

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 271 and 278

[FNS–2016–0018]

RIN 0584–AE27

#### Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)

**AGENCY:** Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA or the Department).

**ACTION:** Final rule.

**SUMMARY:** The Food and Nutrition Service (FNS or the Agency) is updating Supplemental Nutrition Assistance Program (SNAP or the Program) regulations pertaining to the eligibility criteria for retail food stores to participate in the Program by finalizing a proposed rule that was published on February 17, 2016. The Agricultural Act of 2014 (the 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 available on a continuous 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 Act to increase, for certain SNAP authorized retail food stores, the minimum number of staple food categories in which perishable foods are required from two to three. This final rule codifies these mandatory requirements.

In addition, FNS is codifying several other discretionary changes to the existing eligibility criteria. The first is to address depth of stock by establishing a minimum of three stocking units per staple food variety. The rule also amends the definitions of “staple food,” “retail food store,” and “ineligible

firms”, and defines the term “firm” as discussed in the **SUPPLEMENTARY INFORMATION**. Finally, this rule allows FNS to consider the need for food access when making a SNAP authorization determination for applicant firms that fail to meet certain authorization requirements and reaffirms FNS’s authority to disclose to the public certain information about retailers who have violated SNAP rules.

**DATES:** *Effective date:* This rule is effective on January 17, 2017.

*Implementation dates:* See the **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Vicky Robinson, Chief, Retailer Management and Issuance Branch (RMIB), Retailer Policy and Management Division (RPMD), Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), 3101 Park Center Drive, Alexandria, Virginia 22302. Ms. Robinson can also be reached by telephone at (703) 305–2476 or by email at [Vicky.Robinson@fns.usda.gov](mailto:Vicky.Robinson@fns.usda.gov) during regular business hours (8:30 a.m. to 5:30 p.m.), Monday through Friday.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Executive Summary**

###### *Purpose of the Regulatory Action*

In this final rule, FNS is amending SNAP regulations at 7 CFR parts 271 and 278 to clarify and enhance current regulations governing the eligibility of firms to participate in SNAP. This rulemaking also codifies mandatory provisions of the 2014 Farm Bill, as well as other provisions to strengthen current regulations and conform to statutory intent. These changes will improve SNAP households’ access to a variety of healthy food options and they reflect the Agency’s ongoing commitments to provide vital nutrition assistance to the most vulnerable Americans, protect taxpayer dollars, and build on aggressive efforts to ensure Program integrity. The final rule allows FNS to ensure that firms authorized to participate in SNAP as retail food stores are consistent with and further the purposes of the Program. This final rule reinforces the statutory intent of SNAP—that participants are able to use their benefits to purchase nutritious foods intended for home preparation and consumption. In the interests of preserving SNAP households’ food

access, minimizing the burden on participating retail food stores and reflective of the many comments received in response to the proposed rule, this final rule has been substantially modified from its proposed form, including to reduce burden on retailers participating in the program and to help retain their participation in the program.

#### *Summary of the Main Provisions & Changes From the Proposed Rule*

The proposed rule generated a great deal of interest and concern among a diverse array of Program stakeholders. In consideration of these comments FNS has clarified, modified, or excised several provisions contained in the proposed rule. In summary:

- Definition of “Staple Food”—Multiple Ingredient Food Items

The proposed language excluding multiple ingredient food items from being counted towards any staple food category has been removed from the final rule.

- Definition of “Staple Food”—Accessory Food Items

The proposed language has been clarified to specify that “accessory food items” are not defined by consumption between meals or package size and that foods with an accessory food main ingredient (e.g., sugar) are considered accessory foods. Specific examples have been added to the amendatory language at 7 CFR 271.2 and a longer list of examples is included in the preamble of the final rule.

- Definition of “Retail Food Store”—85–15% Prepared Foods Threshold

The proposed language defining “retail food store” as a firm with at least 85 percent of its total food sales in items not cooked or heated on-site before or after purchase has been removed from the final rule. However, related to this proposed provision, language was added to existing regulations on “ineligible firms” to specify that a firm is ineligible for SNAP authorization if at least 50 percent of its total gross sales come from the sale of hot and/or cold prepared foods, including foods cooked or heated on-site, before or after purchase.

- Definition of “Retail Food Store”—Co-located Firms

The proposed language regarding co-located businesses was clarified and narrowed to specify that multiple businesses that operate under one roof will only be considered a single firm for purposes of determining SNAP retailer eligibility if the businesses have common ownership, sale of similar food, and shared inventory.

- Definition of “Retail Food Store”—Depth of Stock

The proposed depth of stock requirement was halved, from six to three stocking units per staple food variety. Additionally, language was added to specify that a firm may not be denied or withdrawn based on certain stocking shortfalls at the time of the Agency inspection if that firm can produce documentation proving that, no more than 21 days prior to the Agency inspection, the firm had ordered and/or received the required stock.

- Definition of “Retail Food Store”—Breadth of Stock

Per statute, no changes were made to this provision, which increased the number of varieties required per staple food category from three to seven and increased the number of staple food categories required to contain at least one perishable variety from two to three.

- Definition of “Firm”

No changes were made to this provision which defines the term “firm”.

- Need for Access

Language was added to this provision to specify that “need for access” factors would not be limited to those enumerated in the regulatory language, that “need for access” would only be considered for applicant firms that fail to meet certain authorization requirements, and that the consideration of “need for access” would be part of the existing SNAP authorization process under 7 CFR 278.1(a).

- Definition of “Staple Food”—Acceptable Varieties in the Four Staple Food Categories

Language was added to the definition of “staple food” to include in the meat, poultry, or fish staple food category three types of plant-based protein sources (beans, peas, and nuts/seeds) as well as plant-based meat analogues (*e.g.*, tofu and seitan) and traditional animal-based protein sources (*e.g.*, chicken and beef). Language was also added to the definition of “staple food” to include in the dairy products staple food category

plant-based dairy alternatives (*e.g.*, rice milk and soy yogurt). Finally, language was added to the definition of “staple food” to specify what constitutes a variety in all four staple food categories. These changes are in keeping with USDA’s MyPlate nutrition guidelines, allow retailers more flexibility in stocking sufficient variety in this staple food category and help to ensure that SNAP households will have access to an array of healthy food options that meet diverse dietary needs and preferences.

- Public Disclosure of Firms Sanctioned for SNAP Violations

Language was added to this provision to specify that the public disclosure of firms subject to term sanctions would last for the term of the sanction.

#### Implementation Dates

The following provisions of this final rule will be implemented on the effective date of this final rule: The definition of “firm” provision (*i.e.*, define “firm” at 7 CFR 271.2 so as to clarify that it also includes retailers, entities, and stores) and the public disclosure of sanctioned firms provision (*i.e.*, reaffirm at 7 CFR 278.1(q)(5) the Agency’s authority and intent to publicly disclose the store and owner name for firms sanctioned for SNAP violations).

The following provisions of this final rule will be implemented for all retailers 120 days after the effective date of this final rule: The co-located firms provision (*i.e.*, establish at 7 CFR 271.2 that establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory are considered to be a single firm) and the prepared foods threshold provision (*i.e.*, establish at 7 CFR 271.2 and 7 CFR 278.1(b)(1)(iv) that firms that have more than 50 percent of their total gross sales in hot and/or cold prepared foods, including foods cooked or heated on-site before or after purchase, shall not qualify).

The stocking provisions of this final rule will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms. The stocking provisions of this final rule include: The accessory food items provision (*i.e.*, amend at 7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(C) the definition of “staple food” so as to modify the regulatory definition of “accessory food items”, to exclude certain items from being counted in any

staple food category), the depth of stock provision (*i.e.*, establish at 7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(A) the requirement that certain firms must stock at least three stocking units of each staple food variety), the breadth of stock provision (*i.e.*, codify at 7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(A) statutory requirements to increase the number of varieties required of certain firms in each of the four staple food category from three to seven and increase the number of staple food categories that must contain at least one perishable staple food variety from two to three), the acceptable varieties provision (*i.e.*, clarify and amend at 7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(C) the definition of “variety” as it pertains to staple food varieties in the four staple food categories), and the need for access provision (*i.e.*, allow at 7 CFR 278.1(b)(6) the Agency to consider “need for access” when a retailer does not meet all of the requirements for SNAP authorization).

As it is used in this document the phrase “existing policy” refers to Agency policy in place as of December 15, 2016. Changes to existing policy included in the final rule will be implemented on or after the effective date of the final rule, January 17, 2017, as described above in this section.

#### Retailer Guidance for Implementation of Final Rule

Many Program stakeholders specifically requested that FNS provide retailers with detailed guidance and training materials on the rule to ensure that all retailers fully understand all of the provisions of the final rule. In addition to the clarifications and lists of examples provided in the preamble of the final rule, FNS will answer retailer inquiries and provide retailers with additional notice, guidance, and training materials during the aforementioned implementation period per 7 CFR 278.1(t). This will include extensive outreach to ensure that the retailer community is provided with sufficient technical assistance to ensure that all firms are adequately informed regarding these changes to SNAP rules.

## II. Background

On August 20, 2013, FNS published a notice entitled, “Request for Information: Supplemental Nutrition Assistance Program (SNAP) Enhancing Retail Food Store Eligibility” in the **Federal Register** (78 FR 51136). This Request for Information (RFI), which included 14 specific questions, focused on ways to enhance the definitions of “retail food store” and “staple foods”, and overall eligibility requirements to

participate in SNAP, in order to improve access to healthy foods and ensure that only firms that effectuate the purposes of SNAP are authorized to accept SNAP benefits. FNS received a total of 211 comments from a diverse group of commenters, including retailers, academics, trade associations, policy advocates, professional associations, government entities, and the general public. These RFI comments were considered in drafting the proposed rule. A copy of the RFI comment summary can be viewed at <http://www.fns.usda.gov/snap/rfi-retailer-enhancement>.

On February 17, 2016, the Agency published a Notice of Proposed Rulemaking (NPRM) rule in the **Federal Register** (81 FR 8015), in which FNS proposed to amend SNAP regulations at 7 CFR parts 271 and 278 in order to strengthen the criteria for the eligibility of certain SNAP retail food stores utilizing existing authority in the Act and to codify statutory provisions in the 2014 Farm Bill. On April 5, 2016, FNS published a document in the **Federal Register** (81 FR 19500) clarifying certain provisions of the proposed rule and extending the proposed rule's comment period.

The proposed rule included statutory changes to the breadth of stock (seven varieties in each of the four staple food categories and at least one variety of perishable foods in at least three staple food categories) required of certain SNAP retailers which were mandated by the 2014 Farm Bill. Additionally, the rule proposed discretionary changes such as provisions to address depth of stock, amend the definition of "staple food", amend the definition of "retail food store", and reaffirm the Agency's authority to disclose to the public certain information about retailers who have violated SNAP rules.

The 91-day public comment period ended on May 18, 2016. FNS received 1,284 public comments, including one comment not considered as it was submitted untimely, and reviewed all 1,283 timely public comments when drafting this final rule. Of these 1,283 comments, 23 were considered duplicative or non-germane, 738 or about 58% of all comments were template or form letters, and 522 or about 41% of all comments were unique submissions. Comments were considered duplicative only if the actual submission and submitter were identical to those of a previously received comment (e.g., a comment that was both submitted to the Agency electronically and by mail) and comments were considered non-germane only if the contents of the

submission had no relation to the general subject or specific provisions of the proposed rule (e.g., comments referencing other disparate rulemaking actions).

### III. Summary of Comments and Explanation of Revisions

#### *Summary of Comments*

Of the 1,260 germane and non-duplicative comments considered by FNS, most of the comments received came from retail food store representatives, owners, managers, or employees (901 or about 72% of total public comments). This total was largely comprised of retailer template comments which either repeated boilerplate language verbatim or with minor modifications and/or personalizations. The retailer template comments (henceforth Template A) submitted by the employees and owners of one chain of firms (a national take-and-bake pizzeria chain which claims over 1,300 locations nationally, about 800 of which are currently authorized to participate in SNAP) accounted for more than one quarter of all public comments received and more than one third of all retailer comments received (333 Template A comments, about 26% of total public comments, or about 37% of all retailer comments). The retailer template comments (henceforth Template B) submitted by the employees and owners of another chain of firms (a regional chain of convenience stores which claims over 600 locations, about 550 of which are SNAP authorized firms) accounted for about a seventh of all public comments received and about a fifth of all retailer comments received (183 Template B comments, about 15% of total public comments, or about 20% of all retailer comments). The comments submitted by the owners, operators, or representatives of convenience stores using the template (henceforth Template C) provided by an international convenience store trade association, which professes to represent more than 1,500 supplier company members and 2,100 retailer company members with over 50,000 convenience store locations nationally, accounted for about a ninth of all comments received and about a sixth of all retailer comments received (143 Template C comments, about 11% of total public comments, or about 16% of all retailer comments). Other retailer comment templates accounted for about 3% of total public comments received and about 5% of all retailer comments received (42 other retailer template comments). In total, retailer template comments (701 total retailer template

comments) constitute about 78% of all retailer comments (901 total retailer comments) and about 56% of all total comments (1,260 total germane and non-duplicative public comments). The remaining 200 retailer comments were unique submissions (about 16% of total public comments, or about 22% of all retailer comments).

The remaining approximately 28% of comments received included feedback from the following entities: 259 private citizens, 29 industry trade associations, 28 medical practitioners/organizations, 21 advocacy or food access organizations, and 22 governmental entities.

Of the 1,260 germane and non-duplicative public comments received, overall opinions on the rule were mixed. A majority of public comments (about 54% of all germane and non-duplicative public comments) neither wholly opposed, nor wholly supported the rule as proposed. This number includes comments that suggested improvements or modifications to the proposed provisions. About 40% of public comments specifically opposed at least one provision of the proposed rule while not voicing support for any specific provision of the proposed rule or offering any improvements or modifications to the proposed provisions. About 5% of public comments specifically supported at least one provision of the proposed rule while not opposing any specific provision of the proposed rule or offering any improvements or modifications to the proposed provisions. Finally, less than 1% of public comments were considered out of scope (e.g., general comments supporting or opposing the Supplemental Nutrition Assistance Program). Comments from medical practitioners/organizations tended to generally support the proposed rule, while comments from private citizens, advocacy organizations, and governmental entities were generally divided between those in favor and opposed to various provisions of the proposed rule. Industry trade associations, largely representing food retailers, manufacturers, and distributors, generally opposed some provisions of the proposed rule. Analysis of the comments which addressed each of the ten provisions in the proposed rule follows.

#### *Definition of "Staple Food"—Multiple Ingredient Food Items*

This discretionary provision proposed to amend language, at 7 CFR 271.2 and 7 CFR 278.1(b), to exclude multiple ingredient food items from being

counted towards any staple food category. This provision was specifically opposed by more public comments than any other provision in the proposed rule. Based on the strength of the arguments of these comments, FNS has stricken this provision from the final rule. Of the total 1,260 germane and non-duplicative public comments received, 867 comments addressed this provision and 685 comments, or about 54% of all public comments, specifically opposed this provision. About 69% of total retailer commenters and a majority of total industry trade group commenters specifically opposed this provision. Private citizens, medical groups, advocacy organizations, and governmental entities that commented on this provision were generally divided and/or expressed mixed opinions.

About one quarter of the total 1,260 germane and non-duplicative public comments were Template A comments submitted by the owners and employees of a take-and-bake pizzeria chain. This chain relies exclusively on cold pizza, a multiple ingredient food item, for their SNAP eligibility under Criterion B (this criterion requires firms to have 50 percent of total gross retail sales in staple food sales). Template A comments expressed opposition to this provision on the grounds that it would categorically eliminate them from the Program and that multiple ingredient foods such as pizza may be healthy and affordable options for low income Americans. Other retailer template comments, such as Templates B and C from convenience store owners and employees, also opposed this provision on similar grounds.

Many of the retailers opposing the multiple ingredient food items provision were from the convenience store industry. Such commenters pointed out that the exclusion of these products from eligibility towards SNAP Criterion A (under this final rule, Criterion A would require firms to stock on a continuous basis seven varieties in each of the four staple food categories and at least one variety of perishable foods in at least three staple food categories) would substantially increase the difficulty of retailer compliance with concurrent proposed enhancements in the required depth and breadth of stock, given the limited space in convenience stores. For example, one comment, jointly submitted by the international convenience store trade association noted above and a petroleum marketers trade association which professes to represent about half of the chain petroleum retailers nationally, stated that, "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. To comply with the proposal, these small format retailers would have to completely overhaul their food offerings—and remove items they now 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."

