

Cage-Free, Free-Range, Organic? Why Animal Welfare Depends on a New Government Labeling Scheme

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Introduction

Grocery stores now offer more products perceived as animal friendly than ever before.¹ In turn, animal conscious consumers increasingly desire to make food purchases that advance the animal welfare movement. In 2007, a survey showed that 68% of consumers care about the welfare of farm animals raised for food.² Still, the aisles contain a confusing myriad of labeling consumers must decipher to infer whether the welfare of these animals is looked after.³ Consumers are forced to navigate their local grocery stores for humanely raised options, many of which will have no offerings at all. Cage-free. Free-range. Even conscientious consumers have a hard time knowing what the best options are. Few know that the USDA informally recognizes the label of cage-free or free-range with no regulatory standards defining the term.⁴ Even worse is the meat department: Rows of labels declaring the meat “all-natural” or “hormone free.” These labels do not inform the customer, however, of any other harm that came to the animal during its life, transport to slaughter, or slaughter.⁵ Many animals are now raised on industrial compounds, commonly referred to as “factory farms,” where the livelihood of the owners depends on how quickly the animal can gain enough weight to be slaughtered.⁶ To achieve this end the animals are given synthetic substances and feed that have drastically altered their natural behaviors and could have undesirable effects on the humans who consume them.⁷ The absence of labeling standards that fully encompass the concerns of animal welfare advocates, that being the health

¹ The World Society for the Protection of Animals, “Finding Animal Friendly Food: The Availability of Humanely Labeled Food in U.S. Grocery Stores,” http://www.wspa-usa.org/download/165_finding_animal_friendly_food_2009_for_web.pdf (last visited April 23, 2010).

² *Id.*

³ *Id.*

⁴ Farm Sanctuary, “The Truth Behind the Label: Farm Animal Welfare Standards and Labeling Practices,” http://www.farmsanctuary.org/issues/campaigns/truth_behind_labeling.html (last visited May 1, 2010).

⁵ United States Dept. of Agriculture, “A Guide to Federal Food Labeling Requirements for Meat and Poultry Products,” August 2007.

⁶ Pollan, Michael, “The Omnivore’s Dilemma: A Natural History of Four Meals,” 68, Penguin Books 2006.

⁷ *Id.* at 70.

and well-being of the animal, and, in turn, the advocate themselves, perpetuates the information gap in this area.

Without government oversight and more consistency in labeling standards it is not surprising that consumers are so confused. While the federal government, through various agencies, has regulated the labeling of food and drugs, there is ample room for abuse. Further, federal agencies have been given considerable discretion in the promulgation and interpretation of rules regarding labeling.⁸ This system has contributed to the current consumer confusion.

In response to some of the same abuses occurring in the European Union (EU), the EU has worked in recent years to pass legislation that significantly increases farm animal welfare. Using more current scientific knowledge of animal etiology, the EU has more specifically laid out required husbandry practices for each species. Members of the EU must comply with these requirements and the public is informed of the label definitions and common husbandry practices through a public education program.

This paper explores whether the creation of an Animal Welfare label similar to that proposed in the European Union might alleviate some of the confusion while at the same time improving the lives of farm animals across the nation. Part I will address the current labeling standards, both through federal regulation and voluntary labeling through private interest groups. Part II will discuss how the federal system perpetuates the abuse of farm animals while at the same time encouraging the misleading labeling and marketing aimed at animal welfare-

⁸ See e.g. *American Public Health Assn. v. Earl Butz*, 511 F.2d 331 (U.S. App. D.C. 1974)(finding the secretary of Agriculture did not abuse his discretion when determining a public education program instead of labeling would best serve to inform consumers of the risk of salmonellae in meat and poultry); *Levine v. Connor*, 540 F.Supp.2d 1113 (N.D. Calif. 2008), vacated and remanded in *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009)(granting summary judgment in favor of government whose interpretation of the Humane Slaughter Act excluded poultry from its requirements. The ruling was subsequently vacated because the appellate court found plaintiffs did not even have standing to bring suit in the first place); *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278 (M.A. 1986); *Nat. Meat Assn. et al v. Brown et al*, No. CV-F-08-1963, 2009 U.S. Dist. LEXIS 12523 (E.D. Calif. Feb. 19, 2009).

conscious consumers. Finally, this paper will suggest specific regulations similar to the European Union's current standards that might be employed to address all of these problems.

I. Marketing vs. Regulation: FDA, USDA and Voluntary Labeling Standards

Both the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) federally govern the current system for the labeling of food products.⁹ These regulatory agencies derive their power from several statutory authorities.¹⁰ Of these, the most relevant to food labeling and animal welfare are the Federal Meat Inspection Act (FMIA) and the Humane Methods of Slaughter Act (HMSA) for the USDA.¹¹ These statutes give broad power to the agency to determine the standards producers must meet and the labeling requirements for food packaging. The National Organic Program (NOP), also run by the USDA, operates to control the approval and labeling of organic products in the marketplace.¹² Under the Federal Food, Drug and Cosmetic Act (FDCA), the FDA is given powers to find a violation of the statute if the agency determines a label is "false or misleading in any particular."¹³ For the purposes of this paper, the focus will be on the USDA rules and regulations as they are most pertinent to the welfare of food animals.

Additionally, many voluntary labeling schemes have developed as a supplement to the federal regulations to provide consumers with even more information about the products they purchase. For example, the animal welfare group, the World Society for the Protection of

⁹ Post, R., et al eds., *A Guide To Federal Food Labeling Requirements For Meat and Poultry Products*, U.S. Department of Agriculture (Aug. 2007) http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf.

