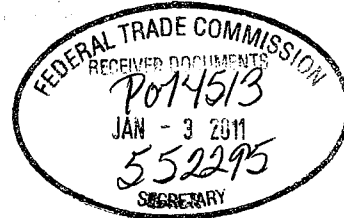




December 30, 2010

Division of Dockets Management
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580



Re: Petition to Change Egg Labeling Requirements

Dear Sir or Madam:

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-596, specifically 5 U.S.C. § 553(e), Compassion Over Killing and other interested parties (together, the "petitioners") submitted a petition for rulemaking to FTC on February 21, 2007, urging FTC to take regulatory action regarding, *inter alia*, the common and pervasive misleading express and implied claims on shell eggs and shell egg cartons sold in the United States. In particular, the petitioners requested that FTC initiate rulemaking to standardize the labeling requirements for shell eggs sold in the United States to indicate to consumers whether such eggs are laid by free-range, cage-free or caged hens. Since the filing of the petition in February, 2007, your office has failed to take any substantive action regarding the issues presented in the petition. Almost four years have passed since the submission of this petition for rulemaking. This constitutes unreasonable delay under the law. *See Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade.") As such, this letter and enclosed submission serves as a final request for FTC to remedy its unreasonable delay and take final action regarding the petition.

Please note that the enclosed petition is to be considered the entirety of the Petition to Change Egg Label Requirements for review before FTC. The petition enclosed here is to supplant all of this existing material and to notify FTC of relevant updated information pursuant to the requirements for citizen petitions, and should serve as the exclusive record of the petition. Please be advised that this submission contains substantively identical information the original petition submitted on February 21, 2007, notwithstanding certain information that is now moot and has been omitted and certain items that have been updated to reflect currently accurate information and occurrences. The minor omissions and additions do not substantively affect the petition, its call for regulation, or its rationale for regulation.

As the enclosed submission details, there are numerous facts demonstrating reasonable grounds for the proposal, and given the level of confusion that results from the current labeling

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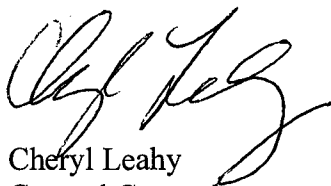


landscape and FTC's purpose to protect the public from unfair and deceptive trade practices¹ the proposal is both in the public interest and promotes FTC's objectives, including adherence to the Federal Trade Commission Act. Therefore, promulgation of the proposed regulations is not only within FTC's authority, but constitutes a mandatory duty.

As you are no doubt aware, agency inaction is subject to judicial review. Under the APA, courts are given the power to compel agency action "unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action" (including the failure to act) for various reasons. 5 U.S.C. §§ 706, 551 (2006). Thus, the APA allows courts to compel an agency to act when said agency has failed to act or when it has engaged in an unreasonable delay. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004).

As such, pursuant to the enclosed submission (which combines the original citizen petition with the aforementioned minor changes), petitioners request FTC fulfill its statutory mandate and institute the requested rulemaking. If FTC does not remedy its unreasonable delay and take final action, petitioners will pursue other remedies under the law.

Sincerely,



Cheryl Leahy
General Counsel

Enclosures

¹15 U.S.C. § 45(a)(2)

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

_____)
Citizens' Petition to Change the)
Labeling Requirements for Eggs)
Sold in the United States)
Updated Version of February 2007 Petition)

Submitted to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Submitted to:

Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
300 12th Street, SW
Room 102, Cotton Annex
Washington, D.C. 20250

Submitted by:

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Citizens' Petition

The undersigned¹ submit this petition pursuant to the Administrative Procedure Act, and specifically 21 U.S.C. sections 321(n), 331, 343, and the Federal Trade Commission Act, 15 U.S.C. § 45, to request that the Federal Trade Commission (“FTC”) take regulatory action to revise the labeling requirements for eggs sold in the United States, to remedy the misleading advertising of the egg labeling field, and to prevent future misleading advertising.

Introduction

The labeling of shell eggs² in the United States today fails to reveal to consumers certain material facts that substantially influence their purchasing decisions. Furthermore, following a

¹ Petitioner Compassion Over Killing, Inc. is a nonprofit animal advocacy organization based in Washington, D.C., representing over 30,000 individual consumers nationwide that, among other things, seeks to correct misleading advertising and educate consumers regarding food production methods. Petitioner Animal Legal Defense Fund (ALDF) is a nonprofit animal advocacy organization based in Cotati, California, representing over 110,000 individual consumers nationwide, which uses the legal system to protect the lives and advance the interests of animals and educate consumers about the treatment of animals in food production. Petitioner Penn Law Animal Law Project is a student-led pro bono project at the University of Pennsylvania Law School, working on legal projects with the goals of improving the lives and legal status of animals and encouraging animal advocacy by supporting advocates and educating the public – including advocating for regulations that would ensure consumers have access to information about how animals are treated during egg production. Petitioner Jennifer Kaplan is an individual with an interest in protecting animals, particularly animals used in agriculture, and in using consumer choice as a tool to that end. Petitioner Andrea Bock (formerly Andrea Collias) is an egg consumer and member of Compassion Over Killing. She is representative of a significant number of Compassion Over Killing members who both consume animal products and are concerned about animal welfare. As an educator and a lifelong animal lover, Andrea strives to make informed and conscientious purchasing decisions to ensure that she obtains products that have been more humanely produced, even if it means paying more for these products. Because of unclear labeling, Andrea routinely experiences confusion and frustration in determining whether the eggs she purchases have been produced in a way that is objectionable to her. After learning that labels often misrepresent the true nature in which eggs have been produced, Andrea feels that she has been misled. Because she lacks specialized knowledge of egg production methods, she fears that this will only continue without clearer labeling requirements. Petitioner Rachel Share is an egg consumer and member of Compassion Over Killing. A vegetarian for most of her life, Rachel is concerned about animal welfare issues and endeavors to purchase food products that have been produced in a more humane manner, regardless of price. Rachel typically purchases eggs bearing an “animal friendly” or “natural” claim on the carton, believing them to have been produced by hens not confined in cages. When she became aware that these egg labels are unregulated and unrelated to actual animal production methods, Rachel felt betrayed and deceived. Now, Rachel is unsure of which eggs to purchase and worries that she may be buying eggs from hens who are confined inside wire battery cages, a practice she strongly opposes on ethical grounds. Rachel represents a segment of the population that is misled by the egg industry’s labels despite an attempt at specialized knowledge and concern over animal treatment.

² The term “shell eggs” is used to indicate eggs in their shells as opposed to egg products such as Egg Beaters™. See *Scrambled Labels: Egg Production in the United States*, CONSUMERS UNION, previously available at

recent increase in consumer interest regarding egg production methods,³ egg labels now commonly employ misleading express and implied claims, which result in a material and significant difference between the product sold and what it purports to be.

A 2000 Zogby International poll of American adults revealed that 86.2 percent of those polled found the common egg industry practice of confining egg-laying hens in densely crowded cages to be unacceptable.⁴ Actual egg production methods are in conflict with public opinion; more than 95 percent of eggs produced and sold in the U.S. come from birds confined in cages.⁵ Moreover, several surveys have shown, and the United States Department of Agriculture (“USDA”) has confirmed, that consumers nationwide are willing to pay substantially more for eggs represented to them as produced under standards that ensure some degree of animal welfare.⁶ In 2001, the USDA, in its “International Egg and Poultry Review,” discussed the impact of consumers’ animal welfare concerns on the industry, noting that “[a]nother key issue affecting egg production worldwide concerns animal welfare and the ethical treatment of

<http://www.eco-labels.org/feature.cfm?FeatureID=1&isPast=1> (last visited Sept. 8, 2006), Ex. 1. The terms “egg[s]” and “shell egg[s]” will be used interchangeably in this petition.

³ *Humane labeling latest niche – American Humane Association certifies food animal producers employing humane standards*, AMERICAN VETERINARY MEDICAL ASSOCIATION (2000),

<http://www.avma.org/onlnews/javma/nov00/s111500d.asp> (last visited Jun 21, 2010), Ex. 2. According to the American Humane Association, 44% of consumers would pay 5% more for food products that provide assurances that animals were “humanely raised.” *Free Farmed™ Certification Questions & Answers*, AMERICAN HUMANE ASSOCIATION, previously available at

http://www.americanhumane.org/site/PageServer?pagename=pa_farm_animals_ff_q_and_a (last visited Sept. 8, 2006) (citing 1999 survey by Animal Industry Foundation), Ex 3.

⁴ *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, REUTERS, CNN, Sept. 20, 2000, at <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited May 20, 2010), Ex. 4; E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), Ex. 5.

⁵ See Sarah Moran, *A Good Egg*, STAR TRIBUNE: NEWSPAPER OF THE TWIN CITIES, December 1, 2008, Ex. 6.

⁶ See, e.g., *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, REUTERS, CNN, Sept. 20, 2000, at <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited May 20, 2010) (indicating that 80.7 % of respondents to 2000 survey by Zogby International would pay more for eggs from chickens raised in “humane” manner), Ex. 4; see also E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), Ex. 5; see also 67 Fed. Reg. 79,552 at 79,554 (Dec. 30, 2002) (“Since some consumers prefer products from animals that have been raised using [free-range] production practices, producers may seek to improve their returns by appealing to such market niches”), Ex. 7. Fifty-eight percent of consumers are willing to pay an additional 10% or more for meat, poultry, or eggs labeled as “humanely raised.” *Frequently Asked Questions*, THE HUMANE TOUCH, 2010 available at <http://thehumanetouch.org/learn-more/faqs> (last visited May 20, 2010), Ex. 8.

animals.”⁷ Given the fact that the public is both unfamiliar with egg production methods and considers them important enough to their purchasing decisions that they will pay more for eggs with perceived higher welfare standards, clear and truthful labeling regulations are needed to protect this market from exploitation. In addition, the public not only supports but recognizes the need for this regulatory scheme, with 80.7 percent of respondents to a survey indicating that they would be willing to pay more for eggs they believe to have been produced in a humane manner.⁸

Pursuant to its statutory mandate, the USDA has begun to regulate animal production method labeling—specifically with regard to the intensive confinement of animals—on certain products.⁹ For example, the National Organic Program requires producers labeling their products as “Organic” to adhere to qualitative animal confinement standards.¹⁰ In 2002, the USDA issued public notice and request for comments regarding livestock and meat industry production/marketing claims,¹¹ including the claims ‘free range,’ ‘free roaming,’ and ‘pasture raised.’¹² Similar provisions have not been adopted for egg labeling. The USDA has also developed and implemented the Process Verified Program (PVP), which actually adds to the

⁷ *Tariff and Non-tariff Barriers*, INT’L EGG & POULTRY REV. (U.S. Dep’t of Agric.), Nov. 13, 2001 at 1, *previously available at* <http://www.ams.usda.gov/POULTRY/mncs/InternationalPoultryandEgg/2001Reports/x111301.pdf> (last visited Sept. 11, 2006), Ex. 9.

⁸ *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, REUTERS, CNN, Sept. 20, 2000, *at* <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited May 20, 2010) (indicating that 80.7 % of respondents to 2000 survey by Zogby International would pay more for eggs from chickens raised in “humane” manner), Ex. 4; E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), Ex. 5.

⁹ *Cf.* Federal Meat Inspection Act, *at* 21 U.S.C. § 601(n)(1) (2006) (prohibiting labeling of meat or meat products that is “false or misleading in any particular”), the Poultry Products Inspection Act, *at* 21 U.S.C. § 453(h)(1) (2006) (prohibiting labeling of poultry products that is “false or misleading in any particular”), *esp.* the Egg Products Inspection Act, *at* 21 U.S.C. §§ 1036(a) (2006) (authorizes USDA to regulate to require egg labels to contain “such other information as the Secretary may require by regulations to describe the products adequately and to assure that they will not have false or misleading labeling”) and 1036(b) (2006) (“No labeling or container shall be used for egg products at official plants if it is false or misleading”).

¹⁰ 7 C.F.R. § 205.239 (2006) (including access to the outdoors and shelter designed to allow for natural maintenance, comfort behaviors, and opportunity to exercise).

¹¹ 67 Fed. Reg. at 79,553 (closing comment period on March 31, 2003), Ex. 7; *see also Food Safety and Inspection Service: Labeling of FSIS-Regulated*, USDA, at 21, *at* <http://www.fsis.usda.gov/OPPDE/larc/Policies/Label101/Label101.PPT> (last visited June 22, 2010) Ex. 10.

¹² 67 Fed. Reg. at 79,554, Ex. 7.

confusion in the marketplace, rather than providing a comprehensive labeling structure to provide accurate and clear information to the consuming public. Not only has the USDA declined to comprehensively or clearly regulate egg labels, but the FDA, which has an identical statutory mandate to the USDA's, has also elected not to regulate this area. Given the prevalence of misrepresentation of egg production methods (discussed below) FTC, which has primary authority over deceptive trade practices,¹³ should remedy this by instituting the regulatory scheme sought in this petition.

At the point of purchase, consumers interested in specific egg production methods must rely on information provided on the egg carton. The omission of production practices on egg cartons, compounded with the misleading representations regarding these products, impedes the free flow of important information to the consumer. As described in more detail below, examples of misrepresentations on cartons of eggs produced by birds confined in cages include imagery of hens outside or lying on nests, as well as language suggesting a level of animal care that is inconsistent with actual farm practices, such as "Animal Friendly," and "Naturally Raised." Furthermore, given the nutritional inferiority of eggs laid by caged versus pastured free-range hens, many express or implied misrepresentations about the level of care given to caged hens amounts to a misrepresentation about the quality and nutritional content of the product.¹⁴

Egg labels make both factual misrepresentations and imply hens' living conditions through imagery, both of which can constitute prohibited forms of misbranding under federal fair labeling laws.¹⁵ FTC is required to take action to remedy and prevent this.¹⁶ Moreover, the

¹³ See, e.g., *Working Agreement Between FTC and FDA*, 4 TRADE REG. REP. (CCH) ¶ 9,850.01 (1971), Ex. 9; see also *Enforcement Policy Statement on Food Advertising*, FTC, May, 1994, at 2, available at <http://www.ftc.gov/bcp/policystmt/ad-food.htm> (last visited June 22, 2010), Ex. 11.

¹⁴ See *infra* at pp. 25-28 (discussing nutritional inferiority of cage-produced eggs relative to pastured free-range eggs and FDA's mandate to cure mislabeling of cage-produced eggs, which obfuscates the nutritional discrepancy).

¹⁵ See, e.g., 21 U.S.C. § 331(a)-(c), (g) (2006) (prohibiting misbranding of food); 21 U.S.C. § 343 (2006) (defining misbranded food); 21 U.S.C. § 321(n) (2006) (describing factors considered in determining whether labeling or

prevalence and recent increase of such misrepresentations demand that FTC go beyond merely exercising its ad-hoc enforcement authority and take general corrective regulatory action by promulgating new regulations, provided herein, pursuant to its statutory mandate.

Action Requested

Petitioner requests that FTC take regulatory action to revise the current labeling requirements for eggs, currently found at Title 21 of the Code of Federal Regulations, Chapter I, Subchapter B, Parts 101, 115, and 160, and/or to promulgate new regulations pursuant to the statutory authority cited herein, to effectuate the following requirement:

(a) For the purposes of this regulation:

(1) The term “egg” means the shell egg of the domesticated chicken, turkey, duck, goose, or guinea. The term “hen” refers to a female domesticated chicken, turkey, duck, goose, or guinea.

(2) The term “cage” means a structure for confining birds, enclosed on at least one side by a grating of wires or bars that lets in air and light, in which hens do not have the ability to fully spread their wings without touching the sides of that enclosure or other birds.

(3) The term “barn” means a building used for sheltering animals used for food production.

(4) The term “label” means a display of written, printed, or graphic matter upon the immediate container of any article. “Container” means any package or other carton in which shell eggs are packed for household or other ultimate consumers.

(b) All eggs that are moved or are moving in commerce to be sold for retail sale in the United States shall bear the appropriate one of the following designations on their labels:

(1) The labels on egg containers containing eggs that are laid by hens that are not confined to cages, and are given readily and easily available access to outdoor pastures which all hens can access at once, with living vegetation and accessible overhead cover, for the period of their lives during which they produce eggs,

advertising is misleading). *See generally* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-99 (2006) (enacted June 25, 1938).

¹⁶*See, e.g., Working Agreement Between FTC and FDA*, 4 TRADE REG. REP. (CCH) ¶ 9,850.01 (1971), Ex. 11.

excluding actual transport or during the provision of veterinary care by a licensed veterinarian though not for a period to exceed ten (10) days shall bear the designation "Free-Range Eggs."

(2) The labels on egg containers containing eggs that are laid by hens that are not confined to cages but kept in a barn or other enclosed structure in which they are permitted to move freely for the period of their lives during which they produce eggs, excluding actual transport or during the provision of veterinary care by a licensed veterinarian though not for a period to exceed ten (10) days shall bear the designation "Cage-Free Eggs."

(3) The labels on egg containers containing eggs that are laid by hens that are confined to a cage for any period of their lives during which they produce eggs, excluding actual transport or during the provision of veterinary care by a licensed veterinarian though not for a period to exceed ten (10) days, shall bear the designation "Eggs From Caged Hens."

