

WHERE’S THE BEEF?
AN EXAMINATION OF THE “PINK SLIME”
CONTROVERSY AND THE IMPLICATIONS OF THE REAL
BEEF ACT ON STATE TRUTH-IN-MENU LAWS

CRYSTAL T. WILLIAMS, Esq.¹

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¹ Crystal T. Williams is an associate attorney at Barnes & Thornburg, LLP, in Indianapolis, Indiana. Williams concentrates her practice in general litigation, with a focus of food law. Williams has experience advising clients in food labeling disputes (e.g. health, nutrient content and structure/function claims, allergens, Nutrition Facts, and menu labeling) and food advertising strategy (e.g. weight management, advertisements geared toward children, competitive advertisements). Williams also has experience advising clients in the food truck industry (as well as restaurants and food servicers looking to get into the food truck industry) to help them navigate the applicable local and city-specific ordinances that govern food truck dimensions, construction, licenses, permitting, food preparation, and parking.

I. INTRODUCTION

Recent criticism concerning the use of lean finely textured beef (“LFTB”), commonly referred to as “pink slime,” has sparked a national debate about whether LFTB should be included on the label of ground beef products sold to the end consumers. On March 30, 2012, the Requiring Easy and Accurate Labeling Beef Act (the “REAL Beef Act”) was introduced to Congress.² If passed, the REAL Beef Act would require that “labels on packages of meat include a statement on whether the meat contains [LFTB].”³

The express language of the REAL Beef Act and its legislative history are not clear on whether the disclosure will be required for restaurants. This article is timely and relevant to the restaurant industry because it addresses the impact the REAL Beef Act may have on restaurant menu labeling. Further, given the disclosure requirements of state truth-in-menu laws, an examination into how the REAL Beef Act will be applied on a state level is critical.

First, this article explains the history of LFTB, including how the substance is made and the impact it has on ground beef production. Second, this article will discuss the current controversy concerning the use of LFTB in ground beef products. Third, this article will discuss the current law on food labeling and how the REAL Beef Act will change current legislation. Fourth, this article will analyze the impact the REAL Beef Act may have on the restaurant industry. Finally, this article will discuss the interplay between the REAL Beef Act and state truth-in-menu laws.

II. WHAT IS LFTB (COMMONLY REFERRED TO AS “PINK SLIME”)?

Today, “[g]round beef is the most popularly consumed beef product among American consumers”⁴ and accounts for

² Requiring Easy and Accurate Labeling Beef Act, H.R. 4346, 112th Cong. § 2(d) (2012).

³ *Id.*

⁴ JOEL L. GREENE, CONG. RESEARCH SERV., R42473, LEAN FINELY TEXTURED BEEF: THE “PINK SLIME” CONTROVERSY 1 (2012), available at <http://www.fas.org/sgp/crs/misc/R42473.pdf>.

almost 45% of all beef consumed in the United States.⁵ Ground beef is federally regulated and consists of chopped fresh and/or frozen beef with or without seasoning, with no more than 30% fat, and with no added water, phosphates, binders, or extenders.⁶ “Ground beef is produced from any part of the boneless beef carcass, but usually beef trimmings, which are a mixture of fat and meat that are trimmed from larger beef cuts.”⁷ In fact, approximately 25% of a beef carcass is lean-beef trimmings.⁸ Given consumers’ high beef consumption, the recent controversy concerning LFTB has had a profound effect on the beef industry.⁹

According to the United States Department of Agriculture (“USDA”), LFTB is a meat product derived from ground beef.¹⁰ Beef Products, Inc. (“BPI”) is the world’s leading producer of lean beef from fresh beef trimmings, and in 1991, the company developed a process that increases the amount of lean meat that can be obtained from livestock carcasses.¹¹ The company purchases beef trimmings from USDA inspected beef plants and sends the trimmings through a centrifuge process that separates the fat from the lean meat.¹² After the centrifuge process, the company uses ammonium hydroxide (“ammonia”) to help

⁵ National Cattelman’s Beef Association, *Average Annual Per Capita Consumption Beef Cuts and Ground Beef*, BEEFUSA.org, <http://www.beefusa.org/CMDocs/BeefUSA/Resources/Statistics/averageannualpercapitaconsumptionbeefcutsandgroundbeef559.pdf> (last visited Apr. 07, 2013).

⁶ 9 C.F.R. § 319.15(a) (2013).

⁷ GREENE, *supra* note 3.

⁸ *Id.* at 2.

⁹ Richard L. Frank & Robert A. Hahn, *The “Pink Slime Affair: Should Lean Finely Textured Beef Be Labeled?”*, 2 FOOD AND DRUG POL’Y F., May 2012, at 3 (noting that LFTB is normally found in ground beef, but it is also combined with other beef components such as lunchmeats, sausage products and canned meats).

¹⁰ *USDA Announces Additional Choices for Beef Products in the Upcoming School Year*, USDA.GOV (March 15, 2012), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2012/03/0094.xml>.

