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FSIS Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
Room 102, Cotton Annex
300 12th Street, SW
Washington, DC 20250-3700

99-029P
99-029P-9
William L. Kovacs

RE: 9 CFR Part 390 - Proposed Rule on Sharing Recall Information with State and Other Federal Government Agencies - Docket No. 99-029P

Dear Sir or Madam:

The U.S. Chamber of Commerce ("U.S. Chamber") is pleased to submit the following comments on the above-referenced rule proposed (the "Proposed Rule") by the Food Safety and Inspection Service ("FSIS") to allow FSIS to share certain information with state and federal government agencies.¹ The U.S. Chamber is the world's largest business federation, representing more than three million businesses of every size, sector, and region. The U.S. Chamber serves as the principal voice of the American business community.

Many of the U.S. Chamber's members are meat, poultry and food producers whose activities are regulated by FSIS, and would be directly affected by the Proposed Rule. Other members would be impacted by the adoption of similar rules by other agencies. **The U.S. Chamber recognizes the importance of a safe and reliable food supply and strongly supports appropriate levels of cooperation between and among state and federal government agencies to ensure the safety and reliability of the food supply. However, the U.S. Chamber strongly believes that FSIS must withdraw the Proposed Rule because the Proposed Rule is fundamentally flawed for two key reasons:**

1. The Proposed Rule would substantially weaken Freedom of Information Act ("FOIA")² protections relating to certain types of confidential information by authorizing FSIS to share this information with state government agencies.
2. The Proposed Rule does not clearly identify the scope of information that may be shared or the circumstances under which information may be shared.

¹ 65 FR 56503 - 56505 (September 19, 2000)

² 5 USC 552

Background

FSIS has the responsibility for ensuring that meat, poultry, and egg products are safe, wholesome, and accurately labeled. Under the Federal Meat Inspection Act³ and the Poultry Products Inspection Act,⁴ FSIS:

1. Inspects all meat and poultry sold in interstate and foreign commerce, including imported products;⁵
2. Establishes standards for a range of activities, facilities and equipment associated with the production of meat and poultry products;⁶
3. Establishes labeling standards and approves labels for meat and poultry products, as well as standards for certain slaughter and processing activities;⁷ and
4. Oversees State meat and poultry inspection programs.⁸

FSIS has no statutory authority to order a mandatory recall of meat or poultry products.⁹ It may, however, conduct investigations and call for a voluntary recall of meat and poultry products.¹⁰ In the event of noncompliance with a voluntary recall request, FSIS may seize or detain food products or consider them adulterated or misbranded.¹¹

Recalls of meat and poultry products from privately owned State-inspected facilities are coordinated and monitored by State agencies. State departments of health, as well as other Federal agencies sit on recall committees with FSIS. In the preliminary stages of a recall investigation, FSIS may contact State and local health departments.¹²

Companies are required to prepare recall plans in advance of any request for a recall by FSIS. Recall plans include names, phone and fax numbers, responsibilities, etc., of internal and external personnel who may be involved in carrying out a recall. Production and distribution records must be maintained and made available to FSIS. A firm conducting a recall is also responsible for promptly notifying each of its affected consignees

³ 21 USC 600 *et seq.*

⁴ 21 USC 451 *et seq.*

⁵ 21 USC 603 - 606, 620 and 455

⁶ 21 USC 608 and 456

⁷ 21 USC 607 and 457

⁸ 21 USC 661 (c) and 454

⁹ 21 USC 600 *et seq.*

¹⁰ FSIS Directive 8080.1 Rev. 3 (January 19, 2000)

¹¹ *Id.*

¹² *Id.*

about the recall. Direct consignees are then instructed to notify secondary consignees. The recalling firm is also responsible for effectiveness checks on the progress of the recall.¹³

Post-recall, a company is required to provide FSIS with a "Recall Status Report." This report includes information on the number of consignees notified of the recall, the number of consignees responding to the recall communication and the number and identity of consignees that did not respond.¹⁴

FSIS also issues press releases on meat and poultry recalls. There are strict limitations on what information can be included in a press release. Because of the sensitive nature of the material, for example, press releases may not identify the specific recipients of product (e.g., grocery store, restaurant, airline, etc.) unless the supplier chooses to release the information to the public.¹⁵

Discussion

I. The Proposed Rule Would Substantially Weaken FOIA Protections.

The Proposed Rule would substantially weaken FOIA protections in two ways: First, it would greatly expand the population to which information exempted from disclosure could be disclosed by allowing information sharing with state agencies. Second, it would ignore existing requirements to notify submitters before information subject to FOIA protections is released.