(c) The appropriate designation shall be printed so as to appear prominently and conspicuously on the principal display panel of the egg container in a type size no smaller than 1/8th of an inch and placed with such conspicuousness as to render it likely to be read and understood by ordinary individuals under customary use.

(d) This regulation shall be implemented no later than 360 days following its adoption.

FTC is authorized to take all of the requested actions under the Federal Trade

Commission Act, 15 U.S.C. § 45(a)(1).

Statement of Grounds

I. Factual Grounds

A. Unregulated production method labeling of eggs misleads consumers.

Unregulated egg labeling is a widespread source of consumer confusion and misplaced reliance on animal welfare claims that are ultimately false or misleading. For example, a recent *Consumer Reports* discussion warns consumers of food labeling that is persuasive but "meaningless" because of the lack of government standardization to back up the terms.¹⁷

¹⁷ See *Food labels can be misleading*, CONSUMER REP., Feb. 2006, previously available at <http://www.consumerreports.org/cro/food/organic-products-206/food-labels-can-be-misleading/> (last visited Sept. 8, 2006), Ex. 13. Only 2% of more than 2000 Americans responding to a Harris Interactive poll were able to correctly identify the definition of "natural" as applied to meat and poultry. *Natural labeling poll*, HARRIS INTERACTIVE

Specifically named are the terms “free-range” or “free-roaming.” The reports states that “stamped on eggs, chicken, and other meat, this label suggests that an animal has spent a good portion of its life outdoors. But U.S. government standards are weak.”¹⁸ Egg labeling is not given even this level of protection. A recent comprehensive study assessing product labeling claims, industry quality assurance guidelines and third party certification standards determined that “various humane certification and labeling programs have been developed in response to growing popular concerns about the cruel treatment of farm animals, but their impact at improving animal welfare has been minimal. Food labeling and marketing claims, like ‘grass fed’ and ‘cage-free,’ are generally subjective and not verified.”¹⁹ The report went on to note that “[a]s a result, a significant portion – likely a majority – of poultry and eggs marketed under these claims in the U.S. are produced in a manner inconsistent with the public’s expectations. . . . Due to inconsistency in their application, the claims ‘free-range’ and ‘free roaming,’ particularly when used with poultry and laying hens, are among the least relevant to animal welfare.”²⁰ Discussing product labeling claims in general, the report concludes that “[i]t is likely consumers grossly over-estimate the animal welfare significance of these claims.”²¹ Because of this consumer demand for higher animal welfare standards in the context of an unregulated labeling

QUICKQUERY, 2009, available at <http://www.awionline.org/ht/a/GetDocumentAction/i/21889>, (last visited August 2, 2010), Ex. 14.

¹⁸ See *Food labels can be misleading*, CONSUMER REP., Feb. 2006, previously available at <http://www.consumerreports.org/cro/food/organic-products-206/food-labels-can-be-misleading/> (last visited Sept. 8, 2006), Ex. 13. A recent Christian Science Monitor article likewise warns consumers that “producers use labels such as “free-range” or “natural” that conjure up bucolic images but may mean very little . . . Free-range or cage-free: No regulation or standard definition exists for most animals. The USDA regulates the use of the term ‘free-range’ with poultry (not eggs) . . .” Amanda Paulson, *As ‘organic’ goes mainstream, will standards suffer?*, CHRISTIAN SCI. MONITOR, May 17, 2006, available at <http://www.csmonitor.com/2006/0517/p13s01-lifo.html> (last visited May 20, 2010), Ex. 15; see also Melinda Fulmer, *Eco-labels on food called into question*, L.A. TIMES, Aug. 16, 2001, at C1, available at <http://www.organicconsumers.org/Organic/ecolabel082801.cfm> (last visited May 20, 2010), Ex. 16.

¹⁹ See FARM SANCTUARY, FARM ANIMAL WELFARE: AN ASSESSMENT OF PRODUCT LABELING CLAIMS, INDUSTRY QUALITY ASSURANCE GUIDELINES AND THIRD PARTY CERTIFICATION STANDARDS 8 (2005), Ex. 17.

²⁰ *Id.* at 68.

²¹ *Id.* at 85.

market, this confusion and ineffectiveness in labeling thrives. Mere voluntary private standards are inadequate to protect against producers misleading consumers.

In fact, there is a special market incentive for sellers to employ deceptive and misrepresentative labeling in the context of egg sales. Recent widely distributed survey evidence has shown that representations regarding welfare-related animal production methods can dramatically increase marketability, with polls indicating that 80.7 percent of respondents would be willing to pay more for eggs from hens raised in what they perceive to be a “humane” manner, 54 percent of consumers would be willing to spend 5-10 percent more for animal welfare standard certified eggs, and an additional 10 percent would be receptive to paying 15-20 percent more for such certified products.²² Given this demand for higher animal welfare standards in egg production, egg manufacturers are faced with a significantly increased profit potential if they capitalize on this market niche. Without government standards regulating any animal welfare aspect of egg production, companies have an incentive to make a profit without actually meeting consumer expectations.

This incentive is especially alluring, and has resulted directly in the prevalent misrepresentation described herein, as consumers have indicated that many common egg production methods are unacceptable. For instance, in September 2000, Zogby International conducted a poll of U.S. consumers which showed that 86.2 percent of respondents found it unacceptable to densely crowd hens in cages.²³ The strong majority of the public that disapproves of confining hens in cages is in stark contrast to the 95 percent of eggs that come

²² *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, REUTERS, CNN, Sept. 20, 2000, at <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited May 20, 2010), Ex. 4; E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), Ex. 5.

²³ *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, REUTERS, CNN, Sept. 20, 2000, at <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited May 20, 2010), Ex. 4; E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), Ex. 5.

from birds confined in cages.²⁴ Some data further suggest that consumers equipped with greater information about egg production methods will increasingly purchase cage-free eggs, and be less apt to purchase conventionally produced eggs.²⁵

To take a specific example, a recent Zogby poll showed 61 percent of consumers prefer to purchase products with the claim “natural” on its packaging, and almost half (48 percent) believe that the “natural” claim indicates that the animals had access to the outdoors.²⁶ However, as discussed *infra*, egg cartons often display claims such as “natural,” and there is no regulation of the term to mitigate its confusing effects with respect to animal welfare. Even the USDA is considering regulation of the use of “natural” to include animal welfare considerations because of its confusing nature.²⁷ In fact, it is animal industry producers and processors who asked the USDA to regulate this term, citing the current definition (which does not even apply to eggs²⁸) as “vague and confusing to consumers.”²⁹ The egg industry is riddled with confusing and misleading imagery and claims such as this one; specific examples are discussed *infra*. Because of a lack of regulation, these claims imply to consumers a false standard of care that causes them to buy a product they otherwise would not buy.

²⁴ See Sarah Moran, *A Good Egg*, STAR TRIBUNE: NEWSPAPER OF THE TWIN CITIES, December 1, 2008, Ex. 6.

²⁵ See Matthew Liebman, ANIMAL LEGAL DEFENSE FUND: REFLECTIONS ON PROPOSITION 2 AND CONSUMER CHOICES (2010), <http://www.aldf.org/article.php?id=1373> (last visited Jun 21, 2010) (citing the correlation between the increased consumer awareness in California of egg production methods following Proposition 2, and the corresponding 180% increase in demand for cage-free eggs, 20% increase in purchase of organic eggs, and decline in demand for battery-cage produced eggs), Ex. 18.

²⁶ E-mail from Rebecca Wittman, Zogby International, to Gene Baur, President of Farm Sanctuary, (January 10, 2007), Ex. 19.

²⁷ *Meetings and Events: FSIS to Hold a Public Meeting to Help Define ‘Natural’ Label*, USDA FOOD SAFETY AND INSPECTION SERVICE, Dec. 4, 2006, at http://www.fsis.usda.gov/News_&_Events/NR_120406_01/index.asp (last visited Aug. 3, 2010), Ex. 20.

²⁸ Currently, “natural flavoring” is regulated by 9 C.F.R. 317.2 (2007), 9 C.F.R. 381.118 (2007), and 21 C.F.R. 101.22, which is irrelevant in the context of shell eggs, and egg label regulations, 9 C.F.R. 590.411 (2007) make no reference to “natural” claims on egg packaging, although misleading advertising is purportedly proscribed.

²⁹ *Producers, Processors Ask USDA to Extend Definition of ‘Natural’*, CATTLE NETWORK, Dec. 13, 2006, available at <http://www.cattlenetwork.com/Producers--Processors-Ask-USDA-To-Extend-Definition-Of--Natural/2006-12-13/Article.aspx?oid=735597> (last visited Aug. 3, 2010), Ex. 21.

As one would expect, if the current and most common egg production methods are unacceptable to a majority of consumers, and low knowledge of production methods is common, sellers have even greater incentive to employ misrepresentations. Sellers nationwide have clearly caved to these incentives, engaging in widespread misrepresentations, and creating the necessity for the corrective regulations called for herein. Given the widespread disapproval of caged confinement, it is logical to infer that consumers aware of the true conditions of these animals – that they were in fact caged – would be much less likely to buy the product. Lack of regulation in this area therefore creates a very real risk that egg companies’ misrepresentations are causing people to buy products they otherwise would not buy. These misrepresentations violate federal law,³⁰ and specifically FTCA.

B. Misleading egg labels are common in the national market.

Consumers shopping for eggs in grocery stores are faced with many examples of potentially misleading labels. A few examples of both misleading factual claims and misleading imagery follow.

1. Factual representations

(a) *Harris Teeter (“HT”) “All Natural” eggs* - Egg cartons found at a Harris Teeter supermarket as part of HT’s “Naturals” line make the claim that they are “Animal Friendly.”³¹ However, HT “Naturals” has two lines of eggs – one is explicitly cage-free and the other makes no such claim. However, both claim to be “Animal Friendly.” This strongly suggests the label with no “Cage-free” claim contains eggs which come from caged birds, which likely contradicts consumer expectations of “Animal Friendly” eggs. Furthermore, labeling on the interior of the carton makes claims that the hens are “happy chickens” who are “lucky enough” to lay HT line

³⁰ *U.S. v. Articles of Drug*, 263 F.Supp. 292 at 216 (D.C. Neb. 1967).

³¹ *Harris Teeter “All Natural Eggs” Egg Carton Image*, Ex. 22.

eggs. They also state that that their hens are “gently cared for.” That these additional claims are made on the interior of the carton makes the claims no less likely to mislead, as most egg purchasers open egg cartons prior to purchase to ensure that none of the eggs are cracked or damaged.

(b) *Farm Fresh “Animal Friendly” eggs*³² – An in-store advertisement at Farm Fresh grocery store conveys that hens producing its private label eggs are treated in an “Animal Friendly” manner that is likely to be inconsistent with consumers' expectations of what that term means. Further information about this claim is not readily available in stores or on Farm Fresh's website, but evidence suggests these eggs are from hens confined in cages.³³

(c) *Giant “Nature’s Promise” Omega-3 Natural Brown Eggs* – The Giant supermarket store brand claims on its carton that its eggs are from “naturally raised hens.”³⁴ The idea that an animal is “naturally raised” conveys to the consumer that the living conditions of these hens are traditionally natural – i.e. that the hens are able to nest, roost, and move about freely in natural outdoor settings. Merely having a diet free of antibiotics, synthetic pesticides, and hormones is not adequate to represent consumer impressions of “raising” an animal. “Raising” implies more than just diet; consumers may logically consider “naturally raised” hens to have had natural – outdoor, free-range – living conditions. However, evidence suggests these birds are raised in cages. Giant has two other lines of “Nature’s Promise” eggs that are labeled “Cage-free” and “Organic,” which are both described on their website as having “access to the outdoors,” yet no such claim is made on the “Omega-3 Natural Brown Eggs” line.³⁵

³² *Farm Fresh Supermarket Image of In-Store Poster, “AA Eggs,”* Ex. 23.

³³ *Farm Fresh Supermarket,* at <http://www.farmfreshsupermarkets.com/> (last visited May 20, 2010), Ex. 24.

³⁴ *Giant “Nature’s Promise” Omega-3 Natural Brown Eggs Carton Image,* Ex. 25.

³⁵ *Giant Brands: Welcome!,* GIANT, previously available at http://www.giantfood.com/brands/natures_promise.htm (last visited Sept. 19, 2006), Ex. 26. The packing code on the carton is 1153, which corresponds to Sauder's packing plant in Pennsylvania. *List of Plants Operating under USDA Poultry and Egg Grading Programs,* AMS AT USDA, previously available at http://www.ams.usda.gov/plantbook/Query_Pages/plant_results.asp (last visited Sept. 19,

(d) *Cal-Maine*³⁶ — Cal-Maine’s “Sunny Meadow” eggs are misleading to consumers because the brand name itself suggests a free-range environment for hens. In particular, the “Sunny Meadow” title implies that the eggs are produced by hens living in natural surroundings and are afforded the ability to roam freely in spacious, “sunny meadows.” In reality, Cal-Maine is the largest producer of shell eggs in the country, confining millions of hens in battery cages where they are unable to roost, roam freely, or engage in many other natural behaviors.³⁷ Cal-Maine offers two other lines of eggs under “Farmhouse” and “Eggland’s Best” brands, both of which are advertised as “Cage-free” and “All Natural.” Even though these claims are unregulated and unverifiable at the point of purchase, no similar production method claim is made for “Sunny Meadow” eggs, indicating that the Sunny Meadow eggs are likely produced by hens housed in a conventional battery cage facility, yet the marketing implies otherwise. This causes consumer confusion and hinders the average shopper’s ability to distinguish specialty eggs from the ones that merely purport to be.

(e) Nature’s Design³⁸ “*All Natural Farm Fresh Eggs*” — These cartons proclaim that the eggs within are “all natural” and “farm fresh,” giving the impression that their hens enjoy a “natural” lifestyle and have free-run of a picturesque “farm.” In reality, the carton’s USDA plant number³⁹ appears to indicate that these are eggs produced in caged facilities, ensuring that neither of these impressions could be true.

2006), now available at http://apps.ams.usda.gov/plantbook/Query_Pages/PlantBook_Query.asp (last visited Aug. 5, 2010), Ex. 27. Evidence suggests Sauder’s is a battery egg supplier. See *Caged Hens/Eggs*, SAUDER’S EGGS, at http://www.saudereggs.com/caged_hens.html (last visited May 20, 2010) (praising the “advantages” of the caging system and criticizing cage-free production), Ex. 28.

³⁶ *Cal-Maine’s “Sunny Meadow” Eggs*, available at <http://www.coastgrocery.com/pages/Products/798> (last visited May 20, 2010), Ex. 29.

³⁷ *Company*, CAL-MAINE FOODS, INC., previously available at <http://www.calmainefoods.com/company.htm> (last visited Nov. 12, 2008), Ex. 30.

³⁸ See *Nature’s Design “All Natural Farm Fresh Eggs,” carton image*, Ex. 31.

³⁹ See carton image showing USDA plant number, Ex. 31.

(f) Wild Harvest Natural “*Natural Grade A Omega-3 Large White Eggs*”⁴⁰ – The inside of the carton states that the eggs are the “best quality Omega-3 egg for your table,” which, given the documented nutritional inferiority of caged-produced eggs, could reasonably lead a consumer to believe the eggs are produced in a pastured free-range egg-production facility. However, the USDA plant number on these cartons indicates that they are sourced from a conventional battery-cage facility, despite the heightened nutritional claims.⁴¹ Additionally, the inside label makes explicit as well as implicit animal welfare claims, stating that “On a daily basis, Wild Harvest supports sustainable family farms and humane animal care in order to bring you the purest farm fresh eggs around.” Reasonable consumers likely do not envision conventional battery cage production when informed that the product supports “humane animal care,” nor do they envision battery cage production when told that the eggs are the “purest farm fresh eggs around” and see images of “family farms” used.

(g) Hillandale Farms “*All Natural Brown Eggs*”⁴² – Labels such as “farm fresh” are employed, and the carton also depicts a charming barn resting upon an open, green pasture overlooking a sunset. The combined effect of these express and implied claims is to mislead the consumer into thinking that these eggs are obtained from facilities other than the battery cage systems actually in use, perhaps one where the laying hens have even minimal access to the outdoors.

⁴⁰ See Wild Harvest Natural “*Natural Grade A Omega-3 Large White Eggs*” carton image at Ex. 32.

⁴¹ See Wild Harvest Natural “*Natural Grade A Omega-3 Large White Eggs*” carton image showing USDA plant number at Ex. 32. The plant number (1153) was linked to a P.O. Box address, but Radlo Foods brand eggs were branded with the same plant number, and that package explicitly states “from caged hens.”

⁴² See Hillandale Farms “*All Natural Brown Eggs*” carton image, Ex. 33.

2. Misleading imagery

(a) *Olivera Egg Ranch "Ranch Pak Eggs"* - The Ranch Pak egg carton depicts a chicken on a nest incubating her eggs.⁴³ This implies Olivera hens have the opportunity to nest and lie on their eggs. In fact, the owner of Olivera Egg Ranch, Ed Olivera, has made a public statement about his hens being caged and praising the caging system.⁴⁴ Hens confined in cages never have the opportunity to nest or lie on their eggs, Olivera's nesting imagery is misleading.