¹¹ *About BPI*, BEEF PRODUCTS INC., <http://www.beefproducts.com/history.php> (last visited Apr. 07, 2013).

¹² GREENE, *supra* note 3, at 2.

eliminate harmful bacteria such as *E. coli* and *Salmonella*.¹³ Ammonia, a compound that results from combining water, hydrogen, and nitrogen, is naturally found in the environment (i.e. air, water, and soil), plants and animals, and humans.¹⁴ The compound is used extensively for food processing and can be found in baked goods, cheese, chocolate, and pudding.¹⁵

Also known as “pH enhancement,” treating the meat with ammonia raises the pH level in ground beef, which results in higher levels of ammonia.¹⁶ Ground beef that does not include LFTB naturally contains approximately 100-150 parts per million (“ppm”) of ammonia; however LFTB, contains between 400-500 ppm of ammonia.¹⁷ Furthermore, pH enhancement makes LFTB approximately one hundred times more alkaline than untreated beef.¹⁸ After pH enhancement, the LFTB mixture is flash frozen, pressed, combined with ground beef trimmings, and finally packaged and sold to grocery stores and restaurants.¹⁹

BPI estimates that LFTB “has been served in over 300 billion meals.”²⁰ Until recently, LFTB was a popular product and widely used by restaurants, supermarket chains, and even the National School Lunch Program.²¹ In March 2012,

¹³ *Id.* (Ammonia hydroxide is created when the ammonia gas mixes with the water in the meat.).

¹⁴ *Questions and Answers about Ammonium Hydroxide Use in Food Production*, FOODINSIGHT.ORG, (Dec. 30, 2009), http://www.foodinsight.org/Resources/Detail.aspx?topic=Questions_and_Answers_about_Ammonium_Hydroxide_Use_in_Food_Production.

¹⁵ *Id.*

¹⁶ *Ammonium Hydroxide*, BEEF PRODUCTS, INC., http://beefproducts.com/ammonium_hydroxide.php (last visited Apr. 07, 2013).

¹⁷ Helena Bottemiller, *Slimegate: Should USDA Require Labeling for LFTB*, FOOD SAFETY NEWS, (Apr. 03, 2012), <http://www.foodsafetynews.com/2012/04/slimegate-should-usda-require-labeling-for-lftb/>.

¹⁸ *Id.*

¹⁹ GREENE, *supra* note 3, at 2.

²⁰ *BPI Lean Finely Textured Beef – What It’s Good In*, BEEF PRODUCTS, INC., http://beefproducts.com/what_its_good_in.php (last visited Apr. 7, 2013).

²¹ Helena Bottemiller, *Fast Food Companies Abandon Ammoniated Beef*, FOOD SAFETY NEWS (Jan. 06, 2012), <http://www.foodsafetynews.com/2012/01/fast-food-companies-abandon-ammoniated-beef/>.

critics of LFTB spoke out about the possible dangers of LFTB, claiming that it is unsafe for consumption, and arguing that food labels should inform consumers that the ground beef products they purchase contain LFTB.

III. THE CONTROVERSY

LFTB supporters argue that LFTB is leaner than trimmings produced through more conventional processes used to separate meat from fat such as a simple hand knife technique. As a result, the beef industry can "recover lean meat that would otherwise be wasted."²² LFTB is normally added to ground beef and makes up 10-20% of ground beef, increasing the "leanness of the meat products."²³ Moreover, some argue that "LFTB reduces the fat content of ground beef products, because LFTB is 90 percent or higher lean."²⁴ Provided LFTB makes ground beef products leaner, LFTB gives consumers a leaner, healthier meat. Furthermore, food and safety advocates point out that LFTB is approved by the USDA.²⁵ In fact, the FDA labels the compound as a "Generally Recognized As Safe" ("GRAS") substance.²⁶ In a recent news release, the USDA appeared to agree with the FDA and the use of LFTB, stating "the USDA continues to affirm the safety of [LFTB] product for all consumers and urges customers to consult science based information on the safety and quality of [the] product."²⁷

Still, critics point to the high levels of ammonia and alkaline present in LFTB in contrast to untreated ground beef. Critics also refute the claim that high levels of

²² *Lean Finely Textured Beef Fact Sheet*, (Mar. 28, 2012), <http://www.kipnews.org/wp-content/uploads/2012/04/Lean-Finely-Textured-Beef-Fact-Sheet1.pdf>.

²³ GREENE, *supra* note 3, at 3.

²⁴ Frank & Hahn, *supra* note 8, at 3.

²⁵ *Id.* at 2.

²⁶ GREENE, *supra* note 3, at 3; See also 21 C.F.R. § 170.30 (2013) (noting that a substance qualifies as GRAS if it is generally recognized, among experts qualified by scientific training and experience to evaluate their safety, as safe for its intended use).

