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The Honorable Kevin Concannon
Under Secretary
Food, Nutrition, and Consumer Services
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

**RE: Supplemental Nutrition Assistance Program Photo Electronic Benefit Transfer Card
Implementation Requirements, RIN 0584-AE45**

Dear Undersecretary Concannon,

On behalf of my clients, the National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”), I appreciate this opportunity to provide comments on the Food and Nutrition Service’s (“FNS” or the “Agency”) proposed rule regarding photo Electronic Benefit Transfer (“EBT”) requirements under the Supplemental Nutrition Assistance Program (“SNAP” or the “Program”).¹ NACS and SIGMA support FNS’ efforts, via this proposed rule, to ensure that state photo EBT requirements do not hinder access to the SNAP program.

NACS is an international trade association with more than 2,200 retail and 1,800 supplier companies as members. The U.S. convenience store industry, with approximately 153,000 stores across the United States, posted \$696 billion in total sales in 2014—representing approximately 2.5 percent of United States GDP. Despite the fact that one in every 25 dollars spent in the American economy is spent in our members’ channel of trade, we are an industry of small businesses. Approximately 63.0% of all NACS members are single-store operators.

SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel that sell more than 50 percent of motor fuel sold in the United States. Most SIGMA members are involved in gasoline and convenience retailing.

NACS and SIGMA members (hereafter referred to collectively as “members”) are important and essential participants in SNAP. These retailers provide low-income Americans with convenient locations to purchase a wide variety of food and beverage items that Congress has determined may be purchased with SNAP benefits. Many times, members’ locations may be the only establishments that are easily

¹ U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program Photo Electronic Benefit Transfer Card Implementation Requirements (RIN 0584-AE45), 81 Fed. Reg. 398 (Jan. 6, 2016).

accessible for SNAP beneficiaries or the only food retailers with expanded hours of operation that remain open for business after a late work-shift ends. Our retailers process over 160 million transactions per day, including many SNAP transactions.

The goals of this proposed rule—to ensure that state photo EBT requirements do not hinder access to the SNAP program—are commendable and important. Those goals can only be achieved, however, if photo EBT requirements do not create confusion, hinder the ability of retailers to participate in the Program, or place unnecessary hurdles in the way of beneficiaries who want to use their benefits. As described in more detail below, NACS and SIGMA support many provisions in the proposal and wish to emphasize that retailer education is key to the successful operation of SNAP. The remainder of this letter discusses NACS’ and SIGMA’s thoughts on specific portions of the proposed rule.

I. Comments on the Proposed Rule

Convenience stores and other small neighborhood retail outlets play an essential role in the Program, particularly in rural and urban communities that often have few, if any, other local options for purchasing food. Convenience stores are a fundamental access point in the Program and are critical to ensuring that those entitled to SNAP benefits can properly access nutrition.

A. To Avoid Creating SNAP Access Barriers, Any State Implementing a Photo EBT Card Must Conduct Sufficient Retailer Education and Outreach.

Members doing business in states which have experimented with photo EBT cards requirements have experienced firsthand the confusion these requirements cause retailers and have witnessed the access hardships these rules can impose on SNAP beneficiaries. In fact, FNS is correct when it notes that photo EBT card requirements “have had major implementation issues, raising concerns about program access, and leading to confusion in the retailer community.”² These issues include “complex legal, operational, and civil rights issues” that, when not properly developed and implemented, harm the very people who are supposed to benefit from the Program. As such, NACS and SIGMA support FNS’ goal to “more explicitly define participant protections that must be maintained as well as implementation requirements if the State agency elects to implement a photo EBT card.”³

NACS and SIGMA support the proposed regulatory changes that would require state agencies to “conduct sufficient education of retailers” when photo EBT cards are required.⁴ States would be required to “clearly inform all retailers in the State and contiguous areas of implementation” regarding the SNAP requirements. In particular, states would be required to notify retailers that any authorized beneficiary is “entitled to use the EBT card” —regardless of whether or not that person’s photo is pictured on the EBT card—provided those individuals enter the valid Personal Identification Number (“PIN”).⁵ Significantly, states would be required to communicate to retailers that “EBT cards from any

² 81 Fed. Reg. at 399.

³ 81 Fed. Reg. at 398.