(b) *Rose Acres "White Shell Eggs"* - Rose Acres produces several lines of eggs available in the retail market including "White Shell Eggs," "Brown Shell Eggs," and "Free-Roaming Cage-Free Eggs." While the imagery on the "Free-Roaming Cage-Free Eggs" depicts hens outside, and its website states it is "proud to offer Free-Roaming eggs which come from chickens that are kept in an open, cage-free hen house," no such claims are made regarding its "White Shell Eggs." Yet the imagery on these cartons also depicts hens outside in a similar free-roaming manner, able to peck at the ground and nest.⁴⁵ The availability of cage-free products, and that no such claims are made on the "White Shell Eggs," suggests that the implied claim on the "White Shell Eggs" is contrary to Rose Acres' actual production methods, which employ cage confinement.⁴⁶

(c) *Wilcox Farms, "All Natural White"*⁴⁷ - Wilcox Farms offers several lines of eggs including "All Natural White" and "Cage-Free." The packages of its "Cage-Free" eggs are

⁴³ *Olivera Egg Ranch "Ranch Pak Eggs" carton image*, Ex. 34. Ranch Pak Eggs are produced by Olivera Egg Ranch; this is known because of the plant code, 1463, visible on Ex. 34, and able to be tracked through USDA's website, at *List of Plants Operating under USDA Poultry and Egg Grading Programs*, AMS AT USDA, previously available at http://www.ams.usda.gov/plantbook/Query_Pages/plant_results.asp (last visited Sept. 11, 2006), now available at http://apps.ams.usda.gov/plantbook/Query_Pages/PlantBook_Query.asp (last visited Aug. 5, 2010), Ex. 27.

⁴⁴ Matt King, *Free-range Ranch Plans*, THE GILROY DISPATCH, August 23, 2005, available at <http://www.gilroydispatch.com/news/contentview.asp?c=166871> (last visited May 20, 2010), Ex. 35.

⁴⁵ *Sales*, ROSE ACRE FARMS, at <http://www.roseacre.com/sales.html> (last visited May 20, 2010), Ex. 36.

⁴⁶ Rose Acres apparently calls its cage confinement systems "pens." *Common Questions, (Question 9)*, ROSE ACRE FARMS, <http://www.roseacre.com/eggfaq.html> (last visited May 26, 2010), Ex. 37.

⁴⁷ *Large All Natural White Eggs*, WILCOX FAMILY FARMS, available at http://www.wilcoxfarms.com/consumer/pop/large_all_natural_18.html (last visited June 29, 2010), Ex. 38.

clearly marked as such and further depict hens outside. In addition, its website states: “All of the hens producing eggs for the Wilcox Cage-free label are free to run, preen and socialize proudly.”⁴⁸ Although no production method claims are made on its packages of “All Natural White” or on its website, the “All Natural White” cartons also include similar imagery of hens outside in a field,⁴⁹ though this is unlikely to accurately represent the method of production employed to produce these eggs, which are likely from caged hens.

(d) *Safeway* - The Safeway supermarket store brand depicts two hens foraging outside on its carton of Grade A Large Eggs.⁵⁰ One hen is pictured foraging on the ground, suggesting that the hens used to produce these eggs are allowed to move freely, socialize with one another, and are granted access to the outdoors. Yet, the carton bears no “free roaming” label like Safeway’s cartons from free-range hens, indicating that these eggs are most likely from hens confined in cages who are not actually provided the level of care depicted in the image.⁵¹

(e) *Nucal Foods*, “*White Eggs*”⁵² — This egg production facility, located in California, offers white eggs for sale under the name “California’s Finest Eggs Brand.” The egg carton features a chicken roosting on a fence in the middle of an open field, an image that falsely suggests to consumers that hens laying these eggs are raised in a free-range setting. However,

⁴⁸ *Egg Products: Wilcox Cage-free*, WILCOX FAMILY FARMS, previously available at <http://www.wilcoxfarms.com/cagefree.html> (last visited Sept. 11, 2006), Ex. 39.

⁴⁹ *Large All Natural White Eggs*, WILCOX FAMILY FARMS, available at http://www.wilcoxfarms.com/consumer/pop/large_all_natural_18.html (last visited June 29, 2010), Ex. 38.

⁵⁰ See *Lucerne “Grade A Eggs”* carton image, Ex. 40.

⁵¹ The plant tracking number on a carton of Lucerne Eggs from a Washington, D.C. Safeway is 1915. According to the USDA website, that tracking number corresponds with Shady Brae Farms. *List of Plants Operating under USDA Poultry and Egg Grading Programs*, AMS AT USDA, previously available at http://www.ams.usda.gov/plantbook/Query_Pages/plant_results.asp (last visited Sept. 11, 2006), now available at http://apps.ams.usda.gov/plantbook/Query_Pages/PlantBook_Query.asp (last visited Aug. 5, 2010), Ex. 40. The Shady Brae farms facility has over 500,000 hens, manure which is stored below the hens, and a Google images search shows what appears to be long barns; all of these indications are consistent with cage production, making it likely that the Shady Brae Lucerne eggs are from caged hens. *Shady Brae Farms Google Satellite Image*; Penn Future, “Permitted and Pending Concentrated Animal Feeding Operations in Pennsylvania,” available at <http://www.pennfuture.org/UserFiles/CAFOPermittingSpreadsheet.pdf> (last visited September 20, 2010), Ex. 40.

⁵² *Nucal Foods’ “White Eggs,”* available at http://www.nucalfoods.com/egg_info_our_Variety.aspx (last visited Nov. 12, 2008), Ex. 41.

without further marketing claims regarding production methods, it is more likely than not that these eggs are produced by hens confined in cages, contrary to the depiction.⁵³

C. Production method claims are especially material.

Misrepresentations regarding production method have a specialized effect on consumer choice in various ways that demand comprehensive and corrective government regulation, to a greater extent than is demanded by other types of misrepresentations. This is because production method claims such as hen caging conditions are difficult to verify by sensory perception at the time of purchase or afterward. A consumer cannot evaluate merely by looking at or eating an egg whether it was produced by a hen confined in a cage, in the way that she can verify whether a frozen steak is fresh by either looking at it or tasting it. Cage-free eggs are an example of “credence” goods. Economic goods are often classified as “search,” “experience”, or “credence” goods. USDA economists explain:

Search goods are those for which consumers examine product characteristics, such as price, size, and color, before purchasing. Experience goods are those for which consumers evaluate attributes after purchasing the product. For example, consumers choose particular brands of canned tuna without sampling the product first. Credence goods have attributes that consumers cannot evaluate even in use. For example, consumers cannot inspect particular produce items and determine whether they were grown organically or whether they are the result of biotechnology. Consumers cannot inspect canned tuna and determine if the tuna was caught without harming dolphins.⁵⁴

⁵³ Nucal carries a few different lines of eggs laid by free roaming hens, including its “Crack A Smile” and “Horizon Organic” brand eggs. It also produces eggs from cage-free hens, under the “Eggland’s Best,” “Nest Best,” and “Cal Egg” brands. Nucal also offers for sale eggs produced by free-range hens. Each of these egg cartons boasts a free roaming, cage-free, or free-range claim, indicating that Nucal’s “White Eggs” come from caged hens. *Id.* In addition, Nucal sources eggs from cage production; a Nucal supplier, Gemperle, was investigated by animal advocacy group Mercy For Animals in 2008. The investigation showed cage production as well as many animal treatment concerns. *See California Egg Farm Investigation*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/caeggs/> (last visited September 20, 2010), Ex. 41.

⁵⁴ Elise Golan, Fred Kuchler & Lorraine Mitchell, *ECONOMICS OF FOOD LABELING, AGRICULTURAL ECONOMICS REPORT*, U.S. DEP’T OF AGRIC., NUMBER 793 (2000) at 7, reprinted in Elise Golan, Fred Kuchler & Lorraine Mitchell, *Economics of Food Labeling*, 24 *Journal of Consumer Policy* 117 (June 2001) (internal citations omitted), Ex. 42.

Cage-free eggs are credence goods just like the tuna. In both cases, consumers cannot evaluate whether animals were harmed in the production method merely by consuming or inspecting the product. In fact, essentially all animal welfare characteristics of food products make them credence goods, as consumers cannot readily determine how animals were treated during production. Animal welfare claims on products, such as egg production method labeling, are classic examples of asymmetric information. The producer has more information and more access to that information (i.e. exactly how the eggs were produced) than the consumer does, increasing the likelihood that the consumer will buy a lower quality good due to its production method (e.g. eggs from hens confined in cages) than they intend to buy.⁵⁵ This risk is especially high where the final products themselves are apparently similar, but one is lower quality because of its production method. Producers do not have sufficient incentive to voluntarily label their products – in fact they have an incentive not to. As a result, the market does not supply enough information to allow consumers to make purchasing choices mirroring their individual preferences.⁵⁶ This creates a market failure, driving the higher-quality goods (e.g. cage-free eggs) unfairly from the market and deceiving consumers in their purchases.⁵⁷

⁵⁵ Blandford and Fulponi (1999) explain:

Where producers are willing to supply products conforming to animal welfare principles, but consumers are not able to distinguish between these and other goods, there is a dysfunction in the market. Many goods produced by the food industry are best qualified as credence type goods, since their quality cannot be discerned by consumers prior to or after purchase. By definition, a credence type good implies a market with imperfect information: asymmetric information between the buyer and seller, thus a specific type of market failure. Since consumers are not able to distinguish by quality (animal friendly), they may choose the lower quality good and this may drive the higher quality good from the market. Labeling is the standard prescription for dealing with different qualities while permitting consumer choice.

David Blandford & Linda Fulponi, *Emerging Public Concerns in Agriculture: Domestic Policies and International Trade Commitments*, 26(3) EUR. REV. OF AGRIC. ECON., at 409 (1999), Ex. 42.

⁵⁶ See Golan, Kuchler & Mitchell, *supra* note 54, at 13, Ex. 42.

⁵⁷ See Blandford & Fulponi, *supra* note 55, Ex. 43.

The information asymmetries and market failures surrounding credence goods justify government intervention, especially in the context of the widespread misrepresentations in egg labeling, and such corrective action will improve economic efficiency by helping consumers to target expenditures toward products they most want. USDA economists explain that, under asymmetric information:

mandatory labels targeting asymmetric information are designed to provide consumers with greater access to information and to increase the efficiency of the market. The objective of government intervention in these types of cases is not so much to alter consumption behavior but to increase informed consumption *effective labeling hinges on the existence of standards, testing, certification, and enforcement services. . . . The government must ensure that quality standards in question are clear and achievable; that testing services, if necessary, are available to measure the validity of labeling claims; that producers (and consumers) are able to certify or otherwise prove the validity of the quality claim; and that a mechanism for enforcing labeling rules exists, including a mechanism to punish producers who make fraudulent claims.*⁵⁸

Especially in light of the special impact misrepresentations have in this context, FTC must take comprehensive and preventative action in the form of the proposed regulatory scheme in order to fulfill its mandate to halt the widespread mislabeling of eggs in the United States marketplace.

D. Recent studies demonstrate the nutritional inferiority of cage-produced eggs to pastured free-range eggs, thereby increasing the need to prevent misleading labels on cage-produced eggs

A 2007 study analyzed and compared the nutritional content of free-range eggs from hens raised in a pastured setting as compared to USDA's reported nutritional content data for commercial eggs.⁵⁹ The eggs tested were from 14 farms across the country, and the results indicated a dramatic difference between the typical commercial eggs (from caged hens) and the free-range pastured eggs in the study. For example, the tested pastured eggs had twice the

⁵⁸ *Id.* at 13-15 (emphasis added).

⁵⁹ *Meet Real Free-Range Eggs*, MOTHER EARTH NEWS, available at <http://www.motherearthnews.com/Real-Food/2007-10-01/Tests-Reveal-Healthier-Eggs.aspx> (last visited May 21, 2010), Ex. 44.

Omega-3 fatty acids,⁶⁰ one fourth less saturated fat,⁶¹ and one third less cholesterol⁶² than conventionally produced (cage) eggs.⁶³

Additional studies have confirmed the nutritional inferiority of eggs from caged hens. In 1974, the *British Journal of Nutrition* published an article which concluded that pastured eggs had 50 percent more folic acid and 70 percent more vitamin B₁₂ than eggs from hens confined in factory farms.⁶⁴

The nutritional differences with respect to B₁₂ are material to any consumer concerned about nutrition and health. However, this is especially material to vegetarians. Vitamin B₁₂ occurs naturally only in foods of animal origin and thus vegetarians who limit their intake of animal products have a more material interest in obtaining B₁₂ from the sources they choose.⁶⁵ Vegetarians made aware of these studies may therefore deliberately purchase eggs they believe to be from free-range pastured hens in the hopes of preventing a vitamin B₁₂ deficiency.

Moreover, in a 1988 study, Dr. Artemis Simopoulos, President of the Center for Genetics, Nutrition and Health, found that pastured eggs in Greece contained 13 times more omega-3

⁶⁰ According to FDA, Omega-3 fatty acids are important to reduce the risk of coronary heart disease, which resulted in FDA's announcement of a qualified health claim for reduced risk of coronary heart disease on certain conventional foods containing Omega-3 fatty acids. See *FDA Announces Qualified Health Claims for Omega-3 Fatty Acids*, UNITED STATES FOOD AND DRUG ADMINISTRATION, available at <http://www.fda.gov/SiteIndex/ucm108351.htm> (last visited Nov. 12, 2008), Ex. 45.

⁶¹ A high intake of saturated fat is linked to high blood cholesterol, stroke, diabetes, and an increased risk of coronary heart disease. See Paula Kurtzweil, *The New Food Label: Help in Preventing Heart Disease*, FDA CONSUMER MAGAZINE (Dec. 1994), available at http://findarticles.com/p/articles/mi_m1370/is_n10_v28/ai_15955606/ (last visited Aug. 3, 2010), Ex. 46; see also *Diabetes, Heart Disease, and Stroke*, NATIONAL DIABETES INFORMATION CLEARINGHOUSE, available at <http://diabetes.niddk.nih.gov/dm/pubs/stroke/> (last visited May 26, 2010), Ex. 47.

⁶² Cholesterol consumption is linked to atherosclerosis, heart disease, stroke, and other health problems. See *Keeping Cholesterol Under Control*, FDA CONSUMER MAGAZINE (Jan./Feb. 1999), previously available at http://www.fda.gov/fdac/features/1999/199_chol.html, now available at <http://www.enotalone.com/article/8601.html> (last visited Aug. 3, 2010), Ex. 48.

⁶³ *Meet Real Free-Range Eggs*, MOTHER EARTH NEWS, available at <http://www.motherearthnews.com/Real-Food/2007-10-01/Tests-Reveal-Healthier-Eggs.aspx> (last visited May 21, 2010), Ex. 44.

⁶⁴ A. Tolan, Jean Robertson, C.R. Orton, M.J. Head, A.A. Christie & Barbara A. Millburn, *Studies on the Composition of food: the chemical composition of eggs produced under battery, deep litter and free-range conditions*, 31 BRITISH JOURNAL OF NUTRITION 185 (1974), Ex. 49.

⁶⁵ *Id.*

polyunsaturated fatty acids than U.S. commercial eggs.⁶⁶ Based on subsequent studies, Dr. Simopoulos has concluded that “the depletion of the (n-3) [omega-3] fatty acids in Western diets is the result of agribusiness [and] modern agriculture.”⁶⁷ The traditional Mediterranean diet, with its much lower intake of (n-6) fatty acids and higher intake of (n-3) fatty acids, has been shown to reduce the risk of cardiovascular disease and cancer.⁶⁸ Therefore, eggs rich in (n-3) (Omega 3) fatty acids, which have been shown to come from pastured free-range hens, have been scientifically proven to be nutritionally superior to those from caged hens.

More recent studies corroborate these findings. A Pennsylvania State University study recently compared eggs from two groups of “Hy-Line Variety Brown” hens. The first group of hens (“caged hens”) was managed in a commercial facility and raised on a diet standard of the industry (commercial mash), while the other group (“pastured hens”) was allowed to forage different pasture plants and thus raised on a diet of mixed grass and legume plants, supplemented by commercial mash.⁶⁹ The study found that the eggs from the pastured hens had a higher concentration of omega-3 fat, vitamin A, and vitamin E than the eggs from caged hens.⁷⁰ In another study conducted in Pennsylvania, four pastured poultry producers compared the nutritional soundness of their products with the industry standard.⁷¹ The results indicated that eggs from caged hens are nutritionally inferior to those from pastured hens, containing less

⁶⁶ See Artemis P. Simopoulos, *The Mediterranean Diets: What Is So Special about the Diet of Greece? The Scientific Evidence*, 131 THE JOURNAL OF NUTRITION 3065S (Nov. 2001), available at <http://jn.nutrition.org/cgi/content/full/131/11/3065S> (last visited May 21, 2010), Ex. 50.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Heather D. Karsten et al., *Vitamins A, E and Fatty Acid Composition of the Eggs of Caged Hens and Pastured Hens*, 25 RENEWABLE AGRICULTURE AND FOOD SYSTEMS 45 (2010), available at <http://ddr.nal.usda.gov/dspace/bitstream/10113/41808/1/IND44347774.pdf> (last visited Aug. 3, 2010), Ex. 51.

