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February 19, 2016

TO: NACS

FROM: R. Timothy Columbus
Eva V. Rigamonti

RE: Proposed Rule, Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (RIN 0584-AE27)

On February 17, 2016, the U.S. Department of Agriculture’s (“USDA”) Food and Nutrition Service (“FNS” or “Agency”) published a proposed rule (the “Proposal”)¹ that alters the eligibility requirements for retailers participating in the Supplemental Nutrition Assistance Program (“SNAP”).

The Proposal would make several changes to the regulations governing SNAP retailer eligibility, namely:

- Codify provisions in the Agricultural Act of 2014 (“2014 Farm Bill”),² that address so-called depth-of-stock requirements: the requirements that address the amount and variety of food that a retailer must have in stock in order to participate in SNAP as a retail food store. Pursuant to the 2014 Farm Bill requirements, retailers would be required to stock at least *seven* different “varieties” of food items in each of the four “staple food” categories and at least one perishable food item in **three** of the staple food categories. (See Section III.C. for more information);
- Add in a provision requiring retailers to stock six different units per variety of food item in order to meet requirements that they offer foods meeting the depth of stock obligations on a “continuous basis.” (See Section III.C. for more information);

¹ Department of Agriculture, Food and Nutrition Service, Proposed Rule, *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)*, 81 Fed. Reg. 8015 (Feb. 17, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-17/pdf/2016-03006.pdf>.

² Pub. L. 113-79, enacted Feb. 7, 2014, available at <http://www.fns.usda.gov/sites/default/files/snap/Food-And-Nutrition-Act-2008-wFB-provisions.pdf>.

- Redefine the term “staple foods” so that multiple ingredient items (e.g. soups or frozen dinners) would not count towards depth of stock requirements. (See Section III.A. for more information);
- Redefine the term “accessory foods” to limit the items that may count as staple foods (e.g., crackers no longer considered a staple food). (See Section III.A. for more information);
- Amend the definition of retail food store to clarify when FNS will consider an establishment to be a restaurant rather than a retail food store. (See Section III.B);
- Expand the factors FNS may consider when evaluating retailer eligibility to include food access considerations. (See Section III.D. for more information);
- Permit the public disclosure of SNAP retailer sanction information. (See Section III.E. for more information); and
- Create a definition for the term “firm” (See Section III.F. for more information).

This memorandum will provide (I) a table summarizing the Proposal, (II) background on the Supplemental Nutrition Assistance Program and the 2014 Farm Bill, (III) an in-depth breakdown of the Proposal, and (IV) a conclusion. As the memorandum will highlight, several of the proposed changes would go significantly beyond the statutory requirements in the 2014 Farm Bill. In its current form, the Proposal will make it increasingly difficult for convenience store owners and operators to participate in SNAP, which in turn will negatively impact the many SNAP recipients that use their benefits at NACS members’ stores.

It is important to note that the issuance of the proposed rule does not in and of itself impose any regulatory obligation on SNAP retailers. No additional requirements will take effect until after the proposal is finalized, which first requires FNS to review and respond to all submitted public comments. Comments on the Proposal are due on **April 18, 2016**.

NACS encourages its members to share their opinions about the proposed rule’s potential impact. These thoughts will inform the comments that NACS will be filing on behalf of its members.

To share comments or for further questions, please reach out to:
Eva Rigamonti, Associate, Steptoe & Johnson LLP, erigamonti@steptoe.com or 202-429-6457.

