

**THE OFFICIAL FEED AND FOOD CONTROLS (ENGLAND) REGULATIONS
2009 CONSULTATION**

**SUMMARY REPORT OF RESPONSES TO CONSULTATION
FROM STAKEHOLDERS**

BACKGROUND

1. The Official Feed and Food Controls (England) Regulations 2009 consultation was issued on 14 September 2009 and closed on 6 November 2009. The purpose of this consultation was to seek comments on the draft Statutory Instrument (SI) that will update and replace the Official Feed and Food Controls (England) Regulations 2007. The Regulations will provide execution and enforcement provisions, in England, for Regulation (EC) 882/2004 on official feed and food controls and Regulation (EC) 669/2009 as regards the increased level of official controls on imports of “high-risk” non-Products of Animal Origin (non-POAO) feed and food. Parallel legislation will be enacted in Scotland, Wales and Northern Ireland.
2. The consultation package was sent to approximately 530 stakeholders. In total, 16 substantive responses were received, including from stakeholder organisations. Separate consultations were undertaken in Scotland, Wales and Northern Ireland.
3. The FSA is grateful to those stakeholders who responded. We have taken replies received into account in finalising the national legislation, associated Impact Assessment (IA) and in revising the Guidance Notes on the legislation.
4. The consultation sought views and evidence on the following key areas:
 - the likely impact of the Regulations on businesses;
 - comments on the assumptions made in the draft IA and
 - clarity of the draft Guidance.

SUMMARY OF RESPONSES

5. The following organisations and individuals provided comments in response to the consultation:
 - Suffolk Coastal Port Health Authority (SCPHA)
 - Seasoning and Spice Association (SSA)
 - Southampton City Council; Trading Standards (SCC)
 - Association of Port Health Authorities (APHA)
 - Agricultural Industries Confederation (AIC)
 - Uttlesford District Council (UDC)
 - Food and Drink Federation (FDF)
 - Fresh Produce Consortium (FPC)

- Crawley Borough Council - Port Health Division (CBC)
- LACORS
- London Borough of Hillingdon (LBH)
- The Trading Standards Institute (TSI)
- Servisair Cargo Stansted Airport (SERV)
- London Port Health Authority (LPHA)
- SH Pratt & Co. (Bananas) Ltd (SHP)
- Eric McArthur (ERIC)

6. Responses are summarised in the table below in three sections as follows:

Section A: Draft Statutory Instrument (SI) the Official Feed and Food Controls (England) Regulations 2009

Section B: Draft Impact Assessment (IA)

Section C: Draft Guidance notes: (i) for Feed and Food Business Operators and (ii) for Enforcement Officers

The Food Standards Agency's considered responses to stakeholders' comments are given in the last column of the table.

| Question/issue raised in consultation | Summary of responses | FSA evaluation/response |
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| Section A - Comments on the proposed legislation | | |
| <p>1. Controls on imports of certain feed and food of non-animal origin (non-POAO) from outside the EU</p> <p>The amending Regulations were proposed to revoke and replace the Official Feed and Food Controls (England) Regulations 2007 to provide for the effective enforcement of Regulation (EC) 669/2009 implementing Regulation (EC) 882/2004 as regards:</p> <p>(a) the increased level of official controls on imports of certain feed and food of non-animal origin and</p> <p>(b) update the areas of responsibilities designated to the competent authorities.</p> | <p>Generally, respondents agreed with the proposals. A few suggestions were made regarding what some respondents felt were omissions. For example: that entry, inspection and sampling powers for feed enforcement should be included to mirror those stated for food enforcement; lack of an offence provision for not importing “high-risk” products through a Designated Point of Entry (DPE); etc.</p> <p>Some respondents highlighted the need for ‘high risk’ products, subject to the provisions of Regulation (EC) 669/2009, to be included or removed from the list in Annex I on the basis of a risk-based system that is quantifiable and clearly understood by the industry.</p> | <p>The proposed amending Regulations will be made to give effect to the provisions in Regulation (EC) 669/2009 implementing Regulation (EC) 882/2004 by means of the new SI that will come into force on 25 January 2009.</p> <p>Views regarding the criteria to be used for inclusion (and delisting) of products in Annex I to Regulation (EC) 669/2009 will be taken into account by the Agency in future EU level discussions.</p> |
| <p>2. Exchange of information (regulation 26)</p> <p>This new measure provides for officers of Her Majesty’s Revenue and Customs (HMRC) to exchange information with the enforcement authorities (local and port health authorities) responsible for the execution and enforcement of the import provisions. The provision also prohibits, subject to conditions, the disclosure of information received from HMRC other than for the purposes of enforcement and without the consent of HMRC. An offence and penalty for onward disclosure in breach of the provisions in</p> | <p>Respondents that commented welcomed this provision. LBH recommended that a legal gateway is also set up to enable the exchange of information between the UK Border Agency (UKBA) and the enforcement authority because since August 2009, UKBA have the responsibility of customs detection work at borders and are responsible for illegally imported products discovered in transit sheds.</p> | <p>This provision will be retained.</p> <p>The view regarding the legal gateway to enable the exchange of information between UKBA and the enforcement authority will be considered as part of post-implementation review of the measures in the SI, which is expected to take place in 2013 as part of a planned EU review..</p> |

