

OVERSIGHT OF ANIMAL RAISING CLAIMS ON  
PRODUCT PACKAGING: A REVIEW OF JURISDICTION  
AND CHALLENGES TO LABEL CLAIMS

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*This Article discusses federal and state oversight of label claims found on meat, poultry, egg, and dairy packaging and mechanisms for challenging misleading or false label claims. Part I introduces why label claims are so critical to animal welfare interests and discusses how false labeling and false advertising exacerbate the problem. Part II discusses the federal regulatory structure over animal-raising claims made on these products. Part III of this Article discusses state causes of action under consumer protection statutes. Part IV discusses the successes and failures public interest groups have had in challenging label claims and attempting to reform the system under which they are regulated. The Article concludes by offering advantages and disadvantages of each forum.*

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## I. INTRODUCTION

As consumers become more aware of the factory-like, modern methods of raising animals for food and other goods, there is a rising demand for products with more transparent production practices—especially those involving ‘humane’ methods. A survey commissioned by the Animal Welfare Institute (AWI) found that 81% of respondents believed it was “very important” or “somewhat important” that farm animals are raised humanely, and 69% of respondents said humane labeling is “very important” or “somewhat important” in deciding what meat and poultry products to purchase.<sup>1</sup> A later survey by AWI found that 66% of consumers pay at least “some attention” to label claims about how the animals were raised.<sup>2</sup>

As demand for more humane products increases, producers are incentivized to take advantage of consumers’ willingness to pay more for products produced on higher-welfare farms.<sup>3</sup> While labels and other forms of advertisement offer producers an opportunity to present consumers with information regarding animal-raising practices, they are also frequently used to deceive customers. For instance, some companies use animal-raising standards as a way to differentiate themselves from competitors by improving how they treat animals under their care, while others capitalize on lax regulatory control to dupe customers into paying higher prices for products raised at—or close to—conventional levels.<sup>4</sup>

False and misleading advertising also harms higher-welfare farms and animals.<sup>5</sup> When farmers who genuinely work to improve the standards of care for their animals are not rewarded with premium prices

<sup>1</sup> ANIMAL WELFARE INST., POLL ON FREE RANGE AND HUMANELY RAISED LABEL CLAIMS 1 (2015), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-FreeRangeHumanelyRaised-Poll-Dec2015.pdf> [https://perma.cc/Z8Z6-CUQ9] (accessed Apr. 15, 2020).

<sup>2</sup> ANIMAL WELFARE INST., SURVEY OF CONSUMER ATTITUDES ABOUT ANIMAL RAISING CLAIMS ON FOOD (PART II) 1 (2018), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-survey-on-animal-raising-claims-Oct-2018.pdf> [https://perma.cc/XEX7-URZM] (accessed Apr. 15, 2020).

<sup>3</sup> See generally C. Victor Spain et al., *Are They Buying It? United States Consumers’ Changing Attitudes Toward More Humanely Raised Meat, Eggs, and Dairy*, 8 ANIMALS 128, 131 (2018) (discussing market research of consumer purchasing decisions related to animal welfare).

<sup>4</sup> *How False Advertising Lawsuits Help Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/how-false-advertising-lawsuits-help-animals/> [https://perma.cc/QZV7-2S8A] (accessed Apr. 15, 2020).

<sup>5</sup> ERIN THOMPSON, ANIMAL WELFARE INST., LABEL CONFUSION 2.0 (2019), [https://awionline.org/sites/default/files/publication/digital\\_download/19LabelConfusionReport.pdf](https://awionline.org/sites/default/files/publication/digital_download/19LabelConfusionReport.pdf) [https://perma.cc/A52S-UMY5] (accessed Apr. 15, 2020).

for their products, it becomes difficult if not impossible for these producers to continue higher-welfare practices.<sup>6</sup> Higher-welfare farming is time and cost intensive.<sup>7</sup> Therefore, a small producer can easily be edged out by a large producer that makes the same claims at a lower production cost, and likely a lower level of welfare. When producers are edged out due to unfair competition, animals suffer because there is no incentive for improving animal care standards. Consequently, ensuring transparency and consistency in labeling is critically important because of the detrimental impact on consumers, farmers, and the animals raised to produce these products.

Many public interest groups focus on truth in labeling as a mechanism for improving animal welfare on farms because consumer sympathies for animal welfare are ripe for exploitation.<sup>8</sup> These efforts can include consumer education, legal and pseudo-legal challenges, administrative advocacy, legislative efforts, and monitoring of label claims. This Article discusses federal and state oversight of false and misleading advertising; labeling of meat, poultry, egg, and dairy products; and provides an overview of methods used by advocacy organizations to challenge and improve transparency and oversight over product labeling.

As a preliminary matter, it is important to discuss the distinction between false labeling on products and misleading advertisements in media because different federal agencies manage their effects on consumers in different ways.<sup>9</sup> Under current labeling and advertising regulations, it is easy for companies to use advertising and labels to take advantage of consumer expectations. The animal agriculture industry uses both methods to promote so-called ‘humane’ farming practices. While false advertisement laws in the United States are written to protect consumers, the complex nature of animal agriculture makes enforcement difficult.<sup>10</sup>

Advertisements, like those seen on TV, the Internet, or a producer’s website, come under jurisdiction of the Federal Trade Commission (FTC), and do not require preapproval.<sup>11</sup> The Federal Trade Commission Act (FTCA) states that it is unlawful for any company to “disseminate . . . any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase . . .

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<sup>6</sup> Hannah Ridge, *The Truth Behind the Price of Humanely Raised Food*, ETHICAL FARMING FUND (May 30, 2018), <https://www.ethicalfarmingfund.org/single-post/2018/05/30/The-Truth-Behind-The-Price-Of-Humanely-Raised-Food> [https://perma.cc/CF29-3YF2] (accessed Apr. 15, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> *Increasing Transparency in Food Labeling*, ANIMAL WELFARE INST., <https://awionline.org/cases/increasing-transparency-food-labeling> [https://perma.cc/M3NV-P3T8] (accessed Feb. 16, 2020); Victor Spain et al., *supra* note 3.

<sup>9</sup> 21 U.S.C. § 343(a) (2010); 15 U.S.C. § 55(a)(1) (2011).

<sup>10</sup> See *infra* Part II, Section D.

<sup>11</sup> *Advertising FAQs: A Guide for Small Business*, FED. TRADE COMMISSION (Jan. 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business> [https://perma.cc/D394-U6Z2] (accessed Apr. 15, 2020).

of food.”<sup>12</sup> The FTC has used this broad definition to exercise its enforcement power over food labels.<sup>13</sup>

The Federal Meat Inspection Act (FMIA), Poultry Products Inspection Act (PPIA), and Federal Food, Drug and Cosmetic Act (FFDCA) define a ‘label’ as “a display of written, printed, or graphic matter upon the immediate container of any article.”<sup>14</sup> While some claims made on labels require pre-approval by the federal agency overseeing that product, others are essentially exempt from federal oversight,<sup>15</sup> including those relating to voluntary government programs or compulsory safety disclosures.<sup>16</sup>

## II. FEDERAL ADMINISTRATIVE OVERSIGHT AND REGULATION OF LABELING

The oversight of labeling in the United States is divided between so many entities that it can be difficult to determine which agency has authority over which products. The Federal Meat Inspection Act (FMIA), Poultry Products Inspection Act (PPIA), Egg Products Inspection Act (EPIA), the Federal Food, Drug, and Cosmetic Act (FFDCA), and the Fair Packaging and Labeling Act (FPLA) all have sections relevant to labeling.<sup>17</sup> According to these statutes, the approval and oversight of labels on animal products is divided between the U.S. Department of Agriculture (USDA), the Food and Drug Administration (FDA), and the Federal Trade Commission (FTC).<sup>18</sup>

The USDA divides authority between the Food Safety and Inspection Service (FSIS) and the Agricultural Marketing Service (AMS).<sup>19</sup> FSIS is mandated by statute to develop regulations to ensure that meat, poultry, and eggs are not misbranded, which includes carrying labels that are not “false or misleading.”<sup>20</sup> AMS oversees several vol-

<sup>12</sup> 15 U.S.C. § 52(a)–(b) (2011).

<sup>13</sup> *Enforcement Policy Statement on Food Advertising*, FED. TRADE COMMISSION (May 13, 1994), <https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising> [<https://perma.cc/2NJN-T3TJ>] (accessed Apr. 15, 2020).

<sup>14</sup> 21 U.S.C. § 601(o) (2011); 21 U.S.C. § 453(s) (2011); 21 U.S.C. § 321(k) (2010).

<sup>15</sup> FOOD AND DRUG ADMIN. & CTR. FOR FOOD SAFETY AND APPLIED NUTRITION, U.S. DEP’T OF HEALTH AND HUM. SERVS., *A FOOD LABELING GUIDE: GUIDANCE FOR INDUSTRY* 21, 34, 60 (2013), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-food-labeling-guide> [<https://perma.cc/6UVM-LE8X>] (accessed Apr. 15, 2020).

<sup>16</sup> *Id.* at 69–71, 80.

<sup>17</sup> FOOD SAFETY AND INSPECTION SERV., U.S. DEP’T OF AGRIC., *A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS* 4 (Post et al. eds., 2007), [https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling\\_Requirements\\_Guide.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES) [<https://perma.cc/5CRT-LFAG>] (accessed Apr. 15, 2020) [hereinafter *FEDERAL FOOD LABELING GUIDE*].

<sup>18</sup> *What Does FDA Regulate?*, FOOD AND DRUG ADMIN. (Mar. 28, 2018), <https://www.fda.gov/about-fda/fda-basics/what-does-fda-regulate> [<https://perma.cc/2GVB-KL4J>] (accessed Apr. 15, 2020).

<sup>19</sup> *Agencies*, U.S. DEP’T AGRIC., <https://www.usda.gov/our-agency/agencies> [<https://perma.cc/86PM-VXDQ>] (accessed Apr. 15, 2020).

<sup>20</sup> 21 U.S.C. § 601(n)(1); 21 U.S.C. § 453(h); 21 U.S.C. § 1036(b) (2011).

untary label programs including the National Organic Program, the Process Verified Program, and the Grademark program.<sup>21</sup> The FDA ensures labeling standards for food, drugs, and cosmetics, but this is generally limited to content/identity and nutrition labeling with a few small exceptions.<sup>22</sup> Finally, the FTC has the power to prohibit the use of misleading advertisements.<sup>23</sup> As discussed earlier, this has been construed to include food labels.

### A. Meat and Poultry

FSIS is charged with ensuring that foods are not ‘misbranded’ and are safe for human consumption.<sup>24</sup> To meet this mission, FSIS generally requires that all labels for meat and poultry products be pre-approved by Labeling and Program Delivery Staff (LPDS) to ensure accuracy and reliability.<sup>25</sup> Generally, statements or claims on labels fall into two categories: ‘generic’ and ‘special.’<sup>26</sup> Generic claims, like ‘smoky’ or ‘country-style,’ do not require pre-approval by LPDS.<sup>27</sup> However, certain “special statements and claims,” which include those pertaining to animal-raising on labels, must be pre-approved by LPDS before entering commerce.<sup>28</sup> For example, if a producer wants to claim that their meat is from animals who are ‘grass-fed,’ ‘cage-free,’ or ‘raised without antibiotics,’ they must submit certain documentation to LPDS to support these claims.<sup>29</sup> Documentation required to sub-

<sup>21</sup> *National Organic Program*, AGRIC. MARKETING SERV., <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> [<https://perma.cc/D9BK-YQ8H>] (accessed Apr. 15, 2020); *Audit Programs for Livestock, Meat, Poultry, and Egg Industries*, AGRIC. MARKETING SERV. (Nov. 2015), <https://www.ams.usda.gov/publications/content/process-verified-program-fact-sheet> [<https://perma.cc/JG34-J8QT>] (accessed Apr. 15, 2020); *Questions and Answers—USDA Shell Grading Service*, AGRIC. MARKETING SERV., <https://www.ams.usda.gov/publications/qa-shell-eggs> [<https://perma.cc/HD2D-S3WV>] (accessed Apr. 15, 2020).

<sup>22</sup> FEDERAL FOOD LABELING GUIDE, *supra* note 17, at 5, 72.

<sup>23</sup> 15 U.S.C. § 45(a)(1) (2011).

<sup>24</sup> FOOD SAFETY INSPECTION SERV., U.S. DEP’T OF AGRIC., FSIS GUIDELINE FOR INDUSTRY RESPONSE TO CONSUMER COMPLAINTS 7 (2019), <https://www.fsis.usda.gov/wps/wcm/connect/8d0a0e73-1e6f-424f-a41f-ea942247a5ff/Guideline-for-Industry-Response-Customer-Complaint.pdf?MOD=AJPERES> [<https://perma.cc/8SMG-DD4L>] (accessed Apr. 15, 2020).

<sup>25</sup> See FOOD SAFETY AND INSPECTION SERV., U.S. DEP’T OF AGRIC., FSIS DIRECTIVE 7221.1 REV. 1, PRIOR LABELING APPROVAL (2014) (discussing generic label approval [hereinafter FSIS DIRECTIVE 7221.1]).

<sup>26</sup> FOOD SAFETY AND INSPECTION SERV., U.S. DEP’T OF AGRIC., FSIS COMPLIANCE GUIDELINE FOR LABEL APPROVAL 2 (2017), <https://www.fsis.usda.gov/wps/wcm/connect/bf170761-33e3-4a2d-8f86-940c2698e2c5/Comp-Guide-Labeling-Evaluation-Approval.pdf?MOD=AJPERES> [<https://perma.cc/DTP3-JADZ>] (accessed Apr. 15, 2020).

<sup>27</sup> FSIS DIRECTIVE 7221.1, *supra* note 25.

<sup>28</sup> 9 C.F.R. § 412.1(c)(3) (2013).

<sup>29</sup> FOOD SAFETY AND INSPECTION SERV., U.S. DEP’T OF AGRIC., LABELING GUIDELINE ON DOCUMENTATION NEEDED TO SUBSTANTIATE ANIMAL RAISING CLAIMS FOR LABEL SUBMISSIONS 6 (2019), <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES> [<https://perma.cc/E7LW-7RMU>] (accessed Apr. 15, 2020) [hereinafter LABEL GUIDE].

stantiate these claims includes: (1) a written description explaining the controls used for ensuring that the claim is valid from birth to harvest (or the relevant time period); (2) a signed and dated affidavit describing how animals are raised to show that the claim is truthful and not misleading; (3) a written description of product tracing and segregation mechanism from time of slaughter or further processing through packaging and distribution; (4) a written description for the identification, control, and segregation of nonconforming products; and (5) if a third-party certifies a claim, the current copy of the certificate from that party.<sup>30</sup>

The fifth requirement for ‘third-party certified’ items includes programs such as Certified Humane or Certified Animal Welfare Approved by A Greener World.<sup>31</sup> These third-party certification programs have vastly different standards for animal care, and their inspection records are private.<sup>32</sup> A certificate of compliance and standards for acceptance from one of these programs is all that is needed to verify the claim.<sup>33</sup>

However, it is important to note that these ‘requirements’ are non-regulatory as they exist only in a guidance document meant to facilitate the agency approval process for label claims.<sup>34</sup> This means that a producer does not even necessarily need to meet these requirements to use claims on a product label if FSIS determines a producer is in compliance with the law by showing other documentation.

For broader claims like ‘raised with care’ or ‘humanely raised,’ FSIS requires that the packaging include a definition of the term.<sup>35</sup> FSIS does not require, however, that the definition be unambiguous, clear, or even relevant. For example, Empire Kosher defines *humanely raised* on packaging for its Uncured Chicken Franks as “meets Empire Kosher’s humane policy for raising chicken on family farms in a stress-free environment.”<sup>36</sup> Nowhere on the packaging, however, does it define their standards for ‘stress free’ or what their ‘humane policy’ entails.

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<sup>30</sup> *Id.*

<sup>31</sup> See *How We Work*, CERTIFIED HUMANE, <https://certifiedhumane.org/how-we-work/> [<https://perma.cc/F2GH-QVLZ>] (accessed Apr. 15, 2020) (discussing the certification’s goals and purposes in animal welfare); see also *Certified Animal Welfare Approved by AGW*, A GREENER WORLD, <https://agreenerworld.org/certifications/animal-welfare-approved/> [<https://perma.cc/TCQ8-K7RS>] (accessed Apr. 15, 2020) (discussing the sustainability and welfare purposes of the certification).

<sup>32</sup> However, if a claim is audited to a third-party standard by the Agricultural Marketing Service, these records are publicly available through the Freedom of Information Act.

<sup>33</sup> LABEL GUIDE, *supra* note 29, at 6.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Empire Kosher Franks, Uncured Chicken*, PUBLIX, <https://www.publix.com/pd/empire-kosher-franks-uncured-chicken/RIO-PCI-113374> [<https://perma.cc/2RJA-9TU4>] (accessed Apr. 15, 2020).