⁷⁰ *Id.*

⁷¹ Barbara Gorski, *Nutritional Analysis of Pastured Poultry Products*, 11 AMERICAN PASTURED POULTRY PRODUCERS ASSOCIATION 1 (Winter 2000), Ex. 52.

vitamin A.⁷² Moreover, the pastured eggs contained omega-6 to omega-3 ratios “considerably better than the standard” (7:1 versus 18:1)⁷³, which is significant because a leaner ratio has been linked to a reduced risk of cardiovascular disease and cancer, discussed *infra*. Finally, *Animal Feed Science and Technology* published an article in 1997, reporting on a study which concluded that eggs from hens fed grass and a commercial mash diet (termed “free-range hens” in the study) were nutritionally superior to the eggs from hens raised on just a commercial mash diet.⁷⁴ Specifically, the “concentration of (*n*-3) fatty acid was almost threefold higher in eggs from hens fed on free-range.”⁷⁵ Altogether, these studies compel the conclusion that eggs from caged hens are nutritionally inferior to those from free-range pastured hens. It is important to note that even though not all eggs that qualify as “free-range” are the pastured eggs that were the subject of these studies, examples highlighted in this Petition imply to consumers that those eggs are not merely from free-range hens, but in fact from pastured free-range hens who are afforded meaningful access outdoors and allowed to forage for food.⁷⁶

Given this scientific data, a reasonable consumer could justifiably consider eggs from caged hens to be nutritionally inferior to pastured free-range eggs due to this data, and seek out the latter. These nutritional differences are physical, material to reasonable consumers, and have health implications for consumers seeking the higher nutrient content of pastured eggs. The misleading egg labeling field includes cartons that often falsely represent to consumers that inferior eggs from caged hens are pastured free-range eggs. Consumers now not only face an inherent risk of purchasing misbranded eggs because of their reliance on materially misleading

⁷² *Id.*

⁷³ *Id.*

⁷⁴ C.J. Lopez-Bote et al., *Effect of free-range feeding on n – 3 fatty acid and α-tocopherol content and oxidative stability of eggs*, 72 ANIMAL FEED SCIENCE TECHNOLOGY 33 (1997), Ex. 53.

⁷⁵ *Id.*

⁷⁶ *See id.*; see also, e.g., *supra* at pp. 7-8, 10-14.

labels with respect to animal welfare, but they also face a health and safety consequence by being misled into purchasing nutritionally inferior eggs. This additional material difference between eggs produced by caged hens and those that are not further establishes FTC's statutory and legal mandate to correct such materially misleading labeling.

Because of the nutritional implications, claims and images that falsely imply eggs are from pastured free-range hens essentially make misleading material misrepresentations with respect to nutritional content, in violation of FTCA,⁷⁷ discussed in further detail *infra*. In addition, FTC is tasked with ensuring the validity of health and nutrient content claims alongside the FDA.⁷⁸ Cartons that claim that their eggs are "Animal Friendly" or "Naturally Raised,"⁷⁹ or that feature images of hens outside, for instance, make nutritional as well as animal welfare claims. That is, these claims and images misrepresent to consumers that the eggs are healthier than conventional (cage) eggs, which is in essence a nutrient content claim – comparable to "Omega-3 enriched," for example. The example "Omega-3" is particularly salient, but this argument could be applied to cholesterol, saturated fat, Vitamin A, or Vitamin E claims as well. Cartons bearing claims and images that communicate these nutrient content claims to consumers often contain eggs from caged hens, the nutritional information they communicate is false and therefore in violation of both FTCA's prohibition against misleading material misrepresentations

⁷⁷ See 15 U.S.C. § 45(a)(2) (demonstrating the legal standard); see also *FTC v. NCH, Inc.*, 1995 U.S. Dist. LEXIS 21098, at *17 (D. Nev. 1995) (quoting *In re Cliffdale Associates Inc.*, 103 F.T.C. 110, 165 (1984)); see also *Cyberspace.com*, 2006 U.S. App. LEXIS 17488, at *8-9 (9th Cir. 2006)).

⁷⁸ *Claims That Can Be Made for Conventional Foods and Dietary Supplements*, FOOD AND DRUG ADMINISTRATION, September 2003, at <http://www.fda.gov/food/labelingnutrition/labelclaims/ucm111447.htm> (last visited October 25, 2010); *Enforcement Statement on Food Advertising*, FEDERAL TRADE COMMISSION, May 1994, at <http://www.ftc.gov/bcp/policystmt/ad-food.shtm> (last visited November 1, 2010), Ex. 54.

⁷⁹ AMS created voluntary standards for the claim "naturally raised" in January, 2009, but this standard does not consider production methods. United States Standards for Livestock and Meat Marketing Claims, Naturally Raised Claim for Livestock and the Meat and Meat Products Derived From Such Livestock, 74 Fed. Reg. 3541-01 (proposed Jan. 21, 2009), Ex. 55.

and they trigger FTC's responsibility to guard against false nutrient content claims.⁸⁰ This is of course in addition to the misleading message they communicate to consumers from an animal welfare perspective, prohibited by FTCA. In addition, the lack of clarifying information on these cartons which would indicate the production method constitutes a material misleading omission of important nutritional and animal welfare-related information in violation of FTCA, as well as an implied nutrient content claim.⁸¹ All of this could be remedied by the adoption of the rulemaking requested herein.

With respect to Omega-3 in particular, the Center for Science in the Public Interest (CSPI) submitted a complaint to FDA⁸² urging the agency to stop seven egg producers from implying their eggs can reduce the risk of heart disease.⁸³ The group argued that the producers' use of Omega-3 claims on egg cartons⁸⁴ is misleading and constitutes a nutrient content claim.⁸⁵ Given that Omega-3 (and heart-healthy) claims on cartons are to be considered nutrient content claims, FTC should consider claims and images indicating hens are raised in an outdoor, pastured setting to be nutrient content claims as well as misleading material misrepresentations.

FTC should take the action requested herein; considering the nutritional differences between pastured free-range eggs and eggs from caged hens, a claim or image representing the latter as the former is a misleading material misrepresentation and omission under FTCA as well as a false express and implied nutrient content claim.

⁸⁰ For the definition of nutrient content claims, see 21 U.S.C. 343(q) and its regulations. For FTC's role, see *Enforcement Statement on Food Advertising*, FEDERAL TRADE COMMISSION, May 1994, at <http://www.ftc.gov/bcp/policystmt/ad-food.shtm> (last visited November 1, 2010), Ex. 11.

⁸¹ *Id.* See also 21 C.F.R. § 101.13 (defining implied nutrient content claims under the FDCA).

⁸² Letter from Center for Science in the Public Interest, to Kathleen Ellwood, Director, Nutrition Program and Labeling Staff (June 21, 2007), available at <http://cspinet.org/new/pdf/omega3letter.pdf>, (last visited May 21, 2010), Ex. 56.

⁸³ *Egg Producers Deceive Consumers, Violate Law with Bogus Omega-3 Claims*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, available at <http://www.cspinet.org/new/200706211.html> (last visited May 21, 2010), Ex. 57.

⁸⁴ "Land O' Lakes claims that 'omega-3 All-Natural Eggs' are a 'good source of heart-healthy nutrition'"—even though the FDA has not set standards of Omega-3 claims and eggs contain too much saturated fat and cholesterol to meet FDA's definition of healthy." *Id.*

⁸⁵ 21 C.F.R. § 101.13(i)(3) (2010).

Because the mislabeling of eggs prevents consumers from making informed nutritional decisions, FTC must also implement the regulations requested in this Petition in order to fulfill its mission of ensuring the validity of health claims.⁸⁶ Misleading claims and images falsely representing to consumers that eggs are from pastured free-range hens thwarts the consumers' ability to make healthier dietary choices if they so choose, in contravention of FTC's responsibility to ensure these health claims are valid.

Misrepresentative claims and images on egg cartons (e.g. "Animal Friendly," "naturally raised hens," images of hens nesting, in fields or pastures, etc.) make express and implied claims indicating to consumers that the eggs come from hens that are treated more humanely and produce more nutritious eggs than is actually the case. Because the nutrition studies are freely available, a reasonable consumer would be justified in choosing to purchase pastured free-range eggs because they are nutritionally superior to eggs from caged hens. The current labeling requirements in the egg industry, however, do not ensure that consumers will be able to identify the products they seek to purchase. To remedy this situation, FTC must implement the regulations requested in this Petition. By implementing these regulations, FTC would not only enable consumers to purchase the products they seek, but it will also allow consumers to identify the higher nutrient products they intend to buy.

E. Egg Producers Promote Cage Production, but Many Oppose Regulation Requiring Disclosure of Production Practices

Despite egg producers' public claims promoting cage production, many egg producers are strongly opposed to the promulgation of regulations requiring the clear identification of

⁸⁶ *Claims That Can Be Made for Conventional Foods and Dietary Supplements*, FOOD AND DRUG ADMINISTRATION, September 2003, at <http://www.fda.gov/food/labelingnutrition/labelclaims/ucm111447.htm> (last visited October 25, 2010), Ex. 54.

“Eggs From Caged Hens” on egg cartons. For example, Willamette Egg Farms has stated that cage production practices are designed for the welfare of the chickens and has led to decreased mortality and increased production.⁸⁷ Many egg producers, such as Feather Crest Farms, Inc., Kofkoff Egg Farms, LLC, Pearl Valley Eggs, Inc., Morning Fresh Farms and Wegman’s Consumer Affairs have opposed the regulatory scheme proposed in this petition.⁸⁸ Egg producer Willamette Egg Farms asserts that cage production methods “are considered humane and ethical by the leading independent scientific experts on animal welfare and behavior,” and help ensure “some of the freshest, safest, cleanest eggs in the world.”⁸⁹ For example, Willamette Egg Farms highlights the benefit of cage systems, stating, “Although the housing and caging of laying hens may appear to limit their freedom, the system is actually designed for the welfare of the birds as well as for production efficiency,” and noted that hens housed in cages produced more eggs, lived longer, and produced cleaner and higher quality eggs.⁹⁰ In response to criticism of battery cage egg production, an editorial featured in Feedstuffs, a weekly agribusiness newsletter, argued that “A check of facts demonstrates that hens housed in cages are less stressed and healthier and safer.”⁹¹ Despite the fact that major egg industry players and industry publications have publicly supported cage production, many egg producers claim that compliance with the proposed legislation by labeling their egg cartons with “Eggs from Caged Hens” would equate to

⁸⁷ *About Willamette Egg Farms*, WILLAMETTE EGG FARMS, <http://www.willamette-egg.com/ourfarm> (last visited July 7, 2010), Ex. 58.

⁸⁸ *See, e.g.*, Letter from Feather Crest Farms, Inc., to Food and Drug Administration, (January 18, 2006), Ex. 59.

⁸⁹ *California Egg Producers Advocate for The Protection Of Consumer Choice*, WILLAMETTE EGG FARMS, <http://www.willamette-egg.com/news/2008/01/29/california-egg-producers-advocate-protection-consumer-choice> (last visited Jul 7, 2010), Ex. 60.

⁹⁰ *About Willamette Egg Farms*, WILLAMETTE EGG FARMS, <http://www.willamette-egg.com/ourfarm> (last visited Jul 7, 2010), Ex. 58.

⁹¹ Marian Burros, *More House Salads, Whether the House Likes It or Not*, THE NEW YORK TIMES, January 16, 2008, http://www.nytimes.com/2008/01/16/dining/16capi.html?_r=1 (last visited July 2, 2010), Ex. 61.

“convey[ing] to consumers that there is something bad about eggs produced from hens housed in cages,”⁹² and therefore vehemently oppose such regulation.

In contrast to the above comments, poultry scientist and leading expert on animal welfare, Dr. Ian Duncan, notes: “The battery cage systems for laying hens was one of the first invasive husbandry systems to come under criticism on animal welfare grounds. These criticisms have continued unabated.”⁹³ More specifically, he points out, “[p]ossibly the biggest problem is the lack of a nesting site The lack of space in battery cages reduces welfare.”⁹⁴

Notwithstanding the significant concern amongst experts over the issue of confining hens in wire cages and the objective standard of care animals should receive, consumer perception is the sole criterion to be considered under misleading advertising analysis. About 81% of respondents to a survey indicated that they are willing to pay more for products produced in a humane manner,⁹⁵ indicating that they find animal care to be materially important to their purchasing decisions, and over 80 percent oppose the use of cages for egg production.⁹⁶ Promulgation of production method labeling requirements would provide consumers with salient information enabling them to make more informed purchasing choices.

Egg producers that submitted comments oppose the full disclosure of production methods on cartons in large part because they are “unnecessary” given that “[e]ggs produced from other than caged housing are always labeled with the type of production to justify a premium price to those consumers that desire and can afford the more expensive eggs.”⁹⁷

However, the biggest concern consumers face is the misleading labeling of eggs from caged

⁹² *Id.*

⁹³ Ian J. Duncan, *Animal Welfare Issues in the Poultry Industry: Is there a Lesson to be Learned?*, 4 JOURNAL OF APPLIED ANIMAL WELFARE SCIENCE 3, July 2001, at 208, Ex. 62.

⁹⁴ *Id.*

⁹⁵ *Poll: U.S. citizens support humane treatment for egg-laying hens*, CNN.COM (2000), <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited Jun 22, 2010), Ex. 4.

⁹⁶ *Id.*

⁹⁷ *See, e.g.*, Letter from Feather Crest Farms, Inc., to Food and Drug Administration, (January 18, 2006), Ex. 59.

hens, and the intent of this petition is to remedy the misleading nature of the existing voluntary labeling programs which tend to increase confusion rather than reduce it, discussed *supra*.

While egg industry commentators argue that “consumers should be able to make their own, personal informed choice about the type of eggs that they want to purchase, whether from modern cage, cage-free or organic,”⁹⁸ and defend caging systems on the one hand, they strongly oppose the full disclosure of egg production methods to consumers at the point of purchase, specifically the identification of “Eggs From Caged Hens.” It is exactly this type of contradictory positioning that threatens consumers and necessitates the regulations requested herein, which seek merely to provide an accurate representation of egg production methods to consumers, enabling them to make more informed choices. In today’s marketplace, the lack of regulations requiring the full disclosure of the applicable production methods allow egg producers to promote and profit from consumer confusion. This is especially concerning in the context of misleading labeling because if there is intent behind a false message, there is a presumption that the false message is the one the consumer receives.⁹⁹

F. Passage of the Prevention of Farm Animal Cruelty Act in California further illuminates the need for egg-labeling regulation.

Uniform federal regulation of egg carton labeling is now even more imperative given the recent passage of the Prevention of Farm Animal Cruelty Act (Proposition 2) in California. As states like California enact laws relating to production methods in egg production, and as FTC

⁹⁸ *California Egg Producers Advocate for The Protection Of Consumer Choice*, WILLAMETTE EGG FARMS, available at <http://www.willamette-egg.com/news/2008/01/29/california-egg-producers-advocate-protection-consumer-choice> (last visited July 7, 2010), Ex. 60.

⁹⁹ See *Del Webb Cmtys., Inc. v. Partington*, 2009 U.S. Dist. LEXIS 85616, 36-37 (D. Nev. Sept. 17, 2009) (“where a defendant intentionally misled consumers or the advertisement is literally false, a presumption arises that consumers were in fact deceived and the burden shifts to the defendant to prove otherwise”) citing *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. Cal 1995).

has the authority and expertise to address food labels generally, efficiency will also be served by the creation of uniform egg labeling disclosure requirements.

The recent passage of the Prevention of Farm Animal Cruelty Act in California illustrates that consumers oppose the use of battery cages. In addition to encompassing animal welfare concerns, discernable differences in nutritional value and health and safety risk results from the varying treatment of hens, as discussed *supra* and *infra*. Accordingly, survey data shows that consumers would distinguish between these two products at the point of purchase if given adequate information.

However, with California requiring its egg producers to rely on cage-free production methods, illegitimate profits stand to be made by the many producers who are falsely representing that their eggs are not from hens confined in cages. The misleading egg-labeling described in this Petition presents a potential market failure where California producers will be looking to compete in the national marketplace selling only eggs from cage-free hens. Where eggs from caged hens can be sold – perhaps more cheaply – falsely representing the level and type of care provided, the California producers will not be able to fairly compete or sell their products at the true price the market will bear.¹⁰⁰ This in turn damages consumers, who will be mistakenly purchasing products they otherwise would not buy, and who will be purchasing products in an unfairly noncompetitive marketplace. Moreover, the recent passage of A.B. 1437 further incentivizes the continued employment of misleading claims creating the perception of

¹⁰⁰ The egg industry's own economic analysis shows the actual increased cost for cage-free production, which breaks down to a mere cent per egg. See Don Bell, *A Review of Recent Publications on Animal Welfare Issues for Table Egg Laying Hens 4* (revised January 11, 2006), available at <http://animalscience.ucdavis.edu/Avian/WelfareIssueslayingHens.pdf> (last visited May 21, 2010), Ex. 63. However, cage-free eggs often sell for significantly more than that (in some cases, upwards of twice the price of cage eggs). Because of the market failures due to misleading claims and imagery, the true value of these eggs to consumers cannot be determined, causing consumers to be harmed by artificially high prices and cage producers' unfair capitalization on consumers' willingness to pay more for cage-free eggs, simply by misrepresenting their eggs as cage-free through misleading claims and images.

heightened animal care on its retail products in the nation's largest egg market, as the bill will require that, as of January, 2015, all whole eggs sold in California sourced from in- and out-of-state come from hens able to stand up, fully extend their limbs, lie down and spread their wings without touching each other or the sides of their enclosure.¹⁰¹

The simple full disclosure of production methods would help to correct this problem. Without regulations requiring such disclosure as requested by the Petition, consumers and California egg producers will suffer harm, and companies that engage in false and misleading advertising will be afforded an undeserved and illegal windfall. Where the manufacture of a product brings about externalities such as the likely damage to California egg consumers and producers in this misleading market, courts have held that "federal regulation is both appropriate and necessary."¹⁰² Thus, FTC is obligated on grounds of public policy to create a uniform system of federal regulation governing the use of labels on egg cartons.

