



Billing Code: 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 278

[FNS-2019-0003]

RIN 0584-AE61

Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program (SNAP)

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

ACTION: Proposed rule.

SUMMARY: The Food and Nutrition Service (FNS, or the Agency) proposes to make changes to the Supplemental Nutrition Assistance Program (SNAP) regulations pertaining to the eligibility of certain SNAP retail food stores. These proposed changes are in response to the Consolidated Appropriations Acts of 2017 and 2018, which prohibited the U.S. Department of Agriculture (USDA) from implementing two retailer stocking provisions (the “Breadth of Stock” provision and the “Definition of ‘Variety’” provision) of the 2016 final rule titled, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)”, until such a time as regulatory modifications to the definition of “variety” are made that would increase the number of food items that count as acceptable staple food varieties for purposes of SNAP retailer eligibility. Using existing authority in the Food and Nutrition Act of 2008, the Agency proposes to modify the definition of the term “variety” as it pertains to the stocking requirements for SNAP authorized retail food stores. These proposed changes would provide retailers with more flexibility in meeting the enhanced stocking requirements of the 2016 final rule which were mandated by the Agricultural Act of 2014 (the 2014 Farm Bill), and align SNAP regulations with

the requirements expressed in the Consolidated Appropriations Acts of 2017 and 2018. This proposed rule does not modify any other provisions or components of the 2016 final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP).”

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

ADDRESSES: USDA FNS invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- Federal e-Rulemaking Portal: This is the preferred method for comment submission. Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Mailed 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 written comments submitted in response to this proposed rule 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 USDA FNS, 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 a.m. to 5:30 p.m.) Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background: Final Rulemaking Action Establishing SNAP Criterion A

In order to be eligible to participate in SNAP, a store must meet either Criterion A (staple food stock) or Criterion B (staple food sales). These requirements were formalized by the final rule titled “Food Stamp Program: Revisions to the Retail Food Store Definition and Program Authorization Guidance” which was published on January 12, 2001 (66 FR 2795). This 2001 final rule implemented changes required by the Food Stamp Program Improvements Act of 1994. Under this 2001 final rule, Criterion A eligibility was established to require that certain stores carry at least three (3) varieties of staple foods in each of the four (4) staple food categories as well as at least one (1) perishable variety in at least two (2) staple food categories. The staple food categories are: meat, poultry, or fish; dairy products; bread or cereals; and vegetables or fruits. This 2001 final rule defined the term “variety”, as used with respect to SNAP Criterion A, at 7 CFR 278.1(b)(1)(ii)(C).

This definition of “variety” was further clarified by Agency guidance in the Benefits Redemption Division Policy Memorandum 01-04, titled, “Implementation of Final Retail Store Eligibility Rule” which was issued on August 14, 2001. This 2001 memorandum states that: “Examples of unacceptable varieties includes tomato juice, fresh tomatoes and canned stewed tomatoes in the vegetables or fruits category.”

Since the establishment of SNAP Criterion A, 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. Main ingredient has generally been determined by a product's first listed ingredient in the ingredients list on the product's Nutrition Facts label, as ingredients on the label are required to be listed from highest to lowest quantity by weight. For example, a can of tomato soup with a first listed ingredient of "tomatoes" in its ingredients list has a main ingredient of tomatoes, as that is the ingredient which occurs in the highest quantity in the soup, by weight; such a product has historically been considered a "tomato" variety in the vegetables or fruits staple food category. In the dairy products and bread or cereals staple food category, most staple foods share the same main ingredients (e.g., cow milk for dairy and wheat for bread or cereals); therefore, product kind (e.g., yogurt for dairy and bagels for bread or cereals) is used to define variety in conjunction with main ingredient. When determining variety in these two categories, FNS first considers main ingredient and then product kind. For example, a package of butter has a main ingredient of "cow milk" and is therefore a dairy product. However, FNS classifies this product as a "cow milk-based butter" staple food variety according to its identifiable product kind (butter). 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) were not generally considered to represent discrete varieties in their respective staple food categories under the 2001 final rule. Main ingredient and product kind have, therefore, been recognized in Agency policy as the primary determinants of variety since the implementation of the 2001 final rule.

Background: Proposed Rulemaking Action Modifying SNAP Criterion A

FNS proposed to modify Criterion A eligibility requirements in a Notice of Proposed Rulemaking (NPRM) titled “Enhancing Retailer Standards in the SNAP” which was published on February 17, 2016 (81 FR 8015). This 2016 NPRM sought to implement changes required by the 2014 Farm Bill and codify discretionary provisions under existing authority in the Food and Nutrition Act.

