

FDA Issues Fact Sheet on Safely Distributing Unused Human Food for Animal Food Use During COVID-19

March 30, 2020

Human and Animal Food

On Friday, March 27, 2020, FDA's Center for Veterinary Medicine (CVM) issued a Fact Sheet on "Safely Distributing Unused Human Food for Animal Food Use During COVID-19."¹ The advisory accompanying the Fact Sheet explains that because of COVID-19-associated restrictions on in-store dining, certain businesses may have surplus food that, if not usable for human food, could be repurposed for animal use during the COVID-19 pandemic.

Although the Fact Sheet seems well-intentioned, as FDA has been aiming to provide flexibility for food companies to find outlets for food originally intended for restaurants and foodservice, as drafted, it raises significant safety and legal concerns. Industry stakeholders may wish to provide comments to CVM regarding these issues, to help ensure that transfer of human food to animal use is done lawfully and the food transferred is safe for that use.

CVM's Fact Sheet

The Fact Sheet explains FDA's position on how to re-distribute for animal use food that is safe but will not be distributed for human food use. It lists a number of "Do's" and "Don'ts" for entities seeking to re-distribute unused human food for animal use. For example, the Fact Sheet includes the following recommendations:

- "If distributing packaged food, make sure it is **Labeled** with a statement of identity and a list of all ingredients."
- "**Consider Submitting** a diversion or reconditioning request if food is adulterated and needs to be re-processed to be safe for animals to consume."
- "**Remove** packaging that makes the food unsafe for animals to consume."
- "**Hold** the food in a way that keeps it safe before it is distributed for use as animal food."
- "**Follow** all state and local government regulations for animal food."

(Emphases in original.)

¹ https://www.fda.gov/media/136521/download?utm_campaign=3-27-2020-FactSheet&utm_medium=email&utm_source=Eloqua.

Concerns CVM's Fact Sheet Raises

We have identified several potential safety and legal issues with the recommendations in CVM's Fact Sheet upon which stakeholders may wish to comment:

- The recommendation to “[f]ollow all state and local government regulations for animal food” would inherently include in many states registration and labeling requirements and requirements that all ingredients either be approved or Generally Recognized As Safe (GRAS) for the specific animal use to which they are being put.
- The Fact Sheet states “[r]estaurant and grocery store waste is commonly used as animal food [, which] is a valuable way to prevent it from going into the landfill.” While this statement is true, such use is frequently accomplished through renderers, who understand the constituents of the food they collect from restaurants and employ robust processes, including testing for contaminants, as appropriate to ensure that the food can be used safely for animal feed.
- While the Fact Sheet acknowledges that unused human food should not be re-distributed for animal use if it includes “ingredients that are unsafe for the animal that will ultimately be consuming it,” the re-distribution of food that is unsafe for the target animal use presents a potentially significant safety and/or legal problem, particularly with respect to entities that are not familiar with the toxicity of certain ingredients in particular species. FDA states that entities may contact askCVM@fda.hhs.gov to seek clarification regarding whether a particular ingredient is safe in a given species, but we have recently experienced significant delays in FDA providing feedback through this resource.
- Lastly, FDA explains that entities wanting to re-distribute for animal use human food that is adulterated or contaminated may submit a diversion or recondition request under FDA's Compliance Policy Guide Sec. 675.200: Diversion of Adulterated Food to Acceptable Animal Feed Use. In our experience, however, FDA may take a substantial amount of time to approve such a request.

The Fact Sheet states that questions may be directed to CVM via askCVM@fda.hhs.gov.

As the legal, regulatory, and commercial implications of coronavirus COVID-19 continue to evolve, our lawyers and advisors are helping clients navigate the complex considerations that companies around the world are facing and develop plans and strategies in response to COVID-19. Reach out to our COVID-19 task force COVID19@cov.com and visit our [COVID-19 Legal and Business Toolkit](#).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Animal Food and Drug practice:

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