

FMI Comments
RIN 0584-AE27
May 18, 2016



May 18, 2016

Vicky Robinson,
Chief, Retailer Management and Issuance Branch
Retailer Policy and Management Division
Food and Nutrition Service
United States Department of Agriculture
3101 Park Center Drive
Alexandria, Virginia, 22302

Re: Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP); Proposed Rule; RIN 0584-AE27

Dear Ms. Robinson,

On February 17, 2016, the Food and Nutrition Service (FNS or the agency) published in the Federal Register a Proposed Rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP).”¹ The Proposed Rule would make changes to the Supplemental Nutrition Assistance Program regulations pertaining to the eligibility of SNAP retail food stores. The Food Marketing Institute (FMI) appreciates the opportunity to comment on this important matter and commends the USDA Food and Nutrition Service for its work on the Proposed Rule.

The Food Marketing Institute (FMI) proudly advocates on behalf of the food retail industry. FMI’s U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost \$770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org.

The supermarket industry, which FMI represents, is proud to be a private sector partner with federal and state governments in an effective, efficient way to reduce hunger and improve access to healthy food for our nation’s poor. FMI members provide innumerable goods and services under SNAP and the government relies heavily on retailers accepting SNAP benefits to provide

¹ 81 Fed. Reg. 8106 (Feb.17, 2016).

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food for low-income recipients across the country. FMI members are an integral part of SNAP-authorized retailers, without whom the program would not run as effectively. FMI and its members appreciate FNS' interest in strengthening the integrity of SNAP with regards to food retailers.

Background

The Agriculture Act of 2014 (2014 Farm Bill) contained a variety of retailer provisions aimed at ensuring integrity, efficiency and continued consumer reliability in SNAP. The Farm Bill amended the Food and Nutrition Act of 2008 (the Act) to increase 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. The 2014 Farm Bill also amended the Act to increase the minimum number of categories in which perishable foods are required from two to three for certain SNAP-authorized retail food stores. This Proposed Rule would codify these mandatory requirements.

The 2014 Farm Bill was the product of long negotiations and compromises among a large number of stakeholders. The depth of stock provisions in the law were one such compromise that FMI and our members supported in the bill. This final compromise would ensure that all SNAP retailers offer customers a greater selection of items to choose from while shopping. It also helped further ensure that SNAP retailers were invested in selling SNAP-eligible foods.

Concerns with Hot Food Sales Threshold

The Proposed Rule goes beyond the statutory requirements in a few areas that raise some conceptual concerns for FMI members. The rule proposes to require that at least 85 percent of an entity's total food sales must be from items that are not cooked or heated on the premises before or after purchase. While we agree that Congress did not intend for restaurants to be SNAP-authorized retailers, and grocers do not function as restaurants, setting this arbitrary standard now could prove problematic in the future. While none of our members currently believe that they would cross the fifteen percent threshold, many of our members are continuing to evolve their offerings to meet their customer demands for more ready-to-eat foods.

Furthermore, unilaterally setting this arbitrary threshold sets a problematic precedent for future regulatory changes by the Agency since it is an area that is outside the scope of the Farm Bill mandates. Additionally, FMI fears that retailers who continue to grow their prepared and hot food offerings will have to track and limit the percentage of sales to ensure they do not exceed the proposed fifteen percent threshold. FMI and our members agree that SNAP recipients are best served in the grocery store with a wide variety of eligible foods. However, we do not believe that a proposed threshold that could hinder a growing area of the supermarket business is the best answer. FMI is committed to working with FNS to find other solutions to address this important issue without limiting potential growth in the supermarket industry.

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Definition of Staple Foods

As noted above, the Proposed Rule goes beyond the mandates in the Farm Bill by proposing a change to the definition of staple foods. The Proposed Rule defines a staple food as those items intended for home preparation and consumption in each of the following four categories: meat, poultry, or fish; breads and cereals; vegetables or fruit; and dairy products. The definition of staple foods is significant because under the Proposed Rule SNAP-authorized retailers would need to have available on a continual basis at least seven varieties of items in each category. In the Proposed Rule, the agency also states that “accessory foods” such as condiments, coffee, tea, salt, sugar and spices are not to be counted under staple foods. The Proposed Rule further notes that “Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall not be counted in any staple food category.”