Breadth of Stock

The “Definition of ‘Retail Food Store’ – Breadth of Stock” provision of the 2016 NPRM proposed to increase the number of varieties required in each staple food category from three (3) to seven (7) and to increase the number of categories required to contain at least one (1) variety of perishable staple foods from two (2) to three (3). These increases were statutorily mandated by the 2014 Farm Bill, and were supported by a majority of commenters.

Definition of “Variety”

The “Definition of ‘Staple Food’ – Acceptable Varieties in the Four Staple Food Categories” provision of the 2016 NPRM proposed to further clarify existing language at 7 CFR 278.1(b)(1)(ii)(C) that defines “variety” for the purposes of SNAP Criterion A eligibility by adding additional examples of food items considered to be acceptable staple food varieties.

After the publication of the 2016 NPRM, FNS received a high volume of questions and interest from a wide range of stakeholders. Some of these questions centered on the definition of “variety” and inquired about other food items considered to be staple food varieties. On April 5, 2016, FNS published a clarification of the proposed rule and 30-day extension of the comment period at 81 FR 19500. In this 2016 clarification and extension, FNS indicated a specific interest in public feedback on the subject of the definition of “variety”, stating that: “FNS is particularly interested in comments from the public as to whether and how variety should take into account

the differences between products within staple food categories (generally and individually), and what factors should be considered when making such distinctions.”

Of the total 1,260 germane and non-duplicative public comments received on both the 2016 NPRM and the subsequent clarification, 168 comments, or approximately 13% of all public comments, specifically addressed this provision. About 16% of total retailer commenters specifically opposed this provision. Food 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. Of those that opposed the provision, some indicated that small format stores would struggle to reach seven (7) varieties in the meat, poultry, or fish and dairy products staple food categories and such commenters suggested increasing flexibility for stores in these categories. Such 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.

Background: Final Rulemaking Action Modifying SNAP Criterion A

After carefully considering the public comments that were received, FNS published the final rule titled “Enhancing Retailer Standards in the SNAP” on December 15, 2016 (81 FR 90675). The “Definition of ‘Retail Food Store’ – Breadth of Stock” provision was published in this 2016 final rule as proposed as this was a change mandated by the 2014 Farm Bill.

The “Definition of ‘Staple Food’ – Acceptable Varieties in the Four Staple Food Categories” provision, however, was published with substantial modifications in the 2016 final rule. These modifications were made in response to public feedback received and were intended to provide retail food stores with a greater degree of flexibility in reaching the new breadth of stock

required of certain retailers under SNAP Criterion A, especially in the meat, poultry, or fish and dairy products staple food categories.

Commenters who responded adversely to the definition of “variety” as it appeared in the 2016 NPRM generally focused on the difficulties small format retailers would have in reaching seven (7) varieties in the meat, poultry or fish and the dairy products staple food category. This concern was born out by the Agency’s final Regulatory Flexibility Analysis which analyzed data from a nationally-representative sample of 1,392 SNAP authorized small format retail food stores and indicated that about 93% of currently SNAP authorized small stores already stocked enough varieties of vegetables or fruits and about 78% of these stores already stocked enough bread or cereals, while only about 46% of these stores already stocked enough meat, poultry, or fish and only about 27% of these stores already stocked enough dairy products. For this reason, FNS focused on providing more flexibility in the latter two staple food categories through the inclusion of plant-based protein sources in the meat, poultry, or fish staple food category, and the inclusion of plant-based dairy alternatives as well as additional dairy flexibilities in the dairy products staple food category.

Plant-Based Protein Sources

The 2016 final rule allowed for the counting of plant-based protein sources as varieties in the meat, poultry, or fish staple food category. Specifically, this meant that beans, peas, and nuts/seeds could each individually be counted once in either the vegetables or fruits staple food category, or once in the meat, poultry, or fish staple food category. In addition, plant-based meat analogues, such as tofu and seitan, were added to the meat, poultry, or fish staple food category. These changes were made, consistent with USDA’s MyPlate nutrition guidelines, to allow retailers more flexibility in stocking a sufficient number of varieties in the meat, poultry, or fish

staple food category, and to help to ensure that SNAP households would have access to an array of healthy food options that meet diverse dietary needs and preferences. FNS is not proposing to modify or affect this change in this proposed rule and it will remain in place as it appeared in the 2016 final rule.