Several retailer commenters also pointed out that, although this change was intended to clear up confusion, it would create more confusion among retailers than under current regulations. As noted by one commenter, an international chain of convenience stores which claims over 50,000 convenience store members in 17 countries including over 7,000 SNAP authorized firms, "The 'main ingredient' for most items is easily determined from the principal display panel and/or the FDA-mandated ingredients list."

Currently, per 7 CFR 271.2 and 7 CFR 278.1(b)(ii)(C), multiple ingredient food items are assigned to the staple food category of their main ingredient as determined by FNS. The final rule titled "Food Stamp Program: Revisions to the Retail Food Store Definition and Program Authorization Guidance", published in the **Federal Register** on January 12, 2001 (66 FR 2795) was further clarified by Benefits Redemption Division Policy Memorandum 01-04, titled, "Implementation of Final Retail Store Eligibility Rule" which was issued on August 14, 2001. In this Agency policy memorandum it is stated that the label may be read to determine the main ingredient in a multiple ingredient food item. The label referenced herein is the ingredients list included at the bottom of the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) mandated "Nutrition Facts" label. On this label, ingredients are listed in descending order of weight (*i.e.*, from most to least). The first listed ingredient, therefore, makes up the largest share of the product's composition.

Long-standing FNS policy, therefore, holds that a multiple ingredient food will be assigned to the staple food category of its first listed ingredient on this label. Under this existing policy, for example, a product such as canned ravioli, with tomato puree as its listed main ingredient, is considered a variety (*i.e.*, tomato) in the vegetables or fruits staple food category. If the main ingredient of a multiple ingredient food item is an accessory food item (*e.g.*, salt), then that multiple ingredient food item is considered an accessory food

item. Per Benefits Redemption Division Policy Memorandum 01-04, one exception to this is the accessory food item water. If the main ingredient of a multiple ingredient food item is listed as water, then that item is assigned to the staple food category of its second listed ingredient. Under this existing policy, for example, a product such as canned tomato soup, with water and tomato paste as its first and second listed ingredients respectively, is considered a variety in the vegetables or fruits staple food category (*i.e.*, tomato). If that second ingredient is also an accessory food item (*e.g.*, sugar) then that item is considered an accessory food item.

In general, a majority of industry groups opposed the proposed multiple ingredient provision. In addition to the concerns about higher costs for certain types of retailers and greater retailer confusion, industry groups opposed to this provision were also concerned about the effect of the provision on SNAP households, which industry groups claim rely heavily on multiple ingredient food items as part of their nutritional intake. For example, the international convenience store trade association and the petroleum marketers' trade association jointly stated that, "multiple ingredient items are often the main sources of nutrition intake for families in the United States". Likewise, other industry groups, such as those representing the manufacturers and distributors of canned and frozen food products, pointed out that multiple ingredient food items, such as "frozen pizza rolls" or "canned soup", can be major sources of important nutritional intake for SNAP households and all Americans.

In addition, about two thirds of advocacy groups opposed this provision. Opposed advocacy group commenters were primarily concerned about the importance of multiple ingredient food items in lower-income Americans' diets, especially for those unable to prepare meals at home due to barriers such as time constraints and/or a lack of adequate kitchen facilities. Additionally, some advocacy groups pointed out that some multiple ingredient food items may have high nutritional value. One national, anti-poverty organization stated that:

USDA has recognized before how essential convenient, multiple ingredient foods are to food purchasing and preparation among SNAP participants. The Thrifty Food Plan is the government market basket upon which SNAP benefit amounts are based. In an effort to be more realistic about the time available for food preparation in the home, USDA incorporated more convenience foods in the

2006 revision of the Thrifty Food Plan . . . Therefore, it is especially odd that many of the foods specifically added to Thrifty Food Plan market baskets in 2006 would be excluded as staple foods under the proposed rule. So long as retail food stores are meeting the increased amounts, variety of staple items and perishable items called by the statute, there is no compelling purpose to exclude multiple ingredient items from counting (as they do under current regulations) under one of the SNAP staple food categories.

However, some advocacy groups, particularly those that are nutrition-focused, supported this provision. A national non-profit consumer advocacy group focused on nutrition and food safety which claims over 750,000 members stated that, "Disallowing multiple ingredient products to count as a staple food (e.g., pizza because the first ingredient is bread) ensures that the minimum stocking requirements for SNAP authorized retailers are for healthier foods".

Governmental entities were divided on this provision while medical entities largely supported it. Overall, medical organizations supported this provision on the grounds that it would compel retailers to stock healthier food options and help steer SNAP households away from calorie-dense and nutrient-poor multiple ingredient food items, while also stressing the need for Agency clarification and guidance of this proposed provision prior to implementation. A representative of one such organization, a national, non-profit, medical association which claims 64,000 pediatrician, pediatric medical subspecialist, and pediatric surgical specialist members, noted that "multiple ingredient foods available in small retail outlets, like pizza and other mixed dish frozen and boxed entrees like casseroles and macaroni and cheese, tend to be higher in sodium, saturated fats, and sugar" and, as a result, supported this provision adding that "nutritional profile should be considered in determining how to define a staple food" and that "FNS [should] provide clear and comprehensive guidance, at the time the rule is finalized, that includes a list of specific foods that would qualify as staple foods".

State and local governmental commenters were divided on this provision. One mayor of a city of 600,000 containing over 1,000 SNAP authorized firms supported the provision, stating, "Currently, the staple food category determination for foods with multiple ingredients is very subjective. We support the proposed changes to the definition of 'staple food' in order to bring clarity to a very

complex regulatory process. This is [a] strong policy that will increase the availability of staple foods in all [of the city's] neighborhoods". Other governmental commenters such as the deputy mayor from another city with a population over 600,000 that contains nearly 500 SNAP authorized firms opposed this provision, stating, "Disqualifying all prepared foods for SNAP eligibility is risky as these are shelf-stable staples in small stores and can serve as primary foodstuffs for SNAP families."

While FNS does agree with the commenters that argued that this provision would likely increase healthy options for SNAP participants, the Agency believes that other provisions in this final rule also help increase healthy options for SNAP participants. The proposed rule would have increased the required depth and breadth of staple food stock while simultaneously expanding the list of accessory foods excluded from the definition of "staple foods" and excluding multiple ingredient food items from the definition of "staple foods". According to some comments received, taken together, these four provisions would constitute an unreasonably burdensome stocking requirement for small format retailers. The Agency shares these concerns and, for these reasons, the proposed multiple ingredient food items provision has been stricken from this final rule. Multiple ingredient food items will, therefore, continue to be assigned to the staple food category of their main listed ingredient per current regulations at 7 CFR 271.2.

#### *Definition of "Staple Food"—Accessory Food Items*

This discretionary provision proposed to amend the definition of "staple food" so as to modify the regulatory definition of "accessory food items", to exclude certain items from being counted in any staple food category, in keeping with statutory intent. The proposed provision would have expanded the list of accessory foods to include: "Foods that are generally consumed between meals and/or are generally considered snacks or desserts such as, but not limited to, chips, dips, crackers, cupcakes, cookies, popcorn, pastries, and candy, or food items that complement or supplement meals, such as, but not limited, to coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt and sugar".

This proposed provision was specifically addressed by a low number of public commenters. Of the total 1,260 germane and non-duplicative public comments received, 65 comments, or

approximately 5% of all public comments, specifically addressed this provision. Of the 65 comments that specifically addressed this provision, about half supported it, about a quarter opposed it, and about a quarter were mixed. Less than 1% of total retailer commenters specifically opposed this provision. Industry trade groups and governmental entities that commented on this provision were generally divided and/or expressed mixed opinions. Medical groups, private citizens, and advocacy organizations that commented on this provision were generally supportive. FNS has retained this provision in the final rule with some modifications and clarifications.

Trade group comments, such as a comment jointly submitted by the international convenience store trade association and the trade petroleum marketers' trade association, contended that this provision would incur costs not captured in the Agency's proposed Regulatory Impact Analysis (RIA) and Regulatory Flexibility Analysis (RFA), as accessory food items with higher profit margins, such as potato chips, would need to be replaced with staple food items with lower profit margins, such as fruits and vegetables. This "opportunity cost" is a significant contributing factor toward compliance cost estimates, such as the estimate submitted by these trade groups in their joint comment, which exceed the Agency's estimates in the proposed RIA and RFA. The Agency appreciates these comments and has incorporated "opportunity costs" into the cost estimates which appear in the final RIA and RFA. This subject is examined in further detail the final rule's RIA and RFA.

This provision was largely supported by advocacy, medical, and local governmental commenters. One State university's nutrition research institute commented that it ". . . strongly supports . . . [the expansion] of the definition of accessory foods to include chips, desserts, and other snack foods, such that these items are not counted as staple foods." Another international, nutrition-focused, non-profit organization professing to represent over 1,000 nutrition professionals stated that, "We support the proposed changes to the definition of 'accessory foods' that would not qualify as staple foods to include snack foods and dessert items such as chips, dips, cookies, cakes and pastries that are typically consumed between meals." A city health department commissioner, representing a city with a population of about 400,000 containing about 450 SNAP authorized firms noted that, "We

support the proposed changes to the definition of ‘accessory foods’ that would not qualify as staple foods to include snack foods and dessert items such as chips, dips, cookies, cakes and pastries that are typically consumed between meals. Many of these items have limited nutritional value, and no longer defining them as staple foods will support the intent of this rule to encourage SNAP retailers to stock healthier items.”

The large, international chain of convenience stores stated that it “. . . does not object to the exclusion of accessory food items from the definition of ‘Staple Food’ ” and another national food retailer trade association which professes to represent nearly 40,000 retail food stores and 25,000 pharmacies stated it, “. . . supports this change conceptually, but notes that retailers will need flexibility and considerable guidance from the agency on the revised definition”. Finally, a national trade association for the travel plaza and truck stop industry which professes to represent about 200 corporate members and over 1,200 locations, acknowledges the validity of this provision, but like those that had opposed the provision, cautioned that this could inadvertently eliminate stores “that market healthy snack food items such as fruit cups, vegetable-and-dip to go packs, and the like” and argued that this provision should be “well tailored [to] prevent retailers that sell predominantly accessory foods from qualifying to redeem SNAP benefits”.

Some commenters, however, do not believe that this proposed provision went far enough in excluding unhealthy foods from being counted as staple food items for the purposes of SNAP authorization. One health commissioner from a city of over 8.5 million containing over 10,000 SNAP authorized firms stated that, “We recommend the USDA avoid defining accessory food items and concentrate efforts in establishing a comprehensive list of staple food items that may be used to determine eligibility to participate in SNAP.”

In their opposition to this provision the comment jointly submitted by the international convenience store trade association and the petroleum marketers’ trade association noted that “[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 . . .”. Other trade group commenters also pointed out that this provision should be considered carefully to avoid

eliminating from consideration healthy snacks like dried fruit and yogurt cups, stating that such healthy snack foods are integral to the diet of the increasing number of Americans who eat on the go.

As explained in the preamble to the proposed rule, the statutory language defining “accessory food items” was explicitly not intended to limit this class of food items to the eight items specifically enumerated in the Section 3(q)(2) of the Act which reads, “‘Staple foods’ do not include accessory food items, *such as* coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices [emphasis added].” This language, which creates an illustrative and not exhaustive list, reflects the original statutory intent in defining “accessory food items” as demonstrated in the legislative history of the Food Stamp Act of 1977. The language in the House Report to the Food Stamp Act of 1977 indicated that Congress had intended its list of accessory food items to be an illustrative, but not exhaustive, list. For example, the House Report stated that “donut, bakery, and pastry shops which specialize in donuts and sweet baked goods . . . [that] do not do a substantial business in the sale of staple foods, such as bread” are not authorized to accept and redeem benefits. This language also indicates that Congress did not consider “donuts, pastries, and other sweet baked goods” to be staple food items. *See* H. Rep. No. 95–464 at 328 (June 24, 1977). Similarly, even though snacks and ice cream were not specifically listed as accessory food items, the House Report indicated that Congress did not intend for snack-type foods and ice cream to be considered staple foods. *See* H. Rep. No. 95–464 at 328 (June 24, 1977) (“Stores whose primary business is the sale of snack-type foods . . . are not authorized to accept food coupons because they do not enable recipients to obtain a low-cost nutritious diet and, therefore, do not effectuate the purpose of the food stamp program.” and “Candy stores and ice cream stores and vendors are not authorized to redeem food stamp coupons because they do not provide recipients with an opportunity to obtain any basic staples.”).

In response to commenters who expressed concern about needing flexibility and additional guidance on this provision, FNS has made some clarification changes to the final rule, has provided a longer list of examples below in Section IV, and will issue additional Agency guidance on this subject following promulgation of this final rule including training materials intended for retail food store owners as needed per 7 CFR 278.1(t). FNS has

removed the language “generally consumed between meals” in order to address concerns that this language is vague or overly broad. Likewise, the listed example of “dips” has been removed as such terminology could be construed to include potential staple foods such as guacamole, hummus, and salsa as noted earlier by commenters. Primarily this provision will expand the definition of “accessory food items” to include snack and dessert foods, as well as specified food items that complement or supplement meals. These foods are typically deficient in important nutrients and are high in sodium, saturated fats, and/or sugar. FNS believes that this approach to excluding typically salty and sugary snack and dessert foods from counting towards retailer eligibility is a logical extension of the statute and is consistent with the USDA 2015–2020 Dietary Guidelines for Americans, which recommend limiting calories from added sugars and saturated fats and to reduce sodium. For administrative purposes FNS cannot consider the nutritional contents of individual products, such as different brands of potato chips, on a case by case basis. FNS, therefore, must generalize to a certain extent. As a result FNS has identified a list of accessory foods that generally meet the criteria above. It will help to ensure that SNAP clients will have access to a range of healthy food products intended for home preparation and consumption when they shop with their benefits. This final rule, however, will not change which products are eligible for purchase with SNAP benefits.

The list of accessory foods in the final rule now reads: “Accessory food items include foods that are generally considered snacks or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and food items that complement or supplement meals such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar.”

In response to commenters’ concerns regarding the effect of this proposed provision on small portion size products, FNS notes that existing regulations at 7 CFR 278.1(b)(1)(ii)(C) specifically state that the “package size” of a product shall not be a determinant of variety. Both an apple and a single-serving package of apple slices would count as the same variety of a staple food item (*i.e.*, apple) in the vegetables or fruits staple food category. Similarly, under existing regulations, both a tub of yogurt and a single-serving yogurt cup are counted as the same variety of staple food item (*i.e.*, yogurt) in the dairy

products staple food category.

Therefore, under existing regulations, neither a single-serving package of apple slices nor a single-serving cup of cow milk-based yogurt would be categorized as an accessory food due to its package size. This sentence in 7 CFR 278.1(b)(1)(ii)(C) remained substantively the same in the proposed rule, and nothing in the proposed rule would have classified staple food items sold in "single-serving", "snack-sized" or "to-go" packs as accessory food items simply on the basis of their packaging size.

However, in response to the confusion expressed by many commenters regarding packaging size, clarifying language explicitly stating that items shall not be classified as accessory food items exclusively based on packaging size has been added in 7 CFR 271.2: "Items shall not be classified as accessory food exclusively based on packaging size . . ." Small-portion packages of staple food items such as apple slices, grapefruit cups, carrot sticks, cheese slices, celery sticks, yogurt cups, bags of nuts, and hummus will continue to be counted as staple food items in their respective staple food categories.

