



**Billing Code: 3410-30-P**

**DEPARTMENT OF AGRICULTURE**

**Food and Nutrition Service**

**7 CFR Parts 278 and 279**

**[FNS-2018-0021]**

**RIN 0584-AE63**

**Taking Administrative Actions Pending Freedom of Information Act (FOIA)**

**Processing**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Supplemental Nutrition Assistance Program (SNAP or Program) regulations to ensure that retail food stores can no longer use the Freedom of Information Act (FOIA) process to delay FNS' administrative actions to sanction a retail food store for SNAP violations. Under this rule, FNS will process FOIA requests and FOIA appeals separately from the administrative action for all SNAP violations, as originally proposed. The processing of FOIA requests and appeals during the administrative and judicial review process will have no impact on when the agency can take administrative action.

**DATES:** This rule is effective [insert date 60 days after date of publication in the Federal Register] and will apply to any FOIA request or appeal received by the agency on or after the effective date.

**FOR FURTHER INFORMATION CONTACT:** Vicky T. Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management, 1320 Braddock

Place, Alexandria, Virginia 22314, by phone at 703-305-2476, or by e-mail at vicky.robinson@usda.gov.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

### **Current Process:**

SNAP regulations at 7 CFR 278.6 provide that retailers considered for a sanction as a result of committing a program violation will be charged with those violations and have a full opportunity to respond to FNS prior to FNS' making a final administrative determination and applying the sanction. After FNS issues a charge letter to the store with detailed information regarding the nature of the violations, the firm has 10 days to respond to the charge letter, orally or in writing, with any information or evidence that explains the activities that led to the charges outlined in the letter. FNS does not consider a FOIA action as an official response to the charge letter. However, if a firm files a FOIA request after receiving a charge letter, FNS currently interrupts the administrative process, such as issuing a sanction determination, while the agency responds to the FOIA request. Even if the firm submits a response to the charge letter in addition to a FOIA request, FNS delays the review of the firm's charge letter response until FNS has responded to the FOIA request.

In the event that the firm appeals the agency's FOIA response, FNS again delays administrative action while it responds to the appeal. The FOIA requires FNS to provide a response to the initial request within 20 days of receipt. The FOIA also requires FNS to make a determination with respect to any appeal within 20 days of receipt. FNS is continually working to improve the time it takes to process FOIA requests and appeals

and to reduce its backlog. Today, however, firms continue participating in SNAP and redeeming benefits until the FOIA actions are complete, regardless of the seriousness of the charges originally outlined in the charge letter or the fact that the firm has not submitted a formal response to the charges. Once responses to the FOIA request and FOIA appeal are complete, the agency renews administrative proceedings by either a) reviewing the firm's official response to the charge letter if one has been submitted, or b) giving the firm another 10 days to provide an official response.

If the firm's official response provides documentation supporting its stance relating to the charges outlined in the charge letter, FNS considers this documentation before issuing a notice of determination. It is only on the issuance of this notice of determination that FNS may impose sanctions against a firm.

Holding SNAP administrative actions, particularly the issuance of a notice of determination, in abeyance throughout the entire FOIA process has had a serious impact on SNAP integrity because FNS practice has enabled violating firms to continue to participate in SNAP during the FOIA process. From Fiscal Year (FY) 2015 to FY 2018, 1,550 SNAP retail food stores submitted FOIA requests to FNS after receiving a charge letter. Of those retail food stores, 902 appealed the agency's FOIA response. These 1,550 firms collectively redeemed over \$266 million in SNAP benefits while the FOIA actions were processed (see Table 1).

### **Proposed Action**

In the Notice of Proposed Rulemaking (NPRM), FNS proposed to amend SNAP regulations in order to process FOIA requests and FOIA appeals separately from administrative actions FNS takes against retail food stores.

### **Summary of this Final Action**

FNS adopts the NPRM as final. This final rule will apply to any FOIA request or appeal received by the agency on or after the publication date. In the final rule, FNS amends SNAP regulations in order to process FOIA requests and appeals separately from administrative actions while a sanction determination is made. In cases warranting permanent disqualification, the sanction is effective upon receipt of the agency determination notice, in accordance with statutory and regulatory requirements. This ensures firms that are found to have committed the most egregious Program violations, such as trafficking, will be removed from the Program expeditiously, as Congress intended when it amended the Food and Nutrition Act of 2008 (FNA) to add requirements for permanent disqualifications to be effective from the date of receipt of the agency's determination notice.