State governments do not have the authority or the expertise to supervise and respond to regulations created by other state governments with respect to egg labeling. Because FTC's primary purpose as an agency is to protect consumers and ensure the marketplace is free from misleading advertising, FTC clearly has the responsibility and the expertise necessary to create an efficient, uniform system of labeling in this context.

To date, however, FTC has not exercised its authority over egg labeling, which has resulted in inconsistency between the multiple agencies' application of their respective statutory

¹⁰¹ A.B. 1437, 2009-2010 Gen. Assem., Reg. Sess. (Cal 2010), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_bill_20100622_enrolled.html (last visited Jul 7, 2010), Ex. 64.

¹⁰² *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 195 (U.S.2001).

provisions¹⁰³ and the widespread use of misleading express and implied production method claims on egg labels as described above.

G. USDA's Process Verified Program (PVP) Creates a Weak, Ad Hoc and Inconsistent Production Method Labeling Regulatory Scheme and Actually Contributes to Misleading Egg Labeling.

The closest structure to a regulatory scheme meant to address production method labeling in the egg industry is the USDA's Process Verified Program (PVP), through which the USDA certifies and audits for individual production method labeling claims.¹⁰⁴ The PVP includes a multitude of animal welfare production method claims which are mostly otherwise unregulated and undefined by any government agency.¹⁰⁵ The PVP has no objective criteria for the evaluation of the substance of the claims. Rather, there is a set of procedural guidelines the producers must follow in order to qualify for the PVP.¹⁰⁶ Once a producer is PVP certified, it is permitted to claim "USDA Process Verified" in conjunction with the specific verified claims it

¹⁰³ These agencies include the USDA, FDA, and FTC. *See* FTC's FTCA, at 15 U.S.C. § 45(a)(1) (2007) (prohibiting "deceptive" practices); *see also* the USDA's Federal Meat Inspection Act, at 21 U.S.C. § 601(n)(1) (2010) (prohibiting labeling of meat or meat products that is "false or misleading in any particular"); *see also* the Poultry Products Inspection Act, at 21 U.S.C. § 453(h)(1) (2010) (prohibiting labeling of poultry products that is "false or misleading in any particular"); *see also* the FDA's FFDCa, at 15 U.S.C. § 45(a)(2) (prohibiting "unfair or deceptive acts or practices.").

¹⁰⁴ *Grading, Certification and Verification: LS Process Verified Program*, UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, available at <http://www.ams.usda.gov/AMSV1.0/processverified> (last visited October 20, 2010), Ex. 65.

¹⁰⁵ For example, "Animal Handling," "Humanely Raised," "Raised Cage Free," "Cage Space and Cage-Free Space Requirements," and "Handling and Catching" are all Verified Claims under the PVP that have been authorized for use by specific individual producers. These and many other claims in the PVP make representations about animal welfare. Many of these claims are completely unregulated and undefined by any federal agency, while some are defined, regulated, and/or partly defined or regulated. For a complete list of Verified Claims and producers under the PVP, *see Official Listing of USDA Process Verified Programs*, USDA, June 29, 2010, at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5071588>, (last visited October 22, 2010); *see also Official Listing of USDA Process Verified Programs*, USDA, October 25, 2010, at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3320450> (last visited October 26, 2010), Ex. 66.

¹⁰⁶ USDA Process Verified Program, AMS Livestock and Seed Program, Audit Review and Compliance Branch, PVP 1001 Procedure, Date Issued 01/15/03, Date Revised 07/10/09, Ex. 67.

has had certified through PVP.¹⁰⁷ Producers that are members of PVP include producers of broiler chickens, beef, pork, veal, and eggs.¹⁰⁸

The PVP program is a de facto regulatory scheme by which producers of animal products (including eggs) are able to use USDA's PVP official seal or obtain USDA's permission to modify it, and can even trademark their version of it,¹⁰⁹ all of which explicitly indicates to the public that their production methods are approved by the USDA. The existence of the PVP materially changes the labeling marketplace for poultry, livestock and – most importantly for the purposes of this petition – for eggs. A federal government agency has created another mechanism by which production method claims are certified, but it has done so without actually

¹⁰⁷ *Use the USDA Process Verified shield and term*, USDA, available at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=UsetheUSDAProcessVerifiedshieldandterm&rightNav1=UsetheUSDAProcessVerifiedshieldandterm&topNav=&leftNav=GradingCertificationandVerification&page=UseofPVShieldandTerm&resultType=&acct=lvstksd> (last visited October 25, 2010) (stating that companies who are approved under the USDA Process Verified Program may use the "USDA Process Verified" shield and/or term on promotional materials, including labels), Ex. 68.

¹⁰⁸ *Official Listing of Approved USDA Process Verified Programs*, USDA, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3320450> (last visited October 25, 2010); see also *Official Listing of USDA Process Verified Programs*, USDA, October 25, 2010 at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3320450> (last visited October 26, 2010), Ex. 66.

¹⁰⁹ 7 C.F.R. § 62.213 and *Department of Agriculture, Agricultural Marketing Service, Quality Systems Verification Programs*, 70 Fed. Reg. 58,969 - 58,974 (Oct. 11, 2005) (both setting forth the requirements for the official USDA PVP seal use), Ex. 69. See also E-mail from Jeffrey Waite, National Supervisor, Audits, USDA, AMS, Poultry Programs, Grading Branch, to Tabatha Milligan, Food Safety Manager, Perdue Food Group (March 9, 2010) (USDA's AMS notes that a version of their shield was added to Perdue's website that resembles the USDA shield but not exactly in appearance. An image of the shield is attached to the e-mail), Ex. 70. There are three active "Process Verified" producer-registered trademarks that are part of this program: Trademarks 77846595, filed October 12, 2009, available at <http://tess2.uspto.gov/bin/showfield?f=doc&state=4009:fhk6em.2.4> (last visited November 2, 2010); 77809199, filed August 20, 2009, available at <http://tess2.uspto.gov/bin/showfield?f=doc&state=4009:fhk6em.2.5> (last visited November 2, 2010); 77020425, filed October 13, 2006, available at <http://tess2.uspto.gov/bin/showfield?f=doc&state=4009:fhk6em.2.6> (last visited November 2, 2010), Ex. 71. Companies must request the use of the "USDA Process Verified" shield within their Process Verified Program. Companies who use the shield and/or term must have a defined process for ensuring that the shield and/or term are used appropriately. ARC 1001 Procedure and ARC 1001A Policy outline the requirements for companies who use the shield and/or term. The ARC 1001 procedures are available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103489>, Ex. 67, and the ARC 1001A policy is available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV310349>, available at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=UsetheUSDAProcessVerifiedshieldandterm&rightNav1=UsetheUSDAProcessVerifiedshieldandterm&topNav=&leftNav=GradingCertificationandVerification&page=UseofPVShieldandTerm&resultType=&acct=lvstksd> (last visited November 1, 2010), Ex. 72.

setting forth a consistent set of objective criteria for evaluating the accuracy of the production method claim.¹¹⁰ Rather, it defers to the producer to determine how the production method claims are to be defined,¹¹¹ and then authorizes the producers to use USDA's name and certification in representing the veracity of those claims to the public.¹¹² This actually adds to the confusion in the marketplace, given its lack of substantive content with respect to the producer and in relation to the meaning of production method claims.¹¹³ This PVP scheme therefore does

¹¹⁰ USDA Process Verified Program, AMS Livestock and Seed Program, Audit Review and Compliance Branch, PVP 1001 Procedure, Date Issued 01/15/03, Date Revised 07/10/09; United States Department of Agriculture Food Safety and Inspection Service, Animal Raising Claims, October 14, 2008, page 15, Docket No. FSIS-2008-0026, available at http://www.fsis.usda.gov/PDF/Animal_Raising_Claims_101408.pdf (last visited October 20, 2010), Ex. 73.

¹¹¹ For example, Perdue uses a "Tenderness Guaranteed" claim that FSIS found "not to be an issue" after review of proposed information provided by Perdue. See Email from Tammie Ballard, Food Technologist, labeling and Program Delivery Division, USDA, FSIS, to Jack Boucher, Assistant National Supervisor, Audits, USDA, AMS, February 17, 2010; Also, Perdue uses "humanely raised" and "cage free" claims and FSIS asked Perdue what "humanely raised" and "cage free" meant to [Perdue] and didn't see it as a "big deal." See Email from Jack Boucher, Assistant National Supervisor, Audits, USDA, AMS, to Jeffrey Waite, National Audit Supervisor, Poultry Programs, AMS-USDA, June 4, 2009, Ex. 70. Additionally, PVP approved companies such as Murphy-Brown, Seaboard Foods and Premium Standard Farms use "animal handling" claims but do not have their particular standards available for public review. *Official Listing of Approved USDA Process Verified Programs*, USDA, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3320450> (last visited October 25, 2010); see also *Official Listing of USDA Process Verified Programs*, USDA, October 25, 2010, at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5071588> (last visited October 26, 2010) (indicating the source of the standards for the certified claims. For example, Cargill and Salmon Creek Farms use the Pork Quality Assurance (PQA) program, which is an industry-developed program, Perdue uses its own privately developed "Perdue's Best Practices," and Bill Mouw and Sparboe use Sparboe's privately developed "Sparboe Production Guidelines"), Ex. 66.

¹¹² *Use the USDA Process Verified shield and term*, USDA, available at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=UsetheUSDAProcesSVerifiedshieldandterm&rightNav1=UsetheUSDAProcesSVerifiedshieldandterm&topNav=&leftNav=GradingCertificationandVerification&page=UseofPVShieldandTerm&resultType=&acct=lvstksd> (last visited October 25, 2010) (stating that companies who are approved under the USDA Process Verified Program may use the "USDA Process Verified" shield and/or term on promotional materials, including labels), Ex. 68.

¹¹³ For example, Perdue uses a "Tenderness Guaranteed" claim that FSIS found "not to be an issue" after review of proposed information provided by Perdue. See Email from Tammie Ballard, Food Technologist, labeling and Program Delivery Division, USDA, FSIS, to Jack Boucher, Assistant National Supervisor, Audits, USDA, AMS, February 17, 2010; Also, Perdue uses "humanely raised" and "cage free" claims and FSIS asked Perdue what "humanely raised" and "cage free" meant to [Perdue] and didn't see it as a "big deal." See Email from Jack Boucher, Assistant National Supervisor, Audits, USDA, AMS, to Jeffrey Waite, National Audit Supervisor, Poultry Programs, AMS-USDA, June 4, 2009, Ex. 70. Additionally, PVP approved companies such as Murphy-Brown, Seaboard Foods and Premium Standard Farms use "animal handling" claims but do not have their particular standards available for public review. See *Official Listing of Approved USDA Process Verified Programs*, USDA, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3320450> (last visited October 25, 2010); see also *Official Listing of USDA Process Verified Programs*, USDA, October 25, 2010, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5071588> (last visited October 26, 2010) (indicating the source of the standards for the certified claims. For example, Cargill and Salmon Creek Farms use the Pork

not correct the problem of the misleading marketplace for shell eggs, and its existence further underscores the need for the regulations requested in this petition, which would provide much-needed clarifying information to the egg-consuming public. FTC clearly has a direct interest in accurate labeling claims and is authorized and mandated to correct the misleading egg labeling landscape by implementing the rulemaking requested herein.

II. Legal Grounds

This pervasive misbranding of egg label advertising violates several statutory provisions, and frustrates Congress' will that claims on food packaging accurately reflect the essential characteristics of the product being sold without misrepresenting or omitting material facts on which consumers rely. These same statutory provisions empower, and in fact require, action by FTC to correct such mislabeling.¹¹⁴

A. FTC has the legal authority and responsibility to regulate egg label false advertising.

Congress has, via passage of the Federal Trade Commission Act (FTCA), made FTC the primary government agency charged with thwarting unfair and deceptive trade practices.¹¹⁵ False labeling falls within the purview of unfair and deceptive trade practices.¹¹⁶ FTC in fact has primary responsibility for regulating food advertising.¹¹⁷ It has also laid out the standards for its

Quality Assurance (PQA) program, which is an industry-developed program, Perdue uses its own privately developed Perdue's Best Practices. and Bill Mouw and Sparboe use Sparboe's privately developed Sparboe Production Guidelines), Ex.66.

¹¹⁴ Specifically, see FTCA, 15 U.S.C. § 45 (2007).

¹¹⁵ 15 U.S.C. § 45(a)(2) (1938) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

¹¹⁶ *Federal Trade Com. v. Kay*, 35 F.2d 160, 162 (7th Cir. 1929) (citing *Federal Trade Com. v. Winstead Hosiery Co.*, 258 U. S. 483, 42 (1922), *Royal Baking Powder Co. v. Federal Trade Com.*, 281 F. 744, 752 (2d Cir. 1922), and *Indiana Quartered Oak Co. v. Federal Trade Com.* (C. C. A.) 26 F.(2d) 340 (1929)).

¹¹⁷ See, e.g., *Working Agreement Between FTC and FDA*, 4 TRADE REG. REP. (CCH) ¶ 9,850.01 (1971), Ex. 11; see also *Enforcement Policy Statement on Food Advertising*, FTC, May, 1994, at 2, available at <http://www.ftc.gov/bcp/policystmt/ad-food.htm> (last visited June 22, 2010), Ex. 12.

approach to evaluating and remedying deceptive acts and practices in a policy statement on this topic.¹¹⁸ Therefore, FTC has the legal authority to regulate misleading claims on egg cartons.

The courts have interpreted the deceptive practices under FTCA as those which are “likely to mislead consumers acting reasonably under the circumstances . . . in a way that is material.”¹¹⁹ A representation need not contain an express statement that is false in order to fall within the purview of acts that are illegal under FTCA.¹²⁰

To establish that a given representation is "deceptive" under 15 U.S.C. § 45(a)(1), FTC must establish three elements, to wit: (1) that there is a representation, omission, or practice; (2) that the representation, omission or practice is likely to mislead consumers acting reasonably under the circumstances; and (3) that the representation, omission, or practice is material.¹²¹

FTC itself summarizes this standard in a similar way: “[c]ertain elements undergird all deception cases. First, there must be a representation, omission, or practice that is likely to mislead the consumer. . . .Second, we examine the practice from the perspective of a [reasonable] consumer . . .Third, the representation, omission, or practice must be a material one . . . likely to affect the consumers conduct or decision with regard to a product . . .”¹²²

1. Egg Producers make representations and omissions on their packaging.

“The first element simply requires a showing that the defendant made some representation” or omission.¹²³ The text and depictions on egg packaging sometimes contain false representations, as they affirmatively depict contented hens in natural settings, while the

¹¹⁸ *FTC Policy Statement on Deception (Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984))*, FTC, October, 1983, available at <http://ftc.gov/bcp/policystmt/ad-decept.htm> (last visited June 22, 2010), Ex. 75.

¹¹⁹ *FTC v. Cyberspace.com, LLC*, 2006 U.S. App. LEXIS 17488 (9th Cir. 2006).

¹²⁰ See *id.* at 6-7.

¹²¹ *FTC v. NCH, Inc.*, 1995 U.S. Dist. LEXIS 21098, *17 (D. Nev. 1995) (quoting *In re Cliffdale Associates Inc.*, 103 F.T.C. 110, 165 (1984); see also *Cyberspace.com*, 2006 U.S. App. LEXIS 17488, at *8-9 (9th Cir. 2006)).

¹²² *FTC Policy Statement on Deception (Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984))*, FTC, October, 1983, available at <http://ftc.gov/bcp/policystmt/ad-decept.htm> (last visited June 22, 2010), Ex. 75

¹²³ *Id.* (quoting *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851 (D. Mass. 1992)).

hens that lay the eggs contained within the packages are confined to battery cages. Almost all packages omit any information about the methods of production used where cage confinement is the production method, often in combination with the misleading representations and imagery. Discussion of materiality, the third element of a deceptive practice, *infra* will further address why these representations and omissions are actionable.

