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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 278

RIN: 0584-AE27

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

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

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

Further, using existing authority in the Act and feedback from a Request for Information that included five listening sessions in urban and rural locations across the nation and generated 233 public comments, FNS is proposing several additional changes. Among other items, these proposed changes address depth of stock, amend the definition of staple foods, and amend the definition of “retail food store” to clarify when a retailer is a restaurant rather than a retail food

store. The rulemaking also proposes that FNS begin disclosing to the public specific information about retailers who have violated SNAP rules.

DATES: To be assured of consideration, comments on this proposed rule must be received by the Food and Nutrition Service on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The Food and Nutrition Service (FNS), USDA, invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- Federal e-Rulemaking Portal: Go to <http://www.regulations.gov>. Preferred method; follow the online instructions for submitting comments on docket [insert docket number].
- Mail: Comments should be addressed to Vicky Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division, Room 418, 3101 Park Center Drive, Alexandria, Virginia 22302.

All comments submitted in response to this rulemaking will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the internet via:
<http://www.regulations.gov>.

All submissions will be available for public inspection at the address above during regular business hours (8:30 a.m. to 5:30 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Address any questions regarding this rulemaking to Vicky Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division at the Food and Nutrition Service, 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 during regular business hours (8:30 am to 5:30 pm) Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

This proposed rulemaking is the result of two separate developments. First are statutory changes included in the 2014 Farm Bill. The second is the effort initiated by FNS in 2013 to look at enhancing the eligibility standards for SNAP retailers to better enforce the intent of the Act to permit low-income individuals to purchase more nutritious foods for home preparation and consumption.

The 2014 Farm Bill increases 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 statutory minimum of seven varieties. Further, the 2014 Farm Bill increases the minimum number of categories in which perishable foods are required from two to three. This proposed rule would codify these mandatory requirements.

In addition, on August 20, 2013, FNS published a notice entitled, “Request for Information: Supplemental Nutrition Assistance Program (SNAP) Enhancing Retail Food Store Eligibility” at 78 FR 51136. The Request for Information (RFI), which included fourteen 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 retailers that effectuate the purposes of SNAP are authorized to accept benefits. FNS received a total of 211 comments from a diverse group, including retailers, academics, trade associations, policy advocates, professional associations, government entities, and the general public. RFI comments were considered in drafting this proposed rule and a copy of the comment summary can be viewed at: <http://www.fns.usda.gov/rfi-retailer-enhancement>.

In this rulemaking, based in part on feedback received via the RFI, FNS is proposing further revisions to SNAP regulations pertaining to the eligibility of retailers to participate in SNAP as retail food stores. Using the authorities in Sections 3 and 9 of the Act, these proposed revisions are intended to limit retailers that do not further the purposes of the Program from participating in SNAP without negatively impacting access for beneficiaries. This proposed rule would not impact eligible foods that can be purchased with SNAP benefits.

Over the years, a growing number of retailers have become authorized to participate in the Program as retail food stores. Some of these retailers operate primarily as restaurants, not retail food stores. Nothing in current regulations specifically prohibits items sold for SNAP benefits that are cold at the point-of-sale from being heated or cooked in the store after purchase. Further, current rules allow foods to be classified as staple or non-staple by their first ingredient; therefore some pizza restaurants, for example, have been deemed eligible with pizza as the qualifying staple food based on the primary ingredient (bread). After selling a cold pizza to SNAP customers, these firms subsequently heat the pizza and then have ultimately sold hot food from their pizza-restaurant location. Except for limited exceptions set forth under Section 3(k) of the Act and 7 CFR 278.1(d)(3), which permit State agencies to enter into contracts with restaurants to prepare and serve low-cost meals to homeless persons, elderly persons and SSI

recipients, Congress specified in Section 3(k) and Section 3(o)(1) of the Act that SNAP-authorized retailers must sell food for home preparation and consumption, which does not include hot foods or hot food products ready for immediate consumption. This proposed rulemaking would clarify and strengthen current regulations to ensure that SNAP retailer policy is aligned with this statutory intent.

