

P.L. 90-492 Exempt Processing Q&A

—Michael Fisher, D.V.M.

[Editor Note: These questions were submitted to Dr. Fisher as part of a larger Q&A that he conducted with the Farm to Consumer Legal Defense Fund. He answered additional questions submitted through Susan Beal on behalf of APPPA members. The APPPA Pastured Poultry discussion on Groups.io has the unabridged email thread. This article has been edited for space.]

The Farm to Consumer Legal Defense Fund recently hosted a webinar on poultry exemptions for its members. Following the webinar, participants could submit questions. Here are the questions submitted and responses provided.

So a restaurant can only sell federally inspected poultry, but a producer can sell under the exemption to a restaurant.

The statement has two parts. The first part is false. The second part is true.

A restaurant can only sell federally inspected poultry. False. A restaurant sells poultry products directly to individual consumers at the restaurant. When preparing these poultry products, the restaurant can use:

- Federally inspected and passed poultry products. This is poultry prepared under FSIS inspection the bears an official mark of inspection.
- Exempted poultry products. These are poultry products prepared under an exemption described in:
 - 9 CFR 381.10(a)(5): Poultry products prepared from sound and healthy poultry in a State by a poultry producer on his own premises from poultry raised on the poultry producer's premises, and distributed by any person (i.e. the poultry producer or someone else) solely within the state.
 - 9 CFR 381.10(a)(6): Poultry products prepared from sound and healthy poultry in a State by a poultry producer or other person for distribution by the poultry

producer or other person solely within the State.

- 9 CFR 381.10(a)(7): Cut up poultry products prepared by a small enterprise for distribution solely within the State.
- 9 CFR 381.10(c): Poultry products prepared by a poultry producer on his own premises from poultry raised on the poultry producer's premises and distributed by the poultry producer solely within the State.
- Poultry products, as provided in 9 CFR 381.223. These are poultry products in inventory at State inspected or exempted establishments on the day the USDA assumes control of all State inspected or exempted establishments.

A poultry producer who slaughters and processes poultry under an exemption can sell to a restaurant. True, but so can other individuals. The following individuals who prepare poultry products under an exemption can sell to a restaurant.

- The poultry producer described in 9 CFR 381.10(a)(5).
- The poultry producer or other person described in 9 CFR 381.10(a)(6).
- The small enterprise described in 9 CFR 381.10(a)(6).
- The owner described in 9 CFR 381.10(c)(5).

What clever circumventions exist to thwart inspectors yet remain technically legal?

I have no clever ideas on how to circumvent or thwart inspectors. Poultry inspection is based on the rule of law. There are rules that must be followed. These rules mandate certain behaviors, prohibit certain behaviors, and are silent on all other behaviors. The inspection service is charged with enforcing the behaviors that are mandated or prohibited by the regulations, just like a highway patrolman. Where the regulations are clear on what is required and what it prohibited, the best course of action is to strictly abide by the regulations.

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That said, opportunities exist where the rules are silent on a behavior. "Everything which is not forbidden is allowed" is a constitutional principle found in the English common law. This is true with the regulations. What the regulations neither mandate nor prohibit is permissible. 9 CFR 381.10 is based on a poultry industry that no longer exists. In our 21st Century poultry industry economy there exist behaviors (i.e. business models) that the regulations neither mandate nor prohibit. Opportunities exist for innovative individuals with a thorough knowledge of what behaviors the regulations mandate, prohibit, and are silent on, and who find innovative ways to market poultry products in that zone of behaviors on which the regulations are silent. This is not a clever idea to circumvent or thwart inspectors. This is taking advantage of opportunity while strictly abiding by the regulations.

Does ground chicken fall under the exemption?

What about chicken sausage?

It is important to understand that exemptions apply to specific types of operations, not specific poultry products. It is possible to prepare ground poultry or poultry sausage under most of the 9 CFR 381.109 exemptions. However, it is not possible to market ground poultry or poultry sausage under all these same 9 CFR 381.10 exemptions.