2. Representations and omissions on egg packages are likely to mislead consumers.

“With respect to the second element, the relevant inquiry is whether the representation is likely to mislead a reasonable consumer ‘by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.’”¹²⁴ The courts have analyzed at length what types of representations are likely to mislead consumers. First, they have stated unequivocally that a literal falsity is not necessary for a representation to be deceptive, but rather that “the impression created by the [representation]” is the relevant inquiry.¹²⁵ Thus, fine print disclosures do not necessarily rectify the false overall impressions created in representations.¹²⁶ “A determination of false advertising can be based upon deceptive visual representations” and not just on misleading statements.¹²⁷ False implications are also actionable under FTCA.¹²⁸

¹²⁴ *Id.* (quoting *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989)).

¹²⁵ *FTC v. Peoples Credit First, LLC*, 2005 U.S. Dist. LEXIS 38545, *21-22 (D. Fla. 2005) (quoting *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982)).

¹²⁶ See *Floersheim v. FTC*, 411 F.2d 876-78 (9th Cir. 1969); see also *Independent Directory Corp. v. FTC*, 188 F.2d 468, 47 F.T.C. 1821 (2d Cir. 1951). The vast majority of egg cartons do not in fact disclose the fact that they employ cage production methods at all. However, in the event that FTC adopted petitioner’s request to mandate disclosure of production methods, it is imperative that the print be of sufficient size, discussed *supra*.

¹²⁷ *Cyberspace.com*, 2006 U.S. App. LEXIS 17488, at *8-9 (9th Cir. 2006) (quoting *Am. Home Prods. Corp. v. FTC*, 695 F.2d at 687)).

¹²⁸ *Id.* at *8 (quoting *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993) (“[Defendant] can point to nothing in statute or case law which protects from liability those who merely imply their deceptive claims; there is no such loophole.”)).

Omissions have the same basic standard, requiring materiality that is likely to mislead consumers under the circumstances, discussed *supra*, and they can give rise to actions under FTCA either on their own¹²⁹ or paired with representations.¹³⁰

3. A reasonable consumer would be deceived by false representations and omissions on egg packages

In order to fulfill the purpose of FTCA, which is to protect consumers, the courts have interpreted the reasonable consumer standard in a light most favorable to consumers. To this end, the class of reasonable consumer under FTCA includes the “least sophisticated” consumers.¹³¹ However, actual reliance is not necessary for FTC to take action against a putative violator. The reasonable consumer standard

is an objective test and does not require an assessment of consumer's subjective reliance. The finding of representation(s) likely to induce reliance by a reasonable person is sufficient to support a showing of consumer injury. . . Moreover, once a plaintiff satisfies his initial burden with evidence of consumer reliance, the burden then shifts to the defendant to show the misrepresentations were not relied upon by consumers.¹³²

In the case of caged hens, as in *Garvey*, “a similar common sense analysis proves useful.”¹³³ If all of the depictions on the egg cartons portray hens that are not confined to cages, or cartons bear the labels “born free”¹³⁴ or “animal friendly,”¹³⁵ and do not disclose the production system used, a reasonable consumer, even one more sophisticated than FTCA

¹²⁹ See *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) (citing *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)); see also *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988)).

¹³⁰ See, e.g., *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1986) (determining there was sufficient evidence that the company violated FTCA because of its misrepresentation and its omission of material facts).

¹³¹ *U.S. v. National Fin. Servs.*, 98 F.3d 131, 135-136 (4th Cir. 1996) (citing *Wright v. Credit Bureau of Georgia, Inc.*, 555 F. Supp. 1005, 1007 (N.D. Ga. 1982)) (“adopting “least sophisticated” reader test of FTCA rather than the “reasonable consumer” test developed under the Truth in Lending Act.”).

¹³² *FTC v. Garvey*, 2001 U.S. Dist. LEXIS 25060, at *13 (D. Cal. 2001).

¹³³ *Id.* at *14.

¹³⁴ “Born Free” is the brand name of the eggs, some of which are in fact from caged hens. *Fresh Shell & Hard Boiled Eggs*, RADLO FOODS, http://www.radlo.com/products.htm#fresh_shell (last visited June 22, 2010), Ex. 46.

¹³⁵ Farm Fresh “Animal Friendly” claim on in-store poster, Ex. 23.

inquiry requires, would incorrectly assume that the hens that laid the eggs are not in fact caged. In reality, these eggs are apparently from caged hens.

4. The deceptive practices of egg producers are material.

Two different criteria may be used to establish that a representation or omission is material for the purposes of FTCA. First, the truthfulness of a representation also affects its materiality. “Express representations that are shown to be false are presumptively material.”¹³⁶ Thus, any packages that portray hens that are not confined to battery cages when the egg-laying hens are indeed caged, are depicting a material falsehood.

A representation is also material if it “involves information that is important to consumers and, hence likely to affect their choice of, or conduct regarding a product.”¹³⁷ Consumer research indicates that 77% of consumers would consider switching brands for a product certified for its animal welfare standards if their current product were not, most consumers are willing to pay more for these products,¹³⁸ 86.2% of American adults believe the common egg industry practice of confining egg-laying hens in densely crowded cages is unacceptable,¹³⁹ although approximately 95% of eggs produced in the United States come from hens in such cages.¹⁴⁰ Given this, there is a high risk of even blatant factual misrepresentations on cartons. Where terms like “free range” or “cage free” are not regulated or even defined, companies are allowed to use them with impunity, even where their use defies logical sense. For

¹³⁶ *Id.* (quoting *Cliffdale Associates*, 103 F.T.C. at 168).

¹³⁷ *Patriot Alcohol Testers*, 798 F. Supp. at 855 (quoting *Cliffdale Associates*, 103 F.T.C. at 165).

¹³⁸ Fifty-eight percent of consumers are willing to pay an additional 10% or more for meat, poultry, or eggs labeled as “humanely raised.” *Frequently Asked Questions*, THE HUMANE TOUCH, 2010 available at <http://thehumanetouch.org/learn-more/faqs> (last visited May 20, 2010), Ex. 77.

¹³⁹ *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, REUTERS, CNN, Sept. 20, 2000, at <http://archives.cnn.com/2000/FOOD/news/09/20/food.hens.reut/index.html> (last visited May 20, 2010), Ex. 4; E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), Ex. 5.

¹⁴⁰ See Sarah Moran, *A Good Egg*, STAR TRIBUNE: NEWSPAPER OF THE TWIN CITIES, December 1, 2008, Ex. 6.

example, eggs claimed to be “animal friendly”¹⁴¹ can be from caged hens. This renders the labeling landscape meaningless.¹⁴² The potential for misleading consumers by omissions or misrepresentations through an unregulated market is rampant. This issue fits squarely into the purview of FTC under FTCA.

B. The FSIS of the USDA recognizes the importance of standardizing production claims

The Food Safety and Inspection Service (“FSIS”) of the USDA has recognized the importance of standardizing basic production method claims.¹⁴³ It has published a policy regarding the evaluation and validation of basic production methods, including review of affidavits, testimonials and protocols.¹⁴⁴ The FSIS thus regulates terms such as “free-range” and “free-roaming,” but not for egg products. In another policy statement, FSIS has discussed the meaning of these terms and its role in “ensuring the truthfulness and accuracy in labeling,” referring to the requirement that “[p]roducers must demonstrate to the Agency that the poultry has been allowed access to the outside.”¹⁴⁵

¹⁴¹ See *supra* note 78.

¹⁴² See *Rambled Eggs: Umbra on free-range chickens and eggs*, GRIST MAGAZINE, Mar. 22, 2006, at <http://www.grist.org/advice/ask/2006/03/22/free-range/index.html> (last visited November 3, 2010); *Cage-Free Over Easy Please – Are Designer Eggs What They’re Cracked up to be?*, HEALTH MAGAZINE, 2003, <http://www.pfda.com/prodServices/Healthcare/ArticleOfMonth.asp?ArticleID=261> (last visited June 22, 2010), Ex. 78.

¹⁴³ FSIS recently proposed defining the “natural” claim, and even considered whether to extend this term to encompass production methods. They also claimed to be working with the AMS to make the “natural” claim standard consistent with the “naturally raised” standard promulgated by the AMS. Product Labeling: Use of the Voluntary Claim “Natural” in the Labeling of Meat and Poultry Products, 74 Fed. Reg. 46951-01 (proposed Sept. 14, 2009) (codified at 9 C.F.R. Parts 317 and 381, not including information on “natural” claim), Ex. 79.

¹⁴⁴ OFFICE OF POLICY, PROGRAM, AND EMPLOYEE DEVELOPMENT, FOOD SAFETY AND INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL PRODUCTION CLAIMS OUTLINE OF CURRENT PROCESS, *available at* <http://www.fsis.usda.gov/OPPDE/larc/Claims/RaisingClaims.pdf> (last visited June 22, 2010), Ex. 80.

¹⁴⁵ FOOD SAFETY INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, FACT SHEETS: MEAT AND POULTRY LABELING TERMS, *at* http://www.fsis.usda.gov/Fact_Sheets/Meat_&_Poultry_Labeling_Terms/index.asp, (last visited June 22, 2010), Ex. 80.

Another FSIS policy statement notes:

FSIS has permitted the application of “animal production claims,” i.e., truthful statements about how the animals from which meat and poultry products are derived or raised, on

To date however FTC has not exercised its authority over egg labeling, which has resulted in inconsistency between the agencies' application of their respective and verbatim statutory provisions,¹⁴⁶ and the widespread use of misleading express and implied production method claims on egg labels as described above.

C. The current regulations do nothing to prevent the misleading egg advertising discussed herein.

The Federal Trade Commission, which also has the authority to regulate advertising on shell egg packaging, has not enacted regulations to curtail the unfair and deceptive representations and omissions associated with concealing the animal husbandry methods used by the egg industry. Existing regulations put into place by other agencies only address things such as safe handling of eggs¹⁴⁷ and required nutrition information.¹⁴⁸

These existing provisions do nothing to address the common omission or misrepresentation of material facts or misleading imagery regarding basic egg production method described in detail above.¹⁴⁹ In fact their narrow focus on health suggests to businesses labeling eggs that there is no federal oversight or interest in the misrepresentation of material

the labeling of meat and poultry products. For many years, animal production claims have served as an alternative to the use of the term "organic" on the labeling of meat and poultry products in the absence of a uniformly accepted definition. Thus, producers may wish to continue the use of animal production claims on meat and poultry labeling. Examples of animal production claims are "No Hormone Implants Used in Raising," "Raised Without Added Hormones," "No Antibiotics Used in Raising," "Corn Fed," "Fed An All Vegetable Diet," "Raised In An Open Pasture," and "Free Range." The system FSIS has in place for evaluating the necessary supporting documentation to ensure the accuracy of animal production claims, such as producer affidavits and raising protocols, will continue to be used whenever these types of claims are made.

See Using the Claim "Certified Organic By ..." on Meat and Poultry Product Labeling, UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD SAFETY AND INSPECTION SERVICE,

http://www.fsis.usda.gov/regulations_&_policies/Certified_Organic/index.asp (last visited Jun 22, 2010), Ex. 81.

¹⁴⁶ See the Federal Meat Inspection Act, 21 U.S.C. § 601(n)(1) (prohibiting labeling of meat or meat products that is "false or misleading in any particular"), and the Poultry Products Inspection Act, 21 U.S.C. § 453(h)(1) (prohibiting labeling of poultry products that is "false or misleading in any particular").

¹⁴⁷ 21 C.F.R. § 101.17(h) (FDA).

¹⁴⁸ 21 C.F.R. § 101.9 (j)(14) (FDA).

¹⁴⁹ Nor do any of the currently proposed agency regulations regarding egg labeling address these issues.

facts or misleading imagery or other representations regarding production method, and this promotes misleading labeling with impunity, in complete contradiction to the will of Congress as expressed in FTCA, among other federal regulations.

D. The proposed regulations are consistent with and fulfill FTC's mandate to correct egg label misbranding.

FTC's authority, according to its own website, is a broad-based grant of power to curtail unfair methods of competition. The Bureau of Consumer Protection exists within FTC

to protect consumers against unfair, deceptive, or fraudulent practices. The Bureau enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Its actions include individual company and industry-wide investigations, administrative and federal court litigation, rulemaking proceedings, and consumer and business education. In addition, the Bureau contributes to the Commission's on-going efforts to inform Congress and other government entities of the impact that proposed actions could have on consumers.¹⁵⁰

In addition, the Division of Advertising practices "protects consumers from deceptive and unsubstantiated advertising. Its law enforcement activities focus on . . . [a]dvertising claims for food . . . [and g]eneral advertising at the national and regional level, particularly advertising making objective claims that are difficult for consumers to evaluate."¹⁵¹

Given FTC's broad mandate to curtail practices that mislead consumers and the rampant misrepresentation of animal husbandry practices in the shell egg industry, it is incumbent upon FTC to enact regulations to protect consumers who buy shell eggs under the false impression that the welfare of the hens who lay them is safeguarded.

¹⁵⁰ *Offices and Bureaus*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/ftc/offices.shtml> (last visited Jun 22, 2010), Ex. 82.

¹⁵¹ *Division of Advertising Practices*, FTC BUREAU OF CONSUMER PROTECTION, <http://www.ftc.gov/bcp/bcpap.shtml> (last visited Jun 22, 2010), Ex. 83.

E. The proposed regulations remedy the common general misbranding of eggs described herein.

The proposed regulations correct the general misbranding of eggs described in detail above. Labeling egg packages as “Free-Range Eggs,” “Cage-Free Eggs,” or “Eggs From Caged Hens” provides the material facts required by consumers in order to exercise effective market choice, and to obtain the product of their choice based on the most basic identification of the relevant production method used – aligning the represented method with the actual method. The proposed regulations also correct misleading express and implied claims by providing an accurate, informative, and unequivocal statement as to basic production method, alleviating the need to engage in costly, time-consuming, and repetitive ad hoc enforcement actions addressing the numerous examples of misrepresentations present in the market today. The public also supports government regulation of egg labeling.¹⁵²

E. “Natural” and “Naturally Raised” language communicates animal welfare message to consumers.

One way in which consumers are misled is through the use of the term “natural” on animal-derived food products, which conveys to consumers an animal welfare message indicating that the animals raised for these products at least have access to the outdoors. In egg production, therefore, the “natural” claim would imply that hens are not confined in cages and are provided the ability to walk around outside, which in many cases is false. A 2007 poll by Zogby International showed 61 percent of consumers prefer to purchase products with the claim “natural” on its packaging, and almost half (48 percent) believe that the “natural” claim indicates

¹⁵² Jayson L. Lusk, Bailey F. Norwood & Robert W. Prickett, *Consumer Preferences for Farm Animal Welfare: Results of a Nationwide Telephone Survey (2007)*, available at <http://asp.okstate.edu/baileynorwood/FAW/files/Robspaper.pdf> (last accessed June 21, 2010), Ex. 84.

that the animals had access to the outdoors.¹⁵³ Although the public overwhelmingly believes that it is “inappropriate for meat, milk, and eggs from animals who are kept indoors, crowded in cages... to be labeled ‘natural,’”¹⁵⁴ because the use of this claim is not regulated on egg cartons, its extensive use contributes significantly to the misleading labeling landscape, particularly with respect to the level of actual care provided to hens. Without regulations standardizing the full disclosure of production methods, these claims mislead consumers into purchasing a product they perceive to be from more humanely treated hens than is actually the case.

FTC has attempted a foray into the definition and regulation of the term “natural” in the 1983 but determined that it could not establish a meaning for the “natural” term¹⁵⁵ This indicates FTC’s awareness of the confusing nature of the “natural” term. While “natural” is unregulated by FTC , there have been efforts made by USDA¹⁵⁶ and FDA¹⁵⁷ to regulate “natural,” but even where these definitions have become finalized, they are irrelevant to the egg labeling field because they do not apply to eggs, nor do they have animal welfare components.¹⁵⁸ Given the numerous examples¹⁵⁹ of misleading claims and images relating to animal welfare used by the

¹⁵³ E-mail from Rebecca Wittman, Zogby International, to Gene Baur, President of Farm Sanctuary, (Jan. 10, 2007), Ex. 19.

¹⁵⁴ *Id.*

¹⁵⁵ Termination of Proposed Trade Regulation; Rule on Food Advertising, 48 Fed. Reg. 23270-01 (May 24, 1983) (codified at 16 CFR Part 437), Ex. 85.

¹⁵⁶ Product Labeling: Use of the Voluntary Claim “Natural” in the Labeling of Meat and Poultry Products, 74 Fed. Reg. 46951-01 (proposed Sept. 14, 2009), Ex. 79.

¹⁵⁷ Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions of Terms, 56 Fed. Reg. 60,466 - 60,467 (Nov. 27, 1991) (FDA solicited comments of the use of the term “natural” on food products in its 1991 Notice of Proposed Rulemaking (“NPR”) for the Nutrition Labeling and Education Act (“NLEA”). FDA recognized that “the meaning and use of the term natural on the label are of considerable interest to consumers and industry”). FDA, however, declined to regulate it. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions of Terms, 58 Fed. Reg. 2407 (January 6, 1993), Ex. 86

¹⁵⁸ Product Labeling: Use of the Voluntary Claim “Natural” in the Labeling of Meat and Poultry Products, 74 Fed. Reg. 46951-01 at 46955-56 (proposed Sept. 14, 2009) (to be codified at 9 CFR Parts 317 and 381) (discussing “natural” and animal production methods) (later omitted “natural” language when codified), Ex. 79.