¹⁰ *Id.* (The statutes granting the agencies their power are: Federal Meat Inspection Act (FMIA) 21 U.S.C. §§601 et. seq., Humane Methods of Slaughter Act (HMSA) 7 U.S.C. §1901 et. seq., the Poultry Products Inspection Act (PPIA) 21 U.S.C. §451 et. seq., the Egg Products Inspection Act (EPIA) 21 U.S.C. §1031 et. seq, the Federal Food, Drug and Cosmetic Act (FDCA) 21 U.S.C. §§301 et. seq., and the Fair Packaging and Labeling Act (FPLA) 15 U.S.C. §1451.

¹¹ FMIA, 21 U.S.C. §601 and HMSA, 7 U.S.C. §1901.

¹² 7 U.S.C. §6501 (2000). The NOP was assembled under the authority of the Organic Food Production Act of 1990.

¹³ *Post*, *Supra*.

Animals (WSPA), has recently created the “Certified Humane” label.¹⁴ This voluntary label allows producers who follow strict standards for raising, transporting and slaughtering food animals to affix the seal to their product labels indicating their adherence to the practices embodied in the WSPA’s mission statement.¹⁵ It appears that among these three entities consumer’s interest would be well looked after. However, the federal regulations contain many loopholes and voluntary labeling is not widespread.

B. Current Process for Label Approval of Food Products

Under the authority of legislation, the USDA has created an application process by which producers must comply before legally labeling their meat food products.¹⁶ All labels under USDA’s authority must be pre-approved.¹⁷ This is opposite of the FDA’s labeling policy, which does not require pre-approval and instead monitors compliance through post-marketing surveillance.¹⁸ Once the USDA approves a label, however, the producer may make small changes without reapplying.¹⁹ The initial process involves submitting a complete application, which includes the requested label and supporting documents for claims made on labels to include protocols for production, affidavits and feed formulas.²⁰ FSIS evaluates more than 60,000 label applications annually.²¹ The agency may deny the initial application and/or request further documentation from the producer,²² however, there is no independent inspection of the

¹⁴ *Finding Animal Friendly Food*, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Animal Production Claims: Outline of Current Process*, United States Department of Agriculture: Food Safety and Inspection Service, available at <http://www.fsis.usda.gov/OPPDE/larc/Claims/RaisingClaims.pdf>.

¹⁷ Post, R., *supra*. note 9, 7.

¹⁸ *Id.*

¹⁹ *Id.* at 7-8.

²⁰ *Animal Production Claims*, *supra*. note 26.

²¹ Post, R., *supra*. at 7.

²² *Animal Production Claims*, *supra*.

validity of the claims made. The agency is relying on the veracity of the producer's documentation as evidence of truthfulness of the claim(s) made on the label.²³

Animal friendly product claims on labels such as “all-natural,” “cage-free,” “free-range” and “hormone free” are minimally regulated. There are no clear standards set forth for determining whether cage-free and free-range items conform, other than the producer's affidavits.²⁴ The only regulation barring claims of all natural or hormone free are whether the item is “minimally processed”²⁵ and whether the applicable statutes allow the use of hormones or not.²⁶ The all-natural chicken label has great potential for deception of animal welfare advocates because, as discussed above, poultry is excluded from all federal regulation.

Organic Labeling

Obtaining a “USDA Certified Organic” label requires a similar process but with some extra steps. The producers must first submit an organic system plan to the National Organic Standards Board (NOSB).²⁷ The plan must include a “description of practices and procedures” to be performed, a list of each substance used, a description of monitoring practices, a description of recordkeeping methods, a description of the plan to keep organic and non-organic components from commingling and any additional information the NOSB requests.²⁸ The NOSB is a 15-member group of stakeholders appointed by the Secretary of Agriculture responsible for reviewing and evaluating the submitted organic system plans. The organic system plan must detail the food will be produced and/or handled according to the regulations set forth by the USDA. Though the federal government regulates this system, participation in the organic

²³ Post, R., *supra*.

²⁴ Farm Sanctuary, *supra*. note 5, 1.

²⁵ USDA Department of Food Safety and Inspection Service, “Food Labeling: Meat and Poultry Labeling Terms,” [http://www.fsis.usda.gov/FactSheets/Meat & Poultry Labeling Terms/index.asp](http://www.fsis.usda.gov/FactSheets/Meat%20&%20Poultry%20Labeling%20Terms/index.asp) (last visited April 23, 2010).

²⁶ *Id.*

²⁷ National Organic Program, 7 C.F.R. §205.201 (2008).

²⁸ 7 C.F.R. §205-201(a)(1)-(a)(6) (2008).

program is completely voluntary. However, organic production of products has increased significantly since the inception of the program in 1990.²⁹

C. Voluntary Labeling Standards Governed by Animal Welfare Groups

To compensate for the inadequate concern the governing statutes have placed on animal welfare, many animal welfare groups have created their own set of voluntary standards to which producers can comply for permission to use the groups' label. One such example is the "Certified Humane" label created by the WSPA.³⁰ There are many others, and they are becoming increasingly more popular as the demand for animal-conscious food is increased.³¹ One example is the Global Animal Partnership 5-Step Program created by Whole Foods Market in 2008.³² This program starts with step one and builds upon that foundation through each successive step.³³ The label will indicate the highest step with which the producer was compliant to inform consumers of the animal welfare conditions of the product they are purchasing.³⁴

Support for growing consumer concern over animal welfare is evident in their purchase demands. Grocery stores have increased their humane offerings in almost all areas from 2008 to 2009.³⁵ The grocery store taking the number one spot on the list is Whole Foods, Inc., a retailer nationally known for its animal friendly and environmentally friendly options.³⁶ Though some of

²⁹ Dimitri, Carolyn, Oberholtzer, L., *Recent Trends from Farms to Consumers*, United States Department of Agriculture, Economic Information Bulletin No. 58 (Sept. 2009), <http://www.ers.usda.gov/publications/eib58/eib58.pdf>.

