or Mennonites, who have specific religious objections to certain legal proceedings, which may include certifications.

REQUEST NO. 8

Impacts or challenges related to product labeling and advertising.

ANSWER 8

Animal care and welfare claims and labels approved by USDA or third parties should remain available to farmers and suppliers who do not comply with the Law. Lawsuits are expected to be filed and/or funded by activists related to such existing labeling and advertising, based on claims that California had determined that unless raised as the Law requires, the animals' housing is cruel.

REQUEST NO. 9

Comments or information regarding animal production and confinement systems in use or in development by industry that are not specifically listed under HSC section 25991 but may still comply with requirements.

ANSWER 9

In addition to information provided above, the 43 square feet per calf requirement is not in compliance with recognized scientific standards for calf housing and is arbitrary and capricious. This is more than twice as much space as mandated by legislation in any other veal producing country in the world. Unlike this section of the Law, the European Union (EU) requires minimum space requirements based on the weight of the calf. The maximum required space for veal calves in the European Union is 19.38 square feet per calf that weighs over 485 pounds. The EU standards are based on sound scientific studies and adapt for the size and expected behavior of the calf. There are no scientific studies the AVA is aware of that demonstrate why veal calves should be mandated to have 43 square feet per calf, especially for a 90-pound newborn calf. The calf is a herd animal and they will stay close together in clusters not utilizing the additional space. The AVA does not know of a veal production system in the world able to meet these requirements for the entire lifespan of a calf.

Additionally, the Law permits a 500 pound sow to be housed in 24 square feet of floor space, yet requires 43 square feet for a 90 pound calf. There is no scientific or non-arbitrary basis for these housing requirements.

REQUEST NO. 10

Comments on methods of verification of a production facility's compliance with animal confinement provisions, including potential audit or inspection frequencies.

ANSWER 10

See prior response.

REQUEST NO. 11 I

Information on existing voluntary animal care related audit and certification programs and how any such programs compare to California's requirements.

ANSWER 11

AVA members have spent in excess of $150 million renovating their production facilities over the past ten years. They did this to comply with the AVA goal of requiring all Milk Fed Veal calves raised by AVA members to be loose and group housed by 2017 (a goal we met). AVA members also used this opportunity to match the floor space requirements published by the EU. The veal industry participates in a voluntary "Veal Quality Assurance" program that is mandatory for all AVA members. The program does not require farm audits other than a certification from a veterinarian confirming the Veterinarian-Client-Patient Relationship exists with each participating farm. As previously stated, the requirement for farmers outside of California to comply with the Law is an impermissible violation of the Commerce Clause, and the inability of farmers and suppliers to comply with existing contracts and the Law is an impermissible violation of the Contracts Clause of the Constitution of the United States.

REQUEST NO. 12

Comments on penalties for violations of the provisions.

ANSWER 12

The State should pay veal farmers and suppliers any and all damages incurred as a result of the implementation and enforcement of the Law.

REQUEST NO. 13

Other information that may help inform CDFA on developing an effective implementation approach, including needed areas of clarification or greater specificity, as well as economic impacts of initial or ongoing compliance.

ANSWER 13

In addition to the objections to the Law as described previously, the AVA's biggest concern is that the intent of the drafters of Prop 12 is to eliminate all veal production. If veal farmers and suppliers are able to overcome all the obstacles described herein and if the Law withstands legal scrutiny, the drafters will simply return with additional restrictions in the future, as they have already done, following approval of Proposition 2. AVA member veal farmers have already heavily invested in new or remodeled barns over the past few years to meet the AVA's requirements, which are similar to the requirements in California's Proposition 2. Most farmers have taken out loans with 15-20 year payback periods. With the new requirements prescribed by the Law and pending regulations, farmers and suppliers could be required to go back to the bank for another significant outlay of capital (~$225,000 / farm). In the near future farmers, suppliers, and bankers will conclude that these investments are not sustainable.

Additionally, there are a limited number of pen building equipment suppliers and building supplies required for additional renovations. As of now, it will be impossible to build or remodel facilities in time to meet the December 31, 2019 deadline. Milk-Fed Veal calves have a 20-26 week fattening period. Therefore, Milk-Fed Veal farmers will have to convert their facilities in time for calf placement prior to July 1, 2019, another impossibility.

The cost of Milk-Fed Veal production will increase between 20% and 30%—a very significant increase in cost. This excludes the anticipated costs of third-party audits—if not found unconstitutional—which have yet to be defined or determined. In addition to religious objections from Amish or Mennonite farmers related to certifications, additional religious and privacy objections are expected related to the inclusion of their names in a California database.