Problems with FSIS's premarket label approval process have been pointed out by many advocacy groups.<sup>37</sup> For example, research conducted by Animal Welfare Institute (AWI) indicates that even though FSIS supposedly requires premarket label approval, it does not appear to proactively enforce this requirement, since many label approval files requested by AWI through the Freedom of Information Act over the past several years have come back with no responsive records.<sup>38</sup>

AMS administers programs relating to marketing and promotion of food, fiber, and specialty crops for United States producers.<sup>39</sup> This includes overseeing voluntary marketing programs, such as Process Verified and the National Organic Program, but does not include crafting standards or definitions for marketing claims, other than 'organic.'<sup>40</sup>

AMS has changed positions over time regarding its authority to create standards for claims used on labels. In 2002, AMS initiated rulemaking by proposing the adoption of new United States Standards for Livestock and Meat Marketing Claims.<sup>41</sup> AMS stated that "development and maintenance of voluntary standards" would facilitate marketing of agricultural commodities, as required by the Agricultural Marketing Act of 1946.<sup>42</sup> As part of this effort, AMS later promulgated the Grass (Forage) Fed Marketing Claim Standard,<sup>43</sup> and the Naturally Raised Marketing Claim Standard.<sup>44</sup> These standards were largely based on industry consensus.<sup>45</sup> In 2016, AMS reversed its position, stating instead that this type of regulation did not fall under its authority. AMS then withdrew the Grass (Forage) Fed standard and the Naturally Raised standard.<sup>46</sup> AMS determined that because the FDA and FSIS regulate food labels to ensure claims were truthful and not misleading, the standards AMS developed did not help to facilitate

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<sup>37</sup> See, e.g., THOMPSON, *supra* note 5 (discussing a study that found "[f]or 20 out of 25 claims requested . . . the USDA had no documentation that the producer underwent premarket label approval for the use of these claims").

<sup>38</sup> *Id.*

<sup>39</sup> *Rules & Regulations*, AGRIC. MKTG. SERV., <https://www.ams.usda.gov/print/rules-regulations> [<https://perma.cc/N45S-9A7L>] (accessed Apr. 15, 2020).

<sup>40</sup> *Id.*; *Audit Programs for Livestock, Meat, Poultry, and Egg Industries*, *supra* note 21.

<sup>41</sup> United States Standards for Livestock and Meat Marketing Claims, 67 Fed. Reg. 79,552, 79,553 (Dec. 30, 2002).

<sup>42</sup> *Id.*

<sup>43</sup> United States Standards for Livestock and Meat Marketing Claims, Grass (Forage) Fed Claim for Ruminant Livestock and the Meat Products Derived From Such Livestock, 72 Fed. Reg. 58,631, 58,631 (Oct. 16, 2007).

<sup>44</sup> 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, 3541 (Jan. 21, 2009).

<sup>45</sup> *Id.* at 3542.

<sup>46</sup> Withdrawal of United States Standards for Livestock and Meat Marketing Claims, 81 Fed. Reg. 1386, 1386–87 (Jan. 12, 2016).

the marketing of agricultural products.<sup>47</sup> Since AMS made this determination, it has only issued standards where statutorily directed.

Although not a third-party program, producers can have certain claims audited by AMS's Process Verified Program (PVP).<sup>48</sup> PVP is a voluntary marketing program for which producers pay AMS auditors to verify 'process points,'<sup>49</sup> for claims such as "no antibiotics ever," "vegetarian fed," and "raised cage free."<sup>50</sup> AMS does not set definitions or substantive standards for these claims. Instead, the applicant provides the definition or standard it wishes to have verified, and AMS conducts a combined desk and on-site audit.<sup>51</sup> With large companies like Tyson, Perdue, or Smithfield, auditors are only able to cover a "representative sample" of farms, which can be around 2%.<sup>52</sup>

After certification, the producer can then place the USDA Process Verified shield on its labels and other promotional materials.<sup>53</sup> AMS requires that the specified process points be printed immediately adjacent to the Process Verified shield, and that asterisks referring the consumer to an information panel for further information about the process points are printed with the shield.<sup>54</sup> AMS also requires labels to include the USDA Process Verified web address.<sup>55</sup> However, even if a claim is Process Verified, premarket label approval by FSIS is still required for certain claims.<sup>56</sup>

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<sup>47</sup> *Id.*; Craig Morris, *Understanding AMS' Withdrawal of Two Voluntary Marketing Claim Standards*, U.S. DEP'T AGRIC. (Jan. 20, 2016), <https://www.usda.gov/media/blog/2016/01/20/understanding-ams-withdrawal-two-voluntary-marketing-claim-standards> [<https://perma.cc/E886-QRAZ>] (accessed Apr. 15, 2020).

<sup>48</sup> *Process Verified Program*, AGRIC. MKTG. SERV., <https://www.ams.usda.gov/services/auditing/process-verified-programs> [<https://perma.cc/H576-9SAJ>] (accessed Apr. 15, 2020).

<sup>49</sup> *See id.* ("Examples of process points verified by AMS include but are not limited to: adherence to a recognized standard that is not otherwise required by the quality management system or regulation; a production and/or handling practice that provides specific information to consumers to enable them to make informed decisions on the products that they buy; a service with a characteristic for that type of operation; a quantifiable characteristic such as size, weight, or age; and a characteristic, practice, or requirement that is specifically requested by a customer or consumer.")

<sup>50</sup> *See* AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., OFFICIAL LISTING OF APPROVED USDA PROCESS VERIFIED PROGRAMS 1-2, 11 (2020), <https://www.ams.usda.gov/sites/default/files/media/Official%20ListingPVP.pdf> [<https://perma.cc/Z4DH-H37D>] (accessed Apr. 15, 2020) (illustrating the various labels approved by PVP certification).

<sup>51</sup> *Audit Programs for Livestock, Meat, Poultry, and Egg Industries*, *supra* note 21.

<sup>52</sup> *See* Harrison Jacobs, *Perdue Farmer Reveals How Bad Life Is for His 'Humanely Raised' Chickens*, BUS. INSIDER (Dec. 10, 2014), <http://www.businessinsider.com/the-truth-about-humanely-raised-chicken-2014-12> [<https://perma.cc/D2EH-CHPD>] (accessed Apr. 15, 2020) (discussing animal treatment practices in large-scale industrial farming); *see also* Interview by Dena Jones, Farm Animal Program Dir., Animal Welfare Inst., with Craig Morris, Deputy Admin., Agric. Mktg. Serv. (Sept. 2013) (stating the representative sample is about 2%).

<sup>53</sup> *Use of the PVP Shield and Term*, AGRIC. MKTG. SERV., <https://www.ams.usda.gov/services/auditing/pvp-shield> [<https://perma.cc/4L7M-N3QA>] (accessed Apr. 15, 2020).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



The Organic Foods Production Act (OFPA) delegates authority to AMS to manage the National Organic Program (NOP).<sup>57</sup> The NOP covers standards relating to animal health and welfare, including access to the outdoors, bedding, and food requirements.<sup>58</sup> To bear a USDA Certified Organic shield, a product's ingredients must be sourced from farms audited by third-party certifiers accredited by AMS.<sup>59</sup> AMS accredits third-party certifiers every five years, and an on-site assessment may be performed at two and a half years.<sup>60</sup>

In 2018, the USDA withdrew new standards under the NOP, known as the Organic Livestock and Poultry Practices rule (OLPP rule), that would have strengthened the animal welfare provisions for organically raised farm animals.<sup>61</sup> In response, several organizations announced new organic certifications to meet consumer demands that the claim meant more than what the USDA provided in the regulations.<sup>62</sup> There is some debate about whether these certification programs are legal, given the fact that the USDA created the organic program to quell varying organic standards that were common before the creation of the NOP.<sup>63</sup> It appears that these organizations are attempting to circumvent the potential legal issue by requiring USDA organic certification as a component of their certification program.

The last agency involved in regulation of labels on meat and poultry is the FDA. FDA's jurisdiction includes food and drug labeling under the FFDC<sup>64</sup> and the FPLA.<sup>65</sup> These acts give the FDA authority to prevent 'misbranded' food from entering commerce.<sup>66</sup> Additionally the FDA has the authority to ensure consumer commodities are

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<sup>57</sup> 7 U.S.C. §§ 6501–6524 (2011).

<sup>58</sup> See, e.g., 7 C.F.R. §§ 205.237–205.239 (2019) (setting the standards for livestock feed, health care, and living conditions).

<sup>59</sup> 7 C.F.R. §§ 205.300, 205.400, 205.403, 205.406 (2011).

<sup>60</sup> *FAQ: Becoming a Certifying Agent*, AGRIC. MKTG. SERV., <https://www.ams.usda.gov/services/organic-certification/faq-becoming-certifying-agent> [<https://perma.cc/G8RV-8LZ5>] (accessed Apr. 15, 2020).

<sup>61</sup> Rules and Regulations for the Department of Agriculture, 83 Fed. Reg. 10,775 (Mar. 13, 2018).

<sup>62</sup> E.g., *Regenerative Organic Agriculture*, RODALE INST., <https://rodaleinstitute.org/why-organic/organic-basics/regenerative-organic-agriculture/> [<https://perma.cc/49PR-2TM8>] (accessed Apr. 15, 2020) (“In 2018, we introduced a new, holistic, high-bar standard for agriculture certification. Regenerative Organic Certification, or ROC . . . Using the USDA certified organic standard . . . [ROC] adds important criteria and builds off these . . . in the areas of . . . animal welfare.”); Press Release, Real Organic Project, Farmers Assemble to Reclaim Integrity for Organic Standards (May 16, 2018) (on file at <https://www.realorganicproject.org/category/pr/> [<https://perma.cc/UE89-JGMN>]) (listing animal welfare as a concern due to the withdrawal of the OLPP rule).

<sup>63</sup> National Organic Program, 65 Fed. Reg. 13,512, 13,512–13 (Mar. 13, 2000) (proposed rulemaking).

<sup>64</sup> 21 U.S.C. § 321(f)–(g)(1).

<sup>65</sup> 15 U.S.C. §§ 1452–1454 (2013).

<sup>66</sup> 21 U.S.C. § 331(a)–(c) (2010); see 21 U.S.C. § 343 (delineating criteria of misbranded food).

labeled to disclose contents, identity, and information about the product's manufacturer as well as prevent consumer deception.<sup>67</sup>

In 2015, the FDA opened a docket regarding the use of the term *natural* on food labels.<sup>68</sup> Given the FDA's jurisdiction over food, this docket would seemingly apply to meat and poultry. Through public comment, the FDA asked an array of questions relating to the term *natural* and how the FDA should regulate its use, including: whether the term should be defined, how it should be defined, and how the agency should determine appropriate use of the term on food labels.<sup>69</sup> Interestingly, after the FDA closed this docket, Consumers Union petitioned the FDA and FSIS to prohibit the use of the claim *natural* on labels of meat and poultry products completely.<sup>70</sup> The FDA has made no statements regarding its intention to move forward since the docket closed in 2016.<sup>71</sup>

### B. Eggs

Both the FDA and the USDA oversee aspects of egg production and labeling, but neither has express authority to regulate the health or welfare of laying hens as a label claim requirement.<sup>72</sup> The department responsible depends upon the type of product and whether the producer participates in a voluntary inspection program.<sup>73</sup> Regulation

<sup>67</sup> 15 U.S.C. §§ 1452–1454 (stating the scope of the labeling prohibition, requirements for labeling, and that the regulatory authority of Secretary of Health and Human Services is shared with the FTC).

<sup>68</sup> Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69,905 (Nov. 12, 2015).

<sup>69</sup> *Id.* at 69,908.

<sup>70</sup> *Id.* at 69,907; see *infra* Table 1.

<sup>71</sup> See *Use of the Term Natural on Food Labeling*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling> [<https://perma.cc/Q3MZ-KB2T>] (accessed Apr. 15, 2020) (discussing the FDA's request for comments in 2016).

<sup>72</sup> See Daniela Galarza, *USDA vs. FDA: What's the Difference?*, EATER (Mar. 24, 2017), <https://www.eater.com/2017/3/24/15041686/fda-usda-difference-regulation> [<https://perma.cc/PC2S-QPG8>] (accessed Apr. 15, 2020) (“Representatives from the USDA and FDA acknowledge that laws surrounding the regulation of eggs are murky and vary from product to product. In general, the USDA inspects egg products, like packaged egg whites and powdered eggs used in food processing, while the FDA regulates whole eggs in their shells. (Again, USDA graded eggs are a part of the branch's marketing arm, and do not reflect inspection for safety.) Egg substitutes and replacements (which do not contain any egg product) are regulated by the FDA.”); Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 TEMP. J. SCI. TECH. & ENVTL. L. 51, 63 (2011) (“The Food and Drug Administration (FDA) and the Food Safety Inspection Service (FSIS) of the USDA share jurisdiction over eggs. However, neither agency has any authority to regulate the conditions under which laying hens are raised.”).

<sup>73</sup> See RENÉE JOHNSON, CONG. RES. SERV., THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 4–5 (2016), <https://fas.org/sgp/crs/misc/RS22600.pdf> [<https://perma.cc/H3F4-4VGG>] (accessed Apr. 15, 2020) (“Examples of FDA-regulated foods are produce, dairy products, and processed foods. FDA also has oversight of all seafood and shellfish products, and most fish products (except for catfish). FDA has jurisdiction over meats from

of claims made on egg and egg product packaging is even more lax than that of meat and poultry products.<sup>74</sup>

The FDA has the authority to regulate shell egg safety pursuant to the FFDCA.<sup>75</sup> Additionally, the department has responsibility for shell egg labels under the FPLA.<sup>76</sup> However, the FDA does not regulate what claims are appropriate for use on labels to the same extent as FSIS does in meat and poultry packages. The FDA requires that safe handling instructions be added to the label of all egg cartons,<sup>77</sup> but otherwise does not regulate animal-raising claims on egg cartons. While the FDA does conduct onsite inspections of all egg production facilities, these are inspections premised to prevent egg infection with *Salmonella* Enteritidis, which does not have implications for egg labeling.<sup>78</sup>

The EPIA delegates oversight of egg products to the USDA.<sup>79</sup> The USDA further splits authority over eggs and egg products between FSIS and AMS.<sup>80</sup> FSIS oversees egg products only, while AMS has authority to some extent over both shell eggs and egg products, depending on whether the producer participates in AMS programs such as grading or organic.<sup>81</sup>

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animals or birds that are not under the regulatory jurisdiction of FSIS. FDA shares some responsibility for the safety of eggs with FSIS. FDA has jurisdiction over establishments that sell or serve eggs or use them as an ingredient in their products . . . FSIS is responsible for implementing and enforcing the Federal Meat Inspection Act (21 U.S.C. 601, et seq.), the Poultry Products Inspection Act (21 U.S.C. 451, et seq.), and parts of the Egg Products Inspection Act (21 U.S.C. 1031, et seq.). In carrying out its responsibilities under these acts, FSIS places inspectors in meat and poultry slaughterhouses and in meat, poultry, and egg processing plants. FSIS also conducts inspections of warehouses, transporters, retail stores, restaurants, and other places where meat, poultry, and egg products are handled and stored. In addition, FSIS conducts voluntary inspections under the Agriculture Marketing Act (7 U.S.C. 1621, et seq.).”

<sup>74</sup> Rodriguez, *supra* note 72, at 70.

<sup>75</sup> See generally, 21 U.S.C. §§ 321(f), 343 (defining *food* and *misbranded food*).

<sup>76</sup> 15 U.S.C. §§ 1452–1454 (authorizing oversight of labeling practices).

<sup>77</sup> 21 C.F.R. § 101.17(h)(1)–(3) (2011).

<sup>78</sup> See 21 C.F.R. §§ 115.50, 118 (2020) (regulating egg production, storage, and transportation to specifically prevent salmonella contamination); Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, 74 Fed. Reg. 33,030 (July 9, 2009) (describing the FDA’s final rule on required salmonella prevention measures). Broad interpretation of this authority could have a positive impact on hen welfare. For instance, the regulations require cleaning and disinfection, removal of visible manure, and limitation of rodents, flies, and other pests. 21 C.F.R. § 118.4.

<sup>79</sup> 21 U.S.C. § 1031 (2010).

<sup>80</sup> See Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 99 (2000) (“[T]he FSIS[] is responsible for inspecting on a continuous basis each plant that processes meat or poultry, and food containing meat or poultry intended for interstate distribution. Another unit, the Agricultural Marketing Service (AMS), operates a large voluntary inspection system for the grading of eggs.”) (internal citations omitted).

