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1000 Lake Cook Road
Glencoe, Illinois 60022

Re: Market Name for Bighead and Silver Carp (NSGLC-10-04-06)

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Dear Pat,

Please find below the information you requested regarding the possibility of changing the market name for Bighead and Silver carp. This information is intended as advisory research only and does not constitute legal representation of Illinois-Indiana Sea Grant or its constituents. It represents our interpretations of the relevant laws and regulations.

In 2009, in response to a request from Illinois-Indiana Sea Grant, the Food and Drug Administration (FDA) issued a letter briefly explaining the FDA's petitioning process and steps to change the market name "carp." As stated by the letter, the Federal Food, Drug, and Cosmetic Act¹ and the Fair Packaging and Labeling Act² require seafood to be labeled with its common or unusual name and prohibit false and misleading labeling. According to FDA regulations, an acceptable "statement of identity" for food products is either 1) a name required by any applicable federal law

¹ 21 U.S.C. § 341.

² 15 U.S.C. §§ 1451-1461.

or regulation, and in the absence of that, 2) the common or usual name of the food, and in the absence of that; 3) an appropriately descriptive term.³

The FDA maintains a "Seafood List" which identifies approved market names, scientific common names, and scientific names.⁴ The FDA provides guidance outlining principles that can be used to find an acceptable market name for seafood species.⁵ The guidance contains six principles for determining acceptable market names:

- 1) A common or usual name required by regulation or law is the required market name of the food;
- 2) A name that is false or misleading is not an acceptable market name;
- 3) A name that has been recognized nationally in the U.S. and commonly used by consumers to identify a species may be an acceptable market name;
- 4) The scientific common name is generally an acceptable market name;
- 5) An established international name or a name that is widely recognized and commonly used in the country of origin may be an acceptable market name;
- 6) A coined name may be an acceptable market name.

On the FDA's list, both *Hypophthalmichthys nobilis* (scientific common name, Bighead Carp) and *Hypophthalmichthys molitrix* (scientific common name, Silver Carp) are given the common name of "carp." As noted by the letter "In the case of the name 'carp' we consider this to be an acceptable market name for fish in the Cyprinidae family." The letter states:

We do not change names of fish to change the perception of consumers in an effort to help market the products because a name may not be appealing or popular to consumers. We discourage the proliferation of different names for the same species because it could be difficult to know and control potential food safety hazards that are associated with the fish.

Many other species of fish have approved market names that are considered to be more marketable than their scientific common names. For example, the Patagonian toothfish is known as "Chilean sea bass" and the goose fish is called "monkfish."⁶⁷ The FDA has accepted the vernacular names of these species as "approved market names." However, the FDA's stance on these species' market names may be distinguished from Bighead and Silver carp. Most consumers do not know that

³ 21 C.F.R. § 101.3.

⁴ U.S. Food and Drug Administration, 2008 FDA Seafood Complete List, http://www.accessdata.fda.gov/scripts/SEARCH_SEAFOOD/index.cfm?other=complete.

⁵ U.S. Food and Drug Administration, *Guidance for Industry: The Seafood List – FDA's Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce*, <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Seafood/ucm113260.htm>

⁶ Terry Rodgers, *Author Tracks Rise and Fall of the Chic Patagonian Toothfish*, THE SAN DIEGO UNION-TRIBUNE, Aug. 30, 2006; David A. Fahrenthold, *Tastier Names Trouble for Seafood Stocks*, THE WASHINGTON POST, A4, July 31, 2009.

⁷ *Id.*

Chilean Sea bass' scientific name is Patagonian toothfish, whereas most people know the scientific common names of Bighead and Silver carp.

While the Bighead and Silver carps' market names have been established by the FDA, a citizen petition could be used to request the FDA to recognize a new market name for Bighead and Silver carp. Citizen petitions may request the FDA to "issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action."⁸ The FDA has allowed name changes for established food products. For example, in the 1980s, the FDA allowed the ingredient called "low erucic acid rapeseed oil" to be changed to canola oil. After industry research indicated that consumers had negative associations with the term "prune," the FDA allowed the name change to "dried plums."⁹ Most recently, the Corn Refiners Association has petitioned the FDA to change the name of "high fructose corn syrup" to "corn sugar."¹⁰

The regulations regarding citizen petitions require the petitioner to include the specific action to be taken. The petition also requires a "statement of grounds" for the change, which includes the factual and legal grounds for making the change.¹¹ In its statement of grounds, the Corn Refiners Association states,

There is compelling evidence that many consumers are confused and misled by the ingredient name. Contrary to its name, and contrary to what many consumers believe, high fructose corn syrup is not high in fructose compared to other commonly used nutritive sweeteners, such as sugar, honey, fruit juice concentrates, and agave nectar. The proposed alternate name "corn sugar" more closely reflects reasonable consumer expectations and more accurately describes the basic nature of the ingredient and its characterizing properties. Accordingly, revision of the high fructose corn syrup GRAS affirmation regulation to recognize "corn sugar" as an alternate common or usual name would promote honesty and fair dealing in the interest of consumers.¹²

A citizen petition requesting a new name for Silver and Bighead carp might likewise argue that calling Silver and Bighead carp "carp" could cause confusion for consumers. Silver and Bighead carp are imported and have distinct features from domestic carp. Several attempts have already been made to market Silver and

⁸ 21 C.F.R. § 10.30. available at <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=10.30>

⁹ *The Fruit Formerly Known As ...*, WASH. POST, Apr. 15, 2001, at A4.

¹⁰ Corn Refiners Association-Citizen Petition, FDA-2010-P-0491, Sept. 14, 2010. Tara Parker-Pope, *A New Name for High-Fructose Corn Syrup*, N.Y. TIMES WELL BLOG, Sept. 14, 2010 <http://well.blogs.nytimes.com/2010/09/14/a-new-name-for-high-fructose-corn-syrup/>.

¹¹ The petition must also contain a statement of environmental impact. After the commissioner reviews the petition, he or she may ask for a statement of economic impact. Petitions should be certified and sent to: Division of Dockets Management, Food and Drug Administration, Room 1061, 5630 Fishers Lane, Rockville, MD 20852.

¹² Corn Refiners Association-Citizen Petition, *supra* note 10.

Bighead Carp under a new name. In Louisiana, the state Department of Fish and Wildlife has rolled out a marketing campaign to rename the fish "Silverfin."¹³ Kentucky State University researchers have tried to rename the fish "Kentucky tuna."¹⁴ However, one article quoting a representative of the FDA noted that an official name change may not be required. "FDA officials said that, in practice, they don't punish many restaurants for calling fish by unsanctioned names. 'It is not a high priority . . . unless it involves a food-safety hazard,' said Spring Randolph, a consumer safety officer."¹⁵

I hope you find this information useful. The Law Center would be happy to conduct any follow-up research if you have any additional questions. Thank you for bringing your questions to the Law Center and we look forward to working with you in the future.

Sincerely,

Terra Bowling
Research Counsel, National Sea Grant Law Center

¹³ <http://www.npr.org/templates/story/story.php?storyId=122367979>

<http://www.nytimes.com/2010/04/22/us/22carp.html>

http://doa.louisiana.gov/LaNews/PublicPages/Dsp_PressRelease_Display.cfm?PressReleaseID=2352&Rec_ID=8

¹⁴ http://doa.louisiana.gov/LaNews/PublicPages/Dsp_PressRelease_Display.cfm?PressReleaseID=2352&Rec_ID=8

<http://www.state-journal.com/news/article/4810880>

¹⁵ Fahrenthold, *supra* note 6.