Plant-Based Dairy Alternatives

The 2016 final rule allowed for the counting of plant-based dairy alternatives as varieties in the dairy products staple food category. Specifically this meant that plant-based dairy products would 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, soy-based milk substitute, almond-based milk substitute, rice-based milk substitute, soy-based cheese substitute, almond-based cheese substitute, rice-based cheese substitute, soy-based yogurt substitute, almond-based yogurt substitute, and rice-based yogurt substitute would each be considered a discrete variety in the dairy products staple food category under the 2016 final rule. Though these items are plant-based, they are recognized as dairy equivalents and, therefore, would not count as varieties in the remaining staple food categories under the 2016 final rule. These changes were made in keeping with USDA's MyPlate nutrition guidelines, to allow retailers more flexibility in stocking a sufficient number of varieties in the dairy products category, and to help to ensure that SNAP households will have access to an array of healthy food options that meet diverse dietary needs and preferences. FNS is not proposing to modify or affect this change in this proposed rule and it will remain in place as it appeared in the 2016 final rule.

Additional Dairy Flexibilities

The 2016 final rule modified existing Agency policy to subdivide certain traditional, cow milk-based dairy varieties into more than one variety. For example, under the 2001 final rule, cheese was considered one variety while under the 2016 final rule, cow milk-based soft cheese and cow milk-based firm/hard cheese each were considered discrete varieties. Additionally, under the 2016 final rule, shelf-stable liquid cow milk (e.g., evaporated or condensed milk), perishable liquid cow milk, and shelf-stable powdered cow milk would each be considered discrete varieties in the dairy products staple food category. Finally, under the 2016 final rule, cow milk-based yogurt and cow milk-based kefir (a yogurt drink) would each be considered discrete varieties in the dairy products staple food category. These changes were made in order to allow retailers more flexibility in stocking a sufficient number of traditional varieties in the dairy products category. This proposed rule would modify these changes, as discussed later in this document, in order to provide further flexibility in the dairy products staple food category.

Sufficient Breadth of Stock under the 2016 Final Rule

Included below are two (2) tables that demonstrate completely different ways a retail food store could reach the required seven (7) varieties in each of the four staple food categories using the definition of “variety” as it appeared in the 2016 final rule. These are just examples of two (2) combinations that would satisfy the requirements in the 2016 final rule. These charts do not include all of the acceptable varieties or possible combinations of varieties. Additional examples of acceptable varieties in the four staple food categories are available in the “List of Examples” section of the 2016 final rule.

Meat, Poultry, or Fish	Dairy Products	Vegetables or Fruits	Bread or Cereals
1. nuts/seeds	1. liquid, perishable cow milk	1. apples	1. wheat-based tortillas

2. chicken	2. cow milk-based yogurt	2. oranges	2. wheat-based pitas
3. tuna fish	3. soy-based milk substitute	3. plums	3. corn-based cold breakfast cereal
4. beef	4. cow milk-based infant formula	4. peaches	4. rice
5. eggs	5. cow milk-based hard cheese	5. lettuce	5. oats-based hot breakfast cereal
6. catfish	6. powdered, shelf-stable cow milk	6. celery	6. wheat-based bread
7. beans	7. cow milk-based soft cheese	7. pumpkin	7. wheat-based buns/rolls

Meat, Poultry, or Fish	Dairy Products	Vegetables or Fruits	Bread or Cereals
1. salmon	1. cow milk-based butter	1. tomatoes	1. wheat-based flour
2. turkey	2. oil-based butter substitute	2. bananas	2. wheat-based baking mixes
3. sardines	3. cow milk-based sour cream	3. grapes	3. rye-based bread
4. pork	4. rice-based milk substitute	4. onions	4. rice-based pasta
5. clams	5. liquid, shelf-stable cow milk	5. pineapple	5. wheat-based bagels
6. peas	6. cow milk-based kefir	6. cucumbers	6. rice-based infant cereal
7. tilapia	7. soy-based infant formula	7. carrots	7. wheat-based English muffins

Proposed Changes to the Definition of “Variety”

On May 5, 2017, the Consolidated Appropriations Act of 2017 was signed into law. Sec. 765 of the Consolidated Appropriations Acts of 2017 and thereafter the Consolidated Appropriations Act of 2018, prohibit the USDA from implementing the “Definition of ‘Staple Food’ – Acceptable Varieties in the Four Staple Food Categories” provision (7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(C)) and the “Definition of ‘Retail Food Store’ – Breadth of Stock” provision (7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(A)) of the 2016 final rule until the USDA promulgates regulatory amendments that modify the “Definition of ‘Staple Food’ – Acceptable Varieties in the Four Staple Food Categories” provision of the 2016 final rule. Such regulatory amendments, moreover, must increase the number of items that qualify as acceptable varieties in each staple food category.

