



May 17, 2016

VIA ELECTRONIC SUBMISSION

The Honorable Kevin W. Concannon
Under Secretary for Food, Nutrition, and Consumer Services
Food and Nutrition Service
United States Department of Agriculture
Jamie L. Whitten Building
1400 Independence Ave., RM-216-E
Washington, DC 20250

Re: Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP), 81 Fed. Reg. 8015, February 17, 2016.

Dear Mr. Concannon:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments in response to the Food and Nutrition Services' (FNS) proposed rule, "*Enhancing Retailers Standards in the Supplemental Nutrition Assistance Program (SNAP)*."¹ Advocacy was contacted by small convenience store operators and their food suppliers who believe the rule will have a significant economic impact on their businesses. This letter is meant to bring those small business concerns to the attention of the FNS. Also, Advocacy recommends that as it finalizes this rule, FNS improve its regulatory flexibility impact analysis and consider reasonable regulatory alternatives that will minimize the impact of the rule on affected small businesses.

I. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess

¹ 81 Fed. Reg. 8015 (February 17, 2016).

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires federal agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

II. Background

On February 17, 2016, FNS published a proposed rule titled: *Enhancing Retailers Standards in the Supplemental Nutrition Assistance Program (SNAP)*.⁶ FNS proposed to make changes to the SNAP regulations pertaining to the eligibility of SNAP retail food stores. The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act) by increasing the requirement that certain SNAP authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties.⁷ For certain SNAP authorized retail food stores the 2014 Farm Bill amended the Act by increasing from two to three the minimum number of categories in which perishable foods are required. This proposed rule serves to codify these mandatory legislative requirements.

Using its own existing authority, FNS published several additional changes in the proposed rule that will impact retailers seeking to be authorized retailers in the SNAP. The modifications address depth of stock requirements, and amend the definitions of "staple foods," "accessory foods" and "retail food store." The rulemaking also proposed that FNS begin disclosing to the public specific information about retailers who have violated SNAP rules.

Advocacy was approached by a number of small businesses and their representatives concerned about many requirements contained in this proposed regulation. They believe that if the rule is finalized it will impose a significant economic impact on their businesses. Advocacy heard from individual convenience store owners and their food suppliers. Many of these small businesses are represented by the National Association of Convenience Stores (NACS) which represents approximately 2,200 retail and 1,800 supplier company members, the majority of which are small businesses based on SBA size standards. NACS data indicates that in the United States there are more than 154,000 convenience stores. Of those, 63 percent are owned by single store operators. NACS statistics also show that 75 percent of the owners own 10 stores or less.

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ 81 Fed. Reg. 8015 (February 17, 2016).

⁷ Staple foods are defined as including meat, poultry, or fish; bread or cereal; vegetables or fruits; and dairy products.

Approximately 106,000 of the convenience stores participate in SNAP, according to NACS.

The stakeholders suggested that this regulation is squarely aimed at small businesses' ability to continue participating in the SNAP after the rule is finalized. They are critical of the rule's Regulatory Impact Analysis and Regulatory Flexibility Analysis. The small entities believe that because of the potential impacts associated with this regulation FNS has an obligation to conduct a thorough and transparent analysis of the burdens the rule will place on small businesses.

III. Advocacy encourages the FNS to improve its RFA analysis and consider reasonable alternatives in the final rule.

Section 603 of the RFA generally requires regulatory agencies to prepare an Initial Regulatory Flexibility Analysis (IRFA) to accompany every proposed rule unless it can provide a factual basis for a certification that the regulation will not have a significant impact on a substantial number of small entities. In summary, the IRFA must identify the number of small entities likely to be impacted by the rule, provide a description of the expected economic impacts including the projected reporting or recordkeeping requirements of the rule, and provide a description of any significant alternatives to the proposed rule which minimizes any significant economic impacts on small businesses.⁸

