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**REPORT BY THE ANIMAL LAW COMMITTEE**

**MEMORANDUM IN SUPPORT OF AN AMENDMENT TO THE FEDERAL MEAT INSPECTION ACT TO ALLOW STATE REGULATION OF THE TREATMENT OF LIVESTOCK AT SLAUGHTERHOUSES**

The Committee on Animal Law of the New York City Bar Association (the “Committee”) respectfully submits this comment recommending an amendment to the Federal Meat Inspection Act (“FMIA”), 21 U.S.C., Title 12 Subsection IV § 678, to allow state regulation of the treatment of livestock at slaughterhouses, where such state regulation is consistent with and in addition to federal laws and regulations concerning the handling of such animals. Such an amendment is necessary in order to adequately protect animal welfare and public safety because (1) existing federal law inadequately protects farmed animals from inhumane handling and slaughter and prohibits state law regulation of the same; (2) audit reports by the U.S. Inspector General identify chronic under enforcement of these minimal federal law standards that has repeatedly resulted in widespread egregious animal cruelty; and (3) state regulation of the treatment and slaughter of farm animals is a valid exercise of police power to protect public health and animal welfare.

**OVERVIEW OF THE LAWS**

**Federal Meat Inspection Act**

The FMIA, originally enacted in 1906 in response to widespread public concern over slaughterhouses conditions exposed in Upton Sinclair’s *The Jungle*, regulates the inspection of meat and meat food products that enter the nation’s food supply.<sup>1</sup> Specifically, the Act was created with the intent to protect the public “by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.” Congressional findings supporting the Act further specified that “[u]nwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.”<sup>2</sup>

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<sup>1</sup> See 21 U.S.C. § 602.

<sup>2</sup> *Id.* “Meat” and “meat food products” as defined by the statute refer to carcasses from cattle, sheep, pigs, and goats. 21 U.S.C. § 601(j).

The FMIA directs inspectors<sup>3</sup> to regulate the way livestock are handled immediately prior to and during slaughter,<sup>4</sup> and further gives the Secretary of Agriculture (“Secretary”) the right to refuse to inspect or temporarily suspend inspection if the animals are not slaughtered in accordance with the HMSA, as discussed in more detail below.<sup>5</sup>

The USDA’s Food Safety and Inspection Service (“FSIS”) has responsibility for administering the FMIA.<sup>6</sup> The FMIA does not authorize states to administer its provisions.<sup>7</sup>

## **Humane Methods of Slaughter Act**

The HMSA, enacted in 1958 as part of the FMIA, was created to establish basic humane handling requirements for livestock prior to<sup>8</sup> and during slaughter.<sup>9</sup> The HMSA applies at “all stages of the slaughtering process,” including “from the moment a truck carrying livestock ‘enters, or is in line to enter,’ a slaughterhouse’s premises.” *Nat’l Meat Assn. v. Harris*, 132 S.

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<sup>3</sup> The Food Safety Inspection Service (“FSIS”), an agency of the United States Department of Agriculture (“USDA”), administers the inspection of animals covered under FMIA. Specifically, inspections are required at all establishments where “livestock are slaughtered for transportation or sale as articles of commerce, or in which any products of, or derived from, carcasses of livestock are, wholly or in part, prepared for transportation or sale as articles of commerce, which are intended for use as human food.” 9 C.F.R. § 302.1. The regulation is inapplicable when the animals are slaughtered by an individual and used exclusively by that individual, his or her household or guests, or are custom slaughtered by a third party on behalf of the individual and thereafter used exclusively by the individual, his or her household or guests. 9 C.F.R. § 303.1.

<sup>4</sup> Specifically, the regulations require that livestock pens, driveways and ramps are kept in good repair, that the floors provide “good footing” for livestock, that pens and driveways are arranged to minimize sharp corners and reversing the direction of animals, and that livestock deemed “U.S. Suspect” or dying, diseased, or disabled are provided with a covered pen sufficient to protect them from adverse climate conditions. 9 C.F.R. § 313.1; *see also* 9 C.F.R. § 309.2. Livestock must be provided “access to water in all holding pens and, if held longer than 24 hours, access to feed” and must be provided sufficient room to lie down if held overnight. 9 C.F.R. § 313.2(e).

<sup>5</sup> 21 U.S.C. § 603 (b).

