

April 11, 2019

TO: NACS

FROM: Doug Kantor
Eva V. Rigamonti

RE: **SNAP “Variety” Proposed Rule, Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program (RIN 0584–AE61)**

On April 5, 2019, the U.S. Department of Agriculture’s (“USDA”) Food and Nutrition Service (“FNS” or “Agency”) published a proposed rule (the “Proposal”) that would update the definition of “variety” as it relates to eligibility requirements for retailers participating in the Supplemental Nutrition Assistance Program (“SNAP” or “the Program”).¹ Those eligibility requirements, which were promulgated in December 2016,² contained a narrow definition of “variety” that would have made it extremely difficult for small format stores, including many convenience stores, to participate in SNAP. Concerned that the narrow definition would push many retailers out of the Program and limit food access for SNAP beneficiaries, Congress delayed enactment of some of the rule’s provisions and directed FNS to rewrite the definition of “variety” in a way that would “increase the number of food items that count as acceptable staple food varieties for purposes of SNAP retailer eligibility.”³

This memorandum will provide an overview of the Proposal, which would expand the definition of variety to provide retailers with greater flexibility to meet their eligibility requirements. Following the executive summary, the memorandum is divided into four sections: a table of the proposed changes (Part I), an example of stocking variety in the four staple food categories (Part II), the legislative and regulatory history of SNAP (Part III), and a conclusion (Part IV).

It is important to note that the issuance of the proposed rule does not in and of itself impose any regulatory obligation on SNAP retailers. No additional requirements will take effect until after the proposed rule is finalized, which first requires FNS to review and respond to all submitted public comments. Comments on the Proposal are due on **June 4, 2019**.

¹ Department of Agriculture, Food and Nutrition Service, Proposed Rule, *Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program (SNAP)*, 84 Fed. Reg. 13555 (Apr. 5, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-04-05/pdf/2019-06597.pdf> [hereinafter *Proposal*].

² U.S. Department of Agriculture, Food and Nutrition Service, Final Rule, *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)*, 81 Fed. Reg. 90675 (Dec. 15, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-12-15/pdf/2016-29837.pdf> [hereinafter *Final Rule*].

³ Congress delayed enactment of certain provisions of the final rule via the Consolidated Appropriations Acts of 2017 and 2018. Proposal, *supra* note 1 at 13555.

Executive Summary

To participate in SNAP **today**, convenience stores must stock **three** varieties in each of the four “staple food” categories ((1) meat, poultry, or fish; (2) dairy; (3) bread or cereals; and (4) vegetables or fruits) and at least **one** perishable item in **two** categories. However, under the 2014 Farm Bill, Congress mandated that retailers will be required to stock at least **seven** different “varieties” of food items in each of the four staple food categories and at least **one** perishable food item in **three** of the staple food categories. The 2014 Farm Bill’s seven-variety and expanded perishable requirements will **not** go into effect, however, until FNS issues a final rule regarding “variety.”

What counts as a “variety,” therefore, is very important. In the 2016 final rule, FNS had defined variety narrowly so that different items from the same species could not count as two separate varieties because they come from the same species. For example, tomatoes and tomato juice would only count as one variety (tomato); brown rice and white rice would only count as one variety (rice); ground beef and steak would only count as one variety (beef); and low fat cow’s milk and whole cow’s milk would only count as one variety (cow’s milk). Had Congress not blocked those regulations from going into effect – an effort NACS actively advocated for – retailers would have had to stock expensive exotic items (such as duck, lamb, or goat) in order to meet their stocking requirements. And that would have pushed many retailers out of the Program, which would have harmed SNAP beneficiaries who rely on NACS’ members’ stores to access food.

The Agency appears to have heeded lawmakers’ instructions and NACS’ concerns. In its current form, the Proposal would expand the definition of variety to provide retailers with greater flexibility that will make it easier for them to meet their stocking eligibility requirements. It would do so by making several changes to the definition of “variety.” These changes would only affect three of the four staple food categories. The proposed changes are described in the tables below.