I. Table Summarizing Proposed Changes³

Issue	Current Regulations	Proposed Regulations
<p>Staple Foods 7 C.F.R. § 271.2</p>	<p>“Staple Food” means:</p> <ul style="list-style-type: none"> • Items intended for home preparation and consumption. • Commercially processed foods and prepared mixtures with <i>multiple ingredients</i> are only counted in one staple food category depending on main ingredient. <p>The following items are <u>NOT</u> “staple foods”:</p> <ul style="list-style-type: none"> • Hot foods are <u>not</u> eligible for purchase with food stamps and, therefore, do not qualify as staple foods. • “Accessory food” items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices. (Although “accessory foods” are not staple foods, they may be purchased with SNAP benefits). 	<p>“Staple Food” means:</p> <ul style="list-style-type: none"> • Items intended for home preparation and consumption. <p>The following items are <u>NOT</u> “staple foods”:</p> <ul style="list-style-type: none"> • Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall <u>not</u> be counted in any staple food category. • Hot foods are <u>not</u> eligible for purchase with food stamps and, therefore, do not qualify as staple foods. • “Accessory food” items include foods that are generally consumed between meals and/or are generally considered snacks or desserts such as, but not limited to, chips, dips, crackers, cupcakes, cookies, popcorn, pastries, and candy, or food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. (Although “accessory foods” are not staple foods, they may be purchased with SNAP benefits).
<p>Retail Food Store 7 C.F.R. § 271.2</p>	<p>To be considered a “retail food store,” a store must:</p> <ul style="list-style-type: none"> • Sell food for home preparation and consumption and offer on a continuous basis a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods.⁴ 	<p>To be considered a “retail food store,” a store must:</p> <ul style="list-style-type: none"> • Sell food for home preparation and consumption and offer on a continuous basis a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods; and • At least 85 percent of an entity’s total food sales must be for items that are <u>not</u> cooked

³ Text in red denotes the Proposal’s insertions, deletions, and other edits to the regulations.

⁴ In addition, a business may qualify as a retail food store if more than 50 percent of its total gross retail sales are in staple foods. This provision has been omitted from the table as it tends to be inapplicable to NACS members.

	<p>The following entities are <u>NOT</u> eligible for SNAP participation as retail food stores:</p> <ul style="list-style-type: none"> • Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption” 	<p>or heated on-site before or after purchase.</p> <ul style="list-style-type: none"> • Establishments that include separate businesses that operate under one roof and have commonalities, such as sale of similar foods, single management structure, shared space, logistics, bank accounts, employees, and/or inventory, are considered to be a single establishment when determining eligibility to participate in SNAP as retail food stores. <p>The following entities are <u>NOT</u> eligible for SNAP participation as retail food stores:</p> <ul style="list-style-type: none"> • Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption”
<p>Approval of Retail Food Store 7 C.F.R. §278.1 (b)(1)(iv)</p> <p>“Ineligible Firms”</p>	<p>Ineligible firms include, but are not limited to:</p> <ul style="list-style-type: none"> • Stores selling only accessory foods; or • Firms that are considered to be restaurants (i.e., firms that have more than 50% of total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption) 	<p>Ineligible firms include, but are not limited to:</p> <ul style="list-style-type: none"> • Stores selling only accessory foods; • Firms that are considered to be restaurants (i.e., firms that have more than 50% of total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption); or • Firms that do not have 85% or more of their total food sales in items that are not cooked or heated on-site, before or after purchase.
<p>Depth-of-Stock 7 C.F.R. § 278.1 (b)(1)(ii)(B), (C)</p>	<p>Retailer required to offer for sale and normally display in a public area, qualifying staple foods on a “continuous basis,” evidenced by:</p> <ul style="list-style-type: none"> • <u>3</u> different varieties in each of the 4 staple food categories;⁵ • At least <u>1</u> <i>perishable</i> food item in <u>2</u> of the staple food categories; and 	<p>Retailer required to offer for sale and normally display in a public area, qualifying staple foods on a “continuous basis,” evidenced by:</p> <ul style="list-style-type: none"> • <u>7</u> different varieties in each of the 4 staple food categories; • At least <u>1</u> <i>perishable</i> food item in <u>3</u> of the staple food categories; with • A minimum of <u>6</u> stocking units for each item of food.

⁵ Staple Food Categories are: (1) meat, poultry, or fish; (2) bread or cereals; (3) vegetables or fruits; and (4) dairy.