²⁷ *USDA Announces Additional Choices for Beef Products in the Upcoming School Year*, *supra* note 9.

ammonia are good for ground beef products because they help kill deadly bacteria.²⁸ They argue that because only a small percentage of LFTB is added to ground beef, it cannot possibly make ground beef safer and to think otherwise is faulty logic. Furthermore, these same critics argue that regardless of whether LFTB is safe for human consumption, “the products should be labeled so that consumers will be able to choose whether to purchase it.”²⁹

Whether or not beef products containing LFTB should be labeled as such has become the primary focus of the LFTB debate. Proponents of LFTB argue that a mandate requiring disclosure of LFTB on food labels should never be passed because mandatory labeling of LFTB is unconstitutional.³⁰ Without scientific evidence that LFTB “poses a health hazard or is nutritionally inferior,” or serves a substantial governmental interest, supporters of LFTB claim that a law requiring labeling of LFTB “would run afoul of the First Amendment”³¹ Furthermore, proponents explain that food labeling is a form of commercial speech protected by the First Amendment, and as a result, there are limits to Congress’s power to mandate disclosures on food labels.³²

In *International Dairy Foods Association v. Amestoy*, the Second Circuit Court of Appeals ruled that “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context.”³³ The court of appeals goes on to explain that if there is a reasonable concern for human health or safety, disclosure may be required.³⁴ The Supreme Court, however, has yet to rule on this issue. In the case of LFTB, increased levels of ammonia and alkaline, if proven unsafe, would remove potential First Amendment legal challenges to the required labeling of LFTB.

Critics of LFTB do not consider LFTB “ground beef” and

²⁸ Frank & Hahn, *supra* note 8, at 3.

²⁹ *Id.* at 5.

³⁰ *Id.* at 6.

³¹ *Id.*

³² *Id.*

³³ *Int'l Dairy Foods Ass'n. v. Amestoy*, 92 F.3d 67, 74 (2nd Cir. 1996).

³⁴ *Id.*

contend that not including LFTB on food labels is a form of fraudulent labeling.³⁵ Congresswoman Chelli Pingree helped voice the concern of LFTB critics by introducing the REAL Beef Act to Congress, which would require “that beef containing LFTB be labeled to disclose that fact to the end purchaser.”³⁶

LFTB supporters, however, caution those in favor of including LFTB on food labels because doing so creates another set of problems. According to the American Meat Institute (“AMI”), “if [LFTB] is not used in fresh ground beef products, approximately 1.5 million additional head of cattle would need to be harvested annually to make up the difference.”³⁷ As a result, consumers could end up paying higher prices for LFTB free ground beef.³⁸ U.S. regulators are also concerned that requiring food labels to include LFTB might “open the floodgates” to including several processing aids on food labels that only show up at low levels.³⁹ Finally, LFTB advocates claim that there is no need to include LFTB as an ingredient on food labels because “nothing is being added that is not beef.”⁴⁰

IV. LEGISLATIVE HISTORY AND THE PROPOSED REAL BEEF ACT

Given the importance of meat in the nation’s total supply of food, “it is essential . . . that meat and meat food products . . . are properly marked, labeled and packaged.”⁴¹ The labeling of meat products is governed by the Federal Meat and Inspection Act (“FMIA”). One of the goals of the FMIA

³⁵ Bottemiller, *supra* note 16.

³⁶ Bettina Elias Siegel, *Congresswoman Pingree Introduces The REAL Beef Act (Requiring Easy and Accurate Labeling)*, LUNCH TRAY (Mar. 30, 2012), <http://www.thelunchtray.com/congresswoman-pingree-introduces-the-real-beef-act-requiring-easy-and-accurate-labeling/>.

³⁷ *Questions and Answers About Lean Finely Textured Beef*, AMERICAN MEAT INSTITUTE, www.meatami.com/ht/a/GetDocumentAction/i/76184 (last visited Apr. 07, 2013).

³⁸ GREENE, *supra* note 3, at 8-9.

³⁹ Bottemiller, *supra* note 16.

⁴⁰ *Id.*

⁴¹ 21 U.S.C. § 602 (2012).

is to regulate meat and meat food products that may be injurious to consumers because they are misbranded.⁴² Critics of LFTB have turned to the FMIA to push for the inclusion of LFTB on food labels. To determine which elements of food production must be included in the ingredients list on food labels, it is important to understand the distinction between ingredients and processing aids.

A. Ingredients vs. Processing Aids

Both ingredients and processing aids can fall within the guidelines of GRAS. Typically, GRAS is a classification used for ingredients; however, numerous processing aids are also recognized as GRAS and are allowed in food production. According to the FDA, an ingredient or food additive is “any substance the intended use of which results or may reasonably be expected to result - directly or indirectly - in its becoming a component or otherwise affecting characteristics of any food.”⁴³ Elements of food production that fall into this category are required on food labels because they are found at significant levels in the final product and technically alter the final product.⁴⁴ Alternatively, processing aids are not found at significant levels and have no “functional or technical effects” on the final product. Consequently, processing aids are not required in ingredients lists on food labels.