As described above, some commenters recommended that FNS avoid defining accessory food items and establish a comprehensive list of staple food items and that the Agency further exclude unhealthy food items from being classified as staple foods items. While FNS appreciates the goals of such suggestions, creating a comprehensive list of all staple food items is outside of the intended scope of the Agency's rulemaking action. Per research conducted by the USDA's Economic Research Service (ERS), about 20,000 new food products are introduced into the retail marketplace annually. Therefore, the Agency does not believe it is practical to make an exhaustive list of acceptable staple varieties. However, to address concerns about excluding unhealthy foods items from being classified as staple food items, FNS will be amending the final rule to change existing policy, which has limited "accessory food items" to include only the eight products explicitly enumerated in regulations at 7 CFR 271.2. Under existing policy a chocolate hazelnut spread (with the first three listed ingredients of sugar, oil, and hazelnuts, in that order) can currently be considered a staple variety in the vegetables or fruits staple food category (*i.e.*, hazelnuts), for example. The accessory food items provision will change this policy such that any food product with an accessory food main

ingredient (with the previously mentioned exception of "water") will also be considered an accessory food item itself. To revise existing policy, the final rule provides that, "A food product containing an accessory food item as its main ingredient shall be considered an accessory food item."

Because the existing regulations and standing policy on accessory foods has resulted in potato chips being counted as a variety in the vegetables or fruits staple food category (*i.e.*, potatoes) and pork rinds being counted as a variety in the meat, poultry, or fish staple food category (*i.e.*, pork), this final rule will amend the definition of staple food in 7 CFR 271.2 to read as set forth in the regulatory text of this rule. The final rule now provides that accessory food items include foods that are generally considered snacks or desserts such as, but not limited to chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. The final rule further clarifies that items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS, consistent with the guidance in this preamble and/or with future guidance. Additionally, the final rule provides that a food product containing an accessory food item as its main ingredient shall be considered an accessory food item and that accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm. This provision will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms.

#### *Definition of "Retail Food Store"—85–15% Prepared Foods Threshold*

This discretionary provision proposed to redefine "retail food store" so as to consider firms that had more than 15% of their total food sales coming from the sale of food items that were cooked or heated on-site, before or after purchase, to be restaurants and to exclude such restaurants from the Program. Existing regulations at 7 CFR 278.1(b)(1)(iv) currently consider firms that have more than 50% of their total gross retail sales coming from items that are hot and/or cold prepared foods not intended for home preparation and consumption to be restaurants and exclude such

restaurants from the Program. The purpose of the proposed provision was to supplement this existing regulation and exclude from the Program firms that have circumvented Congressional intent and achieved SNAP authorization by selling food cold and offering to cook or heat it on the premises after sale. This proposed provision received a high number of adverse comments and based on the strength of the arguments in these comments, FNS has stricken this provision as proposed from the final rule, instead opting to modify existing regulations at 7 CFR 278.1(b)(1)(iv) to close this loophole. The final rule now provides that firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in (1) foods cooked or heated on-site by the retailer, before or after purchase; and (2) hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

For example, a firm has \$100,000 in total gross retail sales consisting of \$60,000 (60%) in nonfood sales and \$40,000 (40%) in food sales. The proposed provision would have considered only the food sales for the purposes of the threshold. Under the proposed provision, therefore, this example firm would be considered a restaurant if more than \$6,000 (15% of \$40,000) of its sales came from the sale of food items that are were cooked or heated on-site, before or after purchase. The final provision, however, considers total gross retail sales rather than only total food sales. Under this final provision, therefore, this example firm could never be considered a restaurant because more than 50% of the firm's total gross retail sales come from nonfood sales. Under this final provision a firm with \$100,000 in total gross retail sales could only be considered a restaurant and excluded from the Program if more than \$50,000 of its sales came from the sale of foods cooked or heated on-site, before or after purchase, and the sale of hot and/or cold prepared foods not intended for home preparation and consumption.

It should be noted that existing policy, the proposed rule, and the final rule do not impact the restaurants authorized by SNAP State Agencies to participate in the Restaurant Meals Program (RMP). The RMP is a State-option program active in only a handful of States that allows eligible homeless, disabled, and/or elderly SNAP recipients to use their SNAP benefits at

participating restaurants to purchase prepared meals.

Of the total 1,260 germane and non-duplicative public comments received, 513 comments, or about 41% of all public comments, specifically addressed this provision. About 48% of total retailer commenters specifically opposed this provision. Medical groups and governmental entities that commented on this provision were generally divided and/or expressed mixed opinions. Industry trade groups, advocacy groups, and private citizens that commented on this provision were generally opposed.

Commenters identifying as retailers and trade associations generally pointed out that a standard convenience store typically has less than 85% of their total food sales coming from the sale of food items that are not cooked or heated on-site before or after purchase. Such commenters indicated that the average convenience store's hot and/or cold prepared foods sales, including sales of foods that are cooked or heated on-site before or after purchase, are closer to 40% of such firms' total food sales, well beyond the 15% threshold for such hot and/or cold prepared foods sales, including sales of foods that are cooked or heated on-site before or after purchase. Commenters opposing this provision stated that this fact would cause the entire convenience store industry to be categorically ineligible for SNAP authorization.

Many advocacy groups also expressed opposition to this provision, noting that this provision could have a deleterious impact on food access for SNAP households. One national, anti-hunger advocacy group noted that, "We remain concerned about access for low-income consumers, particularly in food desert areas, and for all shoppers with mobility issues, such as those who are elderly, have disabilities, and/or lack affordable transportation. We caution the Department against setting a threshold that would cause stores to drop out of SNAP and lessen food access, particularly for these particular SNAP consumers."

Some retailers also noted that determining and documenting what SNAP household customers did with cold food after purchase would be impractical, especially for a firm with an accessible microwave or other heating element. As noted in comments from the international chain of convenience stores:

. . . the determination of whether an eligible food product constitutes a food heated on-site, post-purchase is not always easy to determine. Each . . . store contains a publicly available microwave available for

customer use . . . however, does not monitor its customers' use of store microwaves and does not have a practical method of doing so. Any eligibility requirement which would impose on . . . stores a need to determine, with specificity, which items were heated by customers post-sale would constitute an unreasonable imposition, would unduly disrupt its business and would discourage its customers from using its microwaves. Such monitoring could also have the unintended effect of customers deciding to shop elsewhere. [The company's] stores, especially its franchisees, also lack the technological ability to collect and maintain such data. Imposition of such a requirement would require each store to incur substantial software-related costs and could require the hiring of additional personnel if monitoring of customer activity for SNAP-eligibility purposes is required.

SNAP authorized firms that primarily sell cold food and then offer to cook that food on the premises for customers also specifically opposed this provision. The owner of a SNAP authorized firm that sells primarily prepared meat products commented, "Unfortunately, I am concerned that the FNS proposed rule would jeopardize my future participation in SNAP. . . Currently, the business has more than 15% of the total food sales from items that are 'cooked or heated on site before or after purchase.'" An owner of a SNAP authorized firm that primarily sells pizza, stated opposition to this provision and noted that, "All of our customers are required to pay \$1 more than our posted take-n-bake prices on our menus regardless of method of payment to bake their take-n-bake pizza for them. For SNAP cardholders, the products MUST still be unbaked at the point we swipe their card. [sic]"

Supporters of this provision, namely medical groups and State and local governmental entities, argue that removing restaurants from the Program will benefit SNAP households by eliminating a cost-ineffective source of calorie-dense and nutrient-poor food. One health commission director, representing a city of 600,000 with about 200 SNAP authorized firms, commented, "We support the effort to uphold the original intent of SNAP to purchase food items intended for home preparation and consumption . . . The proposed rule adds an additional requirement that at least 85 percent of an entity's total food sales must be for items that are not cooked or heated onsite before or after purchase. These enhancements will help ensure that SNAP retailers offer and sell a variety of foods consistent with the language defining a 'retail food store'". This position was also echoed by two national advocacy associations, one an

organization which claims 37 million members that advocates on behalf of persons over 50, and one that is a non-profit, health advocacy organization.

Several industry groups expressed support for the concept of excluding restaurants as well, but noted that the threshold set by the Agency was not set appropriately in the proposed rule. As noted by the international convenience store chain, "Without question, [our] stores are not 'restaurants.' Our stores do not have tables or chairs at which our customers can eat and we do not employ servers. Our customers generally leave the store immediately after completing their purchases. None of our stores charge the higher sales tax on restaurant meals found in many jurisdictions. And heated items do not constitute more than 50% of the food items sold in any of our stores." A national, independent grocery trade association which claims 1,200 members indicated support for this provision's intent while noting that they "strongly urge the Agency to lower the proposed threshold." Two State retailer associations, one which claims to represent nearly 400 food retailers, wholesalers, and suppliers and one which claims to represent over 800 corporate members operating more than 3,200 retail food stores, also shared this view. Another national trade association federation of 47 State and regional trade associations which claims to represent approximately 8,000 independent petroleum marketers' nationwide quoted the suggestion of one of their members that the threshold be set at "25% of sites' total gross sales instead of 15% of total food sales."

Other commenters noted that existing regulations at 7 CFR 278.1(b)(1)(iv) already prohibit the authorization of restaurants with 50% of their gross sales in prepared foods intended for home consumption and saw this proposed provision as redundant and excessive. As the international chain of convenience stores commented, "FNS's current regulation regarding retailer eligibility provides a clear, common sense distinction between retail food stores (which have less than 50% of total sales in hot or cold prepared, ready-to-eat foods for immediate consumption) and restaurants (which have more than 50% of total sales in hot or cold prepared, ready-to-eat foods for immediate consumption)."

As stated in the proposed rule, the Agency's intent in proposing this provision was to eliminate restaurants which circumvented Congressional intent and achieved SNAP authorization by selling food cold and offering to cook or heat it on the premises after the sale.

For example, a firm accepts SNAP benefits as payment for the purchase of unpackaged, cold, breaded chicken strips. After making such a sale, the firm then offers to fry this chicken for SNAP customers at the cost of one dollar in cash. Such a firm is taking advantage of a loophole in order to sell hot food and operate as a restaurant within the Program. The Agency still believes that firms that primarily sell seafood, pizza, and other food products cold and then offer to heat or cook these products on the premises are operating as restaurants, not retail food stores. The intent of this proposed provision was to correct shortcomings in the existing regulatory language that have allowed for the authorization of these types of “you-buy-we-fry”-style restaurants and pizza restaurants.

FNS reviewed and considered industry data in response to the concerns from commenters that the 85–15% threshold would have the unintended effect of precluding small-format retail stores with marginal sales in foods cooked or heated on-site, before or after purchase. According to the National Association of Convenience Stores (NACS) State of the Industry (SOI) 2015 Annual Report (*NACS State of the Industry Annual Report Convenience and Fuel Retailing Totals, Trends and Analysis of 2015 Industry Data*) the average convenience store’s total gross sales are divided between 68.22% outside (*i.e.*, fuel) sales and 31.78% inside (*i.e.*, foodservice and merchandise) sales. The inside sales of the average convenience store include 35.93% cigarette and other tobacco sales, 7.21% beer sales, 0.87% health and beauty sales. The remaining 55.99% of inside sales (or about 17.79% of total gross sales) are food sales (including 9.22% of inside sales listed under “All Other”). Of these food sales, about 37.33% come from “Foodservice.” “Foodservice,” as used in the NACS SOI 2015 Annual Report, includes “Prepared Food,” “Commissary/ Packaged Sandwiches,” “Hot Dispensed Beverages,” “Cold Dispensed Beverages,” and “Frozen Dispensed Beverages” and is defined as follows: “Foodservice appears in many different forms in the convenience store channel. In some cases, it’s a coffee program and a soda fountain, in some it’s a roller grill and a condiment bar, and at the other end of the spectrum it’s a full-blown made-to-order quick-serve restaurant (QSR) or a well-known branded franchise location.” Based on this definition, “Foodservice” sales appear to include primarily the sale of hot and/or cold prepared foods, including foods

cooked or heated on-site before or after purchase, and/or intended for immediate consumption (“Foodservice” constitutes 20.90% of total inside sales and about 6.64% of total gross sales).

Based on this data, it appears that excluding firms with more than 15% of their food sales in foods cooked or heated on-site before or after purchase would render the average convenience store ineligible to participate in the Program. Furthermore, given that hot and/or cold prepared foods, including foods cooked or heated on-site before or after purchase, constitutes approximately 6.63% of total gross sales, this data indicates that a convenience store with more than 50% of its total gross sales issuing from the sale of hot and/or cold prepared foods is very far outside of industry norms as such sales figures would represent a nearly eightfold greater sales amount in hot and/or cold prepared foods over the average convenience store.

In light of the comments and data, FNS recognizes that this provision, if implemented as proposed, would likely have sweeping and unintended consequences for smaller format firms. The Agency never intended for this provision to categorically preclude convenience stores and other small retail food stores with marginal sales in foods cooked or heated on-site, before or after purchase, from SNAP participation. The stated purpose of this provision was to realign SNAP regulations with statutory intent and exclude restaurants from SNAP.

Therefore, the Agency is narrowing the scope of this provision in the final rule and is instead amending existing regulations at 7 CFR 278.1(b)(1)(iv) to specifically exclude from SNAP participation firms with more than 50 percent of their total gross sales in (1) foods cooked or heated on-site by the retailer before or after purchase; and (2) hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout. Conforming edits were also made to 7 CFR 271.2 to the definition of “retail food store.” This change to existing regulations will close the existing loophole and align SNAP regulations with Congressional intent to exclude hot food and restaurants from SNAP, while achieving the Agency’s stated objectives and addressing concerns that the proposed provision might adversely affect SNAP-authorized firms, such as convenience stores, that do not operate as restaurants.

This provision was never intended to exclude from the Program firms that offer both microwaveable products (*e.g.*,

frozen burritos and packages of popcorn) for sale and self-service microwaves for customer use. FNS agrees that it is neither feasible, nor desirable that firms be required to monitor customers’ usage of self-service microwaves. Under this final provision microwaveable food products will not be considered foods cooked or heated on-site before or after purchase simply because they *could* be heated after purchase using a self-service microwave and eaten on-site. The final provision specifies that this prepared food threshold will consider those food products that are cooked or heated “by the retailer”. Such language excludes self-service microwaves from consideration under this provision. The purpose of this provision is to prevent certain types of take-out restaurants from continuing to circumvent Congressional intent to exclude hot food and restaurants from SNAP. While many small format retail food stores may offer some hot and/or cold prepared foods, including foods that are cooked or heated on-site by the retailer before or after purchase, for sale, FNS does not expect this provision to affect convenience stores or similar small format retail food stores as such hot and/or cold prepared foods typically constitute less than 7% of total gross sales for the average convenience store as indicated by industry data, per the aforementioned data in the NACS SOI 2015 Annual Report. While this provision is unlikely to affect the vast majority of retailers, it closes existing loopholes that allowed restaurants to participate in the Program. This provision will be implemented for all retailers 120 days after the effective date of this final rule.

#### *Definition of “Retail Food Store”—Co-Located Firms*

This discretionary provision proposed to redefine the term “retail food store” such that multiple co-located businesses sharing certain commonalities would be treated as one firm for the purposes of the Program. As proposed, these commonalities included the sale of similar foods, single management structure, shared space, logistics, bank accounts, employees, and/or inventory. In the proposed rule, FNS specifically sought comments pertaining to any unintended adverse effects of this proposed change and based on the comments that were received this provision was modified to specify that co-located businesses will be treated as one firm by FNS only if they share all of the three following attributes: (1) Ownership; (2) sale of similar or same food products; and (3) shared inventory.

This proposed provision received a moderate number of comments. Of the total 1,260 germane and non-duplicative public comments received, 228 comments, or approximately 18% of all public comments, specifically addressed this provision. About 22% of total retailer commenters specifically opposed this provision. Medical groups that commented on this provision were generally divided and/or expressed mixed opinions while private citizens that commented on this provision were generally supportive. Industry trade groups and advocacy groups that commented on this provision were generally opposed. Support for or opposition to this provision was almost universally concomitant with support for or opposition to the 85–15% prepared foods threshold provision.

Commenters opposing this provision point out that, in conjunction with the 85–15% prepared foods threshold provision, this provision would eliminate from the Program any convenience store co-branded and co-located with a fast food business. The idea of unifying multiple businesses operating “under one roof” for purposes of SNAP authorization was criticized by trade groups and retailers who stated that convenience stores and other small format retail food stores operating in shopping malls, travel plazas, strip malls, truck stops, and other shared structures could face elimination from the Program due to their proximity to a totally unaffiliated fast food restaurant. For example, the national truck stop retailer trade association commented, “As a practical matter, this rule would result in scenarios where [our] members’ convenience stores would be ineligible to participate in SNAP simply because they operate adjacent to a separate restaurant. This is arbitrary and contrary to the Program’s objectives.” Overall opposed commenters noted that this provision was overly broad and could result in the unfair treatment of numerous discrete businesses.

