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Vicky Robinson
Chief, Retailer Management and Issuance Branch
Retailer Policy and Management Division, Room 418
3101 Park Center Drive
Alexandria, Virginia 22302

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

Dear Ms. Robinson,

On behalf of the National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”), I write to express concern with the proposed rule from the U.S. Department of Agriculture’s (“USDA”) Food and Nutrition Service (“FNS” or “Agency”) that would change retailer eligibility requirements in the Supplemental Nutrition Assistance Program (“SNAP” or the “Program”).¹

The proposed rule contains several provisions that will severely restrict the ability of convenience stores and other small format retailers to participate in the Program. Tens of thousands of convenience stores will be pushed out of SNAP, and SNAP beneficiaries who rely on these small stores, especially those in urban centers or rural communities, will lose options upon which they have relied to feed their families.

NACS and SIGMA support codifying the provisions in the Agricultural Act of 2014 (“Farm Bill”).² That law requires retailers to offer at least seven different varieties of food items in each of the four staple food categories, including one perishable item in three of those

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>; see also Department of Agriculture, Food and Nutrition Service, Proposed Rule, *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program; Clarification of Proposed Rule and Extension of Comment Period*, 81 Fed. Reg. 19500 (Apr. 5, 2016).

² Pub. L. 113-79, enacted Feb. 7, 2014.

categories. Those changes were the result of extensive negotiations between lawmakers and stakeholders and balanced the need to increase food choices for SNAP beneficiaries while ensuring that those requirements were not unduly burdensome for small format retailers.

Unfortunately, the proposed rule goes well beyond what the Farm Bill required or envisioned. The proposed rule, by altering the definition of “staple foods” to exclude multiple ingredient items and expanding the definition of “accessory food,” would arbitrarily bar retailers from counting many healthy items towards stocking requirements. FNS also proposes to redefine the term “variety” so that many distinct items would not count as separate items under the stocking requirements.

The proposed rule would also require retailers to publicly display at least six units of each of the seven single ingredient food varieties in all four categories, *a total of 168 items to qualify for the Program*. Given the delivery constraints and store-size limitations that convenience stores characteristically face – and larger competitors do not – these stocking requirements, together with the limited number of acceptable staple food items, will be particularly harmful to our industry and small format retailers generally.

Further, the current proposal would alter the definition of a retail food store to exclude any entity with over fifteen percent of its total food sales in items that are “cooked or heated on-site before or after purchase.” In determining whether a store meets this arbitrary threshold, the proposal would attribute to the store the food sales of a totally separate business – one that merely does business under the same roof as the convenience store. Even stores meeting the onerous “depth of stock” requirements would be barred from participating in SNAP if they exceed the threshold. This provision specifically targets small format retailers and will lead to tens of thousands of stores being pushed out of the Program, which will create serious access concerns for SNAP beneficiaries who often rely on neighborhood retailers when purchasing food.

Through bipartisan agreement, Congress achieved a balance in the Farm Bill between the need to increase the nutritional selection for SNAP beneficiaries and the need to ensure that new requirements would not limit retailer participation in the Program, which could create significant concerns for SNAP beneficiaries who need more, not fewer, places where they can redeem their benefits for food. This proposal undercuts that important bipartisan compromise, and it appears that FNS is trying to push small retailers out of the Program altogether, for no sound public policy reason.³

³ During a Hearing before the House Appropriations Subcommittee on Agriculture shortly after this proposed rule was published, Kevin Concannon, Undersecretary of Food, Nutrition and Consumer Services, testified that there are more small stores participating in SNAP “than we really need.” House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies, “Budget Hearing – Department of Agriculture, Food and Nutrition Service, 114th Cong. (Feb. 24, 2016), <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394393>.

It also appears that FNS is conflating the issues of health and fraud to ultimately exclude small businesses from the Program.⁴ Losing these retailers will reduce access to food options for SNAP beneficiaries – in effect, harming the very people the Program is designed to assist. Such a result is contrary to the very purpose of SNAP, which was created by Congress to “alleviate hunger and malnutrition.”⁵ If there are fewer places for beneficiaries to access food, it increases the likelihood that they will go hungry. By contradicting the statutory purpose of the Program, the proposed rule is contrary to law and violates the Administrative Procedure Act.

The proposed rule violates the Administrative Procedure Act in substance and through procedural errors. Under the guidelines set out under Executive Order 12866,⁶ Executive Order 13563,⁷ the Regulatory Flexibility Act,⁸ and the Unfunded Mandates Reform Act of 1995,⁹ FNS is required to complete a regulatory impact analysis (RIA) in conjunction with a proposed rule of this significance. FNS has failed to do so. It must conduct that analysis and issue another proposed rule accepting comments before it can proceed to a final rule.

More detailed comments on this proposal can be found below.

I. BACKGROUND

A. NACS’ and SIGMA’s Members are Valuable Retail Participants in SNAP With Unique Business Models for Food Distribution.

Today, 106,531 convenience stores – well over 75 percent of the nation’s 154,000 convenience stores – participate in SNAP.¹⁰ These small format retailers, including thousands of

⁴ Secretary Thomas Vilsack has made several comments to retailers and to policymakers that these rules are needed to address obesity. *See* Statements by Secretary Vilsack, Senate Appropriations Subcommittee on Agriculture, “Hearing to Review the FY17 Budget Request for the U.S. Department of Agriculture,” 114th Cong. (Mar. 9, 2016), *available at* <http://www.appropriations.senate.gov/hearings/hearing-to-review-the-fy17-budget-request-for-the-usda> (noting that the SNAP retailer eligibility issue is important “as we deal with the obesity crisis”).

⁵ 7 U.S.C. § 2011.

⁶ Exec. Order No. 12866, 58 Fed. Reg. No. 190 (Sept. 30, 1993).

⁷ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011). Executive Order 13563 demands that an agency “tailor its regulations to impose the least burden on society.”

⁸ Pub. L. 96-354, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C. § 601 *et seq.*). In the event that a proposal is projected to impose a “significant economic impact on a substantial number of small entities,” a federal agency must assess that impact and consider regulatory alternatives that would minimize the impact to small businesses. 5 U.S.C. § 603, 605.

⁹ Pub. L. 104-4 (Mar. 22, 1995), 2 U.S.C. § 1501 *et seq.*

¹⁰ Food and Nutrition Service, Fiscal Year 2015 at a Glance, *available at* <http://www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf>.

NACS and SIGMA members, are essential and valuable participants in SNAP. Many are located in small rural communities and urban centers with no access, or limited access, to large format stores.¹¹

NACS is an international trade association representing the convenience store industry with more than 2,200 retail and 1,800 supplier companies as members, the majority of whom are based in the United States. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.

NACS' and SIGMA's members provide consumers with convenient locations and extended hours, enabling SNAP beneficiaries to purchase a wide variety of food and beverage items that Congress has determined may be purchased with SNAP benefits. Our locations are often the only establishments easily accessible by walking or public transportation, or the only food retail locations open for business after a late work shift ends or before one begins.¹² In fact, 51 percent of all Americans live *less than 1 mile* from a convenience store, and 94 percent of urban Americans and 60 percent of rural Americans live *less than 3 miles* from a convenience store.

Participating in SNAP entails certain challenges for convenience stores particularly in light of the average store size and the supply-distribution obstacles faced by our industry. As small format retailers, the average convenience store is 2,960 square feet – almost sixteen times smaller than the average supermarket.¹³ This means that convenience stores have limited space in which to display and store products, particularly perishable products that must be refrigerated or frozen. Because of these size limitations, any time a store needs to “redesign” or change store layout to accommodate inventory adjustments, there are significant costs involved.

Convenience stores on average have products delivered only once a week, twice a week at most.¹⁴ Thus, our retailers tend to pay a higher wholesale price for items because they receive

¹¹ Compared to high-income neighborhoods, low-income neighborhoods have twice as many convenience stores and four times as many small grocery stores. See Moore LV and Diez-Roux AV, “Associations of Neighborhood Characteristics with the Location and Type of Food Stores,” 96 AM. J. OF PUB. HEALTH 325-331 (2006), available at: <http://ajph.aphapublications.org/cgi/reprint/96/2/325>.

¹² *Store hours an obstacle to fresh foods in low-income areas*, <http://www.medicalnewstoday.com/releases/309762.php> (Apr. 29, 2016) (noting that “[i]t’s not just people getting to stores. It’s whether or not there are lights on when you get to the store,” Clark said. “Time is a resource that we should not discount.”); see also Xiang Chen & Jill Clark, *Measuring Space-Time Access to Food Retailers: A Case of Temporal Access Disparity in Franklin County, Ohio* 68 THE PROFESSIONAL GEOGRAPHER 1 (2016), DOI:10.1080/00330124.2015.1032876.

¹³ NACS, State of the Industry, Annual Report 2014, at 140-141.; see also Food Marketing Institute, *The Food Retailing Industry Speaks 2015*, Table 37 – Sales per Square Foot of Total Store area and Selling Space (noting that the median supermarket/super combination store/niche grocery store is 46,000 square feet).

¹⁴ The distribution process can vary by the size of the chain. Single store operators may stock their stores via “cash and carry” techniques, meaning they purchase product from other retail outlets to stock their stores. Smaller operators also may stock their stores via “buying groups,” a coalition of stores that come together to make bulk

much smaller deliveries than larger format stores. Beyond the costs and frequency of delivery, convenience store owners must also address food safety and storage concerns (i.e., maintaining the cold chain, etc.). Taken together, all of these unique industry attributes impose on convenience stores significant obstacles to participating in SNAP and make meeting depth of stock requirements a significant, if not insurmountable, challenge.¹⁵

B. Most Convenience Stores are Owned and Operated by Small Businesses that Operate on Thin Margins.

In 2015, the industry employed more than two and a half million workers and generated \$574.8 billion in total sales, representing approximately 3.2 percent of the U.S. GDP. In light of the number of fuel and other transactions in which our industry engages, we handle approximately one of every 30 dollars spent in the United States. Our retailers serve about 160 million people per day – around half of the U.S. population – and our industry processes over 73 billion payment transactions per year.

Nevertheless, the convenience store and fuel retail industry is truly an industry of small businesses. Approximately 63 percent of convenience store owners operate a single store, and approximately 75 percent of the industry is composed of companies that operate ten stores or less.

The convenience store and retail fuel market is one of the most competitive in the United States. NACS' and SIGMA's members operate on tiny margins (around 2 percent or less) and are unable to absorb incremental cost increases without passing them on to consumers.

II. COMMENTS ON THE PROPOSED RULE

NACS and SIGMA support FNS' objective to update retailer eligibility requirements in the Program as required by the Farm Bill. However, we remain concerned that FNS' proposed rule has gone well beyond what Congress intended and dictated in the Farm Bill. In so doing, FNS will push tens of thousands of small format retailers out of SNAP, which will create serious access obstacles for the over 44 million SNAP beneficiaries across the country who rely on the Program to feed their families.¹⁶

purchasing in order to obtain volume discounts by making a larger group purchase. Larger operators often use direct-store-delivery via a distributor (or, in some cases, through their own distribution network). Larger more sophisticated operators may also have daily delivery. Franchisees often make supply arrangements with their franchisor.

¹⁵ "If a convenience store has higher prices than other retail formats it is because of higher wholesale costs, higher utility expenses per square foot and higher real estate costs." See NACS, *How Convenience Stores Work and Their Contributions to Communities* (Dec. 2015), at 5.

¹⁶ USDA, Supplemental Nutrition Assistance Program: Number of Persons Participating, available at <http://www.fns.usda.gov/sites/default/files/pd/29SNAPcurrPP.pdf>.

A. NACS and SIGMA Support Increasing the Minimum Variety of Foods in Each Staple Food Category As Established in the 2014 Farm Bill.

FNS is proposing to increase the number of foods that retailers must stock in order to participate in SNAP. Specifically, FNS is proposing to codify the numbers established in the Farm Bill, which require SNAP retailers to stock at least *seven* different “varieties” of food items in each of the four “staple food”¹⁷ categories on a “continuous basis.”¹⁸ In addition, the Farm Bill requires retailers to stock at least one perishable food item in three of the staple food categories.

In developing the Farm Bill, Congress recognized the important role small format retailers play in SNAP, particularly their serving as access points for SNAP beneficiaries.¹⁹ After extensive negotiations that included lawmakers and stakeholders, Congress adopted changes to the so-called “depth of stock” requirements that would increase choices for SNAP beneficiaries while ensuring that those requirements were not unduly burdensome for retailers. Congress recognized that unduly burdensome eligibility requirements would hurt small businesses and result in restricted access for SNAP beneficiaries who rely upon those businesses for access to food. The compromise lawmakers achieved in the Farm Bill, which was based on the existing definition of staple foods, is reasonable. NACS and SIGMA supported these changes in the Farm Bill because the numbers ensure that SNAP beneficiaries have greater access to a suitable array of nutritious foods while remaining achievable for small format retailers.

B. NACS and SIGMA Oppose Altering the Underlying Definition of Staple Foods to Exclude Multiple Ingredient Items and Expand the Definition of Accessory Foods.

In addition to implementing the Farm Bill’s depth of stock provisions, the proposal makes other changes to the depth of stock requirements that Congress had not envisioned or authorized. The proposed rule alters the definition of “staple foods” to eliminate numerous multiple ingredient items – such as soups, stews, and frozen dinners – from being counted

¹⁷ The four staple food categories are: (1) Meat, poultry, or fish; (2) Bread or cereals; (3) Vegetables or fruits; and (4) Dairy products.

¹⁸ The 2014 Farm Bill also contained a 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.

¹⁹ See generally Joint Explanatory Statement of the Committee of Conference, the Agriculture Act of 2014; H. Report 113-333, Conference Report for H.R. 2642 – the Agriculture Act of 2014 (Jan. 27, 2014) (stating “The Managers support preserving food access...and encourage the Secretary to give broad consideration to the impacts additional requirements will have on food access in...areas with limited food access.”); see also H. Report 103-352 (Nov. 10, 1993).

towards depth of stock requirements.²⁰ It would also expand the definition of “accessory food,” to include items “generally consumed between meals.” Such items have not traditionally been considered accessory foods.²¹ This provision will drastically limit the number of items that can be counted towards stocking requirements, effectively knocking out nutrient-dense products including healthy “to go” packs such as apple slices and cheese or hummus and pretzels.²² This is particularly problematic in light of the fact that today Americans across all social classes are eating on the run (rather than sitting down for mealtimes) and gravitating towards snacks instead of meals.²³

NACS and SIGMA find the proposed redefinition of staple foods troubling. Congress did not change the definition of “staple food” in the Farm Bill. Nowhere in the legislative history is there evidence that Congress contemplated changing the existing definition of staple foods.²⁴ Rather, the agreement in the Farm Bill was based on the existing definition of staple foods. There is no basis for FNS to conclude that Congress intended for the Agency to change this definition – in so doing, FNS has acted outside the scope of its authority.

The Agency’s exclusion of multiple ingredient items does not reflect the “intent of Congress that staple foods are those foods intended for home preparation and consumption that provide the main sources of nutrition intake for households.”²⁵ It is unclear why a multiple ingredient item, such as a frozen chicken pot pie or a can of beef and vegetable stew would not be a food intended for home preparation and consumption.²⁶ When putting together meals in

²⁰ This change in the definition of staple foods would apply to all retail food stores participating in SNAP, namely those that participate in SNAP under Criterion A or Criterion B. *See* 7 C.F.R. § 271.2, 278.1 (describing approval of retail food stores and wholesale food concerns).

²¹ 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.”

²² An apple and cheese “to go” pack would be excluded from the staple food category because it could be considered an “accessory food” and because it has “multiple ingredients.”

²³ Hartman Group, *People are cooking less, and turning more to fresh, healthy prepared foods* (Nov. 25, 2014), available at <http://www.hartman-group.com/hartbeat/571/people-are-cooking-less-and-turning-more-to-fresh-healthy-prepared-foods> (noting that “for snacks, [people] gravitate towards increasingly healthy options, such as chips and hummus, fruit cups, yogurt cups and small deli plates.”); *see also* Hartman Group, *As Snackification in Food Culture Becomes More Routine, Traditional Mealtimes Get Redefined* (Feb. 16, 2016), available at <http://www.hartman-group.com/hartbeat/638/as-snackification-in-food-culture-becomes-more-routine-traditional-mealtimes-get-redefined>.

Snacking has been linked to consumers with the healthiest diets. Consumers with Healthier Eating Habits Snack More, The NPD Group (Nov. 12, 2012), <https://www.npd.com/wps/portal/npd/us/news/press-releases/consumers-with-healthier-eating-habits-snack-more-reports-npd/> (reporting that “[c]ontrary to conventional wisdom, the more consumers snack, the healthier their eating behaviors”).

²⁴ *See supra* note 19.

²⁵ 81 Fed. Reg. at 8017.

²⁶ Does FNS have data suggesting that most people purchase a multiple ingredient frozen entrée or canned meal and eat it in the store immediately after purchase?

their home, most Americans eat meals made from processed multiple ingredient items.²⁷ So, contrary to the Agency’s assertion, these multiple ingredient items are often the main sources of nutrition intake for families in the United States.²⁸

In fact, in light of the time constraints facing many American households, the Department of Agriculture’s 2006 Thrifty Food Plan (“TFP”) included many of the items that this proposal would no longer consider “staple foods.” These items were included in the TFP market baskets precisely because they are time-efficient and nutrient-dense. The TFP stated, “Foods such as boxed macaroni and cheese, frozen vegetables, ready-to-serve breads and cereals, canned soups, chicken parts, canned dry beans, and boxed mashed potatoes are included in the TFP market baskets.”²⁹

Single ingredient foods – like a bag of flour – are not inherently healthier than multiple ingredient foods. Having more than one ingredient does not automatically make an item less healthy, but it can make it easier for someone to turn that item into a meal.³⁰ In its own research, FNS has reported that there are “no clear standards” for “defining foods as good or bad, or healthy or not healthy.”³¹ The Agency has also found that implementing food restrictions would increase Program complexity and costs.³² Excluding multiple ingredient items from being counted as “staple foods” is unreasonable and arbitrary.³³ There is no reason to exclude those

²⁷ Julie Beck, *The Atlantic*, *More Than Half of What Americans Eat is ‘Ultra Processed’* (Mar. 10, 2016); Julie Beck, *The Atlantic*, *Don’t Worry So Much About Whether Your Food is ‘Processed’* (Jun. 28, 2015).

²⁸ 81 Fed. Reg. at 8017. *See* Scientific Report of the 2014 Dietary Guidelines Advisory Committee, U.S. DEPARTMENT OF AGRICULTURE (Feb. 2015), at 40 (“Americans consume a substantial amount of foods in the form of mixed dishes”).

²⁹ U.S. Department of Agriculture, Center for Nutrition Policy and Promotion, *Thrifty Food Plan 2006* (April 2007), available at http://www.cnpp.usda.gov/sites/default/files/usda_food_plans_cost_of_food/TFP2006Report.pdf (stating that “efforts were made to consider ease of food preparation and convenience in the development of the TFP market baskets.”).

³⁰ Easy to prepare multiple ingredient meals also facilitate independent living for many disabled individuals that may have mobility or other disabilities that limit their capacity to prepare meals from scratch. Likewise, many beneficiaries may not have fully functioning kitchens with which to prepare food. *See* Keri Szejda, *Will Requiring Food Stamp Retailers to Sell More Healthy Food Make it Easier for SNAP Recipients to Eat Better?* (Mar. 23, 2016), available at <http://foodandagpolicy.org/news/story/will-requiring-food-stamp-retailers-sell-more-healthy-food-make-it-easier-snap-recipients> (noting that “living in a poor urban neighborhood may mean that you don’t have a refrigerator, stove, pots or pans to cook with, so food choices need to reflect what people’s circumstances realistically allow them to prepare.”).

³¹ Food and Nutrition Service, *Implications of Restricting the Use of Food Stamp Benefits – Summary* (Mar. 1, 2007), available at <http://www.fns.usda.gov/sites/default/files/arra/FSPFoodRestrictions.pdf>.

³² *Id.*

³³ Today, commercially processed foods and prepared mixtures with multiple ingredients (e.g., frozen dinner or multiple 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. For example, if a retailer sells canned minestrone and FNS determines that the product’s main ingredient is vegetables, it will count towards one item in

items or abandon the system used today to categorize multiple-ingredient items based on the primary ingredient.