Staple Food Category: Meat, Poultry, or Fish⁴	
Proposed Change	Stocking Examples
A perishable <u>and</u> a shelf-stable item for any species may each count as one discrete variety.	(a) refrigerated bacon (perishable) and canned ham (shelf-stable) would each count as one variety (b) frozen chicken breast (perishable) and canned chicken (shelf-stable) would each count as one variety (c) beef hotdogs (perishable) and beef jerky (shelf-stable) would each count as one variety Total varieties = 6

⁴ Proposal, *supra* note 1 at 13558.

Staple Food Category: Dairy⁵	
Proposed Change	Stocking Examples
<p><u>Cheese</u>: Subdivide the cheese category into (1) cow milk fresh cheese, (2) cow milk semi-soft cheese, (3) cow milk hard cheese, and (4) cow milk cheese-based product (e.g., canned cheese dipping sauce) so each count as one discrete variety.</p> <p>This four category subdivision would apply to other milk-based cheeses as well, such as goat’s milk cheeses.</p>	<p>(1) Cream cheese (fresh cheese) (2) Mozzarella cheese (semi-soft cheese) (3) Cheddar cheese (hard cheese) (4) Alfredo cheese pasta sauce (cheese-based product)⁶</p> <p>Total dairy (cow milk cheese) varieties = 4</p>
<p><u>Milk</u>: Subdivide the milk category so (1) full-fat cow milk, (2) fat-reduced cow milk, (3) a liquid shelf-stable cow milk, and (4) powdered cow milk each count as four discrete varieties.</p> <p>This four category subdivision would apply to other animal milks, such as goat’s milk.</p>	<p>(1) Whole cow milk (2) 2% cow’s milk (3) Long-life cow milk, evaporated cow’s milk, or condensed cow’s milk (liquid shelf-stable cow milk) (4) Powdered cow milk</p> <p>Total dairy (cow milk) varieties = 4</p>
<p><u>Yogurt</u>: Subdivide the yogurt category so (1) cow milk-based yogurt drink , (2) full-fat cow milk-based yogurt (made from milk with 3% or greater fat content), and (3) fat-reduced cow milk-based yogurt would each count as one discrete variety.</p> <p>This three category subdivision would apply to other animal milk based yogurt.</p>	<p>(1) Kefir or lassi (yogurt drink) (2) Fage Total 5% yogurt (full-fat cow milk-based yogurt) (3) Yoplait Light & Fit Nonfat Strawberry Yogurt (fat-reduced cow milk-based yogurt)</p> <p>Total dairy (yogurt) varieties = 3</p>

⁵ Proposal, *supra* note 1 at 13558-13559.

⁶ FNS would put American cheese slices in this sub-category.

Staple Food Category: Bread or Cereals⁷	
Proposed Change	Stocking Examples
<p><u>Wheat-based bread:</u>⁸ <i>Under the 2016 Final Rule, the bread category included “wheat-based bread” which was subdivided into five discrete categories (wheat-based bread, wheat-based bagels, wheat-based buns/rolls, wheat-based English muffins, and wheat-based pitas).</i></p> <p>This proposal would subdivide this “wheat-based bread” category further to count:</p> <p>(1) Wheat-based Indian flatbreads, (2) Wheat-based crescent breads, and (3) Wheat-based matzah.</p> <p>This change would be mirrored for other grain-based breads such as oats-based breads and rice-based breads.</p>	<p>(1) Roti and Naan (2) Plain croissants or refrigerated ready-to-bake crescent breads (3) Egg matzah</p> <p>Total varieties = 3</p>
<p><u>Flour:</u> <i>The 2016 Final Rule had a “general wheat-based product” as a discrete variety. This included flour <u>and</u> things like wheat-based frozen pizza.</i></p> <p>The proposal would subdivide the “general wheat-based product” category so:</p> <p>“wheat-based flour” would be one discrete variety.</p> <p>This change would be mirrored for other grain-based flours such as rice-based flour and cornmeal.</p>	<p>(1) Bag of wheat flour (2) Wheat-based product (e.g. wheat-based frozen pizza)</p> <p>Total varieties = 2</p>
<p><u>100% Whole Grain Product</u></p> <p>Any bread or cereal staple food would be considered one discrete variety if it is a 100% whole grain product, and one discrete variety if less than a 100% whole grain product.</p>	<p>(1) 100% whole wheat cinnamon raisin bagels (100% whole grain) (2) Cinnamon raisin bagels (not 100% whole grain)</p> <p>Total varieties = 2</p>

⁷ Proposal, *supra* note 1 at 13559-13560.