Using existing authority in the Food and Nutrition Act of 2008, as amended, FNS proposes to make changes to regulations at 7 CFR 271.2 and 7 CFR 278.1(b)(1)(ii)(C) to modify the definition of the term “variety” as it pertains to the stocking requirements for certain SNAP authorized retail food stores in order to increase the number of items that qualify as acceptable varieties in the four staple food categories, especially in the meat, poultry or fish, dairy, and breads or cereals staple food categories. These changes would provide retailers with more flexibility in meeting the enhanced SNAP eligibility requirements and meet the requirements expressed in the Consolidated Appropriations Acts of 2017 and 2018.

Together the changes proposed below add five (5) or more additional, discrete varieties in the meat, poultry, or fish, dairy, and bread or cereals staple food category, and provide five (5) more illustrative examples in the vegetables or fruits staple food category. Additionally, the current proposed rule will retain the changes in the 2016 final rule that provided flexibility regarding plant-based protein sources and plant-based dairy alternatives. Those flexibilities would remain

in place as they appeared in the 2016 final rule. In conjunction with the twenty (20) discrete varieties identified in the “List of Examples” in the 2016 final rule, the proposed changes to the definition of “variety” would provide stores with a wide range of options in meeting stocking requirements in all four staple food categories.

FNS is also proposing to add an official definition of “variety” to the General Information and Definitions section of SNAP regulations found at 7 CFR 271.2 in order to convey that variety is intended to signify main ingredient or product kind. The inclusion of this definition codifies existing Agency practice which dictates which food items are considered to be staple food varieties. FNS considers the inclusion of this definition to be paramount to a clear understanding of the term “variety” in the context of SNAP retailer eligibility and the proposed changes in this rulemaking. This proposed rule would not modify any other provisions or components of the 2016 final rule.

Proposed changes made to the definition of “variety” are expected to have significant effects upon the SNAP retailer authorization process. Below are the strategies FNS is proposing to modify the definition of “variety” and provide retail food stores with more flexibility. FNS welcomes comments that specifically address these proposed changes as well as comments that offer other possible strategies for providing retailers with more flexibility while ensuring SNAP recipients have access to a range of healthful options at SNAP authorized retail food stores. FNS encourages commenters to include comments discussing the practicality and rationality of any suggested changes, as well as the nutritional and industry impact of these changes.

I. Flexibility for Perishable and Shelf-Stable Meat, Poultry, and Fish Products

Under the 2016 final rule, “variety” was generally defined by product kind or main ingredient in the meat, poultry, or fish staple food category. This meant that chicken, pork, and beef were each considered discrete varieties. This also meant that, under the 2016 final rule, canned chicken and frozen chicken were not each considered discrete varieties. The Department is proposing a change with this rule that would allow any species of meat, poultry, or fish to be counted once as a discrete variety, if perishable, and once as a discrete variety, if shelf-stable. Per SNAP regulations at 7 CFR 278.1(b)(1)(ii)(B), “perishable foods” are items which are frozen, refrigerated, or fresh staple food items that would spoil or suffer significant deterioration in quality within three weeks if stored at room temperature. An example of a perishable food in the meat, poultry, or fish staple food category is a raw salmon filet. “Shelf-stable foods” are items which are dried, pickled, smoked, or otherwise preserved, and stored in cans, jars, or other packaging that do not require refrigeration and would not spoil or suffer significant deterioration in quality within three weeks if the packaging remains unopened. An example of a shelf-stable food in the meat, poultry, or fish staple food category is a tin of sardines that requires no refrigeration.

To reach the required seven (7) varieties in the meat, poultry, or fish staple food category under this change, for example, a store could stock the following:

1. canned ham (shelf-stable pork)
2. refrigerated bacon (perishable pork)
3. beef jerky (shelf-stable beef)
4. refrigerated deli-sliced roast beef (perishable beef)
5. frozen chicken breasts (perishable chicken)
6. canned chicken (shelf-stable chicken)

7. canned tuna fish (shelf-stable tuna fish)

This is just an illustrative list and not meant to be exhaustive. This proposed change to the definition of “variety” would provide considerable additional flexibility in the meat, poultry, or fish staple food category, as this change would effectively double the number of available varieties in this category, where a staple food is available in both perishable and non-perishable forms.

II. Additional Flexibilities for Common Cow Milk-Based Dairy Products

A. Cheese

Under the 2016 final rule, one specific traditional dairy product (cow milk-based cheese) was subdivided into two varieties (i.e., soft cheese and hard/firm cheese) in order to provide more flexibility for stores in meeting the required seven (7) varieties in the dairy staple food category.

