LABELING OF CREDENCE ATTRIBUTES IN LIVESTOCK PRODUCTION: VERIFYING ATTRIBUTES WHICH ARE MORE THAN "MEET THE EYE"

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INTRODUCTION

Americans are increasingly sensitive to the conditions under which the foods they purchase and consume are raised. Further, consumers are incorporating environmental impacts,[1] animal welfare concerns,[2] and other process attributes[3] into food purchase decisions. More specifically, increased interest in production practices and technologies employed in food production has been seen in the U.S. specifically concerning irradiation, antibiotics, and hormone and pesticide use.[4] Perhaps one of the most controversial technologies employed in food production today is the use of genetic engineering of foods.[5] Not surprisingly, consumers are particularly sensitive about practices employed or technologies used in foods produced specifically for infants or young children,[6] making labeling and marketing of products for such special-interest segments of the population an area of continued controversy.

With regards to livestock, consumers are interested in the production practices employed for raising meat and milk in the U.S. and the resulting animal welfare implications.[7] Analyses of the treatment of chickens with regard to cages for laying hens,[8]

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[1] *See generally* C. Foster et al. Environmental Impacts of Food Production and Consumption: A Report to the Department of Environment, Food, and Rural Affairs, Dec. 2006, *available at* http://www.defra.gov.uk/science/Project_Data/DocumentLibrary/EV02007/EV02007_4601_FRP.pdf.
[2] *See generally* Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade,* 70 Law & Contemp. Prob. 325 (2007).
[3] Consumers are concerned with whether food is grown locally, on a family farm, produced by laborers paid a livable wage, produced in the U.S., etc.
[4] Rodolfo M. Nayga, Jr., *Sociodemographic Influences on Consumer Concern for Food Safety: The Case of Irradiation, Antibiotics, Hormones, and Pesticides,* 18 REV. OF AGRIC. ECON. 467-75 (1996).
[5] Diane Thue-Vasquez, *Genetic Engineering and Food Labeling: A Continuing Controversy,* 10 SAN JOAQUIN AGRIC. L. REV. 77, 77 (2000).
[6] *See generally* David B. Schweikhardt & William P. Browne, *Politics by Other Means: The Emergence of a New Politics of Food in the United States,* 23 REV. OF AGRIC. ECON. 302-18 (2001).
[7] *See* Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade,* 70 LAW & CONTEMP. PROB. 325, 356 (2007).
[8] *Id*.

gestation crates used in pork production,[9] systems for dairy cattle used in milk production,[10] treatment of dairy calves,[11] and production systems for rearing veal calves[12] are abundant. Today's increasingly savvy consumers are concerned about the treatment of livestock or welfare of animals used to produce meat and milk products.[13] As information regarding welfare implications of production practices employed on farms producing meat and milk for the American public becomes more abundant and easily accessible, it is conceivable that consumers will continue to include such information in their purchase decisions.

Complicating the discussion regarding animal welfare implications of production systems is the lack of ability to verify each claim by traditional methods.[14] Many of the animal rearing, handling, and housing claims made are credence attributes of the production processes employed in animal rearing.[15] The welfare of animals associated with food production is often highlighted as a credence attribute due the inability of the consumer to detect the welfare of the animal either when purchasing or when consuming an animal product, such as meat or milk.[16] Producers wishing to label their products as possessing these credence attributes must find ways to convey to the consumer that the claims they are making can be substantiated. Today producers can participate in the Process Verified

[9] *Id.*
[10] Julie Morrow, 2002, An Overview of Current Dairy Welfare Concerns from the North American Perspective *available at* http://www.nal.usda.gov/awic/pubs/dairy/overview.htm.
[11] *Id.*
[12] Gaverick Matheny & Cheryl Leahy, *supra* note 7.
[13] *See generally* L. J. Frewer et al., *Consumer Attitudes Towards the Development of Animal-Friendly Husbandry Systems* J. AGR. ENVIRON. ETHICS, 18, no 4, 345 (2005).
[14] Traditional methods used to verify statements regarding production systems refers to testing of some kind to determine if the labeling is truthful and not misleading to consumers. Furthermore, the "test" would need to be accepted by the governing agency in order to be valid in this context. As technology advances it is likely that there will be periods in time in which a "test" is available although it is not yet recognized by the governing agency.
[15] Credence attributes refer to attributes which cannot be observed by the consumer at the point of sale or after consumption.
[16] Alois Ch. et al., 2003, Consumers' Perception of Credence Attributes in Quality Labeling of Food, *available at* http://oega.boku.ac.at/fileadmin/user_upload/Tagung/2003/gimplinger.pdf.

