

Comments of the Independent Regulatory Review Commission



Department of Agriculture Regulation #2-174 (IRRC #2962)

Food Code; Food Employee Certification

October 10, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the August 11, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Agriculture (Department) to respond to all comments received from us or any other source.

1. Section 46.3 – Definitions. – Clarity.

Raw agricultural commodity

The proposed regulation defines this term as “food in its raw or natural state, including fruits which are washed, colored or otherwise treated in their unpeeled, natural form prior to marketing, **or as otherwise defined in Section 5722 of the Food Safety Act...**” (Emphasis added.) However, the definition of “raw agricultural commodity” in Section 5722 of the Food Safety Act is virtually identical to the definition in Section 46.3 of the proposed regulation. *See* 3 Pa.C.S.A. § 5722. The Department should either explain the reason why this phrase was included or delete it from the final-form regulation.

2. Section 46.212 – Food prepared in a private home. – Implementation procedures; Clarity.

Subsection (a)

This subsection establishes general requirements for food prepared in private homes that is used or offered for human consumption in a retail food facility. Subsection (a)(3) states that the organization that uses the food “informs” the consumer that the food was prepared in an unlicensed and uninspected private home. The Department should specify what kind of notice is necessary to properly inform consumers that the food was prepared in an unlicensed and uninspected private home.

Subsection (b)

This subsection pertains to private homes registered as food establishments under the Food Safety Act. A commentator suggests that Subsection (b) could be interpreted to require private homes to register as food establishments in order to donate food as authorized under Subsection (a). Based on discussions with Department staff, we understand this is not the Department's intent. Therefore, we recommend that the final-form regulation include language to clarify that Subsection (b) relates to foods prepared in private homes "except as otherwise permitted under Subsection (a)," or explain why such clarification is not necessary.

3. Section 46.1141. – License requirement. – Implementation procedures; Clarity.

This section establishes the license requirements necessary to operate as a retail food facility. Subsection (c) establishes the intervals for license expiration for various types of retail food facilities. We raise two issues.

First, Subsection (c) establishes licensing intervals of 24 months, 18 months, 12 months and 6 months based on whether the retail food facility engages in various risk-based factors identified in the Model Food Code. The Department should explain how it determined that each of these timeframes represent the appropriate license expiration date for a retail food facility that meets these criteria.

Second, Subsection (c)(1)(iii) provides that the intervals between license expirations can increase should a retail food facility demonstrate that it has achieved "active managerial control of foodborne illness risk factors . . ." The final-form regulation should clarify what the Department considers appropriate "historical documentation" to validate that a retail food facility has achieved this level of control. This term is also used in Subsections (c)(2)(iii), (c)(3)(iii), and (c)(4)(iii).

4. Section 76.20. – Definitions. – Clarity.

Chapter 76 pertains to food employee certification. Section 76.20 defines certain terms used in the chapter, including "Act," "Certificate," "Conference for Food Protection," "Department," and "Employee." This section states that these terms have the following meanings, "unless otherwise defined in Chapter 46." However, only "Department" and "Employee" are also defined in Section 46.3. In addition, "Department" is the only term defined differently in Section 46.3, as it includes a reference to the Model Food Code. As a result, it is unclear how these terms included in Section 76.20 would be "otherwise defined in Chapter 46." Therefore, we recommend that this phrase be deleted from the final-form regulation. In addition, to improve clarity, we also recommend that the definition for "Department" in Section 76.20 include the same language pertaining to the Model Food Code as that contained in Section 46.3.

5. Miscellaneous clarity.

Section 46.1144 (4) references a specific subpart of the Model Food Code. However, general references to the Model Food Code are used in the following sections of the proposed regulation:

- § 46.3
- § 46.1121 (b)(1)
- § 46.1122 (a)(1)(ii)
- § 46.1122 (a)(2)
- § 46.1141 (c)
- § 46.1141 (c)(iii)

We recommend that the final-form regulation include specific cross-references to the Model Food Code, or the Department should explain why such references are not appropriate.