<sup>81</sup> See A. Bryan Endres & Nicholas R. Johnson, *Integrating Stakeholder Roles in Food Production, Marketing, and Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 43 (2011) (“USDA’s Food Safety Inspection Service (FSIS) assumes jurisdiction when shell eggs are directed to a processing plant for break-

The EPIA delegates FSIS authority over egg products, which includes liquid, frozen, and dried egg products—not shell eggs.<sup>82</sup> FSIS uses this authority to regulate egg products for safety in human consumption.<sup>83</sup> Egg products must undergo premarket label approval (meaning egg products must comply with the FSIS label guidance document to substantiate animal raising claims like “free range” or “pasture raised”),<sup>84</sup> but the authors are not aware of any egg products making broad, holistic animal-raising claims on product packaging, such as humanely raised. FSIS does verify that safety, nutrition, and identification information is placed on labels.<sup>85</sup>

AMS programs relating to marketing and promotion of food, fiber, and specialty crops for U.S. producers also apply to eggs.<sup>86</sup> As in other contexts, AMS does not promulgate regulations defining common welfare claims made on egg packages such as ‘cage free’ or ‘free range.’ Instead, AMS administers voluntary programs touching on these types of claims while using other USDA agency definitions.<sup>87</sup> These voluntary programs include the USDA Grade Shield program and the National Organic Program.<sup>88</sup> As discussed above, in the past AMS promulgated regulatory definitions for terms which theoretically could have applied to eggs (e.g. natural), but these definitions were withdrawn.

AMS administers the voluntary USDA Grade Shield program, which relates to shell egg quality and compliance with sanitary processing, not animal welfare.<sup>89</sup> In essence, by participating in the program, producers who meet AMS standards may place a USDA grade shield on egg packages indicating quality to consumers.<sup>90</sup> How-

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ing to make egg products. Once these egg products leave the factory and enter commerce, however, the regulatory responsibility shifts back to the FDA. Another USDA agency, the Agricultural Marketing Service (AMS), regulates shell egg quality under both the voluntary egg grading program and the mandatory Shell Egg Surveillance Program. Shell egg packers participating in fee-based grading program may affix the official USDA grade shield to products meeting USDA quality standards. The mandatory surveillance program seeks to ensure that shell eggs are wholesome, unadulterated, and properly labeled. As part of the compulsory surveillance program, USDA inspectors visit each packing plant at least four times per year.” (internal citations omitted).

<sup>82</sup> 21 U.S.C. §§ 1031, 1033(f).

<sup>83</sup> 21 U.S.C. § 1031.

<sup>84</sup> See LABEL GUIDE, *supra* note 29, at 10–11 (providing standards for free range and pasture raised products that apply to egg products).

<sup>85</sup> FEDERAL FOOD LABELING GUIDE, *supra* note 17, at 99–103; 21 U.S.C. §§ 1034, 1036.

<sup>86</sup> See *Rules & Regulations*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/about-ams> [<https://perma.cc/7YUX-RM2G>] (accessed Apr. 15, 2020) (discussing AMS’s general jurisdiction); see also *AMS Fact Sheet*, U.S. DEP’T AGRIC. (May 2019), [https://www.ams.usda.gov/sites/default/files/media/AMS\\_Fact\\_Sheet\\_2019.pdf](https://www.ams.usda.gov/sites/default/files/media/AMS_Fact_Sheet_2019.pdf) [<https://perma.cc/7YUX-RM2G>] (accessed Apr. 15, 2020) (discussing the Livestock and Poultry Program).

<sup>87</sup> *Questions and Answers – USDA Shell Grading Service*, *supra* note 21.

<sup>88</sup> 7 C.F.R. § 56 (2019) (entitled Voluntary Grading of Shell Eggs); 7 C.F.R. § 205.

<sup>89</sup> Voluntary Grading of Egg Shells, 7 C.F.R. § 56 (2010).

<sup>90</sup> *Egg Grading Shields*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/grades-standards/egg/grade-shields> [<https://perma.cc/5JCU-BSMF>] (accessed Apr. 15, 2020).

ever, if a USDA Graded egg carton also bears claims such as free range or cage free, certain restrictions apply.<sup>91</sup>

Voluntary production claims on packages with the USDA Grade Shield are source-verified by AMS “through onsite farm visits, at least twice annually, to check that the laying hens are housed in the appropriate production system.”<sup>92</sup> These verifications are conducted according to pre-set definitions of various terms, including cage free and free range, among others.<sup>93</sup> AMS claims it has no authority to promulgate definitions for voluntary label claims because FSIS and the FDA are tasked with ensuring labels are truthful and not misleading.<sup>94</sup> However, AMS’s mandatory Labeling Requirements Guide for grademarked shell egg labels appears to pass judgment on certain terms.<sup>95</sup> For example, ‘animal friendly,’ ‘happy hens,’ and ‘naturally raised in a natural environment,’ are not allowed on packages also bearing the USDA grade shield “unless mandatory labeling requirements are first met” because these three terms are not defined by the FDA or USDA, and the guide says they are “misleading and subjective.”<sup>96</sup> However, the guidance is ambiguous as to whether the lack of definition means these claims can never be used in conjunction with the USDA shield.<sup>97</sup> Interestingly, egg cartons that do not bear a USDA Grade Shield do not have to meet these labeling requirements nor undergo a certification process, but are required to meet at least U.S. Grade B standards.<sup>98</sup>

AMS administers the NOP, which includes egg-laying hens.<sup>99</sup> Therefore, eggs cartons bearing a USDA Organic label must meet NOP

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<sup>91</sup> See *id.* (discussing additional requirements for officially graded and certified USDA eggs that make such claims).

<sup>92</sup> Craig A. Morris, *USDA Graded Cage-Free Eggs: All They’re Cracked up to Be*, U.S. DEP’T AGRIC. (Feb. 21, 2017), <https://www.usda.gov/media/blog/2016/09/13/usda-graded-cage-free-eggs-all-theyre-cracked-be> [https://perma.cc/ES7A-F5UT] (accessed Apr. 15, 2020).

<sup>93</sup> AGRIC. MKTG. SERV., U.S. DEP’T AGRIC., USDA GRADEMARKED PRODUCT LABEL SUBMISSION CHECKLIST (2016), <https://www.ams.usda.gov/sites/default/files/media/USDA%20Grademarked%20Product%20Label%20Submission%20Checklist.pdf> [https://perma.cc/X4W8-TQK7] (accessed Apr. 15, 2020).

<sup>94</sup> See Craig A. Morris, *Understanding AMS’ Withdrawal of Two Voluntary Marketing Claim Standards*, U.S. DEP’T AGRIC. (Feb. 21, 2017), <https://www.usda.gov/media/blog/2016/01/20/understanding-ams-withdrawal-two-voluntary-marketing-claim-standards> [https://perma.cc/4CH9-6ABD] (accessed Apr. 15, 2020) (discussing a potential lack of congressional authority).

<sup>95</sup> See AGRIC. MKTG. SERV., *supra* note 93, at 8 (discussing specific marketing claims).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Questions and Answers – USDA Shell Grading Service*, *supra* note 21.

<sup>99</sup> See 7 C.F.R. § 205.2 (2011) (defining *agricultural product*).

standards, including “access to the outdoors”<sup>100</sup> and other welfare requirements.<sup>101</sup>

As mentioned above, AMS withdrew a rule meant to strengthen NOP standards in 2018. The OLPP rule was primarily created to remedy inconsistencies in the application of the OFPA for egg-laying hens.<sup>102</sup> Under the regulations implementing the Act, access to the outdoors is required for all animals.<sup>103</sup> However, because of varying interpretations of this requirement, some certifiers consider enclosed, concrete floored porches as providing hens access to the outdoors, therefore qualifying the producers as an organic facility.<sup>104</sup> The withdrawn regulations would have been the first codification of comprehensive animal welfare standards at the federal level in the United States.<sup>105</sup> Now, AMS’s Organic Label merely reflects the minimum requirements of the NOP. At the time of writing, several challenges to the withdrawal are pending.<sup>106</sup>

### C. Dairy

The labeling of dairy is overseen by the FDA and USDA via the AMS.<sup>107</sup> However, there is very little regulation over labeling of dairy

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<sup>100</sup> Memorandum from Miles McEnvoy, Deputy Adm’r of Nat’l Organic Program, to Stakeholders and Interested Parties (Jan. 31, 2011) (on file with authors).

<sup>101</sup> 7 C.F.R. § 205.239 (2012) (“Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment: Except, that, animals may be temporarily denied access to the outdoors in accordance with §§ 205.239(b) and (c).”).

<sup>102</sup> ANIMAL WELFARE INST. ET AL., ANIMAL WELFARE IN THE NATIONAL ORGANIC PROGRAM: THE USDA MUST ACT QUICKLY TO PROTECT MILLIONS OF ANIMALS 19 (2017), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-AnimalWelfare-NatOrganicProgram-2017-13.pdf> [<https://perma.cc/4NJ2-BV8G>] (accessed Apr. 15, 2020) [hereinafter ORGANIC REPORT].

<sup>103</sup> 7 C.F.R. § 205.239(a)(1).

<sup>104</sup> ORGANIC REPORT, *supra* note 102, at 19.

<sup>105</sup> 21 U.S.C. § 343(a)(1).

<sup>106</sup> *See* Organic Trade Ass’n v. U.S. Dep’t of Agric., 370 F. Supp. 3d 98, 100–01 (D.D.C. 2019) (“The Organic Trade Association (OTA) challenged the delays to the effective date of the Final OLPP Rule in September 2017, while the November Delay Rule was open for public comment and not yet finalized. Between then and now, the Complaint has twice been amended and now also includes a challenge to the withdrawal of the rule. The government moves to dismiss the Second Amended Complaint. OTA opposes. Having studied the parties’ briefs, the Court finds OTA has standing to sue but will dismiss its challenge to the Delay Rules.”); *see also* Ctr. for Env’tl. Health v. Perdue, No. 18-cv-01763, 2019 WL 3852493, at \*1 (N.D. Cal. 2019) (granting plaintiff’s motion to compel “completion of the Administrative Record with 47,000 public comments submitted in response to a related rulemaking, and production of a privilege log identifying all materials withheld on the basis of privilege”).

<sup>107</sup> The FDA regulates the accuracy of nutritional claims on all food for human consumption, including dairy. 21 CFR §§101.01-101.108 (2020). The USDA’s oversees the grading requirements for milk quality. 7 C.F.R. § 58. The USDA’s oversight of milk labels outside of quality is limited to determining if the requirements to display the USDA organic shield on organic dairy products are met. 7 C.F.R. §§ 205.01-205.699.

products because traditionally milk regulation has been limited to safety, trade, and promotion.<sup>108</sup>

The FDA oversight of dairy labels is intended to prevent false or misleading labels.<sup>109</sup> As with egg labeling, the FDA interprets its authority to include health and nutrient content claims, but not claims relating to animal welfare.<sup>110</sup>

In 1994, the FDA did exercise its jurisdiction over dairy labels to address the issue of bovine somatotropin (bST), or bovine growth hormone, claims on milk products.<sup>111</sup> bST is a synthetic drug used to increase milk production.<sup>112</sup> While bST is FDA-approved,<sup>113</sup> some consumers believed farms treated their cows with the synthetic hormone to compensate for low-welfare conditions or that the presence of recombinant bST (rbST) in milk could present health risks.<sup>114</sup> Eventually, the FDA promulgated guidance in response to complaints that the use of “no rbST” on milk is misleading.<sup>115</sup> In response to these complaints, the FDA found it had no authority to regulate in this realm.<sup>116</sup> The guidance requires that if a producer wants to include a claim such as “no rbST,” the claim must be qualified (e.g. “[n]o significant difference has been shown between milk derived from rbST-treated and non-rbST treated cows”).<sup>117</sup> Finally, the FDA’s potential rulemaking regarding the use of the term *natural* would theoretically apply to milk labels.

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<sup>108</sup> Daniel A. Sumner & Joseph V. Balagtas, *United States’ Agricultural Systems: An Overview of U.S. Dairy Policy*, in ENCYCL. OF DAIRY SCI. 20, 20 (John Fuquay & Patrick Fox eds., 1st ed. 2002).

<sup>109</sup> 21 U.S.C. § 331(a)–(c); 21 U.S.C. § 343.

<sup>110</sup> See *What FDA Does and Does Not Regulate*, FOOD & DRUG ADMIN., <https://www.fda.gov/animal-veterinary/animal-health-literacy/what-fda-does-and-does-not-regulate> [<https://perma.cc/CT9N-47Y9>] (accessed Apr. 15, 2020) (discussing categories of food and dietary label claims); see also *Label Claims for Conventional Foods and Diet Supplements*, FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-labeling-nutrition/label-claims-conventional-foods-and-dietary-supplements> [<https://perma.cc/TBB7-7F6S>] (accessed Apr. 15, 2020) (discussing FDA oversight of food-producing animals).

<sup>111</sup> Interim Guidance on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279 (Feb. 10, 1994).

<sup>112</sup> *Bovine Somatotropin (BST)*, FOOD & DRUG ADMIN., <https://www.fda.gov/animal-veterinary/safetyhealth/productsafetyinformation/ucm055435.htm> [<https://perma.cc/7ELB-DCQK>] (accessed Apr. 15, 2020).

<sup>113</sup> *Id.*

<sup>114</sup> HARRY M. KAISER, CONSUMER ATTITUDES ON BST REFLECT LACK OF INFORMATION (May 1991) <http://publications.dyson.cornell.edu/docs/smartMarketing/pdfs/kaiser5-91.PDF> [<https://perma.cc/78AW-8R7E>] (accessed May 14, 2020); *Report on the Food and Drug Administration’s Review of Safety of Recombinant Bovine Somatotropin*, FOOD & DRUG ADMIN., <https://www.fda.gov/animal-veterinary/product-safety-information/report-food-and-drug-administrations-review-safety-recombinant-bovine-somatotropin> [<https://perma.cc/3WZ8-JKDT>] (accessed Apr. 15, 2020).

<sup>115</sup> Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. at 6279–80.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 6280.

The labeling of organic dairy products is the only context in which USDA controls a label claim relating to the welfare of dairy animals.<sup>118</sup> As mentioned previously, producers that wish to use a USDA organic label must meet organic animal standards, which includes several animal welfare requirements such as access to pasture and limitation of physical mutilations.<sup>119</sup>

#### D. All Foods

Although labels are not included in the definition of advertisement, the FTCA states that the FTC has the authority to prohibit “unfair or deceptive acts or practices in or affecting commerce.”<sup>120</sup> Courts have interpreted this to mean that the FTC has jurisdiction to “prevent unfair competition by means of false labeling and misbranding regardless of the kind of product.”<sup>121</sup> To determine if an advertisement, label, or brand is “deceptive” the FTC looks at (1) whether it is likely to mislead a consumer acting reasonably under the circumstances and (2) whether the representation is “material” to the consumer’s decision to buy or use the product.<sup>122</sup> For example, a label for chicken is deceptive if a consumer purchasing the product relies on a misleading claim—for instance, humanely raised—on the package and chooses that product over another because of that representation.

FTC reviews complaints and conducts investigations for claims that “consumers have trouble evaluating themselves.”<sup>123</sup> In an increasingly global food economy, claims about animal welfare are quite literally impossible for consumers to verify. Even if a consumer had means to visit the sites where animals are raised and slaughtered, they likely would not be able to get inside due to the strict security measures at factory farms.

While the FTC has wide-ranging power, it is spread thin. In 2016, the FTC received over 2.5 million complaints, the majority of which were related to debt collection and identity theft.<sup>124</sup> If an agency investigates a complaint, overwhelming proof of wrongdoing by a company will not necessarily spell victory for the complainant because admin-

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<sup>118</sup> *Organic Standards*, U.S. DEPT AGRIC., <https://www.ams.usda.gov/grades-standards/organic-standards> [<https://perma.cc/7CF5-XNZB>] (accessed Apr. 15, 2020).

<sup>119</sup> *Id.*

<sup>120</sup> 15 U.S.C. § 45(a)(1) (2010).

<sup>121</sup> *Fresh Grown Pres. Corp. v. Fed. Trade Comm’n*, 125 F.2d 917, 919 (2d Cir. 1942).

<sup>122</sup> Letter from James C. Miller, Chairman, Fed. Trade Comm’n, to Jon D. Dingell, Chairman, Comm. on Energy and Commerce (Oct. 14, 1983) (Policy Statement on Deception) [hereinafter FTC Policy Statement].

<sup>123</sup> *Advertising FAQs: A Guide for Small Business*, *supra* note 11.

