

August 31, 2000

Daniel Engeljohn, Ph.D.
Director, Regulations Development
And Analysis Division
U.S. Department of Agriculture
Food Safety and Inspection Service
Room 112, Cotton Annex
300 12th Street, S.W.
Washington, D.C. 20250-3700

Re: FSIS' final rule on a fee increase for egg products inspection for FY 2000 (9 CFR Part 590) and FSIS' proposed rule for increases in fees for meat, poultry and egg products inspection services FY 2001 (9 CFR Parts 391 and 590)

Dear Dr. Engeljohn:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in federal policy making activities. The Chief Counsel (1) participates in rulemakings when necessary to ensure proper representation of small business interests; (2) reports to Congress annually on federal agency compliance with the Regulatory Flexibility Act (RFA); and (3) works with federal agencies to ensure that their rulemakings reflect the results of an analysis of the impact that their decisions will have on small businesses.

FSIS' Fee Increase should be Phased In

On July 20, 2000, FSIS published a final rule issuing notice of a fee increase it will charge egg product plants for providing overtime and holiday inspection services. **SEE**, Federal Register Vol. 65, No. 140, pages 44948-50. Under the regulation, the rate for overtime inspections will increase from \$26.16 per hour per program employee to \$39.76 per hour per program employee. For holiday inspections the rate increase will be from \$17.44 per hour per program employee to \$39.76 per program employee. FSIS acknowledges that the rate increase is significant. FSIS does not dispute that the increased fees will cost egg producers an additional \$13,700 annually. Despite these admissions FSIS has refused to consider a phase-in approach so that firms can more easily cover the increased costs arguing that FSIS is statutorily obligated to recover the fees. FSIS admits that there has not been a change in the overtime and holiday fees for egg product inspection services since the transfer of program functions from AMS to FSIS in May 1995. It has taken FSIS five years to seek reimbursement for the "full cost of inspections." If this five year hiatus was legally permissible under the law, FSIS

clearly believes it has some discretion regarding implementation of the law. FSIS should not now rely on its statutory authority to justify recovery of fees thereby forcing egg producing firms to incur increased fees in an accelerated manner. If the five year hiatus was legal, surely a phase in approach can be justified particularly since safety is not an issue.

FSIS' Certification is Flawed – Cumulative Impacts were not Considered

The Administrator of FSIS determined that the increase in fees will not have a significant impact on a substantial number of small entities as defined by the RFA. Yet, FSIS determined that there are 73 egg products firms, and all but 5 would be classified as small on the basis of the Small Business Administration size definitions. FSIS argues that small egg producing plants will not be adversely affected by the fee increase because the increases represent only a small increase in the costs currently borne by small plants that elect to use overtime and holiday inspections. FSIS states that overtime and holiday services are predominately used by larger plants. FSIS also states that the increase in fees will not take effect until late in fiscal year 2000 so profitability for egg producers should be minimized.

The Office of Advocacy is concerned that the increased fees will likely have an adverse effect on egg producers profitability since FSIS has also published a proposed rule seeking to increase the fees for overtime and holiday inspection of meat, poultry and egg products for fiscal year 2001. **SEE**, Federal Register Vol. 65, No. 142, pages 45545-47. Again, the Administrator of FSIS has certified that the proposed rule will not have a significant economic impact on small entities. If implemented the proposed increase will become effective on October 8, 2000; essentially the same time frame within which affected egg producing firms will be required to pay increased fees for overtime and holiday inspection for fiscal year 2000.

Despite the Administrator's certifications, the rules individually, and severally, may have a significant impact on a substantial number of small businesses, especially if they are made effective simultaneously. FSIS uses the same arguments alleging minimal economic impact on small firms in the final rule for inspection of egg products as it cites in the proposed rule seeking an increase in fees for inspecting meat, poultry and egg products. Section 605(b) of the RFA requires agencies to state a factual basis for their certifications. The certifications provided by FSIS provide no information about the number of small entities that might be affected; nor does it fully or adequately explain why there will not be a significant economic impact associated with implementation of the rules. The assumption that the industry will simply pass on the costs to consumers and therefore will not face significant costs is not a forgone conclusion and therefore will not suffice as a factual basis for RFA purposes.

A more complete analysis could reveal that FSIS' certification might in fact be accurate. However, the agency has not provided a factual basis for its conclusions regarding the impact of the regulations. The Office of Advocacy recommends that FDA republish the final regulation and the proposed regulation with a factually based certification. An

improper certification is judicially reviewable under section 611(a)(1) of the RFA. An adversely affected or aggrieved small business might view an improper certification as an opportunity to sue the FSIS.

Thank you for your attention to this important matter. Please do not hesitate to contact our office if you have any questions, 202-205-6533.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

Linwood L. Rayford, III,
Asst. Chief Counsel for Advocacy

ENDNOTES: 1. Pub. L. No. 94-305 (codified as amended at 15 U.S.C. 634a-g, 637). 2. Regulatory Flexibility Act, 5 U.S.C. 601, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 866 (1996). The RFA requires federal agencies to assess and analyze the impact of their regulations on small entities and asks agencies to consider less burdensome alternatives that do not interfere with the agencies' policy or regulatory objectives. 3. 64 Fed. Reg. at 45,156, citing a report of the Institute of Medicine released on June 2, 1999.