



Testimony of

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On Behalf of the
Food Marketing Institute

Before the

House Agriculture Committee
Hearing on
The Past, Present, and Future of SNAP: The Retailer Perspective

May 12, 2016
Washington, D.C.

Good Morning Chairman Conaway, Ranking Member Peterson and Members of the Committee. My name is Kathy Hanna and I am the Senior Director Enterprise Payments at the Kroger Company based in Cincinnati, Ohio. I am also past Chair of the Food Marketing Institute Electronic Payments Systems Committee and have watched the evolution of the Supplemental Nutrition Assistance Program (SNAP) from paper coupons that were often traded in the store parking lot, to a patchwork regional system with differing administrative requirements, and then finally a nationwide electronic system that has significantly improved efficiencies and reduced the opportunity for fraud and error.

Kroger is the largest traditional grocer in the United States with nearly two dozen banners, all of which share the same belief in building strong local ties and brand loyalty with our customers. Every day, the Kroger Family of Companies makes a difference in the lives of eight and a half million customers and 431,000 associates who shop or serve in 2,778 retail food stores under a variety of local banner names in 35 states and the District of Columbia. At Kroger, we are interested in improving the health of all of our shoppers. More and more shoppers see the supermarket as a health or wellness destination. At Kroger, we currently have 2,231 pharmacies and operate 190 in store clinics. We employ dietitians and nutritionists to assist our shoppers in making healthy choices. Additionally, we employ chefs that hold cooking demonstrations, and provide recipe ideas for families shopping on a budget, or with specific dietary needs. These are benefits and services Kroger offers to all of our customers, regardless of how they are paying for their groceries.

In recent years, FNS has looked for new ways to incentivize healthier eating by SNAP customers and the Agency has been willing to grant waivers allowing grocers to directly incentivize SNAP shoppers. Kroger has recently partnered with AARP who received a Food Insecurity Nutrition Incentive grant from the USDA. This partnership allows us to incentivize SNAP customers to purchase more fresh fruits and vegetables in our stores. Creative incentives such as this are a win-win for the grocery industry and our customers.

We know our SNAP shoppers, like any shopper on a budget, is looking to maximize and stretch their spending power.

BENEFITS OF A NATIONWIDE, INTEROPERABLE EBT SYSTEM

I am honored to be here today to share Kroger's experience as a private partner with the government as the point of redemption for millions of SNAP recipients every month. When I first came to Kroger and worked in the stores, customers redeemed paper Food Stamp coupons torn out of books distributed monthly for food products in our stores. While Food Stamps provided a necessary benefit for Americans most in need, redeeming the stamps at the check-out was a very slow and tedious process subject to human error. The Personal Responsibility and

Work Opportunity Reconciliation Act of 1996 committed to improving the paper system by mandating that Food Stamp benefits move to an Electronic Benefits Transfer (EBT) system by October 1, 2002. The system was designed to mirror the commercially available debit card system and Congress required that all EBT cards require a Personal Identification Number, or PIN, in order to be used. A PIN ensures that the customer presenting the card is an authorized user, so if the card were lost or stolen, it would have no benefit to whoever has it. It also allows the transaction to run on commercial rails to be as efficient and inexpensive as possible.

Migrating to EBT was a huge undertaking that required cooperation among all of the various federal government and state government, retailer, and non-profit and stakeholders. Kroger and all grocers were committed to the move to EBT and invested heavily in its success as we knew it would bring efficiencies into SNAP, reduce our cost of accepting the benefits and reduce the human error rate and the fraud rate by allowing states to share redemption information. At the onset, the system was not nationwide or ubiquitous with alliances of states popping up in various regions of the country under names such as SAS, the Southern Alliance of States, the Northeast Alliance of States and freestanding programs like in my home state of Ohio. Electronic was good, but it was clear that a nationwide, interoperable system would be much better. Then-House Agriculture Nutrition Subcommittee Chair Bob Goodlatte introduced legislation to move us to the nationwide, interoperable system we have today. Today, we enjoy a SNAP redemption system in all of our stores that is ubiquitous, quick, inexpensive to accept and seamless amongst the states.

According to our partners at the Food Marketing Institute, about 9 percent of grocery sales industry-wide are SNAP. That number was higher directly following the severe economic downturn in 2008 and 2009. Even then, with a larger population shopping with SNAP EBT cards, we did not see a slowdown in checkout lines or an increased error rate. The efficiency, ubiquity, low error rate and ability to handle volume increases can all be directly contributed to the streamlined EBT system. These transactions only take a matter of seconds. At Kroger, our point of sale system is integrated to automatically prohibit SNAP benefits from being used to purchase non-allowable items, such as toilet paper or alcohol. This efficiency is further enhanced by the fact that the rules are uniform across the country, so we do not have to individually program EBT restrictions, requirements or allowances by state. Not only is this ubiquity essential on our programming side, it is key for our shoppers who rely on SNAP to have the same set of rules regardless of where they redeem their benefits.