Drawing the line between ingredients and processing aids can be difficult. Dr. Richard Raymond, former undersecretary for food safety at the USDA, asserts that there is not an “exact science” on the classification of processing aids, and as a result, “some processes get excluded from the club.”⁴⁵ The recent controversy

⁴² *Id.*

⁴³ *Overview of Food Ingredients, Additives and Colors*, FDA.GOV (Apr. 2010) <http://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAdditivesIngredients/ucm094211.htm>.

⁴⁴ *Id.*

⁴⁵ James Andrews, *Processing Aids, Labeling and ‘Pink Slime’*, FOOD SAFETY NEWS (Mar. 26, 2012), <http://www.foodsafetynews.com/2012/03/processing-aids-labeling-and-pink-slime/>.

surrounding the use of “meat glue” in beef products is a good example of the line drawing problem between ingredients and processing aids. Meat glue is well known in the food industry practice.⁴⁶ Meat glue is a combination of Transglutaminase (“TG”) and beef fibrin, which are enzymes that bind proteins together, allowing different cuts of meat to mold together to form a uniform size.⁴⁷ According to food service providers, meat glue “allow[s] for flexibility in the sizes and shapes of cuts they serve patrons, . . . which is especially helpful if [you are] serving a large number of people.”⁴⁸ Meat glue can also be found in other food products including imitation crabmeat, pasta, and dairy products.⁴⁹ Nonetheless, some question the practice, claiming that “it is possible that different cuts put together could be more susceptible to contamination by potentially introducing pathogens into the center of a pieced-together steak.”⁵⁰ Unlike the LFTB controversy, whether TG and beef fibrin should be included on food labels is not at issue. The USDA recognizes TG and beef fibrin as ingredients, and as a result, food manufacturers are federally required to include TG and beef fibrin on food labels.⁵¹ Consumers, however, are not likely to see TG or beef fibrin on food labels because the most common use of the enzymes is at the food service level.⁵²

The classification of meat glue as an ingredient is somewhat puzzling because it has characteristics of a processing aid according to the FDA’s definition (see below), but it is recognized as a GRAS substance, similar to LFTB. Without more guidance from the USDA, determining what

⁴⁶ Helena Bottemiller, *Meat Industry Defends ‘Meat Glue’ as Safe, No Secret*, FOOD SAFETY NEWS (May 11, 2012), <http://www.foodsafetynews.com/2012/05/meat-industry-defends-meat-glue-as-safe-no-secret/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ James B. Kelleher, *Industry Defends Ingredient Critics Deride as ‘Meat Glue’*, CHICAGO TRIBUNE (May 11, 2012), http://articles.chicagotribune.com/2012-05-11/news/sns-rt-usa-foodmeat-glue14e8gb8xz20120511_1_ammonia-treated-beef-ground-beef-beef-products.

⁵⁰ Bottemiller, *supra* note 45.

⁵¹ *Id.*

⁵² *Id.*

should qualify as an ingredient or processing aid will continue to present challenges when it comes to properly labeling substances used in meat food products.

B. LFTB is Considered a Processing Aid Under Current FDA Regulations

Under current FDA regulations, LFTB is considered a processing aid. Processing aids fall into one of three categories: (1) substances that are added to a food during its processing but that are removed in some manner from the food before it is packaged in its finished form; (2) substances that are added to a food during processing, are converted into components normally present in the food, and do not significantly increase the amount of the constituents naturally found in the food; or (3) substances that are added to a food for their technical or functional effect in the processing but are present in the finished food at insignificant levels and do not have any technical or functional effect in that food.⁵³ The third category is “wide-reaching” and includes a number of substances, including ammonia.⁵⁴

Although a substance may be GRAS, it may not be suitable in the production of meat. The Food Safety and Inspection Service (“FSIS”), the public health agency in the USDA, determines whether a GRAS substance is safe for use in meat production.⁵⁵ The FSIS concluded that ammonia is a safe and suitable ingredient used in the production of meat if used as a pH control agent in brine solutions or as an agent to kill microbes from beef carcasses and boneless beef trimmings.⁵⁶ When used in LFTB, ammonia serves to kill microbes, making the pink slime

⁵³ 21 C.F.R. 101.100 (a)(3) (2013).

⁵⁴ Andrews, *supra* note 44.

⁵⁵ VANESSA K. BURROWS & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R34247, FEDERAL REGULATION OF SUBSTANCES GENERALLY RECOGNIZED AS SAFE (GRAS) AND THE USE OF CARBON MONOXIDE IN PACKAGING FOR MEAT AND FISH 12 (2008).

⁵⁶ FSIS Directive 7120.1, Safe and Suitable Ingredients Used in the Production of Meat, Poultry, and Egg Products, (U.S.D.A. 2012), available at <http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/7120.1.pdf>.

safe for meat production. Therefore, according to the FDA and USDA, ammonia is a GRAS processing aid used in meat production and does not have to be included in the ingredient lists on food labels. Since LFTB is a mixture of ammonia and ground beef, it too is recognized as a processing aid and, thus, food makers are not required to list it on the labels of ground beef products. As a result, critics of LFTB have turned to the FMIA to push for the inclusion of LFTB on food labels.