The agency's issuance of determinations resulting in sanctions of non-permanent disqualification will become final and take effect 10 days after the firm receives the determination notice, unless the firm makes a timely request for administrative review. If an administrative appeal is filed in a non-permanent disqualification case, the final agency determination—rendered after the administrative review has been completed—will take effect 30 days after the date of delivery of the determination notice to the firm. With the exception of firms disqualified from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and reciprocally disqualified from

SNAP, firms found to have violated program rules will continue to be afforded their full due process opportunities for administrative and judicial proceedings.

### **General Summary of Public Comments**

During the sixty-day comment period, which ended on April 22, 2019, FNS received ten public comments in response to the NPRM. Two comments were from retailer associations that stated they represent small businesses. Two comments were from public advocacy groups. One comment was from a State government office and one comment was received from an independent office within the U.S. Government's Small Business Administration. Four comments were received from the general public, and one of these was submitted on behalf of three individuals. All public comments can be viewed at <https://www.regulations.gov/docket?D=FNS-2018-0021>.

Three commenters expressed general support for the NPRM and its intention to make the administrative action process more efficient. Two of these commenters specifically identified the ability of some retailers charged with trafficking to continue accepting SNAP benefits while an administrative action is held in abeyance during the processing of a FOIA request or appeal as reason alone to promulgate a rule to separate these two processes. Several commenters opposed to the NPRM also cited the importance of removing retailers that traffic benefits, although the commenters did not view the NPRM as a step towards that general goal.

Seven commenters expressed opposition to the NPRM, primarily because of concerns about the impact on retailers' right to due process. Several of these commenters asserted that FNS' current administrative process makes FOIA necessary, suggesting that

FNS' charge letter does not adequately explain the nature of the charges, and arguing the NPRM would take away the only available option for retailers to gain access to the evidence against them prior to being sanctioned. Some commenters also felt that the agency should release more records when responding to a FOIA request or during administrative procedures before judicial review. Some commenters questioned the validity of FNS' assertions in the NPRM regarding the submission of extensive and complex FOIA requests, and appeals that repeatedly request information that has been consistently denied in prior requests, seemingly with the intention of delaying FNS' determination to disqualify or impose a civil monetary penalty against the firm. These commenters stated that FNS must provide a much clearer explanation, based on actual data, for its decision to separate the processing of FOIA actions from administrative decision-making is the correct course of action. Others expressed concern that the NPRM could create a disparate impact on small businesses, including minority-owned businesses and the communities they serve. Commenters requested FNS offer strategies to mitigate these potential impacts.

The comment summary and analysis in this preamble primarily focuses on general comment themes and those comments were considered in this final rule.

### **Analysis of Comments**

#### **Charge Letter Content and Due Process Considerations**

Several commenters suggested that FNS does not provide sufficient information regarding violations when charging retailers with such violations, thereby hampering retailers' due process rights.

When FNS identifies a firm that appears to have violated program rules, the agency issues a charge letter detailing the suspected violations, the sanction(s) that may be imposed for these violations, and the steps the firm must take if it wishes to address the charges before a determination is made and sanctions go into effect. The statute directs that the Secretary promulgate regulations outlining the criteria by which FNS may issue a charge letter on the basis of evidence that may include facts established through on-site investigations (an “investigative case”), inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system (a “data case”). Current regulations at 7 CFR 278.6(b) outline the charge letter process.

A data case is based on transaction data for the firm obtained through the SNAP Electronic Benefit Transfer (EBT) system and is analyzed in relation to the firm’s business model and operation. For a data case, the charge letter provides the firm with a list of transactions that establish a clear and repetitive pattern of unusual, irregular, or inexplicable activity for the firm’s business type. The charge letter specifies the exact charge as well as the sanction provided by regulation for that violation. The charge letter also breaks down the transaction information further by the type of unusual activity, such as multiple transactions made from the same household accounts in a set period of time, or transactions for amounts inconsistent with observed store food stock and firm records. The information currently provided to the firm in the charge letter includes:

- a description of the unusual activity;
- the exact date and time of each transaction;
- the terminal ID number for the device used to conduct each transaction;
- the entry method of each transaction (such as “swipe” or “manual key entry of card number” at the point-of-sale);

- the exact amount of each transaction;
- the total number of transactions and dollar amount for each type of unusual activity; and
- the last four digits of the household account number associated with each transaction.