⁸ Under the 2016 final rule, the staple food variety “wheat-based bread” was subdivided into five discrete staple food varieties in the bread or cereals staple food category (wheat-based bread, wheat-based bagels, wheat-based buns/rolls, wheat-based English muffins, and wheat-based pitas). The Proposal would further subdivide this category with three new options. *See* Proposal, *supra* note 1 at 13559.

The Proposal would not make any changes to the vegetables or fruits staple food category although the proposed rule does provide additional guidance on possible stocking options.⁹

If enacted as proposed, this Proposal would make it easier for retailers to participate in SNAP. It would do so by giving retailers the ability to stock items that customers (both SNAP and non-SNAP consumers) want to buy and that retailers are able to acquire from their suppliers and existing supply chains. (*See* Part III below for an example of how a retailer could meet his depth of stock requirements under this Proposal's definition of variety.)

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

If you would like to discuss the Proposal in further detail, please contact:
Anna Ready, Director of Government Relations (aready@convenience.org or (703) 518-4227) or
Eva Rigamonti, NACS Counsel (erigamonti@steptoe.com or (202) 429-6457).

⁹ Proposal, *supra* note 1 at 13559 (listing lemons and 100% lemon juice and olives among other possible examples).

I. Table Summarizing Proposed Changes¹⁰

Issue	Current Regulations	Proposed Regulations
<p>Staple Foods 7 C.F.R. § 271.2</p>	<p>[No definition of “variety”]</p>	<p>Variety, in evaluating a firm’s stock of staple foods for purposes of determining eligibility to participate in SNAP, means foods that differ from each other by distinct main ingredient or product kind as determined by the Secretary.</p>
<p>Depth-of-Stock 7 C.F.R. §278.1 (b)(1)(ii)(C)</p> <p>“Variety”</p>	<p>Retailer must offer a <u>variety</u> of staple foods, which means different types of foods within each staple food category:</p> <p>For example: apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat and fish category.</p> <p>Variety of foods is <u>not</u> to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods.</p> <p>Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any</p>	<p>Retailer must offer a <u>variety</u> of staple foods, within each staple food category that differ from each other by distinct main ingredient or product kind.</p> <p>For example: apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or fat-reduced cow milk, almond-based milk substitute, soy-based yogurt substitute, soft goat milk-based cheese, cow milk-based butter, cow milk-based sour cream, and cow milk-based full-fat yogurt in the dairy category; or rice, wheat-based bagels, wheat-based pitas, rye-based bread, rice-based pasta, oatmeal, and whole wheat flour wheat-based matzah in the bread or cereals category; or shelf-stable chicken, beans, nuts/seeds, perishable beef, perishable pork, chicken eggs, and perishable chicken tuna in the meat and fish category.</p> <p>Variety of foods is <u>not</u> to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., boxed and bagged, or fresh and frozen), meat cuts, product shapes, textures, or package sizes of the same or similar foods except where explicitly specified in Agency guidance.</p> <p>Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, 1% milk and skim milk, perishable ground beef and perishable beefsteak, or different types of apples (e.g. Empire, Jonagold, and McIntosh) shall count as depth of stock but do <u>not</u> count as more than one staple food variety for the purpose of determining variety in any staple food category except where explicitly</p>

¹⁰ Text in red denotes the Proposal’s insertions, deletions, and other edits to the regulations.

