

# Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

#### 9 CFR Parts 307 and 381

[Docket No. FSIS—2011-0032]

#### Additional Changes to the Schedule of Operations Regulations

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is proposing to amend the meat and poultry products regulations pertaining to the schedule of operations. FSIS is proposing to amend these regulations to define the 8-hour workday as including time that inspection program personnel need to prepare the inspection station, if necessary, or retrieve and return lot tally sheets; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary; and the time necessary to conduct duties scheduled by FSIS, including administrative activities. The activities are integral and indispensable to inspectors' work and are part of the continuous workday as defined by the Fair Labor Standards Act. Therefore, they are activities that need to be part of the Agency's regulatory definition for the 8-hour workday.

**DATES:** Submit comments on or before April 18, 2012.

**ADDRESSES:** FSIS invites interested persons to submit comments on this notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to <http://www.regulations.gov>. Follow the on-line instructions at that site for submitting comments.

- *Mail, including CD-ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and

Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8-163A, Washington, DC 20250-3700.

- *Hand- or courier-delivered submittals:* Deliver to Patriots Plaza 3, 355 E. Street SW., Room 8-163A, Washington, DC 20250-3700

**Instructions:** All items submitted by mail or electronic mail must include the Agency name and docket number FSIS-2012-0013. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to <http://www.regulations.gov>.

**Docket:** For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E. Street, Room 8-164, Washington, DC 20250-3700 between 8 a.m. and 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Daniel L. Engeljohn, Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250-3700, telephone: (202) 205-0495.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.*, and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.*, provide for mandatory Federal inspection of livestock and poultry slaughtered at official establishments and of meat and poultry products processed at official establishments, respectively. FSIS bears the cost of mandatory inspection provided during non-overtime and non-holiday hours of operation. Official establishments pay for inspection services performed on holidays or on an overtime basis.

On August 9, 2010, FSIS proposed to amend its regulations pertaining to the schedule of operations. FSIS proposed to define the 8-hour workday as including time that inspection program personnel need to spend at the workplace donning and doffing required gear, walking to their workstations after donning required gear, and walking from their work stations prior to doffing required gear.

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On June 10, 2011, FSIS issued the final rule that amended the meat, poultry products, and egg products regulations to define the 8-hour workday as including time that inspection program personnel need to spend at the workplace donning and doffing required gear, time spent walking to their workstations after donning required gear, and time spent walking from their work stations prior to doffing required gear.

In connection with our development of the 2011 final rule, FSIS determined that there are three other activities that need to be included as a part of the defined workday. The first is the sharpening of knives in meat slaughter plants, the second is the completion of administrative duties (e.g., time and attendance), and the third is preparing for inspection (e.g., preparing a work station or obtaining forms). FSIS considers these activities as integral and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, "Principal" activities. Therefore, these activities need to be part of the Agency's regulatory definition for the 8-hour workday.

##### Sharpening of Knives

Livestock carcass inspection includes making excisions to cattle carcasses' heads, tongues, and certain organs while they are on the slaughter line and making cuts to the head of swine carcasses while they are on the slaughter line to inspect the carcass for diseases. Currently, inspection program personnel performing on-line inspection duties in poultry establishments do not use knives.

Under this proposed rule, if a livestock slaughter establishment does not offer a knife-sharpening service to inspection program personnel, the establishment would be required to provide time for inspection program personnel that perform on-line inspection duties to sharpen his or her knife.

FSIS determined that inspection program personnel on the cattle slaughter line who work 3 days or less a week would need 15 minutes once a week to sharpen their knife, if the establishment does not sharpen it. Inspection program personnel who work on the swine slaughter line, regardless of the days worked a week, would also need 15 minutes once a week to sharpen

their knife, if the establishment does not sharpen it, because post-mortem inspection procedures for swine require less incising with the knife than post-mortem inspection procedures for cattle. However, inspection program personnel on the cattle slaughter line who work 4 or more days a week would need 15 minutes twice a week to sharpen their knife, if the establishment does not sharpen it, because of the increased number of carcasses they cut into.

FSIS is basing its estimate of 15 minutes to sharpen a knife on an Agency CD-ROM training video, "Knife-Safety and Sharpening Skills." In the video it took an estimated 15 minutes to sharpen a knife. Assuming that the blade is in good condition and free of major nicks, it took 6–10 minutes to sharpen a knife and 5 minutes for preparation and breakdown. To determine the number of times a week a knife needs to be sharpened, FSIS considered a variety of factors, such as the species being inspected (*i.e.*, cattle or swine) and the number of carcasses inspected and species.