<sup>124</sup> *FTC Releases Annual Summary of Consumer Complaints*, FED. TRADE COMM’N (Mar. 3, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-releases-annual-summary-consumer-complaints> [<https://perma.cc/95BX-FM3N>] (accessed Apr. 15, 2020).



istrative agencies have discretion in exercising enforcement authority.<sup>125</sup>

### III. STATE LAWS

Generally, every state has “police power” authority to protect its citizens.<sup>126</sup> However, federal preemption doctrine creates questions about whether states may impose labeling requirements that are different from, or in addition to, federal law. Both the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) have sections that expressly preempt state laws that regulate labeling of meat and poultry products.<sup>127</sup> Nonetheless, states have attempted to regulate, or otherwise influence, labeling on food packaging.<sup>128</sup> For example, many states with large animal agriculture operations have recently attempted to restrict the use of the word *meat* on packages of plant-based imitation meat products.<sup>129</sup> However, the preemption issue with egg labeling is unsettled. Since the Egg Products Inspection Act (EPIA) does not expressly preempt state laws, several states have attempted to require more disclosure on packages of eggs produced in that state.<sup>130</sup>

### IV. ADVOCACY EFFORTS LED BY ANIMAL PROTECTION GROUPS

Given the overlap of administrative jurisdiction over labeling, it is unclear which forum is most effective to challenge misleading labeling claims. Despite this confusion, animal advocacy groups have challenged animal-raising claims on labels and in advertisements for decades.<sup>131</sup>

<sup>125</sup> See *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (holding that there is a presumption of no judicial review of an agency’s decision not to investigate or enforce complaints).

<sup>126</sup> *Chi., Burlington, & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) (“[P]olice power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”) (internal citation omitted).

<sup>127</sup> 21 U.S.C. § 678 (2010); see also 21 U.S.C. § 467(e) (2009) (regarding poultry, stating “marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State.”).

<sup>128</sup> *E.g.*, MO. REV. STAT. § 265.494(7) (2018) (prohibiting “misrepresenting” a product as “meat” if that product is “not derived from harvested production livestock or poultry”).

<sup>129</sup> MO. REV. STAT. § 265.494(7).

<sup>130</sup> *E.g.*, AGRIC. MKTG. SERV., U.S. DEP’T AGRIC., SHELL EGG LABELING GUIDELINES FOR PRODUCT BEARING THE USDA GRADEMARK 5 (2018), <https://www.ams.usda.gov/sites/default/files/media/ShellEggLabelingUSDAGrademarkedProduct.pdf> [<https://perma.cc/C4GB-P8D7>] (accessed Apr. 15, 2020) (providing examples of various state labeling requirements).

<sup>131</sup> See *infra* Table 1 (summarizing relevant efforts to challenge animal-raising claims).

### A. Administrative and Legislative Reform

As an alternative to challenging a misleading or false claim after it has been used in advertisement, many groups have attempted to proactively change advertising laws, regulations, and policies. These efforts offer limited success and can be time consuming.

For example, in 2006, Compassion Over Killing (COK)<sup>132</sup> filed concurrent petitions to the Food and Drug Administration (FDA), Federal Trade Commission (FTC), and United States Department of Agriculture (USDA)—specifically the Agricultural Marketing Service (AMS) and Food Safety Inspection Service (FSIS)—to promulgate regulations requiring that “egg production methods be fully disclosed on the labeling of all cartons.”<sup>133</sup> In particular, COK requested the agencies promulgate regulations requiring each egg carton have a label stating “Free-Range Eggs,” “Cage-Free Eggs,” or “Eggs from Caged Hens.”<sup>134</sup> All three administrative bodies declined to engage in rulemaking, each indicating that it lacked authority to promulgate mandatory labeling regulations for shell eggs.<sup>135</sup> FTC stated that the information provided by COK did not demonstrate that current egg labeling practices were “unfair” or “deceptive” per the Federal Trade Commission Act.<sup>136</sup> The FDA denied the request because, among other reasons, it determined COK had failed to demonstrate that egg labels were omitting a material fact in not disclosing living conditions of egg-laying hens, and that consumer interest in living conditions was insufficient to engage in rulemaking.<sup>137</sup> After the rulemaking petitions were denied, COK and the Animal Legal Defense Fund (ALDF) filed a lawsuit claiming that the dismissals were arbitrary and capricious.<sup>138</sup> In 2017, the Ninth Circuit affirmed the lower court’s ruling in favor of the agencies.<sup>139</sup>

In 2014, the Animal Welfare Institute (AWI) filed a petition for rulemaking with FSIS to amend labeling regulations under the FMIA and the PPIA to require third-party certification for the approval of

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<sup>132</sup> COK recently changed its name to “Animal Outlook,” but will be referred to as COK for this Article to avoid confusion in referring to past work.

<sup>133</sup> See *infra* Table 1; Press Release, Compassion Over Killing, Federal Agencies Fail to Regulate Deceptive Egg Labels (Mar. 28, 2013).

<sup>134</sup> See Citizen Petition from Compassion Over Killing & Penn Law Animal L. Project, to the Food & Drug Admin. (September 2006) (petitioning the FDA to change labeling requirements for eggs sold in the U.S.); *COK Co-Files Lawsuit Against Federal Agencies for Failure to Regulate Deceptive Egg Labels*, ANIMAL OUTLOOK, <https://animaloutlook.org/truth-in-egg-labeling/> [<https://perma.cc/MEY2-FLVJ>] (accessed Apr. 15, 2020) (noting Compassion Over Killing sent the same petition to the FDA, USDA, and FTC).

<sup>135</sup> *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 853 (9th Cir. 2017).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *COK Co-Files Lawsuit Against Federal Agencies for Failure to Regulate Deceptive Egg Labels*, *supra* note 134.

<sup>139</sup> *Compassion Over Killing*, 849 F.3d at 852.

claims regarding animal welfare and environmental stewardship.<sup>140</sup> AWI reasoned that because the FMIA and the PPIA give FSIS almost exclusive authority over labeling in meat and poultry packaging, requiring third-party certification for these types of claims would be the most practical solution for managing misleading advertising given the agency's reluctance to engage in rulemaking to define the terms. The petition included terms like animal friendly, humanely raised, 'raised in a stress free environment,' and claims using the word *sustainable*.<sup>141</sup> In the fall of 2018, AWI filed a lawsuit challenging the USDA's failure to respond to this petition.<sup>142</sup> Unfortunately, AWI's case encountered the most common problem with litigating on failure to respond to a petition: Soon after AWI filed its complaint, FSIS denied the petition.<sup>143</sup> Because FSIS's denial fully responded to AWI's petition and litigation to compel rulemaking is difficult, AWI dismissed the case voluntarily.<sup>144</sup>

### B. Administrative Challenges

Administrative proceedings can also be used to challenge misleading claims; however, not all agencies have formal processes for these types of challenges. For example, the USDA does not have a formal administrative challenge process, so a challenge can be done informally (e.g. by letter to the administrator) or through the petition process (see below Section 1). The FTC on the other hand, has a formal process for bringing administrative challenges (see below Section 2).

In March of 2011, Tyson Foods, Inc.—one of the largest poultry companies in the country—brought a petition against Perdue Farms with FSIS and AMS.<sup>145</sup> Tyson requested that the USDA rescind approval for the Process Verified Program (PVP) labels and point of sale advertising materials that contained the claims "raised cage free" and "humanely raised" on Perdue chicken products.<sup>146</sup> Tyson argued that the claims implied that Perdue raised its chickens differently—hu-

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<sup>140</sup> Petition for Rulemaking from Animal Welfare Inst., to Food Safety and Inspection Serv., (May 2014) (Petition for Rulemaking to Amend Labeling Regulations under the Federal Meat Inspection Act and the Poultry Products Inspection Act to Require Third-Party Certification for the Approval of Animal Welfare and Environmental Stewardship Claims).

<sup>141</sup> *Id.*

<sup>142</sup> Complaint at 1–2, *Animal Welfare Inst. v. U.S. Dep't of Agric.*, No. 18-cv-2021 (D.D.C. Nov. 14, 2018).

<sup>143</sup> Letter from Roberta Wagner, Assistant Admin., Office of Pol'y and Program Dev., to Dena Jones, Farm Animal Program Manager, Animal Welfare Inst. (Feb. 22, 2019).

<sup>144</sup> *Increasing Transparency in Food Labeling*, *supra* note 8.

<sup>145</sup> See *infra* Table 1.

<sup>146</sup> RACHEL MATHEWS, ANIMAL WELFARE INST., HUMANEWASHED: USDA PROCESS VERIFIED PROGRAM MISLEADS CONSUMERS ABOUT ANIMAL WELFARE MARKETING CLAIMS 7 (2012).

manely and without cages—than its competitors.<sup>147</sup> In reality, all broiler chickens raised in the United States are cage free, and Perdue merely relied upon adhering to the National Chicken Council (NCC) guidelines—industry standard—in justifying these claims.<sup>148</sup> Tyson argued that consumers were being misled by the labels bearing the process verified claims, and that the labels implied Perdue’s practices are “humane” as opposed to the “inhumane” practices of competitors like Tyson.<sup>149</sup> Tyson provided statistics from a survey to support the claim that the PVP labels caused confusion.<sup>150</sup>

FSIS denied Tyson’s petition and concluded “Perdue’s Process Verified Label Claims are truthful and not misleading.”<sup>151</sup> FSIS did not agree that the cage-free label implied that other companies raised chickens in cages, but instead was an accurate statement of Perdue’s raising practices.<sup>152</sup> Additionally, FSIS determined, after reading the NCC standards and verifying that Perdue’s chickens are raised in accordance with those standards, that humanely raised was not false or misleading.<sup>153</sup> It determined that it was sufficient that consumers could visit the PVP website to view Perdue’s humane raising standards and could therefore choose to purchase or not purchase Purdue chicken based on their opinions of those standards.<sup>154</sup> Perdue continues to use cage free on its packaging to date.<sup>155</sup>

Several animal advocacy groups have brought complaints to the FTC regarding misleading or deceptive labeling or advertising on animal products under Sections 45(a) and 12 of the Federal Trade Commission Act.<sup>156</sup> However, FTC’s actions in these cases highlight the major disadvantage of challenging labels in this forum: discretion-

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<sup>147</sup> *Tyson Challenges All Perdue Chickens Are ‘Happy’ in Ad*, AGDAILY (May 15, 2018), <https://www.agdaily.com/news/tyson-challenges-perdue-chickens-ad/> [<https://perma.cc/T93Y-SHXG>] (accessed Apr. 15, 2020).

<sup>148</sup> *In Attempt to Fowl Up Customers, Perdue Crows Humanely Raised*, ANIMAL WELFARE INST., <https://awionline.org/awi-quarterly/2010-summer/attempt-fowl-consumers-perdue-crows-humanely-raised> [<https://perma.cc/GUL7-BCCN>] (accessed Apr. 15, 2020).

<sup>149</sup> Letter from Tyson Foods, to Alfred Almanza et al., Admin., Food Safety & Inspection Serv. (Mar. 18, 2011) (Rescind Approval for Process Verified Label Claims Approved for Perdue Brand Chicken Products).

<sup>150</sup> *Id.* (“50% of surveyed consumers presented with the PVP Labels interpreted this claim to mean that only Perdue brand chickens carrying this logo [i.e., a ‘USDA’s Process Verified’ graphic created by Perdue and included in its labels] are ‘humanely raised.’ (Ex. 2, Survey Q7, p. 5). 31% of consumers agreed or strongly agreed with the statement that ‘chicken in packages without the logo are not humanely raised.’ (Ex. 2, Survey, Q6, p.5).”).

<sup>151</sup> Letter from Rosalyn Murphy-Jenkins et al., Director, Labeling & Program Delivery Div., to Robert George, Assoc. Gen. Counsel, Tyson Foods, Inc. (July 11, 2011).

<sup>152</sup> *Id.* at 3.

<sup>153</sup> *Id.* at 2–3.

<sup>154</sup> *Id.* at 3.

<sup>155</sup> See *Perdue Harvestland Products*, PERDUE, <https://www.perdue.com/products/perdue-harvestland/> [<https://perma.cc/LJ3Z-62MS>] (accessed Apr. 15, 2020) (advertising “cage free” products).

<sup>156</sup> 15 U.S.C. § 45(a); 15 U.S.C. § 52 (2011).

ary enforcement power. According to the FTC, an advertisement is deceptive if it “is likely to mislead consumers acting reasonably under the circumstances; and is ‘material’—that is, important to a consumer’s decision to buy or use the product.”<sup>157</sup> The FTC looks at the advertisement’s express and implied claims from the point of view of a ‘reasonable consumer’ to determine if an advertisement is deceptive.<sup>158</sup> Finally, it will look at whether the advertiser includes evidence to support their claims.<sup>159</sup>

Mercy For Animals (MFA) and People for the Ethical Treatment of Animals (PETA) have brought complaints regarding poultry products carrying the third-party American Humane Certified (AHC) label, administered by the American Humane Association (AHA).<sup>160</sup> These two organizations brought challenges using evidence gathered from undercover investigations depicting egregious mistreatment of chickens at Foster Farms and turkeys at Butterball facilities to challenge their use of the AHC label as false and misleading to consumers.<sup>161</sup> Experts consider AHC standards for broiler chickens and turkeys to be only marginally better than industry standard.<sup>162</sup> Despite evidence that the conditions within Foster Farm’s facilities were far from what the reasonable consumer would consider humane,<sup>163</sup> the FTC decided not to recommend enforcement action against Foster Farms or the AHA in MFA’s challenge.<sup>164</sup> In declining to exercise its enforcement power, the FTC also relied upon the fact that “Foster Farms conducted its own investigation, which quickly resulted in the termination of five employees suspected of abusing live chickens,” and an unannounced audit by AHA concluded that all facilities passed.<sup>165</sup> In response to PETA’s

<sup>157</sup> Advertising FAQ’s: A Guide for Small Businesses, *supra* note 11; FTC Policy Statement, *supra* note 122.

<sup>158</sup> FTC Policy Statement, *supra* note 121.

<sup>159</sup> In many closing letters from the FTC, the Division of Advertising Practices also often cites resource allocation, the nature of the violation, and the type and severity of the consumer injury as important factors in determining whether to recommend enforcement. See *Advertising FAQ’S: A Guide for Small Business*, *supra* note 11 (discussing factors the FTC weighs in deciding what cases to pursue).

<sup>160</sup> See *infra* Table 1.

<sup>161</sup> Letter from PETA, to Fed. Trade Comm’n (Nov. 12, 2014) (Citizens complaint from PETA to Federal Trade Commission Re: Action Against American Humane Association and Butterball, LLC for Deceptive Acts and Practices, Including Deceptive Advertising); Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Pracs., to William H. Stallings, Mayer Brown (April 28, 2016).

<sup>162</sup> ANIMAL WELFARE INST., A CONSUMER’S GUIDE TO FOOD LABELS AND ANIMAL WELFARE (2019), <https://www.awionline.org/sites/default/files/uploads/documents/FA-AWI-Food-Label-Guide-Full.pdf> [<https://perma.cc/8F82-YAP8>] (accessed Apr. 15, 2020); Stephanie Strom, *What to Make of Those Animal-Welfare Labels on Meat and Eggs*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/dining/animal-welfare-labels.html> [<https://perma.cc/787E-4JJV>] (accessed Apr. 15, 2020).

<sup>163</sup> In the complaint, MFA included statistics on consumer’s reliance on ‘humane’ claims to buy products. Letter from PETA to Fed. Trade Comm’n, *supra* note 161, at 18–19.

<sup>164</sup> Letter from PETA to Fed. Trade Comm’n, *supra* note 161.

<sup>165</sup> *Id.*

challenge, the FTC declined to pursue action in a brief letter without explanation.<sup>166</sup>

*C. Better Business Bureau, National Advertising  
Division Challenges*

The National Advertising Division (NAD) of Better Business Bureau (BBB) National Programs, formerly known as the Council of Better Business Bureaus, is a non-governmental, voluntary body that provides a mediation process for competitors and individuals to challenge unfair or misleading advertising.<sup>167</sup> The NAD is a valuable forum for challenging a variety of claims because of the broad scope of its definition of “national advertising,” which includes those made on websites, pamphlets, labels, web advertisements, and commercials.<sup>168</sup> The NAD’s procedures allow any person or entity to file a complaint by submitting a written challenge and paying a fee.<sup>169</sup>

Once a challenge is filed, the respondent may submit to the mediation-like process or choose not to participate. If the respondent chooses to participate, the parties continue confidentiality until the disposition of the case.<sup>170</sup> If a company chooses not to participate, the NAD will refer the case to the relevant enforcement agency for investigation.<sup>171</sup> In the case of label or advertising claims made on animal product packaging, this is typically the FTC.<sup>172</sup> Once resolved, the NAD will issue a press release detailing their findings and recommendations.<sup>173</sup> If the advertiser chooses not to comply with the NAD’s recommendations, the NAD will refer the case to the FTC.<sup>174</sup> In many cases, the FTC has found the NAD’s findings to be compelling.<sup>175</sup> The NAD’s self-regulatory process has achieved mixed results for animal advocates and even producers in challenging label claims; however, the fact that

<sup>166</sup> *Id.*; Interview with PETA Staff (July 2018).