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| <p>this regulation is provided (see regulation 41(1) (b)).</p> <p>The exchange of information is particularly important in relation to “high-risk” products that are not presented for official controls but are declared for customs purposes. In such instances, HMRC can withhold clearance and bring the consignment to the attention of the relevant local/port health authority.</p> | | |
| <p>3. Suspension of designation of points of entry (DPE) (regulation 30)</p> <p>Regulation (EC) 669/2009 sets out certain minimum requirements for the DPE regarding performance of controls, facilities and equipment provided to undertake increased levels of control for specific high-risk feed and food. It has, therefore, been necessary to provide a measure for the suspension of DPE where such points of entry are in serious breach of these requirements or their continued operation presents a serious risk to animal and public health.</p> | <p>No objections were raised.</p> | <p>This provision will be retained.</p> |
| <p>4. Costs and expenses (regulation 36)</p> <p>This new measure provides for the costs incurred by the enforcement authority as a result of activities arising from the increased level of official controls are payable by the feed or food business operator or its representative.</p> | <p>Port Health Authorities that responded welcomed the introduction of the cost recovery elements; stating that this will reduce their financial burdens and make sufficient resources available to control high risk foods effectively.</p> | <p>Regulation (EC) 882/2004 sets out rules on the financing of official controls for Member States to comply with, to ensure that adequate financial resources are made available for those controls.</p> |

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| <p>5. Specified provisions (Schedule 6) This schedule sets out various obligations placed on feed and food business operators by Regulation (EC) 669/2009.</p> | <p>Where Article 6 states “<i>common entry document to be completed and transmitted at least one working day in advance</i>”, some port health authorities suggested replacing “one working day” with “24 hours” to avoid misinterpretation.</p> <p>Some industry stakeholders said they would prefer testing at source prior to shipment saying this would overcome wastage, potential delays, logistical and environmental issues envisaged if testing is undertaken at designated points of entry.</p> | <p>The wording “<i>one working day</i>” was retained to mirror Regulation (EC) 669/2009.</p> <p>As regards testing at source prior to shipment, since the EU legalisation does not provide for this option the Agency will retain the measures to provide for appropriate documentary, identity and physical checks to be carried out at the designated point of entry before release into free circulation .</p> |
| <p>6. Definitions The definitions of Community legislation and 'relevant food law' included at Schedules 1 and 3 respectively of the SI have been updated to reflect the changes to Community and national legislation. In addition, we are proposing to revise Schedule 2 and carry out the necessary amendments to the definition of "relevant feed law", when the SI is made, in line with the approach adopted for Schedules 1 and 3.</p> | <p>A respondent questioned the exclusion of the Pesticides (Maximum Residue Levels) (England & Wales) Regulations 2008 from the definition of relevant food law in Schedule 3.</p> | <p>This exclusion will be retained.</p> <p>The Pesticides (Maximum Residue Levels) (England & Wales) Regulations 2008 are excluded from the definition of 'relevant food law' in Schedule 3 to the draft OFFC SI (and the 2007 OFFC SI) because that legislation is covered by Regulation (EC) 882/2004 for sectors for which the FSA is not responsible - it is covered by the Official Controls (Animals, Feed and Food) (England) Regulations 2006 (SI 2006/3472).</p> |
| <p>7. General issues</p> | <p>In general, stakeholders accepted the principle that the updated Regulations will enhance feed and food controls at EU borders and will provide additional consumer protection.</p> <p>However, some industry stakeholders were of the view that the implementation of Regulation (EC) 669/2009 had the potential to be disruptive to industry and to increase costs without improving</p> | <p>These Regulations are necessary to give effect in England to those elements of Regulation (EC) 882/2004 and Regulation (EC) 669/2009 for which a domestic legal basis is needed. Both EC Regulations are directly applicable in Member States.</p> <p>The legal provisions in the SI will apply from 25 January 2010 otherwise the UK will be in</p> |