<p>Depth-of-Stock 7 C.F.R. §278.1 (b)(1)(ii)(C)</p> <p>“Variety”</p>	<p>Retailer must offer a <u>variety</u> of staple foods, meaning:</p> <ul style="list-style-type: none"> • Different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. • Variety of foods is <u>not</u> to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. • Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes, or squash do <u>not</u> count as more than one staple food variety for the purpose of determining variety. • <i>Multiple ingredient</i> food items intended for home preparation and consumption shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS. 	<p>Retailer must offer a <u>variety</u> of staple foods, meaning:</p> <ul style="list-style-type: none"> • Different types of foods within each staple food category. For example: apples, cabbage, tomatoes, bananas, melons, broccoli, and squash in the vegetables or fruits category; or animal-based milk, plant-based milk, hard cheese, soft cheese, butter, sour cream, and yogurt in the dairy category; or rice, couscous, quinoa, bread, cold cereals, oatmeal, and flour tortillas in the bread or cereals category; or chicken, turkey, duck, beef, pork, salmon, and tuna in the meat and fish category. • Variety of foods is <u>not</u> to be interpreted as different brands, nutrient values, packaging types or package sizes of the same or similar foods. • Similar food items such as, but not limited to, link sausages and sausage patties, different types of cold breakfast cereals, whole milk and skim milk, or different types of apples (e.g. Empire, Jonagold, and McIntosh) shall count as depth of stock but do <u>not</u> count as more than one staple food variety for the purpose of determining variety in any staple food group. • Accessory foods and processed <i>multiple ingredient</i> foods shall <u>not</u> be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.
<p>Access Considerations 7 C.F.R. §278.1 (b)(6)</p>	<p>No relevant provision.</p>	<p>When considering whether to allow a retailer applicant to participate in SNAP:</p> <p>FNS will consider whether the applicant is located in an area with significantly limited access to food. To do so, FNS will consider factors such as distance from the nearest SNAP authorized retailer, transportation options to other SNAP authorized retailer locations, the gap between a store’s stock and SNAP required stock for authorized eligibility, and whether the store furthers the purpose of the Program.</p>

<p>Public disclosure of firms sanctioned for SNAP violations 7 C.F.R. §278.1(q)(5)</p>	<p>No relevant provision.</p>	<p>FNS may disclose information to the public when a retail food store has been disqualified or otherwise sanctioned for violations of the Program after the time for administrative and judicial appeals has expired. This information is limited to the name and address of the store, the owner names(s) and information about the sanction itself.</p>
<p>Firm 7 C.F.R. §278.1</p>	<p>No relevant provision.</p>	<p>Firm means:</p> <ul style="list-style-type: none"> • A retail food store that is authorized to accept or redeem SNAP benefits; • A retail food store that is not authorized to accept or redeem SNAP benefits; or • An entity that does not meet the definition of a retail food store. <p>For purposes of the regulations and SNAP policies, the terms firm, entity, retailer, and store are used interchangeably.</p>

II. Background on SNAP and 2014 Farm Bill

SNAP – the largest anti-hunger aid program in the nation – is administered by USDA via FNS and provides millions of low-income individuals and families living in the United States with benefits to assist in the purchase of food. While the origins of SNAP go back to the 1940s, the nationwide program that we are familiar with today took off in the 1960s-1970s.⁶ With passage of the 2014 Farm Bill, SNAP was reauthorized through FY 2018 and select provisions governing the program were amended.

Significantly, the 2014 Farm Bill contained several provisions that impose additional obligations on retailers that redeem SNAP benefits. Prior to the Farm Bill, to be eligible to redeem SNAP benefits, a food retailer must have sold food for home preparation and consumption and meet one of the following two criteria: (1) offer for sale, “on a continuous basis, a variety of foods in each of the 4 categories of staple foods . . . including perishable foods in at least 2 of the categories,” or (2) have “over 50 percent of the total sales of the establishment or route in staple foods”⁷ Because staple foods are unlikely to constitute more than half of a convenience store’s total sales, the industry has relied primarily on the first prong.

⁶ USDA, FNS, *A Short History of SNAP*, available at http://www.fns.usda.gov/sites/default/files/History_of_SNAP.pdf.

⁷ See generally 7 U.S.C. § 2012(p)(1); see also FNS, Retail Store Eligibility, <http://www.fns.usda.gov/snap/retail-store-eligibility-usda-supplemental-nutrition-assistance-program>.

Under the 2014 Farm Bill, SNAP retailers are required to stock at least *seven* different “varieties” of food items in each of the four “staple food” categories on a “continuous basis.”⁸ The four staple food categories are: (1) Meat, poultry, or fish; (2) Bread or cereals; (3) Vegetables or fruits; and (4) Dairy products. In addition, the 2014 Farm Bill requires retailers to stock at least one perishable food item in **three** of the staple food categories.

