

May 4, 2006

Docket No. 04-006P
FSIS Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
300 12th Street, S.W.
Room 102 Cotton Annex
Washington, D.C. 20250

Re: Docket No. 04-006P – Availability of Lists of Retail Consignees During Meat or Poultry Product Recalls

Dear Sir/Madam:

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business 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 of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.¹

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.² Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.³ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat.857 (1996). 5 U.S.C. §612(a).

² Exec. Order No. 13,272 § 1, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

³ E.O. 13272, at § 2(c), 67 Fed. Reg. at 53,461.

⁴ Id. at § 3(c), 67 Fed. Reg. at 53,461.

On March 7, 2006, the Food Safety and Inspection Service (FSIS) published a proposed rule in the *Federal Register* titled, “Availability of Lists of Retail Consignees during Meat and Poultry Product Recalls.”⁵ The proposed rule seeks to amend the federal meat and poultry products inspection regulations to provide that the Agency will make available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled by a federally inspected meat or poultry products establishment if the product has been distributed to the retail level. This proposed change in the inspection regulations will change FSIS’ practice that distribution lists obtained during recalls are confidential business information, exempt from release under the Freedom of Information Act (FOIA).⁶

FSIS is proposing this action because it believes that the efficiency of recalls will be improved if there is more information available as to where products that have been recalled were sold. FSIS is responding to suggestions by some states and consumer groups that product recalls will be enhanced by the disclosure of retail lists.⁷

FSIS’ Certification of No Impact is Insufficient under the RFA

On page 11327 of the *Federal Register* notice, FSIS certified that the rule will not have a significant economic impact on a substantial number of small entities, and consequently FSIS did not prepare an Initial Regulatory Flexibility Analysis (IRFA) pursuant to §605(b) of the RFA.

Section 605(b) of the RFA requires that any agency certification of no impact be accompanied with a statement providing the factual basis for such certification. Advocacy believes that FSIS failed to provide the public with an adequate factual basis for its conclusion that the rule will have no significant impact on a substantial number of small entities. As such, the transparency of the rule would benefit greatly from either statements justifying the reasons for the certification or the completion of an IRFA.

Advocacy suggests that FSIS should consider completing an IRFA. The rule’s preamble states that the regulation was reviewed under Executive Order 12866 and was determined to be significant. If the rule is deemed significant under the criterion of EO 12866 then the resultant economic analysis would be useful under the small entity analysis requirements of the RFA. Further, on page 11327, FSIS states that, “although the benefits of the proposed action are not quantified, it is reasonable to conclude that they are equal to or exceed the costs of the rule, because the costs are expected to be minimal.”

⁵ 71 Fed. Reg. 11326 (March, 7, 2006).

⁶ 5 U.S.C. 552(b)(4).

⁷ 71 Fed. Reg. 11327 (March 7, 2006).

The RFA requires an agency to perform a detailed IRFA when it is unsure of the ability to certify that the rule will not have a significant economic impact on a substantial number of small entities.⁸ Advocacy researched the number of small meat and poultry producers, wholesale distributors of meat and poultry products, and grocery retailers likely to be affected by this regulation using the U.S. Small Business Administration (SBA) size standards.⁹

<u>NAICS Code</u>	<u>Industry Title</u>	<u># Firms</u>
Producers (<500 employees):		
311611	Animal slaughtering (except poultry)	1,712
311612	Meat processing from carcasses	1,184
311613	Rendering & meat byproduct processing	102
311615	Poultry processing	266
3117	Seafood product preparation & packaging	638
Wholesale Distributors (<100 employees.)		
42444	Poultry & poultry products	121
42446	Fish & seafood	270
42447	Meat & meat products	379
Grocery retailers (<\$25 million for supermarkets and convenient stores and <\$6.5 million for meat and fish markets): ¹⁰		
44511	Supermarkets	34,638
44512	Convenience stores	25,410
44521	Meat markets	5,024
44522	Fish markets	1,968

Clearly, a significant number of small entities exist in the business sectors that this rule will affect. The transparency of this regulation would markedly improve with some discussion of how the regulated stakeholders will be affected. The Office of Advocacy believes that the proposal does not meet the analytical requirements of the RFA if it moves forward without the opportunity for the public to comment on a detailed IRFA.

The stakeholders have a right to determine if the costs of amending an already effective regulatory scheme are reasonable when balanced against benefits that cannot be quantified. If, after the IRFA is completed, FSIS concludes no significant economic impact exists for small entities, a certification can be included in the final rule.

⁸ 5 U.S.C. §603.

⁹ The appropriate SBA size standard for each affected industry is shown in the parentheses.

¹⁰ Note: For grocery retailers Advocacy was not able to determine the precise number of affected entities by the size standard because we do not have accurate data on receipts per firm. Instead, Advocacy used an employment size standard of <20 employees to determine the number of affected firms. This is a conservative estimate because the receipt size for smalls would support more than 20 employees. However, because the vast majority of all firms in these industries have <20 employees anyway, adding greater precision would not likely change the number of affected entities significantly.

Meat and Poultry Industry Representatives Approached Advocacy Because They Disagree with FSIS' Certification of No Impact

On page 11327 FSIS concludes that, "This action would not impose a monetary cost on establishments conducting a recall, and the information proposed to be released would not result in any competitive harm to affected establishments." The statement is in direct conflict with the position espoused by stakeholders to Advocacy. Industry representatives believe that the rule will in fact have a substantial economic impact on small meat and poultry producers, small wholesale distributors and small grocery retail stores. Stakeholders believe that FSIS should make its current data on the efficacy of recalls available for public comment before taking steps to change existing effective procedures. Some of the reasons cited by industry in support of their position that this rule will have a significant economic impact on small entities include:

1. This rule is in direct opposition to the conclusion FSIS reached in 2002 during the last regulatory amendment to 9 CFR 390.9 on this issue. At that time FSIS concluded that the type of disclosure being contemplated in the current rule could have an adverse affect on recall efficacy.
2. Current recall procedures provide all necessary product identifying characteristics to allow consumers to check products, regardless of where the product was purchased. Industry contends that consumers currently check the product in their possession against the identifying characteristics of the recall to determine if the product is subject to recall.
3. The proposed rule does not take into account store-to-store transfer of product, which increases the paperwork burden on the regulated entities.
4. FSIS concluded in 2002 that if the agency distributed confidential commercial information to the public, firms would be unwilling to voluntarily share this information with the agency. The agency should analyze how the possible loss of confidential information might impact regulated stakeholders.
5. Most retailers sell numerous meat and poultry products so that the retail name will not serve to differentiate product. This will lead to increases in products returned to the retail establishment, even product that is not subject to the recall.
6. Industry believes that it will take FSIS too long (several days to weeks) to get accurate recall information on its website for public use, thereby eliminating the benefit of the rule and possibly weakening the current recall process.

Conclusion

In conclusion, Advocacy commends FSIS for holding the public hearing on April 24, 2006. It was evident from that hearing (based on the positions advocated by those persons in support of, and against, this regulation) that this rule will benefit greatly from additional economic analysis and from the preparation of an IRFA. The information gleaned from such an analysis would add to the transparency of the rule and would allow stakeholders the ability to comment on the costs and benefits of the regulation.

Thank you for your attention to the above matters. If you have any questions about this correspondence, please do not hesitate to contact Linwood Rayford at (202) 401-6880.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Linwood L. Rayford, III
Assistant Chief Counsel for Advocacy

Cc: Donald Arbuckle, Acting Administrator
Office of Information and Regulatory Affairs