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Bree Evans

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NOTHING SHELLFISH ABOUT IT: WHY THE FDA NEEDS TO UPDATE *THE SEAFOOD LIST* TO REQUIRE GEOGRAPHIC ORIGIN AND SPECIES-SPECIFIC SHRIMP LABELING

By Bree Evans*

Imagine you are seated at a nice restaurant down by the wharf where you live. You are celebrating a job offer, out for a romantic night with your partner, or just craving some salt air and a great meal. You would expect the shrimp tacos brought to your table to be fresh and local—the fishing boats are docked just across the boardwalk. But the seafood brought to your table seems off somehow, not quite the same as you remembered it. Unfortunately, this experience is more common than you might think, and it's getting harder to know how fresh and local your seafood really is. The worldwide ubiquity of shrimp has made this kind of seafood particularly susceptible to consumer confusion as to the geographic origin and species of shrimp.

This article will first look at the problem of shrimp labeling in the United States, will address the primary legal regimes under which shrimp is regulated, and will recommend the Food and Drug Administration adopt regulations mandating the use of species and geographic-origin labeling of shrimp.

I. BACKGROUND

In 2014, an *Oceana* study genetically tested shrimp in producing and consuming cities in the United States and found that 30% of shrimp were mislabeled, misleading, or mixed/mystery.¹ Moreover, all shrimp labeled “Ruby Red” or “rock shrimp” was mislabeled.² In New York, 43% of shrimp were misrepresented, and over 50% of the “wild shrimp” was actually farmed shrimp.³ Seafood fraud is a growing global problem and includes mislabeling or other types of deceptive marketing with respect to quality, quantity, origin, and species.⁴

Not all sources of shrimp are susceptible to this type of fraud.⁵ According to a recent Presidential Task Force Report, “[d]omestic fish and fishery products harvested under a federal fisheries management plan have low incidences of species substitution . . . [s]imilarly, state-managed fisheries have a high incidence of compliance”⁶ This suggests domestically-harvested shrimp are accurately labeled. However, in 2017, the United States’ imported shrimp industry was worth \$6.5 billion,⁷ and an estimated 92.5% of shrimp consumed in the United States is imported.⁸ Therefore, it is likely that problems in the labeling of shrimp are predominantly traceable to imported products.

II. ANALYSIS

The Food and Drug Administration (FDA) is responsible for ensuring that shrimp is properly labeled.⁹ Additionally, under the Food Allergen Labeling and Consumer Protection Act of 2004, seafood retailers are required to declare the species of crustacean shellfish on food labels.¹⁰

To help producers properly market their food, the FDA has produced a *Guide to Acceptable Market Names for Seafood*, commonly known as *The Seafood List*.¹¹ There are fifty-eight listed shrimp species on *The Seafood List*.¹² Of the fifty-eight listed species on *The Seafood List*, there are only a handful of acceptable market names: most are “Shrimp,” “Shrimp or Prawn,” “Shrimp or Brown Shrimp,” and “Shrimp or Pink Shrimp.”¹³ As a consumer, you are only likely to see one of those few labels while you could potentially be eating any number of hundreds of different species.

In fact, there are 470 shrimp and prawn species listed through the United States’ Seafood Import Monitoring Program (SIMP), administered jointly by the National Marine Fisheries Service (NMFS) and Customs & Border Protection (CBP).¹⁴ Through the SIMP program imported shrimp must be accompanied by harvest and landing data, and importers must maintain chain-of-custody records.¹⁵ Unfortunately, however, SIMP is not oriented for consumers because the program does not require labeling, and the information collected is confidential under the program’s authorizing statute, the Magnuson-Stevens Act.¹⁶

While perhaps useful as a marketing designation, the term “shrimp” tells a consumer absolutely nothing about the product’s origin. “Shrimp” is a huge catch-all term that traditionally signaled to consumers the type of crustacean they were purchasing. But today’s consumers operate in a far more sophisticated and global market, and want to know whether their shrimp was sustainably sourced,¹⁷ whether it was likely produced using child and/or slave labor,¹⁸ or whether it has a massive carbon footprint because it was cheaper to catch it in Mexico, then ship it to China, and then ship it back to the United States.¹⁹ The Monterey Bay Aquarium’s Seafood Watch analysis for shrimp includes eight best choice designations, fifty-nine good choice designations, and forty-four avoid designations; the rating system also assesses the industry for various sustainability factors including overfishing, impact on other species (i.e. endangered turtles caught in nets), use of pesticides and antibiotics, and includes purchase recommendations for types of seafood and where it should be coming from.²⁰ In all, there’s a lot to research when buying shrimp, and this process could be made simpler through species and geographic-origin labeling. Moreover, the burden on industry in changing labeling requirements will be minimal because importers are already providing this information through the SIMP program.