For all of these reasons, we respectfully request a delay in the implementation of the Law until at least December 31, 2021. AVA does not waive, and expressly reserves all rights.

Respectfully submitted,

Dale Bakke

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American Veal Association

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June 3, 2019

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Re: Notice of Request for Information on Implementation of Proposition 12: Health and Safety Code sections 25990 through 25994 relating to Farm Animals

Dear Secretary Ross and Dr. Jones:

The American Farm Bureau Federation (AFBF) appreciates this opportunity to offer comments on the California Health and Food Safety Services Division of the California Department of Food and Agriculture's (CDFA or the Agency) above-referenced notice of request for information (RFI), which was published on April 2, 2019. The RFI states that CDFA "is seeking input from stakeholders to inform the development of an implementation approach [for Proposition 12 (Prop 12)] that is consistent with requirements of the law, is effective at ensuring prevention of farm animal cruelty as defined under the initiative and avoids unnecessary burdens upon the industry." AFBF is extremely concerned that Prop 12 and the implementing regulations will infringe on the ability of farmers across the country to run their farms and will force farmers to choose between untenable compliance costs and the loss of interstate markets.

AFBF is a federation of state and county Farm Bureau organizations nationwide, with a state Farm Bureau organization in every state, including California. Under this federated structure, AFBF focuses on national policy, while state and local Farm Bureau organizations advocate on state and local policy.[1] As the nation's largest general farm organization, AFBF

[1] AFBF is commenting here to address the impact of Prop 12 and its implementing regulations on producers nationwide. The California Farm Bureau Federation is filing separate comments on behalf of California producers.

regularly represents its members' interests before Congress, regulatory agencies, and the courts. AFBF's members produce a variety of commodities grown or raised commercially in the United States. Many AFBF members produce eggs, pork, and veal that is eventually sold in California. Therefore, AFBF has a substantial interest in how CDFA implements Prop 12.

Given the unprecedented impact that Prop 12 will have upon producers throughout the country, AFBF urges CDFA to grant a waiver of Prop 12's requirements for at least two years to allow time for farmers to become educated on Prop 12 and, for those desiring to produce Prop 12 compliant products, to make necessary changes to their operations.

AFBF offers the following comments on specific aspects of Prop 12 and the RFI, as well as the constitutional flaws in the law.

I. Prop 12 Presents Several Constitutional Problems

A. Prop 12 Regulates Conduct Occurring Wholly Outside of California and Interferes with Interstate Commerce.

Proposition 12 unconstitutionally dictates to farmers across the United States how they should operate their businesses. It is indisputable that Prop 12 reaches beyond the confines of California's borders, thereby challenging the sovereignty of every other state and effectively regulating every other state's poultry and livestock farmers. Through Prop 12, California has sought to prescribe how farmers in Iowa, Nebraska, Minnesota, and every other state raise the livestock that yield meat products that are eventually sold – even if only in part – in California. Under our Nation's system of federalism, that is not California's prerogative. Prop 12 thus conflicts with our federalist system, which is underpinned by constitutional requirements of due process and full faith and credit.

Prop 12 also violates the Commerce Clause. First, it is a per se violation of the Commerce Clause because it regulates extraterritorially. The Supreme Court has said that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that state's borders is invalid under the Commerce Clause."[2] And yet, that is what Prop 12 does – by using the "hook" of an in-state sale, California will "project its legislation" into other states by prescribing production practices for farms outside California's borders and even thousands of miles away.

Second, it violates the Commerce Clause under a balancing test. As we explain below, Prop 12 imposes enormous costs on the agricultural sector and infringes the sovereignty of other states, yet provides little or no benefit to California or its residents.

B. Prop 12 Offers Little to No Benefit to the State or its Residents.

Even more problematic is the absence of any real benefit from Prop 12 to Californians. Pursuant to Section 2 of Prop 12, the purpose of the law is twofold: prevent animal cruelty and reduce the risk of foodborne illness. Neither claim withstands scrutiny.

[2] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989).

Regarding pork, for example, Prop 12's provisions apply only to a breeding pig. But consumers do not eat breeding pigs – they eat the offspring of breeding pigs. Prop 12 is unsupported by any credible link between the freedom of movement of breeding pigs and the safety of meat produced from their offspring. Further, because California is a designated state pursuant to the Federal Meat Inspection Act, every slaughterhouse and meat packing or processing facility in the state is inspected by the United States Department of Agriculture's Food Safety and Inspection Services (FSIS), and any meat product shipped into California – including whole pork and whole veal – is inspected by FSIS. In short, no meat product may bear the mark of inspection, leave a federally inspected establishment, and enter commerce in California unless inspected and determined by FSIS to be suitable for human consumption.