<sup>6</sup> *See* 21 USC 679c; 21 USC 683(f).

<sup>7</sup> However, FMIA provides that the Secretary of Agriculture may “cooperate” with state agencies in developing and administering state programs under state laws if doing so “would effectuate the purposes” of the FMIA. 21 USC 661.

<sup>8</sup> We note that no federal law addresses the treatment of animals raised for food prior to transport and slaughter. The FMIA regulates only the handling of animals at the time of slaughter. *Harris*, 132 S. Ct. at 969; The Animal Welfare Act expressly excludes farm animals from its protections (7 U.S.C. § 2132(g) (2006) (definition of “animal”)); The Twenty-Eight Hour Law (49 U.S.C §80502) addresses solely the treatment of animals being transported across state lines. *See also* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (“In the case of farmed animals, federal law is essentially irrelevant. The Animal Welfare Act, which is the primary piece of federal legislation relating to animal protection and which sets certain basic standards for their care, simply exempts farmed animals, thereby making something of a mockery of its title. No other federal law applies to the *raising* of farmed animals”).

<sup>9</sup> 7 U.S.C. § 1901. The HMSA states that “Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce.” *Id.*

Ct. 965, 969 (2012). The HMSA requires an inspector to conduct an ante-mortem inspection of the animal before slaughter.<sup>10</sup> If the inspector finds that the animal is healthy, the animal is approved for slaughter. If the animal is dead, dying, or diseased, the animal is deemed “U.S. Condemned” and is disposed of separately.<sup>11</sup> Alternatively, the inspector may classify the animal as “U.S. Suspect,” such as when the animal is non-ambulatory or unable to walk or “rise from a recumbent position” due to illness or injury (“downed”).<sup>12</sup> Regulations require U.S. Condemned and U.S. Suspect animals to be separated from normal ambulatory animals and placed in a covered pen sufficient to protect them from adverse climate conditions.<sup>13</sup> If U.S. Suspect animals are not reclassified because of a change in condition, they are ultimately disposed of separately.<sup>14</sup> FMIA regulations prohibit the slaughter of downed cows for human consumption.<sup>15</sup> The regulations do not provide any guidance regarding the humane slaughter of U.S. Condemned or U.S. Suspect animals (including when the animals should be euthanized or by what means) or handling of these animals, other than restrictions on dragging conscious animals.<sup>16</sup>

Regulations further require that while unloading to holding pens or herding to the stunning area, all livestock must be handled in a manner that creates “a minimum of excitement and discomfort to the animals.”<sup>17</sup> Specifically, the regulations prohibit the “excessive” use of electric prods, canvas slappers or other implements used to drive animals, and outright prohibit the use of pipes, sharp or pointed objects to drive animals.<sup>18</sup>

The FMIA does not provide any fines or penalties for violations of its requirements. Rather, the only recourse for a violation of the humane handling requirements of the Act, regardless of how egregious, is the option of the USDA to temporarily suspend a slaughtering establishment. 21 U. S. C. §603(b).

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<sup>10</sup> 9 CFR § 309.1.

<sup>11</sup> 9 CFR § 309.3. Specifically, the regulations prohibit such animals from being “taken into the official establishment to be slaughtered or dressed...[or] conveyed into any department of the establishment used for edible products.” 9 CFR § 309.13.

<sup>12</sup> 9 CFR § 309.2(b). “Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.” *Id.*

<sup>13</sup> 9 CFR §§ 313.1(c); 313.2(d)(1).

<sup>14</sup> 9 CFR § 309.2(n).

<sup>15</sup> However, the regulations provide that downed veal calves, determined to be too tired or cold to stand, may be set aside and held for treatment under FSIS supervision. § 9 CFR 309.13(b); *see also Case Finally Closed on “Downers” Loophole*, HSUS, March 14, 2009, <http://hsus.typepad.com/wayne/2009/03/obama-downers.html> (all citations listed herein last visited Feb. 2, 2015).

<sup>16</sup> *See* 9 CFR § 313(d) (prohibiting the dragging of conscious downed animals, and requiring that such animals may only be moved on “equipment suitable for such purposes; e.g., stone boats”).

<sup>17</sup> 9 CFR § 313.2(a).

<sup>18</sup> 9 CFR §§ 313.2(b); 313.2(c).