Please note: The 2014 Farm Bill depth of stock provisions will only go into effect once FNS completes a formal rulemaking.

III. Proposed Rule

The Proposal would make the following changes to the SNAP regulations governing retailer eligibility standards:

A. Staple Foods – 7 C.F.R. § 271.2

i. Current Regulations

Staple foods are those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.⁹ Significantly, commercially processed foods and prepared mixtures with multiple ingredients (e.g. macaroni and cheese, cold pizza, frozen dinner, or multi-ingredient soup) are, depending on what FNS determines to be the main ingredient, generally counted as one item in one staple food category for depth of stock determinations. Today, for example, if a retailer sells macaroni-and-cheese and FNS determines that the product’s main ingredient is pasta, it will count towards one item in the bread and cereals category (if FNS determined the main ingredient was cheese, it would count as one item in the dairy category).

Staple foods do not include “accessory foods” such as coffee, tea, cocoa, soda, non-carbonated drinks (e.g. sports drinks, punches, and flavored waters), candy, condiments, or spices. In addition, hot foods or other foods that are “ready to go” or “made to take out” (e.g., prepared salad or sub) are also not staple foods and cannot be counted towards depth-of-stock requirements.

⁸ The 2014 Farm Bill also contained technological mandate to prevent sales of ineligible items. Specifically, the Farm Bill requires SNAP retailers to implement point-of-sale technology systems that will (i) not redeem SNAP benefits for the purchase of ineligible items, and (ii) will further preclude cashiers from manually overriding this prohibition. The technological mandate will not go into effect until FNS completes a formal rulemaking on the issue, which is not expected for some time.

⁹ See 7 U.S.C. § 2012(r)(1); 7 C.F.R. § 271.2. Commercially processed foods and prepared mixtures with multiple ingredients shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will normally be included in the staple food category of the main ingredient as determined by FNS. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under §278.1(b)(1) of this chapter.

ii. Proposed Regulations

The Proposal makes significant changes to the definition of staple foods. The most significant changes cut out “multiple ingredient” staple foods. Specifically, the Proposal would amend the regulations to state the following: “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” (emphasis added).¹⁰ While SNAP beneficiaries would be able to continue purchasing multi-ingredient items with SNAP benefits, those items would not, however, count towards variety, perishables, or depth of stock for purposes of determining a company’s eligibility to participate in SNAP as a retail food store. So, using the example from above, even though a SNAP beneficiary may buy macaroni-and-cheese, the retailer would not be able to count the item towards satisfying either the bread or dairy categories. The explanatory text in the Proposal mentions that certain multi-ingredient items such as yogurt, cheeses, and cereals are easily recognized within a staple food category and would continue to count as staple foods.¹¹ This clarification is, in fact, no clarification at all – it creates serious legal uncertainty as retailers will likely have to guess whether an item they choose to stock will count towards depth of stock requirements. It is clear, however, that many important food items (e.g. canned soups, pot pies, macaroni and cheese) would not be counted towards depth of stock requirements. This means that retailers will have to stock more un-processed single-ingredient foods in order to comply with depth of stock requirements.

In addition to excluding multiple ingredient items from depth of stock analysis, by expanding the definition of “accessory food,” the Proposal further limits what items can be counted towards depth of stock requirements. Specifically, the Proposal states that:

Accessory food items include foods that are generally consumed between meals and/or are generally considered snacks or desserts such as, but not limited to, chips, dips, crackers, cupcakes, cookies, popcorn, pastries, and candy, or food items that complement or supplement meals, such as, but not limited to coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar, and shall not be considered staple foods for the purpose of determining eligibility of any firm.¹²

Despite a much narrower description of “accessory food” in the Food and Nutrition Act of 2008, which merely describes items “such as coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices,” FNS has expanded this term to include other items that have traditionally not been considered accessory foods, such as crackers and dips.¹³

¹⁰ 81 Fed. Reg. at 8017, 8020.

¹¹ 81 Fed. Reg. at 8017.

¹² 81 Fed. Reg. at 8017, 8020.

