



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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August 20, 1997

Honorable Samuel E. Hayes, Jr., Secretary
Department of Agriculture
211 Agriculture Building
2301 North Cameron Street
Harrisburg, PA 17110

Re: IRRC Regulation #2-107 (#1858)
Food Employee Certification

Dear Secretary Hayes:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #2-107. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact James M. Smith at 783-5439. He has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg

cc: LeRoy Corbin
Martha M. Melton
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF AGRICULTURE REGULATION NO. 2-107

FOOD EMPLOYE CERTIFICATION

AUGUST 20, 1997

We have reviewed this proposed regulation from the Department of Agriculture (Department) and submit for your consideration the following objections and recommendations. Subsections 5(d) and 5(e) of the Regulatory Review Act (71 P.S. §§ 745.5(d) and (e)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to protection of the public health, reasonableness, need, and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Commercially prepackaged food exemption: Clarity.

Consistent with statutory language, Section 76.1(d) provides exemptions for three types of food establishments. Section 76.1(d)(1) exempts a food establishment where only commercially prepackaged food is handled and sold. However, there is no distinction in Section 76.1(d)(1) as to whether the food is potentially hazardous or not. It is not clear if these provisions would exempt commercially prepackaged food which is potentially hazardous. The Department needs to clarify its interpretation on this point.

2. Definition of "Foodborne disease outbreak": Clarity.

The definition of "Foodborne disease outbreak" exempts a single case of illness. The Pennsylvania Restaurant Association (PRA) commented that this exemption is no longer valid under the new Centers for Disease Control definition reflected in the 1997 FDA Food Code. The Department needs to review this definition to assure it is consistent with the federal definition.

3. Certificates required in multiple: Clarity.

Section 76.3(a) lists the five industry-specific categories of food establishments. Section 76.3(b) requires a food establishment to employ at least one certified supervisory employe in that industry-specific category. The problem is that a single establishment may fall under more than one industry-specific category. For example, some grocery stores have a bakery and a counter that prepares and serves food. It is not clear whether the Department will require multiple supervisory certifications in this circumstance or just one supervisory certification. The

Department needs to clarify the requirements for food establishments that could qualify under more than one industry-specific category.

4. Certified supervisory employe: Clarity and protection of the public health.

Section 76.3(b) requires a food establishment to employ or designate a certified supervisory employe. It is not clear what authority this employe must have or when the employe must be present in order to implement safety measures. The certified supervisory employe will not be effective in protecting the public health if the employe is powerless to implement safety measures or is not on the premises enough to prevent or rectify safety deficiencies as they occur. In order to protect the public health, the Department needs to clarify what the minimum requirements and authority for the certified supervisory employe will be.

5. Record retention for one year: Reasonableness and need.

Sections 76.3(e)(2) and (6) require a food establishment to maintain records of employes for the past year. Since the food establishment has a maximum of three months to replace its previous certified supervisory employe, requiring maintenance of records for the past year may be excessive. We request that the Department review this provision to determine if record retention for a full year is needed.

6. Availability of records: Clarity and reasonableness.

Section 76.3(f) requires records to be available "during reasonable hours." The interpretation of the phrase "during reasonable hours" will vary widely. We recommend that the Department clarify when records are expected to be made available. One alternative would be to require the records to be available during the normal business hours of the food establishment.

7. Examination requirements: Reasonableness.

Sections 76.4 and 76.10 require a passing grade of 70% on examinations. The PRA is concerned that this requirement could exclude established certification examinations. Section 76.8 also requires an examination to have a minimum of 80 questions. The Department needs to review these requirements to assure that they will not inadvertently exclude examinations which would otherwise qualify.

8. Confidentiality of disclosing examinations and answers: Reasonableness, and protection of the public health.

Section 76.5(d)(4) requires that in order to get a certification program approved, a copy of the examination must be provided together with an answer key for the examination. The PRA raises a concern over the confidentiality of this information. We agree that this information needs to be kept confidential to protect the information from being disclosed to future examinees. The

Department needs to establish procedures to assure the confidentiality of the examinations and answers required by Section 76.5(d)(4).

9. Minimum hours of instruction: Clarity.

Section 76.5 provides guidelines for approval of certification programs. However, there is no requirement for minimum hours of instruction. This would be a core element for a certification program. The Department needs to specify the minimum hours of instruction that will be required.

10. Restrictions on format of tests: Need.

Section 76.8 restricts tests to multiple choice or true or false formats. We see no need to restrict the format. PRA noted other testing methods which would demonstrate the knowledge the Department is seeking. The Department should review the need to limit the format of examinations in Section 76.8.

11. Time period to report the results of an examination: Clarity.

Section 76.9 requires a person who proctors an examination to notify the examinee of their score within 20 days of the examination. It is not clear whether this is 20 calendar or business days. The Department needs to specify in the regulation if these are 20 business or calendar days.

12. Replacement of stolen, lost, or damaged certificates: Clarity.

Section 76.11 does not have any provisions for replacement of certificates which are stolen, lost or damaged. The Department should add a provision for replacement of certificates.

13. Reinstatement of a certificate after revocation or suspension: Clarity.

Section 76.15 provides for revocation or suspension of certificates, but does not provide guidance on how a certificate can be reinstated after a violation has been satisfactorily rectified. The Department needs to include a reinstatement provision in the regulations.

14. Other Clarity Recommendations

- a) Section 76.2 *Definitions* uses the qualifying phrase “unless the context clearly indicates otherwise.” In instances where the context would modify the meaning of a term, another term should be used. Unless the Department can identify a need for this phrase, we recommend deleting the phrase “unless the context clearly indicates otherwise.”
- b) The definition of “Temperature danger zone” in Section 76.2 does not show both degrees Celsius and Fahrenheit. Since degrees Celsius and Fahrenheit are both listed consistently

throughout the regulation, we recommend adding degrees Celsius to the definition of "Temperature danger zone."

- c) Sections 76.3(c) and (d) use the phrase "shall bring itself into compliance." For clarity we suggest replacing phrase "shall bring itself into compliance" with "shall comply."
- d) Section 76.3(c) requires compliance within 90 days. Section 76.3(d) is a similar provision that requires compliance within three months. For clarity, we recommend using either 90 days or three months consistently in both sections.
- e) Section 76.3(e) provides requirements for certification records. Paragraphs 1 through 6 lack clarity because they are poorly organized. For clarity, we suggest Section 76.3(e) be rewritten to simply require the establishment to keep a list of certified supervisory employees under its employment during the last year including: name, certification number, certification category, issuance date, expiration date, date employment began, and date employment terminated.
- f) Sections 76.5(d)(9), 76.11(a)(7), 76.12(b)(5), 76.13(c)(6) require "Other information the Department might reasonably require." The requirement for "other information the Department might require" makes it impossible, based upon the regulation, for the applicant to know what information is required upfront. The Department should specify the information required in these sections and delete the "other information the Department might reasonably require" requirement.
- g) Section 76.7(e)(1)(v) provides the definition of the acronym "HACCP." Since this acronym is also defined in the Definitions section, it is not necessary to restate the meaning in Section 76.7(e)(1)(v).
- h) Section 76.7(f)(2) uses the acronym "MSDS." We recommend adding a definition of "MSDS" to Section 76.2.