In the RFA section of this rule, FNS states that it was inclined to certify the rule because the "rulemaking does not present a significant economic impact to a substantial number of small businesses."⁹ However, out of an abundance of caution FNS performed an IRFA and asked the public to comment on its conclusions and assumptions. Advocacy believes that FNS wisely chose to perform the IRFA because after discussing provisions of this rule with affected small entities the accuracy and transparency of some of the assumptions and conclusions contained in the RFA analysis could be improved. Advocacy's comments on FNS' RFA analysis are outlined below:

A. The factual basis underlying FNS' certification is not clear and is subject to analytical uncertainty which lends support to the need for an improved IRFA.

FNS supports its conclusion that the regulation will not have a significant impact on small covered entities by concluding that while the number of SNAP stores "impacted is large, the agency estimates that the cost to those small businesses for stocking additional inventory would be nominal, on average about \$140."¹⁰ FNS estimates that there are a total of 258,632 retailers authorized to accept SNAP.¹¹ FNS projects that the proposed

⁸ 5 U.S.C. §603.

⁹ 81 Fed. Reg. 8019 (February 17, 2016).

¹⁰ *Id.*

¹¹ See FNS' Regulatory Impact Analysis: A Primer published as part of the docket in Supporting Documents available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PR%252BSR;D=FNS-20016-0018>.

rule will impact nearly 200,000 small grocery stores and convenience stores by requiring that they make changes to their inventory mandated by this regulation.¹² FNS estimates that of the 68,338 combination stores, 112,066 convenience stores (NAICS code 445120, standard of \$29.5 million)¹³ and 15,060 small grocery stores (NAICS code 445110, standard of \$32.5 million)¹⁴ certified to accept SNAP benefits in 2014, almost all of them (194,834 total stores, or 99.7 percent) would fall under the SBA size standard for gross sales.¹⁵ Importantly, FNS concluded that 88.6 percent of current SNAP authorized small stores would not immediately meet the inventory requirements mandated by the 2014 Farm Bill.¹⁶ As a result of the new regulatory requirements, FNS concluded that some stores will decide not to participate in the SNAP program, but the agency believes that the number will be small and that neighborhoods they serve will not be disproportionately affected.¹⁷

Advocacy suggests that the IRFA provides the public with little information on the characteristics, revenues and location of authorized SNAP retailers, especially as it relates to businesses that redeem SNAP benefits in the bottom 10th-30th percentile (as they make up the most likely stores that will cease participation in the program). This type of information is critical as it would support FNS assumptions on the regulatory costs to small retailers, the reasonableness of whether the number of small retailers that choose to leave the program will be small, and whether the removal of these businesses will impact underserved communities. It is reasonable to assume that the loss of these stores will have the greatest impact on the communities that they serve. Low-income areas have more than twice as many convenience stores and four times as many small grocery stores as high-income areas.¹⁸ While small retailers account for just below 10 percent of SNAP redemptions, they make up 60 percent of the total number of authorized retailers.¹⁹

FNS should do a better job of providing the public with information on the makeup and revenues of the small retailers covered by the regulation. This will improve the factual basis upon which FNS relies for its RFA certification.

B. FNS' conclusion that the rule's impact on small authorized SNAP retailers will amount to \$140 is underestimated.

¹² *Id.*

¹³ See FNS' Regulatory Flexibility Analysis published as part of the docket in Supporting Documents on www.regulations.gov.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ FNS analyzed data taken from the Authorized Store Checklist taken from a sample of 1,392 small stores to examine the average number of varieties that retailers may need to add in staple groups as well as the number of stocking units the average retailer may need to add in order to comply with the rule.

¹⁷ *Id.*

¹⁸ Society for Nutrition, Education and Behavior comments to FNS' Request for Information: Supplemental Nutrition Assistance Program (SNAP) Enhancing Retail Food Stores Eligibility. 78 Fed. Reg. 51136 (August 20, 2013).