Under FOIA, the obligation to disclose or retain information rests on federal agencies as defined in Section 551 of the Administrative Procedure Act.¹⁶ FOIA prohibits federal agencies from disclosing to the public certain kinds of sensitive business information, including: trade secrets and confidential commercial information; predecisional documents to protect the deliberative process; information where the disclosure may invade personal privacy; and information that is commercial or financial, obtained from a person and privileged or confidential.¹⁷ Federal agencies may ordinarily share information with each other, but FOIA does not permit federal agencies to share information with state government agencies. FOIA treats State agencies the same way it treats the general public.¹⁸

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 5 USC 551(1)

¹⁷ 5 USC 552 (b)(4)

¹⁸ 5 USC 551

However, the Proposed Rule would explicitly extend information sharing to state agencies as if they were federal agencies even though such state agencies would not be bound by the federal FOIA. Pursuant to the Proposed Rule, information shared with a state agency would not be considered a disclosure of information to the public.¹⁹ Simply put, FSIS has no authority to rewrite FOIA. It is irrelevant whether FSIS thinks it needs such a rule to validate its current information sharing practices or to remedy a defect in a Memorandum of Understanding with the Food and Drug Administration.²⁰ FSIS cannot establish sufficient justification for a rule that would contradict a clear statutory prohibition. Only Congress has the authority to amend FOIA, and FSIS cannot usurp this power under the cover of the administrative rulemaking process.

For many reasons, information protected by FOIA exemptions should not be shared with state agencies. Once such information is released to state agencies, FSIS would no longer control whether the information may be further disseminated to the public. State FOIA statutes would apply, with varying standards and levels of protection. The Proposed Rule attempts to address this by requiring state agencies receiving information to certify that they have authority to protect the information from public disclosure. This is not a sufficient protection, and it is certainly not the level of protection required by the federal FOIA. A multi-state recall could be subject to both federal and multiple state FOIA laws with no guarantees that information would be protected from inappropriate disclosure at the state level.

Moreover, once such information is released to state agencies, the state agencies would determine how that information should be managed, including determining the circumstances under which it could be disclosed. The Proposed Rule imposes no requirement on FSIS to monitor the use of information once it has been shared with another agency or to protect the information in case of a disclosure not in accordance with the federal FOIA. The Proposed Rule also does not require FSIS to update information previously provided with more accurate information, to recall information that is subsequently determined to be inaccurate or inappropriate, or to require the removal of outdated and inapplicable records and information. Under the Proposed Rule, FSIS

¹⁹ 65 FR 56503

²⁰ FSIS's existing information sharing practices may in fact violate or lead to violations of FOIA. For example, FSIS already grants other agencies access to extensive information to the extent FSIS believes it is necessary to effectively execute a recall. These cooperative activities between State and Federal agencies during a recall investigation could lead to sharing of information in violation of FOIA. Thus, the real issue is whether these cooperative information-sharing activities are permitted under FOIA. The U.S. Chamber is concerned that this Proposed Rule could be used to validate the FSIS's current practice of releasing exempted business information to the detriment of the business community and in violation of FOIA.

assumes no responsibility to ensure that the use of such information by a State agency is appropriate, or that the information remains up to date and accurate.

Finally, the Proposed Rule fails to comply with existing requirements to notify submitters when information subject to FOIA protections will be released. The Proposed Rule ignores Executive Order 12600, which requires an agency to notify the submitter of confidential commercial information upon the agency's intent to release that information under a FOIA request.²¹ Under Executive Order 12600, if the submitter objects to the release of the information, the agency must provide a written reason to the submitter explaining why the agency will disclose the information.²² The Proposed Rule makes no provision for such notice to a submitter when information is to be disclosed to a State agency. A Federal agency may propose a rule that does not provide for notice only if certain procedures are followed. Among other things, the rule must "specify narrow classes of records submitted to the agency that are to be released" under FOIA and must provide "in exceptional circumstances for notice when the submitter provides written justification ... that disclosure of the information could reasonably be expected to cause substantial competitive harm."²³ The Proposed Rule does not meet these requirements.

The United States has the safest food supply in the history of the world. Compliance with FSIS voluntary recall requests approaches 100 percent.²⁴ It is not clear how the Proposed Rule would measurably enhance food safety and public health. It is clear, however, that the Proposed Rule is a regulatory redrafting of FOIA. FSIS cannot usurp the legislative powers of Congress by issuing a rule that voids the significant protections to the business community for the submission of confidential information under FOIA. Disrupting the carefully designed checks and balances of FOIA would place the value of the information and the propriety of the regulatory system at risk, and would permit the very harm to business that the FOIA protections are designed to prevent. FSIS should not be permitted to substitute its will for the will of Congress in this way.

