June 4, 2019

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Brandon Lipps
Administrator
Food and Nutrition Service
3101 Park Center Drive
Alexandria, Virginia 22302


Dear Administrator Lipps,

On behalf of the National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”), I provide these comments in response to 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”).

NACS and SIGMA support the Agency’s efforts to respond to the congressional mandate in the Consolidated Appropriations Acts of 2017 and 2018 and increase the number of items that count as different varieties of staple foods for purposes of SNAP retailer eligibility. Congress created SNAP to “alleviate hunger” and provide low-income households with the ability to obtain food “through normal channels of trade by increasing food purchasing power for all eligible households.” Given the Program’s purpose, Congress has always recognized that access is critical for SNAP to function successfully. Without widespread retail participation, SNAP beneficiaries would be limited in their ability to purchase food, which would run counter to the Program’s objectives. Thus, the overly narrow definition of variety that was put in place with the

1 NACS is an international trade association representing the convenience store industry with more than 1,900 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.


2016 Final Rule, which would have made it very difficult for small format stores to participate in the Program, raised serious concerns among lawmakers and prompted Congress to direct the Agency to expand the definition of variety.

This proposal, if enacted as drafted, will expand the number of items that count as different varieties and provide retailers with greater flexibility in meeting their stocking requirements. Nevertheless, the Associations point out that the Agency’s approach to expanding variety is quite complicated and will create difficulties and compliance costs for small format stores.

There is a far simpler way to expand variety – as Congress directed – than what the Agency has proposed. FNS should permit items that are distinct, non-interchangeable items, to count as separate discrete varieties whether or not they come from the same species. For instance, ground beef and roast beef slices or ground turkey, sliced turkey, or frozen turkey legs should all count as different varieties because they are different items; consumers purchase those items for different reasons and do not consider them to be identical or interchangeable. In short, even if an item is in the same food family or is from the same animal or species – such as cheddar or Swiss cheese – those items are not interchangeable and should be considered different varieties. This simpler approach would be practical and rational while maximizing nutritional benefits and facilitating industry compliance.

For instance, refrigerated grilled chicken, raw chicken breast, or a frozen chicken and vegetable single-serving meal all should be considered different varieties. When consumers come to a store, they purchase those items because they are looking to fulfill different food needs. Shoppers may purchase refrigerated grilled chicken when they want to quickly cut up the chicken and put it on a salad; they may buy raw chicken breast to make a family meal on the weekend when they may have the time to do so; or they may buy the frozen chicken-vegetable meal so their child can easily heat up that item in the microwave without adult supervision. Similarly, a mother may wish to purchase cheddar cheese sticks as an easy “to go” item for her child while, at the same time, purchasing sliced Swiss cheese to use to make her child a sandwich to take for lunch. Under the Agency’s proposal, however, none of the examples cited above would count as different varieties because in the poultry example they are all perishable and in the cheese example cheddar and Swiss are both considered “hard” cheese. This is counterintuitive and counterproductive. The Agency should define variety in a way that matches beneficiaries’ needs and expectations as well as provides retailers with flexibility so they can stock items that consumers want to buy, particularly as retailers experiment with offering more perishable and fresh items to adjust to changing consumer tastes.


5 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.).
The problem with defining variety as shelf-stable/perishable pairs in the meat, poultry, or fish category or with a four category subdivision for cheese in the dairy category is that it imposes compliance complexities for small format stores, many of whom do not have in-house counsel to help them navigate the regulations, and ultimately makes it harder for retailers to adapt to meet consumer needs.

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, 119,248 convenience stores – approximately 77 percent of the nation’s 153,000 convenience stores – participate in SNAP. These small format retailers, including thousands of 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.

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. These 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. In fact, 43 percent of all Americans live less than 1 mile from a convenience store, and 89 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 2,988 square feet – approximately

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7 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.

8 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.
fourteen times smaller than the average supermarket. 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. Thus, our retailers tend to pay a higher wholesale price for items because they receive 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 challenge.

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

In 2018, the industry employed 2.36 million workers and generated $654.3 billion in total sales, representing approximately 3.2 percent of the U.S. gross domestic product. 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 165 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 62 percent of convenience store owners operate a single store, and approximately 74 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.