The rulemaking also proposes to make ownership information tied to program violations available to the public, which will assist in maintaining program integrity.

Unless otherwise specified, the Agency proposes to implement the changes described in this rulemaking upon the effective date of the final rule.

Retail Food Store

In order to be eligible to accept SNAP benefits, under Section 3(o)(1) of the Act, a retailer must “sell food for home preparation and consumption” as well as meet other criteria in the Act and SNAP regulations. Section 3(k)(1) of the Act defines “food” to include “any food or food product for home consumption except . . . hot foods or hot food products ready for immediate consumption” Congress specifically did not intend for restaurants to participate in SNAP, except under limited circumstances to serve the elderly, disabled, and homeless, as set forth in Section 3(k) of the Act and as referenced in Section 7(f)(2) of the Act.

The current SNAP regulations at 7 CFR 278.1(b)(1)(iv) provide that ineligible firms include “firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption.” However, nothing in current regulations specifically prohibits items sold for SNAP benefits to be sold cold at the point-of-sale and heated or cooked in the

store after purchase. As a result of this gap in existing regulations, some firms are authorized to accept SNAP benefits even though they primarily sell cold, uncooked, or raw foods and offer to heat or cook those foods for customers for free or for cash before the customer leaves the store premises. This gap has allowed these entities that in effect sell hot foods ready for immediate consumption to participate in SNAP as authorized retailers. The changes noted above will not impact farmer's markets, direct-marketing farmers, military commissaries, and other relevant establishments as described in Sec. 4002 of the Act.

Comments from the RFI involving firms that primarily sell food for immediate consumption and that also sell products cold and heat them for SNAP customers after purchase were evenly split. Some expressed concerns that allowing prepared foods that could be cooked or heated after purchase would likely cost more than unprepared foods, pointing out that SNAP benefit amounts were based on the Thrifty Food Plan, which is a market basket of foods that makes the economic assumption that food purchased with SNAP benefits will be foods intended for home preparation and not prepared foods. Others expressed concern that SNAP recipients without access to a kitchen could benefit by being able to have prepared foods cooked in stores where they are purchased.

Despite this latter comment, the Agency thinks it is important to maintain the intent of Congress' restriction on hot food purchases. Therefore, the rulemaking proposes to close the existing gap in SNAP regulations that allows these types of entities to become authorized SNAP retailers by adding language to the definition of retail food store in current regulations at 7 CFR 271.2 that would require that at least 85 percent of an entity's total food sales must be for items that are not cooked or heated on-site before or after purchase. This proposed threshold is based on a review of the data submitted by SNAP authorized restaurants currently operating outside of

the intent of the Program. FNS requests comments regarding this threshold and the benefits and costs of alternative levels.

Additionally, this rule would add language to prevent such businesses that do not effectuate the purposes of SNAP from circumventing SNAP rules by splitting into two separate businesses that operate under one roof in order to gain eligibility for one of the businesses to participate in SNAP as a retail food store. For example, a restaurant purporting to be two separate businesses (one a hot foods restaurant and one a cold-prepared foods location) for purposes of SNAP authorization but operating from a single location with common employees, accounting, and management, is not eligible. FNS would not recognize separate businesses operating in one location and eligibility determinations would continue to be made based on an evaluation of these separate businesses as a single entity. FNS seeks comments relative to any unintended adverse effects of this proposed change.

The Agency proposes to make the requirements detailed above under “Retail Food Store” effective for all new applicants and all retailers authorized to participate in SNAP within 120 days of the effective date of the final rule.

The rule also proposes to clarify the use of different terms, such as entities, firms, retailers and stores. These are terms used interchangeably in regulations and other policy, and they should be treated as equivalent terms in SNAP regulations and policies.