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| | <p>consumer protection. Some of the issues highlighted were:</p> <ul style="list-style-type: none"> • allow the maximum possible flexibility for products to be sampled/detained at the food business operators' premises, rather than at the port; • some port health authorities were concerned that, where consignments can be checked at the premises of the food and business operator, the condition (Regulation 27(2)(b)(i)) that the consignment must not be tampered with would be difficult to fulfil at airports due to the types of transport containers that arrive at airports; • concerns that the SI will introduce duplication of current documentary systems. A request was made for information, required to give prior notification, that is already provided to other Government departments and agencies to be shared with the Local/Port Health Authorities (to utilise existing systems) to avoid unnecessary duplication of effort and to save costs; • no formal timescale for sampling/analysis; • lack of transparency regarding the criteria being used for inclusion/delisting of "high-risk" products on the list at Annex I of Regulation (EC) 669/2009 and • impact of increased official controls on | <p>breach of its EU obligations to give effect to EC Regulations.</p> <p>Views and concerns have been noted. In particular, the Agency would envisage that enforcement authorities and feed/food business operators will have regard to the Agency's Guidance Notes on the Regulations. The guidance will take into account the consultation responses, in particular concerns expressed by stakeholders. This should enable a proportionate and uniform approach in ensuring compliance with this EU law, covering 'high risk' feed and food.</p> <p>In addition, issues highlighted in the consultation responses will be assessed as part of the post-implementation review of the measures in the SI. As regards improved sharing of data between Government departments and agencies, the Agency continues to take account of the Government's regulatory reform agenda to reduce the regulatory burdens on business, while maintaining or even enhancing the current levels of public protection in undertaking official controls and will explore the possibilities of sharing prior notification data.</p> <p>As regards assisting developing countries, the FSA has participated (and will continue to</p> |

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| | <p>developing countries.</p> <p>Two stakeholders requested that Stansted Airport be added to the list of UK Designated Points of Entry (DPEs).</p> | <p>be involved) in Working Group meetings at EU level to consider draft guidelines to assist third countries in drawing up and presenting information to the Commission concerning the management and organisation of their sanitary control arrangements for goods intended for export to the Community.</p> <p>The agency has invited all UK ports that meet the minimum requirements for facilities and equipment in Regulation (EC) 669/2009 to apply to be UK DPEs.</p> |
| Section B - Comments on the draft Impact Assessment | | |
| <p>8. Costs to businesses/industry</p> <p>The requirement for feed and food businesses to pre-notify the relevant authorities of the arrival of non-POAO identified as presenting a known or emerging risk by means of standard documentation using a Common Entry Document (CED). Completion of the CED and complying with the resulting inspections will represent an information (administrative) obligation for industry. In addition, this new Regulation requires feed and food business operators to pay the competent authority on demand for expenses arising from the increased level of official controls provided for in Commission Regulation (EC) 669/2009. It was estimated that businesses importing high</p> | <p>SCPHA believed that the implied 100% sampling requirement for Sudan dye was incorrect (replaced by requirement for an analysis certificate from country of origin).</p> <p>Respondents that commented noted the difficulty in evaluating industry costs since the number of imports are not precisely known and questioned the absence of an estimate of basmati rice imports.</p> <p>Industry respondents highlighted costs arising from:</p> <ul style="list-style-type: none"> • the potential disruption and demurrage charges arising from such delays; • the need to carry higher stocks to allow for delays; • highly perishable nature of fresh products and the proposed timeframe for completion of the | <p>An explanation of the Agency's opinion, that since Commission Decision 2005/402/EC requires that each consignment is accompanied by an analytical report each consignment is subject to 100 per cent testing, was included in the final IA.</p> <p>As regards the absence of imports data on basmati rice, specific data is not available and this has been explained in the final IA.</p> <p>The data on wages was based on the Annual Survey of Hours and Earnings 2008 (ASHE) and have been updated with 2009 data in the final IA. The ASHE survey is used to ensure</p> |