Following major catastrophic events, such as Hurricane Katrina, we often seen a massive and temporary migration of people. In the Hurricane Katrina case, we saw families from Louisiana flee to Texas, Tennessee and Arkansas for significant periods of time. SNAP's transferability in those cases is essential. A family's SNAP benefits may be been issued in Louisiana but if they were temporarily staying with family in Arkansas, their SNAP benefits would work there

without any challenges. SNAP portability is not just for major catastrophe such as this. I live in Cincinnati, right on the Ohio, Kentucky border. Every day thousands of people travel between those two states to go to work or shop. A SNAP recipient may want to cross into Kentucky from Ohio to shop at a store that is running a sale, or is closer to their job. The ability to redeem benefits with the same rules in multiple states is a very important efficiency that we enjoy in SNAP and often wish for in other government benefit programs. For instance, in the Special Supplemental Nutrition Program for Women, Infants & Children, or WIC, mothers cannot use their benefits in other states. The food packages allowed in one state often differ greatly from a neighboring state, and many states are still using legacy paper checks, while others have moved to EBT. However, in WIC EBT, the technology amongst the states varies where some use the traditional “magnetic” technology and others use what is called a “smart card.” Because of these differences, WIC lacks the ubiquity that we enjoy in SNAP – and in turn is a very expensive transaction we run in the store and one of the most complicated.

While SNAP-EBT has been incredibly successful making SNAP more efficient, we are now starting to look to the future of EBT. SNAP EBT relies on almost fifty-year-old magnetic stripe technology. This legacy technology is currently being replaced here in the United States with “chip cards” in the credit and debit card markets. While current SNAP transactions are still more secure than a chip card without a PIN, we know that the days of magnetic-stripe cards are numbered. Eventually, point of sale readers will move away from magnetic stripe, and we should start thinking now about what the next generation of EBT should look like. The current chip card technology we are rolling out here in the United States is twenty-year-old technology – far from cutting edge. The 2014 Farm Bill directed FNS to pilot online SNAP, which is a great step toward looking at the future. However, we need to look beyond online, and whether there is a place for EBT as a mobile payment as more people have access to smart phones. Or are there other solutions that would best serve our SNAP clients and maintain the efficiencies and ubiquity of SNAP?

EXPANDING SNAP BENEFITS DAYS OF DISTRIBUTION TO MORE EVENLY ALLOCATE LABOR AND ENHANCE FRESH PRODUCT AVAILABILITY

One area where states vary widely is how many days a month they distribute benefits. If a state only distributes benefits one to three days a month, it can create several operational challenges for retailers. This was particularly evident during the upswing in participation in 2008 and 2009.

First, it is important to clarify a bit on SNAP recipient concentration. At the end of 2015, about fourteen percent of Americans were receiving SNAP benefits. However, that does not reflect fourteen percent of the shoppers in every store. As you know, poverty and food insecurity tends to be higher concentrated in some communities. We have many stores across the country that

have a very low SNAP population and we have others with SNAP penetrations significantly higher than 14%.

The grocery industry is a very high volume business; we sell millions of food items every day. Our shelves are constantly being restocked, and we work very hard to keep checkout lines short and moving quickly. Serving large populations of customers on one or two days each month raises significant challenges, from keeping our shelves stocked and checkout lines moving to scheduling associates.

We appreciated the Agriculture Committee including language in the 2014 Farm Bill encouraging states to spread days of benefit distribution throughout the month and we will continue to work with states that currently do not to expand the days of distribution. Another option to consider is staggering SNAP benefits twice a month rather than once. Currently, SNAP recipient benefits are loaded once a month.

I have attached a helpful chart that shows when each state currently distributes benefits to the end of my testimony.

RELATIONSHIP WITH FNS

As the private partner serving the SNAP customer, it is essential the grocers have a close working relationship with USDA's Food and Nutrition Service (FNS). This was incredibly essential as we migrated to EBT for weather and or other disruptions because each of our 3,600 stores was required to work directly with their state agency. Those important relationships continue today.