¹³ 7 U.S.C. § 2012(q)(2); 81 Fed. Reg. at 8017. According to FNS, the statute’s list of accessory foods is “an illustrative list, not a complete list.”

This raises important questions for NACS members:

- If a store sells a cheese and cracker combination item, because the item is prepared with multiple ingredients (one of which is considered an accessory food), can that item count towards depth of stock requirements?
- If a store sells carrots with dip, would that be considered a snack food, and therefore, an accessory food? (If it is an accessory food, it cannot count towards depth of stock evaluations.)

B. Retail Food Store – 7 C.F.R. § 271.2

The Proposal would also amend the definition of “retail food store.”

i. Current Regulations

At the most basic level, to be eligible to redeem SNAP benefits, a business must be considered a “retail food store”: a store that either (A) sells food for home preparation and consumption and offers, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods or (B) has more than 50 percent of its total gross retail sales in staple foods.¹⁴ Under the regulations, entities that have “more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption” are not eligible to participate in SNAP as retail food stores. According to FNS, this is because Congress did not intend for restaurants to participate in SNAP except in limited circumstances to serve the elderly, disabled, and homeless.¹⁵

ii. Proposed Regulations

The Proposal makes a significant change to the definition of retail food store. According to FNS, the changes will prevent restaurant-type entities from circumventing gaps in the regulations and becoming SNAP authorized retailers. The relevant text is the following:

In addition, at least 85 percent of an entity’s total food sales must be for items that are not cooked or heated on-site before or after purchase. Establishments that include separate businesses that operate under one roof and have commonalities, such as sale of similar foods, single management structure, shared space, logistics, bank accounts, employees, and/or inventory, are considered to be a single establishment when determining eligibility to participate in SNAP as retail food stores.¹⁶

¹⁴ 7 C.F.R. § 271.2.

¹⁵ 81 Fed. Reg. at 8016; *see also* 7 U.S.C. §2012 (k).

¹⁶ 81 Fed. Reg. at 8016 (stating that “the rulemaking proposes to close the existing gap in SNAP regulations that allows these types of entities [restaurant-type entities that in effect sell hot food for immediate consumption] to become authorized SNAP retailers by adding the [85 percent] language.”).

In other words, if more than 15 percent of a company’s total food sales come from foods that are cooked or heated on site before or after purchase, that business will be ineligible to participate in SNAP. With this 85 percent language, FNS claims it can prevent businesses that are really restaurants, from getting around gaps in the SNAP regulations and contravening congressional intent for the program.¹⁷ A similar 85 percent provision was also added to the definition of “ineligible firms.”¹⁸ The additional text relating to “separate businesses” was included to block businesses that do not actually further the purposes of SNAP from “circumventing SNAP rules by splitting into two separate businesses...in order to gain eligibility for one of the businesses to participate in SNAP.”¹⁹

With this change to the definition of retail food store, it appears that having failed to statutorily exclude the convenience store industry from participating in SNAP, USDA is seeking to exclude NACS members’ establishments by making it harder for convenience stores to be able to participate in the program. Taken together with the narrow definition of staple foods, this provision would make it well-nigh impossible for a fuel retailer that houses a restaurant chain (e.g., a Subway) and a separate convenience store at a single location to participate in SNAP—just because those separate food businesses share space under the same roof. It is unclear why FNS has chosen to go this route if the purpose of SNAP is to make nutrition widely available to low-income people. It should not matter where an individual purchases his food provided that the business is complying with the depth of stock and other requirements and only redeems SNAP benefits for eligible items. Nor is it clear why providing consumers with a microwave so they could heat up their frozen meal (which they would have to do at home) might render a retailer ineligible to participate in SNAP. If the food is intended for home consumption, but the customer chooses to heat it up at the store that should make no difference. In fact, FNS should be pleased that businesses are providing consumers with a means of preparing nutritious meals that they may not have at home. One also wonders whether a store selling significant amounts of bread baked on site would be able to participate in SNAP. The text of this provision makes clear that “at least 85 percent of an entity’s total food sales must be for items that are not cooked or heated on-site before or after purchase”—so what about bread or other bakery products baked fresh before purchase? Does selling those items mean a store risks losing its eligibility to participate in SNAP?

