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FMI FEDERAL REGULATORY UPDATE August 2012

Issue Highlights:

Department of Agriculture

- WTO Affirms COOL As Illegal Trade Barrier

Department of Health and Human Services

- **Comments Filed:** FDA Food Facility Registration

Federal Reserve System

- Federal Reserve Fraud Adjustment Final Rule

Department of Transportation

- FMI Files Joint Brief in Hours of Service Challenge

Webinar: Food Safety Modernization Act: Imports and Foreign Supplier Verification

On Wednesday, August 8, at 2:00 pm EDT, FMI will be hosting a webinar on what retailers need to do to prepare for the Food Safety Modernization Act's Foreign Supplier Verification Program (FSVP). A number of FMI members import food. The FSVP requires importers of record to verify that the food they import is produced in compliance with new hazard analysis and risk-based preventative controls standards and produce safety standards. Importers must also perform verification activities to verify that product is not adulterated or misbranded. The webinar will also cover the Voluntary Qualified Importer Program established by FSMA. Elizabeth Fawell of Hogan Lovells LLP will be presenting. For more information and to receive the webinar log-in information, please contact Erik Lieberman at elieberman@fmi.org.

DEPARTMENT OF AGRICULTURE

WTO Affirms COOL as Illegal Trade Barrier

The World Trade Organization Appellate Body recently [affirmed](#) that the U.S. Country of Origin Labeling law is an illegal trade barrier, confirming the opinion of a WTO Dispute Panel last year that argued that the law discriminates against livestock imported from Canada and Mexico. FMI's regulatory counsel Erik Lieberman issued a [statement](#) following the WTO ruling. FMI recently met with USDA officials to discuss the types of changes that the agency will propose to the program to comply with the WTO's ruling. FMI is hopeful that the agency will be open to making significant amendments to the COOL program to reduce unnecessary regulatory burden on the industry.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

FMI Files Comments on FDA Food Facility Registration

On Tuesday, July 10, FMI filed [comments](#) in response to FDA's [notice](#) requesting the submission of detailed food facility profile information on a voluntary basis in conjunction with mandatory food facility

registration pursuant to the requirements of the *Food Safety Modernization Act* (FSMA – [P.L. 111-353](#)). Under the Bioterrorism Act of 2002, food facilities (which include warehouses, distribution centers and processing facilities (but not retail outlets)) were required to register with the agency the name and address of the facility as well as the general categories of food products the facility handles. FSMA amended this section to statutorily require that an e-mail address of a contact for each facility be submitted, and an assurance that FDA inspection will be permitted. FSMA imposes a new requirement that registrations be renewed and updated every two years.

FDA is proposing to request that a host of other detailed facility information be provided on a voluntary basis in conjunction with the required registration. The agency states it will use this information to facilitate inspections and develop risk-profiles. The biggest concerns with the proposal involve the information FDA is requesting on hazards and preventative controls. For distribution centers, providing this information could be extremely burdensome. Furthermore, this information could be misinterpreted by regulators. The comments address these concerns and others.

FEDERAL RESERVE SYSTEM

Federal Reserve Issues Final Rule on Interchange Fraud Adjustment Provisions

The Federal Reserve recently [announced](#) the approval of its final rule on the fraud adjustment provisions of the debit card interchange reforms enacted as part of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ([P.L. 111-203](#)). The rulemaking provisions allow eligible debit card issuers to receive an interchange fee adjustment if they enact certain policies that are “designed to reduce the occurrence and costs of fraudulent debit card transactions.” Debit card issuers with assets exceeding \$10 billion will be allowed to charge up to one cent per transaction to help offset these fraud prevention programs. The Merchants Payments Coalition, of which FMI is a founding member, released a [statement](#) criticizing the Federal Reserve’s final rule because it will reward the banks without effectively reducing the occurrence of fraudulent transactions. The final rule will replace the Federal Reserve’s [interim final rule](#) that was issued in July 2011 and has been effective since October 1, 2011. The final rule issued last week will be effective October 1, 2012. Read the Federal Reserve’s final rule [here](#).