FNS has been a strong partner with the industry and is willing to consider our input during rulemaking and other activities. Currently, we are working with FNS implementing provisions from the 2014 Farm Bill. The Agency's proposed rule "Enhancing Retailer Standards in the Supplemental Nutrition Program (SNAP)" rule is open for public comment. The proposed rule codifies the Farm Bill language that increased the number and variety of staple foods a retailer must stock in order to be considered for a SNAP license. We worked with the Agriculture Committee as they drafted the language to find a workable compromise for all stakeholders. However, the proposed rule goes beyond that statutory direction and proposes to change both the definition of a "retail food store" and what qualifies as a "staple food." One unintended consequence of this could be eliminating the convenience store option. In addition to our supermarket locations, Kroger operates 784 convenience stores in the U.S. We strive to offer nutritious options for SNAP customers in those locations as well. In many communities, convenience stores are among the first and most frequently visited retail food option for customers.

Kroger has been a longtime SNAP retailer and believes that SNAP shoppers should have a wide variety of foods to choose from. We appreciate the Agency's interest in ensuring retailer integrity in the program. We hope to work with the Agency to ensure the proposed rule does not have any unintended consequences and will work to further the goal of ensuring that only legitimate food retailers are licenses to accept SNAP.

Another area we are focused on is state-contracted EBT processors. As part of the SNAP transaction, a State will contract with a processor to actually carry out that transaction. Unfortunately, fewer and fewer providers have contracted in that space, and we are now down to only two providers effectively splitting the state contracts between them. We need more competition in this space, with more than two processors bidding on these contracts. Last year, FNS released a request for information asking stakeholders for input on how to attract more players into the space. Attached to my testimony are the comments submitted by FMI.

In addition, more processor providers would help ensure EBT reliability. When an EBT processor experiences an outage and the system goes down, we often do not know about it in the store until multiple SNAP transactions are declined. These outages can cause major disruptions in our stores. In addition to understandably upset shoppers, we see our lanes slow down and unpaid for baskets of groceries left behind. All of this can be very costly for our stores, and disrupt all of our shoppers, not only SNAP shoppers. We believe that the more competition in the payment processor space, the higher the level of reliability we will see from processors.

On a similar note, we often rely on and work with FNS to keep us informed if a processor or a state is scheduling any kind of maintenance on their EBT systems that could cause disruptions in stores. Best practices dictate that any kind of maintenance, upgrade or change should happen at the slowest shopping times, such as on a Sunday at midnight. We rely on getting notices from FNS, the State or our processors when there is scheduled maintenance so we are prepared if there is a disruption. At times, vendors may schedule something during a busier time for us. We have worked with FNS to address these proposals and encourage them to move the maintenance to a more agreeable time.

CONCLUSION

Thank you again for inviting me here today. I hope my remarks have made it clear that Kroger is committed to serving all customers, including our customers who utilize SNAP. We are always looking for opportunities to improve our operations and our customers' shopping experience. SNAP EBT has been a great success, bringing efficiencies, ubiquity and reliability to a program that so many Americans rely on to feed their families. As Congress looks toward the next farm bill, we hope the Committee will consider these successes and efficiencies as they debate

changes to the program. We stand ready to work with the Committee to find additional improvements and future technology solutions to ensure we can meet all of our customers' needs.



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State-by-State Monthly SNAP Benefit Issuance Schedule

State	Day(s) of SNAP Benefit Distribution
Alabama	<p>Previously, when a person was accepted into the SNAP program they were issued a case number. From this case number an issuance date was determined. This date ranged from the 4th of the month to the 18th. The monthly issuance was transferred to the card on the first of the month, but not made available to the person until the issuance date. Any leftover balance carried on the card at the end of the month is rolled over to the following month.</p> <p>In August 2013, the state expanded their distribution dates, moving from the 4th to the 18th of the month to the 4th through the 23rd of the month. To assist in the transition, recipients received half of their benefit on their original date and half on their new date in the month of August to transition.</p>
Alaska**	The main SNAP issuance is all on the first day of the month. Smaller supplemental issuances for new applicants and late recertifications occur daily throughout the month.
Arizona	SNAP benefits are distributed over the first 13 days of the month by the first letter of the recipients' last name. For example: last names that begin with A or B are distributed on the first day of the month; 2 nd day of the month: C and D; etc. (Cash is distributed on the first day of the month for all.)
Arkansas	Arkansans receive their benefits on these eight days: 4th, 5th, 8th, 9th, 10th, 11th, 12th or 13th of each month, based on the last number of their social security number.
California	California is different in that each county distributes SNAP to those who qualify. The payments go out to all those who qualify between the 1-10 of the month. Others (i.e. new applicants) get paid throughout the month depending on when they were accepted.
Colorado	Food Stamp benefits are distributed on the first ten days of the month by the recipient's last digit of their social security number.
Connecticut	SNAP benefits and cash are distributed on the first three days of the month, by the first letter of the recipient's last name. (A-F are available on the first; G-N on the second and O-Z are distributed on the third day of the month.)
Delaware	Benefits are made available over 23 days, beginning with the 2nd day of every month, based on the first letter of the client's last name.
Florida	All SNAP recipients moved from a 15 day distribution to a 28 day distribution in April 2016. In March 2016, to assist in the new