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| <p>risk non-POAO will face three on-going annual costs: (i) relates to charges levied by competent authorities for official controls; (ii) is a result of additional storage costs at the Designated Point of Entry (DPE) for consignments that are detained in order to carry out official controls and (iii) refers to the cost of stock that is damaged during the official control sampling process, and would therefore have to be disposed of as a result.</p> <p>NB: this will apply for 'high-risk' products listed in Annex I.</p> | <p>proposed controls will result in product being unfit for use, and</p> <ul style="list-style-type: none"> • damage at the ports. <p>A few enforcement stakeholders that commented believed that damage to stock consequent on sampling has little impact on industry costs.</p> <p>Some respondents expressed a view that the estimates given for wages of enforcement officers and for storage costs were lower than current rates. SCPHA and LPHA provided data on costs of storage, examination and unloading at the port of Felixstowe. SCPHA highlighted that residual fumigant can cause significant (non-quantified) delay in examination.</p> <p>One industry stakeholder provided a worked example, using chilli tested for Sudan dye, to provide an estimate of additional costs of implementing the Regulation.</p> <p>One industry respondent disagreed with the Agency's assumption that volumes of imports of products listed in Annex I would be similar to imports in 2008 in the near future because Eurostat data indicates that volumes of Annex I listed fresh produce imported to both the EU and the UK have been increasing over the past three years.</p> <p>One enforcement stakeholder noted that the IA covers all relevant costs through all stages involved in the importation process.</p> <p>LBH highlighted that Competent Authorities may</p> | <p>consistency across all IAs.</p> <p>The range of costs used to estimate additional storage costs at the DPE was not amended in the final IA because the port of Felixstowe's charges cannot be generalised for all UK ports.</p> <p>The worked example of additional costs of implementing the Regulation was not included in the final IA because the data cannot be generalised to other products and therefore could not be used to estimate the total impact.</p> <p>Potential non-quantified costs were noted in the final IA.</p> <p>The Agency maintained its assumption on future volumes of imports and used HMRC data as is clearly outlined in the IA. Eurostat data was not used because it reports total imports of food at a high level, with insufficient detail to support an assumption that all categories imported into the UK were increasing in line with the overall trend.</p> |

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| | <p>consider charging for additional activity when dealing with consignments from one-off importers acting independently without an agent, and also agents who only deal with an infrequent number of food consignments. It is likely that these importers will not be able to generate a CED electronically and this responsibility will fall onto officers.</p> | |
| <p>9. Costs to Competent Authorities The proposed Regulation will introduce two new administrative obligations on competent authorities: (i) The obligation to report the number and size of high risk non-POAO consignments entering the UK, the cost of which is likely to fall to Port Health Authorities (PHAs). (ii) The time cost of updating the list of high risk non-POAO on a quarterly basis, which will fall to the Food Standards Agency. In addition there will be a one-off cost to PHAs and Local Authorities in terms of the time required to familiarise themselves with the Official Feed and Food Controls (England) Regulations 2009.</p> | <p>Some enforcement stakeholders highlighted the potential involvement of other competent authorities such as Local Authorities and Trading Standards (in addition to Port Health Authorities) in official controls.</p> <p>A port health authority highlighted other administrative burdens to the competent authorities such as those arising from:</p> <ul style="list-style-type: none"> • identifying consignments subject to official controls which have not been pre-notified, by checks on ships manifests and • additional work needed to establish working relationships in authorities where Port Health/Trading Standards do not currently work together. <p>One enforcement stakeholder believed that recovered costs would be insufficient to cover staff resources, training and one-off set-up costs due to the unpredictable nature of the work, particularly for imported feed.</p> <p>A port health authority commented that higher costs may be incurred for providing potential out-of-</p> | <p>Non-quantifiable costs have been noted in the final IA.</p> <p>As regards cost estimates, these have been amended to reflect current wages etc. in the final IA.</p> |

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| | hours clearance particularly for highly perishable commodities at weekends. | |
| <p>10. Options</p> <p>Two options were proposed: <u>Option 1</u> - do nothing. This would retain the status quo in the UK in terms of the import control arrangements for non-POAO; or <u>Option 2</u> - adopt the SI to ensure that the competent authorities can fulfil their obligations under Regulation (EC) 669/2009 implementing Regulation (EC) 882/2004.</p> | In general, respondents supported Option 2. | The Agency proposes to proceed with the second option. Not to do so would leave the UK in breach of its EU obligations. |
| <p>Section C - Comments on draft Guidance Notes on the import provisions for “high risk” feed and food of non-animal origin (non-POAO)</p> | | |
| <p>11. General issues on both sets of the draft Guidance</p> <p>Draft summary Guidance for (i) feed and food businesses operators on the import provisions for “high risk” non-POAO feed and food and (ii) feed and food enforcers was produced for consultation. The guidance notes aim to assist feed and food businesses and enforcement authorities with the understanding of the new requirements regarding increased levels of official controls of high-risk non-POAO feed and food imported into England from third countries.</p> | <p>Most respondents welcomed the guidance. Whilst the general view was that these were good guides, more detail on practical issues and some clarification on food business operators’ and enforcement officers’ responsibilities were requested. Some inconsistencies between the two sets of guidance were highlighted and suggestions for improvement made.</p> <p>Some industry stakeholders expressed concern about indications that the Commission’s Guidance was not expected to be completed in time for the application of the legislation and hoped that the UK Guidance would be published before the Regulation came into force.</p> <p><u>Charging Arrangements:</u> Most port health authorities would find a standard mechanism for</p> | <p>The guidance notes have been amended to provide further advice, clarity and consistency of information in both sets.</p> <p>The Agency’s Guidance will be published on its website before the Regulations come into force.</p> <p>The process by which a business may challenge the results of residue testing is provided for in the Regulation (see regulations 33, 34 & 38).</p> <p>As regards charging arrangements, the European Commission has started discussions with Member States on possible future options for changes to the provisions on fees and charges for official controls in Regulation (EC) 882/2004. Views expressed</p> |