The Agency contends that multiple ingredient items should be excluded “to prevent confusion.”³⁴ There is no evidence provided with the proposed rule that there is anything confusing about how staple food category determinations are made today. Currently, multiple ingredient food items are categorized in one of the staple food categories depending on the “primary ingredient” of the item. The process for determining which category multiple ingredient items fall into has been in place for many years without confusion. Any questions that arise with regard to multiple ingredient items are dealt with through the licensing and application process. There is no reason the FNS should abandon the “primary ingredient” test. It works.

Despite the proven functionality of the current multiple ingredient test, FNS proposes to exclude multiple ingredient items altogether. A can of tuna, which includes tuna fish and water (and many times vegetable broth and salt),³⁵ has multiple ingredients. Based on the text of the proposal, therefore, a can of tuna would not be eligible to count as a staple item. Yet, FNS indicates in the preamble to the proposed rule that even though the text of rule excludes multiple ingredient items that is not what FNS actually intends to do. According to FNS, certain multiple ingredient items, such as yogurt, cheeses, and cereals, with “primary staple ingredients that are clearly represented and easily recognized” would continue to count as staple foods.³⁶ Other multiple ingredient items that “do not represent a single staple food category,” like “frozen entrees and prepared sandwiches” would not.³⁷

This proffered classification system is arbitrary and capricious because it sets no identifiable standard for which multiple ingredient foods may still count as staple foods. It is highly subjective and 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.

For example, FNS may consider a yogurt with strawberry pieces a staple food item because they consider it to be “easily recognized” as yogurt. But, then again, FNS may conclude just the opposite. The same questions arise if the same size container with the same yogurt is accompanied by fruit and granola or simply by cookie crumble. Is there a specific number of

the vegetable or fruit category (if FNS determined the main ingredient was pasta, it would count as one item in the breads or cereals category).

³⁴ 81 Fed. Reg. at 8017.

³⁵ See Bumble Bee Tuna, Nutrition Facts and Ingredients, <http://www.bumblebee.com/products/tuna/bumble-bee-chunk-light-tuna-in-water/>.

³⁶ 81 Fed. Reg. at 8017; 81 Fed. Reg. at 19501. It is also important to note that this classification system is a “clarification” listed in the proposed rule’s preamble, it has no legal weight going forward as it is not included in the regulatory text. Thus, in ten years’ time, a new FNS administrator could choose to penalize retailers for stocking multiple ingredient items like yogurt and cereals.

³⁷ *Id.*

added ingredients that disqualifies a food from being a staple food? Is there, instead, a volumetric formula for deciding when a food is sufficiently “easily recognized” to count as a staple food? The proposed rule does not answer these questions.

The “easily recognized” standard described in the proposed rule’s preamble invites arbitrary and capricious decisions and does not give SNAP participants any objective means to determine what items will be accepted as staples. The examples of acceptable (e.g., boxed cereal) and unacceptable (e.g., vegetable stuffed ravioli) multiple ingredient items in the Agency’s clarification document are completely arbitrary and based solely on what FNS considers “worthy” healthy items and those items it does not.³⁸

FNS erroneously assumes that by making these proposed changes to the definition of staple foods, it will “ultimately encourage stores to offer more nutritious options”³⁹ By defining staple foods to encompass only single ingredient unprocessed foods, FNS is making it exceedingly costly for small format retailers to participate in the Program. As opposed to encouraging small retailers to stock what FNS considers “healthier” items, it will encourage retailers to leave SNAP. It is laudable that FNS wishes for SNAP beneficiaries to have more access to nutritious options. However, multiple ingredient items are not inherently unhealthy.

Furthermore, demand drives supply, not the reverse. Convenience store retailers continuously and assiduously study consumer habits and preferences to be able to effectively market to those consumers. If they did not do this, they would swiftly go out of business. If retailers are not stocking more single ingredient, unprocessed items, it is because not enough consumers are buying those products. According to certain public health studies and the Agency’s own research, just offering more healthy items or restricting what SNAP beneficiaries can buy does not guarantee that consumers will purchase and eat those items.⁴⁰ Moreover, if FNS wants SNAP beneficiaries to actually cook more nutritious meals and live healthier lifestyles, it should do more to promote nutrition education via SNAP-Ed.⁴¹ Similarly, it should promote innovative techniques to improve nutritional choices of SNAP participants, via programs, such as the Healthy Incentives Pilot, which actually nudge beneficiaries to make better food choices.⁴²

³⁸ See “EXAMPLES of Multiple Ingredient Foods that would be Excluded for Purposes of Retailer Eligibility Decisions,” 81 Fed. Reg. at 19501-19502.

³⁹ 81 Fed. Reg. at 8017.

⁴⁰ Keri Szejda, *supra* note 30. FNS research indicates that even restricting what SNAP beneficiaries can purchase may be ineffective in changing their purchasing behaviors. Food and Nutrition Service, Implications of Restricting the Use of Food Stamp Benefits – Summary (Mar. 1, 2007), *available at* <http://www.fns.usda.gov/sites/default/files/arra/FSPFoodRestrictions.pdf>.

⁴¹ SNAP-Ed, *available at* <http://www.fns.usda.gov/snap/nutrition-education>; *see also* Testimony of Lisa J. Pino, Deputy Administrator for SNAP, House Committee on Agriculture Subcommittee on Department Operations, Oversight, Nutrition, and Forestry, 111th Cong. (Jan. 25, 2010).

⁴² We have heard from several NACS and SIGMA members who noticed meaningful changes in SNAP beneficiary shopping behavior resulting from the Healthy Incentives Pilot. *See also* Susan Bartlett, et al., Evaluation of the Healthy Incentives Pilot (HIP): Final Report, USDA FOOD & NUTRITION SERVICE (Sept. 2004) (finding that the HIP

FNS’ decision to exclude multiple ingredient items from stocking requirements – and the unworkable classification system it describes – is a policy choice unsupported by scientific research, unreflective of American eating behaviors, and contradictory to USDA’s own research. It is arbitrary and capricious, and it goes well beyond the scope of FNS’ authority.

In effect, FNS is affecting a bait and switch. It is ostensibly regulating retailer requirements but ultimately regulating what SNAP beneficiaries can buy. This is because a small format retailer only has so much space in his store and would need to cut out significant numbers of multiple ingredient items from inventory in order to fit the SNAP eligible items on his limited shelf space – including healthy items eligible for purchase with SNAP benefits. As such, if a retailer can no longer carry multiple ingredient items for the purposes of eligibility due to space constraints (or any other reason), those products will no longer be available to the SNAP beneficiaries who rely on those retailers.

Finally, according to FNS, excluding multiple ingredient items is necessary because allowing such items has allowed “prepared foods sold for carry-out or for on-site consumption to be counted as staple foods when determining a store’s eligibility . . . enabling some restaurants to inappropriately participate in SNAP as retail food stores.”⁴³ But this is also true of single ingredient items such as hot rotisserie chicken that is commonly sold in grocery stores. Using an exclusion of multiple ingredient foods from the category of staple foods as a pretext to stop sales of restaurant foods is inappropriate. Prepared foods cannot be purchased with SNAP benefits and by law, prepared foods cannot be considered when determining whether a retailer meets depth of stock requirements.

Rather, FNS should conduct meaningful reviews of retail participants to ensure they are properly complying with requirements and have not been mistakenly admitted into the Program by FNS. The rules are already in place to prohibit the sale of restaurant foods within SNAP. FNS merely needs to enforce these existing rules to prevent such sales – not upend the foundations of retailer eligibility.

Today, in over 99,000 convenience stores, 75 percent of the items in stock are multiple ingredient items, including mixed fruit cups, frozen vegetable meat medley dinners, or canned soups.⁴⁴ To comply with the proposal, these small format retailers would have to completely

financial incentive successfully nudged SNAP beneficiaries to alter their purchasing behavior in “both statistically significant” and “nutritionally relevant” ways).

⁴³ 81 Fed. Reg. at 8017.

⁴⁴ NACS Internal Membership Survey on SNAP Proposed Rule (hereinafter *NACS SNAP Survey*). The NACS SNAP Survey was conducted in March 2016 of 370 retailer companies, representing approximately 22,694 stores, a sample size that is statistically representative of the industry as a whole. This data has a 95 percent confidence level with a margin of error of +/- 5 percent and has been extrapolated to reflect industry-wide numbers. “70 percent of respondents said fewer than half of their stores would be able to participate in SNAP if they had to meet this requirement.” According to results from the NACS SNAP Survey, if required to offer seven single ingredient items in each of the four staple food categories in order to participate in the Program, approximately 91,624 stores would be unable to participate.

overhaul their food offerings – and remove items they know sell – to remain eligible to participate in SNAP. This will be quite costly and, for many, will make it too costly to continue participating in SNAP.

C. FNS Should Not Redefine the Term “Variety.”

FNS has also proposed to “clarify” the term “variety.”⁴⁵ But, the proposed rule advances not a clarification but a redefinition of the term in a way that will make it exceedingly difficult for small format retailers to meet the depth of stock requirements. The Agency would change what variety means so that similar items within the same food family would not count as different varieties. To meet the requirements for variety in the “meat, poultry, or fish” category, for example, FNS has listed duck, catfish, shrimp, lamb, and tofu as acceptable variety options.⁴⁶ FNS has listed these uncommon alternative items because two items from the same animal, such as bacon and ham or ground turkey and sliced turkey, would not count as separate varieties – so retailers will need to stock less common items to meet their variety obligations.⁴⁷

In fact, without including uncommon items like duck and tofu, it is difficult to understand how a retailer could stock seven different varieties in the meat group with FNS’ strange, new definition of variety. Many of these items are exceedingly costly and are not the types of foods that consumers frequenting convenience stores want or are financially capable of purchasing.⁴⁸ Many SNAP and non-SNAP customers in the United States cannot afford these uncommon food items, and SNAP customers – whose benefits are about \$127 per month per person (which amounts to about \$1.41 per person per meal) – would risk depleting their benefits if they did.⁴⁹

⁴⁵ Department of Agriculture, Food and Nutrition Service, Proposed Rule, *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program; Clarification of the Proposed Rule and Extension of Comment Period*, 81 Fed. Reg. 19500 (Apr. 5, 2016).

⁴⁶ 81 Fed. Reg. at 19502; 81 Fed. Reg. at 8021.

⁴⁷ This applies across all staple food categories. Having two varieties of hard cheeses – such as provolone and cheddar – no longer will count as two varieties of staple foods in the dairy category.

⁴⁸ According to www.peapod.com on May 16, 2016, the cost of 1 pound of ground beef is \$4.49 and 1 pound of ground lamb is \$7.99. It seems unrealistic to assume that many people trying to make ends meet would choose lamb over beef given the price differential.

⁴⁹ Center on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits* (Nov. 5, 2015), available at <http://www.cbpp.org/research/a-quick-guide-to-snap-eligibility-and-benefits>; White House Council of Economic Advisors, *Long-Term Benefits of The Supplemental Nutrition Assistance Program* (Dec. 2015), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/SNAP_report_final_nonembargo.pdf (finding that while SNAP is highly effective at reducing food insecurity, “the current level of benefits often cannot sustain families through the end of the month—causing children to go hungry and endangering their health, educational performance, and life chances”).

In addition, consumer eating and purchasing habits vary by neighborhood, state, and region of the country. As mentioned previously, demand pulls supply in the retail industry. Retailers stock items that they know consumers that frequent a particular store want to buy, including groups of items in food families (e.g., different beef products such as hamburger, brisket, roast beef, and the like if beef is a big seller). The proposed rule, however, will make it difficult or impossible to offer multiple staples in popular food families.

FNS should not change the meaning of the term “variety,” which Congress used as a foundation for its decisions in the Farm Bill. Items that are different, non-interchangeable items, therefore, such as ground turkey and sliced turkey or ground beef and roast beef slices, are currently considered different varieties, and there is no reason to change that. Even if an item is in the same food family or is from the same animal or species – like a tuna steak and a can of tuna – those items are not interchangeable and should be considered different varieties.

Likewise, raw chicken breast, refrigerated grilled chicken, or frozen chicken and vegetable stir fry should be considered different varieties. Consumers purchase those items because they are looking to have different food needs met: they may buy raw chicken breast to make a Sunday meal when they may have the time to do so; they may buy the refrigerated grilled chicken when they want to quickly cut up the chicken and put it on a salad; or they may buy the frozen chicken-vegetable meal so their child can easily heat up that item in the microwave without adult supervision.

The problems with the new definition of the term “variety” extend to all of the staple food categories. In the dairy category, for example, we are pleased to see that FNS differentiates between hard and soft cheeses. But two different flavor hard cheeses should not be considered one variety just because they both are made from cow’s milk. Consumers would consider cheddar, provolone, and pepper jack cheese different items because they are, in fact, different. Similarly, shoppers would consider cream cheese and Laughing Cow creamy Swiss cheese to be two different soft cheeses.

For the vegetable or fruit category, there is no reason why Fuji apples and a jar of applesauce should not be considered different varieties; they are different products from the same food family (apples). And for breads or cereals, a loaf of sliced white bread is different from hamburger rolls made from white flour—consumers would not consider them the same item, they buy them to fulfill different food needs.

Consequently, these items should be considered different varieties. Retailers are stocking these different items because consumers are buying them and consider them different things. Thus, variety should continue to be an economically realistic construct, as it has been for years, and one that also is reflective of consumer demand and behavior. Otherwise, retailers are going to have to stock many products customers do not want to buy, and this will lead to spoilage and other costs for retailers.

We are encouraged by Undersecretary Concannon's statements before the House Agriculture Committee indicating that FNS is already reconsidering this aspect of its proposal.⁵⁰ Redefining the term "variety" will only lead to an unclear, subjective standard that makes it difficult for small stores to participate in SNAP.

D. Requiring Small Format Retailers to Stock Six Units of Every SNAP Staple Item on Shelf at All Times Will Be Very Burdensome for These Retailers and Will Impede Retailers' Ability to Participate in SNAP.

Under existing law, to be eligible to redeem SNAP benefits, a small format retail food store must offer for sale, on a *continuous basis*, the requisite number and variety of items to meet the depth of stock requirements.⁵¹ To stock food on a "continuous basis," USDA regulations currently stipulate that the SNAP retailer must, on any given day of operation, offer for sale and normally display an item in a public area. In the proposal, FNS would redefine the term "continuous basis" to require a SNAP retailer to, on any given day of operation, offer for sale and normally display "*a minimum of six stocking units for each food item.*"⁵² According to FNS, requiring six stocking units on shelf at all times will ensure that retailers can meet the "continuous basis" requirements without "complicating collection of information that store visit contractors now collect."⁵³

With this provision, FNS would require retailers to publically display a total of 168 items at all times—a six-fold increase from the requirements in the Farm Bill and a fourteen-fold increase from pre-Farm Bill requirements.⁵⁴ However, since these 168 items must be continually stocked, in reality, a retailer must stock far more than 168 items to replace any items that are sold and still be in compliance with depth of stock requirements. Stocking more than 168 of exactly the right combination of staple food items in addition to all of the other products that stores sell will be a significant challenge for a small format retailer. In fact, according to NACS' industry-wide survey, approximately 57,551 stores would be unable to participate in SNAP if they were required to have six units of every staple item on shelf at all times.⁵⁵

⁵⁰ House Agriculture Committee, Hearing on The U.S. Department of Agriculture, 114th Cong. (Mar. 17, 2016), available at <http://agriculture.house.gov/calendar/eventsingle.aspx?EventID=3202> (citing statements made by Undersecretary Concannon in response to questions by Chairman Mike Conaway (R-TX). Undersecretary Concannon agreed that different items in the same food family - ground beef and sliced beef - should be two separate varieties.).

⁵¹ 7 C.F.R. §278.1(b)(1)(ii)(A).

⁵² 81 Fed. Reg. 8021.

⁵³ 81 Fed. Reg. at 8018.

⁵⁴ 7 varieties x 4 staple food categories = 28 x 6 stocking units = 168.

⁵⁵ NACS SNAP Survey, *supra* note 44. "70 percent of respondents said fewer than half of their stores would be able to participate in SNAP if they had to meet this requirement."

Small stores simply do not have the shelf space to display 168 staple food items in their stores at all times. This is even more burdensome and unrealistic since FNS is proposing to make this more challenging by redefining “staple foods” to exclude multiple ingredient items, some of which have a longer shelf life than other items. Ultimately, this requirement picks winners and losers among stores based on size; and it is merely a pretext for kicking small stores out of the Program, and making it significantly more difficult for SNAP beneficiaries to use their benefits.

FNS has ignored – or is apparently in complete ignorance of – the logistical realities relating to how small retailers are supplied.⁵⁶ On average, most small format retailers receive one delivery per week, while some have two deliveries per week.⁵⁷ Stores track purchasing data to determine how many units of a particular item to deliver to each store each week to maximize sales and minimize spoilage.⁵⁸ Because of supply and shelf space constraints, stores’ stocking practices vary depending on the store space, its supply schedule, the item, its location, and consumer demand. Moreover, in the convenience store industry, retailers tend to put fewer items on shelf as a way of spurring quick item turnover, which, incidentally, also is practical because of stores’ limited shelf space and supply limitations. In fact, most stores stock fewer than six items of a particular product on shelf at any given time.⁵⁹

No changes should be made to FNS’ current rules on stocking requirements. Stores of all kinds – including the largest grocery stores – can have cyclical runs on particular products such that they do not display six stocking unit of every item at all times. For example, supply is affected by the cycle on which SNAP benefits are issued. If benefits are not issued on a

⁵⁶ House Agriculture Committee, Hearing on The U.S. Department of Agriculture (Mar. 17, 2016)(citing statements made by FNS Administrator Audrey Rowe that there was no one with retail experience that took part in the FNS proposed rule drafting process).

⁵⁷ Each time a distributor makes a delivery stop, there is a cost involved. Thus, stores try to maximize their distribution efficiency to avoid escalating costs.

⁵⁸ In the United States, at least 70 billion pounds of food go to waste each year. Food Waste in America, FEEDING AMERICA (last accessed on May 15, 2016), <http://www.feedingamerica.org/about-us/how-we-work/securing-meals/reducing-food-waste.html>; see also Roberto A. Ferdman, *Americans throw out more food than plastic, paper, metal, and glass*, THE WASHINGTON POST (Sept. 23, 2014).

In 2010, 133 billion pounds of food went to waste (around 31 percent of our nation’s total food supply). Retail-level losses represented 43 billion pounds and consumer-level losses were 90 billion pounds. Jean C. Buzby, Hodan F. Wells, and Jeffrey Hyman, *The Estimated Amount, Value, and Calories of Postharvest Food Losses at the Retail and Consumer Levels in the United States*, Final Report, U.S. DEPARTMENT OF AGRICULTURE (Feb. 2014) (finding that “reducing food loss would likely reduce food prices in the United States and the rest of the world”).

⁵⁹ See generally, House Agriculture Committee, Hearing on “The Past, Present, and Future of SNAP: The Retailer Perspective,” 114th Cong. (Mar. 12, 2016), Testimony of Douglas M. Beech, Casey’s General Stores, Inc., available at http://agriculture.house.gov/uploadedfiles/beece_testimony.pdf (noting that Casey’s practice is to keep only two of every item on shelf).

staggered cycle, beneficiaries tend to do all of their shopping at the same time, which leads to supply shortages.⁶⁰

In communities with many SNAP beneficiaries, this can mean that grocery and convenience stores are out of several staple items on some days. Stores work hard to avoid selling out of certain items or running low on them, but it happens to all stores. Runs on certain products can also occur at holidays, or when there are serious weather events predicted.⁶¹ The bottom line is that the proposed requirement of six stocking units is arbitrary, does not account for the real-world practices of small or even large stores, and is unsupported by any data in the proposed rule indicating it is necessary.

Taken together, there are many real-world causes that may overwhelm the supply and stocking efforts of any store – particularly small stores. The approach used by FNS today works well and recognizes the reality that there is a natural cycle making any arbitrary minimum stocking requirement unworkable. No change should be made to current rules in this area.⁶²

E. The Proposed Rule’s Revised Definition of “Retail Food Store” Would Push Tens of Thousands of Convenience Stores Out of SNAP.