C. Depth-of-Stock – 7 C.F.R. § 278.1(b)(1)(ii)

i. Current Regulations

¹⁷ The Proposal adds similar language to 7 C.F.R. § 278.1(b)(1)(iv), which describes “ineligible firms.” Specifically the rulemaking proposes to add the following to the definition of “ineligible firms”— “Firms that do not have 85 percent or more of their total food sales in items that are not cooked or heated on-site, before or after purchase, are ineligible.”

¹⁸ 7 C.F.R. § 278.1(b)(1)(iv).

¹⁹ 81 Fed. Reg. at 8016.

Under existing regulations, to be eligible to redeem SNAP benefits, a store must offer for sale, on a *continuous basis*, at least three varieties of qualifying foods in each of the four staple food groups, with *perishable* foods in at least two of the categories.

To stock food on a “continuous basis,” USDA regulations stipulate that the SNAP retailer must, on any given day of operation, offer for sale and normally display an item in a public area. As mentioned above, retailers must also offer different “varieties” of qualifying foods in each of the food groups. Pursuant to USDA regulations, different “varieties” means different *types* of foods (such as apples, cabbage, tomatoes, and squash in the fruit or vegetable category, or milk, cheese, butter, and yogurt in the dairy category). It does not mean different brands, nutrient values, or packaging.²⁰ Finally, “perishable” foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil, or suffer significant deterioration in quality within 2-3 weeks.

ii. Proposed Regulations

The Proposal would codify the provisions in the 2014 Farm Bill that increased the variety and depth-of-stock requirements relating to retailer eligibility.²¹ Specifically, retailers will be required to stock at least seven different varieties of food items in each of the four staple food categories. In addition, retailers must offer at least one perishable food item in three of those categories.²² To facilitate compliance with the statutory requirement to offer the requisite staple foods for sale on a “continuous basis,” the rulemaking also proposes that retailers always have in stock six different units per variety of food item.

Moreover, the Proposal amends the definition of “variety” to provide greater clarity as to what counts towards variety in depth-of-stock determinations. Specifically, the Proposal would remove existing language that permits multiple ingredient food items intended for home preparation and consumption (e.g. soup or frozen dinner) to be counted as one staple food variety depending on the main ingredient in the dish.²³ With this change, a frozen Szechuan beef and vegetable dinner would not count towards depth of stock requirements either in the meat or vegetable category, whereas under the existing regulations it could have counted towards one or the other category depending on the main ingredient in the dish. The Proposal would also add in more detailed language regarding variety, specifically:

²⁰ For example, offering Granny Smith and Fuji apples would not count as two different varieties since they are both apples. If the retailer sold oranges and apples, those would count to two different varieties. Similarly, regular and light cream cheese are the same variety, but yogurt and cheddar cheese are different varieties of dairy products.

²¹ 81 Fed. Reg. at 8018, 8021.

²² “Perishable” foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil, or suffer significant deterioration in quality within 2-3 weeks.

²³ Although the Proposal includes one line in the non-regulatory text stating that “these [multiple ingredient] foods do not include such items as yogurt, cheeses, and cereals as the primary staple ingredient is clearly represented and easily recognized” one wonders how that standard would be workable in practice. From a policy perspective, prohibiting multi-ingredient items to count towards depth of stock— and then allowing some because they are “obviously” in one staple food group — is inconsistent, creates substantial legal uncertainty, and undercuts the goals of SNAP, to provide low-income Americans with varied nutritious foods. *See* 81 Fed. Reg. at 8017.

Offer a variety of staple foods which means different types of foods within each staple food category. For example: apples, cabbage, tomatoes, bananas, melons, broccoli, and squash in the vegetables or fruits category; or animal-based milk, plant-based milk, hard cheese, soft cheese, butter, sour cream, and yogurt in the dairy category; or rice, couscous, quinoa, bread, cold cereals, oatmeal, and flour tortillas in the bread or cereals category; or chicken, turkey, duck, beef, pork, salmon, and tuna in the meat and fish category. Variety of foods is not to be interpreted as different brands, nutrient values, packaging types or package sizes of the same or similar foods. Similar food items such as, but not limited to, link sausages and sausage patties, different types of cold breakfast cereals, whole milk and skim milk, or different types of apples (e.g. Empire, Jonagold, and McIntosh) shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food group. Accessory foods and processed multiple ingredient foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.