The Agency proposed this provision to close a loophole that allows firms to obtain SNAP authorization in contravention of clear statutory intent to exclude restaurants from the Program. For example, a firm applying for SNAP authorization purports to operate two businesses within one building. The first business sells hot pizza, is considered a restaurant by FNS, and is, therefore, ineligible for SNAP authorization. The second business sells only cold pizza and is, therefore, eligible for SNAP authorization under Criterion B. Both businesses sell the same product, are managed and owned by the same individuals, employ the

same personnel, operate in the same space, draw from the same inventory, and handle their finances through the same accounting mechanisms. The only difference between the two businesses in this example is that the former does not accept SNAP EBT cards as a form of payment at its designated cash register, while the latter does. Firms obtaining SNAP authorization through such a superficial bifurcation of their businesses are clearly circumventing regulatory and statutory intent to exclude restaurants from the Program in order to sell their food, in this example, pizzas. This provision was proposed in order to close this loophole.

It was never the Agency’s intent to treat multiple businesses as one firm because such businesses simply share a roof and an owner. The Agency’s intent in the proposed provision was not to consider multiple businesses operating within one truck stop or strip mall as a single firm even if they shared some commonalities, such as management and personnel, so long as they were not also engaged in other common practices as well, such as selling similar or the same products drawn from the same inventory. In the commenter’s example, therefore, the presence of a fast food restaurant at a travel plaza would not be likely to have any bearing on the SNAP authorization status of a convenience store located in the same travel plaza.

FNS appreciates the comments from stakeholders and other members of the public that highlight the vagueness and possible unintended effects of the proposed provision. In response to these comments, FNS has clarified and narrowed this provision in the final rule. As it is written in the final rule at 7 CFR 271.2, co-located businesses will be treated as one firm by FNS only if they share all of the three following attributes: (1) Ownership; (2) sale of similar or same food products; and (3) shared inventory. This revision clarifies the vagueness in the proposed language and limits the provision’s potential effects in keeping with its intent. This provision will be implemented for all retailers 120 days after the effective date of this final rule.

#### *Definition of “Retail Food Store”— Depth of Stock*

This discretionary provision proposed to address depth of stock by establishing a minimum of six stocking units per staple food variety which certain SNAP authorized firms must offer for sale and normally display in a public area on a continuous basis. This provision received a high number of adverse comments as proposed. Based on the strength of the arguments made in these

comments, in the final rule this depth of stock requirement has been halved to a minimum of three stocking units per staple food variety. When combined with the increases in the number of varieties required per staple food category per the breadth of stock provision of the rule, the proposed depth of stock provision would have required a minimum stock for certain SNAP authorized retailers of 168 items, while under the final rule this depth of stock provision requires 84 items.

Of the total 1,260 germane and non-duplicative public comments received, 490 comments, or approximately 39% of all public comments, specifically addressed this provision. About 91% of commenters that addressed this proposed provision opposed it. About 47% of total retailer commenters specifically opposed this provision. Medical groups that commented on this provision were generally supportive while government entities, private citizens, and advocacy organizations that commented on this provision were generally divided and/or expressed mixed opinions.

Most retailers and industry groups opposed this provision on the grounds that the volume of products required by the proposed depth and breadth of stock provisions (*i.e.*, 168 total items) are untenable, as proposed, for small-scale firms to store, display, and stock. As a representative of an American drug store chain which claims over 8,000 locations, about 7,000 of which are SNAP authorized firms, notes, “Since the 168 items must be continually stocked, a retailer must, in reality, stock far more than 168 items to replace any items that are sold. If a retailer only stocks the required 168 items, they run the risk of non-compliance with Depth of Stock requirements each time an item is sold. We request FNS further clarify this concern.” Other commenters echoed this concern, stating that they feared the loss of SNAP authorization could occur as the result of selling a single item immediately prior to an FNS inspection.

Under existing regulations at 7 CFR 278.1(a), FNS may require an applicant firm to submit to an inspection, or store visit, as a part of the SNAP authorization process. FNS understands that firms may sell out of certain products or experience temporary disruptions to their supply chain and that such occurrences may result in stocking shortfalls at the time of an Agency store visit. If a firm has insufficient food stocked on hand at the time of this store visit, this does not necessarily preclude the firm from receiving SNAP authorization. Under

existing regulations at 7 CFR 278.1(b)(1)(ii)(A), if it is not clear that the firm met the stocking requirements at the time of a store visit, FNS may offer applicant firms the opportunity to demonstrate their compliance with such requirements through the submission of supporting documentation, such as invoices or receipts, indicating that the firm had recently ordered or received the required staple foods prior to the store visit.

In order to address the concerns and confusion of the commenters, the final rule retains and clarifies the language at 7 CFR 278.1(b)(1)(ii)(A) that affords firms the opportunity to submit supporting documentation in the case of certain stocking shortfalls at the time of an Agency store visit. Additionally, the final rule specifies that such supporting documentation must be dated within 21 days of the store visit. This timeframe of 21 calendar days, or three weeks, reflects the need for retailers to stock perishable staple foods on a continuous basis. Existing SNAP regulations at 7 CFR 278.1(b)(1)(ii)(B) define “perishable foods” as items that “will spoil or suffer significant deterioration in quality within 2–3 weeks.” This language in 7 CFR 278.1(b)(1)(ii)(A) should not be construed as allowing retailers to submit receipts or invoices to FNS instead of having sufficient stock on hand; the purpose of this language is to acknowledge the realities of the retail marketplace and provide stores that stock sufficient food on a continuous basis some degree of flexibility. The Agency has amended language in this provision at 7 CFR 278.1(b)(1)(ii)(A) to provide that, “Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the requirement has been met. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had purchased and stocked a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit.”

Under this final rule firms that are SNAP authorized under Criterion A must offer for sale and display in a public area (*e.g.*, on store shelves) qualifying staple food items on a continuous basis, evidenced by having no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each staple variety. This means that, on any given day of operations, such a firm should offer a total of 84 units for sale

(3 stocking units · 7 staple varieties · 4 staple food categories = 84 units). Generally Agency determinations of eligibility under Criterion A are guided by store visit documentation of food items that are being offered for sale and displayed in a public area at the time of store visits. So, for example, if a firm is subject to a store visit on the 22nd of January and is found to have only 83 of the required 84 units on hand, then that firm may be afforded the opportunity to provide FNS with supporting documentation. In this case one acceptable form of supporting documentation would be documentation of order or purchase (*e.g.*, an invoice) verifying that the firm placed an order for food stock, including the missing required unit, that is dated no earlier than the 1st of January and no later than the time of the store visit on the 22nd of January. Another acceptable form of supporting documentation would be documentation of receipt or delivery (*e.g.*, a receipt) verifying that the firm received an order of food stock, including the missing required unit, that is dated no earlier than the 1st of January and no later than the time of the store visit on the 22nd of January. If the firm in this example was able to provide an acceptable form of supporting documentation to verify that the firm stocks the required staple food items on a continuous basis (84 items), then the firm would be authorized to participate in SNAP. However, if, for example, a firm had 0 of the required 84 units on hand at the time of store visit, then that firm would not be given the opportunity to submit supporting documentation and would instead be denied SNAP authorization. Such a result clearly demonstrates the firm has not made a reasonable restocking effort.

Some commenters stated that the failure to meet the stocking requirements of this provision at the time of a store visit would result in substantial costs to firms due to the thousands of dollars in fines FNS would levy against such firms as penalties for failing to meet stocking requirements. Under existing regulations, a firm that fails to meet current stocking requirements is denied SNAP authorization or withdrawn from the Program. Once denied or withdrawn, such a firm must wait six months to reapply for SNAP authorization. FNS does not levy fines against retailers who are denied or withdrawn from the Program on the basis of failing to meet the stocking requirements as no statute or regulations currently authorizes FNS to levy fines against retailers for such a

failure. Neither the proposed rule, nor the final rule change this fact. This matter is further examined in the final rule’s RFA and RIA. A civil penalty (*i.e.*, a civil money penalty or civil monetary penalty) may be applied in lieu of a period of disqualification when a SNAP authorized retailer violates SNAP rules (*e.g.*, sale of cigarettes, tobacco, or alcohol for SNAP benefits).

Another objection raised to this provision pertained to food waste. Some commenters posited that the increase in the number of staple food categories in which perishable food items are required (a statutorily mandated increase from two to three staple food categories) coupled with this depth of stock requirement would result in spoilage, waste, and exorbitant costs to retailers. As noted by a representative of a convenience store distributor company that professes to service over 1,000 retail food stores in six States, “For many non-perishable items, if [convenience stores] do not sell to the consumer by their expiration date, we can send those products back to the manufacturer who will provide certain types of refunds or will replace product. This practice only applies to select nonperishables and DOES NOT [sic] apply to most products stipulated under the revised FNS rules for SNAP. Perishable items are NEVER [sic] refunded by the manufacturer after the expiration date, so the cost of spoilage on those products is borne completely by the retailer.” Under the proposed rule this depth of stock provision would require a minimum of 18 perishable food items, while in the final rule this depth of stock provision requires a minimum of nine perishable food items where “perishable” is defined by existing regulations at 7 CFR 278.1(b)(1)(ii)(B) to include frozen, fresh, refrigerated, and unrefrigerated food products “that will spoil or suffer significant deterioration in quality within 2–3 weeks” such as loaves of bread and potatoes.

Another common objection raised to this provision pertained to space and stocking logistics. Some commenters argued that, in conjunction with the breadth of stock provision, this depth of stock provision would require stocking a quantity of food items that simply exceed the available shelf space at most small format retail food stores. Some commenters also posited that the quantity of perishable food items required by this rule would force small-format firms to purchase additional refrigerator or freezer units for storage. The regional chain of convenience stores which claims over 600 locations, about 550 of which are SNAP

authorized firms, also noted that their “current stocking needs and inventory management systems [cannot] guarantee a minimum of six units at all times for each of the relevant staple foods. At very least, we would need to revise our planograms and general merchandising strategies, and revisit our hardware and software applications.”

As discussed in the RIA and RFA, estimates of the final rule’s impacts on retailers are based on an analysis of a nationally representative sample of 1,392 SNAP authorized small-format firms using data gathered by FNS during store inspections, or store visits. Based on this analysis FNS estimates that the average small-format SNAP authorized firm already stocks over 70% of the stock needed to meet the requirements of this final rule and the average small-format SNAP authorized firm will only need to stock an additional 24 items. Moreover, this analysis indicated that over 98% of small-format SNAP authorized firms currently stock at least nine perishable staple food items and, therefore, that the overwhelming majority of small-format SNAP authorized firms will not need to stock any additional perishable items to meet the requirements in this final rule.

Moreover, as discussed in the RFA, the Agency has analyzed examples of stocking units of qualifying staple food varieties to determine the shelf space that will be occupied by the 84 required items. The Agency estimates that the 84 items required under the final rule would occupy approximately 7,500 cubic inches. These 84 items would occupy about 5.6 square feet of non-refrigerated shelf space. Assuming stores choose to display these non-refrigerated items in a standard manner (*i.e.*, cans of fruit cocktail are shelved three items deep on the shelf) the Agency estimates that these non-refrigerated items would occupy less than two full shelves on standard three-shelf wall shelving unit (84” height x 48” length x 16” depth). While FNS estimates that the refrigerated items would require about 4.3 linear feet of refrigerated shelf space (where a refrigerated shelf has a standard 48” width), 98 percent of small SNAP-authorized firms already stock sufficient perishable items to meet the perishables requirement. Therefore, FNS considers it unlikely that these stores will need additional refrigerated space beyond their current capacity. Furthermore, as our analysis indicates that most stores will need to add far fewer than 84 items to meet the combined stocking requirements of this rule (24 additional items for the average store); the

additional shelf space needed is likely to be well below these estimates.

Since the average small-format SNAP authorized firm already stocks most of the items required under this final rule, FNS contends that this provision, and all of the stocking provisions as a whole, will have a negligible impact on retailers from a spatial and logistical perspective. FNS does not anticipate that requiring firms to utilize a fraction of a shelf to stock an additional 24 items will necessitate any major changes to the planograms or general merchandising strategies of the average small-format retailer.

Certain industry groups, such as that national food retail trade association, had questions regarding the definition of “stocking unit” and requested further clarification. Per commenters’ requests, a list of examples has been added in Section IV of this document which provides a more complete illustrative, but not exhaustive, examination of what constitutes a stocking unit, and what does not constitute a stocking unit for the purposes of this depth of stock provision.

State and local government entities as well as medical and advocacy groups largely supported this provision, arguing that it would ensure the availability of staple food items on the shelves of SNAP authorized firms. One State public health official, representing a State with a population of 38.8 million that includes over 25,500 SNAP authorized firms, noted that this provision would help by “increasing the likelihood that these foods will be available to SNAP participants on an ongoing basis” and a city health department representing 8.5 million people and over 10,000 SNAP authorized firms, noted that, in concert with other provisions, this provision would increase “the overall diversity of foods stocked on a continuous basis”.

On the other hand, several retailer and industry group commenters stated that the proposed number of required stocking units was simply too great for small format retailers and recommended scaling back the number of stocking units required. The petroleum marketers’ trade association federation recommended that, “[to] help the small retailer the depth of stock should be cut to three items of each of the seven varieties in each staple group”. Another State grocer association, which professes to represent about 400 retailer members, recommended that “[reconsideration] of six different units of any food item in a store at any given time should also be made, dropping that requirement to a lower number.”

The proposed rule would have increased the required depth and breadth of staple food stock while simultaneously expanding the list of accessory foods excluded from the definition of “staple foods” and excluding multiple ingredient food items from the definition of “staple foods.” According to some comments received, taken together, these four provisions would constitute an unreasonably burdensome stocking requirement for small format retailers. The Agency acknowledges commenters’ concerns about the overall impact of the various provisions in this final rule on small format retailers. However, the Agency also agrees with the comments from some State/local governmental entities and medical groups that having a depth of stock requirement would increase the likelihood of healthy staple food options being available to SNAP recipients. Therefore, FNS is addressing depth of stock by establishing a depth of stock provision, but amending the provision at 7 CFR 278.1(b)(1)(ii)(A) by reducing the required number of stocking units from the proposed six units to three units for each staple food variety in this final rule. Conforming edits were also made to 7 CFR 271.2 to the definition of “retail food store”. As a result of this change the costs and burdens associated with compliance, perishable spoilage, and shelf space have all been significantly reduced, as reflected in the RIA and RFA. This provision will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms.

#### *Definition of “Retail Food Store”—Breadth of Stock*

As explained in the preamble to the proposed rule, the 2014 Farm Bill amended the Act to increase the number of staple food varieties required per staple food category from three to seven and to increase the staple food categories required to contain at least one perishable variety from two to three. The proposed rule sought to codify these mandatory requirements from the 2014 Farm Bill. This proposed breadth of stock provision received a moderate number of largely supportive or mixed comments. Of the total 1,260 germane and non-duplicative public comments received, 482 comments, or approximately 38% of total public comments, specifically addressed the increase from three to seven varieties and 288 comments, or about 23% of total public comments, specifically

addressed the increase from two to three categories containing at least one perishable variety. About 56% of comments that specifically addressed the increase from three to seven varieties supported this change while approximately 39% were mixed and about 5% opposed this change. Approximately 90% of comments that specifically addressed the increase from two to three staple food categories containing at least one perishable variety supported this change while about 8% opposed this change and approximately 2% were mixed. Overall less than 1% of total retailer commenters specifically opposed this provision. Medical groups, private citizens, and advocacy groups that commented on this provision were generally supportive while government entities and industry trade groups that commented on this provision were generally divided and/or expressed mixed opinions. This provision was included in the final rule as proposed.