The proposed rule would amend the definition of “retail food store” so that if more than 15 percent of a store’s total food sales are from items that are “cooked or heated on-site before or after purchase,” the store would be automatically barred from participating in SNAP. This threshold applies even if the sales are attributable to separate business entities doing business under the same roof, such as a fast food franchise that has a point of sale in the same building as a convenience store – a common business practice.⁶³ If two food businesses operate under the

⁶⁰ See generally, House Agriculture Committee, Hearing on “The Past, Present, and Future of SNAP: The Retailer Perspective,” 114th Cong. (Mar. 12, 2016), Testimony of Jimmy Wright, Wright’s Market, *available at* http://agriculture.house.gov/uploadedfiles/wright_testimony.pdf.

⁶¹ This is a phenomenon experienced by even the largest supermarkets right before Thanksgiving, Christmas, Fourth of July, or other major holiday, and it was evident in the District of Columbia right before and immediately after the January 2016 blizzard.

⁶² There have been indications from USDA that it is seeking to exclude small stores from SNAP in order to combat fraud. Using store size as a proxy for fraud is wrong. It will result in excluding stores that follow the rules – and ignoring many stores that do not. During consideration of the Farm Bill, the Committee on Agriculture rejected using depth of stock, store size, or other sales requirements as a pretext for fraud. Instead, the Farm Bill included a provision directing the Department of Agriculture to write rules establishing technology standards that would prevent fraud. More than two years after the Farm Bill was signed into law, however, FNS has yet to issue a proposed rule addressing the new technology standards. It is inappropriate for FNS to use retailer eligibility requirements relating to depth of stock and other items in FNS’ proposed rule to address fraud – Congress specifically rejected that approach in the Farm Bill. As long as a store complies with SNAP retailer eligibility requirements, including any subsequent technology requirements that may be imposed, it should be eligible to accept SNAP benefits, regardless of what else the store sells and in what quantities it sells those items.

⁶³ Specifically, the proposal states: “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

same roof, FNS will consider their total food sales jointly to determine whether that 15 percent threshold is met, even though hot foods cannot be purchased with SNAP benefits.

There is no justification for penalizing stores that sell hot, prepared foods to non-SNAP customers if those stores meet the other relevant eligibility requirements. Moreover, this provision is counterproductive as it would discourage stores from offering certain fresh items to consumers, for example, breads baked on site and then sold to consumers either as part of a sandwich business or as a single loaf. Finally, this provision highlights that FNS is completely disregarding contemporary American purchasing and eating habits. Today, sales of prepared foods are increasing across convenience stores, grocery stores, and large supermarket chains because this is what Americans want to buy.⁶⁴ Given time constraints due to family and work responsibilities, many families want to be able to purchase prepared foods for their at-home meals. Even though SNAP recipients cannot redeem their benefits on hot foods, this provision would penalize convenience stores owners for meeting their non-SNAP customers' desire for prepared foods.

According to FNS, this provision was included because Congress did not intend for restaurants to participate in SNAP except in limited circumstances to serve the elderly, disabled, and homeless.⁶⁵ Thus, the changes will prevent restaurant-type entities from circumventing gaps in the regulations and becoming SNAP authorized retailers.⁶⁶ But that is not what the proposed change in definition would accomplish. Instead, it would disqualify many stores that are not restaurants but that heat some foods on site or operate under the same roof as a restaurant. Responses from the NACS Survey indicate that if this provision were to be enacted, approximately 47,000 stores would be immediately ineligible to participate in SNAP – knocking almost half of the total number of convenience stores that currently participate out of the Program.

It should not matter what a retail food business sells to non-SNAP customers provided that the business complies with the depth of stock and other requirements and only redeems SNAP benefits for eligible items. Otherwise, this is a back-door way for FNS to overstep its statutory authority to regulate the dietary habits of non-SNAP consumers across the United

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.”

⁶⁴ Food Marketing Institute, *The Food Retailing Industry Speaks 2015*, Table 46 – Prepared Food as a Percentage of Sales, showing that there is a tremendous range in sales of prepared foods among stores. For companies with fewer than 25 stores, it is interesting to note that 11.2 percent of total sales come from prepared foods, compared to companies with more than 125 stores where sales are 3.6 percent of total sales. Undoubtedly, some small, independent grocers will be disqualified from the Program due to this aspect of the proposed rule.

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

⁶⁶ 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.”).

States. If FNS' concern is actually that restaurants are masquerading as retail food stores and selling hot foods through SNAP, it already has the tools to deal with that and merely needs to bring enforcement actions to remove those bad actors from the Program.

F. The Proposed Rule's "Waiver Provision" is Woefully Inadequate to Compensate for the Problems Noted Above.

NACS and SIGMA are pleased that the proposal includes a provision that would allow the Agency to consider factors relating to the number and availability of SNAP retailers in a community when considering whether to permit an applicant retailer to participate in SNAP – even if that store fails to meet some requirements.⁶⁷

According to the proposed rule, the factors FNS will consider for such “waivers” are: (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.⁶⁸ FNS should also consider “whether or not the store offers flexible or expanded hours of service” when processing a waiver request.

While the waiver provision is helpful, it cannot come close to alleviating the problems with the proposed rule. As currently drafted, the proposed rule will push tens of thousands of stores out of the Program. It is unclear, therefore, how FNS would be able to cope with thousands of stores applying for waivers all at once. How would FNS process these waivers? How long would the waiver process take?⁶⁹ Would stores that are currently eligible to participate but cannot meet new standards be granted a waiver automatically? If there are multiple waiver requests from the same community which has no other SNAP retailers, which one will FNS grant (or will it grant multiple waivers)?

A waiver process invites abuse and problems. If a waiver is granted for one store in a community, that store will have a government-created monopoly over some customers. This may cause pricing or other problems for SNAP and non-SNAP consumers in that community. Such artificial monopoly situations could arise even when FNS grants multiple waivers for a community depending on the locations of the stores involved and the transportation options in

⁶⁷ 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....”).

⁶⁸ 81 Fed. Reg. at 8018, 8021.

⁶⁹ Policymakers are already concerned about the lengthy timeline for retailer application approvals. *See* Joint Explanatory Statement of the Committee of Conference, the Agriculture Act of 2014, noting that “having placed new requirements on retailers, the Managers are concerned by the unpredictable and growing variation in the timeline for retailer application approvals,” at 1012. *See also* H. Report 113-333, Conference Report for H.R. 2642 – the Agriculture Act of 2014 (Jan. 27, 2014), at 434.

that community. FNS is not in a position to engage in the central planning process that would be required to dictate the answers to the many questions that will arise in the Program with a waiver process.

SNAP works today because it lets stores of many types participate in the Program based on clear criteria. Stores locate themselves and apply to participate in the Program based on market factors. That is the most efficient way to create as many options as possible for SNAP beneficiaries. Replacing that system with an arbitrary set of waivers that will be required on a massive scale to meet SNAP consumers' needs will not work.⁷⁰

G. FNS' Proposed Rule to Publically Shame SNAP Violators Raises Due Process Concerns.

The “public disclosure of sanctions” provision in the proposal has not been properly constructed. Under the proposed rule, FNS would be allowed to publically disclose certain information about retailers that have been disqualified or otherwise sanctioned for SNAP violations,⁷¹ namely the name and address of the store, the owner name(s), and information about the sanction in question. FNS would disclose that information after the time for administrative and judicial appeals has expired.⁷²

There is no provision of the proposed rule, however, that would allow for sanction 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 or placed under new management. It is inappropriate for FNS to maintain a posting about sanctions against a new store owner that had nothing to do with the sanction in question. Maintaining that information against a new owner may violate the owner's due process rights – and keeping that information public with no ability to ever remove it due to the passage of time or other factors violates the due process rights of owners that may have violated Program rules.

H. The Proposed Rule's Definition of the Term “Firm” Will Negatively Impact Retail Food Stores.

The Agency has proposed to add a definition for the term “firm” to ensure that different terms, such as entities, firms, retailer, and stores are used interchangeably and “treated as

⁷⁰ See Statements made by Undersecretary Concannon on the Waiver Provision, House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies, “Budget Hearing – Department of Agriculture, Food and Nutrition Service,” 114th Cong. (Feb. 24, 2016), <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394393>.

⁷¹ Public disclosure may include posting a list of sanctioned retailers on a public website.

⁷² 81 Fed. Reg. at 8018, 8021.

equivalent terms.”⁷³ This change is ill-considered. It is inappropriate to equate the term “firm” with both “retail food store” and “entity” as they do not mean the same things. Each store is individually licensed to participate in SNAP. That store may be part of a larger “firm” that owns multiple stores participating in the Program (or it may not). To conflate “store” with “firm” may have far-reaching ramifications in terms of licensing, enforcement and other policies. The term “entity,” on the other hand, might be used to describe a store or a firm but some uses of the word will mean one and some will mean the other. Conflating all of these terms will only introduce confusion and lead to unintended results – and uncertainty for businesses participating in the Program.

I. The Agency Has Failed To Comply With Its Obligation to Assess the Impact of the Proposal on Small Businesses in Violation of the Administrative Procedure Act.

Given this proposed rule’s significant potential impact on American businesses and consumers, FNS is required to perform a regulatory impact analysis (“RIA”) under the guidelines set out under Executive Order 12866,⁷⁴ Executive Order 13563,⁷⁵ the Regulatory Flexibility Act,⁷⁶ as amended by the Small Business Regulatory Enforcement Fairness Act,⁷⁷ and the Unfunded Mandates Reform Act of 1995.⁷⁸ By law, an RIA is required if a proposed rule is likely to result in a final rule that may have an annual effect on the economy of \$100 million or more or adversely affect a specific sector of the economy. As is shown in Appendix A and Appendix B of this document, there is no question that the proposed rule would have an annual effect on the economy of more than \$100 million and would adversely affect the convenience store industry sector. The Agency did not follow the guidelines of the Office of Management and Budget to perform RIAs and failed to complete a proper RIA.

⁷³ 81 Fed. Reg. at 8017.

⁷⁴ “Significant regulatory action” means among other things any regulatory action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Exec. Order No. 12866, 58 Fed. Reg. No. 190 (Sept. 30, 1993), available at www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

⁷⁵ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011). Executive Order 13563 demands that an agency “tailor its regulations to impose the least burden on society.”

⁷⁶ Pub. L. 96-354, 5 U.S.C. § 601 *et seq.*

⁷⁷ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. § 601 *et seq.*). In the event that a proposal is projected to impose a “significant economic impact on a substantial number of small entities,” a federal agency must assess that impact and consider regulatory alternatives that would minimize the impact to small businesses. 5 U.S.C. § 603, 605.

⁷⁸ Pub. L. 104-4 (Mar. 22, 1995); 2 U.S.C. § 1501 *et seq.*

When proposing a rule, FNS is required to assess all costs and benefits of available regulatory alternatives in order to select an approach that maximizes net benefits (including the potential impact on economic, environmental, public health and safety factors, and other advantages; distributive impacts; and equity). FNS is also required to analyze regulatory options that would minimize any significant impact of the rules on small businesses.

At every step, FNS has failed to perform a proper analysis.⁷⁹ FNS' methodology is woefully lacking because it does not take into account all of the costs that would fall on retailers if they were to comply with the proposed rule, including, but not limited to, opportunity costs, spoilage costs, and renovation costs. In addition, FNS does not identify any quantifiable benefits that would emerge from the proposal, and the accounting statement it provides is incomplete and contains scant detail. Significantly, FNS does not assess any alternatives to its proposed rules in its RIA or its regulatory flexibility analysis. Finally, FNS grossly underestimated the costs this proposal would impose on small businesses.

To see a complete analysis of the shortcomings in the Agency's RIA, please see Appendices A and B of this document.

J. Statements by USDA Indicate that the Comment Process is not Compliant with the Law.

Statements made by USDA officials indicate that FNS has prejudged comments before it has even received them. FNS Undersecretary Kevin Concannon was quoted as saying, "I've heard from the industry and much of what they said is greatly exaggerated . . . It's an example of moneyed interest groups that just refuse to acknowledge the problem that low-income people have in this country in accessing healthy food."⁸⁰ These statements indicate that the Agency has already determined that any critics of the proposed rule are not credible. Prejudging comments in this way is inappropriate and indicates that USDA considers this comment period to be a sham. That is a violation of the Administrative Procedure Act's requirements.⁸¹

⁷⁹ The Agency has also failed to complete a proper and accurate Civil Rights Impact Analysis. While FNS concludes that "this rulemaking will not in any way limit or reduce the ability of protected classes of individuals to receive SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion, or political belief..." FNS has failed to consider that if numerous small format retailers are pushed out of the Program, the ability of SNAP beneficiaries to redeem their benefits will be negatively affected. 81 Fed. Reg. at 8020.

⁸⁰ Bill Tomson, Agripulse, *SNAP Rule Would Drive Small Stores Out of Program, Group Says* (May 11, 2016)(quoting Undersecretary Kevin Concannon).

⁸¹ 5 U.S.C § 500 *et seq.*; *see, e.g.*, *National Black Media Coalition v. FCC*, 791 F.2d 1016 (1986); *Forester v. Consumer Product Safety Commission*, 559 F.2d 774, 787 (D.C. Cir. 1977)(describing the "meaningful opportunity" to participate).

III. Conclusion

The proposed rule will unreasonably restrict the number and type of locations at which SNAP beneficiaries can redeem their benefits and obtain the food they need. If adopted, the proposed rule would punish SNAP beneficiaries by requiring them to travel outside of their local communities just to get food. We urge USDA to withdraw this proposed rule before it hurts SNAP beneficiaries and their access to food.

Respectfully,



R. Timothy Columbus
Eva V. Rigamonti
Counsel to NACS and SIGMA

Appendix A

Regulatory Impact Analysis Critique

*Enhancing Retailer Standards in SNAP: Changes to Depth of Stock and Stocking Requirements Using
New Farm Bill Definition*

USDA's Regulatory Impact Analysis Does Not Follow the Guidelines
Established by the Office of Management and Budget

Prepared by

John Dunham & Associates
New York

April 8, 2016

Introduction and Summary of Food and Drug Administration Regulatory Impact Analysis Report:

The United States Department of Agriculture's (USDA) Food and Nutrition Service (FNS) has proposed new rules to make changes to the Supplemental Nutrition Assistance Program (SNAP) regulations pertaining to the eligibility of SNAP retail food stores.¹ The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act) to increase the requirement that certain SNAP authorized retail food stores have at least seven varieties of items in each of four staple food categories available on a continual basis. The 2014 Farm Bill also amended the Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three. The proposed rule would codify these requirements.

In addition to these statutory requirements, FNS is proposing several additional changes. These proposed changes address depth of stock, amend the definition of staple foods, and amend the definition of "retail food store."

Since the enactment of the proposed rules would have a substantial impact on business, consumers and the economy, they are what the Office of Management and Budget defines as a "significant" regulation.² This means that the FNS is required to perform a regulatory impact analysis (RIA) under the guidelines set out under Executive Order 12866,³ Executive Order 13563,⁴ the Regulatory Flexibility Act (5 U.S.C. 601-612),⁵ and the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).⁶ Under these provisions the FNS must not only determine if the regulation is necessary but must assess all costs and benefits of available regulatory alternatives to select approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). It also requires the FNS to analyze regulatory options that would minimize any significant impact of the rules on small entities.

¹ 7 *CFR Parts 271 and 278*, "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program," at: https://www.regulations.gov/?mkt_tok=3RkMMJWWf9wsRolsqXJZKXonjHpfsX56O0rWKK0IMI%2F0ER3fOvrPUfGjI4ERcVrI%2BSLDwEYGJlv6SgFSrjCMat53rgPWBk%3D#!documentDetail;D=FNS-2016-0018-0001

² "Significant regulatory action" means among other things any regulatory action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. See: *Executive Order 12866 of September 30, 1993*, at: www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

³ *Executive Order 12866 of September 30, 1993*, at: www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

⁴ *Executive Order 13563 of January 18, 2011*, at: www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

⁵ 5 *U.S. Code Chapter 6 - The Analysis Of Regulatory Functions*, at: <http://www.law.cornell.edu/uscode/text/5/part-I/chapter-6>.

⁶ *Public Law 104 - 4 - Unfunded Mandates Reform Act Of 1995*, at: <http://www.gpo.gov/fdsys/pkg/PLAW-104publ4/content-detail.html>.

The Proposed Rules:

Staple Foods

This proposed rulemaking is the result of two separate developments. First are statutory changes included in the 2014 Farm Bill. The 2014 Farm Bill increases the requirement that certain SNAP authorized retail food stores have available on a continuous basis at least seven varieties of items in each of four staple food categories. Further, the 2014 Farm Bill increases the minimum number of categories in which perishable foods are required from two to three.

Current regulations define staple foods as foods in the following categories: Meat, poultry or fish; bread or cereals; vegetables or fruits; and dairy products. They also specify that foods with multiple ingredients can only be counted in one staple food category, based on the main ingredient. In addition, prepared foods sold for carry-out or for on-site consumption are no longer to be counted as staple foods when determining a store's eligibility to participate in SNAP.

The proposed rule redefines staple foods as those food items intended for home preparation and consumption in each of the following four categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods. The new rules also require that commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall not be counted in any staple food category. Examples of such foods include fruit parfaits, chicken soup, or bagged salad mix containing sliced chicken. Accessory food items, like snacks or desserts, also are not to be considered staple foods under the proposed rules.

Eligibility for Retailers

FNS proposes adding language to the definition of retail food store SNAP eligibility that would require that at least 85 percent of an entity's total food sales be items that are not cooked or heated on-site before or after purchase. Currently, only firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption are ruled ineligible.

Additionally, this rule would add language to prevent two separate businesses (one a hot foods restaurant and the other a convenience store or small grocer, that sells food for home consumption) that operate under one roof from participating in SNAP as a retail food store if they have common employees, accounting, and management and meet the 85 percent threshold for total food sales described above.

Executive Order 12866, Section 3(f)(1) mandates that agencies must submit a regulatory impact analysis for those regulatory actions that are anticipated to "have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State,

local, or tribal governments or communities.⁷ The proposed FNS rule changes are indeed likely to either have a \$100 million impact on the economy, or adversely affect in a material way the retail sector of the economy, and/or local communities, so a proper Regulatory Impact Analysis should be conducted.

Regulatory Impact Analysis Requirements:

According to the Office of Management and Budget, there are 16 elements that every Regulatory Impact Analysis needs to address.⁸ The OMB provides agencies with a detailed Primer on how to conduct an RIA in accordance with its guidelines and the underlying Executive Orders.⁹ Additional requirements from the various laws governing RIAs such as the Unfunded Mandates Reform Act and the Regulatory Flexibility Act also need to be met by the FNS.

The nine structural elements that the OMB suggests that each agency include are:

1. A reasonably detailed description of the need for the regulatory action;
2. An explanation of how the proposed regulatory action will meet that need;
3. An appropriate baseline assessment of how the world would look in the absence of the proposed action;
4. An assessment of potentially effective and reasonably feasible alternatives to the proposed regulatory action;
5. An explanation of why the planned regulatory action is preferable to the potential alternatives;
6. An uncertainty analysis;
7. A description and discussion of the distributive impacts of the potential alternatives;
8. A clear, plain-language executive summary including an accounting statement that summarizes the benefit and costs for the regulatory action;
9. A clear and transparent table presenting anticipated benefits and costs.

In addition to these elements, the OMB states that each regulatory impact analysis must:

1. Use the best reasonably obtainable scientific, technical economic information and present it in a clear, complete and unbiased manner;
2. Provide the data, sources and methods used in the RIA to the public via the internet;
3. Quantify and monetize the anticipated benefits from the regulatory action to the extent feasible;
4. Quantify and monetize the anticipated costs from the regulatory action to the extent feasible;
5. Explain and support how the benefits of the intended regulation justify its costs;
6. Ensure that the preferred option has the highest net benefits unless the law requires a different approach;

⁷ Exec. Order No. 12866, 3 C.F.R. 3 (1993).

⁸ Office of Management and Budget, *Agency Checklist: Regulatory Impact Analysis*, www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf

⁹ Office of Management and Budget, *Regulatory Impact Analysis: A Primer*, at: www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf

7. Use appropriate discount rates for benefits and costs expected to occur in the future;

In addition to these 16 items, a proper RIA must examine a number of additional impacts including international effects and the effects on small businesses.