<sup>167</sup> *National Advertising Division*, NAT’L BBB PROGRAMS, <https://bbbprograms.org/programs/nad/nad-contact-us> [<https://perma.cc/NFQ3-YY83>] (accessed Apr. 16, 2020).

<sup>168</sup> ADVERT. SELF-REG. COUNCIL, THE ADVERTISING INDUSTRY’S PROCESS OF VOLUNTARY SELF-REGULATION 1 (Feb. 1, 2016), <http://www.ascreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Effective-2-1-16.pdf> [<https://perma.cc/3NRH-V5JA>] (accessed Apr. 15, 2020) [hereinafter NAD RULES] (§ 1.1(A) defining “national advertising” as a paid commercial message that includes labeling that is “disseminated nationally or to a substantial portion of the United States”).

<sup>169</sup> *Id.* at 3 (providing in § 2.2 that this fee may be waived at the discretion of the NAD’s president).

<sup>170</sup> *Id.* at 1-2 (§2.1(E)).

<sup>171</sup> *Id.* at 2-3 (§ 2.1(F)(3)).

<sup>172</sup> *Dietary Supplements: An Advertising Guide for Industry*, FED. TRADE COMM’N (Apr. 2001), <https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry> [<https://perma.cc/G3Q8-YF85>] (accessed Feb. 1, 2020).

<sup>173</sup> NAD RULES, *supra* note 168, at 2 (§2.1(E)).

<sup>174</sup> *Id.* at 2-3 (§2.1(F))

<sup>175</sup> Alexander M. Goldman, *Advertisers Should Heed FTC Stats on NAD Referrals*, BBB NAT’L PROGRAMS, INC., <https://bbbprograms.org/Insights/nad-referrals/> [<https://perma.cc/U975-6HQP>] (accessed Apr. 15, 2020) (article originally appeared on Law360).

the NAD now does not allow challengers to issue press releases or use the decisions for ‘promotional’ purposes—which seems to be construed broadly—means many advocacy groups will likely decide against using this forum.<sup>176</sup>

The first use of this forum to challenge animal-raising claims was by COK in 2003.<sup>177</sup> COK challenged the use of “Animal Care Certified” logos on cartons from brands using eggs sourced from producers using the United Egg Producers (UEP) certification.<sup>178</sup> COK argued that Animal Care Certified logos gave the impression that the animals were subject to higher animal care standards than conventional eggs, and the NAD ruled in their favor, recommending that the claim be removed.<sup>179</sup> When COK determined that the UEP was not in compliance with the NAD ruling, the issue was referred to the FTC for review.<sup>180</sup> Eventually, at the direction of the FTC, the UEP agreed to discontinue the use of its “Animal Care Certified” logo.<sup>181</sup>

In a 2011 action, AWI filed an NAD complaint against Allen Family Foods Inc., challenging the use of its ‘Humanely Raised on Family Farms’ claim on chicken packaging.<sup>182</sup> AWI argued that the standards under which Allen’s chickens were produced were very similar, if not identical, to those promulgated by the NCC—an industry group.<sup>183</sup> AWI argued that using the claim humanely raised on chicken raised under NCC standards—which are industry-created, conventional standards—rendered all other humane rearing claims meaningless.<sup>184</sup> In a national web-based consumer research survey commissioned by AWI and conducted by Edge Research, 70% of consumers responded that they think chicken labeled humanely raised is produced under a standard of animal care that is better than typical chicken production practices.<sup>185</sup> AWI argued that Allen’s knew it could exploit consumer desires by using the claim without raising production standards because it understood the importance of humane claims for many consumers in making purchasing decisions.<sup>186</sup> AWI also argued that NCC’s standards could not be viewed as ‘humane’ either by scientific

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<sup>176</sup> NAD RULES, *supra* note 168, at 2 (§ 2.1(F)(2)).

<sup>177</sup> See *infra* Table 1. COK engaged in a complex, years long campaign using multiple forums to stop the use of the Animal Care Certified label. See “Animal Care Certified” Eggs Exposed, ANIMAL OUTLOOK, <https://animaloutlook.org/animal-care-certified-eggs-exposed/> [<https://perma.cc/N3TF-EGHW>] (accessed Feb. 2, 2020) (giving a detailed timeline of COK’s campaign).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Letter from Animal Welfare Inst., to Nat’l Advert. Div. (Nov. 18, 2011) [hereinafter AWI Allen Complaint] (Re: Advertising by Allen Family Food’s Inc.) (on file with author).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> AWI Allen Complaint, *supra* note 181 at 9.

standards or in comparison to third-party animal welfare certification programs.<sup>187</sup>

The NAD determined no investigation was necessary because Allen's counsel asserted that the company was permanently discontinuing the claim.<sup>188</sup> However, in 2013, AWI wrote again to the NAD to request referral to the Federal Trade Commission (FTC) after AWI discovered that the newly minted Allen Harim LLC (Allen Family Foods was bought by a South Korean poultry firm)<sup>189</sup> had continued selling chicken with the same humanely raised label.<sup>190</sup> The information was sent to the FTC, and after contacting Allen Harim's counsel, the company agreed to cooperate and remove the claim.<sup>191</sup> Allen Harim eventually removed the humanely raised claim from its packaging and became third-party certified for animal welfare.<sup>192</sup>

In 2019, AWI challenged a misleading claim on pork labels of Hatfield Quality Meats, a division of Clemens Food Group, before the NAD.<sup>193</sup> Specifically, AWI challenged the use of the claim "ethically raised by family farmers committed to a higher standard of care governed by third party animal welfare audits."<sup>194</sup> AWI argued primarily that this claim was deceptive because the plain language led consumers to believe that the pigs raised under Hatfield's care were subject to better care than pigs raised to conventional standards.<sup>195</sup> Hatfield raised its pigs under the Common Swine Industry Audit, a system of audits meant to verify compliance with industry standards that were created by the National Pork Board, also known as the industry group

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<sup>187</sup> *Id.* ("[NCC standards] permit chickens to spend their lives sitting in wet litter, the sawdust or wood shavings that typically cover the floors of chicken houses, or without litter entirely, on floors of packed chicken feces and urine. Under the standards, chickens live in constant dim light, inducing a state of inactivity in which the animals do nothing but eat, and grow. Industrial chickens have been bred for rapid growth that renders their legs too weak to hold them. Their breasts are so disproportionately large relative to body size that by the ends of their lives the birds cannot walk more than a few steps without toppling over.").

<sup>188</sup> Letter from Nat'l Advert. Div., to Animal Welfare Inst. (Apr. 10, 2012) (Closure Letter Re: Case #5447) (on file with author).

<sup>189</sup> Jamie Smith Hopkins, *Harim USA Is Highest Bidder for Allen Family Foods Assets*, BALT. SUN (July 26, 2011), <http://www.baltimoresun.com/business/bs-bz-allen-family-foods-auction-20110726-story.html> [<https://perma.cc/XCC3-9Q6D>] (accessed Apr. 15, 2020).

<sup>190</sup> Letter from Georgia Hancock, Gen. Counsel, Animal Welfare Inst., to Andrea Levine, Senior Vice President, Dir., Nat'l Advert. Div. (Sept. 5, 2013) (on file with author).

<sup>191</sup> Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, Div. of Advert. Practices, to Andrea Levine, Senior Vice President, Dir., Nat'l Advert. Div. (Feb. 3, 2014).

<sup>192</sup> Letter from Dena Jones, Farm Animal Program Manager, Animal Welfare Inst., to Dan Engeljohn, Assistant Admin'r, Food Safety & Inspection Serv. (Jan. 7, 2014).

<sup>193</sup> Press Release, BBB Nat'l Programs, Inc., NAD Recommends Hatfield Discontinue Animal Welfare Claim for its Pork Products Following NAD Challenge, (Sept. 19, 2019), <https://asrcreviews.org/nad-recommends-hatfield-discontinue-animal-welfare-claim-for-its-pork-products-following-nad-challenge/> [<https://perma.cc/6WM9-3PM4>] (accessed Apr. 15, 2020).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*



Pork Checkoff.<sup>196</sup> Consumer research commissioned by AWI confirmed that purchasers of pork products who noticed this claim perceived it to mean that the pigs raised by Hatfield were treated better than those raised on conventional farms.<sup>197</sup> Additionally, AWI argued that the claim “ethically raised” offered no meaningful standard for comparison against other pork products and that it could mean different things to different people.<sup>198</sup>

The NAD agreed that the plain language was deceptive based on Hatfield’s current auditing, found AWI’s consumer research to be credible, and recommended that the claim be removed from the product packaging.<sup>199</sup> The NAD also noted that Hatfield may be able to make a “more limited” animal welfare claim that more clearly communicates the parameters of the claim.<sup>200</sup> Hatfield stated that it would accept the NAD’s recommendation concerning the use of the “higher standard” portion of its claim and would “communicate more clearly the parameters of an animal welfare claim.”<sup>201</sup> This is the first instance of the NAD finding that an animal-raising claim on a meat product should be removed.

#### D. State False Advertising Actions

While states do not have the power to impose different or additional requirements for the labeling of meat,<sup>202</sup> some states have mechanisms for an individual consumer (on behalf of a class) or organization (on its members’ behalf) to challenge false advertising.<sup>203</sup> Many states have consumer protection acts that create private causes of action.<sup>204</sup> Many advocacy groups and individual plaintiffs have used the state statutes to bring claims, often class actions, challenging misleading label claims on meat, poultry, and egg products, seeking declaratory or injunctive relief.<sup>205</sup> One of the most common defenses to state consumer protection cases is federal preemption, despite the fact that the USDA has not fully regulated this field.<sup>206</sup> State court is an impor-

<sup>196</sup> *About CSIA*, PORK CHECKOFF, <https://www.pork.org/production/tools/common-swine-industry-audit/> [<https://perma.cc/3G8H-SG7E>] (accessed Apr. 15, 2020).

<sup>197</sup> Hal Poret, *Expert Report of Hal Poret Regarding Survey to Measure Consumer Perception of Claims on Hatfield Pork Products Packaging* (Jan. 2019) (on file with author).

<sup>198</sup> Press Release, BBB Nat’l Programs Inc., *supra* note 194.

<sup>199</sup> Clemens Food Group, LLC (Hatfield Pork Products), Report #6305, *NAD/CARU Case Reports* (Aug. 2019) (on file with author).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> 21 U.S.C. § 678.

<sup>203</sup> *See* NAT’L CONSUMER L. CTR., *CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS* (2018) (reporting the Unfair and Deceptive Practices laws in each state).

<sup>204</sup> *Id.*

<sup>205</sup> *See infra* Table 1.

<sup>206</sup> Bruce Friedrich, *Meat Labeling Through the Looking Glass*, 20 *ANIMAL L.* 79, 87–96, 101–02 (2013) (arguing that states would not be preempted from creating addi-

tant forum because, as discussed later, federal consumer protection laws are of little to no use to individual consumers or advocacy organizations. The success of a state claim depends on what type of injury the statute requires and how courts have interpreted that injury. Additionally, many of these cases are settled without the court actually engaging in analysis of whether the label claim violated the state's consumer protection statute.<sup>207</sup>

In a class action headed by MFA against Foster Farms and AHA (the organization behind American Humane Certified), plaintiffs alleged false advertising for the use of the American Humane Certified label on Foster Farms packaging in Los Angeles County Superior Court.<sup>208</sup> Plaintiff argued that the AHA standards were at odds with consumer expectations for humane treatment of chickens, and thus the inclusion of the label was false and misleading per California state law.<sup>209</sup>

The court disagreed with plaintiffs, and ruled wholly in favor of defendants on summary judgment.<sup>210</sup> In applying state common law, the court found that despite consumer expectations being potentially out of line with the reality of Foster Farms' third-party certification, the claim humane is both subjective and vague.<sup>211</sup>

In 2015, PETA brought a class action lawsuit against Whole Foods under California state consumer protection statutes regarding welfare claims, such as "raised right tastes right" and "great-tasting meat from healthy animals."<sup>212</sup> The plaintiffs claimed that Whole Foods used various in-store and point-of-sale advertisements to mislead customers into paying higher prices for meat products that were from animals not

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tional label requirements for humane claims and that state claims around consumer protection statutes should not be dismissed on preemption grounds); e.g., Lauren E. Handel, *A Practitioner's Guide to Defending "Natural" Food Labeling Litigation*, 7 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 255, 275–77 (2014).

<sup>207</sup> See *infra* Table 1.

<sup>208</sup> Complaint at 2, 16–19, *Leining v. Foster Poultry Farms*, BC588044 (Cal. Super. Ct. July 13, 2015) [hereinafter *Leining Complaint*]. In plaintiffs' first amended complaint, American Humane was added as a defendant. Brent E. Johnson, *Attempts to Enforce "Humane" Treatment of Poultry Fail*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=1f5515b6-4e0b-4b56-8aff-1b86f84d0e95> [https://perma.cc/KUW2-XZMQ] (accessed Apr. 15, 2020). Mercy For Animals also pursued an FTC complaint in combination with this suit. *Id.* However, the FTC passed on making a decision about "whether or not the program resulted in a certification that 'conveyed any express or implied representation that would be deceptive if made directly by the advertiser.'" *Id.*; see *infra* Table 1.

<sup>209</sup> *Leining Complaint*, *supra* note 208, at 16–19.

<sup>210</sup> *Leining v. Foster Poultry Farms*, No. BC588004, (Cal. Super. Ct. May 25, 2018), 2018 WL 3089641 (granting defendants Foster Poultry Farms' and American Humane Association's motion for summary judgment and entering judgment for defendants).

<sup>211</sup> *Id.*

<sup>212</sup> *People for the Ethical Treatment of Animals v. Whole Foods Mkt. Cal., Inc.*, No. 15-cv-04301-NC, (N.D. Cal. Jan. 29, 2016), 2016 WL 362229 (granting in part and denying in part defendants' motion to dismiss plaintiffs' second amended complaint); see *infra* Table 1.

raised “in a humane manner exceeding industry standards.”<sup>213</sup> The court found that PETA failed to show that Whole Foods’ misrepresentations tricked customers into overpaying.<sup>214</sup> The judge found “great tasting meat from healthy animal” and “raised right tastes right” were “non-actionable puffery.”<sup>215</sup>

In another example, in October 2012, ALDF filed a class action lawsuit in the Superior Court of California against Judy’s Eggs.<sup>216</sup> ALDF claimed that the imagery of a cartoon hen on pasture, in addition to the language “‘run, scratch and play’ in the fresh air of Sonoma Valley,” was misleading.<sup>217</sup> Upon further investigation, ALDF discovered that the eggs came from a conventional cage free operation: indoor housing with no significant outdoor access.<sup>218</sup> In 2014, the defendants—without admitting fault—agreed to remove the illustration and language, obtain a third-party animal welfare certification, and donate to various animal protection organizations.<sup>219</sup>

### *E. Federal False Advertising Actions*

The Lanham Act is the primary federal law designed to combat false advertising, among other commercial interests.<sup>220</sup> Section 43(a) of the Lanham Act allows a civil action by “any person who believes that he or she is likely to be damaged” through the act of “any person who, on or in connection with any goods or services . . . uses in commerce . . . [any] false or misleading description . . . or misleading representation of fact . . . which is likely to cause confusion, or to cause mistake.”<sup>221</sup> According to the Fifth Circuit, to establish a prima facie case of false advertising under the Lanham Act, the plaintiff must establish: “(1) A false or misleading statement of fact about a product; (2) Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers; (3) The deception is material, in that it is likely to influence the consumer’s purchasing decision; (4) The product is in interstate commerce; and (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.”<sup>222</sup>

<sup>213</sup> *People for the Ethical Treatment of Animals*, 2016 WL 362229, at \*1; see *infra* Table 1.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at \*4.

<sup>216</sup> Complaint at 1, *Glover v. Mahrt*, No. RG12650058 (Super. Ct. Cal. Oct. 1, 2012) [hereinafter *Glover Complaint*]; see *infra* Table 1.

<sup>217</sup> *Glover Complaint*, *supra* note 216, at 2.

<sup>218</sup> *Id.* at 3.

<sup>219</sup> *Challenging Judy’s Family Farm Organic Eggs’ Deceptive Advertising*, ANIMAL LEGAL DEF. FUND (updated Dec. 31, 2014), <https://aldf.org/case/challenging-judys-family-farm-organic-eggs-deceptive-advertising/> [https://perma.cc/L9VK-DVHH] (accessed Apr. 15, 2020).

<sup>220</sup> 15 U.S.C. § 1125(a)(1)(A)(B) (2016).

<sup>221</sup> 15 U.S.C. § 1125(a)(1)(A)(B).

<sup>222</sup> *Pizza Hut, Inc. v. Papa John’s Int’l*, 227 F.3d 489, 495 (5th Cir. 2000), *cert. denied* 532 U.S. 920 (2001).