⁴ 81 Fed. Reg. at 401, 408.

⁵ 81 Fed. Reg. at 408.

State are valid with or without a photo.” Given the variation found across state EBT requirements, these provisions are critically important since a single retail store often serves customers from different states.

In addition to the required outreach under the proposed rule, NACS and SIGMA suggest FNS further delineate the manner and frequency of outreach required by the implementing state. While members train their store clerks regarding SNAP policies, as FNS noted, past experience with photo EBT transition has been confusing for all involved, especially when a clerk may be processing a card from a state that is not where the store is located. As such, FNS should ensure that state retailer outreach programs are robust and timely, so SNAP participants are not disadvantaged during the transition to (and after implementation of) the use of photo EBT cards. For example, states should be required to communicate directly with retailers on a quarterly basis and ensure that all state SNAP guidance documents are up-to-date on the state agency website. In addition, any time a guidance document is updated or a state implements a change relating to SNAP photo EBT requirements, it should be required to communicate directly with retailers in writing and via electronic mail if the state has a retailer’s email on file. Included in the notification, states should provide retailers with a toll-free telephone number where retailers can call to ask questions about the rules.

Further, in any given year, it is not uncommon for retailers to open new locations in different states or to apply for a particular store to become a SNAP authorized retailer for the first time—yet these events may not coincide with a state’s initial implementation of an EBT photo requirement. Thus, in its final rule, FNS should ensure that states’ outreach to SNAP retailers is done regularly on a quarterly basis, even after initial implementation and the “post-implementation assessment and evaluation” proposed under the rulemaking.⁶ This communication should be provided directly to retailers in writing and via electronic mail if a state has a retailer’s email address on file, and it should be highlighted on a state agency’s website. Regular communication by the state to SNAP retailers will keep retailers apprised of any changes to SNAP program requirements, which will facilitate smooth operation of the Program.

FNS has indicated that it will not require those states currently issuing photo EBT cards to retroactively submit Implementation Plans.⁷ Given the acknowledged difficulties in implementing photo EBT cards in those states, NACS and SIGMA disagree with this proposal. FNS should require states with current programs to retroactively submit Implementation Plans to ensure that those states adequately educate retailers on their programs. Ensuring that those states engage in ongoing retailer outreach, similar to the type of outreach described above, could assist in alleviating the problems that have already been identified in some of those states.

B. State Photo EBT Requirements Must Not Hinder SNAP Access and Interoperability.

NACS and SIGMA support FNS’ efforts to ensure a SNAP recipient can access his or her benefits, whether or not that individual is the person pictured on the EBT card. Towards this end, FNS proposes requiring states to include the following statement, or similar FNS-approved alternative text, on photo EBT cards: “Any user with valid PIN can use SNAP benefits on card and need not be

⁶ 81 Fed. Reg. at 409.

⁷ See 81 Fed. Reg. at 405.

pictured.”⁸ NACS and SIGMA favor the inclusion of this language on the EBT card and further suggest that FNS require the text to be printed in a prominent position with a clearly discernable font size and color. This clear and visible language will help all authorized SNAP beneficiaries within a single household access their benefits and ensure proper card usage. The unambiguous proposed language should help alleviate potential access issues by also making the rules clearer for retailers and thus limit potential obstacles in the transaction process. This will ensure SNAP recipients are able to redeem their benefits without undue burdens.

Finally, NACS and SIGMA support efforts under the proposed rule to emphasize the interoperability of EBT cards, regardless of whether the card includes a photo. Many members’ retail outlets are fixtures in urban and rural neighborhoods and can also be found along major roadways. In fact, members frequently have SNAP customers from states other than where the store is located. To reiterate the points made above: all states, whether they require photo EBT cards or not, should conduct proper outreach and education efforts to SNAP retailers to ensure all retailers and SNAP recipients understand the interoperable nature of SNAP EBT cards.

