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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 278 and 279

RIN 0584-AD23

Food Stamp Program: Administrative Review Requirements—Food Retailers and Wholesalers

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This action revises Food Stamp Program regulations affecting the administrative review process available to retail and wholesale firms participating in the Food Stamp Program. It streamlines and makes technical corrections to this process by amending portions of current regulations. The changes eliminate repetitious, outdated and unnecessary provisions without taking away a firm's right to an administrative review.

DATES: Provisions in this rule are effective September 8, 2003.

FOR FURTHER INFORMATION CONTACT: Questions regarding this rulemaking should be addressed to Karen Walker, Chief, Retailer Management Branch, Benefit Redemption Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302. Questions may also be data-faxed to the attention of Ms. Walker at (703) 305-1863, or by e-mail to karen.walker@fns.usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be not significant by the Office of Management and Budget and therefore, was not reviewed by that agency under Executive Order 12866.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Executive Order 13132, Federalism

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments and consult with them as they develop and carry out those policy actions. The Food and Nutrition Service (FNS) has considered the impact of this rule that streamlines and makes technical changes to FNS' administrative review process available to retail food stores and wholesale concerns participating in the Food Stamp Program. This rule has no Federalism implications in that procedural changes set forth do not affect State and local governments. This rule does not impose any substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Eric M. Bost, Under Secretary for Food, Nutrition, and Consumer Services, has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. It eliminates repetitious, outdated and unnecessary provisions; aggrieved businesses will continue to have the right to administrative reviews under this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, this rule contains information collections that are subject to review and approval by the Office of Management and Budget (OMB). These information collections are approved under OMB number 0584-0520.

FNS published a proposed rule on November 25, 2002, which solicited comments. No comments directly related to this notice were received; however, comments related to the elimination of in-person meetings with administrative review staff were received and are addressed in the Background section of this rule.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" paragraph of the preamble of the final rule. In the Food Stamp Program, the administrative procedures for retailers and wholesalers are as follows: for Program retailers and wholesalers—administrative procedures are issued pursuant to section 14 of the FSA (7 U.S.C. 2023) and 7 CFR part 279.

Public Law 104-4

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Public Law No. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of \$100 million or more in any one year. Thus, this rule is not economically significant, nor subject

to the requirements of sections 202 and 205 of the UMRA.

Background

This rule revises Food Stamp Program regulations affecting the administrative review process for retail food stores and wholesale food concerns participating in the program. The revisions streamline administrative review rules by eliminating repetitive and unnecessary provisions and consolidating other provisions in 7 CFR parts 278 and 279. These revisions do not change the rights of aggrieved food retailers and wholesale food concerns to request and obtain an administrative review from FNS. This rule also makes technical corrections involving regulatory cites listed in § 278.1.

Only one trade association submitted comments; no other comments were received. One of their comments dealt with program compliance that is beyond the scope of this rule and another comment expressed support for most revisions in the rule as being “helpful changes that clarify the regulations and the program.” Their remaining comments relate to the elimination of in-person meetings between aggrieved retailers and administrative review staff.

The commenter questioned the “not significant” designation of the rule under Executive Order 12866 in the preamble of the proposed rule and questioned the legality of not submitting it to the Office of Management and Budget (OMB) for review. The Department submitted a workplan with a detailed outline of the proposed rule to OMB for review. OMB designated the proposed rule as “not significant” based on that information, which is standard procedure, and no further review of the proposed rule by them was required.

The commenter also questioned the Department’s determination under the Regulatory Flexibility Act in the preamble that the rule will not have a significant impact on a substantial number of small businesses. The commenter suggested that eliminating in-person meetings would result in “more small businesses being barred from the program.” As stated previously, administrative reviews are based on the facts of the case, not on in-person meetings, and eliminating them will not affect the outcome of reviews; therefore, the Department does not believe this rule will have a significant impact on a substantial number of small businesses.

Content of Request—7 CFR 279.6

Content of request for review: Current regulations at 7 CFR 279.6 include language regarding requests for in-

person meetings with administrative review officers. However, there are only three locations where such meetings occur and most firms that request such meetings must travel long distances to participate. The Department believes the travel cost disparity between those retailers located near review offices and those located a long distance away places many retailers at a disadvantage.