Examples include cold pizza, macaroni and cheese, multiple ingredient soup, sandwiches, TV dinners, and pot pies. FMI believes the proposed changes to the definition of staple foods is confusing and urges FNS to provide further clarification. FMI members believe the definition of commercially processed foods should be narrowed. Without further clarification, retailers will not have clear guidelines to comply with and will raise challenges with enforcement. FNS also states that “multiple ingredient foods” does not include items such as yogurt, cheeses and cereals, “... as the staple ingredient is clearly represented and easily recognized.” FNS acknowledges that making distinctions in the areas of multi-ingredient and accessory foods can be challenging and FNS plans to issue specific guidance. FMI appreciates FNS’ efforts to develop guidance and urges the agency to provide specific examples to help SNAP-authorized retailers understand their obligations.

FMI appreciates the Agency’s interest in ensuring that SNAP customers have a wide selection of staple foods from which to choose. FMI is a strong advocate for families to cook at home and notes that extensive research has been done on the benefits of family meals. The health and societal benefits of families cooking and eating together are clear and are the focus of FMI’s Family Meals Month, which we celebrate every September. This is an important goal for all families, including SNAP recipients. However, FMI is concerned that the proposed change to staple foods is subjective and will add to confusion. As previously stated, the Proposed Rule notes that “Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall not be counted in any staple food category.” The Proposed Rule continues by listing items it intends to exclude, such as multiple ingredient soups and TV dinners. While we continue to believe the core of our members will be able to meet this threshold, the precedence and confusion set by the proposed changes to the definition of staple foods raises concerns.

FMI believes the proposed subjective standard will lead to an incredible amount of confusion. As mentioned above, the Proposed Rule states that multiple ingredient soup would not be included and further notes that vegetable soup with pasta would not be eligible. However, if the soup

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does not contain pasta and only vegetables, based on the Proposed Rule, the vegetable soup would be considered a staple food. But what if the same vegetable soup was prepared in a beef stock? Would the soup then be a multiple ingredient item and not a staple food? Further, in the clarification document FNS states that yogurt would be a staple food. However, if there is fruit on the bottom or granola included, would FNS still consider the yogurt to be a staple item? Given the significant variety of items that are offered for sale in a grocery store in a number of ways, the number of questions that could arise under the proposed definition is troubling.

Additionally, FMI is concerned with the precedence of limiting staple foods that the Proposed Rule would set. The Agency intends to unilaterally narrow what qualifies as staple foods using subjective standards outside of Congressional direction. While we do not believe the current proposal will affect supermarkets' ability to participate, we are concerned about further subjective changes to staple foods, such as limiting production or growing methods.

FMI believes that if the agency moves forward with modifying the definition of staple foods, it should provide strong justification for the changes, clear guidelines and the factors a retailer can rely on in determining whether a particular item would qualify as a staple food. Similarly, we urge the agency to provide guidance on foods that would currently qualify as a staple food, but would be reclassified under a revised definition. Any changes to the definition of staple foods will require significant guidance and outreach, and FMI urges FNS to provide retailers ample time to both understand the changes and make any necessary adaptations to come into compliance with a final rule. FMI is concerned that like the proposed fifteen percent threshold, the definition of staple foods is incredibly subjective and unworkable, and we urge FNS to provide further guidance.

In addition to the above mentioned changes, the Proposed Rule would amend the definition of “accessory foods” to include items such as chips, dips, cookies, cakes, and pastries. FMI supports this change conceptually, but notes that retailers will need flexibility and considerable guidance from the agency on the revised definition. The agency categorizes “accessory foods” as snacks that are often consumed between meals and items that do not actually make up a meal. The challenge with this logic is that a product could be both a snack and used as a component of a full meal depending on diet, culture and preparation. For example, hummus which is made up of chickpeas, would presumably be characterized as a staple food. However, under the Proposed Rule, it is unclear if hummus would also be a snack or “accessory food” since hummus is often consumed as a dip or snack. However, hummus is frequently used in recipes to create a full meal. How does FNS intend to draw this distinction? FMI and our members seek clear guidance from the agency on the definition of “accessory foods.”