Staple Food

As defined in Section 3(k) of the Act, current regulations define staple foods as foods in the following categories: meat, poultry or fish; bread or cereals; vegetables or fruits; and dairy products. Current regulations at 7 CFR 271.2 specify that foods with multiple ingredients can

only be counted in one staple food category, based on the main ingredient, when determining retailer eligibility. This is sometimes confusing and requires labels on many multiple-ingredient products to be examined closely in order to confirm the main ingredient when assigning it to the appropriate staple food category. For example, the main ingredient in some frozen chicken pot pies is bread and in others the main ingredient is chicken; therefore, one brand of chicken pot pie might be categorized in the bread or cereals category and another brand of chicken pot pie might be categorized in the meat, poultry or fish category. In addition, counting foods with multiple ingredients has allowed prepared foods sold for carry-out or for on-site consumption to be counted as staple foods when determining a store's eligibility to participate in SNAP, enabling some restaurants to inappropriately participate in SNAP as retail food stores.

In order to prevent confusion and unintended consequences caused by foods with multiple ingredients, this rulemaking proposes to amend 7 CFR 278.1(b) to revise language in 7 CFR 271.2 defining staple food. The rulemaking proposes to define staple food as those food items intended for home preparation and consumption in each of the following four categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods 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 not be counted in any staple food category. Examples of such foods include cold pizza, macaroni and cheese, multiple ingredient soup, sandwiches, TV dinners, and pot pies. Accessory food items include foods that are generally consumed between meals and/or are generally considered snacks or desserts such as, but not limited to chips, dips, crackers, cupcakes, cookies, ready-popped popcorn, pastries, and candy, or food items that complement or

supplement meals, such as, but not limited to coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar, and shall not be considered staple foods for purposes of determining the eligibility of any firm. These changes would ensure that those foods that do not represent a single staple food category, such as commercially processed and prepared mixtures with multiple ingredients are not considered when determining eligibility to participate in SNAP as a retail food store. Multiple ingredient foods include frozen entrees and prepared sandwiches, prepared salads, and pizza. These foods do not include such items as yogurt, cheeses, and cereals as the primary staple ingredient is clearly represented and easily recognized.

Multiple ingredient foods and accessory foods would not be counted toward variety, perishables, or depth of stock when determining a firm's eligibility to participate in SNAP as a retail food store. This would not change the eligibility of these foods for purchase with SNAP benefits in authorized stores. FNS believes this approach would better reflect the intent of Congress that staple foods are those foods used primarily for home preparation and consumption that provide the main sources of nutrition intake for households.

The rulemaking also proposes changes to the Agency's interpretation of accessory foods, which are not considered to be staple foods, but are eligible foods that can be purchased with SNAP benefits. The Agency currently treats any food items for home preparation and consumption not specifically listed as an accessory food in Section 3(q)(2) of the Act as a staple food. Section 3(q)(2) of the Act states that staple foods do not include "accessory food items, such as coffee, tea, cocoa, carbonated and un-carbonated drinks, candy, condiments and spices." This language in Section 3(q)(2) indicates that the list of accessory foods in the Act is an illustrative list, not a complete list. Therefore, under the proposed changes, FNS is clarifying that in addition to the examples of accessory foods provided in Section 3(q)(2) of the Act,

accessory foods also include items such as chips, dips, cookies, cakes and pastries that are commonly recognized as snack foods and desserts and/or that are typically consumed between meals. Similar to candy, carbonated and un-carbonated drinks, and condiments, which are examples of accessory foods provided in the Act, chips, ready-popped popcorn, cookies, cakes and pastries and similar foods are examples of snack foods or desserts, with limited nutritional value. FNS believes counting such foods as accessory items will ultimately encourage stores to offer more nutritious options and provide SNAP recipients access to a larger selection of healthy foods. Stores that, until now, have relied on these types of accessory foods to count as staple foods may need to expand their offerings of proper staple foods to continue to be eligible. FNS remains concerned that those stores that sell predominantly accessory foods do not further the purposes of SNAP. FNS is interested in public comments as to additional foods that should be categorized as accessory items and/or standards and criteria to determine whether a food is a staple food or an accessory; for example, popcorn that is already popped and has added salt or butter would be considered an accessory food. FNS is interested in whether and how the public would make a distinction between dried corn as a grain and popcorn (popped or un-popped) as a snack food. Accessory foods would remain eligible for purchase with SNAP benefits but would not be counted as staple foods for purposes of determining a store's eligibility to participate in SNAP.