Some governmental, medical, and advocate commenters believed that this provision did not go far enough to ensure that SNAP authorized firms stocked sufficient nutritious food options. Such commenters noted that the SNAP four staple food categories have not kept pace with changes to the USDA's nutritional recommendations, now represented by MyPlate. Such commenters suggested that the vegetables or fruits staple food category should be split into two separate staple food categories—the fruit staple food category and the vegetable staple food category. Such commenters went on to argue that seven varieties should be required for both of these staple food categories (for a total requirement of 14 fruit and vegetable staple food varieties). However, the current four staple food categories are statutorily-mandated in Section 3(q)(1) of the Act and the suggestion of breaking the four staple food categories into five categories would exceed the Agency's statutory authority.

There were other commenters who stated that they expected that retailers would have difficulty reaching seven different varieties in the meat, poultry, or fish and the dairy products staple food categories. As one city mayor, representing a city of 600,000 residents containing 1,000 SNAP authorized firms, pointed out, "It is difficult to list off seven common varieties of dairy that all types of stores will be able to carry. With the majority of dairy products being perishable, retailers cited lack of cooling infrastructure and cold storage, and difficulty in procuring and selling

at an affordable cost as barriers to stock seven varieties of dairy."

FNS acknowledges the difficulties in reaching seven varieties in certain staple food categories. FNS has amended the final rule to address this concern, along with other comments specifically regarding acceptable varieties in the four staple food categories, as explained in the section on "Definition of 'Staple Food'—Acceptable Varieties in the Four Staple Food Categories." However, because the Act requires that stores authorized under Criterion A stock seven varieties in each of the four staple food categories and at least one variety of perishables in three of those staple food categories; this breadth of stock requirement remains unchanged in the final rule. Conforming edits were also made to 7 CFR 271.2 to the definition of "retail food store" and 7 CFR 278.1(b)(1)(ii)(A) to reflect the new breadth of stock requirement. This provision will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms.

#### *Definition of "Firm"*

This discretionary provision proposed to define "firm" so as to clarify that it also includes retailers, entities, and stores. Only one comment, a joint comment submitted by the international convenience store trade association and the petroleum marketers' trade association, specifically addressed this provision. No other retailer commenters specifically opposed this provision.

The one comment that addressed this provision opposed it, stating that "[to] conflate 'store' with 'firm' may have far-reaching ramifications in terms of licensing, enforcement and other policies" and further added that "[conflating] all of these terms will only introduce confusion and lead to unintended results". The purpose of this provision is to clarify and unify terms that are currently used interchangeably throughout current SNAP regulations. Therefore, the provision at 7 CFR 271.2 remains unchanged in the final rule. This provision will be implemented on the effective date of this final rule.

#### *Need for Access*

In the proposed rule FNS proposed to amend 7 CFR 278.1(b) to allow the Agency to consider "need for access" when a retailer does not meet all of the requirements for SNAP authorization. FNS does not anticipate that large grocery stores and supermarkets will

struggle to meet the stocking requirements of this final rule and FNS only expects to consider "need for access" for small format retailers. The purpose of this provision, therefore, is to provide a mechanism to safeguard food access for SNAP recipients especially when an isolated or underserved community relies heavily on small format retail food stores for its grocery shopping needs.

FNS understands that small businesses, such as independent convenience stores, play a vital role in the life of all Americans. These small businesses enrich both urban and rural communities by providing economic prosperity, employment opportunities, and sustainable growth. Very often small format retail food stores are the only venue available in isolated or underserved areas. When drafting this final rule FNS carefully considered the comments from the U.S. Small Business Association Office of Advocacy, as well as the comments submitted by retailers, trade associations, and other commenting entities. Concerns expressed regarding proposed provisions were incorporated into this final rule to minimize potential adverse impacts on small businesses. In addition to these changes, this need for access provision additionally accommodates small businesses and serves as a hedge against potential loss of food access.

With respect to this need for access provision the preamble to the proposed rule stated that "FNS will consider factors such as distance from the nearest SNAP authorized retailer, transportation options to other SNAP authorized retailer locations, the gap between a store's stock and SNAP required stock for authorized eligibility, and whether the store furthers the purpose of the Program."

In the proposed rule, FNS specifically requested comments from the public to help FNS refine the factors used to determine whether a retailer is located in an area with significantly limited access to food. This provision received few comments. Of the total 1,260 germane and non-duplicative public comments received, 48 comments, or about 4% of total public comments, specifically addressed this provision. About 71% of comments that specifically addressed this provision suggested modifications or alterations to the proposed factors to be considered under this provision. This provision has been retained with modifications based largely on feedback received in the final rule. Few retailer commenters specifically opposed this provision and all other commenter types were considered mixed.

Some retailers opposed this provision on the grounds that the implementation of this provision would result in inequitable treatment of firms. The regional convenience store chain that commented noted that, "FNS should not be positioning itself to pick winners and losers in the competitive marketplace."

As explained in the proposed rule, the 2014 Farm Bill amended Section 9(a) of the Act to allow FNS to consider whether an applicant retailer is located in an area with significantly limited access to food when determining the qualifications of that applicant. The Manager's Statement accompanying the 2014 Farm Bill indicated that the intent of Congress was to encourage the Secretary "to give broad consideration to the impacts of additional requirements . . . on food access in food deserts or other areas with limited food access." H. Conf. Rep. 113-333, at 434 (Jan. 27, 2014). As such, this rule is simply implementing a statutory provision that accommodates areas with significantly limited access to food and retailers in such areas for whom the new stocking standards may be a challenge to meet. FNS specifically requested feedback from the public regarding the proposed change during the comment period. FNS has reviewed all comments and will be refining the provision in the final rule as described below. The Agency also intends to provide Program stakeholders with additional guidance on this provision.

Some retailers and industry trade groups also opposed this provision on the grounds that the proposed provision would create additional delays and administrative burdens for applying firms. The proposed process would allow FNS to waive certain retailer eligibility requirements in instances where applying firms served communities with low food access, as determined by FNS. This provision was always intended to function internally to the Agency and in tandem with the existing SNAP authorization process. FNS does not expect to need any additional information from applicant retailers to assist in the Agency determination. Instead, FNS will rely on information that the Agency currently receives as part of the retailer SNAP authorization process and publicly available information about the area in which the store is located, such as data in the U.S. Census Bureau's American Community Survey (ACS). Therefore, FNS does not anticipate any additional burdens, costs, or delays for retailers that would be created by this provision.

FNS, however, acknowledges the confusion of commenters regarding how this provision would work in practice

and how it would affect the timeline for applicant firms' authorization to participate in the Program. As a result, the Agency has clarified the language of this provision in the final rule to specify in 7 CFR 278.1(b)(6) that, "Such considerations will be conducted during the application process as described in 7 CFR 278.1(a)." This means that an applicant firm will still receive an authorization determination within 45 days of Agency receipt of a firm's completed application for authorization. During this period need for access will be considered if applicable.

The international convenience store trade association also opposed this provision on grounds of fairness, stating that "If, for example, only one store in a food desert was SNAP authorized, then it could charge whatever it wanted to a captive consumer base." Under the existing SNAP equal treatment provisions at 7 CFR 278.2(b) and 7 CFR 274.7(f), it is prohibited for firms to treat SNAP households differently than any other customers; therefore, retailers are prohibited from charging SNAP customers different prices than non-SNAP customers for the same products. Such predatory retail price gouging practices targeting SNAP customers would, therefore, already be prohibited under existing SNAP regulations.

Some medical and advocacy groups opposed this provision, or the frequent application of this provision, on the grounds that it would allow firms to avoid compliance and deprive communities that depend on small food retail stores as the most convenient and accessible option for purchasing food of a sufficient variety of healthy food options.

However, most retailer, industry, advocacy, governmental, and medical entities that referenced this provision did not support or oppose the provision, but instead suggested additional factors for FNS to consider. Factors suggested for consideration by commenters, beyond those put forward by the Agency in the proposed rule, included, but were not limited to, car ownership rates, public transportation availability, density of SNAP households, regional food availability, regional food prices, and underserved ethnic communities. In order to ensure that the Agency is able to consider some of these suggested factors, and any other factors needed to determine food access, the language of this provision in the final rule at 7 CFR 278.1(b)(6) provides that the factors listed are not exhaustive.

Additionally, the final rule limits the applicability of this provision to applicant firms that fail to meet both Criterion A (*i.e.*, requiring firms to stock

qualifying staple food items on a continuous basis, evidenced by having no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety) and Criterion B (*i.e.*, requiring firms to have 50 percent of total gross retail sales in staple food sales), but meet all other SNAP authorization requirements. This change is in keeping with Congressional intent as expressed in the Manager's Statement accompanying the 2014 Farm Bill which indicated that this need for access provision is intended to accommodate retailers in low food access areas for whom the new stocking standards may be a challenge to meet.

The need for access provision in the final rule also clarifies the factors that will be considered by the Agency will pertain to either: (1) Area food access; or (2) firm specific information. Finally, the proposed rule put forward the Agency's intent to implement this need for access provision 60 days after publication of this final rule. As stated earlier, this provision is intended to accommodate small retailers in low food access areas for whom the new stocking standards may be a challenge to meet, therefore this provision will be implemented in tandem with the new stocking standards. This need for access provision, therefore, will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms.

This language of this provision in the final rule reads as set forth in § 278.1(b)(6) in the regulatory text of this rule. The final rule provides that FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A per 7 CFR 278.1(b)(1)(ii) or Criterion B per 7 CFR 278.1(b)(1)(iii) so long as the applicant firm meets all other SNAP authorization requirements. The final rule further provides that, in determining whether an applicant is located in such an area, FNS will consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and the availability of transportation in the vicinity of the applicant firm; and that in determining whether an applicant should be authorized in the Program despite failure to meet Criterion A and Criterion B, FNS will also consider firm factors such as, but not limited to, the extent of the applicant firm's

deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Furthermore, the final rule provides that such considerations will be conducted during the application process as described in 7 CFR 278.1(a). This provision will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms.

*Definition of “Staple Food”—Acceptable Varieties in the Four Staple Food Categories*

This discretionary provision proposed to clarify and amend the definition of “variety” as it pertains to staple food varieties in the four staple food categories. This provision received an overall mixed response. Of the total 1,260 germane and non-duplicative public comments received, 168 comments, or approximately 13% of all public comments, specifically addressed this provision. About 16% of total retailer commenters specifically opposed this provision. Industry groups largely opposed this provision and other commenter types, such as advocacy, medical, and governmental entities, were generally divided and/or expressed mixed opinions.

Some commenters opposed to this provision stated that this provision did not represent a clarification of existing policy, but rather a radical change in the definition of “variety,” especially with respect to the definition of “variety” for the meat, poultry, or fish staple food category. A joint comment submitted by the international convenience store trade association and the petroleum marketers’ trade association, for example, stated that ‘FNS has also proposed to ‘clarify’ the term ‘variety.’ But, the proposed rule advances not a clarification but a redefinition’. The national trade association for the travel plaza and truck stop industry echoed this criticism, asserting that FNS policy currently treats multiple formats of turkey and pork as discrete varieties and that the proposed rule would change this supposed standing definition of “variety”:

For example, under the Proposed regulatory text, ham and salami would both qualify as one ‘variety’ of item—‘pork’—for purposes of satisfying the seven-variety staple food threshold. Similarly, turkey burgers, sliced turkey, and ground turkey would all qualify as one variety—‘turkey’ rather than different [sic] three different ‘varieties’ in the meat, poultry, and fish category. The Proposal’s preamble does not

attempt to justify *this significant shift in policy* beyond saying that it is designed to ‘clear up confusion that may exist in current regulations.’ [This organization] is not aware of any such confusion. Indeed, retailer confusion in this area can be sourced entirely to the language in the proposed regulatory text that would treat *all* food items from the same food source (e.g., chicken) as a single ‘variety.’ There is little policy justification for treating all items from the same food source as a single ‘variety’ of item. [emphasis added]

Additionally, some commenters criticized the standing definition of “variety” specifically in the context of the vegetables or fruits staple food category. As the international convenience store trade association and the petroleum marketers’ trade association stated, “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).”

Under existing SNAP regulations at 7 CFR 278.1(b)(1)(ii)(C) multiple formats of the same base product are not construed as constituting multiple varieties for the purpose of Criterion A eligibility. Canned chicken, frozen chicken, and fresh chicken, for example, are currently considered one variety (chicken) under existing SNAP regulations and policies. That this provision counts multiple formats of one variety (e.g., chicken) as a single variety represents a restatement of existing Agency regulation and policy. In fact, the adoption of the suggestions of the international convenience store trade association and the petroleum marketers’ trade association that “raw chicken breast, refrigerated grilled chicken, or frozen chicken and vegetable stir fry should be considered different varieties” and that the Agency should “consider cream cheese and Laughing Cow creamy Swiss cheese to be two different [varieties]” would represent a reversal of the existing definition of “variety,” which in accordance with existing regulations at 7 CFR 278.1(b)(1)(ii)(C), “. . . is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.” This existing policy was further examined in the 2001 Benefits Redemption Division (BRD) Policy Memorandum 01–04 which reads, in part, “Examples of unacceptable varieties includes tomato juice, fresh tomatoes and canned stewed tomatoes in the vegetables or fruits category.” As is clear from this memorandum, long-standing Agency policy has not considered multiple formats of a product (e.g., raw chicken, canned

chicken, and frozen chicken) to constitute discrete staple food varieties.

Variety has been traditionally defined by the Agency based on the essential composition of the food product (i.e., main ingredient), especially in the meat, poultry, or fish and vegetables or fruits staple food categories. Products that share the same primary component (e.g., sliced turkey and ground turkey—turkey) and very similar kinds of products (e.g., McIntosh apples and Empire apples—apples; mozzarella cheese and cheddar cheese—cheeses) have not generally been considered to represent discrete varieties in their respective staple food categories. Main ingredient and product kind have, therefore, been recognized in Agency policy as the primary determinants of variety. The confusion evidenced by retailers’ and trade associations’ comments regarding the Agency’s current definition of “variety” may be a reflection of the fact that retail food stores may generally meet the current Criterion A stocking requirements (i.e., three varieties in each of the four staple food categories) without deliberately considering the products needed for compliance. The increase in the number of required varieties from three to seven, which was mandated by the 2014 Farm Bill, has caused retailers to carefully consider what stock would affect compliance and may have resulted in the aforementioned comments and confusions.

Some advocacy and local or State government commenters suggested including plant-based proteins in the meat, poultry, or fish staple food category and plant-based dairy alternatives in the dairy products staple food category. One county health department, representing a county with a population over 750,000 and containing over 700 SNAP authorized firms argued that, “Additional staple food items that should be considered include eggs and plant-based protein sources such as canned or frozen legumes, unsalted nuts and seeds, and soy products (i.e., tofu). These products could be included in the staple foods category for meat, poultry and fish, re-framed as a protein category.” As discussed earlier in the context of the breadth of stock provision, there were also commenters who stated that they expected that retailers would have difficulty in reaching seven different varieties in the meat, poultry, or fish and the dairy staple food categories.

In common language usage a “dairy product” is understood to mean an edible food product produced from the milk of a mammal, most commonly cow’s milk. Some traditional varieties of

dairy include milk, butter, yogurt, and cheese. There are a small number of unique varieties of commonplace dairy products, most of which share the same main ingredient (*i.e.*, milk). Under existing Agency policy, plant-based dairy alternatives are also considered acceptable varieties in the dairy products staple food category. In fact, as proposed, the rule had specified that “plant-based milk” was included as a variety in the dairy products staple food category, which would provide additional choices for retailers in meeting the new breadth of stock requirements.

FNS acknowledges the difficulty in reaching seven varieties in this staple food category. Given this reality, as well as the needs of lactose-intolerant consumers, the final rule will consider plant-based dairy products to be varieties in the dairy products staple food category based on their main ingredient (*e.g.*, cow’s milk, goat’s milk, almond, and soy) and the traditional dairy product for which they are a substitute (*i.e.*, product kind). For example, almond-based milk, soy-based milk, almond-based cheese, and soy-based cheese will each be considered a discrete variety in the dairy products staple food category under the final rule. Additionally, the final rule modifies existing Agency policy to subdivide certain traditional, animal-based dairy varieties into more than one variety. For example, under existing Agency policy cheese is considered one variety while under the final rule cow’s milk-based soft cheese and cow’s milk-based firm/hard cheese each will be considered discrete varieties.