The commenter opposed the elimination of in-person meetings feeling it will disadvantage retailers who wish to explain their position in person. The Department makes administrative review determinations based on the documented facts of the case, and whether or not aggrieved retailers meet with review staff has no bearing on the outcome. Firms can and do talk with reviewers by phone as a follow-up to written documentation, but review staff base their determinations on the facts of the case, not on a meeting or phone conversation. Even though very few firms request in-person meetings, the Department believes that offering them gives the impression that stores not able to avail themselves of the meetings are disadvantaged. Therefore, the rule eliminates these meetings. Aggrieved retailers are still able to participate in conference calls with administrative review staff.

Implementation

Provisions of this rulemaking will be implemented 60 days after publication of the rule.

List of Subjects

7 CFR Part 278

Administrative practice and procedure, Banks, Banking, Claims, Food stamps, General line—wholesalers, Groceries, Groceries—retail, Penalties.

7 CFR Part 279

Administrative practice and procedure, Food stamps, General line—wholesalers, Groceries, Groceries—retail.

■ Accordingly, 7 CFR parts 278 and 279 are amended as follows:

■ 1. The authority citation for parts 278 and 279 continue to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

§ 278.1 [Amended]

■ 2. In § 278.1:

■ a. Paragraph (k)(1) is amended by removing the reference “(g) or (h)” and

adding in its place the reference “(g), (h) or (i)”;

■ b. Paragraph (k)(2) is amended by removing in the first sentence the words “the Food Stamp Act of 1977, as amended;” and adding in its place the words “paragraph (b)(1)(i) of this section;” and by removing the reference “(b)(1)(iv)” and adding in its place the reference “(b)(1)(vi)”;

■ c. Paragraph (l)(1)(ii) is amended by removing the reference “(g), or (h)” and adding in its place the reference “(g), (h) or (i)”;

■ d. Paragraph (l)(1)(iii) is amended by removing the words “the Food Stamp Act of 1977, as amended,” and adding in its place the words “paragraph (b)(1)(i) of this section;” and by removing the reference “(b)(1)(iv)” and adding in its place the reference “(b)(1)(vi)”.

■ e. The reference “§ 279.5” is removed in paragraph (l)(2) and the reference “part 279” is added in its place; and

■ f. The reference “§ 278.8” is removed in paragraph (p) and the reference “part 279” is added in its place.

§ 278.6 [Amended]

■ 3. In § 278.6, the reference “§ 279.5” is removed wherever it appears in paragraphs (b), (c) and (n), and the reference “part 279” is added in its place.

§ 278.7 [Amended]

■ 4. In § 278.7, the reference “§ 278.8” is removed in paragraph (f) and the reference “part 279” is added in its place.

§ 278.8 [Removed and Reserved]

■ 5. § 278.8 is removed and reserved.

PART 279—ADMINISTRATIVE AND JUDICIAL REVIEW—FOOD RETAILERS AND FOOD WHOLESALE

■ 6. In part 279:

■ a. The words “administrative review officer” are removed wherever they appear and the words “designated reviewer” are added in their place; and

■ b. The words “review officer” are removed wherever they appear and the words “designated reviewer” are added in their place.

■ 7. Subpart A is further amended by removing the word “—General” in the Subpart heading.

■ 8. Revise § 279.1 to read as follows:

§ 279.1 Jurisdiction and authority.

A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 of this chapter may, within a period stated in this Part, file a written request for review of the administrative action with FNS. On receipt of the request for

review, the questioned administrative action shall be stayed pending disposition of the request for review, except in the case of a permanent disqualification as specified in § 278.6(e)(1) of this chapter.

(a) *Jurisdiction.* Reviewers designated by the Secretary shall act for the Department on requests for review filed by food retailers or wholesale food concerns aggrieved by any of the following actions:

(1) Denial of an application or withdrawal of authorization to participate in the program under § 278.1 of this chapter;

(2) Disqualification under § 278.6 of this chapter, except that a disqualification for failure to pay a civil money penalty shall not be subject to administrative review and a disqualification imposed under § 278.6(e)(8) of this chapter shall not be subject to administrative or judicial review;

(3) Imposition of a fine under § 278.6 of this chapter;

(4) Denial of all or part of any claim asserted by a firm against FNS under § 278.7(c), (d), or (e) of this chapter;

(5) Assertion of a claim under § 278.7(a) of this chapter; or

(6) Forfeiture of part or all of a collateral bond under § 278.1 of this chapter, if the request for review is made by the authorized firm. FNS shall not accept requests for review made by a bonding company or agent.