* J.D. Candidate, American University Washington College of Law 2020

III. RECOMMENDATION

Critically, under the Federal Food Drug & Cosmetic Act, a food is deemed to be “misbranded” if its labeling is false or misleading, such as when “the name is the same as the name of another species or is confusingly similar to the name of another species and it is not reasonably encompassed within a group of species so named.”²¹ Because seafood markets globally sell hundreds of species of shrimp, it is unlikely generalized “shrimp” designations will satisfy this misbranding standard. Applying labels that contain species designation and country of origin information would be a critical step forward in informing consumers about their food, could make domestic shrimping more competitive in the market,²² and could help reduce the global carbon footprint of the industry.²³ Since the species-reporting information of SIMP is part of data protected by the confidentiality provisions of the Magnuson-Stevens Act, the FDA would need to independently impose geographic-origin and species-specific labeling requirements under its own

authorities.²⁴ The most basic mandate of the Federal Food, Drug, and Cosmetic Act is that the head of the FDA shall promulgate regulations setting reasonable standards of identity and quality, in the interest of promoting honesty and fair dealing for consumers.²⁵ Accordingly, the FDA appears to have the requisite statutory authority to implement regulations that would require geographic-origin and species-specific shrimp labeling.

Further, the FDA’s adoption of species and geographic origin labeling of shrimp could help resolve a critiqued shortcoming of domestic seafood regulation. In 2009 a Government Accountability Office report condemned CBP, NMFS, and the FDA for not effectively collaborating with each other in fighting seafood fraud.²⁶ The FDA’s adoption of species-specific labeling could be the start of the collaborative effort, would make detecting species substitution easier, could help flag repeat offenders faster, and will make eating shrimp a less stressful endeavor.



ENDNOTES

¹ Larry Olmsted, *Seafood Deception: What’s Wrong With Your Shrimp*, FORBES (Oct. 30, 2014), <https://www.forbes.com/sites/larryolmsted/2014/10/30/foods-latest-scandal-whats-wrong-with-your-shrimp/#4673946e4a65>.

² *Id.*

³ *Id.*

⁴ Presidential Task Force on Combating IUU Fishing and Seafood Fraud, *Action Plan for Implementing the Task Force Recommendations* (2014) (distinguishing between illegal, unreported, and unregulated (IUU) fishing, and seafood fraud, as defined by the United States Government).

⁵ *See generally id.*

⁶ *Id.* at 7.

⁷ *Farmed shrimp output increased by about 6 percent in 2017*, FOOD & AGRIC. ORG. U.N. (May 29, 2018), <http://www.fao.org/in-action/globefish/market-reports/resource-detail/en/c/1136583/>.

⁸ *See Fisheries of the United States, 2017 Report*, NOAA FISHERIES (Dec. 12, 2018), <https://www.fisheries.noaa.gov/resource/document/fisheries-united-states-2017-report>; *see also* M. Shahbandeh, *Distribution Share of the U.S. Shrimp Import Volume in 2017 by Major Exporter*, STATISTA, <https://www.statista.com/statistics/197268/us-shrimp-imports-from-major-exporters-by-volume/>; <https://www.fisheries.noaa.gov/resource/document/fisheries-united-states-2017-report> (noting that the major shrimp exporting countries to the United States for 2017 were, in descending order: India, Indonesia, Ecuador, Thailand, Vietnam, and China).

