

detaining food, with expedited procedures for instituting certain enforcement actions involving perishable food (i.e. take the proposed action)

In the proposed action, we establish a regulatory framework for administratively detaining food.

Costs

The primary costs of the proposed rule arise from differences between administrative detention and other enforcement actions with respect to the following: (1) Cost of transporting and storing food, if necessary; (2) cost of canceling previously scheduled transportation and storage of the affected food when we remove it from commerce, and rescheduling transportation and storage if we later cancel the detention order and release it back into commerce; (3) loss of product value over the detention period, if we later find the food is not violative; and (4) cost of participating in appeals hearings and other enforcement activity.

To analyze the costs of the proposed rule, we first estimate how many times we might use administrative detention. We then estimate the proportion of cases in which we might administratively detain food that we later determine to be not violative. We need to estimate this percentage because we estimate the loss of product value over the detention period for food that we later find to be not violative. (We do not estimate the loss of product value for violative food, because we assume that the violation, not our action, reduces the value of that food.) We then estimate how costs would change if we substituted an administrative detention action for other enforcement actions. We look at the change in costs relative to the baseline of taking these other actions because we probably would have taken some type of enforcement action if we had received the type of information that would allow us to use administrative detention. In other words, we analyze the cost of administrative detention actions in terms of the costs over and above those that would have been associated with the enforcement actions that we would otherwise have taken. We then multiply the changes in costs by the number of times we might substitute an administrative detention action for the other enforcement actions.

Estimate of number of times we might use administrative detention per year

We do not know how often we will receive credible evidence or information that an article of food presents a threat of serious adverse health consequences or death to humans or animals that would allow us to administratively

detain food. However, if we had received credible evidence or information that an article of food presented a threat of serious adverse health consequences or death to humans or animals before Congress granted us authority to take administrative detention actions, we would probably have taken one of the following three actions: (1) Requested a voluntary recall of the suspected product; (2) moved directly to seize the food; or (3) referred the matter to State authorities. We specify moving directly to seize food because we could also seize food after taking some other enforcement action, including administrative detentions. To avoid having to describe streams of enforcement actions, we have simplified the situation into two phases, a "preliminary phase," in which we take some action to detain the food in order to investigate it, and a "final phase" in which we take some final action such as seizing the food or referring the matter to State authorities.

We base our estimate on only these three actions because we believe the situations that lead to these types of actions are the most similar to the situations that may lead to administrative detention. Thus, we assume that any administrative detention would replace issuing class I recalls, moving directly to seizure, or referring the matter to State authorities for most cases involving purely intrastate commerce. If we instead assumed that we might substitute administrative detention actions for other types of enforcement actions, including other actions that we subsequently follow with seizure actions, then our estimate of the number of administrative detentions per year could be significantly larger. Examples of other types of enforcement actions include detentions without physical examination (DWPE) and requests to States to embargo food. We assume that the number of administrative detentions might include 0 to 100 percent of the number of class I recalls and instances in which we moved directly to seize food, and 0 to 10 percent of the number of times we referred matters to State authorities. In all cases, we based the low end of the range on the fact that we do not know if we would have used administrative detention, even if we had the authority to do so, and the criteria for using administrative detention had been met. Analyzing all the factors that would lead us to choose one enforcement action over another is beyond the scope of this analysis. We chose 100 percent as the high end of the range for class I recalls because the

criteria for class I recalls is quite similar to the criteria for administrative detention. We chose 100 percent as the high end of the range for instances in which we move directly to seize food as a practical expedient because the small number of actions implies that such information would have had little or no impact on our cost estimates. We chose 10 percent as the high end of the range for State referrals because our experience with those actions suggests that only about 10 percent of recent referrals involved concerns or situations that would have met the criteria for administrative detention. The other referrals do not appear to meet the criteria for administrative detention.

In fiscal year (FY) 2002, we initiated 184 class I recalls involving food that posed a risk of serious adverse health consequences or death to humans or animals. In the same year, we initiated 16 seizures that may have involved food products that posed hazards to human or animal health. In the last 12 months, we estimate that we referred 234 of such matters to State authorities.

These numbers are repeated in table 1 of this document. Based on this information, we estimate that we might administratively detain food 0 to 223 times per year.

TABLE 1.—SUBSTITUTIONS PER YEAR

Action	Estimated Number of Substitutions of Administrative Detention for Other Enforcement Actions per Year
Class I recalls	0 to 184
No preliminary action (move directly to seizure)	0 to 16
No preliminary action (refer matter to State authorities)	0 to 23
Total	0 to 223

Estimate of the proportion of cases in which the food subject to administrative detention turns out to be not violative

Some of the costs that we will discuss later are only relevant if we eventually determine that food that we have administratively detained is not violative. We do not know the proportion of cases in which we might administratively detain food that we later determine to be not violative. This rate depends on the type of information we receive, and the level of risk aversion we adopt when we apply the criteria allowing us to use