



Advocacy Suggests Improvements to the USDA's Food and Nutrition Service's Proposed Rule on Taking Administrative Actions Pending FOIA Processing

On April 22, 2019, the Office of Advocacy sent a letter to the U.S. Department of Agriculture's Food and Nutrition Service (FNS) suggesting that the agency improve the factual basis underlying its certification of no significant impact on a substantial number of small entities contained in the Taking Administrative Actions Pending Freedom of Information Act (FOIA) Processing proposed rule.

- On February 19, 2019, the United States Department of Agriculture's Food and Nutrition Service (FNS) published in the Federal Register a proposed rule titled: Taking Administrative Actions Pending Freedom of Information Act (FOIA) Processing (84 Fed. R4739). FNS noted that it had the authority to prohibit firms from participating in the Supplemental Nutrition Assistance Program (SNAP) if it determines that the firm violated program rules. FNS contended that authorized firms delay agency administrative action through submission of Freedom of Information Act (FOIA) requests or appeals. The rulemaking seeks to ensure that retail food stores can no longer use the FOIA process to delay FNS' actions by proposing that FOIA requests and FOIA appeals be processed separately from administrative actions.
- Small food retail businesses contacted Advocacy complaining 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.
- Section 605 of the Regulatory Flexibility Act (RFA) provides that an agency may certify that a proposed regulation will not have a significant impact on a substantial number of small entities, but it must also provide a statement providing the factual basis for the certification.
- Advocacy commented that FNS' factual basis for the certification was insufficient as it lacked information on the rule's potential to impact small food retailers.
- For more information, contact Linwood Rayford at (202) 205-6533.