Because the FNS failed to conduct an adequate Regulatory Impact Analysis, the National Association of Convenience Stores (NACS), a trade organization, commissioned JDA to perform a proper analysis using FDA's own assumptions wherever possible.

The initial analysis analyzes the FNS' Regulatory Impact Analysis, using the OMB's Regulatory Impact checklist.

Critique of the FNS Analysis

JDA reviewed the proposed rule, "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program,"¹⁰ in addition to the Regulatory Impact Analysis and the associated "Initial Regulatory Flexibility Analysis – Proposed Rule."¹¹ JDA found the Regulatory Impact Analysis largely failed to meet the OMB's guidelines for performing RIAs.

Does the RIA include a reasonably detailed description of the need for the regulatory action?
Does the RIA include an explanation of how the regulatory action will meet that need?

The Regulatory Impact Analysis produced by FNS makes clear that some of the proposed rules are intended to align with the statutory intent of the program as defined by Congress. However, the FNS fails to adequately explain how the additional rules would bring the program into line with the statutory intent. In fact, it is possible that the proposed rule would bring about changes that would be detrimental to the statutory intent of the program. The Supplemental Nutrition Assistance Program (SNAP) program is intended to bring "nutrition assistance to millions of eligible, low-income individuals and families and provides economic benefits to communities." According to the FNS, the SNAP program is the largest program in the domestic hunger safety net.

The FNS' proposed rules would "strengthen eligibility requirements by no longer counting foods with multiple ingredients that do not clearly represent a single staple food group." This rule may in fact hurt the SNAP program's nutrition assistance mission if consumers who are no longer able to conveniently spend their SNAP dollars on healthy food offerings at their local neighborhood stores. If as many stores as the FNS suggests about 70 percent of current retailers do not even meet the minimum requirements outlined in the farm bill, it is likely that the expanded rules will ensure that a significant number of currently authorized SNAP retailers will likely not be able to afford to continue to participate in the program. This may lead some in

¹⁰ "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program,"

https://www.regulations.gov/?mkt_tok=3RkMMJWWfF9wsRolsqXJZKXonjHpfsX56O0rWKK0IMI%2F0ER3fOvrPUfGjI4ERcVrI%2BSLDwEYGJlv6SgFSrjCMat53rgPWBk%3D#!documentDetail;D=FNS-2016-0018-0001

¹¹ "Initial Regulatory Flexibility Analysis – Proposed Rule."

https://www.regulations.gov/?mkt_tok=3RkMMJWWfF9wsRolsqXJZKXonjHpfsX56O0rWKK0IMI%2F0ER3fOvrPUfGjI4ERcVrI%2BSLDwEYGJlv6SgFSrjCMat53rgPWBk%3D#!documentDetail;D=FNS-2016-0018-0006

poorly served communities to decide to instead sell those SNAP dollars on the black market, or barter them for other less savory products and services.¹²

The FNS also proposes offering waivers to stores located in rural and remote locations like Alaska, where residents may not have access to locations that otherwise meet the requirements of the new SNAP proposed rules. First, over 258,600 retail stores participate in the SNAP Program, it is unclear how FNS will be able to implement a time-efficient and cost efficient waiver program for the many stores that may choose to apply for such a waiver without adding a significant number of new staff. Second, presuming a particular store is granted a waiver, it is unclear what happens if another store tries to enter the original store's market. For example, would the first store then lose the exemption? Unless run appropriately, this waiver program has the potential to create de facto monopolies, which will enable these small rural stores to raise prices, which may be detrimental to SNAP's goal of offering nutrition assistance to millions of eligible, low-income individuals and families and provides economic benefits to communities.

The FNS also proposes "adding language that would require at least 85 percent of an establishment's total food sales be items that are not cooked or heated on-site before or after purchase." It is unclear why the composition of sales in a store should be disqualifying if the store is offering the staple foods necessary to meet the nutritional requirements of SNAP recipients. It is also possible to envision this rule causing undue hardship for SNAP recipients in food deserts or rural areas if their local stores are cut off from the SNAP program. Furthermore, the new restrictions on retailers that heat their food on premises may have a negative impact on SNAP recipients who may not have access to an oven or cooking supplies.

Furthermore, the new rules would also prevent establishments that operate two businesses in one location from accepting SNAP benefits by requiring the two businesses to be evaluated as one in determining eligibility. Once again, it is unclear why owning or operating two stores in one location should disqualify the store as long as one of the stores is offering the staple foods necessary to meet the nutritional requirements of economically disadvantaged Americans who qualify as SNAP recipients.

Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?

The Regulatory Impact Analysis produced by the FNS does not make clear the baseline of their analysis.

Is the information in the RIA based on the best reasonably obtainable scientific, technical, and economic information and is it presented in an accurate, clear, complete, and unbiased manner?

¹² This is the type of unintended consequence that poorly thought out regulations might lead to. In this case, not only are the proposed rules poorly designed, but the Agency has done no research as to their potential effects. In addition, the agency has provided no documentary evidence of any benefits of these rules, including no scientific data for why multiple ingredient items should not be counted as staple foods. This hurts the nutrition access mission. In fact, it is as likely and even more than likely that the rules might actually hamper the agency's mission to provide nutrition assistance to those who cannot afford sufficient levels of food.

The methodology of the RIA is severely lacking because it does not take into account opportunity costs, spoilage costs, and renovation costs that will be incurred by smaller stores who have to make the decision whether or not to remain in the SNAP program. First of all, small stores who wish to remain in SNAP will have to use up more shelf space to stock the additional items required by the new rules. The Regulatory Impact Analysis estimates that the cost of this rule will be limited to one-time new item stocking costs and refrigerated shelving costs. But this estimate does not take into consideration the opportunity costs small retailers will face. If the products that the FNS wishes to mandate small stores to stock were brisk sellers, the store would already be stocking those items in larger quantities. To comply with the proposed FNS rules, small stores would have to replace higher margin and higher selling items with items that would not make as much money. The foregone revenues of higher-margin items, which were previously on the shelving space that would now be occupied with SNAP staple items, consists of the opportunity cost and should be calculated in the RIA.

Furthermore, there is the possibility that a proportion of these items would routinely go unsold and spoil on the shelves. This is another cost that should be calculated in the Regulatory Impact Analysis.

Third, there are additional potentially significant renovation costs that many small stores may face to comply with the new rules. Small stores, which don't have large footprints, often spend thousands or even tens of thousands of dollars per store on redesigns.¹³ Adding additional shelf space may be a burden and impose high costs for small stores that are already dealing with complying with food safety regulations, the Americans with Disabilities Act, and local building codes. The potential cost of these renovations ought to be taken into consideration in the Regulatory Impact Analysis.

Are the data, sources, and methods used in the RIA provided to the public on the Internet so that a qualified person can reproduce the analysis?

The data, sources, and methods used in the RIA are generally available to the public, and provided in the RIA or the RFA, with the exception of internal store data from the agency's Retailer Policy and Management Division's Store Tracking and Redemption System (STARS). The FNS uses its STARS data to estimate the percentage of stores that will be affected by its proposed rule that at least 85 percent of an establishment's total food sales must be for items that are not cooked or heated on-site before or after purchase. The FNS writes that "this change may result in a few additional stores being unable to accept SNAP benefits, but the nationwide impact is small enough that it is unlikely that any particular neighborhood or area will be disproportionately affected." Furthermore, the FNS asserts that the rule will affect "primarily restaurants...not grocery stores or convenience stores." STARS data was not released to the public for purposes of analysis and replication. In other words, the key assumption used in the RIA cannot be independently verified.

¹³ Uhland, V. (2011, March 31). Remodel your store on a budget. *New Hope Network*. Retrieved April 8, 2016, from <http://newhope.com/managing-your-business/remodel-your-store-budget>

To the extent feasible, does the RIA quantify and monetize the anticipated benefits from the regulatory action?

The FNS does not identify any quantifiable benefits; however it does claim qualitative benefits, including improving program integrity, better ensuring that authorized firms offer nutritious foods, and ensuring that only “establishments that effectuate the purposes of SNAP are authorized.”

To the extent feasible, does the RIA quantify and monetize the anticipated costs?

The FNS provides an accounting statement as required by OMB Circular A-4, however this accounting statement is incomplete and short on detail. For instance, the FNS reports that federal agency personnel will be required to remove restaurant-type establishments that sell cold food for on-site heating or cooking from the program by citing FNS Internal data, but they do not specify how many of these small establishments will be removed from the program. Depending on how many of these small establishments are removed from the program, some SNAP recipients could be adversely impacted; however FNS does not attempt to quantify this possibility, writing simply, “It is unlikely that any particular neighborhood will be adversely impacted by this provision.”

Furthermore, while the FNS does provide detail on wholesale costs and additional cold-storage costs that may be incurred by its new stocking requirements, it assumes that these costs will be minimal and one-time only, and does not attempt to quantify the opportunity cost of shelf space lost to lower-margin goods and spoilage costs – costs that will be ongoing and need to be discounted over time.¹⁴

Furthermore, the FNS expects that “very few authorized retailers will be impacted by requiring at least 85 percent of total food sales to be items that are not heated on-site before or after the point of sale.” Based on STARS data that was not released to the public, FNS estimates that less than 1 percent of stores will be impacted. However, there is a growing trend of consumers preferring to buy prepared foods on-site at grocery and other food retail stores. According to a report produced by Nielsen, “in 2013, each of the 15 prepared deli categories, which serve foods for various meals, increased both in dollar and volume sales, some by double digits.”¹⁵ Already, many stores would hit this threshold and be kicked out of the Program—and if this trend continues, many stores that are vital to the SNAP program could fall below the 85 percent threshold, even though they continue to stock staple foods that are essential to meeting the needs of SNAP recipients.

¹⁴ The FNS states that the costs are a minimal \$400 per retailer, and just \$140 per small retailer, a burden which is well below any reasonable cost estimates.

¹⁵ “Convenience, It’s What’s For Dinner Tonight: 2014 Brings A Fresh Take on Making Meals with Ease,” <http://www.nielsen.com/us/en/insights/news/2014/convenience-its-whats-for-dinner-tonight.html>

Does the RIA explain and support a reasoned determination that the benefits of the intended regulation justify its costs (recognizing that some benefits and costs are difficult to quantify)?

The FNS' Regulatory Impact Analysis leaves out some substantial potential costs and minimizes others; furthermore, it does not attempt to weigh the costs and benefits to determine whether or not the benefits justify the costs. If the potential costs, as determined by a more thorough Regulatory Impact Analysis, are deemed to be significant, the proposed FNS rules may need to be adjusted to minimize these potential costs.

Does the RIA assess the potentially effective and reasonably feasible alternatives? Does the RIA assess at least one alternative that is less stringent and at least one alternative that is more stringent?

The FNS does not assess any alternatives to its proposed rules in its RIA or its RFA. The FNS uses the rationale that “most of the changes to inventory requirements in this proposed rule are directed by statute.”

However, the rules on stocking requirements and the 85 percent rule are not directed by statute.¹⁶ By law the FNS must provide in its RIA “a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”¹⁷

Does the RIA consider setting different requirements for large and small firms?

By their very nature, the proposed rules are aimed at small firms. Indeed, the FNS indicates that 70 percent of stores are likely to be impacted by the staple foods definition. Furthermore, the new depth-of-stocking rules would require the average store to add 24 stocking units. According to the RFA, combination stores, convenience stores, and small grocery stores account for 73 percent of all authorized retailers.

Does the preferred option have the highest net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires a different approach?

A thorough cost benefit analysis was not conducted by the FNS, and alternatives were neither proposed nor analyzed. Therefore it is unclear if the rules proposed by the FNS have the highest net benefits.

Does the RIA include an explanation of why the planned regulatory action is preferable to the identified potential alternatives?

The RIA does not significantly discuss potential alternatives, and thus does not make the case for the planned regulatory action as compared to potential alternatives.

¹⁶ The only provision directed by statute was raising the baseline stocking numbers from 3 to 7 and the number of perishables. The changes to the definition of staple foods, accessory foods, variety, and “continuous basis” (6 stocking units) are not referenced at all in the 2014 Farm Bill.

¹⁷ 5 U.S.C. § 603(c).

Does the RIA use appropriate discount rates for benefits and costs that are expected to occur in the future?

The RIA estimates that the costs of the proposed rules will be less than \$1 million per year. Furthermore, the RIA does not identify any quantitative benefits at all. Therefore, the FNS does not use discount rates to estimate benefits and costs expected to occur in the future.

Does the RIA include, if and where relevant, an appropriate uncertainty analysis?

The RIA does not include an uncertainty analysis. An uncertainty analysis would likely be appropriate in order to consider scenarios where retailers incur significant opportunity costs, or scenarios where more stores than anticipated must drop from the SNAP program.

Does the RIA include, if and where relevant, a separate description of distributive impacts and equity?

The RIA does not include a separate description of distributive impacts and equity. An analysis of distributional effects is warranted in this case, as changes to the SNAP system are going to largely affect disadvantaged minority communities in urban environments, or very poor, rural communities. Furthermore, the proposed rules are designed to disproportionately affect small businesses, whether they are chain stores or independent mom and pop retail outlets.

Does the analysis include a clear, plain-language executive summary, including an accounting statement that summarizes the benefit and cost estimates for the regulatory action under consideration, including the qualitative and non-monetized benefits and costs?

The RIA provides a Statement of Need that outlines the proposed rules, but does not provide an executive summary that makes clear the benefits and costs of the proposed rules. Furthermore, the RIA does provide an accounting summary that provides qualitative benefits, but no quantitative benefits. In addition, the RIA does provide an accounting summary of the quantitative costs, but this analysis is incomplete, as it simply states that costs will be less than \$1 million per year for each of the five aspects of the rule. The five aspects of the rule include the Retail Food Store Definition, the Firm Definition, the Staple Food Definition, the Determination of Authorization, and Ineligible Firms.

Does the analysis include a clear and transparent table presenting (to the extent feasible) anticipated benefits and costs (quantitative and qualitative)?

The RIA does include a table but it does not calculate expected costs and benefits, and only gives approximations for some of the costs. Furthermore, the OMB recommends that, in order to communicate uncertainties, cost and benefit tables “should offer a range of values, in addition to best estimates.” The FNS does not present a range of best case and worst case costs and benefits in the RIA.

Based on this analysis, the FNS failed to address, or inadequately addressed nearly all of the 16 provisions that the Office of Management and Budget suggests that every Regulatory Impact Analysis needs to report on. The FNS failed to conduct even a basic analysis of benefits from the proposed rules, and conducted a haphazard and limited analysis of the costs. No alternatives analysis (as required by the OMB) was conducted at all, nor was a sensitivity analysis of the Agency's assumptions. This is particularly inadequate for a rule that will impact as many as 200,000 or so retail stores and millions of SNAP benefit recipients. Since most of the provisions of the proposed rule are arbitrary, and are not required under any current law, the Agency should address the issues brought up in this report, prior to continuing any rulemaking process.

Appendix B

Regulatory Impact Analysis Report

*Enhancing Retailer Standards in SNAP: Changes to Depth of Stock and Stocking Requirements Using
New Farm Bill Definition*

USDA's Regulatory Impact Analysis Does Not Follow the Guidelines
Established by the Office of Management and Budget

Prepared by

John Dunham & Associates
New York

April 29, 2016

Introduction and Summary of Food and Drug Administration Regulatory Impact Analysis Report:

The United States Department of Agriculture's (USDA) Food and Nutrition Service (FNS) has proposed new rules to make changes to the Supplemental Nutrition Assistance Program (SNAP) regulations pertaining to the eligibility of SNAP retail food stores.¹ The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act) to increase the requirement that certain SNAP authorized retail food stores have at least seven varieties of items in each of four staple food categories available on a continual basis. The 2014 Farm Bill also amended the Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three. The proposed rule would codify these requirements.

In addition to these statutory requirements, FNS is proposing several more changes. These proposed changes increase depth of stock, amend the definition of staple foods, and amend the definition of "retail food store."

Since the enactment of the proposed rules would have a substantial impact on business, consumers and the economy, they are what the Office of Management and Budget defines as a "significant" regulation.² This means that the FNS is required to perform a regulatory impact analysis (RIA) under the guidelines set out under Executive Order 12866,³ Executive Order 13563,⁴ the Regulatory Flexibility Act (5 U.S.C. 601-612),⁵ and the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).⁶ Under these provisions the FNS must not only determine if the regulation is necessary but must assess all costs and benefits of available regulatory alternatives to select approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). It also requires the FNS to among other things analyze regulatory options that would minimize any significant impact of the rules on small entities.

¹ *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program*, 7 C.F.R. 271 and 7 C.F.R. 278, February 17, 2016, pp. 19500 – 19502.

² "Significant regulatory action" means among other things any regulatory action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. See: Executive Order 12866, 58 F.R. 51735 (4 Oct 1993). Available at: www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

³ *Ibid.*

⁴ Executive Order 13563, 76 F.R. 3821 (18 Jan 2011), pp. 3821-3823. Available at: <https://www.federalregister.gov/articles/2011/01/21/2011-1385/improving-regulation-and-regulatory-review>.

⁵ *The Analysis of Regulatory Functions*, 5 U.S.C. §§ 601–612 (2016). Available at: <http://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title5-section601&num=0&saved=%7CKHRpdGxIOjUgc2VjdGlvbjo2MDEgZWVpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

⁶ *Unfunded Mandates Reform Act of 1995*, Pub. L. 104-4. 109 Stat. 48-71, March 22, 1995. Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-104publ4/content-detail.html>.

The Proposed Rules:

Redefinition of Staple Food

According to the FNS, this proposed rulemaking is the result of two separate developments. First are statutory changes included in the 2014 Farm Bill that increase the requirement that certain SNAP authorized retail food stores have available on a continuous basis at least seven varieties of items in each of four staple food categories. This is an increase from at least three varieties in each of the staple food categories. Further, the 2014 Farm Bill increases the minimum number of categories in which perishable foods are required from two to three. This is a legislated change that all SNAP participating stores must abide by, and that the FNS must promulgate rules for.

Current regulations define *staple foods* as products in the following categories: Meat, poultry or fish; bread or cereals; vegetables or fruits; and dairy products. They also specify that foods with multiple ingredients can only be counted in one staple food category, based on the main ingredient.

In addition to the legislative requirements, the proposed rule unilaterally redefines staple foods to remove any products with multiple ingredients. Examples of such foods include a fruit parfait, chicken soup, or a bagged salad mix containing sliced chicken. In addition, the Agency is proposing to remove a variety of what it calls *accessory food items*, including but not limited to: Chips, hummus, crackers, pretzels, or apple and cheese snack packs, ready-popped popcorn, pastries, and candy, coffee, tea, cocoa, carbonated and un-carbonated drinks, condiments, and spices.

Depth of Stock

The proposed rule also requires that SNAP eligible retailers stock on a continuous basis at least six units per variety of staple food in order to meet the statutory requirement to offer for sale, on a continuous basis, staple foods in each staple food category. Current law simply requires that these foods be stocked and does not prescribe a minimum volume.

Eligibility for Retailers

FNS proposes adding language to the definition of retail food store that would require that at least 85 percent of an entity's total food sales be items that are not cooked or heated on-site before or after purchase.⁷ Currently, only firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption are ruled ineligible.

Additionally, this rule would add language to prevent two separate businesses that operate under one roof from participating in SNAP as a retail food store if they have common employees,

⁷ In other words, if 15 percent or more of an entity's total food sales come from items that are cooked or heated on site, that entity will be ineligible to participate in SNAP.

accounting, and management and have more than 15 percent of their joint total food sales in items that are cooked or heated on site before or after purchase.

In sum, the FNS is reinterpreting the legislative intent of the 2014 Farm Bill to specifically limit the types of food that can be used to determine if a SNAP eligible retailer is stocking a sufficient number of staple food types, requires retailers to stock an arbitrary number of units of each type, and imposes significant restrictions on how businesses can operate in order to serve customer needs. Considering that there are currently about 258,630 eligible SNAP retailers,⁸ if the burden of the proposed rules is just a minor administrative burden of \$400.00 per store would suggest a cost of about \$103.5 million which would be high enough to ensure that these proposed rules are a *significant regulatory action*, and are subject to a detailed Regulatory Impact Analysis.

Executive Order 12866, Section 3(f)(1) mandates that agencies must submit a regulatory impact analysis for those regulatory actions that are anticipated to “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”⁹ The proposed FNS rule changes are indeed likely to either have a \$100 million impact on the economy, or adversely affect in a material way the retail sector of the economy, and/or local communities, so a proper Regulatory Impact Analysis should be conducted.