C. FMIA & The REAL Beef Act

Section 601(n)(11) of the FMIA states that the term misbranded applies to “any carcass . . . meat or meat food product . . . if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact.”⁵⁷ As previously mentioned, the REAL Beef Act, if approved, would amend section 601(n)(11) of the FMIA to require labels on packages of meat to include a statement on whether the meat contains LFTB.⁵⁸ Specifically, the REAL Beef Act would amend the FMIA to provide that a meat product is misbranded if “at the final point of sale it contains low-temperature rendered product,” also known as LFTB, “unless it bears a label stating that it contains such product.”⁵⁹ The intent of the REAL Beef Act is to notify consumers about the presence of LFTB, so they can make an informed decision about the food they eat. The REAL Beef Act, however, does not specify how much LFTB must be present in the ground beef,⁶⁰ and does not state whether the REAL Beef Act’s labeling requirement would apply to restaurant menus.

V. IMPLICATIONS OF THE REAL BEEF ACT ON THE RESTAURANT INDUSTRY

The REAL Beef Act is silent about whether it applies to

⁵⁷ 21 U.S.C. § 601 (2012).

⁵⁸ Requiring Easy and Accurate Labeling Beef Act, *supra* note 1.

⁵⁹ *Id.*

⁶⁰ Frank & Hahn, *supra* note 8, at 5.

restaurants, and, thus, a strict reading of the REAL Beef Act suggests that restaurants might not be required to disclose the use of LFTB on their menus. Silence, however, does not necessarily mean that legislators did not intend for the REAL Beef Act to apply to the restaurant industry. In fact, the reluctance to pinpoint a particular industry or food establishment may have been intended because it allows for broad application of the REAL Beef Act.

A. The REAL Beef Act does not Apply to Restaurants

According to Congresswoman Pingree, if a beef product contains LFTB, “[consumers] ought to be able to know that when [they] pick it up in the grocery store.”⁶¹ Pingree’s statement implies that the REAL Beef Act may only apply to grocery stores. In addition, the express language of the REAL Beef Act favors the idea that the REAL Beef Act only applies to grocery stores. The REAL Beef Act states that LFTB sold in a package or container at the final point of sale without proper labeling would be deemed misbranded.⁶² Since the REAL Beef Act refers to beef products provided in a package or container, restaurants may not be subject to the REAL Beef Act.

Restaurants deliver their final product to consumers much differently than grocery stores. When a customer dines at a restaurant, the food product is not provided in a package or container at the final point of sale⁶³ unless the customer places a to-go order, similar to a fast food establishment. In the case of a to-go order, the meat or meat food product is provided in a package or container and normally presented to the customer at the final point of sale. This suggests that restaurants would not be required to disclose the presence of LFTB on menus for customers

⁶¹ *Introducing REAL Beef Act to Require Pink Slime Labeling*, PINGREE.HOUSE.GOV (Mar. 30, 2012), http://pingree.house.gov/index.php?option=com_content&task=view&id=776&Itemid=24.

⁶² *Requiring Easy and Accurate Labeling Beef Act*, H.R. 4346, 112th Cong. § 2(d) (2012).

⁶³ *Definition of Point of Sale*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/point-of-sale.asp#axzz22PY0RCCj> (last visited Mar. 07, 2013).

who eat at the restaurant, but disclosure would be required for customers who take their food home instead. This inconsistency should give restaurants pause when it comes to menu labeling. The FMIA’s definition of label and labeling, however, also suggests that the legislation was aimed at grocery stores rather than restaurants.

The FMIA defines label as a “display of written, printed, or graphic matter upon the immediate container . . . of any article”⁶⁴ and defines labeling as “all labels and other written printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.”⁶⁵ While both definitions refer to the labeling of containers or packages, neither definition mentions menu labeling. This omission further suggests that the REAL Beef Act would not amend the FMIA to apply to restaurants.

Finally, according to the USDA, TG and beef fibrin used in meat glue are considered ingredients and must be indicated in the ingredients list on food labels. As mentioned *supra*, consumers are not likely to see TG or beef fibrin on food labels because the most common use of the substances is at the food service level.⁶⁶ Similar to meat glue, LFTB is used at the food service level. Since restaurants will be serving LFTB at the food service level and it is recognized as a processing aid, it is unlikely that restaurants will have to disclose the use of LFTB on menus.

Applying the REAL Beef Act to grocery stores is more straightforward than applying the REAL Beef Act to restaurants. If the REAL Beef Act only applies to grocery stores, restaurants would not have to disclose the use of LFTB on their menus. Fast food establishments and restaurants that prepare to-go orders, however, may be required to disclose the use of LFTB on any package or container that is used to serve their food products. Therefore, whether a restaurant is subject to the REAL Beef Act may be determined simply by how they present their food products to consumers.

