



April 22, 2019

The Honorable Sonny Perdue
Secretary United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

Vicky T. Robinson, Chief Retailer Management and Issuance Branch
Food and Nutrition Service
Retailer Policy and Management Division, Room 418
3101 Park Center Dr.
Alexandria, VA 22302

Re: Taking Administrative Actions Pending Freedom of Information Act (FOIA) Processing

Secretary Perdue:

On February 19, 2019, the United States Department of Agriculture's Food and Nutrition Service (FNS) published a proposed rule titled: *Taking Administrative Actions Pending Freedom of Information Act (FOIA) Processing*.¹ The Office of Advocacy (Advocacy) urges the FNS to better consider the impacts of this rule on small food retailers and to improve the factual basis underlying the agency's certification of no significant impact on a substantial number of small entities as is required under the Regulatory Flexibility Act.

I. Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic

¹ 84 Fed. Reg. 4739 (February 19, 2019).

² 5 U.S.C §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et. seq.).

impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

The preamble of the rule provides that the FNS is authorized under the Food and Nutrition Act (the Act), to prohibit firms from participating in the Supplemental Nutrition Assistance Program (SNAP) if it determines that the firm violated program rules.⁶ In this proposed regulation FNS suggests that authorized firms delay agency administrative action, such as disqualification or civil money penalties, through submission of Freedom of Information Act (FOIA) requests or appeals. This rulemaking seeks to ensure that retail food stores can no longer use the FOIA process to delay FNS' administrative actions by proposing that FOIA requests and FOIA appeals be processed separately from administrative actions.

FNS submits that despite the rule's procedural changes disqualified firms will still receive extensive procedural protections through administrative and judicial review. For example, if disqualified from participation in the SNAP program a retailer can file a request for administrative review within 10 days of the date of delivery of the notice of determination, which allows said retailer to submit additional supportive documentation to FNS. If the agency determination is upheld, it is deemed to be a final administrative action and the disqualification will take place within 30 days.⁷ Thereafter, the disqualified food retailer can file a complaint against the United States to obtain judicial review of the final determination.

II. Small businesses are concerned with the potential administrative and economic impacts of this rule.

Advocacy was approached by small food retail businesses and their representatives, including the American Food Store Association, that are concerned about the consequences of this regulation on their ability to survive and serve their customers who are often located in underserved areas. Advocacy was told that last year, the USDA disqualified more than 1,600 retailers across the country from receiving SNAP payments.⁸ Over 90 percent of those businesses are convenience stores or small groceries. Advocacy was told that often the determination of whether a food retailer has violated SNAP rules is determined through the use of an algorithmic assessment program called Alert. Small businesses suggested that they are often disqualified from the SNAP program based almost entirely on atypical transaction patterns identified by the algorithm. The persons that approached Advocacy believe that if the rule is finalized it will

⁴ Small Business Jobs Act of 2010 (Pub. L. 111-240) § 1601.

⁵ *Id.*

⁶ 84 Fed. Reg. 4739.

⁷ If the Notice of Determination is for trafficking under the SNAP program the disqualification becomes effective immediately upon the date of receipt of the notice.

⁸ See: <https://newfoodeconomy.org/usda-algorithm-food-stamp-snap-fraud-small-businesses/>.

impose a significant economic impact on their businesses and force them into expending large sums of money seeking judicial review of the FNS notice of determinations.

Small businesses assert that as the FNS procedures now stand they have no choice but to use the FOIA process to obtain the grounds underlying FNS' notice of determination. They believe that if finalized this rule will effectively shift the burden of proof from FNS to them by severely prejudicing the retailer's ability to obtain from FNS the information necessary to defend the administrative action until an administrative appeal has been filed thereby affecting their due process rights.

III. Advocacy encourages the FNS to improve the factual basis supporting its decision to certify this rule under the RFA.

The RFA provides that regulatory agencies must either certify that a proposed regulation will not have a significant impact on a substantial number of small entities,⁹ **or** prepare an Initial Regulatory Flexibility Analysis (IRFA) to accompany every proposed rule. If the agency certifies the rule it must also provide a statement providing the factual basis for the certification.

Pursuant to Advocacy's mandate under the RFA, my office has reviewed this rule, including FNS' certification that this rule will not have a significant impact on a substantial number of small entities.¹⁰ In support of its certification FNS states:

While there may be some impact on small retail food stores, the impact is not significant. This proposed rule primarily impacts retail food stores that have been charged with SNAP trafficking and other violations and FOIA officials at the federal level. The retail food stores this proposed rule would impact would no longer be able to delay an FNS determination by submitting FOIA requests. The proposed rule would prompt the FNS notice of determination to be issued in a timely manner.

Unfortunately, there is nothing in this language that allows the public to determine the basis and underlying reasoning supporting the certification. Given the suggestion by FNS (without explanation or quantification) that there may be "some impact" on small retail food stores, and food retail establishments' belief that this rule will have a considerable impact on their businesses, FNS should provide greater detail and transparency supporting its decision to certify the rule. This could include the number of retail food establishments expected to be covered by the rule, a determination of the cost of the rule on covered small businesses' revenues or through the use of some other economic impact metric, and a quantitative explanation of FNS' definition of what constitutes a significant impact as far as covered entities are concerned.

⁹ 5 USC §605.

¹⁰ 84 Fed. Reg. 4740.

Advocacy determined, based on U.S. Census 2012 data, that there are approximately 110,000 small food retailers in the United States.¹¹ The bulk of these businesses are comprised of local grocery stores, convenience stores and beer/wine retailers. As is the case with most industry categories in the United States, this industry is comprised of mostly small businesses.

IV. Conclusion

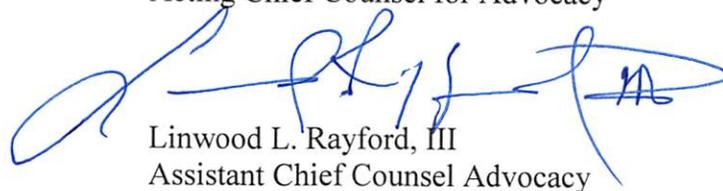
Given that this rule has the potential to significantly impact small food retail businesses, FNS should assess the degree of those impacts in the final rule and compare them with the agency's definition of what constitutes a significant impact under the RFA. This is the only way that covered entities can determine, and provide comment on, FNS' estimates on the economic impacts associated with the rule and the reasonableness of the agency's decision to certify the rule pursuant to the requirements of the RFA.

If you have any questions or concerns, please do not hesitate to contact me or Linwood Rayford at (202) 205-6533, or linwood.rayford@sba.gov.

Sincerely yours,



Major L. Clark
Acting Chief Counsel for Advocacy



Linwood L. Rayford, III
Assistant Chief Counsel Advocacy

Cc: Paul Ray, Acting Administrator Office of Information and Regulatory Affairs

¹¹ This was calculated using the North American Industry Classification System (NAICS) codes within the 445 categories.