



**THE VOICE OF FOOD RETAIL**

Feeding Families  Enriching Lives

April 23, 2013

Andrea Gold  
Director, Benefit Redemption Division  
Rm. 426, 3101 Park Center Drive  
Alexandria, Virginia 22302

**RE:** Proposed Rule Supplemental Nutrition Assistance Program: Suspension of SNAP Benefit Payments to Retailers; 78 Fed. Reg. 12245 (February 22, 2013).

**Docket: FNS--2012--0029**

Dear Ms. Gold;

On February 22, 2013 the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS) announced a proposed rule to suspend SNAP benefit payments to retailers suspected of flagrant violations. The Food Marketing Institute (FMI) and its members share the Agency's desire to eliminate fraud from the program and appreciate the opportunity to comment on the proposed rule. FMI looks forward to continuing to work with the Agency to find ways to eliminate waste, fraud and abuse from SNAP.

FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly \$650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members.

As the voice of the food retail industry, FMI is committed to ensuring that the industry's interests are considered when new rules and regulations are being promulgated. The proposed rule is directed specifically to the retailer, and in turn, we have some concerns with how the rule, if finalized, could impose significant burdens on retailers.

## **7 CFR Part 278--Participation of Retail Food Stores**

### *Suspension of payments:*

The proposed rule states that the Secretary may in consultation with the USDA Office of the Inspector General (OIG) "suspend the payment of redeemed SNAP benefits to a

suspected retail food store or wholesale food concern pending administrative action to disqualify the firm.” The proposed rule says it must be for “flagrant violations” and that to “maintain investigative integrity and security, an exact definition of ‘flagrant’ cannot be provided to the public.” FMI is concerned with the lack of a clear definition of what actions constitute flagrant violations. Absent a specific definition of “flagrant violation,” retailers could be subject, without notice, to arbitrary interpretations by the agency.

It is important that retailers have a clear understanding of how FNS defines “flagrant.” We ask that FNS consider including specific criteria, such as defining flagrant as repeated and intentional violations. If a retailer is suspected of a first time violation or may be unintentionally violating the rules, they should be given the opportunity to rectify the situation before being subject to such drastic repercussions.

Additionally, under the proposed rule, there is no requirement that the Agency inform a retailer of suspected improper activity prior to withholding payments. The lack of due process in the proposed rule is very concerning, especially in conjunction with the potential arbitrary interpretation of “flagrant.” Retailers should be properly notified of specific actions that they are suspected of engaging in before retaliatory action is taken by the Agency. Withholding reimbursements to a retailer, later determined to be innocent, could prove extremely damaging and possibly drive the retailer out of business. Withholding reimbursements should only be used in the more egregious cases; a lack of prior notice combined and no clear definition of “flagrant” leave too much discretion to the Agency staff.

FMI and its members are also concerned with the lack of specificity in the rule regarding suspension of payments to multiple store operators. If FNS suspects one location of “flagrant” violations, does it intend to suspend payments to that specific location or to the entire company? Suspending all SNAP reimbursement payments to retailers with multiple locations could prove incredibly and unfairly costly to a company that has multiple locations that are not suspected of wrong doing. FMI asks that in the final rule, FNS clarifies that the suspension of payments would be by location, not company-wide.

FMI appreciates FNS’ interest in how to best notify a retailer as to the reason why the payments have been suspended. However, we are concerned with the lack of a firm timeline in when to notify the retailer. The proposed rule states “FNS would issue a notice to the firm as soon as administratively possible to advise the firm as to the reason why the payments have been suspended.” While we have already voiced our concern with the lack of prior notice, a retailer should be notified at the time when payments are suspended. The language in the proposed rule is needlessly broad and leaves too much discretion to the Agency as to when to notify a retailer. In an effort to notify the retailer immediately, one possible method would be to issue notification by both email and certified mail. By using both methods, FNS could ensure that a retailer was both

notified as quickly as possible, and by requiring certified mail, ensuring that the retailer is in receipt of the notification.

Finally, with regards to suspension of payments, FMI and its member companies are greatly concerned with a retailer's lack of compensation if it is found innocent of these violations. The proposed rule states, "Outside of the value of the actual transactions themselves, no interest or credit (for benefits held in suspension or transactions estimated to have been subsequently lost due to the suspension) will be paid to the firm if it is ultimately determined that the firm is subject to a lesser penalty or no penalty." This lack of liability to the Agency is greatly concerning as a retailer could suffer extreme economic losses during the process of proving itself innocent and have no recourse. The immense power and discretion given the Agency in the proposed rule should be balanced with possible repercussions for improperly withholding funds of retailers found to be innocent.

*Business Integrity Provisions:*

FMI and its members appreciate FNS' interest in strengthening the integrity of SNAP with regards to retailers. While we are generally supportive of tightening of the requirements, there is concern with the practicality of complying with the proposed rule. The rule states, "In an effort to enhance ownership integrity, the Department is proposing in 7 CFR 278.1(i) and 7 CFR 276.1(1), to codify this ownership change reporting requirement and authorize FNS to withdraw the SNAP authorization of any firm that timely fails to report changes in ownership within the firm. For purposes of reporting changes in ownership, 'timely' would be defined as 10 business days after the occurrence of the change in ownership."

FMI is concerned that only allowing 10 business days to notify FNS of any changes to ownership before being subject to losing SNAP authorization is too tight of a timeframe. When corporate ownership changes, a company could inadvertently neglect to notify FNS of the change. In a case where a company unintentionally failed to notify the Agency of the change in ownership, it should be given the opportunity to rectify the situation without losing its SNAP authorization. A more workable solution would be for the Agency to give notice to a company of the problem and give it time to come into compliance before withdrawing SNAP authorization.

FMI fully understands FNS' interest in addressing unauthorized redemptions. However, we do have some concerns regarding the penalties being applied to the seller of a firm, particularly with regards to losing SNAP authorization in other locations owned or partially owned by the seller. The proposed rule states that it "would make the seller(s) permanently ineligible for SNAP participation due to lacking the business integrity to further the purposes of the Program. In addition, to not being able to be authorized in a new store, the seller(s) would also have the authorization of any other existing

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participating store in which they have a share of ownership permanently withdrawn.” This language is excessively broad, as one specific shareholder could permanently disqualify an otherwise innocent store and its other owners from being a SNAP authorized retailer. While FNS is correct in punishing the bad actor, it is potentially including otherwise innocent owners.

The rule also proposes allowing FNS to deny or withdraw authorization to any store owned by a firm that fails to pay any fine, claim or fiscal penalty assessed against it under Part 278 of the regulation. This proposal is extremely broad and could be excessively harmful to retailers. FNS should first be required to notify the retailer of the delinquent debt and give it adequate time to pay the fine before moving forward with removing authorization.

Finally, FMI and its members have concerns with the proposed rule’s criteria for establishing a “firm practice to violate the program” and removing the need for notifying the retailer. The proposed rule states, “FNS policy states that in instances involving sale of major items by two or more store clerks, firm practice is established if the firm has received prior warning. This proposed rule would clarify that prior warning is not needed to establish firm practice in instances when major ineligible items are sold by two or more clerks and that in such instances, a three year disqualification as prescribed by regulation, would apply.” Retailers should be given an opportunity to correct a situation before being disqualified for three years in these situations. The actions alone of two clerks should not be enough to establish firm practice.

FMI appreciates the opportunity to comment on this important matter. Our members share your commitment to ensure SNAP is run as efficiently as possible and without error. Thank you for your consideration, and we look forward to continue working with you on this and other opportunities to maintain the integrity and efficiency of SNAP.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Erik R. Lieberman  
Regulatory Counsel