FNS understands there are challenges in making clear distinctions in the areas of multi-ingredient foods and accessory foods. FNS plans to issue specific guidance on the changes proposed in this rulemaking. In the past, FNS has issued questions and answers following a final rule. FNS is seeking comments on what specific aspects of the proposed changes should be

addressed in guidance and whether guidance should again be issued after the rule is final or concurrent to issuance of the final rule.

There was mixed reaction from commenters on the RFI with respect to counting multiple ingredient foods as staple foods when determining store eligibility. Approximately half the submissions, including retailer groups and food manufacturers, support the current requirements to count foods with multiple ingredient foods in one staple food category based on the main ingredient. Other commenters, including farmers markets, professional associations, government agencies and policy advocates, supported changing FNS' current rules on multiple ingredient foods.

However, there was strong support, and little opposition, from those submitting comments to the RFI for the notion that enhancing the standards for staple foods would lead to healthier food options that would help prevent obesity and reduce food insecurity. Consequently, most supported changes to the current definition of "staple foods."

Determination of Authorization

Changes proposed for regulations at 7 CFR 271.2 would also require clarification in 7 CFR 278.1 to conform to those changes. Current regulations at 7 CFR 278.1(b)(1)(ii)(C) include language about multiple ingredient foods and, as stated above, this rulemaking proposes to revise and add language to clarify that such foods are not counted as staple foods for purposes of determining store eligibility. Therefore, conforming changes to this paragraph are being proposed as well.

In addition, the rule proposes to codify in 7 CFR 278.1 mandatory requirements from the 2014 Farm Bill. The 2014 Farm Bill amended Section 3(o)(1)(A) of the Food and Nutrition Act

to increase the required minimum variety of foods in each staple food category from three to seven different varieties and require perishables in three staple food categories instead of two, in order to be eligible to participate in SNAP as a retail food store. The rulemaking also proposes a minimum number of six stocking units per variety to ensure that retailers can meet the statutory requirement to offer for sale, on a continuous basis, staple foods in each staple food category. This stocking depth ensures that stores offer the minimum number of varieties on a continuous basis, as required by law without complicating collection of information that store visit contractors now collect for FNS to use in determining store eligibility. FNS requests comments on this stocking depth requirement. This new requirement only affects establishments and house-to-house trade routes that meet the definition of a retail food store in accordance with Section 3(o)(1)(A) of the Act; it does not affect establishments and house-to-house trade routes that have over 50 percent of their total sales in staple foods and would meet the definition of retail food store under Section 3(o)(1)(B) of the Act (i.e. stores that currently participate under criteria B generally include, for example, specialty food meat, fruit and vegetable, or seafood markets with 50% or more of their sales in a specific staple food category. These firm types will not be affected by the changes in this rule.).

The rule also proposes to revise in 7 CFR 278.1(b)(1)(ii)(B) what constitutes a variety of staple foods in order to clear up any confusion that may exist with current regulations and to conform to earlier changes in 7 CFR 271.2 to the definition of staple foods pertaining to multiple ingredient foods.

Responses to the RFI questions mostly indicated support, though there was limited opposition, for the now mandatory, statutory changes to increase the minimum number of staple foods by increasing variety requirements. Most felt the minimum of twelve items currently

required was too few. There was also support for the now mandatory, statutory change that requires perishable items in more than two staple food categories.

The Agency proposes to make the requirements detailed above under “Staple Food” and “Determination of Authorization” effective for all new applicants within 120 days of the effective date of a final rule. Further, FNS proposes that once these requirements become effective for new applicants, a retailer that is withdrawn or disqualified for a term and is subsequently reinstated, must meet these new requirements prior to reinstatement. Finally, this rule proposes that SNAP retailers authorized to participate in the Program on the effective date of the final rule will have one year (365 days) from the effective date of the final rule to comply with the new requirements.