Regulatory Impact Analysis Requirements:

According to the Office of Management and Budget, there are 16 elements that every Regulatory Impact Analysis needs to address.¹⁰ The OMB provides agencies with a detailed Primer on how to conduct an RIA in accordance with its guidelines and the underlying Executive Orders.¹¹ Additional requirements from the various laws governing RIAs such as the Unfunded Mandates Reform Act and the Regulatory Flexibility Act also need to be met by the FNS.

Nine key elements that the OMB suggests that each agency include are:

1. A reasonably detailed description of the need for the regulatory action;
2. An explanation of how the proposed regulatory action will meet that need;
3. An appropriate baseline assessment of how the world would look in the absence of the proposed action;
4. An assessment of potentially effective and reasonably feasible alternatives to the proposed regulatory action;

⁸ 2015 Retailer Management Year End Summary, US Department of Agriculture. Food and Nutrition Service, March 25, 2016. Available at: <http://www.fns.usda.gov/snap-retailer-data>.

⁹ Executive Order 12866, 58 F.R. 51735, October 4, 1993.

¹⁰ *Agency Checklist: Regulatory Impact Analysis*, Office of Management and Budget, Office of Information and Regulatory Affairs, October 28, 2010. Available at: www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf.

¹¹ *Regulatory Impact Analysis: A Primer*, Office of Management and Budget, Office of Information and Regulatory Affairs, August 8, 2011, at: www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

5. An explanation of why the planned regulatory action is preferable to the potential alternatives;
6. An uncertainty analysis;
7. A description and discussion of the distributive impacts of the potential alternatives;
8. A clear, plain-language executive summary including an accounting statement that summarizes the benefit and costs for the regulatory action;
9. A clear and transparent table presenting anticipated benefits and costs.

In addition, the OMB states that each regulatory impact analysis:

1. Use the best reasonably obtainable scientific, technical economic information and present it in a clear, complete and unbiased manner;
2. Provide the data, sources and methods used in the RIA to the public via the internet;
3. Quantify and monetize the anticipated benefits from the regulatory action to the extent feasible;
4. Quantify and monetize the anticipated costs from the regulatory action to the extent feasible;
5. Explain and support how the benefits of the intended regulation justify its costs;
6. Ensure that the preferred option has the highest net benefits unless the law requires a different approach;
7. Use appropriate discount rates for benefits and costs expected to occur in the future;

In addition to these 16 items, a proper RIA must examine a number of additional impacts including international effects and the effects on small businesses.

JDA reviewed the proposed rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program,”¹² in addition to the Regulatory Impact Analysis¹³ and the concomitant “Initial Regulatory Flexibility Analysis – Proposed Rule.”¹⁴ JDA found the Regulatory Impact Analysis largely failed to meet the OMB’s guidelines for performing RIAs.

Because the FNS failed to conduct an adequate Regulatory Impact Analysis, the National Association of Convenience Stores (NACS), a trade organization, commissioned JDA to determine what a proper RIA would have found. To do that, this paper relies first, where possible, on the FNS’s own assumptions and data. Where these are not available, other federal and state government statistics are used. If no government data are available, then published studies, private data sources and our own analysis are utilized.

¹² *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program*, 7 C.F.R. Parts 271 and 278, February 17 2016, pp. 29150 – 29151.

¹³ *Regulatory Impact Analysis: 7 C.F.R. Parts 271 and 278: Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)*, US Department of Agriculture, Food and Nutrition Service, February 18, 2016. Available at <https://www.regulations.gov/#!documentDetail;D=FNS-2016-0018-0006>

¹⁴ *Initial Regulatory Flexibility Analysis – Proposed Rule: Enhancing Retailer Standards in SNAP: Changes to Depth of Stock and Stocking Requirements Using New Farm Bill Definition*, US Department of Agriculture, Food and Nutrition Service, February 18, 2016. Available at <https://www.regulations.gov/#!documentDetail;D=FNS-2016-0018-0006>.

Proper Regulatory Impact Analysis Process and Findings

Executive Summary:

The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 and the ‘Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) to increase the requirement that certain Supplemental Nutrition Assistance Program (SNAP) authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties. The 2014 Farm Bill also amended the Food and Nutrition Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three.

In February of 2016, the FNS proposed new rules (the proposed rules) which are designed to increase the varieties of staple food items and perishable items in SNAP eligible stores to the minimums required under the 2014 Farm Bill. On top of this, the Agency has proposed new rules that would limit the types of items that can be considered as staple food items, impose new requirements on the number of units of staple food items that must be stocked, and limit certain types of business structures and operations in SNAP eligible retailers.

Since the enactment of the proposed rule would have a substantial impact on business, consumers and the economy, it is what the Office of Management and Budget defines as a “significant” regulation, which means that the FNS is required to perform a regulatory impact analysis (RIA).

The analysis below follows the guidelines for a proper RIA set forth by the Office of Management and Budget under the guidelines set out under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

Table 1
Summary of Cost-Benefit Alternatives

Alternative	Initial Cost	Initial Benefit	Net	20 Year	20 Year Discounted	Net Benefit/(Cost)
			Benefit/(Cost)	Discounted Cost	Benefit	
Proposed Rules	\$111,480,169	\$0	(\$111,480,169)	\$817,024,201	\$0	(\$817,024,201)
Null Alternative	\$47,086,366	\$0	(\$47,086,366)	\$415,870,009	\$0	(\$415,870,009)
Expansion of HIP Pilor Program	\$2,697,086,366	\$0	(\$2,697,086,366)	\$28,663,372,247	\$0	(\$28,663,372,247)
Store Non-Participation Alternative	\$54,405,652	\$0	(\$54,405,652)	\$493,889,456	\$0	(\$493,889,456)

Four distinct alternative ways of meeting the FNS’s regulatory intent were examined; the proposed rule itself, a Null Alternative that implements only the requirement of the 2014 Farm Bill, an alternative that enacts the Farm Bill requirements and other rules designed to remove stores where more than 15 percent of foods are heated on-site either before or after sale from the SNAP program and an alternative approach that is designed to incentivize consumers to opt for food items deemed by the FNS to be healthy.

Based on an extensive analysis, none of the proposed alternatives have a positive benefit-cost ratio, and all have net social costs of at least about \$400 million, when discounted over time.

Table 2
Small Business Impacts for Each Alternative

Potential Lost Stores By Alternative	Combination stores	Convenience stores	Small Grocery stores	Other stores	Total
Proposed Rules	6,690	10,653	1,228	895	19,465
Null Alternative	-	-	-	-	-
Expansion of HIP Pilor Program	-	-	-	-	-
Store Non-Participation Alternative	-	-	1,228	-	1,228

In addition to having no social benefit, the rule as envisioned by the FNS would have a disproportionate impact on small businesses, which make up the vast majority of the companies that do not currently meet the guidelines proposed by the FNS.

A sensitivity analysis of the assumptions used in this paper suggest that they are likely modest, and even making them more conservative would not likely impact the overall nature of the benefit-cost calculation (although it could impact the overall magnitude).

Introduction:

The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 and the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) to increase the requirement that certain Supplemental Nutrition Assistance Program (SNAP) authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties. The 2014 Farm Bill also amended the Food and Nutrition Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three.

The Food and Nutrition Act specifically grants the Secretary of Agriculture authority to issue such regulations consistent with the Act as the Secretary deems necessary or appropriate for the effective and efficient administration of the Supplemental Nutrition Assistance Program. It also states that prior to issuing any regulation, the Secretary shall provide the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a copy of the regulation with a detailed statement justifying it.

As such, the US Department of Agriculture, through the Food and Nutrition Service (FNS) has the authority to promulgate regulations relating to the SNAP program subject to the rulemaking procedures of the Agency and of the Federal Government.

In February of 2016, the FNS proposed new rules (the proposed rules) which are designed to increase the varieties of staple food items and perishable items in SNAP eligible stores to the minimums required under the 2014 Farm Bill. On top of this, the Agency has proposed new rules that would limit the types of items that can be considered as staple food items, impose new requirements on the number of units of staple food items that must be stocked, and limit certain types of business structures and operations in SNAP eligible retailers.

Since the enactment of the proposed rules would have a substantial impact on business, consumers and the economy, it is what the Office of Management and Budget defines as a

“significant” regulation.¹⁵ This means that the FNS was required to perform a regulatory impact analysis (RIA) under the guidelines set out under Executive Order 12866,¹⁶ Executive Order 13563,¹⁷ the Regulatory Flexibility Act (5 U.S.C. 601-612),¹⁸ and the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).¹⁹ Under these provisions the FNS must not only determine if the regulation is necessary but must assess all costs and benefits of available regulatory alternatives to select approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). It also requires the FNS to among other things analyze regulatory options that would minimize any significant impact of a rule on small entities.

The *Initial Regulatory Flexibility Analysis – Proposed Rule – Enhancing Retailer Standards in SNAP: Changes to Depth of Stock and Stocking Requirements Using New Farm Bill Definition* issued by the FNS in February of 2016 did not follow the guidelines for this type of analysis as set out by the Office of Management and Budget.²⁰ Specifically, the FNS did not analyze any significant alternatives to their proposed rule, nor did the Agency perform a reasonable cost/benefit analysis.

This report presents the findings that a proper Regulatory Impact Analysis would have made using the FNS’s own assumptions wherever possible. The analysis below has been conducted based on OMB’s guidelines. It not only includes the baseline cost analysis that FNS focused on in its report, but also documents potential benefits of the proposed rule. In addition, as required by the OMB, this report includes both an alternatives analysis and an analysis of how each alternative impacts small businesses.

The report relies first, where possible, on the FNS’s own assumptions and data. Where these are not available, other federal and state government statistics are used. If no government data are available published studies, private data sources and our own analysis are utilized.

¹⁵ “Significant regulatory action” means among other things any regulatory action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. See: Executive Order 12866, 58 F.R. 51735 (4 Oct 1993). Available at: www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

¹⁶ Executive Order 12866, 58 F.R. 51735, October 4, 1993, at: www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

¹⁷ Executive Order 13563, 76 F.R. 3821, January 18, 2011, pp. 3821-3823. Available at: <https://www.federalregister.gov/articles/2011/01/21/2011-1385/improving-regulation-and-regulatory-review>

¹⁸ *The Analysis of Regulatory Functions*, 5 U.S.C. §§ 601–612 (2016). Available at: <http://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title5-section601&num=0&saved=%7CKHRpdGxIOjUgc2VjdGlvbjo2MDEgZWRRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

¹⁹ *Unfunded Mandates Reform Act of 1995*, Pub. L. 104-4. 109 Stat. 48-71, March 22, 1995. Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-104publ4/content-detail.html>.

²⁰ *Initial Regulatory Flexibility Analysis – Proposed Rule: Enhancing Retailer Standards in SNAP: Changes to Depth of Stock and Stocking Requirements Using New Farm Bill Definition*, US Department of Agriculture, Food and Nutrition Service, February 18, 2016. Available at https://www.regulations.gov/#!documentDetail;D=FNS-2016-0018-0006_

Need for Government Regulation:

The FNS states that its job is to end hunger and obesity through the administration of 15 federal nutrition assistance programs including the SNAP program. Its mission is to increase food security and reduce hunger by providing children and low-income people access to food, a healthful diet and nutrition education in a way that supports American agriculture and inspires public confidence.²¹

While the FNS considers its mission to end obesity, and the proposed rules themselves claim that *enhancing the standards for staple foods would lead to healthier food options that would help prevent obesity and reduce food insecurity*,²² this is in fact not the purpose of the SNAP program. According to the law that authorized the program its purpose was to end hunger and malnutrition, not to steer people to a certain prescribed lifestyle or weight goal.²³

The FNS has been tasked by Congress to increase the varieties of staple food items and perishable items in SNAP eligible stores to the minimums required under the 2014 Farm Bill. However, the other rules included in this proposal are being made solely at the Secretary's discretion. According to the FNS these additional changes are being proposed to ensure that retailers are maintaining sufficient food stock for sale to SNAP recipients at all times, and to ensure that retailers are stocking foods that could contribute to a nutritious diet.²⁴ However, the FNS itself suggests that the proposed rules are likely to cause stores to drop out of the program, potentially making it more difficult for SNAP recipients to have access to food – particularly in rural areas or deep urban communities. In addition, the rules do not discriminate between foods based on their nutritional value, but rather on arbitrary measures like the number of ingredients being used.

For example, plain white flour, something that generally cannot be eaten on its own, would be considered a staple food, while organic, gluten-free chicken soup would not. Simply forcing stores to stock flour instead of soup does not seem to be a way to help contribute to a nutritious diet.

²¹ *What We Do*, US Department of Agriculture, Food and Nutrition Service, September 14, 2015. Available at: www.fns.usda.gov/about-fns.

²² *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program*, 7 C.F.R. 271 and 7 C.F.R. 278, February 17, 2016, pp. 19500 – 19502.

²³ The legislation establishing the SNAP program says: *It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.* See 7 U.S.C. § 2011 : US Code - Section 2011: *Congressional declaration of policy*, at: <http://codes.lp.findlaw.com/uscode/7/51/2011#sthash.J41TB1Wt.dpuf>

²⁴ *Op. cit.*, Initial Regulatory Flexibility Analysis.

In short, while the rules related to the number and types of staple foods are needed, the other rules seem simply designed to limit the number and types of stores that can participate in the program, something that may have a legislative purpose (for example lower government administrative costs), but not the purpose being suggested by the Agency.

Current Baseline Situation:

According to the FNS, a total of 258,632 retailers are authorized to accept SNAP.²⁵ Of these, the proposed rules generally apply to approximately 248,100 retail establishments. Based on the RIA, and on general common sense, the larger supermarket-type stores will face only a small administrative impact from the proposed rules as these stores already carry significantly more staple food products than will be required. In addition, these stores are not required to meet the “depth of stock” provisions addressed in the proposal because they meet the eligibility threshold under a different criterion.²⁶ However, this still means that the proposed rules will apply to a large extent to at least 194,650 retailers, which together represent more than 75 percent of SNAP outlets. They will certainly apply to the 106,531 convenience stores that currently participate in SNAP.

Table 3
Current SNAP Participation

Store Type	Firms	Percent	Redemptions	Percent	Average Redemption
Bakery Specialty	3,313	1.28%	\$ 169,661,887	0.24%	\$ 51,211
Combination Grocery/Other	66,896	25.87%	\$ 4,579,132,165	6.59%	\$ 68,452
Convenience Store	106,531	41.19%	\$ 3,494,342,918	5.03%	\$ 32,801
Delivery Route	953	0.37%	\$ 97,600,280	0.14%	\$ 102,414
Direct Marketing Farmer	3,245	1.25%	\$ 5,687,461	0.01%	\$ 1,753
Farmers' Market	3,238	1.25%	\$ 13,754,110	0.02%	\$ 4,248
Fruits/Veg Specialty	1,055	0.41%	\$ 66,497,712	0.10%	\$ 63,031
Large Grocery Store	3,591	1.39%	\$ 1,048,870,392	1.51%	\$ 292,083
Meat/Poultry Specialty	2,794	1.08%	\$ 407,333,744	0.59%	\$ 145,789
Medium Grocery Store	10,858	4.20%	\$ 1,376,781,751	1.98%	\$ 126,799
Military Commissary	187	0.07%	\$ 80,234,725	0.12%	\$ 429,063
Non-Profit Food Co-op	354	0.14%	\$ 25,207,102	0.04%	\$ 71,207
Seafood Specialty	1,432	0.55%	\$ 168,301,033	0.24%	\$ 117,529
Small Grocery Store	12,277	4.75%	\$ 755,975,667	1.09%	\$ 61,577
Super Store	18,844	7.29%	\$ 32,562,141,670	46.85%	\$ 1,727,985
Supermarket	19,024	7.36%	\$ 24,452,134,763	35.18%	\$ 1,285,331
Wholesaler	1	0.00%	\$ 601,576	0.00%	\$ 601,576
Select on-premise	4,039	1.56%	\$ 202,885,993	0.29%	\$ 50,232
Total	258,632	100.00%	\$ 69,507,144,949	100.00%	\$ 268,749

All told these retailers sell approximately \$9.7 million worth of SNAP products, or 13.9 percent of total redemptions. This equates to an average of \$49,660 per retailer that could be significantly impacted by the rules.

Based on the FNS RIA, most of the 194,640 retailers already meet many of the requirements outlined in the proposed rules. As Table 4 shows, unpublished data from the FNS suggests that a

²⁵ Op. cit., *Regulatory Impact Analysis: A Primer*.

²⁶ See: *Retail Store Eligibility USDA Supplemental Nutrition Assistance Program*, at: <http://www.fns.usda.gov/snap/retail-store-eligibility-usda-supplemental-nutrition-assistance-program>

large number of smaller retailers do not meet the minimum stocking requirements for staple foods even under the 2014 Farm Bill requirements. This suggests that the cost of compliance even for these mandatory rules will be large. Once the arbitrary rules proposed by the FNS are accounted for the costs will be significant.

Table 4
Retailers Not Meeting 2014 Farm Bill Requirements

Store Type	Total Stores	Percent Not Qualified				Stores Not Qualified			
		Dairy	Fruit/Veg	Bread	Meat	Dairy	Fruit/Veg	Bread	Meat
Combination stores	66,896	0.928	0.069	0.217	0.665	62,079	4,616	14,516	44,486
Convenience stores	106,531	0.928	0.069	0.217	0.665	98,861	7,351	23,117	70,843
Small Grocery stores	12,277	0.928	0.069	0.217	0.665	11,393	847	2,664	8,164
Other Stores	8,948	0.928	0.069	0.217	0.665	8,304	617	1,942	5,950
Total	194,652					180,637	13,431	42,239	129,444

Many of these retailers may be marginal operations. In fact, according to the National Association of Convenience Stores, small convenience stores have pre-tax profits of less than \$0.60 per square foot.²⁷ NACS data also show that the stores that are most dependent on the sale of SNAP foods, and particularly staple groceries and perishables, tend to be the smallest retailers.²⁸ These retailers are the least able to expand their selections to account for the requirements not only of the Farm Bill, but also the arbitrary requirements being proposed by the FNS.

Table 5
Convenience Retailer Sales By Store Size

Store Size	Total Sales	Estimated Staple Food	Percent Staple
		Sales	Foods
Smallest Quartile	\$981,960	\$91,740	9.3%
Third Quartile	\$1,029,336	\$62,496	6.1%
Second Quartile	\$1,284,036	\$68,160	5.3%
Largest Quartile	\$1,785,972	\$56,760	3.2%

These data show why it is so important that the proposed rules be properly examined. They could put a large number of stores out of business, and with that, put even more people out of work and on to the SNAP roles. This is especially true in the case of those marginal communities in underserved parts of America that rely on small convenience type retailers to supply them not only with food, but with over-the-counter medicines, newspapers, automotive accessories and many of the other products that regulators might take for granted.

Time Horizon for Analysis:

Since the effects of the proposed rule would be on-going, it is preferable that the benefit and cost

²⁷ *NACS State of the Industry Report of 2014 Data and Fact Book*, National Association of Convenience Stores. Available at: <https://www.nacsonline.com/Solutions/Store/Pages/default.aspx>.

²⁸ Ibid.

analysis of the various alternatives be conducted over an extended period of time. However, the bulk of the costs occur in the first year while any potential benefits of the rule, which would only occur if the rule resulted in better access to food, would not be seen until many years in the future.

According to the FNS, the proposed rule would improve SNAP recipient access to a variety of healthy food options, reflecting the Agency's commitment to provide vital nutrition assistance to our most vulnerable Americans, and reinforce the intent of SNAP, that participants use their benefits to purchase more nutritious foods intended for home preparation and consumption. The agency did not quantify any benefits of the proposed rules. In an earlier talking point paper, the Agency suggested that there were nutritional benefits of the program and that low-income households participating in SNAP have access to more food energy, protein, and a broad array of essential vitamins and minerals in their home food supply compared to eligible non-participants.²⁹ However, the research cited for this statement shows that there is no evidence that FSP (Food Stamp Program) participation is associated with overall increases in individuals' food and nutrient intake. In general, participation is not significantly related to the intake of the major food groups and key nutrients and other dietary components.³⁰ In other words, it is quite likely that the marginal rules being proposed by the FNS will have no social benefits at all to offset the significant costs to both business and consumers.