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9 NACS, State of the Industry, Annual Report 2018; see also https://www.fmi.org/our-research/supermarket-facts (noting that the median supermarket/super combination store/niche grocery store is 41,300 square feet).

10 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 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.

11 “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.
c. **Small Format Retailers Face Unique Logistical Hurdles Relating to Food Supply.**

On average, most small format retailers receive one delivery per week, while some have two deliveries per week.\(^{12}\) 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.\(^{13}\) 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 very few items of a particular product on shelf at any given time.\(^{14}\)

II. **COMMENTS ON THE PROPOSAL**

The Associations appreciate the Agency’s attempt to expand the definition of variety. While complicated, the Agency’s proposal would provide flexibility for small format stores to meet their stocking requirements without becoming burdensome to the point where stores leave the Program. Less flexibility than what has been proposed would, however, be a problem. As such, NACS and SIGMA urge the Agency to finalize the proposal as is or provide additional flexibility.

a. **NACS and SIGMA Support the Proposal’s Attempt to Expand Retailer Stocking Options in the Meat, Poultry, or Fish Category.**

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\(^{12}\) 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.


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”).

In 2018, the U.S. Department of Agriculture, the U.S. Environmental Protection Agency and the U.S. Food and Drug Administration signed a formal agreement to collectively reduce food loss and waste, citing food loss of more than 75 billion pounds annually. *See Formal Agreement Among The United States Environmental Protection Agency and the United States Food and Drug Administration and the United States Department of Agriculture Relative to Cooperation and Coordination on Food Loss and Waste available at* https://www.usda.gov/sites/default/files/documents/usda-fda-epa-formal-agreement.pdf.

Meat, poultry, and fish are important sources of protein and provide critical nutrients to Americans, including, but not limited to, iron, potassium, B-complex vitamins, and omega-3 fatty acids.\textsuperscript{15} As such, it is an important staple food category and the Agency’s proposed changes to the meat, poultry, or fish category, although fairly complicated, are nonetheless welcome. The 2016 Final Rule, despite adding in certain non-animal or plant proteins into this category, did not provide sufficient flexibility for retailers and would have made it extremely difficult for retailers to participate in the Program.\textsuperscript{16} In order to meet their stocking requirements in this category, retailers would have had to stock items (such as duck, lamb, goat, shrimp, seitan, tofu, etc.) that consumers are not purchasing from convenience stores, are not generally available from convenience store suppliers, and tend to be more expensive than many other sources of protein that consumers do tend to purchase from convenience stores. Americans overwhelmingly consume four types of poultry and livestock: beef, pork, chicken, and turkey.\textsuperscript{17} While taste buds and preferences do change over time, these are the main meat and poultry items that U.S. consumers eat. Certainly, consumer eating and purchasing habits vary by neighborhood, state, and region of the country. While it is possible that convenience stores in certain micro-regions of the country may see sales of particular items (e.g., catfish), those are outliers and not reflective of the country as a whole.

Demand pulls supply in the retail industry, and 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 pork products such as bacon, ham, hotdogs, sausages, and the like). In short, retailers do what their customers want or risk going out of business. For example, many American consumers are turning to protein-rich diets to meet weight-loss and muscle-development goals, reduce sugar consumption, etc. As such, products like jerky are becoming quite popular as they offer Americans a high energy, protein-rich, carbohydrate-low food option that provides nutrients like iron and zinc without raising insulin levels.\textsuperscript{18} American consumers tend to eat four different types of meat and poultry, which tend to be less expensive than less common items such as duck, goat, lamb, etc. Frankly, consumers are not frequenting convenience stores to purchase these less common items and most U.S. consumers, SNAP consumers in particular, are not financially capable of routinely purchasing these items (if at

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\textsuperscript{16} The addition of plant proteins (beans, nuts, peas, etc.) in this category merely removed flexibility from the vegetable or fruits category and did not provide retailers with sufficient flexibility to meet the variety requirements in this category with meat, poultry, or fish items that consumers want to purchase at small format retailers.