³⁰ World Society for the Protection of Animals, *supra*. note 1.

³¹ Farm Sanctuary, *supra*. note 5, 5-6.

³² <http://www.globalanimalpartnership.com>.

³³ *Id.* The steps for beef cattle are: 1) No crowding, 2) Enriched environment, 4) Pasture centered, 5) Animal centered: no physical alterations, and 5+) Animal centered: entire life on same farm. The steps for chicken/poultry are: 1) No cages, no crowding, 2) Enriched environment, 3) Enhanced outdoor accommodations, 4) pasture centered, 5) Animal centered: bred for outdoors, 5+) Animal centered: entire life on same farm. The steps for pigs are: 1) No crates, stalls or cages, 2) Enriched environment, 3) Enhanced outdoor environment, 4) Pasture centered, 5) Animal centered: no physical alterations, and 5+) Animal centered: entire life on same farm.

³⁴ *Id.*

³⁵ World Society for the Protection of Animals, *supra*. note 1, 5.

³⁶ *Id.*

these voluntary labeling systems still allow animal practices that harm animal welfare, these standards are always greater than even the USDA Organic label requirements because the animal welfare groups feel that neither the FMIA nor the NOB properly address the needs of food animals.³⁷

II. Animal Welfare and Its Demise Under the Current System

Under the current system and the current governing legislation animals have come to much cruelty. The FMIA and HMSA are full of ambiguous language and vague exceptions making it easy for producers to conform the language to their needs.³⁸ Farming has become an uber-business. The idyllic small, family farm where animals graze freely on grass and roam the pasture is no longer the reality.³⁹ Farming is big business and businesses need to make money. The easiest way for them to make the most money is to get the animals to slaughter weight or produce the most milk or eggs as fast as possible at the highest rate possible.⁴⁰ Practices that achieve this in the current agribusiness industry are detrimental to the very nature of food animals.⁴¹

A. Overview of the New Agribusiness

In the 1970's, Earl Butz dismantled the farm bill and created the subsidy system farmers currently work under.⁴² The significance of this move is the over-production of corn that ensued. Corn became the most profitable crop for farmers because the government paid them a subsidy that regulated the cost so that farmers could sell the corn at drastically lowered prices to

³⁷ Farm Sanctuary, *supra*. note 5.

³⁸ *Id.*

³⁹ Pollan, *supra*. note 6, 69.

⁴⁰ *Id.* at 71.

⁴¹ *Id.* at 74-76 (The corn feed now given to cows changes the pH of their stomachs because they are not naturally evolved to eat grain as ruminants. The change in pH creates an environment ripe for bacterial growth and perpetuates the need for daily antibiotics in their feed).

⁴² *Id.* at 49.

manufacturers.⁴³ This flux of corn created new industries. For example, high fructose corn syrup was developed in the 1970's and is now part of almost everything humans consume.⁴⁴ Another creation was feed for food animals.⁴⁵ Animals that evolved as ruminants were now being given feed containing mostly corn.⁴⁶ Eating corn rather than grass may not seem taboo to most people, but other additions to the diet should. The FDA has allowed the addition of beef tallow and other animal by-products to the daily feed of herbivores.⁴⁷ This new diet caused many problems. First, a cow's stomachs are naturally at a neutral pH. The corn diet, however, made their stomachs acidic and caused various illnesses.⁴⁸ To remedy this, farmers began adding multiple antibiotics to cattle feed. The most common antibiotics used today are Rumensin and Tylosin.⁴⁹

The effect on both animal and human health from the current agribusiness practices has been dramatic because the two are inextricably linked. Animal health is affected both psychologically and physiologically. Scientists have shown, for example, that sensory deprivation causes self-narcotizing, like in the case of intense confinement of gestation sows and veal calves.⁵⁰ The daily use of antibiotics in beef cattle has created an acid-resistant strand of *E. coli* bacteria known as 0157:H7.⁵¹ Because the bacteria are immune to the acids in a cow's stomachs, it can be transmitted into beef during slaughter.⁵² In humans, 0157 strands cause Hemolytic Uremic Syndrome (HUS) in about 5-10 percent of cases.⁵³ There have been twenty-

⁴³ *Id.* at 49-50.

⁴⁴ *Id.* at 57.

⁴⁵ *Id.* at 64 (60 percent of corn grown in the United States goes to feed animals on factory farms).

⁴⁶ *Id.* at 73-74.

⁴⁷ 21 C.F.R. §589.2000(a)(1) (2010).

⁴⁸ Pollan, *supra* note 6, 77-78.

⁴⁹ *Id.* at 74.

⁵⁰ Broom, D.M., *Animal Welfare: Concepts and Measurement*, 69(10) J. Anim. Sci. 4167 (1991).

⁵¹ Pollan, *supra* note 6, 82.

⁵² *Id.*

⁵³ Centers for Disease Control and Prevention, "Escherichia coli 0157:H7: Frequently Asked Questions," http://cdc.gov/nczved/divisions/dfbmd/diseases/ecoli_0157h7/index.html (last visited April 23, 2010).

eight 0157:H7 outbreaks reported to the CDC since October 6, 2006.⁵⁴ Most of these outbreaks, about 79%, occurred in contaminated beef.⁵⁵ Additionally, the feedlot diet allows the acids in the ruminant's stomachs to eat away at the lining causing abscessed livers in between 15-70 percent of cows.⁵⁶

In addition to the harm to animals under current animal husbandry practices on factory farms, those animals have little protection under the law. For example, the "28-Hour Law" governs animal transport.⁵⁷ This law, enacted in 1877, restricts the transport of animals for more than twenty-eight hours without unloading the animals to give them food, water and rest.⁵⁸ Until 2006, the USDA interpreted the law not to include trucks, which is the method 95 percent of producers ship their animals to slaughter.⁵⁹ Though this loophole was finally closed, the maximum penalty for violation is a mere \$500.⁶⁰ Animals that are forced into confined transport spaces for such extended periods suffer from injuries that include bruising, lacerations, crippling injuries and death.⁶¹

Animals fare no better, certainly, during slaughter. The protections in place are insufficient and enforcement of violations is scarce. Undercover investigators from the Humane Society of the United States videotaped slaughterhouse workers using a forklift to force a downer

⁵⁴ Centers for Disease Control and Prevention, "E. coli Outbreak Investigations," <http://www.cdc.gov/ecoli/outbreaks.html> (last visited April 23, 2010).