Program and label their production processes with the USDA Process Verified term and logo.[17]

This paper provides an in-depth analysis of the Grain Inspectors, Packers and Stockyards Administration (GIPSA) PVP with specific focus on livestock production systems.[18] Key limitations of the current PVP system of verification are highlighted and market solutions as well as regulatory solutions are proposed and analyzed. With such interest by consumers in the welfare implications of various production practices, animal rearing systems, and animal handling practices or facilities employed, there is a need for in-depth analysis regarding possible mechanisms available to lawfully label production practices which cannot be verified through traditional methods. Without the ability to test meat or milk and determine the production practices employed, housing system used, or welfare implications of animal rearing practices on the animal, producers must find alternative ways to verify claims regarding production systems and production practices.

Part I outlines credence and process attributes and highlights the difficulties involved with verifying and labeling such attributes. Part II evaluates market movements towards credence goods in animal products, such as meat and milk, including the responses of the producer and retailer to changes in consumer demand. Part III provides an analysis of the existing PVP verification and labeling system and examples of current PVPs in use. Part IV investigates the incentives for verification of credence attributes in livestock production for both the retailers and the producers. Part V evaluates possible solutions, including market-

[17] United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration Federal Grain Inspection Service Directive 9180.79. APPENDIX 1 -- Process Verified Program, 1-29-07. *available at* http://archive.gipsa.usda.gov/reference-library/directives/9180-79.pdf.

[18] Arguably, production practices regarding grains, fruits, vegetables, and other food products face labeling and verification issues regarding credence attributes and production processes employed. However, due to the vast differences between production systems for livestock versus crops

based and legislatively imposed solutions, for dealing with the verification of credence attribute claims regarding livestock products.

I. CREDENCE AND PROCESS ATTRIBUTES: AN OVERVIEW

Credence attributes refer to attributes which cannot be observed by the consumer at the point of sale or after consumption.[19] In other words, credence attributes are indiscernible to the consumer before purchase, during consumption, and even after consumption. It is widely accepted that, "[c]redence attributes can describe content or process characteristics of the product".[20] Content attributes refer to the physical properties of a given product, or food.[21] An example of a content attribute is the protein content of a piece of chicken or fish; the consumer may not be easily able to discern the content attributes, but they refer to the physical properties of the food product. Process attributes describe the specific processes used to produce a given product.[22] Process attributes are often very difficult to detect,[23] as they are attributes specific to the production of a product, and not the product itself. In fact, in many cases, neither the consumer nor special testing equipment can detect process attributes.[24] An example of a process attribute is "earth-friendly" management practices; the attribute refers to the practice used to produce the food product, and not the food product itself.

[19] Alois Ch. Gimplinger, Klaus Salhofer, and Stefan Vogel, 2003, Consumers' Perception of Credence Attributes in Quality Labeling of Food, *available at http://oega.boku.ac.at/fileadmin/user_upload/Tagung/2003/gimplinger.pdf.*
[20] http://www.ers.usda.gov/AmberWaves/April04/Features/FoodTraceability.htm
[21] *Id.*
[22] http://www.atosorigin.com/NR/rdonlyres/7895D198-48CB-49BA-A2EE-D313E247AE78/0/sp_cpgTraceability.pdf
[23] *Id.*
[24] ERS, *supra* note 20.

II. MARKET MOVEMENTS TOWARDS CREDENCE ATTRIBUTES IN LIVESTOCK PRODUCTION

A market can be loosely defined as any set of arrangement where buyers and sellers are allowed to communicate and arrange the exchange of goods, services, or resources. A well-functioning market allows consumers to signal to producers what they desire and are willing to pay for. Changes in consumer demand signal through market channels to producers (or sellers) changes in consumer tastes and preferences.

Changes in policies and production practices by food producers have been increasingly consumer-demand driven rather than governed by changing regulations.[25] The growth in "politics by other means – politics practiced through the market" has allowed interest groups to pursue political objectives through the market system rather than through the more traditional legislative channels.[26] Recent changes in production systems for dairy and meat products (among other food products) can be attributed to market pressures, rather than changes in legislation. The recent movement away from rBST use in milk production in various regions of the U.S. is an example of changes in production systems initiated via the market rather than through changes in regulations.[27]

A. Consumer Demand for Processes

"Consumer sovereignty", as defined by economist William Hutt, refers to "the controlling power exercised by free individuals in choosing between ends, over the custodians of the community's resources."[28] As stated by Douglas A. Kysar, "[i]t is not

[25] *See generally* Schweikhardt & Browne *supra* note 6, at 302-18.
[26] *Id*.
[27] *See generally* Clayton Cook-Mowery, Nicole J. Olynk, and Christopher A. Wolf (et al?), *Farm-Level Contracting for Production Process Attributes: An analysis of RBST in Milk Production*, Forthcoming in JOURNAL OF FOOD LAW AND POLICY (unpublished manuscript, on file with author) (2008).
[28] William Hutt, *The Concept of Consumers' Sovereignty*, 50 ECON. J. 66, 66 (1940).

immediately obvious, therefore, why the sphere of influence entrusted to consumers should be held to stop at the physical dimensions of the product, excluding all aspects of the product's processing history that do not directly bear on its price, safety, or functionality."[29] In short, if consumers are generally accepted as agents who are free to choose according to their tastes and preferences, why should those tastes and preferences be limited to the physical (or testable) dimensions of the products which they purchase? Consumers, as evident in purchasing decisions, are certainly capable of placing value on production processes.