⁹ *See, e.g.*, 21 U.S.C. §§ 301-399i (the Federal Food, Drug, and Cosmetic Act) (granting the Secretary the authority to promulgate regulations setting standards for definitions, quality, and standards of fill for food); 15 U.S.C. § 1451 *et seq.* (Fair Packaging and Labeling Act); 21 U.S.C. §§ 301, 321, 331-337 (as amended).

¹⁰ 21 U.S.C. § 343(w)(1)-(2) (requiring products containing major allergens, including Crustacean shellfish, to be labeled to the level of species; a product that is not labeled this way is deemed mislabeled).

¹¹ *The Seafood List*, U.S. FOOD & DRUG ADMIN., https://www.accessdata.fda.gov/scripts/fdcc/?set=seafoodlist&sort=SCIENTIFIC_NAME&order=ASC&startrow=1&type=basic&search=shrimp.

¹² *Id.* (distinguishing common names and scientific names from acceptable market names).

¹³ *Id.*

¹⁴ *See generally U.S. Seafood Import Monitoring Program to Include Shrimp and Abalone by December 31*, NOAA FISHERIES, (Apr. 23, 2018), <https://www.fisheries.noaa.gov/feature-story/us-seafood-import-monitoring-program-include-shrimp-and-abalone-december-31>, (outlining harvest data requirements for shrimp imports effective as of December 31, 2018);

Shrimp and Abalone Compliance Provisions for the Seafood Monitoring Program Extended Through April 1, 2019, NAT’L OCEAN COUNCIL COMM. ON IUU FISHING & SEAFOOD FRAUD, <https://www.iuufishing.noaa.gov/RecommendationsandActions/RECOMMENDATION1415/Implementation.aspx> (discussing the extension of “informed compliance” for shrimp from December, 2018 to April, 2019).

¹⁵ *See id.*

¹⁶ *See U.S. Seafood Import Monitoring Program*, NOAA, <https://www.iuufishing.noaa.gov/RecommendationsandActions/RECOMMENDATION1415/FinalRuleTraceability.aspx> (cautioning that the SIMP program is neither intended to be a labeling program nor consumer-facing) (last visited Apr. 13, 2020); *see also* 16 U.S.C. § 1885 (2020) (requiring information reported under the Seafood Import Monitoring Program to be confidential).

¹⁷ *See* Kim J. DeRidder & Santi Nindang, *Southeast Asia’s Fisheries Near Collapse from Overfishing*, ASIA FOUND. (Mar. 28, 2018), <https://asiafoundation.org/2018/03/28/southeast-asias-fisheries-near-collapse-overfishing/> (reporting that IUU fishing is stressing local fish populations through overfishing, damaging coral reefs, and incidentally killing many other aquatic species such as dolphins, whales, and turtles).

¹⁸ *See, e.g.*, HUMAN RIGHTS WATCH, *HIDDEN CHAINS: RIGHTS ABUSES AND FORCED LABOR IN THAILAND’S FISHING INDUSTRY 4–6* (2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry> (detailing the human rights abuses, such as forced labor, prevalent in the Thai fishing industry).

¹⁹ *See* Maisie Ganzler, *Will Trade Tariffs Cause the American Fish Industry to Flop?*, FORBES (Aug. 16, 2018), <https://www.forbes.com/sites/maisieganzler/2018/08/16/will-trade-tariffs-cause-the-american-fish-industry-to-flop/#7ff1ef6b1e8c> (outlining the legal framework and economics, such as the cheap labor available in china, driving outsourcing of fish processing).

²⁰ *See Shrimp Recommendations*, MONTEREY BAY AQUARIUM, <https://www.seafoodwatch.org/seafood-recommendations/groups/shrimp?q=Shrimp&t=shrimp&o=906122601,1743823070,1681670080,1052796685,289868487,2031855841,1980655895> (denoting ten criterion analyzed in assigning designations) (last visited Apr. 13, 2020).

²¹ *The Seafood List*, *supra* note 11; *see also* 21 U.S.C. § 343(a).

²² *See* Oran B. Hesterman & Daniel Horan, *The Demand for ‘local’ food is growing—here’s why investors should pay attention*, BUS. INSIDER, at 5-6, (Apr. 25, 2017) <https://www.businessinsider.com/the-demand-for-local-food-is-growing-2017-4> (reporting on the increase in local food sales over the last decade).

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