

Q&A: FCN interviews Bob Hibbert on FSIS during uncertain regulatory climate

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Food Chemical News spoke with Bob Hibbert, partner at the law firm Morgan, Lewis and Bockius, LLP, about his thoughts on what the regulatory climate under the Trump administration means for the food industry, particularly for USDA's Food Safety and Inspection Service (FSIS) and the meat and poultry industry the agency oversees.



Hibbert has served as a senior attorney with USDA, where he directed the standards and labeling staff, formulating policy in areas including food safety, product standards, and nutrition labeling. And he was vice president and general counsel for the American Meat Institute.

Q: There's been a lot of talk about regulatory uncertainty under the Trump administration due to the regulatory reform climate and concern that food safety may be at stake, but it's difficult to gauge if any specific FSIS food safety regulations could be ripe for the chopping block, or if the agency would be more likely to focus on other types of regulations to cut that are unrelated to food safety.

A: If you focus on FSIS, the one pending regulation would be the **Nutrition Facts Panel**, where they're trying to catch up with the new FDA format, so that in theory could get tangled up in this situation, although it wouldn't make sense to wind up with two different Nutrition Facts Panels. But beyond that, if you look at FSIS over the past several years there's not been a lot of significant rulemaking, and a lot of that goes back to they have their basic HACCP requirements in place, and on most issues, they're in a position to take action based not on the regulation, but based on upon an interpretation of the existing HACCP requirements, which leave room for plenty of interpretation. So how that's going to play out in the new administration is unclear, but if the question is if there are lot of regs or potential regs in the pipeline, the absence of which would have a great impact with FSIS, I don't think so.

Q: Some in industry have pointed to burdensome regulations, but so far no one has been able to specifically point out any that they would like to see overhauled when it comes to food safety, though the large meat and poultry groups have vowed to work with the Trump administration to ensure that other non-safety-related rules like the GIPSA "Farmer Fair Practices" rule and the Organic Production Practices rule that are now being reviewed do not get finalized.

A: You've got the basic architecture that's set up by HACCP that I don't think there's going to be industry consensus to change that in any fundamental way. If people start looking for things that they consider obsolete, you could start

talking about certain food standards of identity and whatnot that have been embedded in the regulations for many years, but you've got to figure out what the replacement would be, which could be easier said than done. There seems to be this environment where people are being encouraged to put together regulatory wish lists, but it's interesting to hear you say that it's not as if people have much of a list that they're able to put together at this point.

Under the rubric of inspection modernization with FSIS, historically that's always very controversial. You start to take apart the program in any way, especially in a way that pulls apart the notion of carcass by carcass and continuous inspection, there tends to be enormous resistance to that.

On this whole inspection modernization issue, if there's a lot of resistance, if the message starts getting out there the government's going to cut back in ways that make food less safe, at that point industry doesn't want that message to be out there.

The other point is, and you've seen this across the board, most companies, particularly bigger companies, are less concerned with where the regulatory lights are as much as having them be clear and consistent and predictable and uniformly enforced, and once you start tinkering with the status quo, you run the risk of moving away from that as opposed to toward that.

Q: You previously mentioned that for the yet-to-be finalized FSIS Nutrition Facts final rule, because there's no expected compliance period, that may cause a problem for companies that fall under dual jurisdiction with FDA and USDA, although FSIS has previously stated that they would accept for companies to comply with FDA's Nutrition Facts requirements, until FSIS publishes its own final rule.

A: The USDA policy is that even if you're not a dual jurisdiction company, but if for some reason you want to start uniformly adopting the new FDA format, they will allow that, but they've got to put a caveat in there, which I think is more form than substance but I think the official caveat with the proposal is, well, OK, but if we finalize a final rule that says something different, you're going to have to address and comply with that. I think the ultimate goal is going to be as much uniformity as conceivably possible with the FDA format, so I think that's a pretty hypothetical risk, but that's the risk that anyone as an official matter would be taking. FSIS reserves the right to change its mind, basically.