On its face, the statute and criteria seem to allow for any consumer or organization on their behalf to bring a claim. For example, if after discovering that a company who uses “humanely raised” either in advertising or labeling was the subject of an undercover investigation that revealed widespread abuse, a consumer could bring a claim. Unfortunately, courts have determined that the average consumer is not the party the Lanham Act is meant to protect.<sup>223</sup>

Most courts have consistently held that, under the statute, the “any person” contemplated to be protected is in fact someone who has suffered a commercial injury by a competitor’s use of deceptive marketing practices.<sup>224</sup> This means a successful lawsuit can likely only be brought by a business that has verifiably strict animal welfare standards, who is suffering an injury caused by competition with another company that makes similar claims, but in fact does not engage in higher-welfare practices.

For example, in 2012, ALDF and the maker of Faux Gras sued Hudson Valley Foie Gras (HVFG) for false advertising.<sup>225</sup> HVFG claimed that it was the humane choice within the foie gras industry, despite the fact that it still engaged in the industry standard practice of force-feeding ducks with a tube until their livers become engorged.<sup>226</sup> The production of foie gras has been recognized as cruel and inhumane and its sale has been banned in seventeen countries and the state of California.<sup>227</sup> ALDF claimed that HVFG falsely portrayed itself as “the humane choice,” and that “if consumers knew [HVFG was not humane], they would be more likely to buy Faux Gras.”<sup>228</sup> The district court in northern California allowed the case to go forward, stating that the maker of Faux Gras had standing to bring a false advertisement claim under the Lanham Act.<sup>229</sup> Ultimately, the parties settled out of court and Hudson Valley agreed to remove “humane choice” from their advertising.<sup>230</sup>

On the other hand, courts have interpreted the “false or misleading statement” requirement quite broadly.<sup>231</sup> In 2016, Handsome Brook Farms sued the third-party certification organization Humane

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<sup>223</sup> Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005).

<sup>224</sup> Jean W. Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 816 (1999).

<sup>225</sup> Animal Legal Def. Fund v. HVFG LLC, 939 F. Supp. 2d 992, 995–96 (N.D. Cal. 2013); see *infra* Table 1.

<sup>226</sup> *Id.*

<sup>227</sup> Patrick Reischl, *Fight Over Fowl Livers Continues in California*, REG. REV. (Nov. 23, 2017), <https://www.theregreview.org/2017/11/23/reischl-fight-fowl-livers-california/> [<https://perma.cc/DAD9-E48Z>] (accessed Apr. 15, 2020).

<sup>228</sup> *Animal Legal Def. Fund*, 939 F. Supp. 2d at 996.

<sup>229</sup> *Id.* at 1002.

<sup>230</sup> *Foie Gras*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/foie-gras/> [<https://perma.cc/66Q9-4RWG>] (accessed Apr. 15, 2020).

<sup>231</sup> *E.g.*, *Egbert v. Ohio Dep’t of Agric.*, No. 17–08–15, (Ohio Ct. App. 2008), 2008 WL 4559970, at \*3–4.

Farm Animal Care (HFAC)—creators of the Certified Humane certification—after its CEO sent an e-mail to several retailers and potential customers containing claims that Handsome Brook Farms was mislabeling its eggs.<sup>232</sup> The court found that the e-mail containing false information sent to retailers could be construed as “commercial speech” giving rise to a valid Lanham Act claim that was likely to succeed on the merits.<sup>233</sup> The Fourth Circuit affirmed this decision, finding that Handsome Brook Farms was likely to prevail in its Lanham Act claim against HFAC.<sup>234</sup> In an interesting twist, Handsome Brook Farms settled out of court and agreed to become third-party certified by HFAC.<sup>235</sup>

## V. CONCLUSION

Oversight of claims found on packages is complicated and confusing. Despite overlapping oversight of food labels, the system still sometimes fails to protect consumers from misleading claims.<sup>236</sup> Consumer expectations are often at odds with the realities of agricultural production and ripe for exploitation when combined with a competitive marketplace. It is critical for advocates to intervene on behalf of consumers and animals by using the mechanisms discussed in this Article. Because venues have advantages and disadvantages, it is important for advocates to choose a forum best suited for the evidence on hand. Additionally, it is worth considering a multi-faceted approach for challenging these claims because each has its own timeline and advantages.

Filing a petition or introducing legislation to define animal-raising claims or reform administrative processes are extremely cost-effective and offer excellent opportunities for media attention. However, without the support of industry, it is unlikely that Congress or administrative agencies would be willing to promulgate changes. Political deadlock and enormous industry influence greatly affect the utility of these forums for making changes that positively affect farm animals or improve transparency.

On the other hand, seeking judicial review of a claim’s appropriateness through a neutral body can be advantageous because of the lack of political influence. For example, strategic lawsuits can lead to the company removing a misleading claim from its packaging. This is often achieved via out-of-court settlement. Unfortunately, litigation

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<sup>232</sup> *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556, 564–65 (E.D. Va. 2016) (Handsome Brook also moved for a preliminary injunction after it was granted a temporary restraining order).

<sup>233</sup> *Id.* at 569, 574.

<sup>234</sup> *Handsome Brook Farm v. Humane Farm Animal Care*, 700 Fed. Appx. 251, 262–63 (4th Cir. 2017).

<sup>235</sup> *Handsome Brook Farm and Certified Humane® Announce Certification Relationship for Pasture-Raised Eggs*, CERTIFIED HUMANE, <http://certifiedhumane.org/wp-content/uploads/Joint-Statement.pdf> [https://perma.cc/4ERZ-4SW3] (accessed Apr. 15, 2020).

<sup>236</sup> THOMPSON, *supra* note 37, at 5.

can be slow and costly. Because lawsuits are done on a case-by-case basis in a variety of forums and have a tendency to end in settlement, there is little case law on these issues.

While a challenge to the NAD is quick, it can be cost-prohibitive: The NAD has an expensive filing fee (waivable at the discretion of the President of the NAD) and it often finds costly expert reports on consumer expectations to be favorable evidence.<sup>237</sup> Participants also may be deterred from using NAD proceedings because of confidentiality and limitations on publicity. While the NAD does publish its decisions in its Case Reports, participants are forbidden from publicizing them in any way.<sup>238</sup> This limitation could hinder an advocate's campaign against a particular label claim or a producer since it would be unable to let its members or the public know about the decision in any way that might be perceived as "promotional,"<sup>239</sup> which the NAD construes broadly. However, the fact that NAD can refer cases to the FTC<sup>240</sup> can be extremely advantageous, since the FTC often takes NAD's position seriously in making determinations. The FTC and NAD challenges also share a common problem: it is extremely difficult to bring a challenge about a producer's animal-raising claim when there is little or no evidence about what standard of care the producer is actually providing to its animals. This information can be difficult to obtain since producers treat animal care standards as trade secrets, and producers are aware that releasing the information can affect their ability to continue using these claims. Moreover, in all of these forums, challenging claims that are backed by third-party certifiers where animals are actually provided a higher standard of care, as compared to industry, are less likely to be successful. Even if the third-party certification merely indicates compliance with industry standards, overcoming the presumption that a third-party certification body's standards are backed by scientific evidence is an uphill battle.

While it may appear that momentum on challenging claims is low, a quick scan of Table 1 reveals that, over time, challenges to deceptive labeling practices have been increasingly successful.<sup>241</sup> While consumers are increasingly likely to observe more and more animal welfare claims on product packaging and in advertisements of all kinds, few egregious instances go unnoticed because of the diligence of animal advocates.

Unfortunately, the biggest problem facing animal advocates is changing the perspective about the place farm animals hold in society.

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<sup>237</sup> See Joshua Dalton & Jared Craft, *What You Should Know About NAD False Advertising Claims*, LAW360 (Jan. 4, 2013, 11:53 A.M.), <https://www.law360.com/articles/403099/what-you-should-know-about-nad-false-advertising-claims> [<https://perma.cc/26E2-SSQ2>] (accessed Apr. 15, 2020) (discussing "claim substantiation"); see also *National Advertising Division (NAD)*, *supra* note 167 (discussing filing fees).

<sup>238</sup> NAD RULES, *supra* note 168, at 2.

<sup>239</sup> *Id.*

<sup>240</sup> Dalton & Craft, *supra* note 237.

<sup>241</sup> See *infra* Table 1.

Preconceived notions about animals influence decision-making in these forums and make change difficult. While matters appear to be improving on this front, with more and more people recognizing that animals are sentient, feeling beings, there is still a long way to go in elevating the status of farm animals in society, including the importance of accuracy in food marketing claims and advertising. Until deceptive advertisements and marketing campaigns are stopped, corporations will continue to exploit consumer expectations.

TABLE 1: SELECTION OF ACTIONS TAKEN RELATING TO LABEL CLAIMS.

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
<b>Administrative</b>						
12/10	COK/ALDF (citizens' petition) <sup>242</sup>	AMS/FDA/FSIS/FTC (eggs)	Mandatory Labeling Petition	'cage-free;' 'free-range;' 'all natural;' 'animal friendly;' 'naturally raised;' 'farm fresh;' 'sunny meadows;' and related imagery	AMS/FDA/FSIS/FTC Rulemaking Petition	<i>See supra</i> Part IV.A. All four agencies declined to engage in rulemaking.
3/11	Tyson <sup>243</sup>	Perdue (chicken)	Label; point of sale materials	'humanely raised;' 'cage free;' related, USDA-approved 'Perdue's Process Verified' labeling that purportedly imply that the government endorses Perdue's products are superior to Tyson's	USDA/FSIS/AMS Rulemaking Petition	"FSIS disagrees that Perdue's Process Verified Labels and associated point of sale materials are misleading or confusing to customers or that these materials improperly imply that the USDA has endorsed Perdue's product as superior in quality." <sup>244</sup>

<sup>242</sup> Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Cheryl Leahy, et al., Gen. Counsel, Compassion Over Killing (Dec. 12, 2013) (denial of labeling petition concerning the Free Range Eggs and synonymous labels).

<sup>243</sup> Petition from Robert W. George, Vice President & Assoc. Gen. Counsel, on behalf of Tyson Foods, Inc., to Alfred V. Almanza & Rayne Pegg, Adm'rs., U.S. Dep't of Agric. (Mar. 18, 2011), [https://www.fsis.usda.gov/wps/wcm/connect/0291205f-8e6e-4f23-a2a2-713708afcb16/Petition\\_Tyson\\_031811.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/0291205f-8e6e-4f23-a2a2-713708afcb16/Petition_Tyson_031811.pdf?MOD=AJPERES) [<https://perma.cc/Q8JY-WBFW>] (accessed Apr. 15, 2020) (petition to rescind approval for 'Process Verified' label).

<sup>244</sup> Letter from Rosalyn Murphy-Jenkins & Dean Kastner, Dirs., U.S. Dep't of Agric., Food Safety & Inspection Serv., to Robert George, Vice President & Assoc. Gen. Counsel, Tyson Foods, Inc. (July 11, 2011), [https://www.fsis.usda.gov/wps/wcm/connect/475f40e7-59aa-4f7b-8663-ef3e62551866/Petition\\_TysonFood\\_Response\\_071111.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/475f40e7-59aa-4f7b-8663-ef3e62551866/Petition_TysonFood_Response_071111.pdf?MOD=AJPERES) [<https://perma.cc/94YP-P3NU>] (accessed Apr. 15, 2020) (response to the petition denying Tyson's request to rescind approval for 'Process Verified' label).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
6/13	ALDF	FSIS	Mandatory Labeling Petition	Petition requesting that FSIS require mandatory labeling to disclose routine antibiotic use in animals used to produce meat and poultry products, and to clarify the standard for 'antibiotic free' labeling claims.	FSIS Rule-making Petition	"FSIS does not require that meat and poultry product labels disclose the fact that antibiotics were administered to animals as part of the production process because the Agency does not consider animal production practices to be material facts that must be disclosed on the product label." <sup>245</sup>
6/14	Consumers Union <sup>246</sup>	FDA & FSIS	Mandatory Labeling Petition	Petition submitted requesting that FSIS issue an interpretive rule to prohibit the use of the claim 'natural' in the labeling of meat and poultry products.	FSIS Rule-making Petition	No response. <sup>247</sup>

<sup>245</sup> Letter from Terri Nintermann, Assistant Adm'r, U.S. Dep't of Agric., Office of Policy & Program Dev., to Kelsey Eberly, Staff Attorney, Animal Legal Def. Fund (Dec. 30, 2019) (response to petition denying request to prescribe definitions for antibiotics claims in meat and poultry).

<sup>246</sup> Petition from Urvashi Rangan, Exec. Dir., on behalf of Consumers Reports Food Safety & Sustainability Ctr., et al., to Tom Vilsack, Sec'y, U.S. Dep't of Agric. (June 26, 2014) <https://www.fsis.usda.gov/wps/wcm/connect/6122594c-93db-46db-beb6-dc250bc43b6d/Petition-Consumers-Union-062614.pdf?MOD=AJPERES> [<https://perma.cc/5WX7-WWKH>] (accessed Apr; 26, 2020); Petition from Urvashi Rangan, Exec. Dir., on behalf of Consumers Reports Food Safety & Sustainability, et al., to Div. of Dockets Mgmt., Food & Drug Admin. (June 26, 2014) (on file with authors).

<sup>247</sup> See Letter from Charles Williams, Dir., Office of Policy & Program Dev., to Urvashi Rangan, Exec. Dir., Consumers Reports Food Safety & Sustainability Ctr. (Aug. 4, 2014) [hereinafter FSIS Response Acknowledging Receipt of Petition] (on file with authors) (acknowledging receipt of petition requesting an interpretive rule prohibiting the use of the claim 'natural').



Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
5/14	AWI <sup>248</sup>	FSIS	Mandatory Labeling Petition	Petition to amend labeling regulations under the Federal Meat Inspection Act and the Poultry Products Inspection Act to require third-party certification for the approval of animal welfare and environmental stewardship claims.	FSIS Rule-making Petition	After AWI sued USDA, <sup>249</sup> FSIS denied AWI's petition, stating that because producers and individuals have different definitions for animal-raising claims, it could not require third-party certification and that such a requirement was not economically feasible. <sup>250</sup>

<sup>248</sup> Petition from Dena Jones, Dir., Farm Animal Program, on behalf of Animal Welfare Inst., to U.S. Dep't of Agric., Food Safety & Inspection Serv., (May 2014) (on file with authors) (petition for rulemaking requiring third-party certification for animal welfare claims).

<sup>249</sup> Complaint, *supra* note 142, at 1.

<sup>250</sup> Letter from Roberta Wagner, Assistant Adm'r, U.S. Dep't of Agric., Food Safety & Inspection Serv., to Dena Jones, Dir., Farm Animal Program, Animal Welfare Inst., (Feb. 22, 2019), <https://awionline.org/sites/default/files/uploads/documents/FAW-AWI-Case-14-01-FSIS-Final-Response-022219.pdf> [<https://perma.cc/B62J-75C5>] (accessed Apr. 15, 2020) (responding to a petition requesting third-party verification and denying most of the request).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
1/16	AWI <sup>251</sup>	FSIS	Mandatory Labeling Petition	Petition to amend labeling regulations under the Poultry Products Inspection Act to define free range and amend the approval process for the free range claim.	FSIS Rule-making Petition	FSIS issued a “final response” in December 2019, neither granting nor denying the petition. <sup>252</sup> AWI asked for clarification since the letter indicated no final decision was made, and FSIS changed its position, stating instead that it was actually an “interim” response and that it would issue a final response once it reviewed public comments on the open docket for its new Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission. <sup>253</sup>

<sup>251</sup> Petition from Dena Jones, Dir., Farm Animal Program, on behalf of Animal Welfare Inst., to U.S. Dep’t of Agric., Food Safety & Inspection Serv. (Jan. 2016), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-PetitionFSISLabelingRegs-Jan2016.pdf> [<https://perma.cc/9CGA-ZM2H>] (accessed Apr. 15, 2020) (petitioning FSIS to define Free Range and amend approval process for free range claim).

<sup>252</sup> Letter from Terri Nintemann, Assistant Adm’r, U.S. Dep’t of Agric., Office of Policy & Program Dev., to Dena Jones, Dir., Farm Animal Program, Animal Welfare Inst. (Dec. 30, 2019) (interim response to the request to add guidelines on the free range claim) (on file with author).

<sup>253</sup> Letter from Melissa Hammar, Deputy Dir., U.S. Dep’t of Agric., Office of Policy & Program Dev., to Dena Jones, Dir. Farm Animal Program, Animal Welfare Inst. (Jan. 21, 2020) (on file with author).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
<b>Federal Trade Commission</b>						
4/09	PETA (citizens' petition) <sup>254</sup>	FTC (chicken)	Website	"committed to the humane treatment of animals;" "treating animals humanely . . . is a key part of our quality assurance efforts;" "animals should be free from mistreatment at all possible times from how they are raised and cared for to how they are transported and processed"	FTC	FTC declined to pursue action in a brief letter without explanation. <sup>255</sup>
6/10	HSUS <sup>256</sup>	Rose Acre Farms (eggs)	Website	"humane and friendly environment" for caged hens; only "happy" hens will lay eggs	FTC	FTC did not respond, but Rose Acre removed the claims from their packaging shortly after the complaint was filed. <sup>257</sup>

<sup>254</sup> Petition from Bruce Friedrich, on behalf of PETA, to Fed. Trade Comm'n (Apr. 10, 2009), (seeking action against KFC Corporation for unfair and deceptive representations and advertising) (on file with author).