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| | <p>calculating charges useful. An industry stakeholder requested clarification on how mandatory fees would be calculated and imposed.</p> <p><u>Residue testing and challenging of results:</u> An industry stakeholder requested inclusion of information regarding the process by which a business may challenge the results of residue testing; stating that companies should have the option, if they desire, to take a duplicate sample for checking of results.</p> | <p>have been noted and are being taken into account in the on-going EU level discussions. The Agency will review its Guidance when this EU exercise is complete.</p> |
| <p>12. Draft Guidance notes for Feed and Food Business Operators</p> | <p>Most respondents who commented on the guidance requested clarification of: definitions of some terms (e.g. consignment); how certain measures in the Regulation will be implemented in practice and made a number of detailed suggestions for clarifying the guidance notes. For example, procedures to be followed by the Designated Point of Entry (DPE)/Local Authority (LA) where a consignment has been released to a secure place subject to onward transportation pending results of physical checks; guidance on charging schemes etc.</p> <p>One industry stakeholder felt that <i>“making sufficient human resources and logistics available to unload consignments and appropriate sampling equipment”</i> should be the responsibility of the Local/Port Health Authority rather than Feed and Food Business Operators.</p> | <p>The guidance notes have been amended to provide further advice and clarity.</p> <p>Regarding the responsibilities of feed and food business operators, these are set out in the EU legislation.</p> |
| <p>13. Draft Guidance for Enforcement Officers</p> | <p>Most respondents who commented on the</p> | <p>The guidance notes have been amended to</p> |

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| | <p>guidance requested clarification/definitions of terms used and made a number of detailed suggestions for clarifying procedures. For example:</p> <ul style="list-style-type: none"> • procedures that the DPE/LA need to follow in order to fulfil the requirement to notify customs where consignments are allowed in-land pending the results of physical checks; • procedures for ensuring the security of products in various containers being transported to another location; • references to sampling protocols; • the communication pathways between the Customs National Clearing Hub, UKBA, Port Health, LA and the importer, including their responsibilities; • the minimum weight below which the regulations do not apply; • dealing with illegal undeclared imports etc. <p>Industry stakeholders were generally supportive of the inclusion of “the need to control sampling to prevent foreign body, microbiological or allergen cross contamination etc.” FDF was however concerned that specific guidance on how to prevent such problems was not available and requested that detailed instructions and appropriate training be made available for enforcement officers.</p> <p>In the interests of continuous improvement, an industry stakeholder suggested including indicative</p> | <p>provide further advice and clarity.</p> <p>The European Commission has established a strategy, ‘Better Training for Safer Food’ (BTSF), for training the officials of the competent authorities in Member States and third countries that carry out official controls in the feed, food, animal health & welfare and plant health sectors. The first relevant course (titled “<i>Best practices on increased level of official controls on certain feed and food of non-animal origin (Regulation (EC) No 669/2009)</i>”) organised under the BTSF initiative will be held in Rome on 12-15 January 2010. Further details of the BTSF strategy can be found at: http://ec.europa.eu/food/training_strategy/index_en.htm</p> |

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| | <p>target times for the different types of analysis likely to be undertaken e.g. for aflatoxin, pesticides, etc. in the guidance to enable enforcement officers to assess their performance against target turn round times.</p> <p>An enforcement stakeholder was concerned that once consignments are broken up into smaller quantities, the link with initial controls at DPE will be lost, along with evidence of the accompanying CED which will make inland enforcement of feed and food listed in Annex I impossible. Possible product marking or accompanying documentation/labels to assist officers in knowing whether feed/food has been subjected to DPE controls specified by Regulation (EC) 669/2009 was suggested.</p> | |