	transition, benefits were “split.” Recipients received the first half of their benefits on their “old” date and received the second half of their monthly benefits on what will be their “new” date going forward. The ACCESS Florida system assigns benefit availability dates based on the case number recipients received when they became eligible for the SNAP program.
Georgia	In September 2012, SNAP benefits in Georgia expanded from the 5th to the 14th, and then finally to the current 5th to 23rd of each month, distributed every other day.
Hawaii	Benefits are made available on the 3rd and the 5th of every month, based on the first letter of the client’s last name.
Idaho**	Benefits are made available on the first day of every month. (Prior to August 2009, benefits were distributed on five consecutive days at the beginning of each month.) In 2014, H.B. 565 was enacted. The bill requires the state Department of Health and Welfare to issue SNAP benefits over the course of ten consecutive days within a month. Bonus money received from USDA will pay for the cost of the change. Starting July 1, 2016, benefits will be distributed over the first 10 days of each month based on the last number of the birth year of the recipient; for example, a birthday of 8/25/64 would receive benefits on the 4th day of each month. In depth communications to recipients and stakeholders began in April 2016.
Illinois	SNAP benefits are made available on these 12 days of the month: 1st, 3rd, 4th, 7th, 8th, 10th, 11th, 14th, 17th, 19th, 21st, and 23rd of every month, based on a combination of the type of case and the case name.
Indiana	On January 1, 2014, the state implemented an expanded schedule for the distribution of benefits during the fifth through the twenty-third day of each month, to be issued every-other-day, based on the first letter of the recipient’s last name. For example: A or B = benefits available on the 5 th ; first Letter of the Last Name is: C or D = benefits available on the 7 th . Previously, benefits were made available on the first ten calendar days each month. (TANF is issued on the first of the month.)
Iowa	Benefits are made available over the first 10 calendar days of every month, based on the first letter of the client’s last name.
Kansas	Benefits are made available over the first 10 calendar days of every month, based on the first letter of the client’s last name.
Kentucky	Benefits are made available over the first 19 calendar days of every month, based on the last digit of the client’s case number. This was recently expanded from the previous 10 day distribution.
Louisiana	Benefits are made available between the 1st and the 14th of every month, based on the last digit of the client’s SSN. (Elderly and disabled benefits are made available between the 1st and the 4th of every month.)
Maine	Benefits are available the 10th to the 14th of every month based on

	the last digit of the recipient's birthday.
Maryland	In January 2016, the distribution schedule was changed. Benefits are now distributed from the 4 th to the 27 th of every month, based on the first three letters of the client's last name. Previously, benefits were distributed from the 6 th through the 15 th of the month. This was accomplished through a five month phase-in.
Massachusetts	Distribution is based on the last digit of each recipient's social security number and distributed over the first 14 days of the month.
Michigan	In January 2011, SNAP moved from a seven day distribution to the current distribution, which is from the 3 rd to the 21 st , distributed every-other-day, based on the last digit of the head of household's recipient identification number. For example, clients' numbers ending with 0 will receive food benefits on the 3 rd of the month; numbers ending with 1, food benefits will be available on the 5 th of the month.
Minnesota	Benefits are staggered over 10 calendar days, beginning on the 4 th through the 13 th of every month, without regard to weekends or holidays, based on the last digit of the client's case number.
Mississippi	Benefits are made available from the 5 th to the 19 th (15 days) of every month, based on the last two digits of the client's case number. For example, 00-06 are available the 5 th , 07-13 are available the 6 th .
Missouri	Benefits are made available over the first 22 days of every month, based on the client's birth month and last name.
Montana	Benefits are distributed over five days by the last number of the recipient's case number, from the 2 nd to the 6 th of every month.
Nebraska	Nebraska distributes food stamp benefits to individuals during the first five calendar days of the month. The day of distribution is based on the last digit of the social security number.
Nevada**	In Nevada, food stamp benefits are issued on the first day of each month.
New Hampshire**	New Hampshire benefits are available on the 5 th of every month.
New Jersey	The monthly SNAP allotment is available over the first five days of the month. The day is based on the number in the 7 th position of their case number. Some of the cases still receive their benefits based on the assignment at the time the county was converted to EBT. In Warren County, all benefits are made available on the 1 st of the month.
New Mexico	Benefits are made available over 20 days every month, based on the last two digits of the SSN.
New York	The process is twofold as follows: in New York City, recipients receive their SNAP benefits within the first 13 business days of the month, according to the last digit of their case number, not including Sundays or holidays. The actual dates change from one month to the next, so NYC publishes a six-month schedule showing the exact availability dates. The remainder of New York State: recipients receive their benefits within the first 9 days of the month, also