⁵⁵ *Id.* (The other outbreaks were in cookie dough, peanut butter and fresh spinach)

⁵⁶ Pollan, *supra* note 6, 78 (The percentage varies among the feedlots. Abscesses are found at time of slaughter).

⁵⁷ 49 U.S.C. 80502

⁵⁸ *Id.*

⁵⁹ The Humane Society of the United States, *USDA Reverses Decades-Old Policy on Farm Animal Transport* (December 28, 2006) available at http://www.hsus.org/farm/news/ournews/usda_reverses_28_hour_policy.html (last visited April 27, 2010).

⁶⁰ 49 U.S.C. 80502

⁶¹ The Human Society of the United States, *supra*. (The change by Congress was spurred by an investigative report, Compassion Over Killing, uncovering numerous abuses of the law in truck transport. In one instance, investigators noted 50 dead pigs left on a truck for more than 30 hours during transport from Kansas City, MO to Modesto, CA, a trip that took 35-hours).

cow to slaughter.⁶² Downer cows are cattle that are unable to walk themselves to slaughter.⁶³ The abuse of downer cows is appalling, but there are also human consequences to forcing downer cattle into the food supply. Bovine spongiform encephalopathy (BSE), otherwise known as “Mad Cow” disease is known to originate in these downer cows.⁶⁴ In humans, exposure to BSE-contaminated meat can lead to Creutzfeldt-Jakob Disease, a neurological degenerative disease that is always fatal, usually within one year of developing the disease.⁶⁵

Poultry are not excluded from cruel slaughter practices. As discussed above, poultry are excluded from all federal legislation regarding the humane slaughter of animals.⁶⁶ The normal process for slaughtering a chicken in a factory involves hanging them from their feet on an assembly line, then a worker cuts their throat and the chicken moves down the assembly line.⁶⁷ By the time the chicken reaches the next station they are presumed dead and then are thrown into boiling water.⁶⁸ This method is prone to many errors. Animal rights advocate and former Tyson employee, Virgil Butler has first-hand knowledge of these errors. Working at a Tyson slaughterhouse in Arkansas, Butler chronicled the abuses in his online blog. With chickens going through at 182-186 per minute, he says, you can’t possibly kill every one before they enter the

⁶² The Humane Society of the United States, *Rampant Animal Cruelty at Slaughterhouse in California*, (January 30, 2008) available at http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html (last visited April 27, 2010) (The workers were witnessed jabbing the cattle in the eye, using a forklift, a hose and water and electrical shocks to force them to stand).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Center for Disease Control and Prevention, *Creutzfeldt-Jakob Disease, Classic Fact Sheet*, available at <http://www.cdc.gov/ncidod/dvrd/cjd/index.htm> (last visited April 27, 2010).

⁶⁶ Humane Methods of Slaughter Act, 7 U.S.C. §1901 – 1907.

⁶⁷ Farm Sanctuary, *Factory Poultry Production*, available at <http://www.farmsanctuary.org/issues/factoryfarming/poultry/> (last visited April 29, 2010).

⁶⁸ *Id.*

scalding water.⁶⁹ Other abuses happen regularly because of the sheer number of animals being slaughtered every hour.

B. Problems With The Current Labeling Scheme

1. Misleading, Confusing and False Advertising

Federal regulations can be vague and invite producers to find loopholes that circumvent the language of a regulation. This circumvention allows misleading, confusing and false advertising to consumers. One such example is Tyson's "Naturally Raised" label. Tyson includes ionophores in their chicken feed, which are antimicrobial agents designed to prevent certain intestinal parasites in poultry.⁷⁰ Tyson included their use of these agents on their initial application for the "Naturally Raised" label.⁷¹ The label application was reviewed and approved by the USDA in May 2007⁷² and the company was allowed to market the label until 2008, after the USDA wrote them in November 2007 and ordered the label be revised or removed.⁷³ The compromise agreed upon between Tyson and the USDA at the time was later rescinded after the USDA received information that Tyson was using Gentamycin, an antibiotic, regularly in their animals.⁷⁴

⁶⁹ Butler, Virgil, *The Cyberactivist: Inside the Mind of a Killer* (August 31, 2003) available at <http://cyberactivist.blogspot.com/2003/08/inside-mind-of-killer.html> (last visited April 28, 2010).

⁷⁰ Tyson Foods, Inc., *Tyson to Use New Label for Raised Without Antibiotics Chicken; Company and USDA Agree to More Informative Wording*, (December 20, 2007) available at <http://www.tyson.com/corporate/pressroom/viewarticle.aspx?id=2850> (last visited April 28, 2010) (Though ionophores are classified as an antibiotic, Tyson attempted to argue that they were microbials and are technically different because the USDA allows their use in animal feed and therefore the label was not misleading or false in any manner. The company and the USDA agreed upon a compromised label that said "Raised Without Antibiotics that affect human antibiotic resistance").