Q: We heard a year ago that it would be some time before FSIS publishes the Nutrition Facts final rule, and now under the current regulatory climate, if in order to put that out that rule, the agency would have to find two other rules to reduce, that may make it take even longer to release the final rule.

A: Right. The unknown is how that two-for-one directive is going to be interpreted and applied, what exceptions are going to be, and I think there's going to be devils in those details. If you talk about labeling, you've got two or three different moving parts. You've got the new FDA format, you have the pending FSIS [one], but you also have the GMO mandate, and the clock is ticking now that AMS is supposed to come up with the **GMO disclosures** requirements. They've made some form of a disclosure, which not necessarily is in the label, but some implications were in the label. So you have the argument that the regulators are sympathetic to, is we ought to bundle this together in one single effective date. So that's the one thing that you could see happening. How do we pull together in an efficient way, the need to change labels to the new FDA format, a new FDA format for the FSIS market and also the GMO disclosure and how you make those things all fit together? That's going to be a challenge.

Q: We've heard that the Trump administration may actually want to publish a final rule on hog HIMP, because it would reduce inspectors at pork producing facilities, but that may get held up in this process too.

A: The potential irony here is when you talk about so-called inspection modernization, such as the pork HIMP rule, you're talking about having to have a new regulation that deregulates. You may consider that to be good deregulation, but if you're locked into some sort of score card where the publication of something in the *Federal Register* is inherently a bad thing, then you've got a problem.

Q: It seems like these executive orders are overly broad. Is there a way to address that now that they're out?

A: That gets into issues like personnel, and who is going to fill these jobs, how much authority they're going to have and those kinds of unknowns, but what you have with FSIS is an unusual situation where you have a government employee at your facility every day tell you what you can and cannot do. Without statutory change, that's going to continue. So in that sense, I'm going to continue to be heavily regulated if I'm in that business. The question with the documents that come out of Washington are some of the details of how that happens, but it's still going to happen anyway because the inspector has the authority to say this product is inspected, and passed and wholesome, and this one isn't. He has the authority to say that this sanitation is adequate and this is not. That's not going to change.

Q: Can you think of a solution to this problem?

A: In one fashion or another, it seems to me, you're going to have some of that at FSIS. In other words, we're talking about some of the nuances here that apply to this FSIS situation, there are probably different nuances in 40 other agencies, and that becomes part of the dilemma. There's one mindset that says we need to adjust and accommodate these nuances, the other is that if we start accommodating too much the core policies, what's going to happen? We're going to make so many exceptions to the rule that they're going to swallow the rule. I don't pretend to know what's going to happen, but that's a challenge.

Q: Moving forward, do you have any other thoughts on the future for FSIS?

A: At least at the working level, the agency is still focused on microbiological safety and particularly on *Salmonella* more than anything else, because that's the one where the numbers haven't gone down the way they have with some other things like *E. coli* and *Listeria*, so I think at the working level of the agency, there's still an active interest in driving those numbers down, and I think it's a question of how that's going to play out in this new environment.

Q: On another note, do you think the idea of a single food safety agency that has been floated over the past 20 years could be something that is looked at more closely under the new administration?

A: It could. You could easily see someone saying that this is a way to streamline government, and so on. The problem in my mind is and has always been: that's fine, it wouldn't necessarily be that big a deal to just move around boxes in a flowchart and have one boss, whether it's at USDA or HHS, or somewhere else in charge of all this stuff, but you still have two different approaches to food safety that are driven by different statutes. You have the FDA approach and you have the FSIS approach that you're locked into under the language of the meat and poultry and egg acts. So if you consolidate that under one boss, you've still got to have one unit that's in charge of FSIS-type

inspection, unless you actually change the acts, and another one in charge of FDA-style inspection, so I don't see it beyond moving boxes in a flowchart or organization chart, I don't see that changing that much.

Q: Completely separately, is the length of time it's taking to confirm Sonny Perdue as secretary of agriculture, who has broad support from the food and agriculture industry, creating a problem for industry?

A: I don't see a specific, concrete problem, but I think there's probably over time a concern that let's get not just the top job, but the next level of jobs, let's get them filled, and let's get to work, and it just seems like we're a good ways away from that happening.