The distinction that exists between characteristics or attributes of the product versus the processes used to produce the product make preferences regarding processes seem illegitimate because it limits the scope of consumers' interests to claims on physical attributes that exist in an end product and affects the use of the product for the consumer.[30] Although preferences for processes are sometimes seemingly "discounted" due to an inability to test for product differences, history shows that consumers do indeed have preferences for credence attributes. Numerous studies have investigated consumers' preferences for various credence attributes, including eco-friendly, no use of growth hormones, non-genetically-modified, and shade-grown claims.[31] While results from studies investigating consumers' preferences vary, there is a general consensus that

[29] Douglas A. Kysar, "Preferences for Processes: the Process/Product Distinction and the Regulation of Consumer Choice" (October 18, 2004). *Cornell Law School. Cornell Law School Legal Studies Research Paper Series.* Paper 8. *available at* http://lsr.nellco.org/cornell/lsrp/papers/8

[30] Kurt Buechle, *The Great, Global Promise of Genetically Modified Foods: Overcoming Fear, Misconceptions, and the Cartagena Protocol on Biosafety*, 9 IND. J. GLOBAL LEGAL STUD. 283, 311 (2001) (argueing that labels must express traits that effect the use of the product in order to help consumers).

[31] Wendy J. Umberger et al., Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions, Paper Presented at the 2003 FAMPS Conference:"Emerging Roles for Food Labels: Inform, Protect, Persuade" Washington D.C. March 20-21, 2003 available at http://www.iowafarmbureau.com/programs/commodity/pdf/cool_usconsumerperceptions.pdf.

certain segments of the population are willing to pay more for foods which are labeled as having certain credence attributes.[32]

B. Retailer Response to Consumer Demand

The literature examining retailer responses to consumer demand is large and diverse, however an overriding theme throughout the literature is that retailers must respond to consumer demand and, fundamentally, must provide a product which consumers are willing to purchase. Many meat products, for example, are differentiated according to specific attributes which the product may have.[33] Consumers may have some willingness to pay for content attributes, but they also may have some willingness to pay for credence attributes. Retailers are becoming an increasingly powerful source of change in the processes used in the production of animal products; in fact, "[r]etailers are becoming the most potent force in setting animal welfare standards and will be the major engine for influencing animal welfare change. They can move faster than Governments, can cut off suppliers' livelihoods by stopping contracts, and can ignore international trade agreements."[34] Basically, retailers are able to respond to "politics practiced through the market"[35] relatively quickly (in comparison to legislative changes) and alter the production systems used for the products they sell, thereby effecting change in animal

[32] Wendy J. Umberger, Dillon M. Feuz, Chris R. Calkins and Bethany M. Sitz, *Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions*, Paper Presented at the 2003 FAMPS Conference:"*Emerging Roles for Food Labels: Inform, Protect, Persuade"* Washington D.C. March 20-21, 2003 *available at* http://www.iowafarmbureau.com/programs/commodity/pdf/cool_usconsumerperceptions.pdf.

[33] John D. Lawrence, *The Cost of Meeting Consumer Demand*, Paper provided by Iowa State University, Department of Economics in its series Staff General Research Papers with number 12289.

[34] David Bayvel, *The Use of Animals in Agriculture and Science: Historical Context, International Considerations and Future Direction*, 24 REVUE SCI. ET TECHNIQUE 791, 794 (2005), *available at* http://www.oie.int/eng/publicat/RT/2402/PDF/harris647-653.pdf (quoting COLIN SPEDDING, ANIMAL WELFARE (2000)).

[35] Schweikhardt & Browne *supra* note 6, at 302-18.

welfare standards in the industry.[36] In the U.S. specifically, the largest reforms for animal welfare standards for food production animals were initiated by restaurants.[37]

The retailer is staking its reputation on claims regarding production practices used in producing or processing the food products which it sells.[38] Further, the visibility and name recognition of retailers makes them targets for campaigns for change in production processes; such recognition in the public eye means that retailers may be driven to compete for ever-increasing standards and levels of animal welfare, for example.[39] In short, retailers are competing to offer the "best" options to consumers in the way of credence attributes. This movement is simply another example of retailers moving to serve changing tastes and preferences of consumers; the difference is that now consumers are voicing preferences for processes rather than products.