California's other stated rationale, animal welfare, is equally spurious. There is absolutely no scientific basis for the arbitrary square footage requirements in Prop 12 – which in fact are not used anywhere else in the world. Moreover, any purported cruelty associated with smaller square footage housing occurs *outside* of California. California cannot regulate commerce outside of California just because its citizens may feel better about conforming out-of-state businesses to their standards of animal care (or, for example, workplace safety or minimum wage requirements).

C. Prop 12 Will Impose a Heavy Economic Burden on Producers, Consumers, and Interstate Commerce.

The burden upon interstate commerce will be tremendous. It is estimated that at least 95 percent of swine breeding farms in the United States currently do not meet Prop 12's housing square footage requirements. For these farms to produce piglets that can be raised into hogs that ultimately yield pork salable in California, they must either reduce their inventory by approximately 20 percent (to meet the 24 square feet requirement) or make substantial capital investments if they wish to retain production capacity. This added capital investment or decreased piglet production due to a lower inventory will impose a financial hardship on breeding farms. In addition, the breeding animals that remain will be less productive because group housing often leads to additional injuries caused by mixing sows at a vulnerable time, further threatening the financial viability of the swine breeding operation.

Finishing farms that wish to raise hogs for pork salable, even in part, in California also will suffer financial hardship because they must procure piglets (feeder pigs) from a Prop 12 compliant breeding farm. As costs for both types of producers materially increase, they will pass those costs down the supply chain to packer processors and, ultimately, consumers. Under Prop 12, the cost of pork production will increase and availability of pork will decrease, harming consumers, swine farmers, and everyone in the supply chain in between.

Prop 12 will also affect the price of "non-covered" products in all 50 states. This impact occurs because, even though a significant portion of almost every hog will end up in products sold outside of California, the added cost associated with producing a Prop 12-compliant hog (or calf) is still there. The retail costs of non-covered products, such as sausages, links, patties, cured hams, hot dogs, pulled pork, salami, *etc.* will go up as the input (hog) costs go up.

II. Issues and Questions Raised by CDFA

A. CDFA Must Protect the Privacy Rights of Farmers.

The RFI states that CDFA's "current thinking is that certification of a facility would be based on verification of compliance through direct field verification audits." The RFI further states that it is considering a penalty regime. It is imperative that CDFA not allow any individual farmer's business information to become public, whether CDFA is engaging in certification inspections, leveling a penalty, or any other component of implementing Prop 12. Private farm information includes, among other things, a farm's location, size, ownership, and operational information. Prop 12 must not become a tool to circumvent farmers' privacy rights.

B. The CDFA Regulations Should Recognize that Farmers Who Do Not Certify Their Products as Prop-12 Compliant Are Not Subject to Inspections, Audits, or Enforcement Actions.

Given the costs associated with changing farming operations or procuring Prop 12 compliant feeder pigs, some swine farmers may choose not to produce pork salable in California. Yet it is entirely possible that, through no fault of such a producer, some non-Prop 12-compliant pork originating from that producer may end up in California. CDFA should specify that farmers who do not certify their products as Prop-12 compliant are not subject to inspections, audits, or enforcement actions by the state or by private attorneys general.

C. CDFA Must Consider the Complexity, Dangers, and Challenges Associated with Audits, Certification, and Penalties.

CDFA should be mindful of certain considerations as it contemplates compliance and enforcement. First, CDFA officials undoubtedly know the biosecurity measures routinely taken on livestock production sites.[3] Swine are susceptible to numerous contagious diseases and given heightened awareness about diseases such as African Swine Fever (ASF), biosecurity concerns have never been more pressing.

Ever concerned about animal health, swine farmers have taken many measures over the last few decades to stop or slow the spread of disease. Many breeding farms were intentionally constructed in remote areas, far from other farms. A critical biosecurity measure is limiting access to farms by people (and their vehicles, tools, clothing, *etc.)* who have recently visited other hog farms. Many farrowing facilities require all visitors to "shower in and shower out" of facilities and wear special clothing to avoid spreading disease to the farm. Other farrowing facilities will not allow a person on site if that person has visited another swine farm within the last 72 hours.[4]

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[3] The CDFA website has substantial information on that topic. *See, e.g.* https://www.cdfa.ca.gov/ahfss/Animal_Health/BioSpecies/BioSwineSheepGoat.html.