¹⁹ *Id.*

FNS states that while “most small stores would be required to make changes to their inventory in order to comply with this rule, the cost to those small businesses for stocking additional inventory would be nominal, on average about \$140.”²⁰ This estimate, however, fails to consider a variety of costs associated with changes to inventory. First, it does not take into account the cost of the additional floor and shelf space required to store and display several additional stocking units of each newly required food variety. Importantly, using this extra space for new items means less space for storing and displaying products that are already selling well, meeting consumer demand, and producing profits. This clearly entails an economic tradeoff that should be properly accounted for in the cost analysis. Second, the requirement to display more varieties of food and a greater number of perishable items suggests that more refrigeration space will be necessary. While FNS estimates that only about 1.5% of stores would need to purchase an additional cold case at the cost of approximately \$750,²¹ that potential cost is not included in the overall cost analysis. FNS should modify its IRFA to include both the cost of a cold case for those who will likely need to purchase one, as well as increased energy fees and taxes for all impacted firms. Third, FNS should account for the cost of increased spoilage associated with stocking more perishable items and more items that are not necessarily demanded by consumers. Finally, FNS does not address costs associated with supply chain effects, such as renegotiating contracts with food suppliers and distributors. If certain small stores will require more frequent delivery due to an increase in perishable items or other stocking changes, those costs should also be included in FNS’ estimates.

FNS also states that it “knows of no reporting or recordkeeping requirements that would impact small entities.”²² While the rule may not include explicit reporting or recordkeeping requirements, small entities will still experience administrative burdens that are not included in FNS’ estimates. For example, the IRFA does not account for time and costs associated with rule familiarization or staff training. Even if these costs are nominal, they should still be described and accounted for. Second, although FNS briefly notes the possibility of obtaining a waiver of requirements “if access to certified SNAP retailers would be limited by the elimination of a small store,”²³ it does not describe in detail what the waiver process would entail. FNS should provide a thorough description of the process for obtaining a waiver, estimate the number of waivers it expects to receive, and fully account for all associated costs.

Based on our conversations with industry representatives, we believe that initial per store compliance costs could be close to \$600, and overall per entity costs could surpass the \$4,000 mark. These estimates do not even take into consideration some of the unaddressed items discussed above. Thus, FNS has likely underestimated the cost of this rule to small entities and should revise its estimates to more fully and accurately account for small business impacts.

²⁰ See FNS’ Regulatory Flexibility Analysis published as part of the docket in Supporting Documents on www.regulations.gov, page 2.

²¹ See *Id.* at 5.

²² See *Id.* at 2.

²³ See *Id.* at 10.

- C. While some requirements of the rule are statutorily mandated, FNS failed to entertain reasonable alternatives as required by the RFA.

Section 603(c) of the RFA requires that each IRFA shall contain a description of any significant alternatives to the proposed rule which minimize any significant economic impact on small entities. FNS' IRFA suggests that the agency appreciated comments filed in response to its 2013 Request for Information; however, its ability to entertain alternatives is limited by the mandates of the 2014 Farm Bill. FNS also intimates that it has the ability to waive the rule's requirement for a retailer if access to certified SNAP retailers would be limited by the elimination of a small store.²⁴

While the proposed rule does make changes to existing SNAP regulations as required by the 2014 Farm Bill, it also significantly modifies long-held definitions upon which industry relied when determining whether to seek authorization as a SNAP provider. Affected small businesses report that it is these definitional changes ("retail store," "accessory food," and "multi-ingredient food") that create most of the economic burdens associated with the rule. Advocacy suggests that FNS should improve its assessment of reasonable alternatives by analyzing how altering the definitions impact small SNAP retailers. Small businesses suggest that simply altering some of the proposed definitions would result in decreased impacts on the industry while still allowing FNS to meet its policy goals of improving SNAP beneficiaries' nutrition.