- The 9 CFR 381.10(a)(1) retail dealer exemption is limited to the cutting up of poultry products. Preparing ground poultry and poultry sausage product is prohibited.
- The 9 CFR 381.10(a)(2) territorial exemption applies to the processing of poultry products and includes preparing ground poultry and poultry sausage for sale in commerce.
- The 9 CFR 381.10(a)(3) personal exemption applies to the processing of poultry and includes grinding and making sausage; but product use is restricted to the person who prepared the poultry products. The poultry products cannot be sold.
- 9 CFR 381.10(a)(4) custom exemption applies to the processing of poultry and includes grinding and making sausage; but product use is restricted to the person who owns the live poultry and pays the custom operator a fee for service. The poultry products cannot be sold.

- The 9 CFR 381.10(a)(5) producer exemption applies to the processing of poultry products and includes preparing ground poultry and poultry sausage for sale in commerce.
- The 9 CFR 381.10(a)(6) producer or other person exemption applies to the processing of poultry products and includes preparing ground poultry and poultry sausage for sale in commerce.
- The 9 CFR 381.10(a)(7) small enterprise exemption applies to the processing of poultry products and includes preparing ground poultry and poultry sausage for sale in commerce.
- The 9 CFR 381.10(c) owner exemption applies to the slaughter of poultry; not the processing of poultry. Preparing ground poultry and poultry sausage product is prohibited.
- The 9 CFR 381.10(d) retail store and restaurant exemption applies to the processing of poultry products and includes preparing ground poultry and poultry sausage for sale in commerce.
- The 9 CFR 381.10(e) poultry pizza exemption is limited to poultry pizzas containing poultry product ingredients which were prepared, inspected, and passed in a cured or cooked form as ready-to-eat. Preparing ground poultry and poultry sausage product is prohibited.

Can brined birds be prepared under exemption?

Yes. Brining is a form of processing. Preparing brined poultry is compatible with the exemption described in 9 CFR 381.10(a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), and (d). Preparing brined poultry is not compatible with the exemption described in 9 CFR 381.10(a)(1), which is restricted to the cutting up of poultry products; (c), which is restricted to slaughter; and (e), which is limited to pizza. If the brine contained a restricted ingredient, such as nitrite, the regulatory limits places on the use of nitrites in poultry product apply. Exceeding these limits adulterates the product.

Is poultry bone broth exempt from the requirement for inspection?

Yes and No.

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Yes, 9 CFR 381.15 exempts articles containing poultry ingredients only in a relatively small proportion or historically not considered by consumers as products of the poultry food industry. Such articles are exempted from the definition of "poultry product" and the requirements of the Act and the regulations applicable to poultry products. Poultry broths are such an article if all these points are met:

- The broth contains poultry meat and/or "Mechanically Separated (Kind of Poultry)" or poultry fat only in condimental quantities (i.e. quantities used to flavor or complement food);
- The poultry ingredients used in the broth were prepared under inspection, or were inspected under a foreign inspection system and imported in compliance with the Act and the regulations;
- The product name on the label does not represent the broth as a kind of poultry. If the product name is Chicken Flavored Broth or Turkey Flavored Broth, then the broth is not a

poultry product and is exempt from the requirement for inspection;

- The broth contains less than 2 percent cooked poultry meat and/or "Mechanically Separated (Kind of Poultry)" or less than 10 percent of cooked poultry skins, giblets, or fat, separately, and less than 10 percent of cooked poultry skins, giblets, fat, and meat or "Mechanically Separated (Kind of Poultry)" in any combination; and
- The poultry broth will not be used in the processing of any poultry product in any official establishment.

No, if the product name is Chicken Broth or Turkey Broth, then the broth is a poultry product and not exempt from the requirement for inspection.

[Editor's Note: Clarification from Susan: The product name is a difficult thing to wrap your head around. The product name cannot directly represent the product as a poultry product. The product name "Chicken broth" describes the broth as CHICKEN! Product named Chicken Broth is a

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poultry product and not exempt from inspection. The product name "Chicken Flavored Broth" describes the broth as something other than chicken that is flavored to taste like chicken. See the difference? Chicken is a poultry product. Chicken Flavor is not a poultry product. Chicken Noodle Soup is Chicken with noodles in a soup. Chicken Flavored Noodle Soup is Noodle soup with no chicken, just chicken flavor.]