Definition of Variety

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The 2014 Farm Bill mandated an increase in the “minimum variety of foods in each food category from three to seven different varieties and requires perishables in three staple food categories instead of two.” While FMI supports this concept, we seek further guidance on how “variety” is interpreted. The agency is also requesting comments on whether it should consider food items from the same animal, in the case of meat, separately under a separate variety. FMI believes they should be counted separately. Different cuts from the same animal can vary widely in flavor, nutritional value, texture, manner of preparation and cost. The agency’s example of turkey is very helpful in demonstrating that meat from a single animal can vary widely. For example, ground turkey breast tastes very different than sliced turkey sandwich meat. The nutritional profile, preparation, and method of consumption are very different and therefore they should not be considered one variety, but distinct categories. A similar example is apples. One retailer may sell fresh apples and apple sauce. In both cases the retailer is selling apple products, but they are very different in character, preparation, and consumption and should constitute two varieties in their fruits and vegetable stock count. Additionally, merchants sell both frozen and fresh blueberries. FMI urges FNS to acknowledge the differences in varieties of similar products to ensure that individual, distinct food products are properly considered in the requirement to offer a minimum of seven varieties.

The 2014 Farm Bill mandated an increase in the “minimum variety of foods in each food category from three to seven different varieties and require perishables in three staple food categories instead of two.” While FMI supports this concept, we seek further guidance on how FNS intends to interpret the proposed actual unit stocking requirements. The Proposed Rule states that retailers must stock a minimum of six units of each variety. The clarification document gives some insight by stating that an item typically stocked in bunches, but can be separated by the consumer would be considered one item. For example, six actual bananas would fulfill the unit requirement for that variety. However, FMI seeks clarification on how this standard would apply to items such as carrots that are often sold in bunches but are occasionally sold individually. In that case, would three loose carrots and three bunches suffice to meet the six item minimum? Furthermore, if the retailer stocks both bagged and loose onions how would those items be counted? And adding to the above example, would FNS provide that a purple onion should be counted as a different variety than a yellow onion? Would they both be counted toward the six for that variety or would there need to be a minimum of six for each variety? FMI urges FNS to clarify what they mean by “variety” and stocking units in the Proposed Rule.

Public Disclosure of Stores Sanctioned or Removed from SNAP

Finally, in the rule, FNS proposes to disclose to the public information about retailers that have been disqualified or otherwise sanctioned for SNAP violations. FNS further states that they intend to release store name and address, the owner name(s) and information about the sanction itself. FMI and our members support holding routine SNAP violators accountable to maintain integrity of the program; however, the proposed disclosure raises significant concerns. First, FMI

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does not believe that the name of a store owner should be disclosed if the owner name identifies an individual in the store. FMI members believe that the owner name disclosure is unnecessary and could lead to mental and emotional harm to the owner or associate. Additionally, retailers often have specific internal disciplinary sanctions that are sufficient to deter and address SNAP violations. The agency is also proposing to release detailed store information once the administrative and judicial appeals process has been exhausted for disqualified or otherwise sanctioned SNAP retailers. While FMI opposes the proposed disclosure, we urge FNS to consider the due process considerations for disclosing information prior to giving an individual an opportunity for a hearing or appeals process.

FMI notes that there is a significant difference between a retailer who has been disqualified as opposed to a retailer who has been sanctioned. FNS should also consider and take into consideration the seriousness of the sanctions imposed and whether there have been multiple violations. Publicizing a store owner's private information for a first time sanction that may have resulted from an inadvertent violation is unreasonable and clearly extreme.

Furthermore, the rule does not provide for having the information removed at any time. A store that may have been disqualified may be sold to a new owner who does qualify for a SNAP license. If the new owner continues to operate the store under the old name or in the same location, a public disclosure that the store was removed from the program could create both customer confusion and unwarranted stigma for a legitimate operator. FNS should address how to have stores removed from a public list in circumstances like the one above.

While FMI opposes the proposed disclosure requirements, we look forward to working with the agency to find a more reasonable alternative to deter bad actors and uphold the integrity of the Supplemental Nutrition Assistance Program.

FMI thanks the Agency for its work on the Proposed Rule and appreciates the opportunity to submit comments. Ensuring access to a wide variety of healthy foods to our customers and SNAP recipients is a top priority for the supermarket industry.

We appreciate your consideration of these comments. Please do not hesitate to contact me at sbarens@fmi.org or (202) 220-0614 if you have any questions.

Sincerely,



Stephanie K. Barnes
Chief Regulatory Officer