Advocacy also requests that FNS analyze whether granting increased compliance time for a percentage of small retailers, especially those operating in underserved and/or rural areas, would markedly decrease the impacts associated with this regulation.

- D. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires FNS to publish small business compliance guides in conjunction with the finalization of this rule.

After having spoken with affected stakeholders, it is clear that small businesses will require help complying with the requirements of this regulation. SBREFA requires that, "for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis under section 605(b) of title 5, United States Code, the agency shall publish one or more guides to assist small entities in complying with the rule and shall entitle such publications 'small entity compliance guides.'"²⁵ This recommendation was also made by the Michigan Department of Human Services in its comments to FNS' Request for Information.²⁶ FNS should commit to publishing small business compliance guides as this rule becomes finalized as it will help small businesses adapt to the new requirements.

²⁴ See FNS' Regulatory Flexibility Analysis published as part of the docket in Supporting Documents on www.regulations.gov.

²⁵ P.L. 104-121, March 29, 1996 (As Amended by P.L. 110-28, May 25, 2007), Title II §212(a)(1).

²⁶ Michigan Department of Human Services' comments to FNS' Request for Information: Supplemental Nutrition Assistance Program (SNAP) Enhancing Retail Food Stores Eligibility. 78 Fed. Reg. 51136 (August 20, 2013).

IV. The rule’s Regulatory Impact Analysis (RIA) could be improved as the costs and benefits are not transparent nor adequately explained.

Understanding that many provisions in this proposed rule are required by statute, FNS nonetheless failed to adequately describe the problems which the rule is intended to address or how the proposed changes will achieve the desired policy outcomes. The RIA also lacks analytic rigor, and does not sufficiently explain or quantify either costs or benefits.

A. The RIA lacks analytical rigor.

FNS’ RIA fails to define a baseline of analysis, which according to OMB’s Circular A-4 Primer, should represent “the agency’s best assessment of what the world would be like absent the action.”²⁷ This could include a discussion of the universe of current firms participating in SNAP, the current varieties of food and depth of stock offered, and the extent to which various categories of affected firms would or would not be in compliance with the proposal. A discussion of firms’ SNAP revenues, participation, and the current compliance burden would also be helpful. Without this initial assessment, it is impossible to accurately analyze costs, benefits, or alternatives.

FNS does not provide a timeline of analysis, likely because it incorrectly assumes that all costs will be one-time investments. We encourage FNS to clearly state the time horizon of analysis, and conduct a benefit-cost analysis that encompasses all costs and benefits that will accrue over that time period. This will allow SNAP participants and other stakeholders to understand and evaluate the long-term effects of this rule.

Data transparency is an important component of any RIA or IRFA. Unfortunately, FNS is neither transparent about the nature of the internal data on which it relies nor is it specific when describing the impacts it has deduced. The IRFA, for example, is based on data from FNS’ Authorized Store Checklist, which produced “a sample of 1,392 small stores.”²⁸ Beyond noting the size of the sample, however, few relevant details are provided. The analysis would be more transparent if FNS described when the data were collected, which firms were included in the sample, the extent to which the sample is representative of the broader population of impacted firms, and whether there are any other data issues that may influence the analysis. When discussing the anticipated impacts of various provisions, FNS frequently uses very broad and/or sweeping terms (such as “very few”, “most,” “minimal”) rather than providing specific numerical estimates. Moreover, FNS frequently argues that the rule’s provisions will have minimal or no impact on retailers, consumers, low income neighborhoods or the federal budget,

²⁷ See Office of Management and Budget, “Regulatory Impact Analysis: A Primer,” https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

²⁸ See FNS’ Regulatory Flexibility Analysis published as part of the docket in Supporting Documents on www.regulations.gov, page 3.

but rarely does it provide adequate evidence to support these claims. We encourage FNS to cite relevant data and to disclose any studies upon which the agency relied to justify its conclusions.