EXECUTIVE OFFICE OF THE PRESIDENT

FMI Urges the White House to Exclude Supermarkets from Menu Labeling

On Friday, July 27, FMI submitted a [letter](#) to Cass Sunstein, administrator of the Office of Information and Regulatory Affairs at the White House, thanking Administrator Sunstein for issuing his [June 22 Memo](#) on reducing regulatory reporting and paperwork burdens and discussing how it should be applied to FDA’s menu labeling rule in the context of how the rule regulates supermarkets. The Memorandum directs agencies that impose high paperwork burdens—like the Department of Health and Human Services—to “attempt to identify at least one initiative, or combination of initiatives, that would eliminate two million hours or more in annual burden.” FMI notes that FDA’s proposal to exclude supermarkets from the scope of menu labeling will eliminate millions of hours in burdens. The letter states that the Memorandum and a previously issued executive order ([E.O. 13610](#)) demand that the agency adopt Option 2.

Sunstein to Leave White House “Regulatory Czar” Post

Cass Sunstein, administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget, will leave his post at the White House later this month to return to his previous position at Harvard Law School. Sunstein, often referred to as the “regulatory czar,” has been

responsible for reviewing hundreds of regulatory initiatives and preventing excessively expensive and burdensome regulations from being implemented. FMI has worked with Sunstein on a number of pending regulations, including FDA's menu labeling rulemaking and front of pack labeling.

DEPARTMENT OF TRANSPORTATION

FMI Files Joint Brief in Hours of Service Challenge

On July 31, FMI joined 14 other associations in filing an [amicus curiae brief](#) in support of the American Trucking Associations' challenge to the Department of Transportation's Federal Motor Carrier Safety Administration's (FMCSA) [final rule](#) on hours of service. FMI has been outspoken in opposing the FMCSA's regulation throughout the rulemaking process, including filing [written comments](#) with the agency, submitting [congressional testimony](#) on behalf of the industry and [participating](#) in an FMCSA listening session. Among the many provisions of the final rule, FMI supports the agency's retention of the 11-hour shift limit and opposes the provisions that would amend the 34-hour restart. FMI issued a [media advisory](#) following the filing of the brief.

DOT Opens Docket on Transportation of Hazardous Substances in Reverse Logistics

Last month, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration published an [advance notice of proposed rulemaking](#) to identify ways to reduce the regulatory burden on retail outlets that ship consumer products containing hazardous materials. PHMSA is considering a regulatory definition for "reverse logistics" and a possible new section in the hazardous materials regulations that will identify the regulatory responsibilities of the shipper. PHMSA believes the section should address: 1) classification of HAZMAT under the definition of reverse logistics; 2) training requirements for employees who handle HAZMAT under reverse logistics; and 3) packaging approved for the shipment of HAZMAT under reverse logistics. Please see this [memo](#) from the law firm of McBreen & Kopko containing more information on the proposed rulemaking. FMI will be filing comments on this matter. The agency is accepting comments through October 3.

DEPARTMENT OF COMMERCE

Florida Tomato Growers Request Rescission of Suspension Agreement

A group of Florida tomato growers recently [announced](#) that they had submitted documents with the Department of Commerce and International Trade Commission to request the rescission of their 1996 antidumping petition and the Tomato Suspension Agreement. The 1996 lawsuit called for an investigation into imported tomatoes from Mexico and led to the formation of the Tomato Suspension Agreement, which now serves as a framework for current tomato trade regulations. The Agreement suspended an antidumping investigation that had been ongoing at the time of the petition and called for the Department of Commerce to set a minimum price for tomatoes. Mexican growers would not sell their tomatoes in the U.S. under this minimum price. The Department of Commerce is now weighing whether the current Suspension Agreement or a new import tax on imported tomatoes from Mexico is in the public interest. FMI will provide the membership with additional information in the coming weeks on how the rescission request and a potential tomato import tax could impact the industry.