## **State Law Regulation of Downed Animal Handling Prohibited as Preempted by Federal Law—*National Meat Association v. Harris*.**

With regard to state regulation, the FMIA directs that any state law regarding the “premises, facilities and operations of any establishment at which inspection [under the FMIA] is provided...which are in addition to, or different than those [requirements] made under this [Act]...may not be imposed by any State.”<sup>19</sup>

This provision has been interpreted by the United States Supreme Court to preclude states from imposing *any* laws or regulations concerning the handling or treatment of livestock at slaughterhouses, including downed animals,<sup>20</sup> even where such state laws are consistent with and in addition to federal regulations.<sup>21</sup> Consequently, states are effectively barred from enacting any laws concerning the handling of farmed animals at slaughterhouses that would increase anti-cruelty protections for animals, or set higher public safety and health standards for consumers.

In the *Harris* case, for example, the state legislation under review was a California law requiring, inter alia, a slaughterhouse to “tak[e] immediate action to humanely euthanize [a non-ambulatory] animal” and provided for a maximum penalty of up to one year in jail and a \$20,000 fine. *Harris* at 970. The law was enacted following the release of an undercover investigation of a California slaughterhouse in which workers were dragging, kicking and electro-shocking sick and disabled cows. The Court struck down the California law on the basis of the FMIA preemption provision, and explained that “FMIA’s preemption clause sweeps widely—and in so doing, blocks the applications of [the California law] challenged here. The clause prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse’s facilities or operations.” *Id.*

As explained below, this pre-emption is of great concern given the widespread and egregious under-enforcement of the minimum standards of the FMIA. The *Harris* decision and the FMIA thus exemplify a situation where preemption has created an inadequate ceiling for consumer protection and animal welfare.

### **THE NEED TO ALLOW STATE REGULATION: PROTECTION OF PUBLIC HEALTH AND ANIMAL WELFARE**

The repeated instances of egregious non-compliance with FMIA humane handling and slaughter regulations demonstrate that existing federal law, and enforcement thereof, is inadequate to address the animal welfare and public safety issues associated with the handling and slaughter of downed animals. Accordingly, states should be permitted to enact more stringent laws and regulations concerning the treatment of livestock at slaughterhouses –

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<sup>19</sup> 21 U.S.C. § 678.

<sup>20</sup> See *Nat’l Meat Assoc. v. Harris*, 132 S. Ct. 965, 974 (2012) (holding that FMIA regulations “apply throughout the time an animal is on a slaughterhouse’s premises, from the moment a delivery truck pulls up to the gate”).

<sup>21</sup> *Id.* (striking down a California law prohibiting slaughterhouses in the state from “buy[ing], sell[ing], or receiv[ing]...process[ing], [or] butcher[ing]” of downed animals, and mandating “immediate action to humanely euthanize the animal” in instances where a downed animal was identified at the facility).

consistent with and in addition to existing federal law – in order to adequately protect animal welfare and public safety.

### **Abuses of Downed Animals in Violation of Federal Law.**

In recent years, public attention to the inhumane treatment of farmed animals has grown as documented inhumane conditions in farms, stockyards and slaughterhouses have revealed egregious cases of the inhumane treatment of farmed animals,<sup>22</sup> particularly downed farmed animals.<sup>23</sup> Downed animals are frequently subjected to violent physical abuses in an attempt to make them stand or walk and are commonly left unattended for days without food, water, protection from the elements, or veterinary care.<sup>24</sup>

Notably, in 2008 an undercover investigation by the Humane Society of the United States (“HSUS”) of a California slaughterhouse documented diseased and crippled cows being forced to slaughter, including downed animals being pushed with forklifts and sprayed with high-power water hoses.<sup>25</sup> The investigation resulted in a recall of 143 million pounds of beef produced by the company—the largest in U.S. history.<sup>26</sup> Of the recalled beef, 37 million pounds had been provided to federal food nutrition programs.<sup>27</sup> Since this incident, undercover investigations by

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<sup>22</sup> See e.g., Joby Warrick, *The Washington Post*, *They Die Piece by Piece*, April 10, 2001 alleging widespread repeated violations of the Humane Slaughter Act, including that “the government took no action against a Texas beef company that was cited 22 times in 1998 for violations that include chopping hooves off live cattle.” See also Statement of Senator Robert Byrd, 147 Cong. Rec. S7310 (daily ed. July 9, 2001) (“The law clearly requires that these poor creatures be stunned and rendered insensitive to pain before this process [i.e., by which they are cut, skinned and scalded] begins. Federal law is being ignored. Animal cruelty abounds. It is sickening. It is infuriating. Barbaric treatment of helpless, defenseless creatures must not be tolerated even if these animals are being raised for food – and even more so, more so.”).