Given the high value of consumers' goodwill and trust in retailers' names, retailers must be cognizant of the potential liabilities associated with "standing behind" a false or misleading claim. With all that the retailers have at stake in their reputation and consumer goodwill and trust, retailers will likely seek ways to verify producer and processor claims regarding production practices, especially those processes to which consumers are highly sensitive, such as animal welfare.

C. Producer Responses to Retailer Demand

Individual producers must make decisions regarding changes which are initiated by the retailer in response to the consumer demands which the retailer perceives. In

[36] Note that standards here are not regulatory standards per say, but are the processes which are accepted as standard within an industry.
[37] Gaverick Matheny & Cheryl Leahy, *supra* note 7.
[38] Lawrence, *supra* note 33.
[39] Gaverick Matheny & Cheryl Leahy, *supra* note 7.

short, the individual producer has the retailer as its consumer. In order to sell products in the market, the producer must provide a product for which the retailer has demand.

A key component of the decision facing the individual producer is the assessment of the costs and benefits of changing production processes employed. Producers must be practical in making decisions regarding obtaining higher prices or bonuses for using certain production processes, handling techniques, or facilities.[40] Producers sometimes get caught up in obtaining premiums or higher prices, but costs associated with obtaining those premiums must be considered.[41]

III. LIVESTOCK AND USDA PROCESS VERIFIED PROGRAMS[42]

The GIPSA has official procedures in place for verification of products assigned to GIPSA and services associated with marketing these products.[43] Verification services through GIPSA are voluntary and provided to producers, marketers, processors, and other associated service providers of agricultural products for a fee.[44] Given the mission of the GIPSA to facilitate marketing of agricultural commodities, GIPSA recognizes that standard testing services and grading services do not adequately address emerging practices for marketing U.S. agricultural products.[45] "[I]n response to changing consumer demands, the market is adopting a variety of new marketing mechanisms, such as identity preservation, to augment traditional marketing approaches."[46] Overall,

[40] Lawrence, *supra* note 33.
[41] Lawrence, *supra* note 33.
[42] Official Listing of Approved USDA Process Verified Programs. Last revised September 3, 2008. *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRD3320450
[43] United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration Federal Grain Inspection Service Directive 9180.79, 1-29-07. *available at* http://archive.gipsa.usda.gov/reference-library/directives/9180-79.pdf.
[44] *Id.*
[45] *Id.*
[46] *Id.*

GIPSA's stated goal is to "add value in this evolving marketplace by augmenting, not supplanting, existing marketing practices."[47]

A. Process Verified Program Overview

The USDA states that, "[i]n light of the ever-changing consumer, successful livestock producers must adapt their production practices to consider consumers' lifestyles, preferences, and taste."[48] The USDA offers a service by which a third-party verifies a company's documented quality management program through audits to aid producers in verifying production processes used on-farm.[49] The PVP program uses a label with "USDA Process Verified" to boost confidence of consumers in the product which they are purchasing.[50]

The PVP is a voluntary program available at a fee to producers, marketers, processors, and associated service providers of agricultural products to provide verification of an organization's "quality management system" where the organization 1) needs to show an ability to provide a product that meets customer and applicable regulatory requirements, 2) aims to improve customer satisfaction through its management system, and 3) identifies specific claims to use with the USDA Process Verified term and logo.[51] Operations with multiple sites, which are expanding their quality management systems to include a group of locations, are able to use the USDA

[47] *Id.*
[48] http://www.ams.usda.gov/lsg/arc/Arctifold.pdf.
[49] USDA, *supra* note 48.
[50] United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration Federal Grain Inspection Service Directive 9180.79. APPENDIX 1 -- Process Verified Program, 1-29-07. *available at* http://archive.gipsa.usda.gov/reference-library/directives/9180-79.pdf.
[51] *Id.*

Multi-site Verification Program (MSVP) which provides assurance that all parties involved are following the PVP.[52]

The guidelines provided for PVP participation are purposefully generic as they are intended to apply to all organizations which provide a product or service regardless of the type of operation, size of operation, or product provided.[53] Such broad explanations in the guidelines for PVP development and submission provide the opportunity for a large number of different types of operations to benefit from the PVP program and to potentially be approved to use the UDSA Process Verified term and logo, however potential difficulties may arise, particularly within industries where specific knowledge regarding processes may be required to adequately address consumers' concerns in labeling of processes.