C. State Photo EBT Rules Should Not Hinder the Participation of Retail Food Stores.

While NACS and SIGMA support the overall intentions of this proposed rule and many of its proposed changes, some of the proposed changes regarding the participation of retail food stores (7 C.F.R. Part 278), raise concerns. For example, FNS proposes requiring a retailer to ask any individual “using three or more EBT cards” for identification and “an explanation of why multiple cards are being used.”⁹ According to FNS, the purpose of requiring identification and an explanation in this circumstance is to assist the retailer in the “limited purpose of reporting suspected fraud”—and “should a retailer believe that fraud is occurring the retailer may record the individual’s information ... and the reason for using three or more cards.”¹⁰ Retailers are required to treat all SNAP clients in the same manner as non-SNAP clients. Asking for identification is something retailers do frequently with all customers, so that would not raise any eyebrows or present discrimination concerns. However, NACS and SIGMA are unaware of any other instance where a retailer asks a customer for an explanation of why he or she is using a particular payment card. Thus, by requiring retailers to ask a SNAP user “for an explanation,” NACS and SIGMA are concerned that this practice discriminates against SNAP beneficiaries since it would be a practice only performed relative to SNAP-clients. In addition, NACS and SIGMA question whether an explanation would result in any information that would actually be helpful in the fight against SNAP fraud and trafficking.

In addition, if an individual refuses to present identification, the proposed rule would give retailers the option of denying a sale if fraud is suspected.¹¹ While this provision is here to address fraud, it is unclear if there would be any repercussions for a retailer that denied a sale that turned out to be

⁸ 81 Fed. Reg. at 404, 407.

⁹ 81 Fed. Reg. at 410.

¹⁰ *Id.*

¹¹ *Id.*

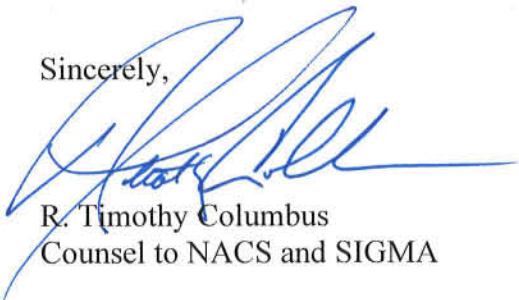
legitimate. If a SNAP retailer denies a sale because s/he suspects fraud, FNS should make clear that the retailer will not be held liable—or stripped of his or her ability to participate as a SNAP retailer—should it turn out the attempted sale was legitimate. In other words, FNS should clarify that a retailer’s ability to participate in the program will not be compromised in any way because of the retailer’s good faith attempts to comply with the anti-fraud provisions contained in the proposed regulation.¹²

FNS has also asked for comments on whether it should employ “testers” that go out to check whether SNAP participants and their authorized representatives are able to use their benefits at authorized retailers, regardless of whether they are pictured on the card.¹³ While NACS and SIGMA believe that FNS should collect data to determine whether photo EBT cards are creating access problems at the retail level, we caution FNS that any negative “test results” should in no way affect a retailer’s ability to continue to participate in the program. Rather, the problems should be addressed via retailer education outreach.

II. Conclusion

NACS and SIGMA appreciate the opportunity to comment on the proposed rule. As stated above, NACS and SIGMA support the proposed rule’s underlying goal: ensuring SNAP beneficiaries have nutrition access whether or not a state implements mandatory or voluntary photo EBT card requirements. Our members’ stores play an integral role in the Program, and we wish to see the Program operate efficiently for both retailers and recipients. To that end, we encourage FNS to address the various issues discussed above to better ensure access for SNAP recipients and to reduce confusion in the retail community. We appreciate your consideration and stand ready to provide any additional assistance that may be helpful.

Sincerely,



R. Timothy Columbus
Counsel to NACS and SIGMA

¹² As an aside, NACS and SIGMA are concerned with language in the proposed rule saying that “trafficking often involves a willing retailer.” While it is true that there may be cases where an owner or operator is directly linked to SNAP trafficking, in other instances, trafficking involves an individual store clerk acting independently—and it would be inappropriate to suggest that those clerks are acting with the blessing of a store’s management/ownership. Trafficking also can occur without any knowledge or involvement by a SNAP retail food store. According to FNS data, only “about eight percent of all authorized SNAP stores engaged in trafficking.” See Food and Nutrition Service, Office of Research Analysis, *Final Report: The Extent of Trafficking in the Supplemental Nutrition Assistance Program: 2006–2008*, available at <http://www.fns.usda.gov/sites/default/files/Trafficking2006.pdf>.

¹³ See 81 Fed. Reg. at 403.