II. The Scope of Information Subject to the Rule and the Circumstances under which Information could be Shared under the Rule are Unclear.

The text of the rule and the accompanying background materials are confusing and fail to clearly identify the scope of information subject to information sharing under the Proposed Rule. Furthermore, the Proposed Rule does not adequately describe the

²¹ Exec. Ord. 12600 (June 23, 1987)

²² *Id.*

²³ Exec. Ord. 12600, section (d)

²⁴ FSIS Food Safety Focus - <http://www.fsis.usda.gov/OA/pubs/recallfocus.htm>

circumstances under which information can be shared. The text of the Proposed Rule is open to multiple interpretations, and the background section only adds to the confusion.

A. The Proposed Rule does not clearly and adequately identify the types and scope of information that may be shared.

The Proposed Rule would allow FSIS to share “confidential commercial information” with other agencies. The term is not statutorily defined and is not defined in the text of the rule. Arguably, the definition employed in Executive Order 12600 should apply.²⁵ However, in the background to the rule, FSIS attempts to define the term differently by reference to exemption 4 of FOIA.²⁶ But this definition is ambiguous and could be read either to include or exclude trade secrets. Further reading of the background materials to the rule only obscure the intended scope of information by employing undefined terms such as “proprietary (non-public) information and “proprietary information.” In short, it is impossible to determine what information would be subject to information sharing under the Proposed Rule.

B. Circumstances under which information can be shared are not adequately and clearly described.

The text of the rule is ambiguous and allows for two possible interpretations of the circumstances under which information could be shared. Under one interpretation, information could be shared by FSIS with federal and state agencies if the information was obtained as part of a recall. Under an alternative interpretation, information could be shared by FSIS with federal and state agencies if the sharing of the information is in connection with a recall. The structure of the opening paragraph of the text of the rule allows for either interpretation. These interpretations yield very different results. Under the first scenario, sensitive data from the Recall Plan, such as names and phone numbers

²⁵ For purposes of the Predisclosure Notification Procedures for Confidential Commercial Information, Executive Order 12600 Section 2(a), 3 CFR 235 (1988), defines “confidential commercial information” is defined as “records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.”

²⁶ “Therefore, FSIS is proposing to amend 9 CFR part 390 by adding a new section that will enable FSIS to share with other State agencies non-public information that is protected from mandatory public disclosure by exemption 4 of the FOIA (5 U.S.C. 552(b)(4)). Exemption 4 covers two broad categories of information in Federal agency records – trade secret information and information that is: (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential (“confidential commercial information”)” 65 FR 56504.

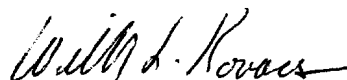
of company employees, could be released. However, all the information would ostensibly pertain to the situation at hand. In contrast, virtually any information about any aspect of a company or facility, including inspection data, distribution lists, or even past history of recalls, could be disclosed under the second scenario. While FSIS states in the background section that it intends disclosure of information to other agencies to be solely for the purpose of recalls, the text of the rule could be interpreted more broadly. FSIS should unambiguously state its intent in the background and the text of the rule should unambiguously reflect this intent.

Conclusions

The Proposed Rule is fundamentally flawed. FOIA does not permit FSIS to share information with state government offices, and FSIS does not have the authority to amend FOIA. Even if FSIS wants a rule to delineate the information it shares with other federal agencies and how its information sharing procedures comply with FOIA, that rule must meet certain minimum criteria: First, it must comply with Executive Order 12600 regarding prediscovery notification procedures. Businesses must have recourse to prevent the disclosure of business confidential information in violation of FOIA. Second, the rule must incorporate and preserve all FOIA exemptions. Third, FSIS must actually monitor all information distributed to ensure that such data remains accurate and current, and that such data is not improperly used or released. Fourth, any such rule must limit the sharing of information to those agencies that have a verifiable legal obligation to uphold the same level of protection of the information as is provided by the federal FOIA. Finally, the rule and accompanying background materials must be clear, consistent and understandable. The Proposed Rule fails on all of these counts and must be withdrawn.

The U.S. Chamber appreciates the opportunity to submit these comments and thanks FSIS for soliciting the opinion of the U.S. business community concerning this important issue.

Sincerely,



William L. Kovacs