Extensive guidance is given by GIPSA regarding requirements and components of a PVP.[54] Of particular interest in this analysis are the "Process Verified Points" which top management must ensure are established and stated in the quality manual and included as part of the quality management system and which must add value to the product or service, be substantive, be verifiable, be repeatable and be within the scope of GIPSA's authority.[55] Further, and importantly, "Process Verified Points" may not be requirements of regulations, the USDA Process Verified Program requirements, or standards under which other organizations in the same industry generally operate.[56] In short, the USDA PVP is limited to those programs in which the process verified points

[52] United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration Federal Grain Inspection Service Directive 9180.79. APPENDIX 2 – Multi-Site Verification Program, 1-29-07. *available at* http://archive.gipsa.usda.gov/reference-library/directives/9180-79.pdf.
[53] USDA, *supra* note 50.
[54] USDA, *supra* note 50.
[55] USDA, *supra* note 50.
[56] USDA, *supra* note 50.

are identified by the supplier and are supported by a documented quality management system.[57]

B. Process Verified Program Livestock Examples in Use

Currently reported claims verified by the USDA include age, source, feeding practices, or raising and processing claims.[58] Specifically, examples of claims associated with process verified points given by the USDA and AMS are "grass (forage) fed, [n]ever-ever claims such as [n]o antibiotics, [n]o [g]rowth [p]romotants ([h]ormones), and [n]o [a]nimal [b]y-products [a]dministered, [b]reed."[59]

Even more specifically, claims listed as verified by the USDA PVP which relate to livestock include "Unit of production traceability", "Source verified cattle", "Age verified cattle", "All pigs are traceable to Farm of Origin", "Selected for meat quality", and "Genetic Validation".[60] Clearly a wide range of claims are being verified by the USDA PVP and the producers themselves must submit plans for quality management and submit materials on how such claims can be verified.[61] Due to the wide range of claims which are verified, and the complexity of some of those claims, is the PVP program becoming too diverse to adequately address all of the claims it verifies (even with the help of on-site audits)?

C. Potential Challenges of Process Verified Program Use in Livestock

Several challenges arise in the analysis of the PVP program currently in place for the verification of claims made by livestock producers. An overarching question of

[57] USDA, *supra* note 50.
[58] Official Listing of Approved USDA Process Verified Programs, *supra* note 42.
[59] http://www.ams.usda.gov/lsg/arc/Arctifold.pdf.
[60] Official Listing of Approved USDA Process Verified Programs, *supra* note 42.
[61] USDA, *supra* note 50.

whether the consumer places trust in the USDA label remains throughout the analysis. If such trust is eroded, the PVP term and logo has less credibility in the marketplace.

The USDA PVP as it currently operates is quite general. Agricultural producers of all products, if using an approved PVP, use the same term and logo on their labels. As competition among producers to provide credence process attributes continues to increase, the general verification statement by the USDA may be "too general" to distinguish the verification of processes in livestock versus other agricultural products. In other words, consumers may place higher value on verification programs which are specific to a product, such as meat or milk. A potential outcome of the general label is that in the event of a negative episode involving mislabeling of process attributes, which either can not be verified by the entity claiming to verify the claim or which are found to be wrong, there is potential for spillover due to the same label being used for all products. Further, as processes become more complex in some arenas, such as livestock production practices, the potential for a mistake increases unless specialized individuals are verifying their programs and process claims.

A problem inherent to all verification techniques, and not specific to the USDA PVP, is that retailers and consumers must trust the verifying party in order for verification to be worthwhile.[62] Admittedly, there exists potential for erosion of consumer trust if any claim, regardless of the method of verification, is found to be false (or unable to be verified). The argument made here is simply that to mitigate the risks of a false (or unverifiable) claim being labeled incorrectly, individuals with knowledge and

[62] Even in the event that consumers and retailers trust the verifying party completely, it is possible that the verification is not "worthwhile" if the costs of the verification are larger than the benefits of having the claim verified.

expertise specific to a given production system or given agricultural sector should be employed, and specialized verification systems and labels should be used.

IV. INCENTIVE TO VERIFY?

Several well-established and growing consumer advocate groups exist as proponents of animal welfare. Recent changes in production practices have been increasingly driven by consumer demand rather than by changes in regulations.[63] This trend towards changes in practices in response to consumer groups rather than solely in response to changes in regulation affected by more traditional means provides support for the expectation of continued change in practices in response to animal welfare advocate groups. Additionally, this trend means that there are interested and committed groups which are "policing" producers to make sure that claims made regarding processes in livestock for food production are verifiable and not misleading to consumers.

A. Retailers

Given the high value of consumers' goodwill and trust in retailers' names, retailers must be cognizant of the potential liabilities associated with "standing behind" a false or misleading claim. With all that the retailers have at stake in their reputation and consumer goodwill and trust, retailers will likely seek ways to verify producer and processor claims regarding production practices, especially those processes to which consumers are highly sensitive, such as animal welfare. "How long before reputation and liability costs force companies do their due diligence before they put their name on it."[64] With the consolidation and concentration of market power among retailers in the food

[63] *See generally* Schweikhardt & Browne *supra* note 6, at 302-18.
[64] Lawrence, *supra* note 33.

industry, it is conceivable that verification of claims could even become a "condition of sale".[65]

Retailers' incentives for verification of claims regarding process attributes, and the processes employed in production of, transportation of, and handling of the food they sell are fundamentally driven by a desire to not be associated with a "misbranded" or mislabeled product. Arguably, proving that a product is mislabeled in the context of a credence attribute of the production process is more difficult than proving mislabeling of physical content, however it is not impossible. A single disgruntled employee would be all that it takes to bring scrutiny on labeling of production process attributes.[66] While the perceived risks of such a situation occurring may seem low to some retailers, it is worthwhile to examine potential alternatives to the existing PVP system which may strengthen labeling claims in the eyes of the consumers.