	according to the last digit of their case number, including Sundays and holidays.
North Carolina	Effective July 2011, the state expanded its 10-day distribution schedule and are now available from the 3rd to the 21st of every month, based on the last digit of the primary cardholder's Social Security Number.
North Dakota**	Benefits are made available on the first day of every month.
Ohio	In April 2014, Ohio expanded its SNAP distribution from the first ten days of the month to the first 20 days of the month, staggered every two days. This only affected SNAP recipients who moved from one county to another; recipients who experienced a one-day or more break in eligibility was because of a failure to take a required action; and, all new recipients. Recipients who were on SNAP before April 2014 did not see a change.
Oklahoma	Benefits are made available from the 1st to the 10th of every month, based on the last digit of the client's SNAP case number.
Oregon	SNAP is distributed on the first nine days of the month as such: social security numbers ending with "0" or "1" distribute on the 1st day of the month, numbers ending with a "2" are distributed on the 2nd day of the month and so on.
Pennsylvania	Benefits are made available over the first 10 business days of every month based on the last digit of the client's case number.
Rhode Island**	Benefits are made available on the first day of every month.
South Carolina	In 2012, South Carolina expanded from a nine day to a 20 day issuance. Current recipients stayed within the nine day distribution, but all new recipients were given a date that expanded into the 20 days.
South Dakota**	Benefits are made available on the 10th day of every month.
Tennessee	In October 2012, Tennessee expanded distribution from 10 to 20 days.
Texas	Benefits are made available over the first 15 days of the month, based on the last digit of the client's SNAP case number.
Utah	Benefits are made available on the 5th, 11th, or 15th of every month, based on the first letter of the client's last name: A - G available on the 5th; H - O available on the 11th; P - Z available on the 15th.
Vermont**	Vermont benefits are available on the first of every month.
Virginia	Benefits are made available from the 1st to the 9th of every month, based on the last digits of the client's case number.
Washington	Benefits are staggered over the first 10 days of the month based on the last digit of the households' assistance unit number. Weekends and holidays do not affect the schedule.
West Virginia	Benefits are made available over the first nine days of every month, based on the first letter of the client's last name.
Wisconsin	Benefits are made available over the first 15 days of every month,

	based on the eighth digit of the client's SSN.
Wyoming	SNAP is distributed on the first four days of the month as such: last names beginning with "A" to "D" distribute on the first day; last names beginning with "E" to "K" on the 2nd day; "L" to "R" on the third and "S" to "Z" on the fourth.

Current as of May 2016; Food Marketing Institute

Notes:

- ▶ **States with asterisks are those that only distribute benefits on one day a month. There are eight that still do so, although Idaho will soon be expanding.
- ▶ There is no limit on the number of days for stagger. The only condition in regulation is that no single household's issuance should exceed 40 days *between* issuances.
- ▶ Currently, benefit recipients may only be issued their benefits one time a month, or within 40 days.



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The Honorable Audrey Rowe
Administrator
Food and Nutrition Service
Department of Agriculture
3101 Park Center Drive
Alexandria, VA 22302

September 8, 2014

Docket No: FNS-2014-0030; Federal Register 45175

**RE: Request for Information: Supplemental Nutrition Assistance Program (SNAP);
Retailer Transaction Data**

Dear Administrator Rowe:

On Monday, August 4, 2014, the United States Department of Agriculture (“USDA”), Food and Nutrition Service (“FNS”) published a Request for Information (“RFI”): Supplemental Nutrition Assistance Program (“SNAP” or “the Program”); Retailer Transaction Data in the Federal Register.¹ The RFI is being issued in response to a decision by the U.S. Court of Appeals for the Eighth Circuit², which held that annual SNAP retailer redemption data did not fall within the withholding exemption under the Freedom of Information Act (“FOIA”) and therefore must be disclosed unless it qualifies for another FOIA exception. FNS recognizes that despite the court’s decision the agency must also consider whether this redemption data constitutes confidential business information.