<sup>23</sup> In its 2009 rulemaking regarding non-ambulatory cattle, the USDA recognized the significant potential for abuse and inhumane treatment of downed animals. *Requirements for Disposition of Cattle*, 74 Fed. Reg. at 11,463, <http://www.gpo.gov/fdsys/pkg/FR-2009-03-18/pdf/E9-5987.pdf>. “The Agency issued a proposed rule in response to a January 2008 investigation into events at the Hallmark/Westland Meat Packing Company that highlighted a vulnerability in our inspection system and that disclosed instances where cattle had been inhumanely handled.” *Id.*

<sup>24</sup> See Patrick Battuello, *Abuse at Willet Dairy Farm*, Examiner.com, Feb. 3, 2010, <http://www.examiner.com/article/abuse-at-willet-dairy-farm> (noting that “downers [were] left unattended for days”); *Dairy’s Dark Side*, Compassionate Living Magazine, Spring/Summer 2010, <http://www.mercyforanimals.org/CL6web.pdf> (noting that a 2010 investigation of a New York dairy farm revealed “numerous cases of downed cows left to suffer for up to 12 days with no apparent provision of food, water or veterinary care”); *Downed Animal Fact Sheet*, HSUS, [http://www.humanesociety.org/assets/pdfs/109\\_downers\\_100605.pdf](http://www.humanesociety.org/assets/pdfs/109_downers_100605.pdf) (noting that “[d]owned animals may be left for days without food, water, or veterinary care as they await slaughter”).

<sup>25</sup> Nichole Gaouette, *Panel grills meatpacking chief on beef recall at Chino plant*, LOS ANGELES TIMES, March 13, 2008, <http://articles.latimes.com/2008/mar/13/nation/na-hallmark13>; *Case Finally Closed on “Downers” Loophole*, HSUS, March 14, 2009, <http://hsus.typepad.com/wayne/2009/03/obama-downers.html>.

<sup>26</sup> Miriam Falco, *USDA: Reinspection of downed cattle was key issue in beef recall*, CNN, Feb. 20, 2008, <http://www.cnn.com/2008/HEALTH/02/20/downer.cattle/index.html>; see also *The HSUS Applauds President Obama for New Cattle Protections*, HSUS, March 14, 2009, [http://www.humanesociety.org/news/press\\_releases/2009/03/hsus\\_applauds\\_obama\\_for\\_downed\\_cattle\\_ban\\_031409.html](http://www.humanesociety.org/news/press_releases/2009/03/hsus_applauds_obama_for_downed_cattle_ban_031409.html).

<sup>27</sup> See Falco, *supra*.

animal protection organizations have documented continuing egregious abuses of downed animals. For example, in 2009, an undercover investigation of a Vermont slaughter plant documented downed calves being dragged, kicked and repeatedly shocked in an effort to make the calves rise for slaughter.<sup>28</sup> In 2010, a New York dairy farm investigation documented downed cows being hit, kicked and shocked by workers.<sup>29</sup> In 2011, an investigation documented workers in a Texas calf-raising facility beating downed calves with hammers and pickaxes, standing on their ribs and necks, and leaving conscious but severely injured calves without medical care.<sup>30</sup> In 2012, an investigation of an Idaho dairy farm documented workers beating and kicking downed cows and dragging conscious downed cows by the neck with a chain,<sup>31</sup> while another 2012 investigation of a California livestock auction documented downed animals being dragged by their appendages while conscious and left unattended overnight without shelter or medical care.<sup>32</sup> In 2013, a Wisconsin dairy farm investigation documented workers beating and stabbing downed cows in an attempt to make them walk or stand and using a tractor to drag conscious downed cows.<sup>33</sup> Further, in January 2014, a New Jersey calf slaughter plant investigation documented downed calves being dragged by a truck, workers hitting and shocking downed calves repeatedly, and lifting their entire weight by their tails in an effort to make them walk or stand.<sup>34</sup>