Need for Access

The 2014 Farm Bill amended Section 9(a) of the Act to allow the Agency to consider whether an applicant retailer is located in an area with significantly limited access to food when determining the qualifications of that applicant. Pursuant to that change, FNS proposes to amend 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 is interested in comments and suggestions regarding this proposed change. In considering need for access, at both authorization and reauthorization, the Agency would consider factors such as distance from the nearest SNAP authorized retailer, transportation options to other SNAP authorized retailer locations, the gap between store’s stock and SNAP required stock for authorization eligibility, and whether the store furthers the purposes of the Program. FNS is particularly interested in comments to help the Agency refine the language in the proposed change.

Public Disclosure of SNAP Information

With the exception of employment identification numbers (EINs) and social security numbers (SSNs), the Act allows information collected from retail food stores to be disclosed for purposes directly connected with the administration and enforcement of the Act and SNAP regulations. This rulemaking proposes to allow FNS to disclose to the public specific information about retailers that have been disqualified or otherwise sanctioned for SNAP violations. The information would be disclosed only after the time for administrative and judicial appeals has expired and would be limited to the name and address of the store, the owner name(s) and information about the sanction itself. Public disclosure of this information may include the posting of a list of sanctioned retailers on a public website. Public disclosure of such information would assist the Department in its efforts to combat SNAP fraud by providing an additional deterrent. The information would also provide the public with valuable information about the integrity of these businesses and individuals for future dealings. Therefore, public disclosure of this information would be for purposes directly connected with the administration and enforcement of the Act and its regulations.

Regulatory Impact Analysis

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all cost 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. This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget. The RIA for this rulemaking was published as part of the docket in Supporting Documents on www.regulations.gov. A summary of the regulatory impact analysis (RIA) follows.

Need for Action

The proposed rule is needed to codify mandatory provisions of the 2014 Farm Bill, and to clarify and enhance current regulations governing the eligibility of retail food stores participating in SNAP.

Benefits

This rulemaking will codify mandatory provisions of the 2014 Farm Bill, and strengthen provisions in current regulations, to conform to the intent of the statutory requirements. Proposed changes will improve SNAP recipient access to a variety of healthy food options. It reflects the Department's commitment to provide vital nutrition assistance to our most vulnerable Americans, protect taxpayer dollars and build on aggressive efforts to ensure program integrity. The proposed rule would allow FNS to ensure that retailers authorized to participate in SNAP as retail food stores are consistent with the purposes of the Program. It would reinforce the intent of SNAP, that participants use their benefits to purchase more nutritious foods intended for home preparation and consumption. FNS requests information on any other benefits of this rule.

Costs

There will be minor costs to the Federal government as a result of the rule, as it does not change benefit levels, and existing retailer authorization and oversight resources would be used

to enforce it. FNS anticipates that this rule may result initially in a small increase in requests for administrative reviews, but the estimated cost for additional reviews is less than \$150,000. 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 intent of Congress to make foods available to SNAP participants for home preparation and consumption. Firms that do not stock sufficient staple foods to meet the new requirements will have the opportunity to modify their staple food stock in order to be eligible to participate 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. FNS requests comments on the costs to retailers from this rule.

Regulatory Flexibility Act

This proposed 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 significant economic impact to a substantial number of small businesses; although the number of stores impacted is large, we estimate that the cost to those small businesses for stocking additional inventory would be nominal, on average about \$140. However, FNS has prepared this Regulatory Flexibility Analysis to provide the opportunity for comment and input from the public. The complete Regulatory Flexibility Analysis for this rule was published as part of the docket in Supporting Documents on www.regulations.gov. A summary of the analysis follows: This proposed rule will impact nearly 200,000 small grocery stores and convenience stores by requiring that these stores make changes to their inventory in order to comply with the new minimum inventory requirement

mandated in this rule. FNS estimates that for the vast majority of stores the changes needed will be minimal and represent less than one-tenth of one percent of a store's total gross sales.