FMI appreciates the opportunity to comment on this important matter.

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.

¹ 79 Fed. Reg. 45175 (August 4, 2014).

² *Argus Leader Media v. U.S. Department of Agriculture*, 740 F.3d 1172 (8th Cir. 2014).

Background

Food retailers who participate in SNAP are required to submit annual applications, which are administered by FNS through its nationwide network of field offices. Any retailer that would like to accept SNAP benefits (EBT) must hold a valid permit and be licensed to participate in the Program. The submission of information is a mandatory pre-requisite for participation in SNAP. In 1978, FNS published a final rule affirming that the information furnished by food retailers was to remain confidential as required by section 9 (c) of the Food Stamp Act (“The Act”). On February 2011, *Argus Leader*, a South Dakota newspaper submitted a FOIA request for all SNAP authorized retailer redemption data from 2005-2010. Relying on the 1978 rule, FNS denied the FOIA request prompting *Argus Leader* to challenge FNS’ interpretation of the Act in a lawsuit. FNS’ position was initially upheld in the district court but was overturned by the Eighth Circuit on appeal. The Eighth Circuit held that the requested information did not fall within the withholding contemplated by Section 9 (c) of the Act and therefore the requested information was not exempt from disclosure under Exemption 3. The court did not address whether the information would be exempt from disclosure under another provision of FOIA, specifically whether SNAP redemption data would constitute confidential business information under Exemption 4.³

The SNAP Program is a Crucial Safety Net for Low-Income Participants

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. Serving 14% of the population, the SNAP program provides critical assistance to over 45 million people, almost half of whom are children.⁴ FMI members provide innumerable goods and services under SNAP and the government relies heavily on retailers accepting SNAP benefits to provide food for low-income recipients across the country. A large number of FMI members were SNAP-authorized retailers from 2005 through 2010 and continue to support the program. In fiscal year 2013, supermarkets and superstores redeemed a significant portion of all SNAP benefits.⁵ FNS reports that in 2013, almost \$76 billion in client benefits were redeemed in the 252,962 participating stores, farmers markets, and others authorized retailers who accept SNAP. FMI members are an integral part of SNAP-authorized retailers, without whom the program would not run as effectively.

SNAP Retailer Redemption Data should not be disclosed under FOIA Exemption 4

The Freedom of Information Act (FOIA) provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such are protected from public disclosure by one of the nine exemptions prescribed in the Act. Exemption 4 under FOIA protects two distinct categories of information in federal agency records: “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”⁶

³ 5 U.S.C. 552(b)(4).

⁴ “Putting Healthy Food Within Reach” USDA SNAP Report 2013.

⁵ *Id.*

⁶ 5 U.S.C. 552(b)(4).

In reviewing the legislative history of Exemption 4, it is clear that the objective is to prohibit the public disclosure of confidential business information that would damage or disrupt a particular company or industry. Exemption 4 serves two very important interests: that of the government in efficient operation and the protection for those persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.⁷ “The exemption affords protection to those submitters who are required to furnish financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.”⁸

There was vast discussion about the importance of protecting this type of information during the 1963 FOIA hearings. For example, during hearings on S. 1666,⁹ a representative from the treasury stated that “we can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.” A member of the subcommittee which conducted the hearings raised the issue again with respect to Small Business Administration loan applications: “I am thinking of a situation, for example, where the company couldn't qualify for funds, and they have exposed their predicament to the world and it might give competitors unfair advantage to know their weak condition at that time. I wonder if there might be some cases where it might be in the public interest if all the facts about a company were not made public.”¹⁰ In light of the context in which the exemption was drafted, it is clear that individual SNAP retailer redemption data is the precise type of highly sensitive sales and profit data the exemption seeks to protect.

SNAP Redemption Data is Commercial Information Obtained from a Person

If information relates to business or trade, courts have little difficulty in considering it "commercial or financial."¹¹ The Court of Appeals for the District of Columbia Circuit has firmly held that these terms should be given their "ordinary meanings" and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.¹² Individual SNAP redemption data constitutes commercial information because retailers have a commercial or financial interest in sales information which directly relates to their business.

⁷ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

⁸ See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (recognizing fundamental societal value of "protecting sensitive business information").

⁹ The text of this bill, as introduced, appears in Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 1-2 (1964) (hereafter, 1963 Hearings).

¹⁰ *Id.*

¹¹ See, e.g., *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating "to business decisions and practices regarding the sale of power, and the operation and maintenance" of generators (quoting agency declaration)).