The Department is proposing a change with this rule that would further subdivide cow milk-based cheese into four discrete varieties in the dairy products staple food category. The proposed subdivision of cow milk-based cheese would include the following four varieties and would be mirrored for other animal milk-based cheeses (e.g., goat milk-based cheese):

1. Fresh cow milk-based cheeses (e.g., cream cheese, cottage cheese, and ricotta cheese) are creamy, spreadable, and perishable dairy products.
2. Soft and semi-soft cow milk-based cheeses (e.g., mozzarella cheese, Munster cheese, and brie cheese) are moist, slightly cured, and perishable dairy products.
3. Hard, firm, semi-hard, or medium-hard cow milk-based cheeses (e.g., cheddar cheese, Swiss cheese, and Parmesan cheese) are less moist and more cured dairy products.
4. Cow milk-based cheese products and cow milk-based cheese- or dairy-based sauces, spreads, or dips (e.g., canned spray cheese sauce, canned cheese dipping sauce, jarred

Alfredo pasta sauce, and American cheese slices) are processed, often shelf-stable dairy products that have a dairy main ingredient (e.g., milk or whey).

With this change, a store could stock four discrete varieties of cow milk-based cheese (fresh cheese, soft cheese, hard cheese, and cheese product). This change to the definition of “variety” would, therefore, provide an additional two cheese varieties for each type of animal milk-based cheese in the dairy products staple food category.

B. Milk

Under the 2016 final rule, one specific traditional dairy product (cow milk) was subdivided into three varieties (perishable cow milk, liquid shelf-stable cow milk, and powdered cow milk) in order to provide more flexibility for stores in meeting the required seven (7) varieties in the dairy staple food category. The Department is proposing a change with this rule that would further subdivide traditional dairy milk (cow milk) into four discrete varieties in the dairy products staple food category. The proposed subdivision of cow milk would include the following four varieties and would be mirrored for other animal milks (e.g., goat milk):

1. Full-fat cow milks (e.g., whole milk, cream, and half-and-half) are liquid, perishable cow milk products with 3% or greater fat content.
2. Fat-reduced cow milks (e.g., 2% milk, 1% milk, skim milk, and other low-fat and non-fat milks) are liquid, perishable cow milk products with less than 3% fat content.
3. Liquid shelf-stable cow milks (e.g., long-life milk, evaporated milk, and condensed milk) are cow milk products that have been processed and sealed in cans or cartons to render them shelf-stable.
4. Powdered cow milks (e.g., dried milk, whey powder, and casein powder) are cow milk products that have been processed and dehydrated to render them shelf-stable.

With this change, a store could stock four discrete varieties of cow milk products (full-fat cow milk, fat-reduced cow milk, liquid shelf-stable cow milk, and powdered cow milk). This change to the definition of “variety” would, therefore, provide an additional variety in the dairy products staple food category for each type of animal milk in the dairy products staple food category. As noted earlier, the plant-based dairy alternatives proposed in the 2016 final rule – such as almond-based and soy-based milk substitutes – would remain unchanged in this proposed rule, and thus would also provide retailers with additional stocking options in this category.

C. Yogurt

Under the 2016 final rule one specific traditional dairy product (cow milk-based yogurt) was subdivided into two varieties (cow milk-based yogurt and perishable cow milk-based kefir) in order to provide more flexibility for stores in meeting the required seven (7) varieties in the dairy staple food category. The Department is proposing a change with this rule that would replace “perishable cow milk-based kefir” with cow milk-based yogurt drinks, to include other general yogurt-based drinks such as lassi and probiotic cultured milk smoothies. In addition, the Department is proposing to further subdivide “cow milk-based yogurt” into two distinct varieties and to mirror this subdivision in other animal milk-based yogurts (e.g., goat milk-based yogurt). Thus, these proposed changes to the definition of variety would provide an additional variety in the dairy products staple food category for each type of animal milk-based yogurt. The proposed subdivision of cow milk-based yogurt would include the following three varieties:

1. Cow milk-based yogurt drinks (e.g., lassi, kefir, and probiotic cultured milk smoothie) are liquid cow milk-based yogurt beverages that have cultured milk or yogurt as a main ingredient.

2. Full-fat cow milk-based yogurts (e.g., strawberry full-fat yogurt, vanilla full-fat yogurt, and plain full-fat yogurt) are fermented semi-solid food products made from cow milk with 3% or greater fat content.
3. Fat-reduced cow milk-based yogurts (e.g., strawberry low-fat yogurt, vanilla non-fat yogurt, and plain non-fat yogurt) are fermented semi-solid food products made from cow milk with less than 3% fat content.