Additionally, FNS acknowledges the importance of plant-based sources of protein and the potential difficulties in reaching seven varieties in the meat, poultry, or fish staple food category. The final rule, therefore, will modify existing Agency policy to include three varieties of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) in the meat, poultry, or fish staple food category. Under current Agency policy such products (*i.e.*, nuts/seeds, beans, and peas) are counted as varieties in the vegetable or fruits staple food category. Under this final rule beans and peas may only be counted once each as a variety in the meat, poultry, or fish staple food category or once each as a variety in the vegetables or fruits staple food category while nuts/seeds may only be counted once as a variety in the meat, poultry, or fish staple food category. This change is in keeping with the nutritional guidance of USDA’s MyPlate, which clarifies that, while beans and peas belong to both the

protein foods group and the vegetable group, nuts/seeds are only considered to belong to the protein foods group. This means that if a store stocked one jar of peanut butter, one bag of almonds, and one bag of sunflower seeds, this would be considered three stocking units of one variety (*i.e.*, nuts/seeds) which could be counted towards breadth of stock in the meat, poultry, or fish staple food category. In this example, additional units of these or other nut/seed products (*e.g.*, three bags of walnuts) would not further be counted as additional varieties in the meat, poultry, or fish staple food category. This also means that if a firm stocked three bags of dried kidney beans (*i.e.*, beans) and three bags of dried black eyed peas (*i.e.*, peas), then these products would be counted as two varieties towards the breadth of stock in the meat, poultry, or fish staple food category or in the vegetables or fruits staple food category. Beans and peas can each only be counted once as variety in either the meat, poultry, or fish staple food category or in the vegetables or fruits staple food category. This means that if a firm stocked three bags of dried kidney beans, three bags of dried black beans, and three bags of dried pinto beans, then these products could only be counted as one variety (*i.e.*, beans) in either the meat, poultry, or fish staple food category or in the vegetables or fruits staple food category. Likewise, three bags of dried black-eyed peas, three bags of dried split peas, and three bags of dried lentils could only be counted as one variety (*i.e.*, peas) in either the meat, poultry, or fish staple food category or in the vegetables or fruits staple food category. These varieties may not individually be split between staple food categories. This is a departure from the way in which “variety” is traditionally defined (*i.e.*, by main ingredient and/or product kind). The reason for this unique exception is that these plant-based proteins are being added to the meat, poultry, or fish staple food category in order to supplement, not supplant, the animal-based proteins for which the category is named. Under this provision firms will not be able meet the breadth of stock requirement for the meat, poultry, or fish staple food category by stocking seven kinds of nuts/seeds, peas, and/or beans, each of these may only be counted once.

Plant-based meat substitutes or analogues, marketed as vegetarian or vegan alternatives to meat, will also be counted as varieties in the meat, poultry, or fish staple food. Varieties of such meat analogues may include, but

are not limited to, mycoprotein-based meat analogues, soy-based meat analogues (*e.g.*, tofu or tempeh) and gluten-based meat analogues (*e.g.*, seitan). For such meat analogues variety is assigned in the traditional way (*i.e.*, by main ingredient and by product kind). This means that if a firm stocked three packages of tofu this would be considered one staple variety counting toward the breadth of stock in the meat, poultry, or fish staple food category. In this example, additional units of this or other soy-based meat analogues (*e.g.*, three bags of textured soy protein or three boxes of soy-based vegan hot dogs) would not further be counted as additional varieties in the meat, poultry, or fish staple food category. None of these or any other meat analogues may be counted as a variety in any other staple food category.

Even with the addition of these plant-based varieties into the meat, poultry, or fish staple food category it will be necessary for most firms to stock animal-based varieties to meet the breadth of stock requirement for the meat, poultry, or fish staple food category. For example, if a firm stocked five of the aforementioned plant-based varieties (*e.g.*, three jars of peanut butter [nuts/seeds], three bags of dried black beans [beans], three bags of dried lentils [peas], three packages of tofu [soy-based meat analogue], and three packages of seitan [gluten-based meat analogue]), that firm would still be required to stock at least two more varieties in the meat, poultry, or fish staple food category (*e.g.*, three dozen eggs, three packages of frozen chicken cutlets, and three packages of ham).

These changes better align SNAP regulations with the nutritional guidance of USDA’s MyPlate, help to ease the burden of compliance on retail food stores, and serve to increase the availability of healthy food options for low-income Americans.

Some governmental, medical, and advocate commenters believed that additional restrictions should be placed on these required varieties to ensure that a certain number of healthy options were available. For example, two city health departments, one noted earlier as representing a city of 8.5 million, and another representing a city of over 1.5 million containing over 2,300 SNAP authorized firms, argued that, within each staple food category, certain kinds of healthy varieties should be mandated by FNS. Examples of such healthy varieties included low-fat dairy, lean meat, fresh vegetables, and whole grain breads. While FNS does agree with the commenters that argued that such changes would likely increase healthful

options for SNAP participants, the Agency believes that incorporating such additional enhancements to this provision could be overly burdensome on retailers.

Other commenters suggested that variety shortfalls in one or more staple food categories should be allowed to be covered with additional varieties of fruits or vegetables (e.g., a store may stock only five varieties of dairy but nine varieties of fruits and vegetables). While the Agency supports changes that would encourage firms to stock more nutritious products, including fresh fruit and vegetable products, such a change would run counter to statutory requirements of the 2014 Farm Bill that a retailer offer for sale “a variety of at least 7 foods in each of the 4 categories of staple foods” and exceeds the Agency’s statutory authority.

Some commenters who supported the proposed provision pointed out that a lax definition of “variety” would allow stores to skirt variety requirements by stocking seven different formats of one or two kinds of products with the same main ingredient. If a lax definition of “variety” were implemented, for example, the variety requirement for the vegetables or fruits staple food category could be satisfied by frozen French fries, powdered mashed potatoes, frozen hash browns, potato chips, canned cream of potato soup, frozen tater tots, and potatoes. FNS concurs with these concerns and will not be altering the proposed definition of “variety” to allow for different formats of products with the same main ingredient to count as different varieties.

Under both current Agency regulations and the final rule, “variety” is generally defined by product kind or main ingredient for the meat, poultry, or fish and vegetables or fruits staple food categories. This means that chicken, pork, and beef each represent discrete varieties for the former category and that apple, banana, and lettuce each represent discrete varieties for the latter category. Products like Empire apples and McIntosh apples may have different names and slightly different appearances, but they are generally recognized as the same kind of product. For this reason both Empire apples and McIntosh would be not each be considered a discrete variety, but rather the discrete variety is the product kind itself—apples. Likewise although apples, 100% apple juice, and applesauce are different products, they would not each be considered a discrete variety for the purposes of SNAP Criterion A because they share the same main ingredient (i.e., apples). Similarly, although deli-sliced chicken breast,

frozen chicken drumsticks, and canned chicken are different products, they would not each be considered a discrete variety for the purposes of SNAP Criterion A because they share the same main ingredient (i.e., chicken). For multiple ingredient food products the first ingredient determines variety such that a frozen microwaveable meal with beef listed as the first ingredient would constitute a variety in the meat, poultry, or fish staple food category (i.e., beef) and a can of ravioli with tomato sauce listed as the first ingredient would constitute a variety in the vegetables or fruits staple food category (i.e., tomato). 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 (e.g., wheat and oats) as described in Part IV List of Examples below.

Numerous commenters requested additional Agency guidance on what constituted a variety for each of the four staple food categories. In response, a list of examples in Section IV is included in the preamble of the final rule; this list provides 20 examples of varieties in each of the four staple food categories and is intended to be illustrative, not exhaustive. Additionally, the examples listed in the proposed rule have been amended in the final rule to illustrate the intended flexibility for retailers. The changes made to the examples of varieties in the meat, poultry, or fish and the dairy products staple food categories reflect the inclusion of plant-based alternatives. “Plant-based” milk has been, for example, removed as a listed example and replaced with almond milk to reflect the inclusion of multiple varieties of plant-based milks (e.g., almond milk, soy milk, and rice milk) in the dairy products staple food category. Additionally, the example “melon” was removed and replaced with grapes as melon is not considered a product kind under the definition of “variety” but instead includes several discrete varieties (e.g., honeydew and cantaloupe). Likewise, “breakfast cereal” was removed and replaced with “rice” because the former is not a

product kind but instead includes several discrete varieties (e.g., rice-based breakfast cereal and oat-based breakfast cereal).

After review of all comments on this provision, this final rule has largely retained the long-standing Agency definition of “variety” and, as described above, modifies the definition of “variety” to allow retailers more flexibility in meeting the breadth of stock provision in the dairy, bread and cereals, and meat, poultry, and fish staple food categories. This provision will be implemented for all new applicant firms and all firms eligible for reinstatement 120 days after the effective date of this final rule and 365 days after the effective date of this final rule for all currently authorized firms.

#### *Public Disclosure of Firms Sanctioned for SNAP Violations*

This discretionary provision proposed to reaffirm the Agency’s authority and intent to publicly disclose the store and owner name for firms sanctioned for SNAP violations. This provision received few comments most of which were supportive. Of the total 1,260 germane and non-duplicative public comments received, 14 comments, or about 1% of total public comments, specifically addressed this provision. About 71% of comments that specifically addressed this provision were supportive while approximately 14% opposed this provision and approximately 14% were generally divided and/or expressed mixed opinions. No retailer commenters specifically opposed this provision, industry trade groups that commented specifically on this provision generally opposed this provision and all other commenter types that commented on this provision were generally supportive.

Three retailer associations (i.e., the international convenience store trade association, the petroleum marketers’ trade association, and the national food retailer trade association) opposed the disclosure of this information. One noted that it, “. . . does not believe that the name of a store owner should be disclosed if the owner name identifies an individual in the store. [Our] members believe that the owner name disclosure is unnecessary and could lead to mental and emotional harm to the owner” and went on to add, “FNS should also consider and take into consideration the seriousness of the sanctions imposed and whether there have been multiple violations. Publicizing a store owner’s private information for a first time sanction that may have resulted from an inadvertent

violation is unreasonable and clearly extreme.” Another of these three associations commented, “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.” A fourth retailer association representing independent grocers seconded this final point and stated the group, “. . . is not opposed to public disclosure of disqualified retailers who have engaged in fraudulent activity after the appeals process has been exhausted; however [the organization] encourages the Agency to remove or amend the public notice when a store is sold so the new owners are not harmed by this disclosure.”

One State welfare fraud investigator association commented, “We believe the proposed rule changes (increasing the minimum number of categories in which perishable goods are required, amending the depth of stock, redefining ‘Retail Food Store’ to exclude restaurants, and, particularly, disclosing information about retailers who have violated SNAP rules) would serve to deter fraud.” A city health department representing the large city of 8.5 million and over 10,000 SNAP authorized firms also stated that this provision will “increase integrity efforts against fraud, waste, and abuse in SNAP”.

FNS closely monitors retailers to ensure that they comply with Program rules and regulations. FNS may warn or sanction retailers found violating Program rules. Sanctions can include time-limited or permanent Program disqualification as well as civil penalties. This provision is an essential tool in Agency efforts to combat and deter Program fraud and abuse. For example, the names of retail stores and owners whom have been charged, indicted, or convicted for SNAP retailer fraud by federal, state or local authorities are already disclosed publicly through news releases and other means. This provision reaffirms FNS’ authority and intent to disclose the store and owner name for firms sanctioned for SNAP violations. In response to the suggestion that encourages the Agency to remove or amend the public notice when a store is sold so the new owners are not harmed by this disclosure, FNS believes that the public disclosure of both the retail store name and the owner who had been sanctioned would mitigate the potential harm to a new store owner.

FNS, however, acknowledges the concerns of these commenters. As a

result, FNS has clarified and narrowed this provision in the final rule. Specifically, the final rule stipulates that information regarding firms sanctioned for SNAP violations will be disclosed by FNS only for the duration of the sanction. Firms sanctioned for lesser offenses (*e.g.*, sale of minor ineligibles) may face term disqualifications as short as six months. FNS agrees that making the owner and store name of such firms indefinitely available to the public is neither necessary nor is it judicious. This provision has been modified such that FNS may disclose the name and address of the store, the owner names(s), and information about the sanction itself for the duration of the sanction. The duration of the sanction lasts until the period of disqualification ends or until the civil penalty has been paid in full, whichever is longer. Additionally, this provision has also been modified such that in the event that a sanctioned firm is assigned a civil penalty in lieu of a period of disqualification, as described in 7 CFR 278.6(a), FNS may continue to disclose this information for as long as the duration of the period of disqualification or until the civil penalty has been paid in full, whichever is longer. The information regarding firms sanctioned with permanent disqualification for offenses such as the trafficking SNAP benefits should and will be made publicly available for the duration of the disqualification (*i.e.*, indefinitely). Program violations that result in a permanent disqualification are serious offenses and the Agency is dedicated to fighting Program fraud and abuse in all forms. FNS agrees with the comments from governmental entities that the public disclosure of the owner and store name of firms that violate Program rules is a powerful deterrent to retailer SNAP fraud. This provision will be implemented on the effective date of this final rule.

#### IV. List of Examples

##### *Summary of List of Examples*

The final rule codifies a statutory provision to increase the required number of staple food varieties in each of the four staple food categories from three to seven and to increase the required number of staple food categories containing at least one perishable foods variety from two to three, where “perishable foods” are defined as items which are either frozen, fresh, unrefrigerated, or refrigerated staple food items that will spoil or suffer significant deterioration in quality within three weeks. The final rule also codifies a discretionary

provision which clarifies and modifies the definition of acceptable “variety” in each of the four staple food categories.

Included below are lists of acceptable varieties in the four staple food categories. Also included is an examination of what constitutes a stocking unit for the purposes of the depth of stock provision. Finally, included is a list of food items which are and are not considered accessory food items. The lists of examples that follow are intended to be illustrative and provide guidance on the final rule. What follows is not to be construed as an exhaustive list of staple food varieties, stocking units, or accessory food items.

##### *The Meat, Poultry, or Fish Staple Food Category*

In the meat, poultry, or fish staple food category “variety” is generally defined by product kind or main ingredient. This means that chicken, pork, and beef each represent discrete varieties. For multiple ingredient food products the first ingredient determines variety such that a frozen microwaveable meal with beef listed as the first ingredient would constitute a variety in the meat, poultry, or fish staple food category (*i.e.*, beef).

This list of examples serves to provide guidance on acceptable varieties in the meat, poultry, or fish staple food category. The meat, poultry, or fish staple food category now includes varieties of meat analogues (*e.g.*, soy-based meat analogue and gluten-based meat analogue). The meat, poultry, or fish staple food category also now includes three types of plant-based protein staple foods (*i.e.*, nuts/seeds, beans, and peas). Each of these three aforementioned plant-based protein types may only be counted once each as a variety in the meat, poultry, or fish staple food category. Alternatively, beans and peas may instead be counted once each as a variety in vegetables or fruits staple food category. These two types (*i.e.*, beans and peas) may only be counted once each regardless of the staple food category they are counted in. Nuts/seeds may only be counted once as a variety in the meat, poultry, or fish staple food category, but not in the vegetable or fruits staple food category.

What follows is an illustrative, but not exhaustive, list of 20 acceptable varieties in this staple food category. Included parenthetically with each variety are two different examples of food items which would usually fall within that variety. The examples of multiple ingredient food items in this list would be acceptable only if the listed main ingredient would be

considered a variety in the meat, poultry, or fish staple category. Perishable foods are indicated by the presence of an asterisk (\*).