¹² *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

For purposes of Exemption 4, the term “person” refers to individuals as well as to a wide range of entities, including corporations and state governments, who provide information to the government. Courts have further expanded the reach of Exemption 4 to explain that it is “sufficiently broad to encompass financial and commercial information concerning a third party” and protection is therefore available regardless of whether the information pertains directly to the commercial interests of the party that provided it -- as is typically the case -- or pertains to the commercial interests of another.¹³ Participating SNAP retailers clearly fall within the definition of a person, which includes individuals and corporations who provide confidential information to the government in applications and annual SNAP redemption data. Thus, whether or not individual store SNAP redemption data is submitted directly by a retailer or is done through third-party EBT transactions, retailers would still be considered a person for purposes of Exemption 4.

Individual Store SNAP Retail Redemption Data is Commercial Information

The second requirement under Exemption 4 requires the information submitted to be of a commercial nature. Under this prong, the person submitting the information to the government must show that they actually face competition. The food retail industry is a fiercely competitive market and supermarkets face meaningful day-to-day competition with their competitors who offer similar goods and services both within and outside certain geographical areas. Current profit margins in the industry are approximately one percent,¹⁴ on average, and individual retailers are constantly trying to establish methods for increasing volume and sales to remain competitive. Intense competition over the past two decades in the U.S. food marketing system has spurred innovations and cost efficiencies.¹⁵ Consumers have access to a wider range of products, services, and store formats that appeal to their preferences for convenience and quality.¹⁶ The food retail industry is changing and has seen a recent shift from the traditional grocery store to other food retail formats. “In response to an eroding market share, traditional grocers are expanding the number and types of product offerings, designing new store formats, and using innovative in-store technologies.”¹⁷ “Globalization has meant that domestic retailers face increasing competition from foreign retailers operating in the United States. As food companies strive to maintain market share in the domestic food economy, largely limited by population growth, consumers are the beneficiaries of this heightened competition through diverse product offerings, new and improved services, and competitive prices.”¹⁸

Individual Store SNAP Retail Redemption Data Constitutes Confidential Business Information

¹³ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

¹⁴ Food Retailing Industry Speaks, Food Marketing Institute, 2013

¹⁵ *Twenty Years of Competition Reshape the U.S. Food Marketing System*, Stephen Martinez and Philip Kaufman, United State Department of Agriculture, Economic Research Service, April 1, 2008.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The test for determining whether information is confidential has been adopted by the courts and is referred to as the *National Parks* test.¹⁹ Information is "confidential" under this prong if disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."²⁰ Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; rather, the evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown.²¹ As stated above, food retailers face significant competition with very slim margins. FMI believes that individual store SNAP redemption data constitutes confidential business information, which, if disclosed, would result in significant competitive harm to the food retail industry and should therefore be withheld under Exemption 4 of FOIA. Numerous types of competitive injury have been identified by the courts as properly cognizable under the competitive harm prong, including the harms generally caused by disclosure of: "(1) detailed financial information, such as a company's assets, liabilities, and net worth;²² (2) a company's actual costs, break-even calculations, profits and profit rates; (3) data describing a company's workforce that would reveal labor costs, profit margins, and competitive vulnerability;²³ (4) a company's selling prices, purchase activity and freight charges; and (5)²⁴ market share, type of product, and volume of sales."²⁵ These last two competitive harms would clearly result from the required disclosure of store level SNAP redemption data.

The disclosure of individual store SNAP redemption data is proprietary information that could be used by supermarkets to analyze a competitor's current vulnerabilities, market share for SNAP participants and volume of sales that would result in significant harm to the competitive position of participating retailers. Disclosure would provide companies with valuable insights into the operational strengths and weaknesses of their competitors resulting in selective pricing, market concentration, expansion plans and possible take-over bids facilitated by knowledge of the financial information sought. Suppliers, contractors, labor unions and creditors too could use such information to bargain for higher prices, wages or interest rates, while the competitor's or suppliers unregulated information would not be similarly exposed.²⁶

FMI notes that the information sought by the *Argus Leader* is not of the type that is disclosed through any other required public filings. For example, public companies are only required to disclose total sales figures for the entire company, not store level information. 10Ks and other financial filings do not disclose individual store sales, traffic numbers or store transactional information. Further, independent and non-public food retailers do not have to disclose overall

¹⁹ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

²⁰ *Id.*

²¹ *See generally Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

²² *See, e.g., Nat'l Parks*, 547 F.2d at 684.

²³ *See, e.g., Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D.Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976).

²⁴ *Lion Raisins*, 354 F.3d at 1081.

²⁵ Department of Justice Guide to the Freedom of Information Act (2008).