<sup>255</sup> Citizens Petition from Mary Engle, Assoc. Dir., Fed. Trade Comm'n, to Steven Steinborn, Esq., (Mar. 4, 2010), [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/kentucky-fried-chicken-inc./100304kfcclosingletter.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/kentucky-fried-chicken-inc./100304kfcclosingletter.pdf) [<https://perma.cc/V68N-ANHY>] (accessed Apr. 15, 2020) (notifying KFC that the FTC will not pursue enforcement of advertising rules).

<sup>256</sup> Letter from Humane Soc'y of the U.S. et al., to Fed. Trade Comm'n (Jun. 15, 2010) (complaint for action to stop false or deceptive advertising by Rose Acre Farms) (on file with author).

<sup>257</sup> Interview with Peter Brandt, Senior Att'y, Humane Soc'y of the U.S. (July 3, 2018).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
12/11	MFA <sup>258</sup>	Sparboe Farms (eggs, chicken)	Advertisements; website	Company claims to “ensure” hens are provided the “five essential freedoms,” which are discussed at length	FTC	FTC determined no action was warranted based on removal of the “five freedoms” section of website and assurances to the FTC.
1/12	HSUS <sup>259</sup>	Seaboard Foods (pork)	Advertisements; website	“the most humane practices throughout the animal’s life;” “free from cruelty;” “best industry practices;” “treating our animals humanely is a moral and ethical obligation everyone at Seaboard Foods takes seriously;” “our barns are designed to give pigs adequate room to eat, drink, rest, sleep, and move without injury;” and many other comparable claims	FTC	Settlement reached in which defendant removed “the most humane practices throughout the animal’s life” from its website. <sup>260</sup> Other language was from a written report published in 2008, and thus could not be removed.

<sup>258</sup> Cindy Galli, *Animal Rights Group Accuses Sparboe Farms of False Advertising*, ABC NEWS (Dec. 1, 2011), <https://abcnews.go.com/Blotter/animal-rights-group-accuses-sparboe-farms-false-advertising/story?id=15064443> [https://perma.cc/K27B-99SP] (accessed Apr. 15, 2020); see Nathan Runkle, *MFA Files Federal Petition Against Egg Factory Farm for Consumer Fraud*, MERCY FOR ANIMALS (Dec. 1, 2011), <https://mercyforanimals.org/mfa-files-federal-petition-against-egg-factory-farm-for-consumer-fraud> [https://perma.cc/9TCR-XPMK] (accessed Apr. 15, 2020) (discussing Sparboe’s shortcomings under its “Five Essential Freedoms” for its hens).

<sup>259</sup> Maureen Morrison, *Humane Society Files Complaint with FTC Against Pork Trade Group*, AD AGE (Apr. 18, 2012) <https://adage.com/article/news/humane-society-files-complaint-ftc-pork-trade-group/234210> [https://perma.cc/Q5M2-B9LR] (accessed Apr. 15, 2020) (requesting action to enjoin the dissemination of false or deceptive advertising); see Joanna Zelman, *Seaboard Corporation Pig Treatment Challenged by Humane Society Investigation*, HUFFINGTON POST (updated Dec. 6, 2017), [https://www.huffingtonpost.com/2012/02/01/seaboard-corporation-pig-video\\_n\\_1244229.html](https://www.huffingtonpost.com/2012/02/01/seaboard-corporation-pig-video_n_1244229.html) [https://perma.cc/UY8T-9DPS] (accessed Apr. 15, 2020) (discussing Seaboard’s animal welfare claims).

<sup>260</sup> Greg Hack, *Seaboard Foods Changes Language on Animal Treatment*, KAN. CITY STAR (Feb. 13, 2013), <https://www.kansascity.com/news/local/article314627/Seaboard-Foods-changes-language-on-animal-treatment.html> [https://perma.cc/LJ3A-L6DZ] (accessed Apr. 15, 2020).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
4/12	HSUS <sup>261</sup>	National Pork Producers Council (pork)	Advertisements; website	Numerous claims about the humane treatment of pigs made under the umbrella of the 'We Care' and 'Pork Quality Assurance Plus' programs	FTC	FTC declined to pursue action in a brief letter without explanation. <sup>262</sup>
3/13	ALDF <sup>263</sup>	Tyson (cattle, chicken, pork)	Advertisements	"Leading the Industry pursuit . . . To enhance animal well-being;" "Tyson Team members, as well as our poultry growers and beef and pork suppliers . . . to respect and serve as stewards of the animals we work with every day, treating them in a proper manner at all times;" "make animal well-being decisions based on best available scientific research and the recommendations of animal well-being experts in the industry"	FTC	"Upon review of the matter, including non-public information submitted to the FTC, we have decided not to take additional action at this time . . . . Among the factors we considered are Tyson's decision to remove the promotional videos for the <i>FarmCheck</i> <sup>TM</sup> Program from its website and YouTube as well as Tyson's clarification of its position on gestation crates for sows, via a hyperlink that it added to the Animal Well-Being page on the Tyson website." <sup>264</sup>

<sup>261</sup> Morrison, *supra* note 258.

<sup>262</sup> Interview with Peter Brandt, *supra* note 256.

<sup>263</sup> Daniel Lutz, *Tyson Exposed by Former Suppliers' Convictions*, *ADVOC. FOR ANIMALS* (Apr. 17, 2013) <http://advocacy.britannica.com/blog/advocacy/2013/04/tyson-exposed-by-former-suppliers-convictions/> [<https://perma.cc/GS9R-ANC5>] (accessed Apr. 15, 2020).

<sup>264</sup> Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices., to Robert W. George, Vice President & Gen. Counsel, Tyson Foods, Inc. (Jan. 10, 2014), [https://www.ftc.gov/system/files/documents/closing\\_letters/tyson-foods-incs-promotion-farm-checktm-animal-well-being-program/140110tysonresolutionletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/tyson-foods-incs-promotion-farm-checktm-animal-well-being-program/140110tysonresolutionletter.pdf) [<https://perma.cc/78W5-RLYZ>] (accessed Apr. 15, 2020) (regarding Tyson Food's promotion of the *FarmCheck*<sup>TM</sup> animal well-being program).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
11/14	PETA (citizens' petition) <sup>265</sup>	Butterball (turkey)	Label	"American Humane Certified"	FTC	FTC declined to pursue action in a brief letter without explanation. <sup>266</sup>
7/15	MFA <sup>267</sup>	Foster Farms (chicken)	Label	"American Humane Certified"	FTC	"Despite concerns about the AHC certification in light of the documented animal abuse, the staff has decided not to recommend enforcement action" because follow-up actions at Foster Farms were deemed to have addressed the problem. <sup>268</sup>

<sup>265</sup> Letter from People for the Ethical Treatment of Animals, to Div. of Advert. Practices, Fed. Trade Comm'n (Nov. 12, 2014), <http://www.mediapeta.com/peta/pdf/PETA-FTC-Complaint-AHA-and-Butterball-Labeling.pdf> [<https://perma.cc/9W2N-XRKC>] (accessed Apr. 15, 2020) (regarding action against American Humane Association, and Butterball, for deceptive acts and practices, including deceptive advertising).

<sup>266</sup> E-mail from Jared Goodman, VP & Deputy Gen. Counsel for Animal Law, People for the Ethical Treatment of Animals, to Erin Sutherland, Staff Attorney, Animal Welfare Inst. (May 15, 2018) (on file with authors).

<sup>267</sup> Letter from Mary K. Engle, Assoc. Dir., Div. Advert. Practices, Fed. Trade Comm'n, to William H. Stallings (Apr. 28, 2016), [https://www.ftc.gov/system/files/documents/closing\\_letters/nid/160428fosterfarmscltr.pdf](https://www.ftc.gov/system/files/documents/closing_letters/nid/160428fosterfarmscltr.pdf) [<https://perma.cc/4JBH-SYWZ>] (accessed Apr. 15, 2020) (opinion letter regarding Foster Poultry Farms, Inc., FTC File No. 152-3244).

<sup>268</sup> *Id.* at 2 ("Some of the factors we considered include that, after MFA publicized its undercover video in June 2015, Foster Farms conducted its own investigation, which quickly resulted in the termination of five employees suspected of abusing live chickens. The AHA then conducted an unannounced audit of the facilities at issue, and each facility passed. In addition, Foster Farms recently implemented an expensive, state-of-the-art video monitoring and auditing system at its AHC-certified facilities. Under this system, auditors at a remote facility review footage on a daily basis to assess employee compliance with the company's animal welfare policies and procedures.").

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
10/16	HSUS <sup>269</sup>	National Pasteurized Eggs, Inc. d/b/a Davidson's Safest Choice	Advertisements; label; website	"all-natural;" farm fresh; "Safest Choice;" "not all eggs are created equal;" and related imagery (images of hens on pasture)	FTC	Davidson's changed some aspects of its label (e.g. images of hens on pasture next to barn), but not the Safest Choice claim. The FTC did not send a close-out letter to HSUS. <sup>270</sup>
12/18	HSUS <sup>271</sup>	Pilgrim's Pride (chicken)	Website	"100% natural;" "ensures that birds are humanely raised" through an "uncompromising commitment" to animal welfare that includes "strict" adherence to protocols of the "highest standards"	FTC	Pilgrim's Pride changed some of its website language to claim that instead of birds "raised with the highest standards," the company ensures "that birds are treated humanely and raised with care." Pilgrim's representatives say the changes have nothing to do with the complaint. <sup>272</sup> HSUS' Brandt stated there are no plans to withdraw action. <sup>273</sup>

<sup>269</sup> Letter from Humane Soc'y of the U.S. et al., to Fed. Trade Comm'n (Oct. 14, 2016), <https://www.truthinadvertising.org/wp-content/uploads/2016/10/HSUS-Davidson-complaint.pdf>. [<https://perma.cc/FX8W-PNKQ>] (accessed Apr. 15, 2020) (regarding HSUS's complaint for action to stop false or deceptive advertising).

<sup>270</sup> E-mail from Daniel Waltz, Staff Attorney, Animal Legal Def. Fund, to Erin Sutherland, Staff Attorney, Animal Welfare Inst. (Aug. 19, 2019) (Daniel Waltz (f/k/a Lutz) is the current attorney of record, in the HSUS's complaint against National Pasteurized Eggs).

<sup>271</sup> Letter from Laura Fox & Peter Brandt, Humane Soc'y of the U.S., to Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm'n (Dec. 12, 2018), <https://blog.humanesociety.org/wp-content/uploads/2018/12/2018-12-12-Pilgrims-Pride-FTC-Complaint.pdf>. [<https://perma.cc/2R4A-HMQY>] (accessed Apr. 15, 2020) (complaint requesting action to enjoin the dissemination of false or deceptive advertising by Pilgrim's Pride).

<sup>272</sup> Deena Shanker, *Pilgrim's Pride Drops Some Chicken Welfare Claims Amid 'Scalding' Complaint*, BLOOMBERG (Jan. 9, 2019), <https://www.bloomberg.com/news/articles/2019-01-09/pilgrim-s-pride-drops-some-chicken-welfare-claims-amid-ftc-complaint> [<https://perma.cc/2JZW-QV3X>] (accessed Apr. 15, 2020).

<sup>273</sup> Interview with Peter Brandt, *supra* note 256.

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
<b>Securities and Exchange Commission</b>						
5/19	HSUS <sup>274</sup>	Pilgrim's Pride (chicken)	Website	100% natural; "ensures that birds are humanely raised" through an uncompromising commitment to animal welfare that includes strict adherence to protocols of the highest standards	SEC	Pending.
<b>Legal Actions</b>						
3/13	Class Action (HSUS) <sup>275</sup>	Perdue (chicken)	Label	humanely raised	D. N.J.	Settlement agreed to in which Perdue would remove claim from packaging. <sup>276</sup>
2/14	Class Action (COK) <sup>277</sup>	Kroger's Simple Truth (chicken)	Label	"raised cage free in a humane environment"	N.D. Cal.	Settlement agreed to in which defendants would remove "humane" claim from packaging. <sup>278</sup>

<sup>274</sup> Deena Shanker, *Pilgrim's Pride Lands in Front of SEC Over Its Chicken Claims*, BLOOMBERG (updated May 13, 2019), <https://www.bloomberg.com/news/articles/2019-05-09/sec-is-latest-front-in-game-of-chicken-with-pilgrim-s-pride> [https://perma.cc/LQP9-D67J] (accessed Apr. 15, 2020).

<sup>275</sup> Third Amended Complaint at 2, *Hemy v. Perdue Farms Inc.*, No. 3:11-cv-00888-FLW-LHG (D. N.J. July 30, 2012), 2012 WL 12057254.

<sup>276</sup> *Settlement Reached in Lawsuit Concerning Perdue Chicken Labeling*, STATES NEWS SERV. (Oct. 13, 2014), <https://www.tzlegal.com/wp-content/uploads/2014/10/Settlement-Reached-in-Lawsuit-Concerning-Perdue-Chicken-Labeling.pdf> [https://perma.cc/4J3U-V9NS] (accessed Apr. 15, 2020) (Herb Frerichs, General Counsel for Perdue Farms, stated that "Perdue rejects the plaintiffs' allegations and maintains that its labels are not misleading in any way. Nonetheless, it has agreed to discontinue the labeling claim at issue . . . Perdue is committed to treating animals with respect and to ensure their health and safety. We are pleased this lawsuit has been resolved.").

<sup>277</sup> *Lawsuit Filed – Simple Truth Chicken's "Humane" Label*, ANIMAL OUTLOOK, <https://animaloutlook.org/simple-truth/> [https://perma.cc/2A5P-6AKD] (accessed Apr. 15, 2020).

<sup>278</sup> *Simple Truth Chicken Labeling Lawsuit – Settlement Reached*, ANIMAL OUTLOOK (Oct. 13, 2014), <https://animaloutlook.org/press/press-releases/simple-truth-chicken-label-removed/> [https://perma.cc/MWS9-A27N] (accessed Apr. 15, 2020).



Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
6/14	Class Action (HSUS) <sup>279</sup>	Kroger and Perdue (chicken)	Label	humanely raised	M.D. Fl. and D. N.J. (Perdue); N.D. Cal (Kroger)	Settlement agreed to in which Perdue would remove claim from packaging.
7/15	Class Action (MFA) <sup>280</sup>	Foster Farms and American Humane Association (chicken)	Advertisements; label	American Humane Certified	Super. Ct. Cal., County of Los Angeles	Summary judgment granted to Foster Farms finding that “[p]laintiff failed to meet her burden of showing a triable issue of fact that an independent, non-profit’s standard for the humane treatment of poultry, which was developed by members with expertise on the behavior of chickens and enforced through a reasonable auditing process, was somehow divergent from the reasonable consumer’s subjective view of the humane treatment of chickens.” <sup>281</sup>

<sup>279</sup> Complaint at 1, *Roy v. Perdue Farms Inc.*, No. 6:13-cv-01656-CEH-KRS (M.D. Fla. Oct. 24, 2013), 2013 WL 5816821; see also Anne Bucher, *Kroger, Perdue Farms Settle Chicken Labeling Class Action Lawsuits*, TOP CLASS ACTIONS (Oct. 15, 2014), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/42213-kroger-perdue-farms-settle-chicken-labeling-class-action-lawsuits/> [<https://perma.cc/HY9V-T8GS>] (accessed Apr. 15, 2020) (stating the terms of the Perdue settlement agreement).

<sup>280</sup> Leining Complaint, *supra* note 208.

<sup>281</sup> Brent Johnson, *Attempts to Enforce “Humane” Treatment of Poultry Fail*, LEXOLOGY (June 11, 2018), <https://www.lexology.com/library/detail.aspx?g=1f5515b6-4e0b-4b56-8aff-1b86f84d0e95> [<https://perma.cc/PAD9-FKTT>] (accessed Apr. 15, 2020).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
9/15	Class Action (PETA) <sup>282</sup>	Whole Foods (GAP standards)	In-store displays and materials	Global Animal Partnership (GAP) standards plus animal welfare claims, e.g., “raised right tastes right;” “great-tasting meat from healthy animals;” “cage free”	N.D. Cal. – Consumers Legal Remedies Act (CA); False Advertising Law (CA); Unfair Competition Law (CA)	Dismissed. Plaintiffs failed to show that some Whole Foods signage was objectively untrue (e.g., “no cages;” “healthy animals”); that other subjective statements were amenable to objective standards (e.g., “great-tasting meat from healthy animals”) and anything other than legal “puffery.” <sup>283</sup>
8/16	Organic Consumer Association/ALDF <sup>284</sup>	Handsome Brook (eggs)	Advertisements; label	‘pasture-raised’	D.C. Super. Ct.	Settlement in which defendants agreed to obtain third party (Certified Humane) certification and ensure future purchases of eggs from outside its own network would be third party (American Humane Association) certified.
10/12	ALDF <sup>285</sup>	Judy’s Eggs and Petaluma Farms	Label	“raised free of cages;” “run, scratch and play in the fresh air of Sonoma Valley;” and related imagery	Super. Ct. Cal.	Settlement in which defendants agreed to modify packaging and language, obtain third-party (Certified Humane) certification, and make donations to three nonprofit organizations.