To reach the required seven (7) varieties in the dairy products food category under this change, for example, a store could stock the following:

1. 2% milk (fat-reduced cow milk)
2. nacho cheese dip (cow milk-based cheese-based sauce)
3. parmesan cheese (cow milk-based hard cheese)
4. evaporated milk (liquid shelf-stable cow milk)
5. peach full-fat yogurt cup (cow milk-based full-fat yogurt)
6. ricotta cheese (cow milk-based fresh cheese)
7. whole milk (full-fat cow milk)

III. Additional Examples of Staple Food Varieties in the Vegetables or Fruits Staple Food Category

Under the 2016 final rule, FNS generally considered each distinct vegetable or fruit plant (e.g., lettuce, collard greens, kale, etc.) to be a discrete staple food variety. As such, twenty (20) examples of fruits or vegetables, all considered to be acceptable varieties in the vegetables or fruits staple food category, were provided in the “List of Examples” section. This list was not intended to be comprehensive, as the number of distinct vegetable and fruit plants is considerable. Accordingly, the 2016 final rule provided numerous stocking options in meeting

requirements in the vegetables or fruits staple food category, as evidenced by the 93% of currently authorized small format retailers who already meet requirements under the definition of variety provided in the 2016 final rule.

This proposed rule would maintain the definition of variety as outlined in the 2016 final rule as it pertains to acceptable varieties in the fruits or vegetables staple food category, with no proposed changes at this time. In attempting to identify additional, new staple food varieties in the category, FNS was unable to identify any additional edible vegetable or fruit which was not already considered to be a discrete staple food variety under the 2016 final rule. Further, all attempts to subdivide existing vegetable or fruit staple food varieties were problematic in that they clearly favored those vegetables or fruits which are more distinctly divisible.

That said, FNS recognizes that additional guidance on the numerous stocking options available in this category may be necessary. Thus, in addition to the further explanation provided above, included below are an additional five (5) varieties that are also considered acceptable varieties in the vegetables or fruits staple food category. These five (5) examples of acceptable varieties did not appear in the 2016 final rule “List of Examples” section:

1. Lemons (e.g., 100% lemon juice and fresh lemons)
2. Beets (e.g., canned beets and fresh beets)
3. Spinach (e.g., fresh spinach and frozen spinach)
4. Cauliflower (e.g., fresh cauliflower and packaged cauliflower rice)
5. Olives (e.g., canned black olives and jarred pimiento stuffed olives)

IV. Additional Flexibilities for Common Wheat-Based Bread and Cereal Products

A. Bread

Under the 2016 final rule, the staple food variety “wheat-based bread” was subdivided into five discrete staple food varieties in the bread or cereals staple food category (wheat-based bread, wheat-based bagels, wheat-based buns/rolls, wheat-based English muffins, and wheat-based pitas) in order to provide more flexibility for stores in meeting the required seven (7) varieties in the bread or cereals staple food category. The Department is proposing a change with this rule that would further subdivide the “wheat-based bread” staple food variety by adding the following three discrete staple food varieties in addition to the five varieties listed above: wheat-based Indian flatbread, wheat-based crescent bread, and wheat-based matzah. This subdivision would be mirrored for other grain-based breads such as oats-based breads and rice-based breads. Thus, the proposed change to the definition of “variety” would provide three additional staple food varieties in the bread or cereals products staple food category for each type of grain-based bread. Under the proposed changes, the following eight would be considered discrete staple food varieties in the bread or cereals staple food category:

1. Wheat-based breads (e.g., loaves of sliced bread and whole baguettes)
2. Wheat-based pitas (e.g., plain pitas)
3. Wheat-based bagels (e.g., cinnamon raisin bagels and blueberry bagels)
4. Wheat-based English muffins (e.g., plain English muffins and maple-infused English muffins)
5. Wheat-based buns/rolls (e.g., hamburger buns and frozen dinner rolls)
6. Wheat-based Indian flatbreads (e.g., roti and Naan)
7. Wheat-based matzah (e.g., egg matzah and wheat matzah)
8. Wheat-based crescent breads (e.g., plain croissants and refrigerated, ready-to-bake crescent breads)

B. Flour

Under the 2016 final rule, wheat flour was considered to be a “general wheat-based product” staple food variety, such that a bag of wheat flour and a wheat-based frozen pizza were both considered to be a “general wheat-based product” staple food variety in the bread or cereals staple food category. The Department is proposing a change with this rule that would add “wheat-based flour” as a discrete staple food variety in the bread or cereals staple food category. This change would be mirrored for other grain-based flours such as rice-based flour and cornmeal. Thus, the proposed change to the definition of “variety” would, therefore, provide an additional staple food variety in the bread or cereals products staple food category for each type of grain-based flour. Under the proposed changes, the following two would be considered discrete staple food varieties in the bread or cereals staple food category:

1. General wheat-based product (e.g., a wheat-based frozen pizza and a wheat-based pre-packaged sandwich)
2. Wheat-based flour (e.g., a bag of wheat flour)

V. Flexibility for 100% Whole Grain Products

Under the 2016 final rule, 100% whole grain products, such as 100% whole grain rye-based bread, were not considered to be discrete varieties in the bread or cereals staple food category. This meant that if a store stocked both wheat-based bagels and 100% whole grain wheat-based bagels, the store would have only one staple food variety: wheat-based bagels. The Department is proposing a change with this rule that would allow any bread or cereal staple food to be counted once if it is a 100% whole grain product, and once if less than a 100% whole grain product. The proposed change to the definition of “variety” would provide considerable additional flexibility in the bread or cereals staple food category, as this change would

effectively double the number of available varieties in this category, where a staple food is available in both 100% whole grain and less than 100% whole grain forms.

To reach the required seven (7) varieties in the bread or cereals staple food category under the proposed changes, for example, a store could stock the following:

1. spaghetti (wheat-based pasta)
2. frozen pre-made burritos (general wheat-based product)
3. wheat flour (wheat-based flour)
4. whole wheat bagels (100% whole grain wheat-based bagels)
5. roti (wheat-based Indian flatbreads)
6. plain croissants (wheat-based crescent breads)
7. cinnamon raisin bagels (wheat-based bagels)

Comments Requested on the Definition of “Variety”

FNS requests comments that address logical and implementable ways to modify the definition of “variety” so that it provides more flexibility to stores, while also ensuring that SNAP recipients are assured access to a range of healthful food options.

The word “variety” denotes diversity and difference. FNS depends primarily upon a product’s main ingredient or product kind to define “variety.” Several other defining elements of food products (brands, nutrient values, flavorings, packaging types or styles, or package sizes) are generally excluded from consideration, as they have the potential to render the term “variety” meaningless in effect. For example, if FNS were to consider different brands and packaging types as discrete staple food varieties, a store could meet the vegetables or fruits staple food category requirement with seven (7) kinds of tomatoes (e.g., Brand A tomato sauce, Brand B tomato sauce, 100% tomato juice, raw Roma tomato, raw beefsteak tomato, canned tomato paste,

and sundried tomatoes). Such a result would seem to run counter to the purpose of Criterion A, namely ensuring that SNAP authorized retail food stores offer for sale to SNAP recipients a range of different food products in all four staple food categories.

That said, some of the changes to the definition of “variety” already discussed in this proposed rule consider nutrient values and packaging styles in a limited fashion, especially in the meat, poultry, or fish and dairy products staple food categories. In providing these additional flexibilities, FNS acknowledges these were the two (2) main categories in which small format retailers were likely to experience stocking challenges under the 2016 final rule. Nevertheless, FNS welcomes comments that address feasible ways to modify the definition of “variety” in each staple food category to provide more flexibility to stores.

Procedural Matters

Executive Orders 12866 and 13563

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, reducing cost, harmonizing rules, and promoting flexibility. This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget. The Regulatory Impact Analysis (RIA) for this rulemaking was published as part of the docket in Supporting Documents on www.regulations.gov. A summary of the RIA follows.

Regulatory Impact Analysis

Need for Action

The proposed rule is in response to Sec. 765 of the Consolidated Appropriations Act of 2017 and Sec. 728 of the Consolidated Appropriations Act of 2018, which prohibit USDA from implementing two retailer stocking provisions (“Breadth of Stock” and “Definition of ‘Variety’”) of the final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” (the 2016 final rule), until such a time as regulatory modifications to the definition of “variety” are made that would increase the number of food items considered to be staple food varieties for purposes of SNAP retailer eligibility. The proposed rulemaking would modify the definition of “variety” in order to align SNAP regulations with the requirements expressed in the Consolidated Appropriations Acts of 2017 and 2018, thus allowing FNS to move forward with implementation of the “Breadth of Stock” requirements of the final rule, which were mandated by the Agricultural Act of 2014.

Benefits

This rulemaking would provide regulatory flexibility to 187,000 smaller authorized retailers (e.g. convenience stores, small grocery stores, combination stores, etc.) in meeting the enhanced stocking requirements of the 2016 final rule. As discussed below, the proposed changes would require the average small store to add six (6) fewer items to their stock in order to meet the new stocking requirements of the 2016 final rule, providing a savings of \$16.1 million to retailers in fiscal year (FY) 2018 and approximately \$22.5 million over five years, FY 2018 through FY 2022, relative to the costs of the 2016 final rule.