[4] The current spread of ASF in China and elsewhere demonstrates how critical biosecurity is. ASF spreads quickly and kills animals. Experts estimate ASF will affect as many as 150-200 million hogs in China alone, resulting in a very significant drop in hog production.

Any regulatory requirements from CDFA must account for those biosecurity concerns and animal health. It would be arbitrary and capricious for CDFA to implement a law purportedly aimed at animal welfare in a manner that actually increases the risk of animal distress, discomfort, and disease.

Setting aside biosecurity, the sheer number and geographic scope of farms likely to produce hogs that ultimately yield meat sold in California make it unlikely that CDFA could carry out an inspection program of any meaningful scale. There are approximately 60,000 hog producers in the United States, many with multiple production locations. Iowa alone has more than 6,000 hog farms and it seems unlikely CDFA has the resources to inspect even a small fraction of these farms.

Importantly, Prop 12 does not direct CDFA to develop an inspection or certification program. Rather, it simply provides that a certificate obtained in good faith is a defense to any public or private enforcement action. Given the magnitude of the pork industry and significant biosecurity concerns, swine farmers should be permitted to self-certify and all downstream supply chain participants – packers, processors, further processors, distributors, warehouses, retailers, foodservice operators, *etc.* – should be able to rely upon that certification as a defense. Should CDFA conclude some program is needed beyond the producer's own certification, CDFA should create a certification standard, which swine farmers can use with auditors. Such an approach is consistent with how some producers submit to periodic animal welfare audits required or requested by processors or other downstream entities.

In designing these certifications CDFA should be mindful of the burden audits impose and establish reasonable time periods for re-certification of a facility. Given the very many farms and the small number of third-party inspectors, a reasonable, practical time frame for re-certification is no more than once every four (4) years. CDFA also should be flexible regarding the form used for certification and not require an attestation under oath, notarization, or other formalities. The law requires no specific form or formalities, and CDFA should strive to make certification practical for farmers.

Certification should not be limited to a specific product or load of pigs or calves; rather, it should attach to a facility and time period. A producer should be allowed to have his or her farm certified as meeting Prop 12 requirements and have that certification cover all animals raised at that farm going forward for a period of years or until its re-certification, whichever is earlier. This approach is consistent with models used for other purposes – such as programs for food safety, animal welfare, organic, *etc.* Although an audit necessarily captures a snapshot in time, compliance should be established through that snapshot.

When considering compliance with the space requirements, CDFA needs to recognize the importance of "free choice crates" in the hog industry. These crates were originally developed and used to protect sows from being "bullied" by other sows in open pens. As producers shift to group sow housing, other options are necessary to protect sows from becoming subjects of aggression. An increasingly popular innovation is the free choice crate system. In that system sows are kept in pens but have the option of voluntarily entering an area – similar to a crate – to avoid other sows. Although the free choice crate typically does not allow the sow to turn around freely, the sow can easily exit the crate back into the pen when she wishes. CDFA should

recognize in its regulations that using crates in free choice systems does not result in animals who are "confined in a cruel manner" so long as sows may enter and exist these crates voluntarily. Rather than being "cruel," these systems are safer for both the sows and people handling the sows.

Sow barns and veal calf barns come in different shapes, sizes, types, designs, *etc.* As part of its certification efforts, CDFA should provide guidance about how to calculate usable floorspace per sow or per calf in these various configurations. Doing so will help producers understand whether their barns comply and will also inform whether and how producers may wish to build or renovate facilities.

CDFA should recognize that not all pens are the same and allow producers the option to calculate usable floorspace based on total floorspace of all pens within a barn. Such an approach would allow the square footage from the free-choice crates to be included when determining square footage because it is usable space accessible to the sows.

D. CDFA Should Specify How Prop 12 Impacts Imported Products.

CDFA should also clarify Prop 12's impact on imported products and imported livestock. The U.S. imports a significant number of pigs, feeders in particular, from Canada. CDFA needs to explain how Prop 12 applies, if at all, to meat from pigs born outside the U.S. Similarly, a significant amount of veal is imported from New Zealand, Australia, and Canada. CDFA should consider and explain how livestock farms in foreign countries will be certified, inspected, and audited for compliance.

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AFBF appreciates the opportunity to submit these comments. AFBF again reiterates its request that CDFA grant a waiver of the Prop 12 requirements for an additional two years. Providing such a waiver will help mitigate the adverse impact the law undoubtedly will have on consumers, producers, and the supply chain.

Sincerely,

Paul Schlegel
Vice President, Public Affairs