B. Producers

Retailers have incentives for requiring verification of labeled production process claims on products which they sell. The producers of the products themselves also have incentives to labeling (and verifying) claims on production process attributes of the products which they produce. Producers want consumers to believe the claims which they make on their labels. Further, producers want to maintain credibility, and therefore do not want to make claims which they cannot verify. First and foremost, before producers can provide products to consumers, producers must convince retailers that

[65] Lawrence, *supra* note 33.
[66] *See generally* Clayton Cook-Mowery, Nicole J. Olynk, and Christopher A. Wolf (et al?), *Farm-Level Contracting for Production Process Attributes: An analysis of RBST in Milk Production*, Forthcoming in JOURNAL OF FOOD LAW AND POLICY (unpublished manuscript, on file with author) (2008).

there exists adequate demand for their products, and that the claims made with regard to their products are verifiable (in a way in which consumers trust).

V. POSSIBLE MARKET OR LEGISLATIVE SOLUTIONS[67]

As consumers demand changes in the processes used to produce their food, and retailers demand changes from producers in order to fulfill the demands of the consumers, the question of how the retailer is going to verify the claims of the producers becomes paramount. Regulations have been put into place to assure certain standards of treatment of livestock. Standards of treatment assuring humane treatment or a specified level of animal welfare are not the focus of this analysis; however, regulations put into place which limit the availability of production processes to producers (particularly, regulations which limit the availability of production processes or technologies to producers within a certain geographic region) are of interest in this context as such regulations are indeed addressing the potential challenges associated with the current system in place to verify production practices employed.[68]

A key element to keep in mind is that there appear to be efficiency and social welfare arguments which support the continued involvement of the USDA in commodity standards and grading and certification services.[69] Still in question is whether the consumer believes that the USDA grading and certification programs benefits outweigh

[67] Chad Carr, Larry Eubanks, and Ryan Dijkhuis. *Specialty Meat Marketing Claims: What's the Difference?* Document AN191 from Animal Science Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida *available at* http://edis.ifas.ufl.edu/pdffiles/AN/AN19100.pdf

[68] While regulation which would limit the available set of technologies or production systems for a producer would alleviate some consumer concerns on verifying the use of certain practices, it also limits the choice set for consumers. For example, regulations which would make the use of crates for housing pigs during gestation illegal would provide assurance to consumers purchasing pork that the pigs were raised without crates, although such regulation also eliminates the possibility for consumers to select and purchase pork raised in crates. The real focus of this analysis is on ways of verifying production practices, rather than a review of practices which are eliminated from the producers' choice set.

[69] Kenneth C. Clayton and Warren P. Preston. *The Political Economy of Differentiating Markets: Facing Reality Inside the U.S. Department of Agriculture.* AMER. J. AGR. ECON. 85(3)737, 741 (2003).

their costs.[70] Overall, given that the USDA is currently involved in verifying processes, and that there appear to be benefits associated with continued USDA involvement, a complete abandonment of USDA involvement in verifying processes used on livestock operations is unlikely to be beneficial overall. A complete abandonment of USDA involvement in verifying processes would likely necessitate involvement of another party, thereby leading to another set of questions to be dealt with.

"[T]raceability is a valuable tool in supporting the marketing and labeling of process credence attributes because such attributes are only verifiable through recordkeeping."[71] Traceability allows retailers and consumers alike to verify the processes used in the production and processing of meat and milk products. A major hurdle to effectively being able to verify processes employed is the quality of the records available or the credibility of the records in the eyes of consumers. With the goal of traceability in mind, several possible options exist for improving the current system of labeling and verifying credence process attributes.

A. Make No Changes to the Current System

The simplest option available for labeling and verifying process attributes is to maintain the system that is already in place, wherein livestock and other production systems all participate in the same PVP program and use the same USDA Process Verified term and logo. The current system provides the backing of the USDA to the processes claimed by the producer, however, as increasingly complex livestock production systems become part of the program, maintenance of high standards in evaluating programs may become increasingly difficult.

[70] *Id.*
[71] http://www.atosorigin.com/NR/rdonlyres/7895D198-48CB-49BA-A2EE-D313E247AE78/0/sp_cpgTraceability.pdf.