\textsuperscript{18} The 2016 Final Rule permitted jerky to count towards variety requirements. This was a positive piece of the 2016 Final Rule and is not a change made by the current proposal – contrary to the inaccurate public statements of some organizations. The Associations urge FNS to be aware that comments submitted by organizations making inaccurate public statements may be grounded upon inaccurate assumptions about the impact of the current proposal.
Many SNAP and non-SNAP customers in the United States cannot afford these uncommon food items, and SNAP customers – whose benefits are about $126 per month per person (which amounts to about $1.40 per person per meal) – would risk depleting their benefits if they did.\textsuperscript{20}

The provisions of the Agency’s proposal which would permit retailers to count one shelf-stable and one perishable item per species as a discrete variety would add much needed flexibility to the definition of variety.\textsuperscript{21} This aspect of the proposal, if finalized, would provide retailers with more practical, nutritious, affordable, consumer-driven options to meet their stocking requirements, which will benefit SNAP customers. The ability to stock a perishable and shelf-stable item for each species will enable retailers to stock more items that consumers want to buy (e.g., beef). It will also provide retailers with greater flexibility to selectively choose perishable items, which require refrigeration and are costly if they spoil. As an example, the proposal would enhance retailers’ ability to experiment with fresh fish and seafood offerings, which are rich in nutrients and a source of low-fat protein. It would do so by ensuring that retailers could continue to stock popular items like canned tuna or canned salmon along with a perishable tuna or salmon option and have those count as separate varieties. In this way, retailers could try to offer a perishable fish option without sacrificing a popular shelf-stable option such as canned tuna as they try to meet variety requirements. Without a reasonable definition of variety, retailers would have to remove items that sell from their stores to make room for exotic and unappealing items that customers do not purchase just to meet their variety requirements. In some cases it would be too costly for retailers to make such a business decision, and absent the flexibility allowed by the Agency’s proposal, those businesses may forego participating in SNAP, a bad result for beneficiaries.

While the Associations support the proposed changes in this category, it is important to emphasize that FNS’ approach is more complicated than it needs to be. By not permitting retailers to count different items from the same species as discrete varieties (other than distinguishing between perishable and shelf stable items), retailers could not count roast beef slices, ground beef, and beef steak as different varieties because they are all perishable.

\textbf{b. The Associations Support the Proposal’s Expansion of Variety in the Dairy Category.}

\textsuperscript{19} According to www.peapod.com on May 29, 2018, the cost of 16 ounces of ground turkey is $4.69 and 1 pound 16 ounces of ground lamb is $7.19. It seems unrealistic to assume that many people trying to make ends meet would choose lamb over turkey given the price differential.


\textsuperscript{21} Proposal, \textit{supra} note 2 at 13558.
Dairy is an important SNAP staple food category. Consumption of dairy products, which
contain a variety of nutrients including calcium, potassium, vitamin D, and protein, is critical to
bone health, among other health benefits. It is also a category that presents challenges in terms
of stocking requirements. This is because Americans overwhelmingly consume dairy products
made from cow’s milk as opposed to other dairy products (e.g., sheep, goat, or plant-based dairy
substitutes)—a reality the 2016 Final Rule did not account for. This is because the 2016 Final
Rule did not sufficiently broaden the definition of variety to ensure that retailers had reasonable
options—i.e., options that are available from suppliers, cost competitive for the small format
retail channel, and attractive to consumers—to meet the stocking requirements. For instance, the
2016 Final Rule purported to expand variety flexibility by noting that retailers could stock items
made from sheep or goat milk as well as non-dairy options (e.g., rice, almond, and soy milks,
etc.)—all items that small format retailers rarely offer because most consumers do not buy those
products at convenience stores. Similarly, the 2016 Final Rule permitted infant formula to
count as a separate variety in dairy, a fine thought but the overwhelming majority of convenience
stores do not offer infant formula because it is an oft-stolen product and they do not have space
to lock it up.