⁶⁴ 21 U.S.C. § 601(o) (2012).

⁶⁵ *Id.* at § 601(p).

⁶⁶ Bottemiller, *supra* note 45.

B. The REAL Beef Act Applies to Restaurants

According to Congresswoman Pingree, the REAL Beef Act is about choice and transparency.⁶⁷ Pingree explained that while consumers may not have a choice about whether LFTB is used in beef products, they should be able to choose whether they want to buy beef products containing LFTB.⁶⁸ Consumers, however, cannot make that decision “unless they know whether or not [LFTB is] in the product they are buying.”⁶⁹ In other words, the REAL Beef Act aims to give consumers accurate information regarding the presence of LFTB in their food, and allows them to make an informed decision about whether they want to purchase the food product. This broad explanation suggests that the REAL Beef Act is intended to apply to all food service providers that use LFTB, including restaurants. Transparency in the restaurant industry would require some form of labeling, most likely on the menu, so that consumers can identify what menu items contain LFTB and avoid ordering those items if they so choose.

Menu labeling seems to be the most logical place to disclose the presence of LFTB in meat products, because the majority of consumers will look at the menu before they order. It is likely that restaurants will only have to disclose the presence of LFTB, which can be easily added to the description of the menu item. For example, an entrée that includes beef such as spaghetti may list the ingredients under the menu item as follows: *Spaghetti – whole wheat noodles, marinara sauce, ground beef (LFTB used)*. A blanket statement on the menu that states that “*All beef products are made with LFTB*” may also suffice. Such a label is clear and may encourage customers to inquire about the presence of LFTB in their specific entrée.

Even if the REAL Beef Act does not directly apply to restaurants, it may cause restaurants to voluntarily disclose

⁶⁷ *Introducing REAL Beef Act to Require Pink Slime Labeling*, PINGREE.HOUSE.GOV (Mar. 30, 2012), http://pingree.house.gov/index.php?option=com_content&task=view&id=776&Itemid=24.

⁶⁸ *Id.*

⁶⁹ *Id.*

the presence (or absence) of LFTB on their menus. The USDA, which runs the school lunch program, gave school districts the choice of ordering ground beef that contains LFTB.⁷⁰ As a result, only three states have chosen to continue to use ground beef products containing LFTB.⁷¹ Similarly, popular fast food establishments have voluntarily chosen not to use LFTB in their ground beef products.⁷² Given the customer backlash surrounding LFTB and customers’ insistence on properly labeling LFTB, restaurants may voluntarily choose to disclose the use of LFTB. Again, it is about transparency and choice, and customers might feel more comfortable eating at a restaurant that is upfront and honest about the products they serve.⁷³ Some may argue that restaurants could lose business by disclosing such information because customers will choose not to eat there.⁷⁴ That might not be the case, however. First, customers might be hesitant to eat at a restaurant that does not disclose the use of LFTB because they want more transparency about what they are consuming.⁷⁵ Second, disclosing the use of LFTB does not mean that customers will choose not to buy the product.⁷⁶ Many customers may be okay with eating beef products containing LFTB, but they may simply want to know when

⁷⁰ Bettina Elias Siegel, *USDA To Allow Voluntary Labeling of LFTB: Branstad Requests Congressional Hearing*, LUNCH TRAY (Apr. 02, 2012), <http://www.thelunchtray.com/breaking-usda-to-allow-voluntary-labeling-of-lftb-branstad-requests-congressional-hearing/>.

⁷¹ *Most Schools Opt Out of “Pink Slime” in Lunches, USDA Says*, CBS NEWS (June 5, 2012), http://www.cbsnews.com/8301-504763_162-57447621-10391704/most-schools-opt-out-of-pink-slime-in-lunches-usda-says/.

⁷² Matthew Rosenbaum, *McDonald’s Announces End to ‘Pink Slime’ in Burgers* (Feb. 01, 2012), <http://abcnews.go.com/blogs/health/2012/02/01/mcdonalds-announces-end-to-pink-slime-in-burgers/> (noting that McDonalds, Taco Bell, and Burger King no longer purchase beef with LFTB in them).

⁷³ Ashley Arthur, Note, *Combating Obesity: Our Country’s Need for a National Standard to Replace the Growing Patchwork of Local Menu Labeling Laws*, 7 Ind. Health L. Rev. 305, 325. (2010).

⁷⁴ *Id.*

⁷⁵ *See Id.* at 325-26.

⁷⁶ *Id.*

they are doing so. Furthermore, if one restaurant voluntarily discloses the use of LFTB, it may put more pressure on other restaurants to do the same. As a result, disclosing the use of LFTB on menus could become an industry standard, which can have the same impact as a regulation.

If legislators agree with Congresswoman Pingree that the intent of the REAL Beef Act is to provide customers with transparency and choice concerning the food products they consume so they can make an informed decision, then it is likely the REAL Beef Act would apply to restaurants. Consequently, restaurants would be required to disclose the presence of LFTB in food products, which would most likely be placed on their menus.