B. The RIA's discussion of the rule's benefits could be greatly improved.

The FNS does not adequately explain, much less quantify, the anticipated benefits of this regulation. While Advocacy understands that certain parts of the proposed rule are necessary to codify mandatory provisions of the 2014 Farm Bill, we encourage FNS to describe in more specific terms, and to quantify where feasible, the incremental benefits of this regulation. For example, in its accounting statement of benefits FNS states that the regulation will allow “FNS to effectively enforce the prohibition against the purchase of hot foods with SNAP benefits, better ensure that authorized firms offer nutritious foods and also better ensure that only those establishments that effectuate the purposes of SNAP are authorized.”²⁹ However, FNS does not explain the magnitude of any of the above-referenced problems or the extent to which the proposed rule will produce the desired benefits. The analysis could be improved if FNS provided a more extensive discussion of anticipated benefits and how each of the regulatory provisions relates to those benefits. Quantification would greatly improve the analysis to the extent that it is feasible.

C. The RIA's discussion of costs is lacking analysis, quantification and transparency.

FNS' analysis of costs is deficient with respect to both the RIA and the IRFA. With regards to the RIA, it appears that FNS failed to analyze costs. In Section II of the RIA (“Summary of Impacts”), FNS does not provide any numbers to quantify or monetize benefits, costs, transfers, or federal budget impacts. Instead, it simply provides a table of asterisks, apparently indicating that all relevant figures are less than \$1 million per year. Neither per-firm cost estimates, nor aggregate cost estimates, are provided for any provision of the rule. There is also no discussion of how any cost estimates (or the lack thereof) were deduced. FNS should conduct a cost analysis, explain its methodology and assumptions, and populate all relevant tables with the resulting numbers.

With respect to the IRFA, FNS should be more transparent about its methodology for developing its cost estimates. While IRFA Table 2 (“Wholesale Costs for Specific Food Items in Each Staple Food Group”) lists potential compositions of seven food varieties for each of the staple food groups, FNS does not indicate the source of the cost estimates, what year the estimates were obtained, whether costs would vary by region, or whether costs vary depending on purchase volume. This information would assist commenters in assessing the reasonableness of FNS' estimates and assumptions.

²⁹ See FNS' Regulatory Impact Analysis published as part of the docket in Supporting Documents on www.regulations.gov, page 3.

V. Small businesses are concerned with various requirements contained in the proposed rule and the associated costs.

The stakeholders that approached Advocacy voiced trepidation with many of the regulatory proposals contained in the rule and the associated costs. Advocacy wishes to bring those small business concerns to the attention of the FNS.

- A. Small businesses that approached Advocacy are concerned that the SNAP rule's requirements will adversely impact small retail businesses covered by the rule and low-income SNAP beneficiaries (especially in rural settings) that rely on the small retailers for their sustenance. They believe that because of the economic significance of the rule, FNS had an obligation to accurately assess the impacts of the rule under Executive Order 12866 and the RFA.³⁰ They suggested that the RIA and the IRFA published in the proposed rule were insufficient as they relied almost entirely on information obtained from FNS' analysis of data from the agency's Authorized Store Checklist, which was limited to a sample of 1,392 small stores.³¹ The representatives also criticize FNS' use of its Retailer Policy and Management Division's Store Tracking and Redemption System (STARS) database to justify the revision to the retail store definition. FNS draws conclusions from the database, but does not disclose the underlying data or provide a citation to where the database can be located for public review.
- B. The stakeholders note that their review of the rule suggests that FNS underestimated the costs of the rule for affected small entities, and failed to take into account costs that they will incur complying with the regulation (e.g. additional refrigeration, increased product spoilage, and increased display area caused by the increased stock requirements). For example, the FNS' stocking provision (not required under the 2014 Farm Bill) rule would require small retailers to display at least six (6) units of each of seven (7) food varieties in four (4) staple categories. This means that to qualify for the SNAP retailers must display a minimum of 168 FNS approved staple food items. Small businesses believe this requirement is onerous, and that alternatives exist that would minimize the economic impact of the provision.
- C. The small business representatives told Advocacy that the economic impacts of this proposed rule will fall squarely on the shoulders of small businesses and that many will have no alternative but to leave the SNAP. This regulation comes at a

³⁰ Executive Order 12866 provides that when a regulatory action is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, Local, or tribal governments or communities the agency must conduct a regulatory impact analysis. 58 Fed. Reg. 51735 (October 4, 1993).