Dairy products are predominately perishable items and tend to require refrigeration.
Cooler space, however, is limited in the small format retail channel as compared to larger format
stores. Thus, small format retailers face obstacles in terms of proper storage when it comes to
dairy products. Related to perishability and refrigeration are concerns with spoilage. Spoilage is
a real and significant cost to retailers. When a perishable item spoils, the retailer is out the cost of
the product itself, has failed to turn a profit, and is responsible for disposing of that product—all
significant costs for a tight margin industry. Those costs get passed onto customers as well so
requiring retailers to stock products that will spoil rather than sell harms SNAP beneficiaries.
For this reason, retailers only stock what consumers want to buy because they cannot afford to
stock products that no one buys. Certainly, the industry is constantly adapting to changing
consumer tastes, which occasionally necessitates experimenting with new products, but retailers
experiment and adapt intentionally and with great deliberation.

Today, when consumers come to convenience stores to purchase dairy items, they do so
for traditional items, such as cow’s milk-based milk, cheese, and yogurt. Customers, particularly
SNAP customers who are very cost-conscious, are not coming into NACS’ or SIGMA’s
members’ stores to purchase expensive items such as sheep’s or goat’s milk. In fact, those items,

22 U.S. Department of Agriculture, Dairy: Nutrients and Health Benefits, https://www.choosemyplate.gov/dairy-
nutrients-health (last accessed May 23, 2019).

23 Benjamin Phelan, Other’s Milk: Why don’t we consumer dairy products from mammals that aren’t cows? (July
buffalo-pigs-sheep-and-goats.html.

24 See generally 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.govinfo.gov/content/pkg/FR-2016-12-15/pdf/2016-29837.pdf [hereinafter Final Rule].

25 Utilities, on average, are retailers’ third highest operating cost. The cost of refrigeration is a considerable driver of
overall operating costs.
which are significantly more expensive than cow’s milk based items, are not widely sold even in larger format stores. Furthermore, small format retailers’ suppliers often do not offer these non-traditional items. This is a very real and practical concern. Despite adding plant-based dairy substitutes for milk and yogurt in the 2016 Final Rule, many small format retail suppliers do not offer these items to their retail customers. Thus, the 2016 Final Rule’s “flexibility” was not practical or realistic. The 2016 Final Rule did, however, permit both liquid shelf stable and powdered milk to count as two separate varieties in the dairy category and the Associations support the Agency’s decision to maintain those variety distinctions in this proposal. These are particularly important because they provide retailers with two shelf-stable options in a category that is otherwise almost all perishable.

In light of the concerns relating to stocking dairy products, the Associations support the Agency’s proposed changes to the dairy category and caution the Agency against reducing those options in the final rule. With regard to milk, the Associations support the proposal to subdivide this subcategory to account for not only the liquid shelf-stable and powdered milk that were permitted under the 2016 Final Rule but for full fat and reduced fat milk. Today, per USDA’s own data, Americans purchase significant quantities of whole milk as well as reduced/low fat milk. This is unsurprising as the two types of milk have different tastes, which appeal to different American consumers. The different health profiles of these items, such as the health recommendations for very young children with regard to whole milk consumption, demonstrate that these are different varieties. Considering whole and reduced fat milk as two separate varieties will provide retailers with practical, widely-available, and nutritional options to meet their dairy requirements. And, as noted above, it is imperative the Agency also maintain the liquid shelf-stable and powdered milk options as well as they provide retailers with two shelf-stable options in a category that is otherwise almost all perishable.

Similarly, the Associations support the Agency’s proposal to subdivide yogurt to include full fat and reduced fat yogurt in addition to the expanded yogurt drinks option. As with milk, the subdivision of yogurt is practical and achievable as it will provide retailers with greater options to meet the dairy category. Finally, the Associations support the proposed subdivision of the

26 According to IRI market data, for example, approximately 97.6 percent of American households purchase cow’s milk based cheese while only 9 percent of American households purchase goat cheese. This is unsurprising in light of the cost differential for the two types of products: cow’s milk based cheese sells at approximately $4.73/lb compared to $13.19/lb for goat cheese. The cost differential for milk is even more extreme: $3.90/volume for cow’s milk and $17.80 for goat’s milk. https://www.iriworldwide.com/en-US. Generally speaking, many of the non-traditional “dairy” items can be more expensive. https://www.forbes.com/sites/jennagoudreau/2011/12/08/the-healthy-choices-that-are-costing-you/#4cbd5eb524e2