Can I prepare poultry bone broth that is exempt from the requirement for inspection in a kitchen space certified for processing food?

This is not an exemption question. This is a jurisdiction question. A poultry bone broth that is exempt from the requirement for inspection is not a poultry product; therefore, not amenable to the Act. FSIS has no jurisdiction; nor does a State Poultry Inspection Program unless the State legislature makes such poultry bone broth amenable to the State statute. The State agency with jurisdiction over non-meat and non-poultry food products would have jurisdiction over such poultry bone broth.

Understanding how federal vs. state exemptions for poultry inspection work is confusing.

The federal 9 CFR 381.10 exemptions apply in any location where the Poultry Products Inspection Act applies; therefore, the federal 9 CFR 381.10 exemptions apply in states with State poultry inspection programs and states without State poultry inspection programs.

In states with State poultry inspection programs, the exemptions described in the State poultry inspection regulations exist along side the federal 9 CFR 381.10 exemptions; therefore, in states with State poultry inspection programs, both the State and federal exemptions apply.

In states with State poultry inspection programs, the exemptions described in the State poultry inspection regulations take priority over the federal 9 CFR 381.10 exemptions.

If the State program exemptions are the same as the federal exemption, the State program exemption applies.

If the State program exemptions are more restrictive than the federal exemption, the State program exemption applies.

If the State program exemptions are less restrictive than the federal exemption, then State program is not 'equal to' and FSIS will cause the State to change its exemption.

Most states with a state poultry inspection program adopt the 9 CFR 381.10 language in their State regulations. However, a prudent producer in a state with a State poultry inspection program will not assume that the State poultry inspection program adopts the 9 CFR 381.10 language in their State regulations. A prudent producer will check with the State poultry inspection program director and confirm the exemption language in the State regulations and act according to the language in the State regulations.

Under (5) Producer, (7) Small Enterprise, or (10c) Owner, do the birds have to be raised on property under the owner's name or can they be raised on land owned by someone else, but used for raising the owner's birds?

For the 9 CFR 381.10(a)(5) producer exemption, the live poultry must be:

- Slaughtered and processed by the poultry producer. The exemption does not apply if someone else slaughters and processes the poultry. The exemption does not require the poultry producer to actually do the work of slaughter and processing. The poultry producer could hire an employee to perform the actual work of slaughter and processing.
- Raised by the poultry producer. The exemption does not require that the poultry producer actually own the poultry raised by the poultry producer. Nor does the exemption require the poultry producer to actually do the work of raising the live poultry. The poultry producer could hire

an employee to perform the actual work of raising the live poultry.

- Raised on the poultry producer's premise. The exemption does not require that the poultry producer actually own the premise on which he/she raise the live poultry. The poultry producer could rent or lease the premises.

For the 9 CFR 381.10(a)(7) small enterprise exemption, the live poultry need not be raised by the small enterprise, under the name of the small enterprise, or on the premise of the small enterprise.

For the 9 CFR 381.10(c) owner exemption, the live poultry must be:

- Slaughtered by the owner. The exemption does not apply if someone other than the owner of the poultry slaughters and processes the poultry. The exemption does not require the owner of the poultry to actually do the work of slaughter and processing. The owner of the poultry could hire an employee to perform the actual work of slaughter and processing.
- Owned by the owner.

- Raised by the owner. The exemption does not require that the owner of the poultry actually do the work of raising the live poultry. The owner of the poultry could hire an employee to perform the actual work of raising the live poultry.
- Raised on the farm of the owner. The exemption does not require that the owner of the poultry actually own the farm on which he/she raise the live poultry. The owner of the poultry could rent or lease the farm.

Dr. Fisher is a retired United States Department of Agriculture (USDA) Food Safety and Inspection Services (FSIS) veterinarian. He has been involved with the APPPA Conference as an expert resource for the previous two events. His goal is to help farmers understand federal regulations and avoid costly mistakes. A portion of this article was excerpted from Dr. Fisher's post on the NMPAN email list. Additional questions were provided to him by APPPA Board President Susan Beal, D.V.M. The answers are Dr. Fisher's own words, except where noted.

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