⁷¹ *Id.*

⁷² *Id.*

⁷³ Consumers Union, *Letter to Secretary Vilsack* (February 11, 2009) available at http://consumersunion.org/pub/pdf/consumersunion.org_letter_to_secretary_vilsack_021109.pdf (last visited April 29, 2010) (In their letter, the USDA clarified their interpretation of ionophores was that they were antibiotics and though they were approved for use in animal feed the producer could not then use a "naturally raised" label claim if they chose to include it in their feed).

⁷⁴ USDA Food Safety and Inspection Service, Congressional and Public Affairs, *Statement by Under Secretary for Food Safety Dr. Richard Raymond Regarding the Tyson Foods, Inc. Raised Without Antibiotics Label Claim*

III. Following the European Union's Lead: Changing Farmed Animal Practices and Creating a Label to Indicate Animal Friendly Handling and Slaughtering

Recently, the European Council developed new standards of care for raising, transporting and slaughtering farm animals.⁷⁵ This legislation was created with the idea that farmed animals were worthy of and in need of legal protection.⁷⁶ Additionally, the Council recognized the link between animal welfare and food safety.⁷⁷ The European Council undertook this project with an understanding of the need for governmental rather than voluntary third-party regulation. These new standards set out the basic requirements for the living conditions of various species of farmed animals and authorized the creation of a committee whose primary responsibility is to promulgate the specific regulations using the legislation and its purpose as their guiding light.⁷⁸

Many of these standards could be implemented in the United States without causing a huge disruption to the industry while at the same time increasing the welfare of farmed animals. Implementing these standards, or something similar, in the United States in combination with creating a label scheme informing consumers of the standards to which the producer adhered will serve to reduce the confusion consumers who care about the welfare of farmed animals often face, make animal friendly products available to a larger section of the population and, most importantly, improve the lives of millions of animals every year. Education of the standards set forth and the new labeling scheme will be a key factor in achieving these goals.

Withdrawal (June 3, 2008) available at http://www.fsis.usda.gov/news/NR_060308_01/index.asp (last visited April 29, 2010).

⁷⁵ Commission Working Document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, COM (2006) 14 final (Jan. 23, 2006).

⁷⁶ *Id.* at 3.

⁷⁷ *Id.*

⁷⁸ *Id.* at 6.

A. Overview of the European Union Plan

The European Union first took note of a need for improvement in animal welfare standards more than 30 years ago and in 2006, the Commission of the European Communities met in Brussels, Germany to discuss the status and needed reformations of animal welfare and proposed a Community Action Plan.⁷⁹ The ideas set forth in the Council's plan to change husbandry practices built upon the EU's Common Agricultural Plan (CAP) Reform policy created in June 2003.⁸⁰ CAP was successful in gaining consumer confidence in food safety while at the same time encouraging more rural farm policies and stabilizing prices and surplus.⁸¹ The plan worked by offering several incentives to farmers.⁸²

The general principles of the European Convention for the Protection of Animals Kept for Farming Purposes addresses the particular needs of farmed animals and requires that specific regulations developed by the Committee be based on the "physiological and ethological needs in accordance with established experience and scientific knowledge" of the animal with regard to its species.⁸³ In each of the species-specific regulations promulgated, the Standing Committee included at the beginning an ethological description of the animals' natural instincts and needs for which the subsequent regulations attempted to promote and encourage.⁸⁴ These regulations

⁷⁹ COM (2006) 14 final (Jan. 23, 2006).

⁸⁰ *Id.* at 3 (The Council sought to build upon CAP reform by adding the following measures: more support for farmer's whose animal husbandry practices go beyond the baseline standards, creation of "farm advisory services" to help farmers implement the standards and support of farmers who wish to advertise and market their animal friendly husbandry practices to promote these standards. More important elements of CAP Reform are the existence of sanctions for non-compliance, a comprehensive system for training of inspectors to ensure uniformity across all member states and the distribution of informational materials to enhance public understanding. The sanctions involve the reduction or repeal of subsidies).

⁸¹ European Commission: Agriculture and Rural Development, "The Common Agricultural Policy Explained," available at "http://www.ec.europa.eu/agriculture/capexplained/change/index_en.htm" (last visited December 1, 2010).

⁸² European Commission: Agriculture and Rural Development, "Funding Opportunities," available at http://ec.europa.eu/agriculture/grants/index_en.htm (last visited December 1, 2010).

⁸³ *Id.*

⁸⁴ Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Turkeys*, (EC) June 21, 2001; Standing Committee of the European Convention

are the minimum standards with which all producers must comply in the European Union.⁸⁵

These regulations are far superior to the protections afforded farmed animals in the United States under the FMIA, HMSA and Twenty-eight Hour Law.⁸⁶ Additionally, the minimum standards required by the EU prohibit some practices that even the USDA Organic regulations allow regarding husbandry practices for weaning and minimum space requirements and the mutilation practices of certain species.⁸⁷

EU Labeling Scheme

Acting on public demand for improved animal welfare standards in farming practices, the Council stressed the importance of proper labeling and education in their Community Action Plan.⁸⁸ The Council stated the lack of proper labeling might have been preventing consumers from purchasing animal friendly products though those consumers wished to do so.⁸⁹ To achieve this end, the Council proposed the creation of a label indicating whether the animal was raised under the minimum EU standards or under more strict standards that may be set forward

for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Cattle*, (EC) October 21, 1988 (see Appendix C for Recommendation Concerning Calves); Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Pigs*, (EC) December 2, 2004; Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Domestic Fowl*, (EC) November 28, 1995.

⁸⁵ European Convention for the Protection of Animals Kept for Farming Purposes, *supra*. note 109, Art. 9.

⁸⁶ For example, none of the U.S. statutes have regulations specific to each species and based on scientific etiologies. Further, poultry is not covered at all by the HMSA. Additionally, many of the standard farming practices employed in the U.S. such as tail docking, gestation crates, de-beaking, etc. are banned in the EU's legislation. Finally, the EU legislation has put in place measures meant to encourage more rural farming practices rather than the industrial feedlot system most common in the United States.