FSIS has instructed its inspection program personnel that if an establishment provides a knife sharpening service for inspection program personnel, they are to use that service. Should this rule become final, and if a knife-sharpening service is not provided, livestock slaughter establishments would need to incorporate the times and frequencies discussed above for knife sharpening into the 8 hours of inspection or request that it be done in an overtime period.

#### Administrative Activities

The completion of the AD-3530-4, Time and Attendance Report, constitutes the most time consuming and regularly occurring administrative duty that inspection program personnel may have to accomplish within the 8-hour workday. At slaughter establishments, FSIS estimates inspection program personnel need 1 minute every day to complete the time and attendance report.

To determine this time estimate, FSIS evaluated the time needed to complete the actual Time and Attendance Reports for inspection program personnel performing on-line inspection duties. FSIS took into account various activities, such as the need to code leave and record overtime. Also, the Agency included the time needed for inspection program personnel to obtain the time and attendance record and to gather the data to be recorded on the time report. Based on its evaluation and the factors it considered, FSIS estimates that each day inspection program personnel need

1 minute within the scheduled 8-hour workday to allow for completion of the time and attendance report. Therefore, should this rule become final, slaughter establishments would need to provide inspection program personnel 1 minute everyday to complete the time and attendance activity. The 1 minute would need to be incorporated into the 8 hours of inspection or request that it be done in an overtime period.

#### Preparation for Inspection

It is necessary for livestock work stations to be set up to include supplies needed for post-mortem inspection—for example, stamps used to identify condemned parts. This preparation can be done by the slaughter establishments. Should this rule go into effect, and the establishment choose not to prepare the work station, FSIS will direct its supervisory personnel at livestock establishments to measure the amount of time it takes inspection program personnel to don required gear, walk to a work station, prepare the work station, return from the work station and doff required gear.

Inspection program personnel on poultry slaughter lines do not prepare the work station. However, they pick up and drop off lot tally sheets, which capture the number of birds condemned on post-mortem inspection, the conditions for which birds are condemned per lot, and the class of poultry for that lot. Should this rule go into effect, FSIS will direct its supervisory personnel in poultry slaughter establishments to measure the amount of time it takes inspection program personnel to don required gear, pick up a lot tally sheet, walk to a work station, return from the work station, drop off a lot tally sheet, and doff required gear.

#### Request for Comment and General Implementation Plan

FSIS is not aware of any duties other than those discussed above that are integral and indispensable work activities under the Fair Labor Standards Act and, therefore, should be included as part of the continuous workday. The Agency requests comment on whether there are other duties that it should consider including.

Should this rule become final, as with the provisions for donning, doffing, and the associated walk time, establishments will need to either incorporate the time for inspection program personnel performing on-line inspection duties to conduct knife sharpening, to complete the time and attendance reporting, and to prepare for inspection into their hours of operation or request overtime

charges. The regulations provide that FSIS bills overtime in 15 minute increments (9 CFR 307.6 and 381.39). Therefore, in situations where establishments have requested overtime, FSIS, when possible, will instruct inspection program personnel performing on-line inspection duties to do the activities addressed in this proposed rule during any time that remains within 15 minutes of requested overtime.

#### Proposed Amendment to 9 CFR 307.4(c) and 381.37(c)

For the reasons discussed above, FSIS is proposing to amend the meat and poultry products regulations to provide that the 8 hours of inspection service provided to establishments free of charge will include activities necessary to fully carry out an inspection program, including time for inspection program personnel to prepare the work station, if necessary, or retrieve and return lot tally sheets; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary; and the time necessary to conduct duties scheduled by FSIS, including administrative duties.

#### Executive Order 12866 and the Regulatory Flexibility Act

This rule was reviewed by the Office of Management and Budget under Executive Order 12866 and was determined to be non-significant.

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated non-significant under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

#### Cost to the Industry

Under this proposed rule, the most direct cost to the industry will be the overtime fee that the Agency will need to charge slaughter establishments for the time inspection program personnel spend in three groups of activities: (1) Sharpening knives, (2) completing administrative activities, and (3) preparing for inspection. As we explained in the cost analysis of the

Final Rule on Changes to the Schedule of Operations Regulations (76 FR page 33979), if meat and poultry slaughter establishments want to maintain their normal shift length of operating for 8 hours, they would incur some overtime fees.<sup>1</sup> Although the choice is voluntary, should this rule become final, the Agency expects that most meat and poultry slaughter establishments will choose to maintain their current shift-time, as shortening the shift-time will decrease production and revenue while idling existing capacity. However, FSIS expects the overtime fee from these three groups of activities will not be significant because (1) the establishments have options, as we will discuss later, besides paying overtime for some of these activities, and (2) the time for carrying out administrative activities and preparing for inspection (including preparing an inspection station and picking up and dropping off lot tally sheets) is small (one minute or two per day) and will probably not push the overtime over the 15 minutes threshold to incur more overtime charge than are currently assessed for donning and doffing activities.