**Plant-based Protein Types:**

1. Nuts/Seeds (*e.g.*, sunflower seeds or peanut butter)
2. Beans (*e.g.*, dried black beans or dried red kidney beans)
3. Peas (*e.g.*, dried lentils or canned split pea soup with a first listed ingredient of split peas)

**Meat, Poultry, and Fish:**

4. Turkey (*e.g.*, fresh deli sliced turkey\* or fresh ground turkey\*)
5. Goat (*e.g.*, fresh goat chops\* or frozen rack of goat ribs\*)
6. Salmon (*e.g.*, packaged smoked salmon or canned salmon)
7. Chicken (*e.g.*, fresh chicken cutlets\* or frozen chicken nuggets\*)
8. Beef (*e.g.*, fresh ground beef\* or beef jerky)
9. Tuna (*e.g.*, fresh albacore tuna steak\* or canned albacore tuna fish)
10. Shrimp (*e.g.*, frozen shrimp scampi meal\* or fresh cocktail shrimp\*)
11. Tilapia (*e.g.*, fresh tilapia filet\* or panko breaded frozen tilapia meal\*)
12. Crab (*e.g.*, fresh crab cakes\* or canned crab meat)
13. Soy-based meat analogue (*e.g.*, tofu\* or soy-based vegan chicken alternative\*)
14. Chicken eggs (*e.g.*, fresh eggs\* or liquid egg whites\*)
15. Catfish (*e.g.*, frozen catfish filet\* or smoked packaged catfish)
16. Lamb/Mutton (*e.g.*, fresh lamb chops\* or fresh ground lamb\*)
17. Cod (*e.g.*, frozen cod\* or fresh cod\*)
18. Pork (*e.g.*, pork loin\* or fresh sliced ham\*)
19. Duck (*e.g.*, fresh duck\* or canned duck)
20. Clams (*e.g.*, frozen clams\* or canned clam meat)

**The Vegetables or Fruits Staple Food Category**

In the vegetables or fruits staple food category “variety” is generally defined by product kind or main ingredient. This means that apples, bananas, and lettuce each represent discrete varieties. For multiple ingredient food products the first ingredient determines variety such that a can of ravioli with tomato sauce listed as the first ingredient would constitute a variety in the vegetables or fruits staple food category (*i.e.*, tomato).

What follows is an illustrative, but not exhaustive, list of 20 acceptable varieties in this staple food category. Included parenthetically with each variety are two different examples of food items which would usually fall

within that variety. The multiple ingredient food item examples in this list would be acceptable only if the main ingredient is in the vegetables or fruits staple category. Perishable foods are indicated by the presence of an asterisk (\*).

1. Potatoes (potatoes\* or frozen tater tots\*)
2. Oranges (100% orange juice\* or fresh oranges\*)
3. Tomatoes (canned tomato soup or sun dried tomatoes)
4. Apples (dried apples or pre-cut apple go-packs\*)
5. Pumpkin (canned pumpkin or fresh whole pumpkin)
6. Bananas (fresh bananas\* or frozen bananas\*)
7. Onions (canned onions or fresh onions\*)
8. Grapes (fresh grapes\* or 100% grape juice)
9. Lettuce (fresh head of iceberg lettuce\* or pre-cut and bagged romaine lettuce\*)
10. Pineapples (canned pineapple rings or fresh whole pineapple\*)
11. Cucumbers (fresh cucumbers\* or jarred pickles)
12. Strawberries (fresh strawberries\* or frozen strawberries\*)
13. Peaches (canned peaches or fresh peaches\*)
14. Carrots (fresh whole carrots\* or pre-cut carrot stick go-packs\*)
15. Grapefruit (fresh whole grapefruit\* or grapefruit fruit cup\*)
16. Cabbage (*e.g.*, fresh head of cabbage\* or jarred kimchi)
17. Artichoke (*e.g.*, fresh artichoke\* or canned artichoke hearts)
18. Broccoli (*e.g.*, fresh broccoli\* or frozen broccoli florets\*)
19. Avocados (*e.g.*, ready-made guacamole\* or fresh avocado\*)
20. Celery (*e.g.*, pre-cut celery stick go-packs\* or fresh whole celery\*)

**The Dairy Staple Food Category**

In common language usage a “dairy product” is understood to mean an edible food product produced from the milk of a mammal, most commonly cow’s milk. Some traditional varieties of dairy include milk, butter, yogurt, and cheese. There are a small number of unique varieties of commonplace dairy products, most of which share the same main ingredient (*i.e.*, milk). Based on the limited types of commonplace dairy products and the new breadth of stock requirements, it is impractical to define “variety” for the purposes of this staple food category based on the main ingredient and it is useful to include plant-based alternatives. Plant-based dairy products will be considered a variety in the dairy products staple food

category based on their main ingredient and the traditional dairy product for which they are a substitute. So, for example, almond-based milk, soy-based milk, almond-based cheese, and soy-based cheese will each be considered a discrete variety in the dairy products staple food category under the final rule. Though these items are plant-based, they are recognized as dairy equivalents and therefore, do not count as varieties in the remaining staple food categories. Additionally, some of the traditional types of dairy products have been divided into varieties based on distinct and generally accepted differences. For example, the dairy type cheese has been divided into two discrete varieties: Cow’s milk-based soft cheese and cow’s milk-based hard/firm cheese based on generally accepted industry norms. What follows is an illustrative, but not exhaustive, list of 20 acceptable varieties in this staple food category. Included parenthetically with each variety are two different examples of food items which would usually fall within that variety. The multiple ingredient food item examples in this list would be acceptable only if the main ingredient is in the dairy products staple category. Perishable foods are indicated by the presence of an asterisk (\*).

1. Yogurt (*e.g.*, fresh whole milk French vanilla yogurt\* or fresh nonfat peach yogurt\*)
2. Soy yogurt (*e.g.*, strawberry soy yogurt\* or lite vanilla soy yogurt\*)
3. Almond yogurt (*e.g.*, mixed berry almond yogurt\* or low-fat plain almond yogurt\*)
4. Perishable cow milk (*e.g.*, fresh skim cow milk\* or fresh whole cow milk\*)
5. Perishable cow kefir (*e.g.*, nonfat fresh blueberry kefir\* or fresh banana kefir\*)
6. Shelf-stable liquid cow milk (*e.g.*, condensed cow milk or evaporated cow milk)
7. Shelf-stable powdered cow milk (*e.g.*, powdered cow milk or casein/whey powder)
8. Cow milk-based infant formula (*e.g.*, organic, milk-based formula or milk-based, iron-fortified formula)
9. Soy-based infant formula (*e.g.*, iron-fortified, soy-based formula or hypoallergenic, soy-based formula)
10. Butter (*e.g.*, frozen sweet cream butter\* or fresh salted butter\*)
11. Butter substitute (*e.g.*, margarine or non-dairy spread)
12. Sour cream (*e.g.*, fresh, lite sour cream\* or fresh, organic sour cream\*)

13. Almond-based milk (e.g., refrigerated almond milk\* or shelf-stable almond milk)
14. Soy-based milk (e.g., shelf-stable soy milk or refrigerated soy milk\*)
15. Rice-based milk (e.g., shelf-stable rice milk or refrigerated rice milk\*)
16. Firm/hard cheese (e.g., fresh deli sliced cheddar cheese\* or packaged grated parmesan cheese)
17. Soft cheese (e.g., fresh curd cheese\* or pre-wrapped American cheese product slices\*)
18. Goat cheese (e.g., fresh honey goat cheese\* or fresh plain goat cheese\*)
19. Soy-based cheese alternative (e.g., mozzarella-style soy cheese\* or American-style soy cheese slices\*)
20. Perishable goat milk (e.g., fresh whole goat milk\* or fresh low-fat goat milk\*)

#### *The Bread or Cereals Staple Food Category*

Most bread or cereals food items sold and consumed in America primarily derive from one of the following four grains: Wheat, corn, rice, and/or oats. Based on the limited types of common grains and the new breadth of stock requirements, therefore, it is impractical to define “variety” for the purposes of this staple food category based exclusively on the product kind or exclusively on the main ingredient, as is the standard for two of the other staple food categories.

What follows is an illustrative, but not exhaustive, list of 20 acceptable varieties in this staple food category. Included parenthetically with each variety are two different examples of food items which would usually fall within that variety. The multi-ingredient food examples in this list would be acceptable only if the main ingredient is in the bread or cereal staple category. Perishable foods are indicated by the presence of an asterisk (\*).

1. Wheat (e.g., whole wheat flour or wheat germ)
2. Corn/maize (e.g., cornmeal or cornbread)
3. Rice (e.g., brown rice or basmati rice)
4. Oats (e.g., oatmeal or honey oat bread\*)
5. Barley (e.g., pearled barley or barley meal)
6. Rye (e.g., raw rye or rye bread\*)
7. Millet (e.g., millet flour or raw millet)
8. Quinoa (e.g., raw quinoa or quinoa pasta)
9. Teff (e.g., raw teff or injera\*)
10. Bread (e.g., a loaf of rye bread\* or a loaf of multigrain bread\*)
11. Pasta (e.g., gluten-free spaghetti or whole wheat rotini)
12. Baking mixes (e.g., pancake mix or cornbread mix)

13. Tortillas (e.g., corn tortillas\* or flour tortillas\*)
14. Bagels (e.g., poppy seed bagels\* or plain bagels\*)
15. Pitas (e.g., low-carb pita\* or whole wheat pita\*)
16. Cold breakfast cereal (e.g., rice-based cereal or oat-based cereal)
17. English muffins (e.g., whole wheat English muffins\* or honey oat English muffins\*)
18. Hot breakfast cereal (e.g., cream of wheat or farina)
19. Buns/rolls (e.g., frozen dinner rolls\* or hot dog buns\*)
20. Infant cereal (e.g., wheat-based infant cereal or oat-based infant cereal)

As an example, a firm could meet the requirements for the bread or cereals staple food category by stocking three loaves of bread, three bags of rice, three boxes of spaghetti, three bags of pitas, three bags of tortillas, three bags of flour and three packages of cornmeal.

#### *Stocking Units*

The proposed rule put forward a discretionary provision requiring six stocking units per qualifying staple food variety. The final rule halves that proposed requirement and codifies a discretionary provision that requires three stocking units per qualifying staple food variety. This list of examples serves to define “stocking unit” for the purposes of this provision. If a food item would not usually be sold individually, then it does not individually constitute a stocking unit. Such food items are usually sold in bunches, boxes, bags, or packages with a number of other identical items (e.g., a loaf of bread, a bunch of grapes, a carton of eggs, a bag of rice, or a package of sliced turkey). The individual sale of such food items would be impractical given their small individual size. For such products it is the bunch, box, bag, or package that represents one stocking unit. What follows is an illustrative, but not exhaustive, list of such products and their standard stocking unit size.

- Small fruit and berries: A package of blueberries or a package of strawberries
- Leaf vegetables: A head of lettuce or a bunch of collard green leaves
- Stalk/root vegetables: A bunch of carrots or a bunch of celery sticks
- Deli sliced items: A package of turkey slices or a package of cheddar cheese slices
- Grains: A bag or sack of rice or a box of oatmeal

If a food item is usually or often sold singly, then that single unit may constitute one stocking unit. What

follows is an illustrative, but not exhaustive, list of such products and their standard stocking unit sizes:

- Hand fruit: A banana or an apple
  - Large fruits or vegetables: A watermelon or a pumpkin
  - Small portion or single-serving packages: A yogurt cup or a fruit cup
- If a food item (e.g., grains, dried fruits, nuts, deli cold cuts, etc.) is stored singly in a common container or unit, but sold to customers by weight, then the standard stocking unit is considered to be one pound. A bulk container containing three pounds of dried cranberries, available to and sold to the customer by weight, therefore, would constitute three stocking units of one variety in the fruit or vegetable staple food category.

If FNS determines that a bunch, box, bag, or package usually sold as a unit has been subdivided into unreasonably small units in order to meet this depth of stock provision, FNS will not consider such food items to constitute a stocking unit for the purposes of this depth of stock provision.

#### **V. List of Accessory Food Items and Examples of Staple Food Items**

##### *Accessory Food Items*

The final rule codifies a discretionary provision which clarifies the definition of “staple food”. This provision realigns the definition of “accessory food items” with statutory intent, defining “accessory food items” to include snacks, desserts, and foods that complement or supplement meals.

While any food or food product intended for home consumption is generally considered to be eligible for purchase with SNAP benefits, only staple food products are counted toward a retail food store’s eligibility to participate in SNAP. Staple foods are generally considered to be basic items of food that make up a significant portion of an individual’s diet and are usually prepared at home and consumed as a major component of a meal. Some examples include tomatoes, ground beef, milk, or rice. Accessory food items, on the other hand, are generally considered to be food items consumed as snacks or desserts as well as food items that complement or supplement meals, such as most beverages and spices.

A product is often considered an accessory food item if it is usually consumed on its own, usually as a snack or dessert, without being cooked or prepared (e.g., potato chips or an ice-cream sandwich). Products that are explicitly identified as staple foods, such as hand fruit, are not considered

accessory foods even if they are sometimes consumed on their own without being cooked or prepared. A product is also often considered an accessory food item if it is usually used to flavor other foods (e.g., salt or sugar) or if it is a beverage (e.g., soda pop or water). If a product would normally be considered a staple food, but is sold in a small package size (e.g., a small bag of dried apricots or a yogurt cup), that product is still generally considered a staple food.

Commercially processed foods and prepared mixtures with multiple ingredients are usually assigned to the staple food category of their main ingredient on their "Nutrition Facts" label per current regulations and policy. For example, a frozen pizza with enriched white wheat flour listed as its main ingredient would be considered a staple food variety in the bread or cereals staple food category. If the main ingredient of a multiple ingredient food item is an accessory food item (e.g., salt), then that multiple ingredient food item is considered an accessory food item. The one exception to this policy is the accessory food item water. If the main ingredient of a multiple ingredient food item is water, then that item is assigned to the staple food category of its second listed ingredient. If that second ingredient is also an accessory food item (e.g., sugar) then that item is considered an accessory food item.

All food products identified as accessory food items in Agency guidance materials shall not be considered staple foods for the purposes of determining the eligibility of any firm. Any food products with main ingredients identified as accessory food items in Agency guidance shall also be considered accessory food items and shall not be considered staple foods for the purposes of determining the eligibility of any firm. Any other food product that is not identified as an accessory food item in Agency guidance materials shall be considered a staple food in the category of its main ingredient. Agency guidance that explicitly identifies types of accessory food items will be updated as necessary per 7 CFR 278.1(t). If a retail food store owner is unsure as to whether a food item is or is not an accessory food item, they may look online for guidance through the USDA FNS's Ask the Expert system at: <http://www.fns.usda.gov/ask-the-expert> (--> "Nutrition" --> "Supplemental Nutrition Asst Prgm"). Additional training for retail food store owners will be made available to further clarify this matter as deemed necessary.

What follows is a list of accessory food items; any product not listed below

or in future Agency guidance will be considered a staple food, as explained above, provided that its main ingredient is considered a variety in the staple food category.

#### *Snack and Dessert Food Items:*

- Potato, corn, wheat, tortilla, pita, and vegetable chips, crisps, sticks, and straws; onion ring snacks; corn nuts; snack mixes; crackers; pork rinds; pretzels; pre-popped or unpopped popcorn; and cheese puffs or curls
- Doughnuts, cupcakes, cookies, snack cakes, muffins, pastries, sweet rolls, pies, cakes, pudding, churros, scones, gelatin desserts, and any packaged mixes intended to create any of the aforementioned products
- Mints, chocolate, marshmallow, gum, toffee, brittle, fudge, marzipan, nougat, candy bars, and candy of all kinds
- Ice cream, ice milk, frozen yogurt, custard, whipped cream, sherbet, sorbet, gelato, granita, Italian ices, frozen carbonated beverages, snow cones, and ice pops
- Any food product with a main ingredient that appears on this list or in Agency guidance as an accessory food item

#### *Food Items That Complement or Supplement Meals:*

- Powdered, dried, or extracted spices or seasonings
- Baking soda and baking powder
- Sugar, honey, maple syrup, aspartame, molasses, high fructose corn syrup, and any other natural or artificial sweeteners
- Soda pop, sports or energy drinks, iced tea, fruit punch, mixers for alcoholic beverages, water, and all other carbonated or uncarbonated beverages (except milk, plant-based milk alternatives, and 100% fruit or vegetable juice)
- Monosodium glutamate, sodium nitrate, olestra, and any other food additives or any food product that is edible but non-caloric and non-digestible
- Vegetable oil, olive oil, shortening, lard, safflower oil, and any other solid or liquid oils or fats (except butter)
- Ketchup, mayonnaise, salad dressing, hot sauce, mustard, vinegar, relish, horseradish, chutney, duck sauce, marmite, and all other condiments
- Vanilla extract or other flavor extracts and cooking wine
- Gravy and bouillon
- Any food product with a main ingredient that appears on this list

or in Agency guidance as an accessory food item

Some mixed packaged food products may consist of more than one discrete element, such as salted crackers and soft cream cheese packaged together. In this example, the salted crackers are considered an accessory food while the soft cream cheese is considered a staple food. If the accessory food item is the main component of the mixed packaged food product, per the ingredients list on the Nutrition Facts label, then such a product is considered an accessory food item. If the staple food item is the main component of the mixed packaged food product, per the ingredients list on the Nutrition Facts label, then such a product is considered a staple food item.