Costs

The proposed rule is not expected to impact costs to the Federal government. While FNS anticipates that the need to conduct store visits to verify that stores are compliant with the new requirements, those costs were fully captured in the 2016 final rule analysis.

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 would not present a significant impact to a substantial number of small businesses. It provides greater regulatory flexibility to SNAP retailers, particularly small entities, in meeting the enhanced stocking requirements of the 2016 final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP).” FNS estimates average costs to those small businesses for meeting enhanced stocking requirements, would be \$86 less per store in the first year and \$120 less over five years, for a decreased average cost of \$160 per store in the first year and \$500 over five years. 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.

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 \$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 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 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

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 this proposed rule, Department of Agriculture Programs and Activities Excluded from Executive Order 12372 (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372.

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 proposed rulemaking does not have federalism implications. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 deregulatory action that seeks to ease the staple food stocking requirements for SNAP authorized retailers. In particular, the proposed changes would aid small format retailers in meeting the enhanced stocking requirements of the 2016 final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” by expanding the definition of “variety” in the four staple food categories. These changes would provide retailers with additional options of acceptable staple food varieties in each of the four staple food categories, which will aid them in meeting the enhanced SNAP retailer eligibility requirements of Criterion A and save them an average of \$86 in meeting stocking requirements.

Executive Order 12988, Civil Justice Reform

This proposed 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 that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effects. 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

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.

FNS has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. If a Tribe requests consultation, the FNS 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.

It should be noted that, 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.

Civil Rights Impact Analysis

FNS has reviewed this proposed rule in accordance with Departmental Regulations 4300-4, “Civil Rights Impact Analysis” and 1512-1, “Regulatory Decision Making Requirements” to identify and address any major civil rights impacts the proposed rule might have on minorities, women, persons with disabilities, or other protected classes. FNS has determined that this proposed rule will not have an adverse impact on any retail food store owners or SNAP recipients belonging to protected classes. The regulation only concerns those retail food stores participating in SNAP that would not meet the increased staple food stocking requirements necessary for SNAP authorization that were mandated by the 2014 Farm Bill and codified in the 2016 final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP).” The proposed regulatory changes would aid those retail stores, which are primarily small format retailers, in meeting the enhanced stocking requirements of the 2016 final

rule. This proposed rule would 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 would have no differential impact on protected classes of individuals, minority owned or operated business entities, or woman owned or operated business entities. Relatedly, 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, and 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.

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 information collection burden associated with this proposed rule.

E-Government Act Compliance

FNS is committed to complying with the E-Government Act of 2002, Public Law 107-347, 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 proposed rule using online media.

List of Subjects

7 CFR Part 271

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

7 CFR Part 278

Banks, banking, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, 7 CFR parts 271 and 278 are proposed to be amended as follows:

1. The authority citation for 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, add a definition for *Variety* in alphabetical order to read as follows.

§ 271.2 Definitions.

* * * * *

Variety, in evaluating a firm's stock of staple foods for purposes of determining eligibility to participate in SNAP, means foods that differ from each other by distinct main ingredient or product kind as determined by the Secretary. See 7 CFR 278.1(b)(1)(ii)(C).

* * * * *

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

3. Revise § 278.1(b)(1)(ii)(C) to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(C) (1) Offer a variety of staple foods within each staple food category that differ from each other by distinct main ingredient or product kind. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or fat-reduced cow milk, almond-based milk substitute, soy-based yogurt substitute, soft goat milk-based cheese, cow milk-based butter, cow milk-based sour cream, and cow milk-based full-fat yogurt in the dairy products category; or rice, wheat-based bagels, 100% whole grain wheat-based bagels, wheat-based pitas, rye-based bread, rice-based pasta, oatmeal, and wheat-based matzah in the bread or cereals category; or shelf-stable chicken, beans, nuts/seeds, perishable beef, perishable pork, chicken eggs, and perishable chicken in the meat, poultry, or fish category.

(2) 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. boxed and bagged, or fresh and frozen), meat cuts, product shapes, textures, or package sizes of the same or similar foods except where explicitly specified in Agency guidance. Similar food items such as, but not limited to, tomatoes and tomato juice, brown rice and white rice, 1% milk and skim milk, perishable ground beef and perishable beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but 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 except where explicitly specified in Agency guidance. Accessory 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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Dated: March 28, 2019.

Brandon Lipps
Acting Deputy Under Secretary
Food, Nutrition, and Consumer Services
[FR Doc. 2019-06597 Filed: 4/4/2019 8:45 am; Publication Date: 4/5/2019]