Similar to donning and doffing, the actual time FSIS inspection program personnel will take to perform these activities will vary in each meat and poultry slaughter establishment depending on plant-specific variables. FSIS has developed preliminary estimates on the amount of time it takes for inspection program personnel to perform these activities and is requesting from all interested parties input on FSIS' estimates.

#### Knife-sharpening:

a. Two 15-minute periods per week for inspection program personnel who perform on-line inspection duties in beef slaughter operations for 4 or more days per week.

b. One 15 minute period per week for inspection program personnel on the beef slaughter line for 3 days or less per week or in a swine slaughter establishment.

- One minute per day to complete administrative activities.

- Two minutes or less for preparing for inspection.

Agency personnel data<sup>2</sup> show that there are 3,053 inspection program personnel performing on-line inspection duties in the poultry and meat slaughter establishments—2,037 in poultry, 1,000

<sup>1</sup> This regulatory change should not impact the schedule of operations for meat and poultry processing establishments and egg product plants because those establishments can begin operations without FSIS inspection program personnel being at an on-line inspection work station.

<sup>2</sup> As of November 2011.

in meat, and 16 in establishments that slaughter both meat and poultry. Data<sup>3</sup> from a recent Agency survey indicate that among the meat slaughtering inspectors, 56 percent work in beef establishments that operate 4 or 5 days per week, 4 percent work in beef establishments that operate less than 4 days per week, 36 percent work in swine establishments, and 4 percent work in lamb, sheep, and goat establishments. Because lamb, sheep, and goat establishments are small or very small establishments, inspection program personnel would be able to complete the activities addressed in this proposed rule within the 8-hour day, and, therefore, there are no related cost calculations for these establishments in this proposed rule. Applying the percentages to the total of 1,016 meat slaughter inspectors,<sup>4</sup> 573 inspection program personnel are in beef establishments that operate 4 or 5 days per week, and 409 are in either beef establishments that operate less than 4 days per week or in swine establishments. The overtime fee that the Agency charges for each 15 minute interval is \$17.08 for FY 2012. Multiplying this number by the Agency estimated knife-sharpening time, we estimated the annual cost for knife sharpening time to be about \$1,776.3 (\$17.08 per quarter-hour × 2 knife-sharpening period per week × 52 weeks per year) per inspection program personnel in beef slaughter establishments that operate more for 4 days or more a week, and \$888.2 (\$17.08 per quarter-hour × 52 weeks per year) per inspection program personnel in beef slaughter establishments that operate 3 days or less or in swine establishments (FY 2012 rate). If the industry had to pay all the meat slaughter inspectors to sharpen their knives, the total cost to the industry would be about \$1.38 million (\$1776.3 × 573) + (\$888.2 × 409). However, the actual impact would be much less because the industry can offer knife-sharpening services to Agency inspection program personnel instead of paying overtime for it.

If an establishment provides a knife-sharpening service, FSIS will instruct inspection program personnel to use that service. A preliminary Agency query<sup>5</sup> found that the majority of the meat-slaughter establishments are offering knife sharpening to their

<sup>3</sup> Survey date is March 2011.

<sup>4</sup> We count the inspection program personnel in combined meat and poultry as meat inspectors so not to underestimate the cost, as poultry slaughter inspectors do not currently have to sharpen knives.

<sup>5</sup> OFO conducted the query in November 2011.

employees, and about 91% of those also offer the service to Agency inspection program personnel as well. We expect that many other establishments will start offering the service to avoid paying overtime charges should this rule become effective.

As for the other two groups of activities, the time they take is minimal. According to the Agency's estimates mentioned above, these activities combined will be at most 3 minutes per day. In addition, FSIS will permit the establishment to take on the responsibility of preparing the inspection station for inspection program personnel in livestock slaughter establishments. Given that the Agency charges overtime in 15 minute increments, and that it believes the donning, doffing, and walking time to be usually less than 15 minutes, time for these additional activities can be absorbed in the overtime period for donning, doffing, and walking time in most cases, thus not causing any additional overtime. In the unlikely, worst-case scenario where these activities push the daily overtime beyond the first 15 minute interval, the establishments would pay each inspection program personnel another \$4,441 (\$17.08 per inspector × 5 days per week × 52 weeks per year) annually. However, the Agency believes this scenario would apply to only a very small percentage of the inspection program personnel.