	<p>staple food category.</p> <p>Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.</p>	<p>specified in Agency guidance.</p> <p>Accessory foods shall <u>not</u> be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.</p>
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II. Example of How to Meet the Depth of Stock “Variety” Requirements in Your Store

Staple Food Category	Possible Varieties (7 items, at least 1 perishable in 3 categories)
Meat, Poultry, or Fish	<ul style="list-style-type: none"> • Canned Tuna • Sliced deli ham • Eggs • Beef jerky • Beef hotdogs • Turkey jerky • Canned chicken
Vegetables or Fruits	<ul style="list-style-type: none"> • Applesauce (large jar or individual single-serving containers) • Bananas • Peanut butter • Pre-cut carrot to-go pack • Beans • Canned tomato soup • 100% orange juice
Dairy	<ul style="list-style-type: none"> • Cheddar Cheese • 2% cow milk • Powdered cow milk • Low-fat yogurt cup • Full-fat yogurt • Cream cheese (either mini packets or large packages) • Individual mozzarella cheese sticks
Bread or Cereals	<ul style="list-style-type: none"> • Flour/Corn Tortillas • Cold breakfast cereal • Instant oatmeal packets • Hot dog buns • English muffins • 100% Whole wheat bread • Cup-o-noodle

III. Background on SNAP and 2014 Farm Bill

SNAP – the largest anti-hunger aid program in the nation – is administered by USDA via FNS and provides millions of low-income individuals and families living in the United States with benefits to

assist in the purchase of food. While the origins of SNAP go back to the 1940s, the nationwide program that we are familiar with today took off in the 1960s-1970s.¹¹ With passage of the 2014 Farm Bill, SNAP was reauthorized through FY 2018 and select provisions governing the Program were amended.¹²

Significantly, the 2014 Farm Bill contained several provisions that impose additional obligations on retailers that redeem SNAP benefits. Prior to the Farm Bill, to be eligible to redeem SNAP benefits, a food retailer must have sold food for home preparation and consumption and meet one of the following two criteria: (1) offer for sale, “on a continuous basis, a variety of foods in each of the 4 categories of staple foods . . . including perishable foods in at least 2 of the categories,” or (2) have “over 50 percent of the total sales of the establishment or route in staple foods”¹³ Because staple foods are unlikely to constitute more than half of a convenience store’s total sales, the industry has relied primarily on the first prong.

Under the 2014 Farm Bill, SNAP retailers are required to stock at least seven different “varieties” of food items in each of the four “staple food” categories on a “continuous basis.”¹⁴ The four staple food categories are: (1) Meat, poultry, or fish; (2) Bread or cereals; (3) Vegetables or fruits; and (4) Dairy products. In addition, the 2014 Farm Bill requires retailers to stock at least one perishable food item in three of the staple food categories.

In December of 2016, FNS finalized a rule implementing the requirements of the 2014 Farm Bill. However, due to the problems with the definition of “variety” in that rulemaking, Congress – via the Consolidated Appropriations Acts of 2017 and 2018 – blocked FNS from implementing two retailer stocking provisions and directed the Agency to revise the definition of variety to increase the number of food items that count as acceptable staple food varieties for purposes of SNAP retail eligibility.

IV. Conclusion

This Proposal would, if finalized as proposed, provide greater flexibility for retailers. NACS welcomes comments from its members that provide insight into the potential impact of this Proposal on SNAP retailer participation.

¹¹ USDA, FNS, *A Short History of SNAP*, available at http://www.fns.usda.gov/sites/default/files/History_of_SNAP.pdf.

¹² The Program was subsequently reauthorized in the FY2018 Farm Bill.

¹³ See generally 7 U.S.C. § 2012(p)(1); see also FNS, Retail Store Eligibility, <http://www.fns.usda.gov/snap/retail-store-eligibility-usda-supplemental-nutrition-assistance-program>.

¹⁴ The 2014 Farm Bill also contained technological mandate to prevent sales of ineligible items. Specifically, the Farm Bill requires SNAP retailers to implement point-of-sale technology systems that will (i) not redeem SNAP benefits for the purchase of ineligible items, and (ii) will further preclude cashiers from manually overriding this prohibition. The technological mandate will not go into effect until FNS completes a formal rulemaking on the issue, which is not expected for some time.