The Proposed Rules:

According to the FNS, this proposed rulemaking is the result of two separate developments. First are statutory changes included in the 2014 Farm Bill. The 2014 Farm Bill increases the requirement that certain SNAP authorized retail food stores have available on a continuous basis at least seven varieties of items in each of four staple food categories. This is an increase from at least three varieties in each of the staple food categories. Further, the 2014 Farm Bill increases the minimum number of categories in which perishable foods are required from two to three. This is a legislated change that all SNAP participating stores must abide by, and that the FNS must promulgate rules for.

Redefinition of Staple Food

Current regulations define *staple foods* as products in the following categories: Meat, poultry or fish; bread or cereals; vegetables or fruits; and dairy products. They also specify that foods with multiple ingredients can only be counted in one staple food category, based on the main ingredient.

In addition to the legislative requirements, the proposed rule redefines staple foods to remove any products with multiple ingredients. Examples of such foods include a fruit parfait, chicken

²⁹ *The Benefits Of Increasing The Supplemental Nutrition Assistance Program (SNAP) Participation In Your State*, US Department of Agriculture, Food and Nutrition Service, September 5, 2013. Available at: <http://www.fns.usda.gov/benefits-increasing-supplemental-nutrition-assistance-program-snap-participation-your-state>.

³⁰ Gleason, Philip, Rangarajan, Anu and Christine Olson, *Dietary Intake and Dietary Attitudes Among Food Stamp Participants and Other Low-Income Individuals*, Mathematica Policy Research, Inc., September 2000. Available at: <http://econpapers.repec.org/paper/mprrmpres/7de7096e094445cba404d4e9728f13d6.htm>.

soup, or a bagged salad mix containing sliced chicken. In addition, the Agency is proposing to remove a variety of what it calls *accessory food items*, including but not limited to: Chips, hummus, crackers, pretzels, or apple and cheese snack packs, ready-popped popcorn, pastries, and candy, coffee, tea, cocoa, carbonated and un-carbonated drinks, condiments, and spices.

Depth of Stock

The proposed rule also requires that SNAP eligible retailers stock on a continuous basis at least six units per variety of staple food in order to meet the statutory requirement to offer for sale, on a continuous basis, staple foods in each staple food category. This means that retailers will have to have 168 units on shelf at all times. Current law simply requires that these foods be stocked and does not prescribe a minimum volume.

Eligibility for Retailers

FNS proposes adding language to the definition of retail food store that would require that at least 85 percent of an entity's total food sales be items that are not cooked or heated on-site before or after purchase. Currently, only firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption are ruled ineligible.

Additionally, this rule would add language to prevent two separate businesses that operate under one roof from participating in SNAP as a retail food store if they have common employees, accounting, and management and both are not eligible retail food stores. Without data on which stores actually are authorized to accept SNAP it is impossible to determine how this particular rule might impact business, consumers or the general economy. Therefore it is not considered in this analysis; however, it is difficult to see how the rule could have any potential benefits to SNAP recipients, particularly those who do not have easy access to food preparation facilities.

Alternative Approaches:

The goals of the proposed rules are to first ensure that the legislative intent of the 2014 Farm Bill is implemented. In addition, the Agency believes that its unilateral decision to redefine *staple foods* would lead to better nutrition for SNAP recipients. The Agency is also interested in ensuring that businesses that are not generally authorized to accept SNAP are not utilizing the program. This is the reason behind the rules that are designed to modify business operational strategies. While Rule 1 (as defined above) is legislatively required, the FNS has considered no alternative approaches to meet its other goals. The proposed rules are simply drawn out of thin air and, as required by OMB guidelines, other approaches that may have similar or even preferable results were never considered. For the purpose of this analysis, four alternatives are considered. These are:

- 1) **The Proposed Rules:** This alternative would implement the proposed rules as promulgated by the FNS.

- 2) **The Null Alternative:** This approach would implement only the rules related to the number of staple food and perishable items required by retailers as required by Congress.
- 3) **Expansion of Healthy Incentives Pilot Program:** This approach would implement the rules under the Null Alternative and expand the Healthy Initiatives Pilot Program, which is designed to incentivize consumers to opt for food items deemed by the FNS to be healthy. The Food, Nutrition and Conservation Act of 2008 authorized \$20 million for pilot projects to determine if incentives provided to SNAP recipients at the point-of-sale increase the purchase of fruits, vegetables or other healthful foods. Hampden County, Massachusetts was selected as the Healthy Incentives Pilot site.
- 4) **Implement Rules Designed to Ensure that Stores with More than 15 Percent of Heated Food Sales Are Not Participating in the Program:** This approach would implement the Null Alternative along with the rules regarding cold foods and provisions designed to keep single companies operating as multiple businesses out of the SNAP program.

Expected Effects of Each Regulatory Alternative:

Proposed Rule: The goals of the proposed rule are to first, ensure that the legislative intent of the 2014 Farm Bill is enacted. In addition, the FNS believes that the unilateral changes to the definition of staple foods and its proposed depth of stock requirements will ensure that SNAP recipients have better access to healthier foods. The agency also believes that certain aspects of the proposed rules will help to ensure that certain restaurant businesses which would not generally be eligible to participate in SNAP are not taking advantage of certain loopholes.

The Null Alternative: This alternative would meet the goals of ensuring that the legislative intent of the 2014 Farm Bill is enacted. Since these legislative changes are specifically designed to assist FNS in its mission of ensuring that SNAP recipients have better access to healthier foods, the alternative will also meet that goal. The Agency is proposing rules to help ensure that certain restaurant businesses which would not generally be eligible to participate in SNAP are not taking advantage of certain loopholes. The RIA conducted by the FNS claims that fewer than one percent of current SNAP retailers (or less than, 2,600 firms) would be effected. This suggests that there is not a large problem with restaurants attempting to game the SNAP system, so it is quite possible that the changes already required by the 2014 Farm Bill might lead many of these stores to drop out of the program.

Expansion of Healthy Incentives Pilot Program: This alternative would meet the goals of ensuring that the legislative intent of the 2014 Farm Bill is enacted. The FNS conducted a Pilot program in 2012 which provided SNAP recipients with an incentive of 30 cents for every dollar of SNAP benefits that they spent on targeted fruits and vegetables in participating retailers. The incentive was capped at \$60 per household per month. As a result of this program participants consumed significantly more targeted fruits and vegetables per day (almost a quarter of a cup equivalent) than did non-participants, representing an increase in consumption of 26 percent.³¹

³¹ Bartlett, Susan, et al. *Evaluation of the Healthy Incentives Pilot (HIP): Final Report*, Prepared by Abt Associates, Inc. for the US Department of Agriculture, Food and Nutrition Service, September 2014. Available at: www.fns.usda.gov/sites/default/files/HIP-Final.pdf.

In other words, the Healthy Incentives Program actually assisted FNS in its mission of ensuring that SNAP recipients have better access to healthier foods.

Store Non-Participation Alternative: This alternative would also meet the goals of ensuring that the legislative intent of the 2014 Farm Bill is enacted. In as much as these legislative changes assist FNS in its mission of ensuring that SNAP recipients have better access to healthier foods it will also meet that goal. In addition, the agency proposals to help to ensure that certain businesses which would not generally be eligible to participate in SNAP are not taking advantage of certain loopholes would be included.

As described above, each of the proposed alternatives will likely meet the goals set forth by Congress in the 2014 Farm Bill. Therefore, further analysis should be undertaken for each.

Expected Economic Costs of Each Regulatory Alternative:

Proposed Rule: The rule being proposed by the FNS has four cost components. The first of these is required by Congress and would require that SNAP authorized retail food stores have available on a continuous basis at least seven varieties of items in each of four staple food categories. This is an increase from at least three varieties in each of the staple food categories. In addition Congress requires that the minimum number of categories in which perishable foods are available increases from two to three. In addition to this required change, the proposed rules would unilaterally redefine staple foods to remove any products with multiple ingredients. Examples of such foods include a fruit parfait, chicken soup, or a bagged salad mix containing sliced chicken. In addition, the proposed rule would remove a variety of what it calls *accessory food items*, including but not limited to: Chips, hummus, crackers, pretzels, or apple and cheese snack packs, ready-popped popcorn, pastries, and candy, coffee, tea, cocoa, carbonated and un-carbonated drinks, condiments, and spices. The proposed rules would also establish a requirement that all SNAP authorized retailers stock on a continuous basis at least six units per variety of staple food.

Table 6
Estimated Cost of Proposed Rule

Component	Initial Costs	Ongoing Costs (Discounted)	Total Costs
Staple Foods Variety			
<i>Stocking</i>	\$5,844,193	\$0	\$5,844,193
<i>Opportunity Cost</i>	\$5,318,109	\$51,369,923	\$56,688,032
<i>Spoilage Costs</i>	\$1,298,549	\$12,543,254	\$13,841,803
Perishables Rule			
<i>Refrigerated Storage Cost</i>	\$3,063,579	\$0	\$3,063,579
<i>New Energy Costs</i>	\$48,082	\$464,444	\$512,526
Depth of Stock Rule			
<i>Stocking</i>	\$16,761,591	\$0	\$16,761,591
<i>Opportunity Cost</i>	\$15,776,634	\$152,393,370	\$168,170,004
<i>Spoilage Costs</i>	\$3,553,447	\$34,324,289	\$37,877,736
Staple Foods Redefinition			
<i>Stocking</i>	\$12,768,849	\$0	\$12,768,849
<i>Opportunity Cost</i>	\$7,191,484	\$69,465,667	\$76,657,151
<i>Spoilage Costs</i>	\$1,022,513	\$9,876,901	\$10,899,414
85 Percent Rule			
<i>Lost SNAP Sales</i>	\$7,319,286	\$70,700,162	\$78,019,448
Administrative Costs			
<i>Administrative Costs</i>	\$31,513,854	\$304,406,021	\$335,919,875
Total	\$111,480,169	\$705,544,031	\$817,024,201

In addition to these rules pertaining to the amount and types of food that each SNAP retailer must stock, the FNS proposes adding language to the definition of retail food store that would require that at least 85 percent of an entity's total food sales be items that are not cooked or heated on-site before or after purchase. Currently, only firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption are ruled ineligible.

Additionally, this rule would add language to prevent two separate businesses that operate under one roof from participating in SNAP as a retail food store if they have common employees, accounting, and management and have more than 15 percent of their joint total food sales in items that are cooked or heated on site before or after purchase.

Table 7
Incidence of Estimated Cost of Proposed Rule

Component	Initial Costs	Ongoing Costs (Discounted)	Total Costs
Cost To Consumers	\$104,160,884	\$634,843,869	\$739,004,753
Cost To Retailers	\$7,319,286	\$70,700,162	\$78,019,448
Total Cost	\$111,480,169	\$705,544,031	\$817,024,201

The estimated cost of the rules to business and consumers over a 20 year period, discounted at 7 percent is \$817.0 million, or an average of about \$573 per store per year at the consumer level. The bulk of this is costs to consumers, as stores pass through additional storage, stocking and opportunity costs. It is estimated that the rules will cost consumers approximately \$739.0

million, while marginal retailers would be forced to drop out of the program and experience a reduction of about \$78.0 million in SNAP sales over a 20 year period.³²

The \$573 per store initial annual cost, and approximately \$4,200 overall cost compares to an estimate by the FNS of a one-time cost of just \$400 per store (most of which the Agency says will be recouped) or in the case of smaller stores, just \$140. These figures completely fail to take into account how SNAP consumers are impacted and how stores actually operate. Even the estimates in this analysis might be extremely modest considering that a survey of convenience retailers conducted by the National Association for Convenience Stores (NACS) finds that the average store believes that the proposed rules will cost as much as \$5,000 per month.³³

The methodology for calculating each cost component is as follows.

Stocking Costs: The stocking costs used in this analysis come directly from the RIA document prepared by the FNS. These data are based on the Agency's internal data and **are not** publicly available. According to the FNS, 66,896 so-called combination stores, 106,531 convenience stores and 12,277 small grocery stores will be impacted by the rule. To this, JDA added 8,948 other retailers which represent bakeries, meat and seafood stores, vegetable stands and other similar SNAP retailers that would generally be smaller stores with limited space and a limited ability to stock large numbers of products that do not tend to quickly move off of the shelves. According to FNS, in order to meet the Congressional requirements, these stores will, on average, need to stock two additional dairy items at an average cost to the retailer of \$6.84, two additional produce items at an average cost to the retailer of \$1.16, 1 additional bread item at a cost of \$3.62, and two additional meat or fish items at a cost to the retailer of \$6.13. Table 8 outlines these costs.

³² It is important to note that these costs would be offset by increased revenues at other SNAP retailer; however, there is an unmeasured cost to consumers resulting from lost convenience, higher acquisition costs for food, and potentially lower caloric intake due to a lack of either cooking facilities or available stores.

³³ NACS Internal Membership Survey on SNAP Proposed Rule (hereinafter *NACS SNAP Survey*). The NACS SNAP Survey was conducted in March 2016 of 370 retailer companies, representing approximately 22,694 stores, a sample size that is statistically representative of the industry as a whole. This data has a 95% confidence level with a margin of error of +/- 5 percent and has been extrapolated to reflect industry-wide numbers.

Table 8
Data Used to Calculate Stocking Costs

	Combination stores	Convenience stores	Small Grocery stores	Other Stores
Total Stores	66,896	106,531	12,277	8,948
Stores Not Meeting Dairy Requirement	62,079	98,861	11,393	8,304
Additional Dairy Units	2	2	2	2
Average Cost	\$6.84	\$6.84	\$6.84	\$6.84
Stores Not Meeting Produce Requirement	4,616	7,351	847	617
Additional Produce Units	2	2	2	2
Average Cost	\$6.84	\$6.84	\$6.84	\$6.84
Stores Not Meeting Cereals Requirement	14,516	23,117	2,664	1,942
Additional Cereals Units	1	1	1	1
Average Cost	\$3.62	\$3.62	\$3.62	\$3.62
Stores Not Meeting Meat/Fish Requirement	44,486	70,843	8,164	5,950
Additional Meat/Fish Units	2	2	2	2
Average Cost	\$6.13	\$6.13	\$6.13	\$6.13

While these are the costs to retailers of building additional stock, all costs are eventually passed through to consumers.³⁴ For the purpose of this analysis, retail margins derived from Bureau of Economic Analysis (BEA) personal consumption expenditure margins for each of the product types was applied to the wholesale price reported by FNS.³⁵ The result is a total one-time cost to stores of \$4.2 million, with that passed through to consumers at a total cost of \$5.8 million.

Table 9
Calculation of Additional Refrigeration Costs

	Combination stores	Convenience stores	Small Grocery stores	Other Stores	Total Costs
Total Stores	66,896	106,531	12,277	8,948	
Percent Requiring Additional Refrigeration	1.5%	1.5%	1.5%	1.5%	
Units Required	1,003	1,598	184	134	
Conservative Cost	\$752,580	\$1,198,474	\$138,116	\$100,665	\$2,189,835
Estimated Energy Costs	\$16,524	\$26,315	\$3,033	\$2,210	\$48,082
Total Cost to Retailer	\$769,104	\$1,224,788	\$141,149	\$102,875	\$2,237,917
Total Cost to Consumer	\$1,069,384	\$1,702,980	\$196,257	\$143,041	\$3,111,661

Perishables Rule: According to the FNS, the requirement that SNAP retailers will be required to stock and keep on hand more perishable items will add to their cost for refrigerated storage. The RIA only calculated the potential cost of small additional storage units. Maintenance and operational costs were not included in that analysis; however, even with low energy costs today, over time these could be substantial. As Table 9 shows, these costs would equate to about

³⁴ The costs of all regulations, including those being proposed by the FNS are always paid by people, either consumers, workers or families that own and operate stores. Retailers pass on the bulk of higher stocking costs, costs for adding and maintaining refrigeration, the costs of lost sales due to less space dedicated to products that consumers want, even the cost of lost products due to spoilage to consumers through higher prices. In markets where prices cannot be passed through, the costs are borne either by workers or eventually by entire communities that see stores close and lose their business and tax base.

³⁵ Use Tables: After Definitions: Marin Details, US Department of Commerce, Bureau of Economic Analysis, 2007. Available at: www.bea.gov/industry/more.htm

\$48,000 and would continue every year.³⁶ This means that over a 20 year period, the cost of this additional refrigeration would be about \$3.6 million, at the consumer level.

Spoilage Costs:

Even with all of the additional refrigeration, the products that are required by the FNS simply do not sell in most small convenience stores to the level that the Agency would like. If a broader range of milk and cheese products were selling, stores would already stock them. As such, the requirements enhancing the number and amount of units stocked will lead to increased losses from spoilage.

Table 10
Calculation of Additional Spoilage Costs

	Combination stores	Convenience stores	Small Grocery stores	Other Stores	Total
Total Stores	66,896	106,531	12,277	8,948	194,652
Additional Dairy Products Stocked	\$849,780	\$1,353,263	\$155,955	\$113,666	
Spoilage Rates	0.25%	0.25%	0.25%	0.25%	
Turnover Per Year	15.99	15.99	15.99	15.99	
Spoilage Costs	\$33,970	\$54,097	\$6,234	\$4,544	\$98,845
Spoilage Costs To Consumer	\$46,750	\$74,449	\$8,580	\$6,253	\$136,032
Additional Produce Items Stocked	\$10,709	\$17,053	\$1,965	\$1,432	
Spoilage Rates	12.00%	12.00%	12.00%	12.00%	
Turnover Per Year	12	12	12	12	
Spoilage Costs	\$15,421	\$24,557	\$2,830	\$2,063	\$44,870
Spoilage Costs To Consumer	\$21,605	\$34,406	\$3,965	\$2,890	\$62,866
Additional Cereals Items Stocked	\$52,487	\$83,585	\$9,633	\$7,021	
Spoilage Rates	2.00%	2.00%	2.00%	2.00%	
Turnover Per Year	12	12	12	12	
Spoilage Costs	\$12,597	\$20,060	\$2,312	\$1,685	\$36,654
Spoilage Costs To Consumer	\$17,596	\$28,022	\$3,229	\$2,354	\$51,201
Additional Meat/Fish Items Stocked	\$545,142	\$868,132	\$100,047	\$72,918	
Spoilage Rates	4.00%	4.00%	4.00%	4.00%	
Turnover Per Year	12	12	12	12	
Spoilage Costs	\$261,668	\$416,703	\$48,022	\$35,001	\$761,395
Spoilage Costs To Consumer	\$360,321	\$573,806	\$66,127	\$48,196	\$1,048,450
Total Spoilage Costs to Retailer	\$323,656	\$515,417	\$59,398	\$43,292	\$941,764
Total Spoilage Costs to Consumer	\$446,272	\$710,683	\$81,902	\$59,693	\$1,298,549

The table above calculates the additional spoilage costs based on spoilage rates from the RIA conducted by the FNS and product turnover rates from the National Association of Convenience Stores.³⁷ Discounted over a 20 year period, these costs reach \$13.8 million at the consumer level.

Opportunity Cost: One particular item that the FNS does not discuss is the opportunity cost to retailers from potentially overstocking newly declared staple food items. Store space is limited and retailers can make significantly more revenue and profits from other items sold in the store.

³⁶ This is based on an energy cost of about \$165 per unit per year. See: Jamieson, Meriah, *A \$3 Billion Opportunity: Energy Management in Retail Operations*, Schneider Electric. Available at:

http://www.resourceadvisor.com/assets/a_3_billion_opportunity_energy_management_in_retail_operations.pdf.

³⁷ *NACS State of the Industry Report of 2014 Data and Fact Book*, National Association of Convenience Stores. Available at: <https://www.nacsonline.com/Solutions/Store/Pages/default.aspx>.

One way to think of this is that the SNAP program is “renting” shelf space in the store, and if more space is “rented” for SNAP items, there is less available to “rent” to other categories.

In order to calculate the lost opportunity costs from overstocking staple items, JDA developed an index of convenience store gross margins to the cubic inch. This was based on the volumetric dimensions of key items in each staple product category (and the other major product categories carried by convenience stores), and reported gross margins by category.³⁸ Using this index, the model added the expected dollars to new required staple products to the average store, and removed the same amount of the next most profitable product. For example, the additional volumes of vegetables replace health and beauty care items and the dairy products stocked replaced the same volume of sweet snacks.