The definition of "accessory food items", however, is not based on packaging size or style, nor does it include food items identified in any of the four staple food categories. What follows is an illustrative, but not exhaustive, list of staple food items NOT considered accessory food items; any product not listed below will be considered a staple food in the staple food category of its main ingredient as explained previously.

#### *Examples of Staple Foods:*

- Commercially processed foods and prepared mixtures with multiple ingredients with a staple food main ingredient
- Pre-cut, to-go packages or cups of fresh apple, carrot, grapefruit, celery, or other fruits or vegetables
- Single-serving yogurt cups containing or not containing fruit, with a staple food main ingredient
- Milk, flavored milk (e.g., chocolate milk), and plant-based milk alternatives (e.g., soy milk), with a staple food main ingredient
- Yogurt and flavored yogurt (e.g., strawberry yogurt) with a staple food main ingredient
- Dehydrated, smoked, fermented, cured, or dried meats such as jerky or salami with a staple food main ingredient (e.g., beef or chicken)
- Peanut butter, strawberry jam, and other plant-based spreads with a staple food main ingredient
- Fresh vegetables often used as herbs including, but not limited to, fresh basil, fresh thyme, and fresh mint
- 100% fruit and/or vegetable juice
- Salsa, hummus, guacamole, and other plant-based dips with a staple food main ingredient
- Pickled fruits, vegetables, eggs, or meats with a staple food main ingredient
- Single-serving packets of dried fruit

including, but not limited to, raisins, prunes, dried apples, and dried papaya spears, as well as dried vegetables

- To-go packages of nuts or seeds

## VI. Procedural Matters

*Executive Order 12866, Executive Order 13563, and Executive Order 13272*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both cost and benefits, of reducing cost, of harmonizing rules, and of promoting flexibility. Finally, Executive Order 13272 and the Small Business Jobs Act of 2010 require agencies engaged in rulemaking actions to respond directly to written comments submitted by the Small Business Administration (SBA) Office of Advocacy.

The SBA Office of Advocacy submitted a comment in response to the proposed rule. This comment identified shortcomings in FNS's Regulatory Impact Analysis (RIA) and Regulatory Flexibility Analysis (RFA) and also conveyed the concerns of small business stakeholders regarding the RIA, RFA, and certain provisions of the rule as proposed. The SBA commented that the RIA and RFA lacked analytical rigor and transparency, and further maintained that the costs, benefits, and other impacts of the proposed rule were not sufficiently quantified in the RIA and RFA. Specifically, the SBA stated that the Agency's "conclusion that the rule's impact on small authorized SNAP retailers will amount to \$140 is underestimated." Furthermore, the SBA indicated that FNS failed to consider alternatives adequately when drafting the proposed rule, especially with respect to a narrower rulemaking action that codified only the statutory breadth of stock provision. In response to these and other concerns FNS has carefully reexamined the proposed RIA and RFA. The final versions of these documents reflect substantial modifications made in order to incorporate the feedback of the SBA as well as industry trade associations. These changes address concerns regarding the consideration of alternatives and the calculation of the cost impact, among others.

Additionally, in its comment the SBA suggested that "FNS should commit to

publishing small business compliance guides as this rule becomes finalized as it will help small businesses adapt to the new requirements." As stated previously in this final rule's section titled "Retailer Guidance for Implementation of Final Rule," many Program stakeholders specifically requested that FNS provide retailers with detailed guidance and training materials on the rule to ensure that all retailers fully understand all of the provisions of the final rule. In addition to the clarifications and lists of examples provided in the preamble of the final rule, FNS will answer retailer inquiries and provide retailers with additional notice, guidance, and training materials during the aforementioned implementation period per 7 CFR 278.1(t). This will include extensive outreach to ensure that the retailer community is provided with sufficient technical assistance to ensure that all firms are adequately informed regarding these changes to SNAP rules. The SBA also suggested that FNS should consider "granting increased compliance time for a percentage of small retailers." As stated previously in this final rule's section titled **DATES**, the stocking provisions of this final rule will be implemented 365 days after the effective date of this final rule for all currently authorized firms. This phased implementation will give small format retailers the time they need to come into compliance with the provisions of this final rule.

This final rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB). The Regulatory Impact Analysis (RIA) for this rulemaking was published as part of the docket in Supporting Documents on [www.regulations.gov](http://www.regulations.gov). A summary of the RIA follows.

### *Regulatory Impact Analysis Summary*

**Need for Action:** The final rule is needed to clarify and enhance current regulations governing the eligibility of retail food stores participating in SNAP and to codify mandatory provisions of the 2014 Farm Bill.

**Benefits:** This final rulemaking will codify mandatory provisions of the 2014 Farm Bill and strengthen provisions in current regulations to conform to the intent of statutory requirements. The final rule will increase the variety of nutrient-dense staple food products offered for sale at SNAP-authorized firms, while also increasing the required depth of stock. Together, these provisions will help to ensure that SNAP households have access to healthier foods on a continuous basis. The final rule reflects the Agency's

commitment to provide vital nutrition assistance to our most vulnerable citizens, protect taxpayer monies, and safeguard Program integrity. The final rule allows FNS to ensure that retailers authorized to participate in SNAP as retail food stores are consistent with the purposes of the Program. The final rule reinforces the intent of SNAP that participants use their benefits to purchase more nutritious foods intended for home preparation and consumption.

**Costs:** There will be costs to the Federal government as a result of the final rule due to a short-term increase in store visits to ensure compliance with the new stocking requirements. The Agency has estimated the total cost to the Federal government as approximately \$3.7 million in Fiscal Year (FY) 2018 and \$15 million over five years. With respect to the cost impact to retailers, the rule would mainly impact those firms that are minimally stocked and those that are primarily restaurants and, therefore, are inconsistent with the statutory intent of the Act to make nutritious foods available to SNAP participants for home preparation and consumption. Some retailers may incur small costs due to the need to modify their stock. Estimates of the final rule's impacts on retailers are based on an analysis of a nationally representative sample of 1,392 SNAP authorized small-format firms using data gathered by FNS during store inspections, or store visits. Based on this analysis FNS estimates that the average small-format SNAP authorized firm already stocks over 70% of the stock needed to meet the requirements of this final rule and the average small-format SNAP authorized firm will only need to stock an additional 24 items. Moreover, this analysis indicated that over 98% of small-format SNAP authorized firms currently stock at least nine perishable staple food items and, therefore, that the overwhelming majority of small-format SNAP authorized firms will not need to stock any additional perishable items to meet the requirements in this final rule. The average cost to a small SNAP authorized retail food store is estimated at about \$245 in the first year and about \$620 over five years.

Firms that do not stock sufficient staple food items to meet the new stocking requirements will have the opportunity to modify their staple food stock in order to be eligible to continue participating in SNAP. In the course of store reviews, FNS has observed that stores that are determined to not be eligible typically expand their food offerings to participate in SNAP.

It should be noted that most of the provisions in this final rule have been modified significantly from their proposed language. This final rule, for example, requires less stock than the proposed rule (*i.e.*, 168 item stock requirement proposed and 84 item stock required in the final rule). Nevertheless, the final average retailer cost estimate (about \$245 in the first year and about \$620 over five years per firm) represents an increase over the cost estimate presented in the proposed RIA and RFA (about \$140 in the first year per firm). Several commenters pointed out types of costs, including ongoing costs, not originally accounted for in the Agency's cost estimate (*e.g.*, "opportunity costs"). FNS appreciates this public feedback and has incorporated these types of costs in its calculations of estimated cost for the final rule's RIA and RFA.

#### *Regulatory Flexibility Act*

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Pursuant to that review, FNS believes that the rulemaking does not present a substantial economic impact to a considerable number of small businesses; although the number of stores impacted is large, we estimate that the cost to those small businesses for stocking additional stock would be nominal, on average about \$245 in the first year and \$620 over five years. FNS has prepared a final Regulatory Flexibility Analysis (RFA) to respond to public comments received in reference to the proposed RFA and to reflect revisions to the rule. The complete RFA for this final rule was published as part of the docket in Supporting Documents on [www.regulations.gov](http://www.regulations.gov). A summary of the RFA follows.

#### *Regulatory Flexibility Analysis Statement*

This final rule will impact nearly 200,000 small grocery stores and convenience stores by requiring that these stores make changes to their stock in order to comply with the new minimum stocking requirement mandated in this rule. FNS estimates that for the vast majority of stores the changes needed will be minimal and represent a negligible share of a store's total gross sales. The average small store will need to add an estimated 24 items to their existing stock to meet the new minimum requirement in this rule. Costs would be greatest in the first year, as stores make one-time changes to their stock. In future years, costs will be primarily opportunity costs associated with stocking items with lower profit

margins and administrative costs associated with reading guidance to ensure compliance with the requirements. The average cost to a SNAP-authorized retailer is estimated at about \$245 in the first year and \$620 over five years.

#### *Public Law 104–4, the Unfunded Mandate Reform Act*

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments, and the private sector. Under Section 202 of the UMRA, the Agency generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments in the aggregate, or to the private sector, of \$146 million or more (when adjusted for 2015 inflation; GDP deflator source: Table 1.1.9 at <http://www.bea.gov/iTable>) in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$146 million or more in any one year. This rulemaking is, therefore, not subject to the requirements of Sections 202 and 205 of the UMRA.

#### *Executive Order 12372*

Executive Order 12372 requires Federal agencies to engage in intergovernmental consultation with State and local officials when involved in Federal financial assistance programs and direct Federal development. SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final Rule codified in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372.

#### *Executive Order 13132, Federalism Summary Impact Statement*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have Federalism implications, agencies are directed to provide a statement for

inclusion in the preamble to the regulations describing the agencies' considerations in terms of the three categories called for under Section 6(b)(2)(B) of the Executive Order 13132.

FNS has determined that this rulemaking does not have Federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a Federalism summary impact statement is not required.

#### *Executive Order 12988, Civil Justice Reform*

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effects with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effects unless so specified in the Dates paragraph of the final rule. Prior to any judicial challenge to the provisions of the final rule or the application of its provisions, all applicable administrative procedures must be exhausted.

#### *Executive Order 13175, Tribal Impact Statement*

This rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Currently, FNS provides regularly scheduled quarterly information sessions as a venue for collaborative conversations with Tribal officials or their designees. Reports from these information sessions are part of the USDA annual reporting on Tribal consultation and collaboration.

During the open comment period FNS received a letter from an Indian Tribal Organization (ITO). On September 28, 2016, the Food and Nutrition Service met with the Tribal Organization and 8 Tribes represented by this Organization to further discuss comments contained in this letter. FNS identified one (1) actionable comment, *e.g.* SNAP

eligibility should be considered circumstantially in areas with limited food access.

The 2014 Farm Bill authorized additional consideration where an applicant retailer is located in an area with significantly limited access to food when determining the qualifications of that applicant. This flexibility of the rule was clarified during the meeting on September 28, to provide a deeper understanding of the agency's underlying rationale in implementing this program in this manner.

If a Tribe requests consultation, the Food and Nutrition Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

*USDA Regulation 4300-4, Civil Rights Impact Analysis*

FNS has reviewed this final rule in accordance with Departmental Regulations 4300-4, "Civil Rights Impact Analysis" (CRIA) and 1512-1, "Regulatory Decision Making Requirements" to identify and address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. This final rule enhances current regulations and codifies statutory requirements and, after a careful review of the final rule's intent and provisions, FNS has determined that this final rule will not have an adverse impact on any retail food store owners or SNAP recipients belonging to protected classes. The complete CRIA for this final rule was published as part of the docket in Supporting Documents on [www.regulations.gov](http://www.regulations.gov).

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. There is no new information collection burden associated with this final rule.

*E-Government Act Compliance*

FNS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes. FNS

intends to provide Program stakeholders with guidance and technical assistance materials related to this final rule utilizing online media. The Agency also intends to use online media to publicly disclose information regarding firms sanctioned for Program violations.

**List of Subjects**

*7 CFR Part 271*

Food stamps, Grant programs—Social programs, Reporting and recordkeeping requirements.

*7 CFR Part 278*

Claims, Disqualification, Financial institutions, Fines and penalties, Food stamps, Retail food stores, Wholesale food concerns.

Accordingly, for reasons set forth in the preamble, 7 CFR parts 271 and 278 are amended as follows:

- 1. The authority citation for 7 CFR parts 271 and 278 continue to read as follows:

Authority: 7 U.S.C. 2011-2036.

**PART 271—GENERAL INFORMATION AND DEFINITIONS**

- 2. In § 271.2:
    - a. Add a definition for *Firm* in alphabetical order.
    - b. Revise paragraph (1) of the definition of *Retail food store*.
    - c. Revise the definition of *Staple food*.
- The addition and revisions read as follows:

**§ 271.2 Definitions.**

\* \* \* \* \*

*Firm.* (1) *Firm* means:

- (i) A retail food store that is authorized to accept or redeem SNAP benefits;
- (ii) A retail food store that is not authorized to accept or redeem SNAP benefits; or
- (iii) An entity that does not meet the definition of a retail food store.

(2) For purposes of the regulations in this subchapter and SNAP policies, the terms firm, entity, retailer, and store are used interchangeably.

\* \* \* \* \*

*Retail food store* means:

(1) An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale qualifying staple food items on a continuous basis, evidenced by having no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of

perishable foods in at least three such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

\* \* \* \* \*

*Staple food* means 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (*e.g.*, tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not

limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

\* \* \* \* \*

**PART 278—PARTICIPATION OF RETAIL FOOD STORES WHOLESAL FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS**

- 3. In § 278.1:
  - a. Amend the last sentence in paragraph (b)(1)(i)(A) by removing the word “two” and adding in its place the word “three”.
  - b. Revise paragraph (b)(1)(ii)(A);
  - c. Amend the first sentence in paragraph (b)(1)(ii)(B) by removing the word “two” and adding in its place the word “three”.
  - d. Revise paragraph (b)(1)(ii)(C);
  - e. Revise the fourth sentence in paragraph (b)(1)(iv);
  - f. Redesignate paragraph (b)(6) as paragraph (b)(7);
  - g. Add new paragraph (b)(6).
  - h. Add paragraph (q)(5).

The additions and revisions read as follows:

**§ 278.1 Approval of retail food stores and wholesale food concerns.**

\* \* \* \* \*

- (b) \* \* \*
- (1) \* \* \*
- (ii) \* \* \*

(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking

requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.

\* \* \* \* \*

(C) Offer a variety of staple foods which means different types of foods within each staple food category. 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 products 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, poultry, or fish category. Variety of foods is not 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. 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 staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.

\* \* \* \* \*

(iv) \* \* \* In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. \* \* \*

\* \* \* \* \*

(6) *Need for access.* FNS will consider whether the applicant firm is located in an area with significantly limited access

to food when the applicant firm fails to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm’s stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process as described in paragraph (a) of this section.

\* \* \* \* \*

(q) \* \* \*

(5) *Public disclosure of firms sanctioned for SNAP violations.* FNS may disclose information to the public when a retail food store has been disqualified or otherwise sanctioned for violations of the Program after the time for administrative and judicial appeals has expired. This information is limited to the name and address of the store, the owner(s) name(s) and information about the sanction itself. FNS may continue to disclose this information for as long as the duration of the sanction. In the event that a sanctioned firm is assigned a civil penalty in lieu of a period of disqualification, as described in § 278.6(a), FNS may continue to disclose this information for as long as the duration of the period of disqualification or until the civil penalty has been paid in full, whichever is longer.

\* \* \* \* \*

Dated: December 7, 2016.

**Audrey Rowe,**  
*Acting Under Secretary, Food, Nutrition and Consumer Services.*

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**DEPARTMENT OF ENERGY**

**10 CFR Part 609**

**RIN 1901-AB38**

**Loan Guarantees for Projects That Employ Innovative Technologies**

**AGENCY:** Loan Programs Office, Department of Energy.