¹⁵⁹ *See, e.g., supra* at pp. 11-17.

egg industry including “natural” or “naturally raised,” FTC must require production method disclosure to protect consumers.

The average consumer associates with the claim “naturally raised” with the idea that the animals are raised on pasture and treated humanely, as discussed *supra*. Egg consumers may purchase eggs marketed with the claims “naturally raised” or “natural,” believing them to be produced by hens treated humanely and provided access to pastures, when in reality they are very likely to be the product of hens confined inside battery cages. This problem continues because “the majority of claims citing naturally raised animal production methods are defined at the discretion of the individual company selling the product.”¹⁶⁰ The varied standards are a major source of confusion, which manufacturers have capitalized on by misusing the “natural” label to mislead consumers and increase profits. FTC must institute clarifying language on egg cartons to prevent consumers from being misled and to protect their interests.¹⁶¹

“Natural” conveys to reasonable consumers that animals had access to the outdoors, which is untrue in much of the egg-labeling field. Given that the public has demonstrated its

¹⁶⁰ *USDA Proposes Standards for ‘Naturally Raised’ Meat but Leaves Out All-Important Pasture Requirements*, USDA AGRICULTURAL MARKETING SERVICE (Nov. 28, 2007), available at http://www.organicconsumers.org/articles/article_8647.cfm (last visited May 20, 2010), Ex. 87.

¹⁶¹ Although USDA has published factors it considers in allowing a “natural” claim to be made on a food product, it currently evaluates “natural” labeling claims on a case-by-case basis. *Public Meeting on Product Labeling: Definition of the Voluntary Claim “Natural” on Meat and Poultry Product*, LABELING AND CONSUMER PROTECTION STAFF, FOOD SAFETY AND INSPECTION SERVICE (Dec. 12, 2006), available at http://www.fsis.usda.gov/PDF/Natural_Claim_Presentation.pdf (last visited May 20, 2010), Ex. 88. More recently, the FSIS has proposed defining the conditions under which the voluntary “natural” claim can be used on the labeling of meat and poultry products. However, even if codified, this standard will not remedy the misleading labeling of eggs, because it will still not standardize “natural” on egg labels, and moreover, will still fail to consider egg production methods within its definition. *Product Labeling: Use of the Voluntary Claim “Natural” in the Labeling of Meat and Poultry Products*, 74 Fed. Reg. 46951-01 (proposed Sept. 14, 2009), Ex. 79. The term “natural” is used in the Organic Foods Production Act as a synonym for “nonsynthetic”; however, this definition is valid only in the organic foods context because it is used only to distinguish between materials that may and may not be used in organic food production. 7 C.F.R. § 205.2 (2010). This definition is therefore inapplicable to the regulation of labeling in conventional egg production.

interest in natural products¹⁶² and the use of “natural” claim on eggs from caged hens is widespread and demonstrably misleading, FTC must require clarifying production method labeling to protect consumers.

In addition, a study funded by the European Union about the impact of animal welfare on consumer food choice found that “consumers define animal welfare in terms of natural rearing and humane slaughter and that consumers use animal welfare as an indicator of other, more important, product characteristics such as food safety and quality.”¹⁶³ A British study published in the *British Food Journal* in 2002 corroborated those results, revealing that consumers confound the meaning of organic food production and free-range, or animal-friendly, production.¹⁶⁴ The study confirmed that standards of animal welfare are used by consumers as indicators of the safety and healthiness of food.¹⁶⁵

In essence, the unregulated use of the term “natural” on egg labels is misleading because of the false message that this word conveys to consumers—that the living conditions of these hens are traditionally natural in the sense that the hens are able to nest, roost, and move about freely in natural outdoor settings. Because consumers believe that the term “natural” is relevant to animal welfare, yet there are no standards for the use of this term on egg labels, the egg industry’s use of this term is misleading. This example further strengthens the argument that FTC should promulgate the proposed regulations to fulfill the agency’s mandate to protect consumers from false advertising, establish clarity in the marketplace, and provide consumers

¹⁶² In 2007, a Mintel market survey found that “all natural” is the second most frequent claim made on food labels. See *FDA declines to define ‘natural,’* available at <http://www.care2.com/greenliving/fda-declines-to-define-natural.html> (last visited May 20, 2010), Ex. 89.

¹⁶³ Gemma C. Harper & Aikaterini Makatouni, *Consumer perception of organic food production and farm animal welfare*, 104 *BRITISH FOOD JOURNAL* 287 (2002) (internal citations omitted), Ex. 90.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

with access to the information they need to make informed decisions. The public also supports government regulation of egg labeling.¹⁶⁶

F. The Connection Between Production of Eggs from Caged Hens and Risk of Salmonella Contamination Provides an Additional Basis for FTC's Responsibility to Correct Misleading Egg Labeling

FTC is responsible for protecting the public health by insuring that there are no false or misleading claims made with respect to the healthiness of a product.¹⁶⁷ It is therefore clearly within the scope of FTC's jurisdiction and duties to address the Salmonella Enteritidis (SE) issue in shell eggs. Studies indicate that eggs from farms using the cage production method have an increased risk of becoming contaminated with SE, due largely in part to the sheer volume of chickens housed in extremely close, unsanitary conditions where the concentration of manure is much higher than at non-cage production facilities. There is a connection between SE risk and cage production methods, discussed *infra*. Given this, and the massive August 2010 egg recall caused by an SE outbreak from cage production facilities, it is clear that regulations are necessary for consumers who wish to purchase cage-free or free-range products in order to mitigate their health risk to prevent them from being misled into purchasing eggs from caged hens.

1. The Threat of Salmonella Infection in Eggs

Most cases of food borne Salmonella in the United States are associated with the consumption of shell eggs. The predominant Salmonella serotype in shell eggs is Salmonella

¹⁶⁶ Jayson L. Lusk, Bailey F. Norwood & Robert W. Prickett, *Consumer Preferences for Farm Animal Welfare: Results of a Nationwide Telephone Survey* (2007), available at <http://asp.okstate.edu/baileynorwood/FAW/files/Robspaper.pdf> (last accessed June 21, 2010), Ex. 84.

¹⁶⁷ *Working Agreement Between FTC and FDA*, 4 TRADE REG. REP. (CCH) ¶ 9,850.01 (1971), Ex. 11 *see also* *Enforcement Policy Statement on Food Advertising*, FTC, May, 1994, at 2, available at <http://www.ftc.gov/bcp/policystmt/ad-food.htm> (last visited June 22, 2010), Ex. 12

Enteritis (SE), which is transferred from infected hens to the egg before the egg is laid.¹⁶⁸

Chickens are notoriously susceptible to Salmonella infections and if infected, the egg likely will be as well.¹⁶⁹ The worst Salmonella outbreak in U.S. history (aside from the latest August 2010 outbreak) caused by eggs sickened hundreds of Americans in 1994.¹⁷⁰ In 2005, the CDC estimated that infected eggs in a more typical year cause over 100,000 cases of human Salmonella poisoning, referring to the salmonella outbreaks as akin to an epidemic.¹⁷¹

Due to the recent August 2010 Salmonella outbreak, which has been referred to as “one of the largest shell egg recalls in recent history,”¹⁷² more than 500 million eggs were recalled and thousands of people were sickened with Salmonella throughout 14 states, with numbers expected to rise.¹⁷³ The outbreak was traced back to two facilities in Iowa, specifically Wright County Egg and Hillandale Farms.¹⁷⁴ At these particular farms, FDA inspectors who inspected the facilities after the outbreak found populations of “rats, mice and maggots” living inside of the

¹⁶⁸ Kåre Mølbak & Jakob Neimann, *Risk Factors for Sporadic Infection with Salmonella Enteritidis*, Denmark, (2002) (Den.), 12, (published by FSIS), available at <http://www.fsis.usda.gov/oppde/rdad/frpubs/04-034n/introduction.pdf>. (last visited September 13, 2010), Ex. 91

¹⁶⁹ Anna Vigran, *With Salmonella, It's A Chicken-Or-Egg Conundrum*, NATIONAL PUBLIC RADIO, August 31, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=129472951> (last visited September 13, 2010), Ex. 92

¹⁷⁰ *Frequently Asked Questions and Answers: FDA's Investigation into the Salmonella Enteritidis Outbreak Involving the Recall of Shell Eggs*, CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, August 27, 2010, available at <http://www.fda.gov/Food/NewsEvents/WhatsNewinFood/ucm223723.htm> (last visited September 15, 2010), Ex. 93

¹⁷¹ *Preliminary FoodNet Data on the Incidence of Infection with Pathogens Transmitted Commonly Through Food - 10 States*, CDC-MMWR WEEKLY, 2008, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5813a2.htm?s_cid=mm5813a2_e (last visited September 15, 2010), Ex. 94

¹⁷² *Frequently Asked Questions and Answers: FDA's Investigation into the Salmonella Enteritidis Outbreak Involving the Recall of Shell Eggs*, CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, August 27, 2010, available at <http://www.fda.gov/Food/NewsEvents/WhatsNewinFood/ucm223723.htm> (last visited September 15, 2010), Ex. 93

¹⁷³ *Id.*

¹⁷⁴ Hillandale Farms is also referred to in Section (B)(1)(g) in the Petition, as the labeling of their egg cartons is misleading to consumers. Thus, the uninformed consumer, tricked into thinking he/she is buying free-range eggs when really buying caged eggs, is unwittingly putting their health at risk. Consequently, the issue of misleading advertising is directly related to the use of battery cages and the increased risk of Salmonella associated with them.

egg-laying houses.¹⁷⁵ Infected rodents spread Salmonella through their feces into the chicken feed thus contributing to the infectious outbreak.¹⁷⁶ This current Salmonella occurrence serves as evidence of the serious public health dilemma posed by SE in eggs and further demonstrates the clear need for clarifying regulation and educating the public on production methods.

2. Legal Grounds for FTC's Authority and Responsibility to Address Salmonella Risk and its Relationship to Egg Carton Labeling

FTC's role is to insure the validity of claims, including taking action against claims that communicate a false message of healthiness in a food product.¹⁷⁷ Salmonella risk is higher in eggs which come from cage production facilities, as discussed *infra*. As such, the labeling regulations requested in this petition are required to inform consumers about the use of cages in egg production- a key aspect of the production method, which has implications for public health and safety as well as nutrition and animal welfare. In the SE context and its link to cage egg production methods, the FDA's duty to protect the public health and safety further demonstrates the necessity for regulations to protect consumers.

3. Cage Production and its Link to a Higher Salmonella Risk

Numerous studies demonstrate an express link between the cage system of egg production and the increased risk of outbreak of SE in eggs. The August 2010 outbreak of SE

¹⁷⁵ *Questions and Answers Concerning 483 Inspectional Observations*, FDA, September 3, 2010, available at <http://www.fda.gov/Food/NewsEvents/WhatsNewinFood/ucm224855.htm> (last visited September 15, 2010), Ex. 95

¹⁷⁶ Jeroen Dewulf, *Salmonella Thrives in Caged Housing*, 25 WORLD POULTRY, (May 20, 2010), available at <http://www.worldpoultry.net/background/salmonella-thrives-in-cage-housing-7481.html> (last visited September 13, 2010), Ex. 96

¹⁷⁷ *Working Agreement Between FTC and FDA*, 4 TRADE REG. REP. (CCH) ¶ 9,850.01 (1971), Ex. 11 *see also* *Enforcement Policy Statement on Food Advertising*, FTC, May, 1994, at 2, available at <http://www.ftc.gov/bcp/policystmt/ad-food.htm> (last visited June 22, 2010) (citing 15 U.S.C. §§ 45, 52, 55 (1980)), Ex. 12

that caused the recall of more than a half-billion eggs was traced back to Wright County Egg and Hillandale Farms, both large-scale battery cage egg facilities in Iowa.¹⁷⁸

A recent study comparing cage to cage-free systems found that there were 20 times greater odds of *Salmonella* infection in caged flocks.¹⁷⁹ One other study concluded that, after close study of 519 flocks, the risk of SE infection in caged flocks were “significantly higher ... than in on-floor flocks (cage-free)” and that the infection risk increased with the “number of hens housed in the cage poultry-house.”¹⁸⁰ The study attributed the higher risk of contamination to the fact that “cage poultry houses are difficult to clean and disinfect” and that cage houses typically use a “common egg conveyor belt” that links houses together which further boosts the spread of disease.¹⁸¹ Eggs can also become infected by SE fecal contamination through the pores of the shells after they’re laid.¹⁸² The higher density of animals found in the cage production system as compared with the cage-free or free-range system constitutes a risk factor for *Salmonella*.¹⁸³

Some practices that increase the occurrence of *Salmonella* in cage production include: (1) the sheer number of birds increases the volume of potentially contaminated feces and dust, (2) manure pits, coupled with the fact that hen movement is restricted to cages, makes factory farms an attractive environment for salmonella-infected rodents, and (3) the complexity of the system

¹⁷⁸ *Frequently Asked Questions and Answers: FDA’s Investigation into the Salmonella Enteritidis Outbreak Involving the Recall of Shell Eggs*, CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, August 27, 2010, available at <http://www.fda.gov/Food/NewsEvents/WhatsNewinFood/ucm223723.htm> (last visited September 15, 2010), Ex. 93.

¹⁷⁹ S. Van Hoorebeke et al., *Determination of the within and between flock prevalence and identification of risk factors for Salmonella infections in laying hen flocks housed in conventional and alternative systems*, 94 PREVENTATIVE VETERINARY MEDICINE (2010), 94-100, Ex. 97

¹⁸⁰ Adeline Huneau-Salaün et al., *Risk factors for Salmonella enterica subsp. enterica contamination in 519 French laying hen flocks at the end of the laying period*, 89 PREVENTATIVE VETERINARY MEDICINE 51-58 (2009), Ex. 98

¹⁸¹ *Id.*

¹⁸² *Fact Sheets: Egg Products Preparation, Shell Eggs from Farm to Table*, FOOD SAFETY AND INSPECTION SERVICE, September 7, 2010, available at http://www.fsis.usda.gov/factsheets/focus_on_shell_eggs/index.asp (last visited September 15, 2010), Ex. 99

¹⁸³ Jeroen Dewulf, *Salmonella Thrives in Caged Housing*, 25 WORLD POULTRY (May 20, 2010), available at <http://www.worldpoultry.net/background/salmonella-thrives-in-cage-housing-7481.html> (last visited September 13, 2010), Ex. 96

makes it difficult to thoroughly clean and disinfect the cages.¹⁸⁴ Diseases are further spread by “manure pits,” located under concentrated hen houses and utilized by large, concentrated factory farms to catch chicken excrement. These manure pits fill up quickly and can be overloaded, which attracts rodents and provides them greater access to the hen sheds. This further increases the risk of spread of disease. In the recent August 2010 outbreak, Wright County Egg in Galt, Iowa had manure piled 4 to 8 feet high.¹⁸⁵ The manure pits also create a high volume of contaminated fecal dust, which can increase the spread of salmonella among the flocks. In cage-free and free-range housing systems, there are fewer, less concentrated animals and the open structure of the housing does not allow for manure to pile up in one centralized place.¹⁸⁶ To support the ban against barren battery cages, the EU conducted a peer-reviewed survey of more than 5,000 egg operations across two dozen countries finding that for every type of Salmonella studied within every category of production system examined, there was a significantly higher risk of Salmonella infection in cage production.¹⁸⁷ This analysis by the European Food Safety Authority found that there were 43% lower odds of SE contamination in cage-free barns, where hens were raised indoors, than in cage production.¹⁸⁸ Additionally, a study conducted by the American Journal of Epidemiology, concluded that people who ate eggs from caged hens had

¹⁸⁴ P. S. Holt et al., *Emerging Issues: Social Sustainability of Egg Production Symposium, The Impact of Other Housing Systems on Egg Safety and Quality*, POULTRY SCIENCE, at 3, available at http://www.poultryscience.org/docs/PS_794.pdf (last visited September 13, 2010), Ex. 100

¹⁸⁵ *Questions and Answers Concerning 483 Inspectional Observation*, CENTER FOR FOOD SAFETY AND NUTRITION, September 3, 2010, available at <http://www.fda.gov/Food/NewsEvents/WhatsNewinFood/ucm224855.htm> (last visited September 15, 2010), Ex. 95

¹⁸⁶ P. S. Holt et al., *Emerging Issues: Social Sustainability of Egg Production Symposium, The Impact of Other Housing Systems on Egg Safety and Quality*, POULTRY SCIENCE 3, available at http://www.poultryscience.org/docs/PS_794.pdf (last visited September 13, 2010), Ex. 100

¹⁸⁷ European Food Safety Authority, *Report of the Task Force on Zoonoses Data Collection on the Analysis of the baseline study on the prevalence of Salmonella in holdings of laying hen flocks of Gallus gallus*, THE EFSA JOURNAL 97 (February 2007), available at www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178620761896.htm. (last visited September 13, 2010), Ex. 101

¹⁸⁸ *Id.*

almost double the probability of contracting Salmonella food poisoning compared to those who did not eat eggs from hens confined in cages.¹⁸⁹

The cage production system also increases the risk for contamination of feed specifically and thus puts entire flocks at risk for contracting Salmonella. Highly dense battery cage facilities are difficult to clean and disinfect between flocks because of the complexity of the cage system (stacked cages and conveyor belts within and between hen houses) and this potentially results in the spread of Salmonella from flock to flock.¹⁹⁰ Salmonella-infected feces of rodents (commonly mice and rats) can also contaminate the animal feed which occurs commonly on chicken, turkey and duck farms.¹⁹¹ A single mouse produces 100 droppings a day and each can contain up to 230,000 SE bacteria.¹⁹² By defecating in feed troughs where chickens eat, on egg belts, and in other areas near the hens and the eggs, rodents can quickly spread infection throughout the chicken house and contaminate hens and their eggs with Salmonella.¹⁹³

The above-mentioned links between caged hens and increased risk of SE in the eggs produced by caged hens is evidence that the shortcomings of egg carton labeling is misleading the average, reasonable consumer into purchasing eggs that could potentially increase their chances of illness. In addition to the reasons discussed *supra* in this Petition setting forth the factual and legal bases for FTC correcting the misleading egg labeling field in the U.S., the

¹⁸⁹ Kåre Mølbak and Jakob Neimann, *Risk Factors for Sporadic Infection with Salmonella Enteritidis*, 12 (2002) (Den.) (published by FSIS), available at <http://www.fsis.usda.gov/oppde/rdad/frpubs/04-034n/introduction.pdf>. (last visited September 13, 2010), Ex. 91

¹⁹⁰ P. S. Holt, et al., *Emerging Issues: Social Sustainability of Egg Production Symposium, The Impact of Other Housing Systems on Egg Safety and Quality*, POULTRY SCIENCE 3, (citing Carrique-Mas, J. J., et al., *Persistence and clearance of different Salmonella serovars in building housing laying hens*. 137 EPIDEMIOLOG. INFECT. 837-846 (2009)), available at http://www.poultryscience.org/docs/PS_794.pdf (last visited September 13, 2010), Ex. 100

¹⁹¹ *Prevention of Salmonella Enteritidis in Shell Eggs During Production; Proposed Rule*, 69 Fed. Reg. 56824-01 (September 22, 2004), at 13, available at <http://www.fda.gov/downloads/Food/FoodSafety/Product-SpecificInformation/EggSafety/EggSafetyActionPlan/UCM155358.pdf> (citing 21 U.S.C. § 321) (last visited September 13, 2010), Ex. 102

¹⁹² S.A. Davison et al., *Preharvest HACCP in the Table Egg Industry*, PENN STATE COLLEGE OF AGRICULTURAL AGRIC. SCI. (1997), at 11, available at <http://pubs.cas.psu.edu/FreePubs/pdfs/AGRS72.pdf> (last visited September 15, 2010), Ex. 103.