This approach assumes that stores do not undergo any type of significant redesign in order to comply with the proposed rules but rather remove more profitable and salable items from the shelves to replace them with the newly required items like bleached white flour, lentils or tinned fish. If stores need to undergo a significant redesign the costs could be very large.

Merchandising equipment for the average convenience store costs as much as \$115 per square foot. This would mean that a redesign of just 100 square feet of space or about 5 percent of the store would cost a minimum of \$11,500.³⁹ This cost, is not even included in the analysis as it is impossible to determine exactly how many stores will need redesign based on the data presented by the FNS.

Table 11
Calculation of Opportunity Costs

	Combination stores	Convenience stores	Small Grocery stores	Other Stores	Total
Total Stores	66,896	106,531	12,277	8,948	194,652
Dairy Opportunity Costs	\$596,739	\$950,299	\$109,516	\$79,820	\$1,736,373
Produce Opportunity Costs	\$14,067	\$22,401	\$2,582	\$1,882	\$40,931
Cereals Opportunity Costs	\$463	\$738	\$85	\$62	\$1,348
Meat Opportunity Costs	\$716,096	\$1,140,374	\$131,421	\$95,785	\$2,083,676
Total Opportunity Costs to Retailer	\$1,327,365	\$2,113,812	\$243,603	\$177,548	\$3,862,328
Total Opportunity Costs to Consumer	\$1,827,673	\$2,910,545	\$335,421	\$244,469	\$5,318,109

All told, the annualized opportunity costs of substituting SNAP required items and amounts for other products is about \$5.3 million at the consumer level, which translates into a 20 year cost of \$56.7 million.

Cost of Depth of Stock Rule: The FNS is proposing that all SNAP authorized retailers keep on hand on a continuous basis at least six units per variety of staple food in order to meet the statutory requirement to offer for sale, on a continuous basis, staple foods in each staple food

³⁸ Volumes calculated based on the average dimensions of a basket of goods, as reported by several online vendors. Gross margins data was retrieved from NACS. See: *NACS State of the Industry Report of 2014 Data and Fact Book*, National Association of Convenience Stores. Available at: <https://www.nacsonline.com/Solutions/Store/Pages/default.aspx>.

³⁹ *NACS State of the Industry Report of 2014 Data and Fact Book*, National Association of Convenience Stores. Available at: <https://www.nacsonline.com/Solutions/Store/Pages/default.aspx>.

category. Current law simply requires that these foods be stocked and does not prescribe a minimum volume. This means that those retailers impacted by these rules will face additional opportunity costs, spoilage costs and stocking costs resulting from an increase in products that they are required to keep on their shelves.

Table 12
Calculation of Depth of Stock Costs

	Combination stores	Convenience stores	Small Grocery stores	Other stores
Total Stores	66,896	106,531	12,277	8,948
Stores Not Meeting Dairy Requirement	62,079	98,861	11,393	8,304
Additional Dairy Units	6	6	6	6
Average Cost	\$6.84	\$6.84	\$6.84	\$6.84
Stores Not Meeting Produce Requirement	4,616	7,351	847	617
Additional Produce Units	-	-	-	-
Average Cost	\$1.16	\$1.16	\$1.16	\$1.16
Stores Not Meeting Cereals Requirement	14,516	23,117	2,664	1,942
Additional Cereals Units	-	-	-	-
Average Cost	\$3.62	\$3.62	\$3.62	\$3.62
Stores Not Meeting Meat/Fish Requirement	44,486	70,843	8,164	5,950
Additional Meat/Fish Units	6	6	6	6
Average Cost	\$6.13	\$6.13	\$6.13	\$6.13
Total Cost to Retailers	\$4,184,765	\$6,664,183	\$768,003	\$559,754
Total Cost to Consumers	\$5,760,451	\$9,173,443	\$1,057,179	\$770,517

It is likely that (particularly in the case of smaller retailers) the depth of stock rule will require some restructuring of the supply chain, including the need for additional weekly deliveries. This is particularly true in the case of perishable goods. In some cases, where stores may be located in isolated areas or not on distributors' daily supply routes, retailers may have to obtain products at retail prices from other regional supermarkets or warehouse stores in order to adequately maintain the proper depth of stock for faster moving items. Determining these costs is extremely difficult without having access to the SNAP retailer database (by store size and type) which the FNS does not make available to the public even under FOIA requests.

As Table 12 shows, these costs are the result of stores having to stock more dairy and meat products than they normally would. All told, the additional stocking costs would reach \$12.2 million at the store level and as much as \$16.8 million at the consumer level.⁴⁰

These additional stocking requirements also lead to higher spoilage and opportunity costs over time. Based on the data outlined above, and the same opportunity cost and spoilage analysis that was used for the costs associated with the legislative changes to the SNAP program, it is estimated that the depth of stock requirements will result in a total of \$26.2 million in added costs to retailers, which would be \$36.1 million at the consumer level. This equals a total of \$222.8 million over a discounted 20 year period.

Again, this is on top of the stocking, spoilage and opportunity costs that would occur as a result of the required changes in the SNAP regulations.

⁴⁰ Based on the total number of current SNAP retailers of 258,632. See: *Fiscal Year 2015 At A Glance*, US Department of Agriculture, Food and Nutrition Service, at: www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf

Table 13
Spoilage and Opportunity Costs Related to Depth of Stock Rule

	Combination stores	Convenience stores	Small Grocery stores	Other stores	Total
Total Stores	66,896	106,531	12,277	8,948	194,652
Stocking Costs					
To Retailers	\$4,184,765	\$6,664,183	\$768,003	\$559,754	\$12,176,706
To Consumers	\$5,760,451	\$9,173,443	\$1,057,179	\$770,517	\$16,761,591
Spoilage Costs					
To Retailers	\$886,915	\$1,412,400	\$162,770	\$118,634	\$2,580,718
To Consumers	\$1,221,212	\$1,944,764	\$224,121	\$163,349	\$3,553,447
Opportunity Costs					
To Retailers	\$3,938,505	\$6,272,018	\$722,809	\$526,814	\$11,460,146
To Consumers	\$5,421,952	\$8,634,387	\$995,057	\$725,240	\$15,776,634
Total Costs					
To Retailers	\$9,010,185	\$14,348,601	\$1,653,582	\$1,205,201	\$26,217,570
To Consumers	\$12,403,615	\$19,752,594	\$2,276,357	\$1,659,106	\$36,091,672

Staple Foods Redefinition: In addition to requiring that stores stock a greater number of products, the proposed rules would unilaterally redefine staple foods to remove any products with multiple ingredients. Examples of such foods include a fruit parfait, chicken soup, or a bagged salad mix containing sliced chicken. In addition, the Agency is proposing to remove a variety of what it calls *accessory food items*, including but not limited to: Chips, hummus, crackers, pretzels, or apple and cheese snack packs, ready-popped popcorn, pastries, and candy, coffee, tea, cocoa, carbonated and un-carbonated drinks, condiments, and spices.

Table 14
Costs of Unilateral Changes in Staple Foods Definition

	Combination stores	Convenience stores	Small Grocery stores	Other stores	Total
Total Stores	66,896	106,531	12,277	8,948	194,652
Stores Not Meeting Dairy Requirement	62,079	98,861	11,393	8,304	
Additional Dairy Units	6	6	6	6	
Average Cost	\$6.84	\$6.84	\$6.84	\$6.84	
Stores Not Meeting Produce Requirement	4,616	7,351	847	617	
Additional Produce Units	-	-	-	-	
Average Cost	\$1.16	\$1.16	\$1.16	\$1.16	
Stores Not Meeting Cereals Requirement	14,516	23,117	2,664	1,942	
Additional Cereals Units	12	12	12	12	
Average Cost	\$3.62	\$3.62	\$3.62	\$3.62	
Stores Not Meeting Meat/Fish Requirement	44,486	70,843	8,164	5,950	
Additional Meat/Fish Units	-	-	-	-	
Average Cost	\$6.13	\$6.13	\$6.13	\$6.13	
Total Cost to Retailers	\$3,179,186	\$5,062,812	\$583,456	\$425,247	\$9,250,701
Total Cost to Consumers	\$4,388,267	\$6,988,257	\$805,351	\$586,974	\$12,768,849

Specifically this provision would also remove a range of healthy snacks like pretzels, hummus, or string cheese from the definition of staple foods. This would force SNAP eligible retailers to

stock even more types of items that they would not generally carry based on market demand. As Table 14 shows, this proposed rule would require stores to stock an additional 6 units of dairy products and 12 cereal and bread products at a total cost to retailers of \$9.2 million which is equal to \$12.8 million at the consumer level.

As with the depth of stock requirements, these additional stocking requirements also lead to higher spoilage and opportunity costs over time. Based on the data outlined above, and the same opportunity cost and spoilage analysis that was used for the costs associated with the legislative changes to the SNAP program, it is estimated that the redefinitions proposed for staple foods will result in a total of \$15.2 million in added costs to retailers, which would be \$21.0 million at the consumer level. This equals a total of \$100.3 million over a discounted 20 year period.

Based on the RIA prepared by the FNS, the Agency assumes that about 1 percent of all SNAP retailers would be impacted by the rules limiting the amount of food heated on premise, and the participation of multiple businesses with the same ownership structure operating under one roof. This equals 2,586 retailers.⁴¹ Assuming that these would only be the smallest of the so-called “combination stores” that these rules would generally impact, this would mean that each store would lose an average of \$2,830 in SNAP sales, for a total of \$7.3 million in lost annual sales. Discounted over 20 years, this equates to a total of \$78.0 million in lost SNAP sales for these particular retailers. These figures are likely extremely low. According to a survey conducted by NACS, currently about 47,000 stores would be in non-compliance with this provision.⁴²

Table 15
Spoilage and Opportunity Costs Related to Changes in Stable Foods Definition

	Combination stores	Convenience stores	Small Grocery stores	Other stores	Total
Total Stores	66,896	106,531	12,277	8,948	194,652
Stocking Costs					
To Retailers	\$3,179,186	\$5,062,812	\$583,456	\$425,247	\$9,250,701
To Consumers	\$4,388,267	\$6,988,257	\$805,351	\$586,974	\$12,768,849
Spoilage Costs					
To Retailers	\$253,073	\$403,016	\$46,445	\$33,851	\$736,385
To Consumers	\$351,407	\$559,611	\$64,491	\$47,004	\$1,022,513
Opportunity Costs					
To Retailers	\$1,795,776	\$2,859,750	\$329,567	\$240,203	\$5,225,296
To Consumers	\$2,471,495	\$3,935,824	\$453,578	\$330,587	\$7,191,484
Total Costs					
To Retailers	\$5,228,035	\$8,325,577	\$959,468	\$699,301	\$15,212,381
To Consumers	\$7,211,169	\$11,483,692	\$1,323,420	\$964,565	\$20,982,846

Administrative Costs: This proposed rule, like any regulation, requires that all firms familiarize themselves with, and abide by the law. This can require retailers (who may not be familiar with the legalese of many regulatory forms and requirements) to fill out more forms, to try to determine which individual products count toward depth of stock, file for waivers if they are eligible. All of this takes time, money and in many cases outside legal support.

⁴¹ Ibid.

⁴² NACS SNAP Survey.

The FNS did not include these costs in the RIA, but they are real, and will be passed through to consumers, not only by the stores directly impacted by the proposed rules, but likely by all stores. Since the Agency did not estimate the paperwork hours required to abide by these rules, an estimate was made based on cost avoidance.

According to the FNS, in 2015, a total of 2,608 firms received sanctions (either a time-limited term disqualification or a permanent disqualification). The SNAP program allows a fine of \$11,000 for violations of rules, so the total potential fine from these sanctions was \$28.688 million. Dividing this by the average retail manager wage rate of \$31.88 per hour, would equate to a total of 899,875 hours.⁴³ Taken across all SNAP participating firms, the potential expected cost of fines would therefore be equivalent to a negligible 3.63 hours of management time per store per year, or less than half a minute per day. While this seems small, it adds up across all 248,110 SNAP authorized retailers and needs to be included in the cost analysis. Marked up to the consumer level, this is equal to \$31.5 million per year, or \$335.9 million discounted over a 20 year time period. This is a very conservative estimate of the administrative costs of the proposed rule in that it underestimates the real costs of avoiding regulatory actions. In addition to paying fines, retailers that are subject to regulatory actions also must pay legal fees, take additional time away from their duties, and even experience certain reputational harm to their store or their brand if they find themselves under some sort of regulatory investigation.

All told, based on this estimate, the combined costs of the rules as proposed by the FNS is \$111.5 million in the first year, and \$817.0 million discounted at a 7 percent discount rate over 20 years. The estimated cost of the rules to business and consumers over a 20 year period, discounted at 7 percent is \$817.0 million, or a discounted average of about \$210 per store per year at the consumer level. This is equal to about \$573 per store in initial annual costs, and approximately \$4,200 overall costs.

Null Alternative: The reason that the FNS is promulgating the rules is that Congress has changed the requirements for retailers. The 2014 Farm Bill requires that SNAP authorized retail food stores have available on a continuous basis at least seven varieties of items in each of four staple food categories. This is an increase from at least three varieties in each of the staple food categories. In addition Congress requires that the minimum number of categories in which perishable foods are available increases from two to three. This should be considered the base case or Null Alternative.

As Table 16 shows, the costs of the rules outlined in the Farm Bill are substantial, reaching as much as \$415.8 million over the course of 20 years, with an implementation year cost of \$47.1 million. These costs are all calculated at the consumer level. Consumers bear the brunt of costs because in the end, in order to stay in business and stay profitable firms will pass through costs to consumers, and in many cases mark these costs up to cover higher operating or inventory expenses.

⁴³ Based on wages of management occupations (SOC 11-0000) at grocery stores (NAICS 445100). *May 2015 National Industry-Specific Occupational Employment and Wage Estimates*, US Department of Labor, Bureau of Labor Statistics, March 30, 2016. Available at: http://www.bls.gov/oes/current/naics4_445100.htm.)

Table 16
Estimated Cost of Null Alternative

Component	Initial Costs	Ongoing Costs (Discounted)	Total Costs
Staple Foods Variety			
<i>Stocking</i>	\$5,844,193	\$0	\$5,844,193
<i>Opportunity Cost</i>	\$5,318,109	\$51,369,923	\$56,688,032
<i>Spoilage Costs</i>	\$1,298,549	\$12,543,254	\$13,841,803
Perishables Rule			
<i>Refrigerated Storage Cost</i>	\$3,063,579		\$3,063,579
<i>New Energy Costs</i>	\$48,082	\$464,444	\$512,526
Administrative Costs			
<i>Administrative Costs</i>	\$31,513,854	\$304,406,021	\$335,919,875
Total	\$47,086,366	\$368,783,642	\$415,870,009

The Null Alternative includes the stocking costs, opportunity costs and spoilage costs calculated above under the Proposed Rule Alternative, as well as the costs associated with increased refrigeration and administrative expenses.

All told the combined costs of the rules as required under the 2014 Farm Bill are \$47.1 million in the first year, and \$415.9 million discounted at a 7 percent discount rate over 20 years, or a discounted average of about \$106 per store per year at the consumer level. This is equal to about \$240 per store in initial annual costs, and approximately \$2,135 overall costs.

Table 17
Estimated Cost of Store Non-Participation Alternative

Component	Initial Costs	Ongoing Costs (Discounted)	Total Costs
Staple Foods Variety			
<i>Stocking</i>	\$5,844,193	\$0	\$5,844,193
<i>Opportunity Cost</i>	\$5,318,109	\$51,369,923	\$56,688,032
<i>Spoilage Costs</i>	\$1,298,549	\$12,543,254	\$13,841,803
Perishables Rule			
<i>Refrigerated Storage Cost</i>	\$3,063,579	\$0	\$3,063,579
<i>New Energy Costs</i>	\$48,082	\$464,444	\$512,526
85 Percent Rule			
<i>Lost SNAP Sales</i>	\$7,319,286	\$70,700,162	\$78,019,448
Administrative Costs			
<i>Administrative Costs</i>	\$31,513,854	\$304,406,021	\$335,919,875
Total	\$54,405,652	\$439,483,804	\$493,889,456

Store Non-Participation Alternative: The third alternative includes the Congressional requirements, along with the rules related to the definition of a retail food store that would require that at least 85 percent of an entity's total food sales be from items that are not cooked or heated on-site before or after purchase. Currently, only firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption are ruled ineligible. Additionally, this rule would add language to prevent two

separate businesses that operate under one roof from participating in SNAP as a retail food store if they have common employees, accounting, and management and both are not eligible retail food stores.

The estimated cost of the rules to business and consumers over a 20 year period, discounted at 7 percent is \$493.9 million. The bulk of this is costs to consumers, as stores pass through additional storage, stocking and opportunity costs. It is estimated that the rules will cost consumers approximately \$415.9 million, while marginal retailers would be forced to drop out of the program and experience a reduction of about \$78.0 million in SNAP sales over a 20 year period.⁴⁴

Table 18
Incidence of Estimated Cost of Store Non-Participation Alternative

Component	Initial Costs	Ongoing Costs	Total Costs
		(Discounted)	
Cost To Consumers	\$47,086,366	\$368,783,642	\$415,870,009
Cost To Retailers	\$7,319,286	\$70,700,162	\$78,019,448
Total Cost	\$54,405,652	\$439,483,804	\$493,889,456

Consumers bear the brunt of costs because in the end, in order to stay in business and stay profitable firms will pass through costs to consumers, and in many cases mark these costs up to cover higher operating or inventory expenses.

This alternative would cost the same as the Null Alternative, along with the additional costs associated with the reduction in SNAP participating retailers. This results in lost SNAP sales for these particular stores. This is generally a cost that would be offset by higher SNAP sales at other retailers, but is included in the analysis for purposes of demonstrating the potential impact of these proposals in an alternatives analysis framework (something that was not done by the FNS). In general; however, these costs should be considered more as disruption costs, for SNAP recipients, something that is included in the *Non Quantified Costs* section of the analysis.

Based on the RIA prepared by the FNS, the Agency assumes that about 1 percent of all SNAP retailers would be impacted by the rules limiting the amount of food heated on premise, and the participation of multiple businesses with the same ownership structure operating under one roof. This equals 2,586 retailers.⁴⁵ Assuming that these would only be the smallest of the so-called “combination stores” that these rules would generally impact, this would mean that each store would lose an average of \$2,830 in SNAP sales, for a total of \$7.3 million in lost sales. Discounted over 20 years this equates to a total of \$78.0 million in lost SNAP sales for these particular retailers.

⁴⁴ It is important to note that these costs would be offset by increased revenues at other SNAP retailers; however, there is an unmeasured cost to consumers resulting from lost convenience, higher acquisition costs for food, and potentially lower caloric intake due to a lack of either cooking facilities or available stores.

⁴⁵ Based on the total number of current SNAP retailers of 258,632. See: *Fiscal Year 2015 At A Glance*, US Department of Agriculture, Food and Nutrition Service, at: www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf

All told the combined cost of this alternative is \$54.4 million in the first year, and \$493.9 million discounted at a 7 percent discount rate over 20 years, or a discounted average of about \$127 per store per year at the consumer level. This is equal to about \$280 per store in initial annual costs, and approximately \$2,530 overall costs.

Incentives Alternative: The OMB suggests that a good alternatives analysis will include non-regulatory approaches to achieve an Agency's goals. This alternative would meet the goals of ensuring that the legislative intent of the 2014 Farm Bill is enacted and would also encourage consumers to purchase more of the staple food products that the FNS wants to promote. The alternative would still include the changes to SNAP requirements legislated under the Farm Bill, and would also resurrect a pilot program conducted in 2012 which provided SNAP recipients with an incentive of 30 cents for every dollar of SNAP benefits that they spent on targeted fruits and vegetables in participating retailers. The incentive was capped at \$60 per household per month. As a result of this program participants consumed significantly more targeted fruits and vegetables per day (almost a quarter of a cup equivalent) than did non-participants, representing an increase in consumption of 26 percent.⁴⁶ In other words, the Healthy Incentives Program actually assisted FNS in its mission of ensuring that SNAP recipients have better access to healthier foods. The costs associated with this alternative would differ in that they would accrue not to consumers and retailers but to taxpayers.