⁸⁷ Standing Committee of the European Convention for the Protecting of Animals Kept for Farming Purposes Recommendations, *supra*. note 113. (Every recommendation lays out specific requirements for the housing and space requirements of the animals. Additionally, the weaning of pigs and cattle are specified based on the specie's natural weaning habits. Mutilation such as tail docking and de-beaking is not allowed under the regulations. Other forms of mutilation, such as castration are allowed, but specific requirements for anesthesia and proper training for personnel performing procedure are mandated).

⁸⁸ Commission Working Document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, COM (2006) 14 final (Jan. 23, 2006).

⁸⁹ "Consumer Concerns about Animal Welfare and the Impact of Food Choice," EU FAIR-CT36-3678, Dr. Spencer Henson and Dr. Gemma Harper, University of Reading.

voluntarily by each Member State.⁹⁰ Additionally, imported products that do not meet at least the minimum EU standards would be labeled clearly as such.⁹¹ In this way, consumers may clearly choose their products with full understanding of the animal welfare standards to which the producer adhered.

To further this understanding, the European Commission of the Directorate General for Health and Consumer Protection enlisted the Food Chain Evaluation Consortium (FCEC) to research and recommend options for a new animal welfare label.⁹² The study concluded that using a variety of methods to reach consumers including a label in combination with the introduction of educational materials to make consumers aware of the minimum standards and the various levels of labeling would be most effective for consumer knowledge and purchasing power while allowing producers to earn respectable profits on their products.⁹³

The FCEC produced seven options for labeling food products that might achieve the fulfillment of the guiding principles set forth by the Council.⁹⁴ The seven options are:

- 1) Mandatory labeling of the welfare standards under which products of animal origin are produced, 2) Mandatory labeling of the farming system under which products of animal origin are produced, 3) Mandatory labeling of compliance with EU minimum standards or equivalence with those, 4) Harmonized requirements for the voluntary use of claims in relation to animal welfare, 5) Harmonized requirements for the voluntary use of claims in relation to farming systems, 6) A Community Animal Welfare Label for voluntary participation, and 7) Guidelines for the establishment of animal welfare labeling and quality schemes.⁹⁵

After discussion of the feasibility of them, they determined that the most feasible options were mandatory labeling of the welfare standards, mandatory labeling of the farming system or the

⁹⁰ COM (2006) 14 final (Jan. 23, 2006) *supra*. note 99, at 11.

⁹¹ *Id.*

⁹² Food Safety, *Animal Welfare Labeling and the Creation of a European Network of Reference Centers for Animal Protection and Welfare*, (EC), available at http://www.ec.europa.eu/food/animal/welfare/farm/labeilling_en.htm (last visited May 2, 2010).

⁹³ *Id.*

⁹⁴ *Id.* at vii

⁹⁵ *Id.* (see Table 1: “Summary of policy options for indicating animal welfare related information on products of animal origin”)

voluntary Community Animal Welfare Label.⁹⁶ The impetus for new labeling requirements, and the purpose behind the Community Action Plan in general, was to improve animal welfare based on the current scientific knowledge and increase the baseline knowledge with the support of research.⁹⁷ The FCEC members did not feel many of the options would in any great depth address these principles.

Among the three forerunners, the voluntary Community Animal Welfare label is most favored by the consortium for several reasons. First, they believe it best enhances the guiding principles set for the by the European Council's directive.⁹⁸ Second, modeling the label after the EU organic label provides all interested parties with real indicators as to the possible success and impact of the new label.⁹⁹ And, lastly, it does not force any farmer or producer to adhere to any particular farming system in order to compete, which, in turn, will not significantly raise the operating costs unless the demand for these products becomes such that the investment is taken on by the industry.¹⁰⁰ Though this option is still voluntary, the combination between the new farming standards, the public demand for animal welfare improvement for farmed animals, and the greater detail of information and understanding the public will gain with the labeling and education scheme will allow those consumers who wish to make these purchases more able to do so and at the same time might increase demand for these products and force producers to undertake new practices to come into compliance with terms of the label requirements.¹⁰¹ On the

⁹⁶ *Id.* at 35 (See Table 8: Assessment of compatibility of the options with guiding principles).

⁹⁷ COM (2006) 14 final (Jan. 23, 2006) *supra*. note 99.

⁹⁸ Food Chain Evaluation Consortium, *supra*. note 123, at 35.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

last reason, the FCEC actually determined that this labeling is cost neutral if the minimum requirements in the EU legislation don't change.¹⁰²

C. Proposed Labeling Scheme for Adoption in the United States

An animal-centric labeling scheme should be implemented in the United States. Modeling a label based on the EU standards provides a solid baseline foundation both in scientific knowledge of animal welfare and sociological data regarding the demand and need for a labeling scheme to enhance animal welfare standards.¹⁰³ Using a similar standard to the Community Animal Welfare label and minimum farming practice standards mandated in the EU, an animal welfare label creates a nation-wide, federally regulated voluntary scheme. However, one reason the EU option works is because the minimum regulations for farming practices are already much improved over the United States practices. Additionally, the EU began using scientific information on animal welfare to provide inspectors with ways to rate farms for the level of animal welfare that is included on the label. Following the EU's lead in both respects, animal welfare legislation and labeling, is necessary to successfully implement a meaningful animal welfare-labeling scheme.

Implementation of any proposed plan will face obstacles in the United States. For example, the agribusiness industry is strongly opposed to stricter regulations.¹⁰⁴ Any changes to the minimum animal husbandry practices for non-organic producers would impose a significant cost impact on the industry.¹⁰⁵ Further, the cost for the government to implement a successful education plan to increase consumer awareness of the standards would presumably be substantial.