1. *Retailers*

Currently retailers are not uniformly requiring verification of process attribute claims prior to carrying a product. However, given continued consolidation and concentration of market power, requiring verification before a product is carried is a plausible option in the future.[72] Given that the possibility exists for retailers to require verification in order to protect their own reputations, maintenance of the current system in the long-run will depend on whether the current PVP program provides enough assurance, with "enough" being determined by the retailers.

2. *Producers*

Producers are continuously trying to distinguish themselves from their competition. Producers adopting production processes which are accepted or selected by consumer groups are distinguishing their products from their competition. Given that the current system in place for labeling credence process attributes includes the same term and logo for all agricultural producers, regardless of size or type of operation, the current USDA Process Verified term and logo does not distinguish producers by product. Depending upon how consumers view the label by the USDA versus other more specific labels intended to "verify" claims made by producers, they may desire increasingly specific labels to distinguish themselves from other agricultural producers.

A likely smaller concern, although potentially important in the event of a negative outcome, is that since all PVPs use the same term and logo, a case of mislabeling in one arena may have spillover effects on other types of agricultural producers. For example, a beef producer may be verifying completely different Process Verified Points than a grain elevator, although since they use the same USDA Process Verified term and logo, risks

[72] Lawrence, *supra* note 33.

for spillover effects to the beef producers' credibility exist in the event that the grain elevator's claims are found to be wrong.

B. Legislative Changes to USDA Process Verified Programs Approval[73]

A potential option for strengthening the labeling of credence attributes in livestock products is to differentiate the USDA Livestock Process Verified Programs, for example, from other USDA PVPs. Livestock production systems are becoming increasingly complex and the Process Verified Points highlighted by livestock producers are often very specific to livestock operations. For example, if a claim being verified is that cattle have a minimum percentage of Angus Genetics,[74] the personnel overseeing such a program will likely need a different skill set than if overseeing trait tests for inbound specialty grains to an elevator.[75] Possible options to overcome these issues of increasing complexity and necessity for different skill sets and experience by regulating agencies include the development of branches of the USDA PVP and/or the development of verification "models" for simplifying the claims which can be verified under the PVP.

1. *Development of Verification "Models"*

The guidelines provided for PVP participation are purposefully generic as they are intended to apply to all organizations which provide a product or service regardless of the type of operation, size of operation, or product provided.[76] Such broad explanations in the guidelines for PVP development and submission allow a large number of different types of operations to benefit from the PVP program, but potential difficulties may arise

[73] Kenneth C. Clayton and Warren P. Preston, *supra* note 69.
[74] Official Listing of Approved USDA Process Verified Programs, *supra* note 42.
[75] Official Listing of Approved USDA Process Verified Programs, *supra* note 42.
[76] USDA, *supra* note 50.

when specific knowledge regarding processes may be required to adequately address consumers' concerns in labeling of processes.

A possible solution to address the increasing complexity of the Process Verified Points is to develop "models" which can be used to expedite application to and approval of PVP, as well as simplify the regulation and oversight of such operations. For example, livestock operations which intend to include "age verified cattle"[77] could enroll in a program designed around age verification of cattle.[78] By enrolling in a specific program, the transaction costs of the regulatory agency could be decreased as a more "standardized" combination of Process Verified Points would be verified. Perhaps more importantly, enrolling a more specific program would allow more specific labeling, such as USDA Age Verified Cattle Assurance Program, for example.

2. *Development of Branches of USDA Process Verified Programs*

Building "models" for Process Verified Points does create a more "tailored" program for producers of a given agricultural product; however, the flexibility of the PVP is lost. A potential remedy to the single term and logo for the PVP which does not limit flexibility of the program is to develop "branches" of the USDA PVP. By developing different labels and tailoring requirements to different sectors of agricultural production the flexibility of the program to verify points which the producer himself designates is maintained, although some specificity for the product in question is added. Development of "branches", such as the USDA Livestock Process Verified Program, for example, would provide the differentiation among agricultural products, a distinctive label for different types of products, and still maintain flexibility for the producer to "build his/her

[77] Official Listing of Approved USDA Process Verified Programs, *supra* note 42.
[78] This is a very simple example, although potentially many combinations of verification points could be included.

own program". The development of "branches" of the USDA for process verification would likely gain increased consumer support versus other legislative options because it would ensure that people with more experience with a given area of agriculture are involved in the process verification.

C. Private Labeling (Market Solutions)

Market solutions to concerns regarding animal welfare for farm animals, or animals used for food production have been used extensively. "[S]elf-regulation and work to meet consumer expectations has helped develop processes that improve the welfare conditions of all animals—from the farm, through the transportation process, and to the plant."[79] Thus far, many changes in livestock production have been driven by the market.[80] Several options exist for self-regulation or self-verification through direct information provided to consumers or employing a third party for verification. Note that since USDA is currently involved in verifying processes and that there appear to be benefits associated with continued USDA involvement, a complete abandonment of USDA involvement in verifying processes used on livestock operations is unlikely to be beneficial overall. Private verification and market solutions are likely to be additional options, although not replacements for, USDA PVP labeling.