27 See generally Proposal, supra note 2 at 13558-13559.


cheese subcategory to permit not only a semi-soft and a hard cheese, as was permitted by the 2016 Final Rule, but also a fresh cheese and a cheese-based product. The 2016 Final Rule’s lumping together of products such as cream cheese and mozzarella in an over-broad soft cheese category, for example, was impractical and created significant concerns for the industry in light of the popularity of those different items among customers. FNS’ inclusion of cheese-based product as a discrete variety is also important because it would permit retailers to stock products consumers demand, such as American cheese slices, and count them as separate varieties. In addition, this subdivision would provide retailers with the possibility to stock shelf-stable items (e.g., a cheese pasta sauce), which is significant in light of the perishable nature of the dairy category generally. These changes in the proposal also track consumer behaviors. Consumers treat these items – different types of cheese and cheese products – as different items that meet different needs. By moving toward the way consumers want to shop and eat, the proposal will help ensure that SNAP beneficiaries are better served by the Program. In sum, the Associations support the changes to the dairy category, which would provide practical, nutritional, and reasonable options to small format retailers.

c. NACS and SIGMA Support the Proposal’s Expanded Flexibility in the Breads or Cereals Category.

In the 2016 Final Rule, the breads or cereals category was the only category where the Agency acknowledged that because of American eating habits, the definition of variety had to be adjusted. Specifically, the Agency stated:

Most bread or cereals food items sold and consumed in America primarily derive from one or more of the following four grains: Wheat, corn, rice, and/or oats. Based on the limited types of grains and the new breadth of stock requirements, FNS believes it is impractical to strictly define “variety” for the purposes of this staple food category by the aforementioned method (i.e., product kind and main ingredient), as is the standard for two of the other staple food categories. As a result, in the bread or cereals staple food category variety is defined by product kind (i.e., bread and other baked or finished grain-based products) or main ingredient.

Nonetheless, as the Agency has recognized here, the definition of variety in this category still remained too narrow. NACS and SIGMA support the proposal’s expansion of the “wheat-based bread” staple food variety by adding wheat-based Indian flatbread, wheat-based crescent bread, and wheat-based matzah (and mirroring this subdivision in other grains). Expanding variety in this way will provide retailers the opportunity to better tailor offerings to their communities, particularly ethnic communities where certain types of breads (e.g., naan, roti, pita, matzah, tortilla, etc.) may be particularly popular. The Associations also support the proposed changes with respect to flour and 100% whole grains (i.e. permitting a retailer to count a 100% whole

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31 2016 Final Rule, supra note 4 at 90691.

32 Proposal, supra note 2 at 13599.
This proposed change, if finalized, will not only give retailers additional flexibility but will incentivize the stocking of more complex grain products, which provide important fiber and other nutrients to consumers.

d. The Agency Has Not Adequately Assessed the Impact of the Proposal on Small Businesses.

Given this proposed rule's 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, Executive Order 13563, the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act of 1995. By law, a 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. In light of the size of the SNAP program, 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 did not complete a RIA supported by proper evidence and data.

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.

While the Associations believe that this proposal could, if enacted as drafted, provide the necessary flexibility for retailers without undue cost, FNS has not performed an adequate

33 Proposal, supra note 2 at 13560.

34 "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.


37 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.

analysis. The Agency has also failed to complete a proper and accurate Civil Rights Impact Analysis.

The Associations also note that the Agency has not complied with Executive Orders 13771 and 13777.

III. CONCLUSION

The Associations’ members that participate in SNAP are proud to partner with FNS to ensure that low-income Americans have access to food. If enacted as proposed, this proposal would provide small format retailers with flexibility so that they remain retail participants, enhancing access for SNAP beneficiaries. The Associations urge the Agency against finalizing a rule that would result in less flexibility for retailers. NACS and SIGMA appreciate the opportunity to comment on this important proposal and are prepared to be of assistance to the Agency in its consideration of this matter.

Sincerely,

Douglas S. Kantor
Eva V. Rigamonti
Counsel to NACS and SIGMA

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39 The Agency has also failed to complete a proper and accurate Civil Rights Impact Analysis.