¹⁰² *Id.* at 44.

¹⁰³ See, generally, Section B

¹⁰⁴ Open Secrets.org, *supra.* note 98.

¹⁰⁵ Food Chain Evaluation Consortium, *supra.* note 123, at 35.

1. Using Scientific Knowledge of Animal Welfare to Determine Standards of New Label

Scientific data has amassed over recent years regarding animals in general. Animals that were once thought of as unfeeling and unthinking creatures are now viewed by many people as sentient beings.¹⁰⁶ More importantly here, the research regarding the effects in animal's social, emotional and physical wellbeing in modern agribusiness is more readily available.¹⁰⁷ Studies have shown that animals raised in confinement farming practices suffer abnormalities in all three areas.¹⁰⁸ The EU, in their preference for a Community Animal Welfare label, reasoned that this option provided the most flexible standards under which the changing scientific knowledge of animal welfare could be addressed without the need to make significant changes in the labeling standard. For example, research cited by the EU shows that a stimulus-organism-response (SOR) model could be used to provide indicators with which to determine an animal's overall welfare and thus be implemented into the certification process for producer's use of the label.¹⁰⁹ While the validity across all species and farming practices and ease of collecting data of these indicators has put into question the feasibility of a mandatory program, they could be used to establish a voluntary scheme.¹¹⁰ The Welfare Quality organization in the EU has created assessment protocols for seven different species to measure the animal welfare on farms in the EU.¹¹¹

¹⁰⁶ Fraser, David, "Animal Behaviour, Animal Welfare and the Science of Affect," 118 *Applied Animal Behaviour Science* 108 (2009).

¹⁰⁷ See, generally, Swanson, J.C., *Farm Animal Well-Being and Intensive Production Systems*, 73 *J. Anim. Sci.* 2744 (1995); Muller-Graf, Christine, et al., *Risk Assessment in Animal Welfare – EFSA Approach*, 14 *AATEX* 789, 6th World Congress on Alternatives and Animal Use in the Life Sciences (August 21-25, 2007).

¹⁰⁸ Swanson, J.C., *supra*.

¹⁰⁹ Food Chain Evaluation Consortium, *supra*. note 123, at 27.

¹¹⁰ *Id.*

¹¹¹ Welfare Quality, <http://www1.clermont.inra.fr/wq/index.php?id=protocol&prod=#> (last visited May 3, 2010) (The organization has identified four needs common to all species, and defined those needs as related to each specific species. Based on these four guiding principles, they have developed assessment protocols for inspectors with specific testing requirements. The result of the inspectors' assessment gives the farm a score that is published for public record.)

In order for a similar method to be viable in the United States, the baseline for animal welfare must be increased. Research similar to that used in the EU must be employed by the federal government to increase the minimum standards of animal welfare. Then there will exist a quantifiable measure with which to compare the SOR model indicators, or some similar method of determining animal welfare for labeling standards. For example, researchers might rely on the creation of a species-specific Risk Assessment (RA) to determine the minimum standards to which the SOR model indicators will be measured against.¹¹² In creating RA's specific to animal welfare, the hazards pertaining to adverse welfare must first be identified.¹¹³ Armed with this data, scientists can then create tables charting the severity, duration of effect and the likelihood and the likely frequency of exposure.¹¹⁴ Though this is seen as somewhat difficult in the animal welfare realm, it is not impossible.¹¹⁵

Applying RAs to the creation of SOR model indicators can give U.S.D.A. inspectors' assessment tools that would increase animal welfare. In the EU, the European Food Safety Authority's (EFSA) panel on Animal Health and Welfare (AHAW) is beginning to do this.¹¹⁶ AHAW has used scientific data to set forth RAs on how the most relevant farming systems affect animal welfare in dairy cows and pigs.¹¹⁷

¹¹² Muller-Graf, Christine, et al., *Risk Assessment in Animal Welfare – EFSA Approach*, 14 AATEX 789, 6th World Congress on Alternatives and Animal Use in the Life Sciences (August 21-25, 2007).

¹¹³ *Id.* at 790.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 791 – 793 (Identifying clearly the hazards is crucial to developing clear RAs. Doing this on a population wide, as opposed to individual animal, basis requires the consideration of many outside factors such as the breed, species, production system, farm environment, stage of life, etc.).

¹¹⁶ European Food Safety Authority, Animal Welfare, *available at* <http://www.efsa.europa.eu/en/ahawtopics/topic/animalwelfare.htm> (last visited December 1, 2010).

¹¹⁷ *Id.* (Four RAs have been established for dairy cows based on the research on farming practices and their affect on the cows' welfare. The hazards identified cause risks in the following areas: 1) Metabolic and reproductive disorders, 2) Udder disorders, 3) Leg and locomotion problems, and 4) Behavioral disorders, fear and pain. For pigs, the same method produced the following scientific opinions: 1) Piglet castration, 2) Effects of different space allowances and floor types on the welfare of weaners and rearing pigs, 3) Housing and husbandry practices for fattening pigs, 4) Housing and husbandry practices for adult breeding boars, pregnant farrowing sows, and unweaned piglets, and 5) Risks associated with tail biting in pigs.

A similar approach should be developed in the United States and used by inspectors to rate farms as the EU's Welfare Quality organization has done. Presumably, the RAs under current farming practices in the United States would show high severity of risks, long duration of the effects of hazards and high likelihood of affectation. Making this information available to consumers through labeling will increase awareness of farmed animals plight and, hopefully, encourage consumers to demand improved farming and husbandry practices. Ideally, though, the creation of RAs would coincide with mandatory improvements of farming and husbandry practices by the federal government. The flexibility in this approach is ideal for both producers and consumers in that the SOR model can be easily modified as new research exposes new areas of need in animal welfare.¹¹⁸

2. Utilizing Sociological and Market Data to Evaluate Possible Success of Label

The success of the USDA Organic label can be illustrative of the success that an animal welfare label might have in the United States. While critics of the organic program say the regulations are too vague as to permit many producers to maneuver through loopholes that undermine the purpose of organic farming practices¹¹⁹, several third-party organizations have stated that buying USDA Organics products is still the best way to ensure optimum animal welfare under current standards.¹²⁰ Further, the USDA recently passed a final rule that rectifies some of the concerns about the organic industry.¹²¹

¹¹⁸ Welfare Quality, *supra*. note 156.