(b) *Authority.* The determination of the designated reviewer shall be the final administrative determination of the Department, subject, however, to judicial review under section 14 of the Food Stamp Act and subpart B of this part.

§§ 279.2 through 279.4 [Removed]

■ 9. Remove §§ 279.2 through 279.4.

§§ 279.5 through 279.11 [Redesignated]

■ 10. Subpart B is further amended by redesignating §§ 279.5 through 279.9 as §§ 279.2 through 279.6, respectively.

§ 279.2 [Amended]

■ 11. Amend newly redesignated § 279.2 as follows:

■ a. The heading of paragraph (a) is amended by removing the word "Addressing" and adding in its place the word "Submitting".

■ b. Paragraph (a) is further amended by removing the words "Room 304".

■ c. Paragraph (c) introductory text is amended by removing the words "with the Director, Administrative Review Division,".

§ 279.3 [Amended]

■ 12. Remove the last two sentences of paragraph (b) in newly redesignated § 279.3.

■ 13. Amend newly redesignated § 279.4 as follows:

■ a. Paragraph (a) is amended by revising the first two sentences and by removing the last sentence;

■ b. Paragraph (c) is revised; and

■ c. Paragraph (d) is removed.

The revisions read as follows:

§ 279.4 Action upon receipt of a request for review.

(a) Upon receipt of a request for review of administrative action, the administrative action shall be held in abeyance until the designated reviewer has made a determination. However, permanent disqualifications for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2) of this chapter.

* * *

(c) *Extensions of time.* Upon timely written request to FNS by the firm requesting the review, FNS may grant extensions of time if, in FNS' discretion, additional time is required for the firm to fully present information in support of its position. However, no extension may be made in the time allowed for the filing of a request for review.

■ 14. Amend newly redesignated § 279.5 as follows:

■ a. The heading of paragraph (a) is amended by removing the word "officer",

■ b. Paragraph (b), (c) and (e) are revised; and

■ c. Paragraph (f) is removed and paragraph (g) is redesignated as paragraph (f).

The revisions read as follows:

§ 279.5 Determination of the designated reviewer.

* * *

(b) *Review of denial or withdrawal of authorization.* When the action under review is the denial of an application for authorization or the withdrawal of an existing authorization, the designated reviewer shall sustain the action under review; sustain the action under review, but specify a shorter period of time the action will remain in effect; or direct that the action under review be reversed.

(c) *Review of disqualification or civil money penalty or fine.* When the action under review is disqualifying a firm from program participation or assessing a civil money penalty or fine against a firm, the designated reviewer shall: Sustain the action under review; specify a shorter period of disqualification;

specify a reduced money penalty or fine; direct that an official warning letter be issued to the firm in lieu of a disqualification, civil money penalty or fine; or, direct that the action under review be reversed. The designated reviewer may change a disqualification of a firm to a civil money penalty if the disqualification would cause a hardship to participating households (except in the case of a permanent disqualification). The designated reviewer, working with the appropriate FNS office, shall determine if circumstances warrant a civil money penalty in accordance with § 278.6 of this chapter.

* * *

(e) *Determination notifications.* FNS shall notify the firm of the determination. Such notification will be sent to the representative of the firm who filed the request for review.

* * *

■ 15. In newly redesignated § 279.6, revise paragraph (a) to read as follows:

§ 279.6 Legal advice and extensions of time.

(a) *Advice from Office of the General Counsel.*

If any request for review involves any doubtful questions of law, the Benefit Redemption Division shall obtain the advice of the Department's Office of the General Counsel.

* * *

Subpart B [Removed]

■ 16. Subpart B is removed.

Subpart C [Redesignated as Subpart B]

■ 17. Subpart C is redesignated as Subpart B.

§§ 279.10 and 279.11 [Redesignated as §§ 279.7 and 279.8]

■ 18. Redesignate §§ 279.10 and 279.11 as §§ 279.7 and 279.8.

§ 279.7 [Amended]

■ 19. Amend newly redesignated § 279.7 as follows:

■ a. Paragraph (a) is amended by removing the reference "§ 279.8(e)" and adding in its place the reference "§ 279.5(e)".

■ b. Paragraph (b) is amended by removing the words the "officer or".

Dated: July 2, 2003.

Roberto Salazar,
Administrator, Food and Nutrition Service.
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