FNS does not have the authority to make certain foods ineligible under SNAP, only Congress does. However, this detailed description of variety made up of single-ingredient items taken together with the proposed expansion of accessory foods and the removal of multi-ingredient items from depth of stock evaluations, appears to be the Agency's way of circumventing the constraints on its authority.

In reviewing this Proposal, NACS members will need to carefully evaluate how these changes will impact operations. For example, what is the potential impact of the six-unit stocking requirement and its feasibility given NACS members' current stocking practices? Moreover, because FNS is proposing to narrow the staple food category by removing multiple-ingredient items, NACS members will need to evaluate to what degree these stocking requirements will become problematic as retailers need to stock more items to meet depth of stock requirements than initially anticipated.

D. Access Considerations

i. Current Regulations

There are no existing provisions that allow the Agency to consider factors relating to SNAP retailer accessibility when considering whether to permit an applicant retailer to participate in SNAP as a retail food store even if that store fails to meet all depth of stock requirements.

ii. Proposed Regulations

The Proposal would add a provision that would permit FNS, when reviewing the qualifications of a retail store applicant, to consider whether an applicant retailer is located in an

area with significantly limited access to food.²⁴ In particular, the proposed changes would allow FNS to consider factors such as (1) distance from the nearest SNAP authorized retailer, (2) transportation options to other SNAP authorized retailer locations, (3) the gap between a store's stock and SNAP required stock for authorized eligibility, and (4) whether the store furthers the purpose of the program.²⁵ It is interesting that this provision gives FNS remarkable subjective discretion to grant or deny applications.

E. Public Disclosure of SNAP Information

i. Current Regulations

Excluding employment identification numbers and social security numbers, federal law and existing regulations allow FNS to disclose information collected from retailers for purposes related to the administration and enforcement of SNAP.

ii. Proposed Regulations

The Proposal would add a provision that would allow FNS to publically disclose certain information about retailers that have been disqualified or otherwise sanctioned for SNAP violations.²⁶ FNS would only be allowed to disclose the name and address of the store, the owner name(s), and information about the sanction in question—and FNS would only be permitted to disclose that information after the time for administrative and judicial appeals has expired.²⁷

FNS believes that public disclosure of sanctions and disqualifications for SNAP violations will assist in maintaining program integrity and assist with efforts to combat SNAP fraud by providing an additional deterrent.²⁸ Significantly, there is no provision that would allow for this information to be taken down after the passage of a certain amount of time or in the event a store was sold to another owner.

F. Firm - 7 C.F.R. §278.1

i. Current Regulations

Existing regulations contain no definition for the term “firm,” even though it is used throughout the regulations.

²⁴ The 2014 Farm Bill amended the Food and Nutrition Act to provide USDA with the ability to consider food access when making retailer eligibility determinations. *See* 7 U.S.C. § 2018 (stating that “In determining the qualifications of applicants, there shall be considered among such other factors as may be appropriate, the following: [...] (C) whether the applicant is located in an area with significantly limited access to food....”).

²⁵ 81 Fed. Reg. at 8018, 8021.

²⁶ Public disclosure may include posting a list of sanctioned retailers on a public website.

²⁷ 81 Fed. Reg. at 8018, 8021.

²⁸ 81 Fed. Reg. at 8016, 8018.

ii. Proposed Regulations

The rulemaking proposes to clarify that various terms, including firm, entity, retailer, and stores are used interchangeably in the regulations and policies and should be treated as equivalent terms. Specifically, the Proposal would define firm as (i) a retail food store that is authorized to accept or redeem SNAP benefits; (ii) a retail food store that is not authorized to accept or redeem SNAP benefits; or (iii) an entity that does not meet the definition of a retail food store.²⁹ NACS Counsel is in the process of reviewing this change to understand any potential impact it would have on the regulations.

IV. Conclusion

NACS is concerned that the provisions in the Proposal may negatively impact the ability of convenience stores to participate in SNAP. NACS welcomes comments from its members that provide insight into the potential impact of this Proposal on SNAP retailer participation.

To share comments and for any questions you may have, please contact:
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²⁹ 81 Fed. Reg. at 8017, 8020.