Comparing the cost to the annual revenue of the meat slaughtering industry alone, which is about \$67.2 billion,<sup>6</sup> the costs of this rule to the industry would not be significant.

#### Cost to the Consumer

The industry is likely to pass the increased costs on to consumers because of the inelastic nature of the consumer demand for meat and poultry products. However, given that the total volume of meat and poultry slaughtered under Federal inspection in 2010 was about 92 billion pounds,<sup>7</sup> the increased cost per pound due to the overtime fee will be less than \$0.0001 on average.

#### Benefits of the Rule

This proposed rule will include integral and indispensable work activities (as defined by the Fair Labor

<sup>6</sup> Summary of the Animal (except Poultry) Slaughtering Industry in the U.S. and its International Trade [2010 edition.] Supplier Relations US, LLC. [http://www.htrtrends.com/report-2700858-Animal\\_except\\_Poultry\\_Slaughtering\\_Industry\\_in\\_the\\_U\\_S\\_and\\_its\\_International\\_Trade\\_Edition.html](http://www.htrtrends.com/report-2700858-Animal_except_Poultry_Slaughtering_Industry_in_the_U_S_and_its_International_Trade_Edition.html), as of 11/16/2011.

<sup>7</sup> Livestock, Dairy, & Poultry Outlook/LDP-M-209/November 16, 2011; Economic Research Service, USDA.

Standards Act) into the defined inspector "workday." Therefore, if finalized, this proposed rule will help ensure compliance with the law and the improved use of Agency resources.

#### Regulatory Flexibility Analysis

The FSIS Administrator has made a preliminary determination that this proposed rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). There are 263 small and 566 very small meat and poultry slaughter establishments (by Small Business Administration standard). In small and very small establishments, inspection program personnel typically have adequate time during their tour of duty to sharpen their knives as well as conduct the other activities under this proposed rule, because they do not have to be on-line for 8 hours. Therefore, the impact will not be significant.

#### Paperwork Reduction Act

This proposed rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or recordkeeping requirements.

#### Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

#### USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, or audiotape) should contact USDA's Target Center at (202) 720-2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250-9410 or call (202) 720-5964 (voice and TTY). USDA is an equal opportunity provider and employer.

#### Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at: [http://www.fsis.usda.gov/regulations\\_&\\_policies/Federal\\_Register\\_Notices/index.asp](http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp).

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: [http://www.fsis.usda.gov/News\\_&\\_Events/Email\\_Subscription/](http://www.fsis.usda.gov/News_&_Events/Email_Subscription/). Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

#### List of Subjects

##### 9 CFR Part 307

Government employees, Meat inspection.

##### 9 CFR Part 381

Government employees, Poultry products inspection.

For the reasons discussed in the preamble, FSIS is proposing to amend 9 CFR Chapter III as follows:

#### PART 307—FACILITIES FOR INSPECTION

1. The authority citation for part 307 continues to read as follows:

**Authority:** 7 U.S.C. 394; 21 U.S.C. 601-695; 7 CFR 2.17, 2.55.

2. In § 307.4(c), remove the second sentence and add two sentences in its place to read as follows:

#### § 307.4 Schedule of operations.

\* \* \* \* \*

(c) \* \* \* The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period, but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear and to walk to a work station; to prepare the work station; to return from a work station and remove required gear; to sharpen knives, if necessary; and to conduct duties scheduled by FSIS, including administrative duties. \* \* \*

#### PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

3. The authority citation for part 381 continues to read as follows:

**Authority:** 7 U.S.C. 138f, 450; 21 U.S.C. 451-470; 7 CFR 2.7, 2.18, 2.53.

4. In § 381.37(c), remove the second sentence and add two sentences in its place to read as follows:

#### § 381.37 Schedule of operations.

\* \* \* \* \*

(c) \* \* \* The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period, but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear, pick up required forms and walk to a work station; and the time for FSIS inspection program personnel to return from a work station, drop off required forms, and remove required gear; and to conduct duties scheduled by FSIS, including administrative duties. \* \* \*

\* \* \* \* \*

Done at Washington, DC, on: March 9, 2012.

**Alfred Almanza,**  
*Administrator.*

[FR Doc. 2012-6372 Filed 3-16-12; 8:45 am]

**BILLING CODE 3410-DM-P**