Such incidents highlighting animal abuse and endangerment of the food supply persist, despite numerous attempts in recent years to tighten or clarify federal regulations. For example, in 2011, the FSIS published a response to petitions submitted by the HSUS and Farm Sanctuary.<sup>35</sup> While reviewing the petitions, the FSIS “found that certain statements in [its]

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<sup>28</sup> John Curran, *2 Vt. slaughterhouse workers charged with cruelty*, ASSOCIATED PRESS, June 4, 2010, [http://www.boston.com/business/articles/2010/06/04/2\\_vt\\_slaughterhouse\\_workers\\_charged\\_with\\_cruelty/](http://www.boston.com/business/articles/2010/06/04/2_vt_slaughterhouse_workers_charged_with_cruelty/).

<sup>29</sup> See Battuello, *supra*.

<sup>30</sup> *American Veterinary Medical Assoc. condemns cruelty to calves at Texas Facility*, Examiner.com, April 20, 2011, <http://www.examiner.com/article/american-veterinary-medical-assoc-condemns-cruelty-to-calves-at-texas-facility>.

<sup>31</sup> *Idaho workers charged with animal cruelty at Bettencourt Dairies’ Dry Creek Dairy*, ASSOCIATED PRESS, Oct. 11, 2012, <http://www.nydailynews.com/news/national/watch-animal-cruelty-filmed-idaho-dairy-article-1.1180094>.

<sup>32</sup> *Undercover video leads to animal cruelty charges for livestock yard owner*, Examiner.com, May 30, 2012, <http://www.examiner.com/article/undercover-video-leads-to-animal-cruelty-charges-for-livestock-yard-owner>.

<sup>33</sup> *DiGiorno dumps dairy farm after NBC shows company video of alleged abuse*, NBC NEWS, Dec. 10, 2013, <http://investigations.nbcnews.com/news/2013/12/10/21819763-digiorno-dumps-dairy-farm-after-nbc-shows-company-video-of-alleged-abuse>.

<sup>34</sup> *USDA Shuttles Calf Slaughter Plant in New Jersey in Wake of HSUS Investigation*, HSUS, Jan. 27, 2014, [http://www.humanesociety.org/news/press\\_releases/2014/01/Catelli\\_investigation\\_012714.html](http://www.humanesociety.org/news/press_releases/2014/01/Catelli_investigation_012714.html). Pursuant to the investigation, FSIS suspended the plant’s operation until “such time as [the plant provides] the FSIS Raleigh District Office with adequate written assurances including corrective actions and further planned preventive measures to assure that livestock at [the plant’s] establishment are slaughtered humanely.” *Notice of Suspension Revised*, United States Department of Agriculture, Jan. 27, 2014, <http://www.fsis.usda.gov/wps/wcm/connect/e5b67320-9fc5-4303-b323-3327d852ea4d/01809AM-Suspension-012414.pdf?MOD=AJPERES>.

<sup>35</sup> See 74 FR 11464, *Federal Register* Vol. 76 No. 25 February 7, 2011. The Farm Sanctuary petition requested that ante-mortem inspection regulations require immediate humane euthanasia of all non-ambulatory disabled livestock, including pigs, sheep, goats, and other amenable livestock species and the HSUS petition requested that the veal calf set-aside provision be removed from existing regulations.

directive on ante-mortem inspection...and in other Agency guidance may be inconsistent with the 2009 final rule (which required that all non-ambulatory disabled cattle at an official establishment (including those that become non-ambulatory disabled after passing ante-mortem inspection) be condemned and disposed of properly.)”. Accordingly, the Agency issued a FSIS notice clarifying humane slaughter requirements upon or after inspection of cattle.<sup>36</sup>

However, as recognized by the USDA, significant potential for abuse and inhumane treatment of downed animals remains due to the insufficiency of existing regulations.<sup>37</sup> As an initial matter, slaughterhouses are not prohibited from purchasing disabled or diseased animals.<sup>38</sup> The FMIA permits a slaughterhouse to hold downed livestock that have not been condemned without euthanizing those animals<sup>39</sup> and also permits an animal initially designated as “U.S. Suspect” to be separated and later re-inspected, so as to determine if its condition has changed.<sup>40</sup> Such allowances in FMIA regulations may incentivize slaughterhouses to purchase downed animals and then force such animals to walk or stand—often through abusive practices—in order to qualify as fit for slaughter for human consumption. Such regulatory gaps underscore the benefit of allowing states to implement additional regulations which are consistent with federal law.