<sup>282</sup> *People for the Ethical Treatment of Animals v. Whole Foods Mrkt. Cal. Inc.*, No. 15-CV-04301 NC, 2016 WL 1642577 (N.D. Cal. 2016) (order granting defendant’s motion to dismiss plaintiffs’ third amended complaint with prejudice).

<sup>283</sup> *Id.*

<sup>284</sup> See *Handsome Brook and Humane Farm Animal Care Settle*, CORNUCOPIA INST. (updated Feb. 5, 2020), <https://www.cornucopia.org/2018/06/handsome-brook-and-humane-farm-animal-care-settle/> [<https://perma.cc/N2XS-9YMU>] (accessed Apr. 15, 2020) (discussing Handsome Brook’s recognition of its animal welfare claim shortcomings as a result of settlement of another lawsuit).

<sup>285</sup> Glover Complaint, *supra* note 216, at 2.

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
9/17	ALDF <sup>286</sup>	Hormel (cattle, chicken, pork, turkey)	Advertisements; label	natural; "containing no nitrates or nitrites"	D.C. Super. Ct. – Consumer Protection Procedures Act (D.C.)	Dismissed by lower court. <sup>287</sup> Appeal pending. <sup>288</sup>
6/17	Class Action (Organic Consumers Association, Friends of the Earth, and Center for Food Safety) <sup>289</sup>	Sanderson Farms Inc. (chicken)	Advertisements on radio and television; social media; website	100% natural	N.D. Cal. – Unfair Competition Law (CA); False Advertising Law (CA)	Dismissed without prejudice. Plaintiffs failed to demonstrate standing. <sup>290</sup> Appeal before Ninth Circuit pending. <sup>291</sup>
1/18	Class Action (named plaintiff, Gibson) <sup>292</sup>	Walmart and Cal-Maine Foods (organic eggs)	Label	farm fresh; "free to roam, nest and perch in a protected barn with outdoor access"	N.D. Cal. – Consumers Legal Remedies Act (CA); False Advertising Law (CA); Unfair Competition Law (CA)	Dismissed without prejudice.
3/18	Class Action (Hagens Berman Sobol Shapiro, representing Palmer) <sup>293</sup>	Walmart and Cal-Maine Foods (organic eggs)	Label	farm fresh; "free to roam, nest and perch in a protected barn with outdoor access"	N.D. Cal. – Consumers Legal Remedies Act (CA); False Advertising Law (CA); Unfair Competition Law (CA)	Voluntarily withdrawn by plaintiffs.

<sup>286</sup> *Animal Legal Def. Fund v. Hormel Foods*, 2016-CA-004744 B (D.C. Super. Ct. Sept. 20, 2017) (order denying defendant's motion to dismiss).

<sup>287</sup> *Animal Legal Def. Fund*, 2016-CA-004744 B at 1 (Apr. 19, 2019).

<sup>288</sup> *Animal Legal Def. Fund v. Hormel Foods*, 19-CV-0397 (D.C. appeal filed May 6, 2019).

<sup>289</sup> First Amended Complaint at 1–2, 20, *Organic Consumers Ass'n v. Sanderson Farms*, No. 17-cv-03592 (N.D. Cal. Aug. 23, 2017).

<sup>290</sup> *Organic Consumers Ass'n v. Sanderson Farms*, No. 17-cv-03592, 2019 WL 3457787 (N.D. Cal. July 31, 2019) (order granting motion to dismiss without prejudice).

<sup>291</sup> *Friends of the Earth v. Sanderson Farms, Inc.*, 19-cv-16696 (9th Cir. Filed Aug. 8, 2019) (briefed and waiting opinion).

<sup>292</sup> Complaint at 2, 5, 22, *Gibson v. Wal-Mart Stores*, No. 18-cv-00134-KAW (N.D. Cal. Jan. 8, 2018).

<sup>293</sup> Complaint at 2, 5, 22, *Palmer v. Wal-Mart Stores*, No. 3:18-cv-00459-DMS-KSC (N.D. Cal. Mar. 2, 2018).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
3/18	Class Action (Hagens Berman Sobol Shapiro, representing Silva) <sup>294</sup>	Walmart, Michael Foods and Nest Fresh Egg Farms	Label	farm fresh; “free to roam, nest and perch in a protected barn with outdoor access”	W.D. Wash. –Consumer Protection Act (WA); unjust enrichment (general)	Voluntarily withdrawn by plaintiffs.
3/18	ALDF <sup>295</sup>	Trader Joe’s (eggs)	Packaging	cage free accompanied by illustration of chickens on pasture	Super. Ct. of Cal., Alameda Cty. – Consumers Legal Remedies Act (CA); False Advertising Law (CA); Unfair Competition Law (CA)	Settlement in which defendant agreed to stop using said packaging.

<sup>294</sup> Complaint at 1, 3, 5, *Silva v. Wal-Mart Stores*, No. 2:18-cv-00324 (W.D. Wash. Mar. 2, 2018).

<sup>295</sup> *Trader Joe’s Cage-Free Egg Lawsuit Reaches Settlement in a Win for Truth in Advertising*, ANIMAL LEGAL DEF. FUND (June 29, 2018), <https://aldf.org/article/trader-joes-cage-free-egg-lawsuit-reaches-settlement-in-a-win-for-truth-in-advertising/> [<https://perma.cc/QX9A-YMWX>] (accessed Apr. 15, 2020).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
7/18	Organic Consumers Association <sup>296</sup>	Ben & Jerry's Homemade, Inc.	Label, website	"happy cows" humane treatment of cows in the "Caring Dairy" program and "values-led sourcing"	D.C. Super. Ct.—Consumer Protection Procedures Act (DC)	Motion dismissed on Jan. 10, 2019, but "happy cows" claim no longer used. <sup>297</sup>
2/19	Food & Water Watch, Organic Consumers Association <sup>298</sup>	Pilgrim's Pride (chicken)	Website	"treated humanely" and fed "only natural ingredients"	D.C. Super. Ct. – Consumer Protection Procedures Act (DC)	Voluntarily dismissed by plaintiffs. <sup>299</sup>
3/19	Class Action (PETA) <sup>300</sup>	Pete and Gerry's Organics and Nellie's Free Range Eggs	Advertisements; label	Depiction of idyllic chicken life indicating a higher welfare standard	S.D.N.Y.	Case discontinued after Defendants motion to dismiss was partially granted <sup>301</sup> and parties settled. <sup>302</sup>

<sup>296</sup> Complaint at 2, 4, *Organic Consumers Ass'n v. Ben & Jerry's Homemade, Inc.*, No. 2018 CA 004850 B (D.C. Super. Ct. July 9, 2018).

<sup>297</sup> *Organic Consumers Association Wins on Motion to Dismiss in Case Against Unilever-Owned Ben & Jerry's for Deceptive Marketing Claims*, ORGANIC CONSUMERS ASS'N (Jan. 10, 2019), <https://www.organicconsumers.org/press/organic-consumers-association-wins-motion-dismiss-case-against-unilever-owned-ben-jerrys> [<https://perma.cc/Q55T-C3UQ>] (accessed Apr. 15, 2020); *Judge Dismisses 'Happy Cow' Suit Against Ben & Jerry's*, ASSOCIATED PRESS (May 11, 2020) <https://www.boston.com/news/business/2020/05/11/ben-and-jerrys-happy-cow-lawsuit> [<https://perma.cc/V2Q8-NL8X>] (accessed May 13, 2020).

<sup>298</sup> Complaint at 2, *Food & Water Watch v. Pilgrim's Pride*, 2019 CA 000730 B (D.C. Super. Ct. July 10, 2019).

<sup>299</sup> Notice of Voluntary Dismissal, *Food & Water Watch v. Pilgrim's Pride*, 2019 CA 000730 B (D.C. Super. Ct. Sep. 23, 2019).

<sup>300</sup> Complaint at 14, 25, *Lugones v. Pete & Gerry's Organics*, No. 19-cv-02097 (S.D.N.Y. Mar. 6, 2019).

<sup>301</sup> Opinion and Order, *Lugones v. Pete and Gerry' Organics, LLC*, 19-cv-2097 (S.D.N.Y. Feb. 21, 2020) (granting and denying in part defendants' motion to dismiss for lack of personal jurisdiction and failure to state a claim), <https://www.courtlistener.com/recap/gov.uscourts.nysd.511393/gov.uscourts.nysd.511393.35.0.pdf> [<https://perma.cc/C7W7-73HQ>] (accessed May 14, 2020).

<sup>302</sup> Order of Discontinuance, *Lugones v. Pete and Gerry's Organics, LLC*, No. 19-cv-2097 (S.D.N.Y. Apr. 23, 2020), <https://www.courtlistener.com/recap/gov.uscourts.nysd.511393/gov.uscourts.nysd.511393.42.0.pdf> [<https://perma.cc/9E3C-N263>] (accessed May 14, 2020).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
6/19	Class Actions (Plaintiff Firms) <sup>303</sup>	Fairlife (milk products)	Label & website	“extraordinary care and comfort”	E.D. Ill. – Consumer Protection Act (OH), Deceptive Business Practices Act (IL)	Pending: original complaints filed 6/11/2019 and 6/12/2019.
<b>Lanham Act</b>						
11/12	ALDF <sup>304</sup>	Hudson Valley Foie Gras	Print materials; social media; website	“the humane choice”	N.D. Cal. – Lanham Act (U.S.) Unfair Competition Claims (CA)	Case dismissed HVFG agreed to take “the Humane Choice” out of advertising. <sup>305</sup>
<b>BBB National Advertising Division</b>						
6/03	COK <sup>306</sup>	United Egg Producers (egg)	Label	Animal Care Certified logo	NAD	BBB ruled in COK’s favor that ACC logo is misleading and should be discontinued. UEP did not comply with the ruling, so the case was referred to the FTC. After litigation, Animal Care Certified was removed and replaced with United Egg Producers Certified.

<sup>303</sup> Complaint at 2, 17–19, 21–22, 24, Michael v. Fairlife, No. 19-cv-03924 (N.D. Ill. June 11, 2019); Complaint at 2, 17–18, Schwartz v. Fairlife, No. 19-cv-03929 (N.D. Ill. June 12, 2019); Elaine Watson, *Fairlife Hit With Two Proposed Class Action Lawsuits Alleging Fraud in Wake of Animal Abuse Allegations*, FOOD NAVIGATOR (updated June 13, 2019, 6:54 PM), [https://www.foodnavigator-usa.com/Article/2019/06/13/Fairlife-hit-with-two-proposed-class-action-lawsuits-alleging-fraud-in-wake-of-animal-abuse-allegations?utm\\_source=newsletter\\_daily&utm\\_medium=email&utm\\_campaign=13-Jun-2019&c=1z%2Btsiin1hPA4o4jNa7a%2Fr13mLjnTS8F&p2=#](https://www.foodnavigator-usa.com/Article/2019/06/13/Fairlife-hit-with-two-proposed-class-action-lawsuits-alleging-fraud-in-wake-of-animal-abuse-allegations?utm_source=newsletter_daily&utm_medium=email&utm_campaign=13-Jun-2019&c=1z%2Btsiin1hPA4o4jNa7a%2Fr13mLjnTS8F&p2=#) [https://perma.cc/638M-22SL] (accessed Apr. 15, 2020).

<sup>304</sup> *Foie Gras*, *supra* note 230.

<sup>305</sup> *Id.*

<sup>306</sup> Press Release, Compassion Over Killing, Federal Trade Commission Announces End to Misleading Egg Logo (Oct. 3, 2005).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
1/09	HSUS <sup>307</sup>	D'Artagnan Artisan (foie gras)	Advertisements	"liver is not diseased, simply enlarged;" "animals are hand-raised with tender care under the strictest of animal care standards"	NAD	NAD recommended advertiser discontinue claim. D'Artagnan stated that it "strongly disagree[d] with NAD's decision but nonetheless will comply and modify its advertising."
6/10	AWI <sup>308</sup>	Perdue (chicken)	Label	humanely raised; 'cage free'	NAD	Shortly before BBB ruling, lawsuit was filed by HSUS, foreclosing review by the NAD.

<sup>307</sup> Press Release, BBB Nat'l Programs, Inc., NAD Examines Advertising for D'Artagnan's Artisan Foie Gras, (Jan. 26, 2009), <https://asrcreviews.org/nad-examines-advertising-for-dartagnans-artisan-foie-gras/> [<https://perma.cc/D6W9-L8RE>] (accessed Apr. 15, 2020).

<sup>308</sup> Closure Letter, National Advertising Division (on file with authors).

Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
11/11	AWI <sup>309</sup>	Allen Harim (chicken)	Label	humanely raised	False advertising (NAD, then FTC)	"Because the advertiser agreed to permanently discontinue the claim—an undertaking that NAD determined was necessary and appropriate—NAD determined that the matter did not warrant the expenditure of its resources and administratively closed its inquiry." <sup>310</sup> However, after Allen Harim did not make the promised changes, AWI re-engaged with NAD. NAD forwarded claim to FTC, and the company subsequently removed the claim and agreed to third-party (GAP) certification. <sup>311</sup>

<sup>309</sup> See *The Private Advertising Litigation and Consumer Protection Committees' Recent Litigation Developments [Cases from October 29 and November 12, 2013]*, A.B.A. SEC. ANTITRUST L. 1, 6–7 [www.americanbar.org/content/dam/aba/publications/antitrust\\_law/at32940\\_0\\_update\\_20131112.pdf](http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at32940_0_update_20131112.pdf) [<https://perma.cc/3XZ4-Y4WC>] (accessed Apr. 15, 2020) (reviewing AWI's claim against Allen Harim); *NAD Refers Allen Harim Foods to FTC Following Compliance Review of 'Humanely Raised' Ad Claim*, BBB NAT'L PROGRAMS (Nov. 13, 2013), <https://asrcreviews.org/nad-refers-allen-harim-foods-to-ftc-following-compliance-review-of-humanely-raised-ad-claim/> [<https://perma.cc/4Q8Y-TUKE>] (accessed Apr. 15, 2020).

<sup>310</sup> *Id.*

<sup>311</sup> Letter, *supra* note 192, at 2.



Date (mo/yr)	Challenger/Petitioner	Respondent	Type of Claim	Claim(s)	Forum	Outcome
2018	Tyson Foods <sup>312</sup>	Perdue (chicken)	Advertisements on television and YouTube; website	Express claims: Perdue's chickens are happy; Implied claims: Perdue has changed the way that it raises all its chickens; all of Perdue's chickens are raised 'organically' (free-range, non-GMO, 100% vegetarian-fed, and raised without use of antibiotics), all the chickens Perdue raises are happy	NAD	NAD agreed in part with Tyson and recommended that Perdue discontinue the misleading advertisements or make it clear that they applied only to Perdue's Harvestland Organic brand rather than its entire line of poultry products. NAD did not find that Perdue's website claims were misleading.
2019	AWI <sup>313</sup>	Hatfield Quality Meats (pork)	Label	"ethically raised by family farmers committed to a higher standard of care governed by third party animal welfare audits"	NAD	NAD recommended Hatfield remove the claim from its packaging. NAD also suggested Hatfield may have sufficient support for a more narrow animal raising claim. <sup>314</sup>

<sup>312</sup> NAD Finds Line Claim in Ads for Perdue's Organic Chicken Brand, Recommends Advertiser Modify, Discontinue Broadcast, YouTube Spots; Perdue to Appeal, BBB NAT'L PROGRAMS (Apr. 27, 2018), <http://ascreviews.org/nad-finds-line-claim-in-ads-for-perdues-organic-chicken-brand-recommends-advertiser-modify-discontinue-broadcast-youtube-spots-perdue-to-appeal/> [<https://perma.cc/7V3Z-BG7M>] (accessed Apr. 15, 2020) (initial filing date is not mentioned in release).

<sup>313</sup> Press Release, *supra* note 194.

<sup>314</sup> CLEMENS FOOD GROUP, NAD/CARU CASE REPORTS (Aug. 2019) (on file with author) (note, Clemens Food Group conducts business as Hatfield Pork Products).