VI. JURISDICTIONAL ISSUES POSED BY STATE TRUTH-IN-MENU REGULATIONS

Jurisdictional issues related to ground beef products sold in restaurants⁷⁷ may make practical application of the REAL Beef Act cumbersome. Even if the REAL Beef Act did not have the effect of federally mandating that restaurants disclose the use of LFTB, proponents of the REAL Beef Act claim that “many states’ truth-in-menu laws would have the effect of applying the bill’s disclosure requirement to menus.”⁷⁸ While the idea of relying on state truth-in-menu laws to enforce disclosure requirements to menus is plausible, it may not be likely. Today, truth-in-menu laws are governed by various agencies and administrative entities seeking to make labeling of food more accurate.⁷⁹ Still relatively new, truth-in-menu laws are constantly being revised, and, in most states “[r]estaurants are not currently required to divulge their ingredients lists [recipes] to their guests.”⁸⁰

⁷⁷ Frank & Hahn, *supra* note 8, at 5.

⁷⁸ *Id.*

⁷⁹ *Truth in Menus Managing Hospitality Risk*, NATIONAL SPECIALTY UNDERWRITERS, INC., http://www.nsui.com/wp-content/uploads/2012/07/MHR_Menus.pdf (last visited Apr. 07, 2013).

⁸⁰ *Id.*

A comprehensive search of the laws of every state reveals that only seven states have laws that address the labeling of ingredients on restaurant menus. The seven states are California, Hawaii, Illinois, South Dakota, Minnesota, New Jersey, and Rhode Island. Of those states, California, Hawaii, Illinois, Minnesota, and South Dakota have laws that addressing the use of imitation hamburger sold or served in restaurants. Generally speaking, these laws state that if imitation hamburger is sold or served in restaurants, a list of the ingredients must appear on the menu. Each state, however, defines imitation differently and has varying menu labeling requirements. New Jersey and Rhode Island’s truth-in-menu laws focus on the misrepresentation of identity on food menus.

A. California

In California,

If imitation hamburger is sold or served in a restaurant a list of ingredients thereof shall appear on the menu, . . . [but] no list of ingredients . . . shall be required for imitation hamburger that contains not more than 10 percent added protein and water, and that does not contain other binders or extenders.⁸¹

Although California addresses disclosure of ingredients related to hamburger meat on restaurant menus, California’s truth-in-menu law is not directly on point with requiring disclosure of LFTB. Section 111200 of California’s Health and Safety Code, defines imitation hamburger as “chopped fresh or frozen beef, or a combination of both fresh and frozen beef, with or without the addition of beef fat . . . [that] may contain binders and extenders, with or without the addition of partially defatted beef tissue.”⁸²

As previously mentioned, LFTB is derived from ground

⁸¹ CAL. HEALTH & SAFETY CODE § 111205(a) (2012).

⁸² CAL. HEALTH AND SAFETY CODE § 111200(b) (2012).

beef. Moreover, it does not contain any binders or extenders. As a result, LFTB would not fall under the definition of imitation hamburger according to California law. Additionally, provided that LFTB meets the less than 10% threshold for added water and protein, the exception would apply. Therefore, California's truth-in-menu laws, as they currently stand, are not likely to force restaurants to disclose the use of LFTB on their menus.

B. Hawaii, Illinois, and South Dakota

Under Hawaii, Illinois, and South Dakota law, any "imitation food or hamburger," or "substitute food product" sold in a restaurant is prohibited, unless the menu discloses such information.⁸³ Unlike California, the truth-in-menu laws in Hawaii, Illinois, and South Dakota do not define imitation, making it more difficult to determine whether restaurants would have to disclose the presence of LFTB. If these states did define imitation similar to California, it is likely that their truth-in-menu laws would not require restaurants to disclose the presence of LFTB for the same reasons that apply in California. South Dakota's law is more restrictive than Hawaii and Illinois because it only applies to "imitation hamburger."⁸⁴ LFTB, however, can be added to various beef products such as lunch meats. Therefore, in South Dakota, restaurants would only be required to disclose the presence of LFTB in hamburger meat products. However, it is not clear whether restaurants would have to disclose in that case either, because as mentioned, South Dakota does not provide an adequate definition for imitation, and LFTB is made from ground beef.

C. Minnesota

According to Minnesota statute, "[a]ny restaurant, eating place, or other establishment serving meat . . . that has any filler or meat . . . substitute added to it or

⁸³ HAW. REV. STAT. § 328-6 (2012); 410 ILL. COMP. STAT. § 650/10.1 (2012); S.D. CODIFIED LAWS § 34-18A-7 (2012).

⁸⁴ S.D. CODIFIED LAWS § 34-18A-7 (2012).

incorporated in it, shall clearly and prominently indicate on its menu or bill of fare the meat entrees that contain filler.”⁸⁵ Industry experts, including the USDA, agree that LFTB is a meat filler that helps reduce costs.⁸⁶ As a result, restaurants in Minnesota would be required to disclose the presence of LFTB on their menus or bill of fare. Currently, however, there do not appear to be any instances of Minnesota restaurants enforcing disclosure of LFTB on their menus.