²⁶ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

or individual store sales at all. Disclosing SNAP redemption data for a non-public company would result in a significant departure from current practice and would provide competitors access to valuable, confidential sales data giving competitors a direct avenue into a private retailer's earnings. FMI members are similarly concerned that if the type of proprietary information sought is disclosed for a public company immediately prior to a quarterly filing with the SEC, investors and the public alike will use the valuable information to predict a company's earnings resulting in market changes and fluctuation in stock price.

Additionally, if individual SNAP data is disclosed, retailers will have prized information on redemption data geographically that could prompt and inform a competitor's expansion strategy into new markets with a large number of SNAP recipients. For example, if a retailer discovers that their competitor redeems 60% of the total SNAP benefits in a particular area they could develop targeted marketing and business strategies to increase market share and convert current SNAP recipients. Further, our members are concerned that disclosure of individual store SNAP redemption data could have a chilling effect on participation in the program by those most in need. In fact, some retailers indicate that the competitive harm caused by disclosure would lead to their departure from SNAP entirely. A large number of withdrawing SNAP retailers will ultimately result in diminished access for SNAP recipients and consolidation of participating stores.

The Disclosure of Individual Retailer SNAP Redemption Data would be Duplicative and Impose Unnecessary Costs in Government Administration of the Program with little Corresponding Benefit to the Public

FMI urges FNS to consider the important role our members play in providing essential nutrition benefits to low-income populations. Public disclosure of individual retail SNAP redemption information would result in significant competitive harm to FMI members. It would create challenging and unnecessary burdens in administration of the program and a potential reduction in the number of recipients and participating retailers while providing no additional savings or value to the program.

FMI does not believe that disclosure of redemption data at the individual store level would improve the administration or enforcement of SNAP requirements. In the Act, Congress specifically limits disclosure of information received from applicants and participating SNAP retailers. USDA already publishes a State-by-State breakdown on the amount of benefits and percentage of authorized firms under SNAP. Additionally, existing USDA data breaks down reimbursement data by retailer type on an annual basis. There are 25 firm types, with classifications differentiated by sales volume, ratio of food sales, or whether firms specialize in one staple food group. Reporting and disclosing store level data on a monthly basis would

significantly burden the administration of SNAP and would be an unfortunate use of such limited resources in administration and enforcement of the program.

Disclosure would create an unprecedented and unreasonable public information request in violation of long standing practices and criteria under FOIA that is certain to influence FOIA requests for years to come. FMI SNAP retailers are already required to meet stringent and comprehensive standards set by USDA to become authorized and therefore eligible to participate in the Program. Qualification is rigorous and requires significant documentation that includes verification of tax returns and tax filings. Tax filings and individual sales data information by definition are: "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;" as expressly exempted from public request at FOIA.²⁷ We respectfully submit that the USDA's current policy of protecting the confidentiality of proprietary retailer financial information be maintained and, if needed, strengthened to clarify its policy in light of the *Argus Leader* litigation.

Similarly, FMI believes that Congress did not intend for SNAP redemption data to be public information under Section 9(c) of the Act. FMI agrees with FNS' interpretation and final rule codifying the interpretation that Section 9 (c) prohibits the use or disclosure of "information furnished by firms,... including their redemption of coupons... except for purposes directly connected with the administration and enforcement of the Food Stamp Act and it's corresponding regulations."²⁸

Should Aggregated Annual SNAP Redemption Data at the Individual Store Level be Released for Transparency Purposes?

Transparency and public accountability are of the utmost importance for retailers and our customers. FMI members are responding by providing with increased access to information on food, nutrition and the products that they carry – one example being the industry's voluntary Facts Up Front initiative to provide key information via icons on the front of packaging. Transparency that improves the efficiency of the program or the availability of important attributes of a product like nutrients or allergens may have value to customers and taxpayers. However, FMI does not see how disclosure of individual store SNAP redemption data will result in greater transparency in SNAP administration or greater value to customers, agencies or retailers. As stated above, the disclosure of the information sought will result in greater costs and challenges for administering states without a corresponding benefit to the public. SNAP redemption data is already publically available by retail sector, state and locality and the competitive harm that would result from disclosure strongly outweighs the potential for minimal benefit to the petitioner for use in a published story.

²⁷ 5 U.S.C. 552 (b)(4).

²⁸ 79 Fed. Reg. 45175.

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FMI appreciates the opportunity to comment on this important matter. Please do not hesitate to contact me at sbarnes@fmi.org or (202) 220-0614 if you have any questions.

Sincerely,

Stephanie Barnes

Regulatory Counsel