Table 19
Estimated Cost of Healthy Incentive Program Alternative

Component	Initial Costs	Ongoing Costs (Discounted)	Total Costs
Staple Foods Variety			
<i>Stocking</i>	\$5,844,193	\$0	\$5,844,193
<i>Opportunity Cost</i>	\$5,318,109	\$51,369,923	\$56,688,032
<i>Spoilage Costs</i>	\$1,298,549	\$12,543,254	\$13,841,803
Perishables Rule			
<i>Refrigerated Storage Cost</i>	\$3,063,579		\$3,063,579
<i>New Energy Costs</i>	\$48,082	\$464,444	\$512,526
Administrative Costs			
<i>Administrative Costs</i>	\$31,513,854	\$304,406,021	\$335,919,875
Healthy Incentives Program			
<i>Implementation</i>	\$89,800,000	\$0	\$89,800,000
<i>Incentives Cost (Medium Case)</i>	\$2,650,000,000	\$25,597,502,237	\$28,247,502,237
Total	\$2,786,886,366	\$25,966,285,879	\$28,753,172,245

This alternative is a much more expensive approach, but would have the beneficial effect of providing additional benefits to those who rely on the SNAP program as well as encouraging recipients to purchase the types of food products that the FNS prefers.⁴⁷ The costs associated

⁴⁶ Bartlett, Susan, et al. *Evaluation of the Healthy Incentives Pilot (HIP): Final Report*, Prepared by Abt Associates for the U.S. Department of Agriculture, Food and Nutrition Service, September 2014, at: www.fns.usda.gov/sites/default/files/HIP-Final.pdf

⁴⁷ According to Bartlett (Ibid.) HIP was envisioned primarily as a financial inducement to increase fruit and vegetable intake among SNAP participants. A 30 percent incentive lowers the net price and should have increased sales of fruits and vegetables by roughly 20 percent. HIP's impact was likely amplified by the implicit and explicit nutrition education and marketing provided by HIP leading to higher sales increases than expected (about 26

with ensuring that the Farm Bill is implemented would be the same as those under the Null Alternative, or about \$415.9 million in additional food costs for consumers. In addition, the implementation of the Healthy Incentives Program on a national level would cost about \$2.65 billion per year or a discounted \$28.2 billion over 20 years.⁴⁸ This is a discounted average of about \$7,360 per store per year at the consumer and taxpayer level. This is equal to about \$13,855 per store in initial annual costs, and approximately \$147,250 overall costs.

Table 20
Incidence of Costs From Healthy Incentive Program Alternative

Component	Initial Costs	Ongoing Costs (Discounted)	Total Costs
Cost To Consumers	\$47,086,366	\$368,783,642	\$415,870,009
Cost To Retailers	\$0	\$1	\$2
Cost to Taxpayers	\$2,650,000,000	\$25,597,502,237	\$28,247,502,237
Total Cost	\$2,697,086,366	\$25,966,285,880	\$28,663,372,247

Expected Benefits of Each Regulatory Alternative:

In its Regulatory Impact Analysis the FNS did not identify any benefits of the proposed rules. In fact, the Agency suggests that rather than incurring the costs (as identified above) many smaller retailers will opt out of the SNAP system. This means that at a minimum those who receive SNAP benefits will have substantially fewer locations where they can purchase food products. These consumers will face additional costs associated with traveling to new retailers and with the inconvenience of shopping at fewer stores. There are also well documented social costs associated with the fear that SNAP recipients be treated disrespectfully by unfamiliar grocery store cashiers.⁴⁹

The agency suggests that the changes to stocking requirements and to the definitions of staple foods will improve SNAP recipient access to a variety of healthy food options and would reinforce the intent of SNAP, that participants use their benefits to purchase more nutritious foods intended for home preparation and consumption.⁵⁰ No data as to how the rules might do this are provided.

The Healthy Incentives Program (HIP) did show some benefits, in that during the pilot program, non-HIP participant households made mean monthly fruit and vegetable purchases of \$10.86, and HIP participants made significantly higher mean monthly purchases of \$12.05, an increase

percent). This suggests that programs like HIP will likely have the kind of impact that the FNS would like on sales of its preferred food products.

⁴⁸ *Ibid.*

⁴⁹ See for example, Bryant, Carol, et. al., *A Social Marketing Approach to Increasing Enrollment in a Public Health Program: A Case Study of the Texas WIC Program*, *Human Organization*, Fall 2001, Vol. 60, No. 3, pp. 234-246, at: <http://www.sfaajournals.net/doi/abs/10.17730/humo.60.3.9kdw80dx97284yg8>

⁵⁰ *Regulatory Impact Analysis: 7 C.F.R. Parts 271 and 278: Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)*, US Department of Agriculture, Food and Nutrition Service, February 18, 2016. Available at <https://www.regulations.gov/#!documentDetail;D=FNS-2016-0018-0006>.

of \$1.19, or 11 percent.⁵¹ According to the FNS, the impact of HIP on total caloric intake was small (49 fewer kilocalories per day in the HIP group) and not statistically significant so the agency could not determine whether higher fruit and vegetable consumption associated with HIP participation was in addition to or in place of the consumption of other foods. The HIP pilot program also had no statistically significant effect on proportions of participants meeting the 2010 Dietary Guidelines.⁵²

Since even the provision of incentives equal to over \$2.6 billion per year did not seem to materially impact the quality or quantity of foods purchased by SNAP recipients, it is unlikely that rules that force small retailers to carry more yogurt will have any noticeable impact on public health.

As such, no benefits are calculated to result from any of the studied alternatives.

Discounted Cost/Benefit Ratio of Each Regulatory Alternative:

Based on the above analysis, the alternative with the lowest discounted net cost would be the Null Alternative. Even this alternative has substantial costs that will be incurred by consumers, including those who receive SNAP benefits; however, since the rules considered under this alternative are required by the 2014 Farm Bill, they must be implemented by the FNS.

The analysis of the potential costs and benefits of the alternatives suggests that over 20 years (discounted at a rate of 7 percent) the Null Alternative will cost approximately \$415.9 million. This is roughly half of the cost of the rules being proposed by FNS which would cost consumers and businesses about \$817.0 million. The most expensive alternative would be the expansion of the HIP program which would cost nearly \$28.7 billion discounted over 20 years, with most of that falling on the taxpayer.

Table 21
Benefit-Cost Comparisons

Alternative	Initial Cost	Initial Benefit	Net	20 Year	20 Year Discounted	Net Benefit/(Cost)
			Benefit/(Cost)	Discounted Cost	Benefit	
Proposed Rules	\$111,480,169	\$0	(\$111,480,169)	\$817,024,201	\$0	(\$817,024,201)
Null Alternative	\$47,086,366	\$0	(\$47,086,366)	\$415,870,009	\$0	(\$415,870,009)
Expansion of HIP Pilot Program	\$2,697,086,366	\$0	(\$2,697,086,366)	\$28,663,372,247	\$0	(\$28,663,372,247)
Store Non-Participation Alternative	\$54,405,652	\$0	(\$54,405,652)	\$493,889,456	\$0	(\$493,889,456)

Evaluation of Non-monetized Benefits and Costs:

This analysis has attempted to monetize all costs and benefits associated with the four alternative scenarios; however, there are some items that simply cannot be quantified.

In its Regulatory Impact Analysis the FNS did not identify any benefits of the proposed rules. In fact, the Agency suggests that rather than incurring the costs (as identified above) many smaller retailers will opt out of the SNAP system. This means that at a minimum those who receive

⁵¹ Op. cit., Bartlett, Susan.

⁵² Ibid.

SNAP benefits will have fewer locations where they can purchase food products. These consumers will face additional costs associated with traveling to new retailers and with the inconvenience of shopping at fewer stores.

It is also likely that in many areas there are only a limited number of retailers that accept SNAP – or for that matter a limited number of retailers that sell food. Anything that discourages participation in the program could increase the size and scope of these “food deserts,” or could lead to situations where only a single monopoly retailer is available for SNAP purchases. This would likely lead to higher prices for SNAP recipients above and beyond the increases calculated in this analysis. Recipients might have to travel longer distances to obtain food, or subjected to prices that increases above the market rate (that would otherwise prevail in a more competitive environment).

It is possible that the Agency is more expert in food retailing than those who own and manage many SNAP authorized stores. If this is the case, the proposed rules could lead to general improvements in the quantity, quality and stock of food products and for that matter other products, available to consumers. The FNS has provided no data to this effect; however, an economic theory would suggest that it would be unlikely for a government agency to understand a market better than thousands of individual competing firms. As such, while it is possible that the proposed rules would improve the retail environment for SNAP beneficiaries, this outcome is unlikely.

Sensitivity Analysis and Examination of Uncertainties:

The results presented are highly dependent on a large set of assumptions, most of which are provided by the FNS. The model economy is much simpler than the real world and results may vary as larger macroeconomic effects influence the system.

Despite the use of rigorous and highly accepted economic principles, it is at best theoretical to recognize the impact of every aspect of this proposal. Other extenuating factors not included in this analysis, for example, could involve the expansion of black market sales of SNAP benefits if recipients are not able to, for example, heat food on site. The potential reduction in retail establishments participating in the program could mitigate direct costs, but would make it more difficult or expensive for SNAP beneficiaries to purchase necessary food.

In particular, the following simplifying assumptions to the base model need to be examined:

Administrative Costs:

The RIA prepared by the FNS assumes that there would be no measurable administrative costs resulting from this rule. In this report, it was assumed that administrative costs would be equal to the avoidance costs of negative FNS regulatory actions on firms. This cost was applied across all retailers currently authorized to accept SNAP.

Some retailers would potentially not be impacted by the proposed rule changes and might therefore not incur any regulatory costs. Based on the RIA developed by the FNS, about 92.8

percent of the impacted store types will not meet at least one of the requirements of the proposed rules. Removing the administrative costs from 7.2 percent of stores will reduce the overall net cost of the Null Alternative by nearly 6 percent, and the cost of the rules as proposed by the FNS by about 3 percent. Table 22 outlines the 20 year costs that would result from this change in assumptions.

Table 22
Sensitivity Analysis – Administrative Costs

Alternative	20 Year Discounted Cost	Alternative 20 Year Discounted Cost	Difference	New Discounted Cost	Percent Change
Proposed Rules	\$335,919,875	\$311,733,644	(\$24,186,231)	(\$792,837,970)	-3.0%
Null Alternative	\$335,919,875	\$311,733,644	(\$24,186,231)	(\$391,683,778)	-5.8%
Expansion of HIP Pilot Program	\$335,919,875	\$311,733,644	(\$24,186,231)	(\$28,639,186,016)	-0.1%
Store Non-Participation Alternative	\$335,919,875	\$311,733,644	(\$24,186,231)	(\$469,703,225)	-4.9%

Retail Markups

The retail margins used here are based on 2007 data from the Bureau of Economic Analysis. The economy has changed substantially since then and these margins may not reflect the current retail environment. Instead of using these margins, if the margins reported by the National Association of Convenience Stores in 2014 were to be used, the overall cost of the Null Alternative would be about 1.5 percent (\$6.2 million) lower.⁵³ The cost of the rules as proposed by the FNS would be about \$37.2 million lower over a 20 year period, or a change of 4.6 percent.

Table 23
Sensitivity Analysis – Retail Margins

Alternative	20 Year Discounted Cost	Alternative 20 Year Discounted Cost	Difference	Percent Change
Proposed Rules	(\$817,024,201)	(\$779,816,754)	\$37,207,447	-4.6%
Null Alternative	(\$415,870,009)	(\$409,624,101)	\$6,245,907	-1.5%
Expansion of HIP Pilot Program	(\$28,663,372,247)	(\$28,657,126,340)	\$6,245,907	0.0%
Store Non-Participation Alternative	(\$493,889,456)	(\$487,643,549)	\$6,245,907	-1.3%

Discount Rate

The 20 year cost projections found in this paper are based on a discount rate of 7 percent. They also do not factor in any inflation which is assumed to be included in the discount factor. If inflation were to change over time, the 7 percent discount rate might be either too high or too low. Generally regulatory analysis conducted by Federal agencies examines costs and benefits over time using an arbitrary 7 percent and 3 percent discount rate. Were the discount rate to be changed to 3 percent, the discounted costs over time would change dramatically, increasing by between 38 and 39 percent depending on the alternative.

⁵³ *NACS State of the Industry Report of 2014 Data and Fact Book*, National Association of Convenience Stores. Available at: <https://www.nacsonline.com/Solutions/Store/Pages/default.aspx>.

This large increase is due to the fact that the higher discount rate used in the base analysis significantly devalues costs that occur in out-years. This is likely to occur in this instance as small retailers would be dropping out of the program over time as these firms discover that the costs far outweigh the benefits of accepting SNAP. This is one of the goals of the proposed rules, which are designed specifically to reduce the number of retailers in the program.

Table 24
Sensitivity Analysis – Discount Rate

Alternative	20 Year Discounted Cost	Alternative 20 Year Discounted Cost	Difference	Percent Change
Proposed Rules	(\$817,024,201)	(\$1,127,245,541)	(\$310,221,340)	38.0%
Null Alternative	(\$415,870,009)	(\$578,020,847)	(\$162,150,838)	39.0%
Expansion of HIP Pilot Program	(\$28,663,372,247)	(\$40,080,513,695)	(\$11,417,141,447)	39.8%
Store Non-Participation Alternative	(\$493,889,456)	(\$687,126,517)	(\$193,237,061)	39.1%

Effects on Small Businesses:

The Regulatory Flexibility Act (RFA) was enacted in 1980 to ensure that agencies evaluate a proposed regulation’s anticipated impacts on small entities. Small entities may include small businesses, small nonprofits, and small governmental jurisdictions. The purpose of the RFA is neither to prohibit regulation nor to give preferential treatment to small entities, but rather to encourage consideration of regulatory alternatives that achieve the agency’s stated goal while “minimizing the burden on small entities.”⁵⁴

Table 25
Effect of Alternative Proposals on Small Firms

	Combination stores	Convenience stores	Small Grocery stores	Other stores	Total
Annual SNAP Redemptions					
10th Percentile	\$2,830	\$2,130	\$1,990	\$2,317	
20th Percentile	\$7,050	\$5,530	\$6,300	\$6,293	
30th Percentile	\$11,720	\$8,750	\$11,650	\$10,707	
Estimated Annual Pre Tax Income From SNAP					
10th Percentile	\$386	\$291	\$272	\$316	
20th Percentile	\$962	\$755	\$860	\$859	
30th Percentile	\$1,599	\$1,194	\$1,590	\$1,461	
Estimated Annualized Cost to Retailer By Alternative					
Proposed Rules	\$573	\$573	\$573	\$573	
Null Alternative	\$242	\$242	\$242	\$242	
Expansion of HIP Pilot Program	\$242	\$242	\$242	\$242	
Store Non-Participation Alternative	\$280	\$280	\$280	\$280	
	Combination stores	Convenience stores	Small Grocery stores	Other stores	Total
Potential Lost Stores By Alternative					
Proposed Rules	6,690	10,653	1,228	895	19,465
Null Alternative	-	-	-	-	-
Expansion of HIP Pilot Program	-	-	-	-	-
Store Non-Participation Alternative	-	-	1,228	-	1,228

⁵⁴ *The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act*, Small Business Administration, Office of Advocacy, October 2010, at: www.sba.gov/sites/default/files/advocacy/RFA_in_a_Nutshell2010.pdf.

In instances where the proposal is likely to affect a significant number of small entities, the regulating agency is required to prepare an initial regulatory flexibility analysis (IRFA) that considers alternate regulatory strategies that might achieve the stated impact without disproportionately hurting small players. The ultimate purpose of the Regulatory Flexibility Act is to ensure that any regulation passed is built upon as level a playing field as possible by minimizing barriers to competition, innovation, and entry.

According to the RIA produced by the FNS, *retailers that redeem the least amount of SNAP benefits may be the most likely to make a business decision to leave the program because they find the changes needed to comply with the new inventory requirements to be more costly than the profit from SNAP participation.*⁵⁵

Table 25 shows total SNAP sales by store type and size from the RIA prepared by the FNS.⁵⁶ Using an average profit margin for convenience stores, the estimated pretax income from these sales are calculated. No store would continue to participate in the program if its income were less than the initial costs imposed by the rules. The average cost of the rules per store is estimated by dividing the total cost calculated above by the total number of stores. This is likely a low estimate for the smaller retailers, but could be a high estimate for larger retailers. Based on each of these cost considerations, an estimate of the number of retailers that would be incentivized to drop from the SNAP program is calculated. As Table 25 shows, the Null Alternative, which only implements the intent of Congress as outlined in the 2014 Farm Bill, would likely not encourage stores to drop the program. The same is true of the HIP alternative which would actually expand SNAP sales. The higher costs associated with the FNS proposed rules would encourage retailers, particularly small businesses to drop out of SNAP, and would therefore have a direct impact on small businesses. In other words, the FNS proposal, as it stands, disproportionately affects smaller retailers. The costs associated with regulations, especially the depth of stock rules and those associated with business structure (like the 85 percent rule) cannot be sustained by hundreds of small retailers.

The figures above assume that most retailers will continue to participate in the SNAP program unless they have marginal sales; however, very few retailers will be able to continue to participate in the program without undertaking the significant changes to their business that are outlined in the Alternatives Analysis. According to NACS, of the 154,195 currently participating in SNAP, 47,000 will be barred immediately because over 15 percent of their total food sales come from items that are cooked or heated on site. The proposal to require seven single-ingredient items in each of four staple food categories would eliminate 91,624 stores based on their current stocking patterns, and 57,551 of these stores would be unable to participate in the program unless they augmented their depth of stock.⁵⁷

⁵⁵ *Initial Regulatory Flexibility Analysis – Proposed Rule: Enhancing Retailer Standards in SNAP: Changes to Depth of Stock and Stocking Requirements Using New Farm Bill Definition*, US Department of Agriculture, Food and Nutrition Service, February 18, 2016, available at <https://www.regulations.gov/#!documentDetail;D=FNS-2016-0018-0006>.

⁵⁶ Ibid.

⁵⁷ NACS SNAP Survey.

Summary and Conclusions:

This report examined four distinct alternative ways of meeting the provisions of the 2014 Farm Bill and the desire by the FNS to increase the availability of certain foodstuffs that the agency has deemed to be preferable for SNAP recipients to purchase. These alternatives include the proposed rule itself, an alternative examining just the requirements set forth in the Farm Bill, a less onerous set of rules that address the Farm Bill provisions and those tied to discouraging restaurant type businesses from participating in SNAP, and an alternative that increases benefits targeted toward more nutritious products. Based on an extensive analysis, none of the proposed alternatives have a positive benefit-cost ratio, and the least onerous would impose net social costs of at least \$415.9 million, when discounted over time.

Based on the alternatives analysis performed in this report, it is estimated that the combined costs of the rules as proposed by the FNS will be \$111.5 million in the first year, and \$817.0 million discounted at a 7 percent discount rate over 20 years. This means that the proposal would cost a discounted average of at least \$210 per store per year at the consumer level. This is equal to about \$573 per store in initial annual costs, and approximately \$4,200 overall costs. This does not even include the potential costs of store redesign, changes to delivery systems, or costs to consumers related to traveling further to acquire adequate food. It is also based on the extremely conservative assumptions made by FNS of the number of stores that may no longer be able to participate in the program under the more onerous limits on in-store food preparation of warming.

Even the relatively modest estimates presented in this analysis show that these rules will cost retailers and consumers – including SNAP recipients – a substantial amount of money over the study period, well beyond the minimal one-time costs claimed by the FNS in its RIA. As the Sensitivity Analysis presented above shows, even if the assumptions are changed to reflect the lowest possible costs, the regulations would still be well above the levels that would ensure that these proposed rules require that the FNS prepare a full RIA and submit it to OMB.

In addition to not having any net social benefit, the rule as envisioned by the FNS would have a disproportionate impact on small businesses, which make up the vast majority of the companies that would be directly impacted by the rules. It is expected that even the least restrictive of the alternatives studied could encourage nearly 19,500 small enterprises to opt out of the SNAP program.

A sensitivity analysis of the assumptions used in this report suggest that they are likely quite modest, and even making them more conservative would not likely impact the overall nature of the benefit-cost calculation (although it could impact the overall magnitude).

Therefore, the proposed regulations will likely not benefit the economy or society in any significant manner.