### **Public Health Issues Associated with the Slaughter of Downed Animals.**

In addition to the extreme animal cruelty often associated with the handling and slaughter of downed animals, the slaughter of such animals poses a significant human health risk. As recognized by the USDA, downed animals are more likely to carry disease, including Bovine Spongiform Encephalopathy (“BSE”, commonly known as “mad cow disease”), salmonella and E. coli, since they typically wallow in feces and their immune systems are often weak.<sup>41</sup>

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<sup>36</sup> Specifically, the notice stated that all ante-mortem condemned, non-ambulatory disabled cattle and all cattle that become non-ambulatory disabled after passing ante-mortem inspection, must be promptly and humanely euthanized. *Id.* See also: USDA FSIS Notice 11-14, February 2014, available at <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/regulations>. It should be noted that, although the FSIS stated in the Federal Register publication that it was inclined to grant the HSUS petition, no regulation removing the veal calf set-aside has been issued to date. The Federal Register statement also indicates that the FSIS received numerous comments during 2007 and 2009 rulemaking sessions requesting that the FSIS prohibit slaughter of all non-ambulatory disabled livestock, including livestock other than cattle; however the Agency is only now beginning to fully evaluate the issues raised in those comments because, according to the Agency, “issues related to the humane handling of livestock other than cattle were outside the scope of the 2007 and 2009 proceedings.”

<sup>37</sup> *Requirements for Disposition of Cattle*, 74 Fed. Reg. at 11,463, <http://www.gpo.gov/fdsys/pkg/FR-2009-03-18/pdf/E9-5987.pdf>.

<sup>38</sup> *Harris* at 971, citing 9 CFR § 325.20(c). The regulations acknowledge the business of “buying, selling, or transporting” dead, dying, disabled or diseased livestock that do not die from slaughter, and separate same from the business of animals intended for use as human food, but do not state the contemplated end-use of these animals. 9 CFR § 320.1(a)(3).

<sup>39</sup> *Harris* at 971.

<sup>40</sup> *Id.* at 969.

<sup>41</sup> See USDA Audit Report No. 24601-10-Hy, September 2009, <http://www.usda.gov/oig/webdocs/24601-10-HY.pdf> (noting that such downed animals “carry a higher risk of disease than healthy [animals]”); *Beef Over Cattle Abuse Video Escalates*, CBS NEWS, Feb. 19, 2008, [http://www.cbsnews.com/8301-201\\_162-3846461.html](http://www.cbsnews.com/8301-201_162-3846461.html).

As recognized by FSIS, typical clinical signs of BSE frequently go undetected in non-ambulatory cattle because “the signs of BSE often cannot be differentiated from the typical clinical signs of the many other diseases and conditions affecting non-ambulatory cattle.”<sup>42</sup>

### **Chronic Under-Enforcement of Federal Laws.**

Furthermore, audit reports by the U.S. Inspector General identify significant under-enforcement issues<sup>43</sup> and acknowledge FSIS inspectors’ lack of experience and/or understanding of FMIA and HSMA violations.<sup>44</sup> These issues have reportedly continued despite efforts to “boost [FSIS’] humane handling verification inspection activities” in recent years.<sup>45</sup> For example, a May 2013 audit report of pig slaughterhouses highlighted “egregious [humane handling] violations where inspectors did not issue suspensions. As a result, the plants did not improve their slaughter practices, and FSIS could not ensure humane handling of swine.”<sup>46</sup> In this same report, the Inspector General recommended that FSIS standardize when a slaughterhouse should receive a suspension, as well as minimize reliance on an inspector’s subjective judgment to ensure consistent enforcement of HMSA.<sup>47</sup>

Similar concerns have been raised by FSIS inspectors themselves. In March 2010, Dr. Dean Wyatt, a supervisory veterinarian at FSIS, delivered testimony to the U.S. House Oversight and Government Reform Committee in which he described incidents of senior USDA officials attempting to cover up reports of cruel and illegal slaughterhouse practices and retaliating against inspectors who cited slaughterhouses for unsafe and illegal practices. He testified that “upper-level FSIS management [have] look[ed] the other way as food safety or humane slaughter laws are broken...retaliate[d] against people who are enforcing those laws” and that as a result, “animal welfare and food safety have suffered.”<sup>48</sup> Concerns about the USDA’s humane handling

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<sup>42</sup> See, e.g., *USDA Meat Inspection and the Humane Methods of Slaughter Act*, Congressional Research, Feb. 26, 2008, <http://research.policyarchive.org/19529.pdf> (quoting 69 *Federal Register* p. 1870).