¹⁹³ *Id.*

Salmonella issue's link to cage production provides an additional rationale for FTC to implement the regulations requested in this Petition: the misleading egg labeling field's implication for public safety and health.

FTC, has the authority and responsibility to ensure truth in labeling on egg cartons. Given the plethora of data available which illustrates that caged hens are producing eggs at a significantly higher risk of disease, it is clear that the public health is at risk without proper labeling and that a reasonable consumer would be justified in seeking out cage-free or free-range eggs in order to mitigate this health risk. Consumers have a right to make informed, accurate egg purchases. However, with the current misleading egg labeling field, the consumer's health and preferences are inadequately protected. Misleading labeling not only communicates false animal welfare treatment but also communicates a false sense of healthiness and wholesomeness. A consumer with the intent of purchasing cage-free eggs may be misled into purchasing an egg carton with a free-roaming chicken depicted on the label, for example. That consumer may well be buying eggs from caged-hens (despite the misleading free-range images) and thus also be at a higher risk for exposure to Salmonella. FTC has a direct interest in shielding consumers from a labeling system that communicates false messages to the public and that puts their health at risk. The most effective way to inform the public and to ensure that the average consumer is offered the opportunity to make informed decisions concerning their own health is through accurate labeling on egg cartons as requested in this Petition.

G. Corrective regulation in the European Union and Australia alleviates confusion and protects consumer interests.

Misleading and false advertising in egg labeling has been a concern in the European Union ("EU") as well as in the United States. Public concern about animal welfare has been

increasing, and with it, the need for labeling regulations.¹⁹⁴ The EU has responded to this concern with regulatory action requiring the labeling of eggs. EU eggs must have a code on them – “1” stands for Free-Range eggs, “2” stands for Barn eggs (i.e. cage-free Eggs), and “3” for Eggs from caged hens.¹⁹⁵ European Commission Regulation (EC) No 1651/2001, 2001 O.J. (L 220) 5 (Ex. 43) cites and adopts Council Directive 1999/74/EC of July 19, 1999, and requires standardization of terms regarding cages.¹⁹⁶ Article 1(7) of the EC regulation requires certain standardized labeling on how the laying hens were kept:

<i>On packs</i>	<i>On Eggs</i>
Free-range eggs	Free-range
Barn eggs [cage-free]	Barn
Eggs from caged hens	Cage

These terms may be supplemented by indications referring to the particular characteristics of the respective farming method.

The terms on the eggs may be replaced by a code designating the producer’s distinguishing number permitting to identify the farming method provided that the meaning of the code is explained on the pack.

This simple and clear system is effective for a jurisdiction as diverse in language, culture, and industry as the EU’s 27 member states. The establishment of similar standards in the U.S. would be relatively simple. American consumers’ concerns on production methods and right to clear labeling are at least as strong as European consumers’.

¹⁹⁴ *Fresh Calls for Welfare Labels*, FARMER’S WEEKLY INTERACTIVE, Jun. 19, 2006, at <http://www.fwi.co.uk/Articles/2006/06/19/95387/Fresh+calls+for+welfare+labels.html> (last visited May 21, 2010), Ex. 94 see also *Report on Welfare Labeling*, FARM ANIMAL WELFARE COUNCIL (“FAWC”), Jun., 2006, Ex. 105

¹⁹⁵ *International – Egg Labeling*, ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (“RSPCA”), previously available at <http://www.rspca.org.uk/servlet/Satellite?pagename=RSPCA/RSPCARedirect&pg=InternationalCampaigns&marker=1&articleId=999516092840> (last visited Sept. 11, 2006), Ex. 106

¹⁹⁶ Commission Regulation 1651/2001, 2001 O.J. (L 220) 5, Ex. 107

Likewise, Australia acted to address concerns arising from misleading and false advertising in egg labeling. In response to growing public concern about animal welfare resulting from misleading egg labeling, Australia adopted standards similar to the EU: egg producers are required to clearly identify production method on cartons of shell eggs as “cage,” “free-range,” or “barn laid.”¹⁹⁷

The establishment of similar standards in the U.S. would be relatively simple. American consumers’ concerns on production methods and right to clear labeling are at least as strong as European and Australian consumers’. FTC is obligated to promulgate egg labeling regulations, as requested in this Petition, for the protection of American consumers.

Economic Impact

I. The costs of the regulation would be negligible.

Under the proposed regulation, egg producers who report using cage systems would face no additional costs. There is no price premium for cage eggs (which represent 95-98% of all eggs produced) relative to cage-free eggs, and thus no economic incentive to mislabel cage-free eggs as eggs from caged hens. Producers who report using cage systems would not require inspections to verify housing claims; and the costs of labeling changes “may be absorbed in the normal label change cycle if the compliance period is sufficiently long” to allow producers time to change printing plates or other printing mechanisms.¹⁹⁸

¹⁹⁷ *The Facts about Egg Labeling*, AUSTRALIAN EGG CORPORATION LIMITED, previously available at <http://www.eggs.org.au/index.asp?pageid=377>, (last visited Nov. 12, 2008), Ex. 108 see also *From Label to Liable: Scams, Scandals and Secrecy*, VOICELESS, May 2007, at http://www.voiceless.org.au/images/stories/reports/Voiceless_Label_to_Liable_Report.pdf (last visited June 21, 2010), Ex. 109

¹⁹⁸ See Elise Golan, Fred Kuchler & Lorraine Mitchell, ECONOMICS OF FOOD LABELING, AGRICULTURAL ECONOMICS REPORT, U.S. DEP’T OF AGRIC., NUMBER 793 (2000) at 16, reprinted in Elise Golan, Fred Kuchler & Lorraine Mitchell, *Economics of Food Labeling*, 24 *Journal of Consumer Policy* 117 (June 2001) (internal citations omitted), Ex. 42

Only egg producers who report using cage-free or free-range systems, which amount to less than 5% of eggs produced, would face additional costs. These producers' housing claims would need to be verified by an annual inspection. These costs are likely to be insignificant. Around one-third of U.S. table eggs¹⁹⁹ are packed under USDA's voluntary egg grading service, a third-party assurance scheme.²⁰⁰ The USDA states the service costs are insignificant: "This assurance is available at little or no additional cost to consumers – eggs graded by USDA (eggs identified with the USDA grade shield) cost essentially the same as eggs without the USDA grade shield."²⁰¹ There is no reason to believe a third-party assurance scheme for layer housing would be any more costly than USDA egg grading. In fact, annual inspection of housing systems would involve considerably less labor than egg grading.

Several animal welfare certification schemes for cage-free eggs already exist in the United States, including Certified Humane[®] by Humane Farm Animal Care and American Humane[®] Certified by the American Humane Association.²⁰² Egg producers complying with these certifications pay a \$500 annual inspection fee and a royalty fee of \$0.04 per case of 30 dozen eggs. In the United Kingdom, the RSPCA administers the Freedom Foods label on eggs, charging an annual inspection fee of \$200 per 6,000 hens and a royalty fee of \$0.07 per case of

¹⁹⁹ "Table eggs" are defined as "eggs consumed as shell eggs, as opposed to eggs that are used to make egg products." Prevention of Salmonella Enteritidis in Shell Eggs During Production, 69 Fed. Reg. 56824, at 56827 (Sept. 22, 2004) (codified at 21 C.F.R. pt. 16, 118) (stating that "[t]able eggs" are also synonymous with "market eggs."), Ex. 102. See Don Bell, *Table Egg Layer Flock Projections and Economic Commentary* (2003), available at <http://animalscience.ucdavis.edu/Avian/uepeconmemo203.htm> (last visited May 21, 2010), Ex. 102.

²⁰⁰ *Egg Carton Labeling*, USDA (2006), previously available at <http://www.ams.usda.gov/poultry/consumer/labelingexplained.htm> (last visited Sept. 11, 2006), Ex. 110

²⁰¹ *Id.*

²⁰² *Certified Humane*, HUMANE FARM ANIMAL CARE, available at <http://www.certifiedhumane.org/> (last visited May 21, 2010), Ex. 111. There is additionally a certification scheme called "Animal Welfare Approved" (AWA) created by the Animal Welfare Institute (AWI) which has the highest requirements for certification. However, at present, no egg producers who supply supermarkets are compliant with the AWA scheme. *Animal Welfare Approved*, ANIMAL WELFARE INSTITUTE, available at <http://www.animalwelfareapproved.org/> (last visited May 27, 2010), Ex. 112. Sparboe Companies, LLC also has their own production guidelines. *Animal Care*, Sparboe Farms, available at <http://www.sparboe.com/documents/SparboeProductionGuidelines.pdf> (last visited May 27, 2010), Ex. 113.

30 dozen eggs.²⁰³ A hen produces 260 eggs per year.²⁰⁴ A typical U.S. egg operation houses on the order of 100,000 hens, producing 72,000 cases of eggs per year.²⁰⁵ Thus the HFAC, AHA, and RSPCA certifications would cost a typical producer \$0.04-0.07 for royalties and \$0.006–0.05 for inspections per case of cage-free eggs. Total certification costs would be \$0.05–0.12 per case. Cage-free eggs cost between \$14.11 and \$17.60 per case to produce (12 to 40 percent more than battery egg production, which averages \$12.60 per case to produce).²⁰⁶ Mandatory certification and labeling would thus increase cage-free costs between 0.3 and 0.9 percent.

While cage-free egg producers would face slightly higher costs as a result of labeling, they would benefit from the reduction of inaccurate labeling claims that now cause unfair competition. Moreover, cage-free labeling costs could be passed on to cage-free egg consumers without loss of revenues. As discussed at length above, in surveys, consumers report a willingness to pay higher prices for eggs with animal welfare labels. Indeed, recent research suggests consumers are willing to pay an average of between 17- to 60-percent more for eggs with welfare assurances.²⁰⁷ Moreover, there are no close substitutes for eggs, and, as a result, consumers continue to purchase virtually the same number of eggs as prices increase. The own-price elasticity of demand for shell eggs in the United States is -0.057 .²⁰⁸ Thus, a 0.3 to 0.9-

²⁰³ Calculated based on exchange rates available at <http://www.oanda.com> on May 21, 2010, these figures would be \$160 per year for 6,000 hens, and \$0.06 per case of 30 dozen eggs.

²⁰⁴ *Chickens and Eggs 2004 Summary*, USDA (2005), previously available at <http://usda.mannlib.cornell.edu/reports/nasst/poultry/pec-bbl/lyegan05.pdf> (last visited Sept. 12, 2006), Ex. 114.

²⁰⁵ *Id.*

²⁰⁶ Don Bell, *Table Egg Layer Flock Projections and Economic Commentary* (2003), available at <http://animalscience.ucdavis.edu/Avian/uepeconmemo203.htm> (last visited May 21, 2010), Ex. 102; A. ELSON, *The laying hen: systems of egg production*, WELFARE OF THE LAYING HEN (Perry GC ed., CABI Publishing 2004), Ex. 115.

²⁰⁷ Richard Bennett & D. Larson, *Contingent valuation of the perceived benefits of farm animal welfare legislation: An explanatory survey*, 47(2) J. OF AGRIC. ECON. 224, 229-231 (1996), Ex. 116; Richard Bennett, *Farm animal welfare and food policy*, 22 FOOD POLICY 281, 283-84 (1997), Ex. 117; J.C. Rolfe, *Ethical rules and the demand for free-range eggs*, 29 J. OF AGRIC. ECON. 85, 196-99 (2003), Ex. 118; Bennett, R. M. and Blaney, R.J.P. *Estimating the benefits of farm animal welfare legislation using the contingent valuation method*, J. OF AGRIC. ECON. 29, 85-98 (2003), Ex. 119.

²⁰⁸ Kuo Huang & Biing-Hwan Lin, *Estimation of Food Demand and Nutrient Elasticities from*

percent increase in the retail price of cage-free eggs would decrease demand 0.02 to 0.05 percent. At this elasticity, producers could, as a group, pass increased costs on to consumers without any loss in profits. Cage-free egg consumers, in turn, would increase their annual average per capita expenditures on shell eggs by perhaps \$0.03 to \$0.09 for the roughly 260 eggs they consume per year,²⁰⁹ assuming cage-free egg consumers have similar egg consumption habits as the average egg consumer.²¹⁰ As mandatory corrective disclosure of basic production method would not affect production costs for 95-98% percent of producers, and would increase production costs for 2-5 percent of producers by at most 0.9 percent, and as these costs could be passed onto consumers with no loss in revenue, certification should have no significant effect on the productivity of wage earners, businesses, or government; on the supplies of important materials, products, or services; on employment; or on energy supply or demand.

Conclusion

As described herein, the labeling of shell eggs in the United States today fails to reveal to consumers certain material facts which substantially influence their purchase decisions and commonly egg labels employ misleading express and implied claim which result in a material and significant difference between the product sold and what it purports to be, all in violation of federal law. The focus of this petition is not to advocate on behalf of the integrity of specific claims such as “free range,” “cage free,” or any of the unregulated misleading terms used as examples in the original petition, but to demonstrate labeling field is misleading overall. The most efficient and effective way to remedy the common and persistent mislabeling of eggs is to

Household Survey Data (TB-1887), USDA ECONOMIC RESEARCH SERVICE, 11, 20-30 (September 2000), Ex. 120.

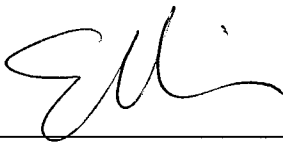
²⁰⁹ *Table 24 – Eggs: Per capita consumption of shell eggs and egg products*, USDA ECONOMIC RESEARCH SERVICE, at <http://usda.mannlib.cornell.edu/usda/ers/89007/table0024.xls> (last visited May 21, 2010), Ex. 118.

²¹⁰ *Chickens and Eggs 2004 Summary*, NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA (2005), *previously available at* <http://usda.mannlib.cornell.edu/usda/nass/PoulProdVa//2000s/2005/PoulProdVa-04-29-2005.pdf> (last visited Sept. 12, 2006), Ex. 121.

require simple disclosure of production method on all egg cartons. The proposed market-wide regulation requiring the identification of “Free-Range Eggs,” “Cage-Free Eggs,” or “Eggs From Caged Hens” on cartons, as appropriate based on actual production methods, is the most efficient and effective way to deliver accurate information expected by consumers, while alleviating the need to engage in costly, time consuming, and repetitive ad hoc enforcement actions addressing the numerous examples of misrepresentations present in the market today. The proposed regulations would effectuate the goals of the statutes discussed herein, and in light of the increasing and prevalent nature of the misrepresentations, best fulfill FTC’s mandate to prohibit the misbranding of food products.

Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner, which are unfavorable to the petition.



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ATTACHMENTS

#1 - 121

NOT SCANNED