1. *Self Verification Methods*

Technologies available at relatively low cost to producers today would allow self-verification methods which are arguably more convincing to the general public. With

[79] Angela J. Gieman, Commentary: "It's the right thing to do": Why the Animal Agriculture Industry Should Not Oppose Science-Based Regulations Protecting the Welfare of Animals Raised for Food, 106 MICH. L. REV. First Impressions 128 (2008).

[80] *See generally* David B. Schweikhardt & William P. Browne, *Politics by Other Means: The Emergence of a New Politics of Food in the United States*, 23 REV. OF AGRIC. ECON. 302-18 (2001) and *See generally* Clayton Cook-Mowery, Nicole J. Olynk, and Christopher A. Wolf, *Farm-Level Contracting for Production Process Attributes: An analysis of RBST in Milk Production*, Forthcoming in JOURNAL OF FOOD LAW AND POLICY (unpublished manuscript, on file with author) (2008).

self verification by producers, labels or other advertising could communicate to consumers the entity responsible for verification (and possibly the processes employed). For example, American Humane Association fellow John J. McGlone, Ph.D. testified at a congressional hearing with regards to live video feeds from animal-processing facilities.[81] Private firms could certainly adopt strategies such as video surveillance or live-feed video to verify claims regarding housing, handling practices, and animal rearing practices in place on a given operation. Such methods may seem extreme, although if a producer is making an extremely novel claim, such methods may build consumer confidence in the producer and eliminate concerns regarding mislabeling of production process attributes.

At its most simplistic, self-verification could include in-depth record keeping in the form of a journal or manager's notes. Such methods are unlikely to convince consumers of the credibility of a producer's statements since the producer is likely asking a higher price for products with certain attributes, and thus has incentive to misrepresent the attributes of a product. Stronger methods such as video logs and pictures may provide necessary support for production process claims, although whether such methods would suffice without outside audits and verification is likely to depend heavily on the particular process being verified. For example, if it is being verified that animals are grass fed, records of cattle movements in pastures and pictures of facilities may suffice. If verification of genetics used is desired, however, simple records kept by a producer may not be convincing to consumers (or retailers).

[81] American Humane Expert Proposes Live Video Feeds for Meat Industry in Testimony to U.S. House Subcommittee, Copyright PR Newswire Association LLC Apr 17, 2008. (full testimony available at www.americanhumane.org/mcglone)

2. *Third Party Private Verification*

When American Humane Association fellow John J. McGlone, Ph.D. testified at a congressional hearing with regards to live video feeds from animal-processing facilities, he talked about the benefits of having an independent third-party organization monitor live video feeds of animal-processing facilities.[82] Third-party verification by private companies would seek to provide similar benefits as the USDA PVP; namely providing outside verification that claims regarding process attributes were credible.

Potential benefits to having an outside third-party verification system, rather than the USDA through PVP, is that transaction costs may be decreased if the time required to participate and costs of participation are less than that of a PVP. Further, if a third-party is hired, there may be more flexibility in "process-specific" labeling because likely a producer would need to label his own processes and would then include a statement regarding "verified by …".

Challenges would also exist with a third-party verification system. Unless a third-party has already established a reputation in the industry, producers cannot be sure how much credibility consumers and retailers will place on claims which are verified by a private third-party. Problems may also arise if third-party verifiers are unfamiliar with animal agriculture and the processes employed in today's production systems. Such unfamiliarity may erode consumer confidence in verification by private third-parties. Overarching all of these concerns are questions regarding whether the consumer would discount verification performed by a private third-party versus verification by the USDA and a PVP.

[82] *Id.*

CONCLUSION

An incident involving mislabeled credence process attributes would erode consumer confidence in the labeling and verification of such process attributes and in the retailers selling these mislabeled products. Currently, with the PVP system in place, an incident in one area of agriculture would have consequences on and influence consumers' confidence on claims made in other areas of agriculture. As production process claims become more complex and as increasing numbers of producers seek to verify production processes there may be increased potential for mislabeling. Retailers and livestock producers alike want to avoid the negative consumer sentiments that could result from an incident in which claims made on labels could not be verified, therefore changes to the PVP should be explored to develop options for verification which are specific to livestock production practices. Changes to the current USDA PVP program, in the way of development of branches of the program for different segments of agriculture, are likely the most efficient and effective options for the development of livestock production specific claims, verification methods, and labeling schemes. Verification schemes employing third-party verification are also likely to gain popularity, although costs associated with such programs are largely unknown. Modifications to the USDA PVP program appear most likely to provide efficient and effective verification for livestock producers.