<sup>43</sup> See, e.g., *Food Safety and Inspection Service – Inspection and Enforcement Activities At Swine Slaughter Plants*, USDA Audit Report 24601-0001-41, May 2013, <http://www.usda.gov/oig/webdocs/24601-0001-41.pdf> (see page 2 of the PDF).

<sup>44</sup> See generally *Humane Methods of Slaughter Act: USDA Has Addressed Some Problems but Still Faces Enforcement Challenges*, United States General Accounting Office, Jan. 2004, <http://www.gao.gov/new.items/d04247.pdf>.

<sup>45</sup> See Kenneth E. Peterson, D.V.M., M.P.H., Assistant Administrator, Office of Field Operations, March 8, 2010, <http://www2.nycbar.org/pdf/report/uploads/20072295-CommentonDownedAnimals.pdf> (letter in response to a citizen’s inquiry).

<sup>46</sup> *Food Safety and Inspection Service – Inspection and Enforcement Activities At Swine Slaughter Plants*, USDA Audit Report 24601-0001-41, May 2013, <http://www.usda.gov/oig/webdocs/24601-0001-41.pdf>. See, in particular, Section 2, Finding 4 at p. 22-27.

<sup>47</sup> Alfred V. Almanza, *Responses to Recommendations re: Official Draft Report—Inspections and Enforcement Activities at Swing Slaughterhouses*, April 17, 2013, <http://www.usda.gov/oig/webdocs/24601-0001-41.pdf> (see page 44-49 of the PDF).

<sup>48</sup> *Statement of Dr. Dean Wyatt FSIS Supervisory Public Health Veterinarian, Domestic Policy Subcommittee, Oversight and Government Reform Committee*, March 4, 2010, [http://www.humanesociety.org/assets/pdfs/farm/dr\\_dean\\_wyatt.pdf](http://www.humanesociety.org/assets/pdfs/farm/dr_dean_wyatt.pdf).



enforcement deficiencies have also been raised by animal protection organizations such as the Animal Welfare Institute, which “uncovered several serious problems in the USDA’s oversight of the federal humane slaughter law: incomplete and inconsistent record keeping, inadequate reporting of noncompliances, failure to take appropriate action to stop inhumane practices, and inconsistent actions by USDA District Offices.”<sup>49</sup>

Additionally, even assuming proper training of FSIS inspectors, these internal audits have pointed to an overall lack of inspectors. Indeed, data provided by the USDA between 2011 and 2013 show that the number of FSIS inspectors employed to address humane handling requirements constitutes only a small fraction of the overall number of FSIS inspectors.<sup>50</sup> Further, a July 2013 audit reports that more than 400 of the inspectors averaged more than 120 hours each pay period for all of 2012.<sup>51</sup> “OIG maintains that overworked FSIS inspectors may be risking their own and the public’s health, especially if they are tired or fatigued while performing crucial food safety-related tasks.”<sup>52</sup>

## **STATE REGULATION TO COMPLEMENT FEDERAL LAW MINIMUM STANDARDS IS A VALID EXERCISE OF POLICE POWER TO PROTECT PUBLIC HEALTH AND ANIMAL WELFARE**

Allowing states to develop and regulate humane handling standards is both appropriate and necessary, as it would be a valid use of police power that is beneficial to the states in their efforts to protect public health and animal welfare.

### **State regulation of the handling and treatment of livestock at slaughter is a valid use of police power to protect public health and animal welfare.**

States have traditionally been deemed to have power to legislate in areas such as public health, including food safety, in order to protect against harm to their citizens.<sup>53</sup> Animal welfare legislation is also recognized as a valid exercise of state police power to protect citizen

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<sup>49</sup> *Legal Protections for Farms Animals at Slaughter*, ANIMAL WELFARE INSTITUTE, <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-LegalProtectionsAtSlaughter-082310-1282586825-document-23638.pdf> (see page 4 of the PDF).