D. Rhode Island and New Jersey

Rather than address the particular ingredients in food products, both Rhode Island and New Jersey truth-in-menu laws focus on the misrepresentation of identity on food menus. Generally speaking, under the laws of each jurisdiction, it is unlawful for restaurants to “misrepresent on any menu . . . the identity of any food or food products.”⁸⁷ Unfortunately, New Jersey does not offer guidance on how to determine whether the identity of a food item is misrepresented. In Rhode Island, however, the identity of a food item is misrepresented if “[i]t purports to be or is represented as a food or food product for which a definition of identity and standard of quality has been established by custom and usage.”⁸⁸ Critics of LFTB would argue that LFTB does not meet the standard for ground beef established by custom because LFTB contains increased amounts of ammonia not custom in LFTB free ground beef. Critics would also argue that LFTB changes the appearance of ground beef to make it appear “as red meat.”⁸⁹

⁸⁵ MINN. STAT. § 31.633 (2012).

⁸⁶ Sarah Kidmore, *Supermarkets Join Move Away From ‘Pink Slime’ Beef Filler*, USA TODAY, (Mar. 22, 2012), <http://www.usatoday.com/money/industries/food/story/2012-03-22/pink-slime-supervalu-food-lion-safeway/53700356/1>.

⁸⁷ N.J. STAT. ANN § 56:8-2.9 (2013); *see also* R.I. GEN. LAWS § 23-1-40(a) (2012).

⁸⁸ R.I. GEN. LAWS § 23-1-40(b)(4) (2012).

⁸⁹ Jim Avila, *Beef Products Inc. Comeback: It’s Not ‘Pink Slime’; It’s Safe, Nutritious and It’s Beef*, ABC NEWS (Mar. 27, 2012), <http://>

On the other hand, proponents of LFTB would argue that the presence of LFTB in ground beef does not alter the quality standard of ground beef. In fact, LFTB may improve the standard because it makes ground beef leaner. Given the arguments on both sides, it is unclear whether Rhode Island's truth-in-menu law would apply to restaurants. Clearly, if Rhode Island sides with the critics of LFTB, restaurants would be required to disclose the presence of LFTB on their menus.

Each of the seven states, with the exclusion of Minnesota, offer vague truth-in-menu laws that mainly address the use of imitation food products. Without more definitive laws that provide adequate definitions concerning imitation products, it is unlikely that these states would impact restaurant menu labeling when it comes to disclosing the presence of LFTB in food products.

VII. CONCLUSION

On April 12, 2012, the REAL Beef Act was referred to the House Subcommittee for review.⁹⁰ Although the bill is still under review, the USDA has already endorsed the idea of labeling ground beef containing LFTB.⁹¹ Essentially, USDA inspectors will certify that voluntarily labeled "LFTB free" ground beef "will be inspected to ensure it is true to its new label."⁹² Moreover, the USDA also announced that it will allow school districts that participate in the National School Lunch Program to decide whether or not to buy

abcnews.go.com/Business/beef-products-comeback-pink-slime-safe-nutritious-beef/story?id=16014232#.UAXyNY4WB8s.

⁹⁰ Requiring Easy and Accurate Labeling Beef Act, *supra*, note 1.

⁹¹ Jim Avila, *Are LFTB or 'Pink Slime' Safety Claims Meaningful to Consumers?*, ABC NEWS (Apr. 03, 2012), <http://abcnews.go.com/blogs/headlines/2012/04/are-lftb-or-pink-slime-safety-claims-meaningful-to-consumers/>.

⁹² *Id.*

ground beef that includes LFTB.⁹³

It remains unclear how restaurants should approach menu labeling when it comes to LFTB. Even if the REAL Beef Act is passed, it does not expressly state that restaurant menus should be labeled to include the presence of LFTB in meat food products. Given the intent of the REAL Beef Act, however, it is plausible that the it could apply to restaurants. Provided the REAL Beef Act will apply to restaurants, the restaurant industry as a whole will have to be more diligent about informing customers about the use of LFTB either through menu labeling or posted signs. For now, at least, food servicers, restaurants, and fast food establishments should closely monitor the passage and implementation of the REAL Beef Act and how it will be applied to the restaurant industry.

⁹³ *USDA Announces Additional Choices for Beef Products in the Upcoming School Year*, USDA.GOV (March 15, 2012), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2012/03/0094.xml> ("By law, USDA has two primary responsibilities as part of its mandate to provide safe and nutritious food to the American people. Through the Food Safety and Inspection Service, USDA ensures that safety of the nation's commercial supply of meat, poultry, and processed egg products. Through the Food and Nutrition Service and the Agricultural Marketing Service, USDA provides food and nutrition assistance through several domestic programs, including the National School Lunch Program.").