³¹ See footnote 16 above.

time when retailers are also being asked to adapt to new Americans with Disability Act (ADA) and food safety regulations.

- D. The rule proposes that any entity with over 15 percent of its total food sales in items that are cooked or heated on-site before or after purchase would be ineligible to participate in the SNAP. NACS estimates that of the 154,195 of the total number of retailers currently participating in SNAP, 47,000 will be barred immediately because over 15 percent of their total food sales come from items that are cooked or heated on site. The provision requiring seven (7) single-ingredient items in each of four staple food categories would eliminate 91,624 stores based on their current stocking patterns, and 57,551 of these stores would be unable to participate in the program unless they augment their stock. The majority of these stores will be small businesses.
- E. Under the proposed rule multiple ingredient items (e.g. soups, stews or frozen dinners) would not count towards depth of stock requirements. Historically, if a retailer stocked chicken noodle soup with chicken as the main ingredient, the item could count towards one item in the meat, poultry, or fish staple food category. Under the new regulation this multi-ingredient item, and many other multi-ingredient items, would be totally excluded from depth of stock determinations. This severely limits a retailer's stocking and food offering options.
- F. As an alternative to the rule's requirements, small business representatives request that FNS restrict this regulation to the provisions required under the 2014 Farm Bill. They suggest that they were involved in the 2014 Farm Bill legislative process that increased the minimum number of perishable foods necessary to participate in SNAP from two to three. The representatives believe that the 2014 Farm Bill did not contemplate the definitional changes being pursued by FNS in this regulation. It is these definitional changes that cause the majority of the regulation's negative economic impacts. At a minimum, they suggest that FNS should entertain alternatives to the proposed retail store, accessory food and multi-ingredient definitions that will ameliorate those burdens.
- G. The proposed rule provides FNS with the ability to issue waivers from the requirements of this regulation if there are unforeseen problems with low-income access to food under the SNAP. Stakeholders believe that the existence of the waiver provisions contained in the rule is a benefit to both small retailers and SNAP beneficiaries. However, they have concerns that in this regulation, and in recent Congressional testimony, FNS has used the waiver process as a catch-all solution for any problems that might arise after this rule is finalized.

More importantly, stakeholders believe that FNS has not analyzed potential problems and costs associated with the waiver process. They told Advocacy that contrary to FNS' conclusion, they believe the 15 percent threshold for SNAP eligibility for total food sales in items that are cooked or heated on-site before or after purchase, and the multi-ingredient provisions will result in vast numbers of

small retailers exiting the program unless they can obtain a waiver. FNS did not provide estimations in the proposed rule on how many businesses might seek a waiver, the cost of seeking the waiver, and on how long it would take for a business to receive a waiver determination.

Conclusions and Recommendations

Advocacy urges the FNS to give full consideration to the above issues and recommendations. If you have any questions or require additional information please contact me or Assistant Chief Counsel Linwood L. Rayford, III at (202) 205-6533, or by email at linwood.rayford@sba.gov.

Sincerely,



The Honorable Darryl L. DePriest
Chief Counsel
Office of Advocacy
U.S. Small Business Administration



Linwood L. Rayford, III
Assistant Chief Counsel for Food, Drug and
Health Policy
Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Howard Shelanski
 Administrator
 Office of Information and Regulatory Affairs
 Office of Management and Budget