<sup>50</sup> As of September 30, 2011, FSIS employed 9,295 full-time employees. However, in that same year, “the agency devoted 152.88 FTEs [full-time equivalent, or the workload of an employed person]...to the verification and enforcement of humane handling requirements in federally inspected establishments.” USDA, 2013 Explanatory Notes: Food Safety and Inspection Service, <http://www.obpa.usda.gov/21fsis2013notes.pdf> (see pages 21-1, 21-21 of the PDF).

<sup>51</sup> *FSIS and AMS’ Field-Level Workforce Challenges*, USDA Audit Report No. 50601-0002-31, July 2013, <http://www.usda.gov/oig/webdocs/50601-0002-31.pdf> (see page 6 of PDF).

<sup>52</sup> *Id.*

<sup>53</sup> *U.S. v. Butler*, 297 U.S. 1 (1936) (holding that a federal law aimed at increasing the price of certain farm products for farmers by decreasing the quantities produced, was beyond the delegated powers of the federal government because it regulated and controlled agricultural production); *New York v. U.S.*, 505 U.S. 144 (1992) (stating that, although the federal government could regulate the interstate market of radioactive waste disposal, it could not commandeer the states’ legislative processes by directly compelling them to enact and enforce a federal regulatory program).

morality.<sup>54</sup> State laws previously have been upheld where they do not treat out-of-state businesses any differently than in-state businesses and where such laws are not less restrictive than, or otherwise preempted by, federal law.<sup>55</sup> Of course, any state laws must comply with federal constitutional mandates.

Prior to the *Harris* decision, a number of states enacted or sought to enact laws with stricter animal welfare and food safety regulations than those provided by federal law with respect to the handling and slaughter of downed animals. For example, in 2011 California enacted Penal Code § 599f to prohibit slaughterhouses in the state from “buy[ing], sell[ing], or receiv[ing]...process[ing], [or] butcher[ing]” of downed animals, and mandating “immediate action to humanely euthanize the animal” in instances where a downed animal was identified at the facility. In 2010 Ohio enacted a ban on the transport of downed cattle to slaughter.<sup>56</sup> Similar legislation has been introduced in New York.<sup>57</sup> Following the *Harris* decision, these state laws have been invalidated and in the absence of legislation to remove the existing preemption clause from FMIA, states will continue to be precluded from enacting such legislation.

## CONCLUSION

For the aforementioned reasons, we recommend that the FMIA be amended to allow state regulation of the treatment of livestock at slaughterhouses where such state regulation is consistent with and in addition to federal laws and regulations concerning the handling of such animals.

February 2015

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<sup>54</sup> Since state animal cruelty laws were enacted throughout the country starting in the 19<sup>th</sup> century, they have been uniformly upheld as a valid exercise of police power. See *People v. Bunt*, 118 Misc. 2d 904, 910 (N.Y. J. Ct. 1983) (New York anti-cruelty law constitutional as “reasonable extension of the state’s police powers”); *Goodwin v. Touhey*, 71 Conn. 262, 268 (Conn. 1898) (“public sentiment sustains [animal cruelty laws] as being no more than a proper exercise of the police power”); *C.E. Am., Inc. v. Antinori*, 210 So.2d 443, 444 (Fla. 1968) (“it is now generally well recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power”); *Commonwealth v. Hart*, 42 Pa. D. & C. 3d 180, 183 (1986) (upholding a state animal fighting prohibition law as “justified for the purpose of regulating morals and promoting the good order and general welfare of society”); *City of St. Louis v. Schoenbusch*, 8 S.W. 791, 792-93 (Mo. 1888) (“[l]aws for the prevention of cruelty to animals may well be regarded as an exercise of such police powers”).

<sup>55</sup> *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476 (1991) (upholding state law regulating pesticide usage where not in conflict with federal law concerning pesticide usage, noting that “the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress”).

<sup>56</sup> See *Nat’l Meat Assoc.; Ohio*, Farm Forward, <http://www.farmforward.com/features/ohio>.

<sup>57</sup> *Bill S427-2011*, Open, <http://open.nysenate.gov/legislation/bill/S427-2011>.