¹¹⁹ Kate L. Harrison, "Organic Plus: Regulating Beyond the Current Organic System," 25 Pace Envtl. Rev. 211, 221-227 (Winter 2008).

¹²⁰ World Society for Protection of Animals, *supra*. note 1; Farm Sanctuary, *supra*. note 5.

¹²¹ 7 CFR 205 (Effective June 17, 2010, this regulation clarifies many aspects of the access to pasture ambiguity used to create loopholes by producers previously. The livestock must have access to pasture for at least 120 days for growing season and must intake a minimum of 30 percent dry matter through grazing).

Additionally, the incredible growth of the organic market proves that demand for these products is on the rise.¹²² Surveys both in the United States and abroad have also shown that many consumers wish to make more informed choices about animal welfare in their food purchases.¹²³ A relevant example in both the United States and the European Union of this evidence is the egg product market. Though there is some confusion for consumers about what the various labels mean, the sales of cage-free, free-range and organic eggs has risen dramatically in recent years. At a time when overall sales of eggs were down due to dietary concerns, the sales of specialty eggs, i.e. cage-free, free-range and organic went up 23%.¹²⁴ Additionally, the overall sale of organic meat and eggs in the United States was approximately \$600 million dollars in 2008.¹²⁵ This number is up from roughly \$10 million in 1997.¹²⁶ Moreover, this category of organic sales, while fast growing, represents the least popular category of organic products, falling behind produce and dairy.¹²⁷ However, the data does show that organic products overall are rising incredibly.¹²⁸ The creation of an Animal Welfare label now can take advantage of this momentum for the betterment of farmed animals.

3. Advantages to a Federal Voluntary System

Those producers who already comply with federal organic standards would have little cost in getting approved for an Animal Welfare label similar to the EU's Community Animal Welfare label. The organic standards in the United States are already closely aligned with the EU

¹²² Golan, Elise et al., *Do Food Labels Make a Difference? ... Sometimes*, Amber Waves, November 2007, available at <http://www.ers.usda.gov/AmberWaves/November07/Features/FoodLabels.htm>

¹²³ Consumer Concerns about Animal Welfare and the Impact of Food Choice, *supra*. note 118; Farm Sanctuary, *supra*. note 5; World Society for the Protection of Animals, *supra*. note 1.

¹²⁴ Weise, Elizabeth, "Cage-free hens pushed to rule roost," USAToday (April 10, 2006).

¹²⁵ Dimitri, Carolyn, *supra*. note 39, at 19.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

principles. Some improvement is necessary,¹²⁹ but the organic regulations are already beginning to be amended for clarity and alignment with consumer and industry demands.¹³⁰ In addition to complying with updated organic standards, the farm would need to undergo inspection applying the RAs and SOR model indicators in order to establish a ranking for the farm's level of animal welfare to be included on the label. If the organic program is updated to meet the EU standards, the likely cost to organic farmers would be additional costs incurred by changes to the standards and the certification costs involved in the review of the Organic Farming Plan and the inspection charge for application of the SOR model indicators.

National standards and a harmonized label could diminish the confusion consumers feel when shopping for animal friendly products. Misleading and untruthful labeling practices should decrease. Market demand will dictate the rate at which farmers change their farming practices. Making changes to the minimum standards, using the animal welfare label and educating the public about the differences might push producers closer to following standards closer to organic regulations in order to compete. In just the way consumers know that products not labeled organic fail to meet certain standards, they will also know that products without the Animal Welfare label fall short of the those standards.

The economic cost and impact on both producers and customers should be minimal with a voluntary label. Depending on the size of the organic farm, since these producers are most likely to take advantage, at first, of a voluntary label, one can estimate the cost. For example, the

¹²⁹ The organic standards already require livestock to have access to pasture, prohibit the use of antibiotics and other harmful practices. However, the organic standards currently do not prohibit many of the mutilation procedures common in animal husbandry in the United States such as de-beaking, tail docking, etc. This would need to be changed to meet the EU standard.

¹³⁰ 7 CFR 205, *supra*. note 147.

European Union found that the cost per hectare decreases as the number of hectares increases.¹³¹

If these are similar estimates in the United States then the average cost should also be small because sixty-percent of organic farms, or 866, are more than 500 acres.¹³² Since the production and certification costs should remain low for these producers, the cost to consumers should remain very close to their current rate. Additionally, even if there is a slight increase in cost, studies have shown that consumers are willing to pay a premium for products in line with their beliefs and priorities.¹³³

Conclusion

Protecting the welfare of animals is important to consumers in the United States. One way to improve this protection is to implement a voluntary Animal Welfare label akin to the proposed EU Community Animal Welfare label and to the USDA Organic label utilizing similar regulations for organic farming in the United States with the addition of SOR model indicators based on RA identifiers to assess the welfare of farmed animals. To have any meaningful impact, this label will need to generate market demand for animal friendly products that encourages more producers to adopt the standards and, in turn, increase the protection of farmed animals.

¹³¹ FCEC, *supra*. at 43. The cost started at 47.00 Euro per hectare for up to 5 hectares and was negligible per hectare once you went above 65 hectares.

¹³² Marketing, *supra*. at 11, Figure 5

¹³³ *Id.*