Public Law 104-4

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 Department 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 \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department 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 proposed 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 \$100 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

SNAP is listed in the Catalog of Federal Domestic Assistance under Number 10.551 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

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 agency's 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 proposed 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

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed 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 proposed rule is not intended to have retroactive effects unless so specified in the Effective Date 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

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 consultation sessions as a venue for collaborative conversations with Tribal officials or their designees. Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in timely and meaningful manner to Tribal government requests for consultation concerning this proposed rule. The policies contained in this rulemaking should not have Tribal implications that preempt Tribal law.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Departmental Regulations 4300–4, “Civil Rights Impact Analysis” and 1512–1, “Regulatory Decision Making Requirements.” After a careful review of the proposed rule’s intent and provisions, FNS has determined that this rulemaking will not in any way limit or reduce the ability of protected classes of individuals to receive SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion or political belief nor will it have a differential impact on minority owned or operated business entities, and woman owned or operated business entities that participate in SNAP. The regulation affects or may potentially affect certain retail food stores that participate in (accept or redeem) SNAP. The only retail food stores that will be directly affected, however, are those retailers that participate in SNAP in accordance with Section 3(o)(1)(A) of the Act and that do not stock at the newly required and proposed levels, or whose hot food (heated before or after purchase) sales exceed 15 percent.

FNS does not collect data from retail food stores regarding any of the protected classes under Title VI of the Civil Rights Act of 1964. FNS specifically prohibits retailers that participate in SNAP to engage in actions that discriminate based on race, color, national origin, sex, age, disability, religion or political belief. This proposed rule will not change any requirements related to the eligibility or participation of protected classes or individuals, minority owned or operated business entities, or woman owned or operated business entities in SNAP. As a result, this rulemaking will have no differential impact on protected classes of individuals, minority owned or operated business entities, or woman owned or operated business entities.

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 proposed 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.

Lists of Subjects

7 CFR Part 271

Food stamps, Grant programs--Social programs, reporting and recordkeeping requirements

7 CFR Part 278

Approval and participation of retail food stores and wholesale food concerns, food stamps; participation of financial institutions, disqualification and imposition of civil penalties or fines for retail food stores and wholesale food concerns; and disposition of claims; penalties.

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

1. The authority citation for 7 CFR 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.
- b. Amend the definition of Retail food store by adding two sentences at the end of paragraph (1).
- c. Revise the definition of Staple food.

The additions and revision read as follows:

§ 271.2 Definitions.

* * * * *

Firm (1) 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 and SNAP policies, the terms firm, entity, retailer, and store are used interchangeably.

* * * * *

Retail food store means:

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

* * * * *

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. 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 not be counted in any staple food category. Examples of such foods include cold pizza, macaroni and cheese, multiple ingredient soup, sandwiches, TV dinners, and pot pies. Accessory food items include foods that are generally consumed between meals and/or are generally considered snacks or desserts such as, but not

limited to chips, dips, crackers, cupcakes, cookies, popcorn, pastries, and candy, or food items that complement or supplement meals, such as, but not limited to coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar, and shall not be considered staple foods for purposes of determining the eligibility of any firm.

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PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

3. In § 278.1:

- a. Revise the first sentence in paragraph (b)(1)(ii)(A);
- b. Amend the first sentence in paragraph (b)(1)(ii)(B) by removing the word “two” and adding in its place the word “three”.
- c. Revise paragraph (b)(1)(ii)(C);
- d. Amend paragraph (b)(1)(iv) by adding a new sixth sentence;
- e. Redesignate paragraph (b)(6) as paragraph (b)(7);
- f. Add new paragraph (b)(6).
- g. 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 staple food categories, with a minimum of six stocking units for each food item. * * *

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

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(iv) * * * Firms that do not have 85 percent or more of their total food sales in items that are not cooked or heated on-site, before or after purchase, are ineligible. * * *

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(6) FNS will consider whether the applicant is located in an area with significantly limited access to food. In determining whether an applicant is located in such an area, 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.

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(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 names(s) and information about the sanction itself.

Dated: February 8, 2016.

Kevin Concannon,

Under Secretary,

Food Nutrition and Consumer Services.

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