The charge letter also explains the firm's right to respond to the charges by presenting evidence or explanation for the unusual activity. The firm must submit this response within 10 days of receiving the charge letter, and may do so orally or in writing. The charge letter provides a name and phone number of a specific FNS employee to contact regarding this action and a mailing address for any documentation that the firm would like to submit in its defense.

For an investigative case, the charge letter provides the firm with a redacted copy of the investigator's report. Only information that would otherwise allow firms to identify undercover investigators is redacted. The report contains information regarding undercover visits to the retail food store made by the investigator and describes each visit in detail. The report indicates:

- the number of investigators;
- the number of visits;
- the start and end dates during which the visits occurred;
- the number of visits that resulted in a purchase that violated SNAP regulations;
- the date of the transaction(s);
- the exact transaction amount(s);
- the amount of SNAP benefits trafficked, if applicable; and
- the items purchased using SNAP benefits, and whether the item was eligible or ineligible.

As with the charge letter for a data case, the investigative charge letter also explains the firm's right to respond to the charges by presenting evidence or explanation for the transactions that violated SNAP regulations. The firm must submit its response to the charges within 10 days of receiving the charge letter, and may do so orally or in writing. The charge letter provides a name and phone number of a specific FNS employee to contact, and a mailing address for any documentation that the firm would like to submit in its defense.

The agency disagrees with the assertion that retailers' due process rights are hampered by a lack of sufficient information regarding violations provided in a charge letter. When issuing a charge letter, FNS provides a significant amount of substantial information to a retail food store in a clear and concise manner. As explained above, a firm is provided with data identifying exactly which transactions are violations of SNAP regulations or are suspicious, the basis for FNS' determination that those transactions are violations of SNAP regulations or are suspicious, and when those transactions occurred. Finally, the charge letter explains a firm's opportunity to respond to the charges by presenting evidence or a rational explanation for those transactions, should it choose to do so.

FNS carefully considers a firm's response to the charge letter before issuing a notice of determination. Firms that ultimately receive an adverse determination are afforded extensive procedural protections through administrative and judicial review.

Such firms may file a request for administrative appeal within 10 days of the date of delivery of the notice of determination.

If the agency determination is upheld in administrative review, FNS issues a final administrative determination informing the firm that the adverse action will take effect 30 days from the date of delivery of the notice — unless the firm has been charged with a serious offense warranting permanent disqualification such as trafficking, in which case the permanent disqualification is already in effect as required by statute. The firm is also advised in the final administrative determination that it has 30 days to avail itself of the judicial review process by filing a complaint against the United States in Federal court.

### **Releasing Records**

A few commenters suggested that FNS could address the issue of lengthy delays in administrative decision-making by simply providing all of the records related to the charges leveled against a firm in the charge letter itself, when responding to the FOIA request, or during administrative review proceedings. As noted above, FNS already provides extensive data and details regarding suspected violations in the administrative process.

The FOIA (5 U.S.C. 552) provides the public the right to request access to records from a Federal agency. Federal agencies are required to disclose any agency records requested under the FOIA unless they fall under one of nine exemptions which protect interests such as personal privacy, national security, and law enforcement. FNS exercises caution and due diligence when deciding whether to release a record in response to a FOIA request. For example, 5 U.S.C. 552(b)(7)(E) protects from disclosure information

which “would disclose techniques and procedures for law enforcement investigations or prosecutions, or that would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law....” Under this exemption, FNS does not disclose information that would publicly reveal methods used in analyzing data or in conducting an on-site investigation, as such information would make it possible for a retail food store to modify its activity in the future to avoid detection. Failing to protect this information from disclosure under FOIA would jeopardize FNS’ ability to identify and investigate firms that are violating program rules.

The release of agency records of such a sensitive nature under administrative review proceedings would likewise jeopardize the agency’s ability to investigate firms. However, if, after the agency’s findings and ruling, the firm still takes issue with FNS’ determination, judicial review is an available option. Under the discovery process at judicial review, some of these records *may* be released; however, these records are typically released under a protective order that protects the information from public view. Such a protective order is not an option available through the administrative review process or FOIA.

In some instances, when a firm is charged with violations, the firm requests the SNAP sales of individual stores that are similar to its store. FNS protects individual retail food store SNAP sales amounts (i.e., SNAP redemptions) from disclosure under FOIA exemption 4 (5 U.S.C. 552(b)(4)), in accordance with a recent Supreme Court decision and subsequently issued Department of Justice guidance, both detailed below.

This FOIA exemption protects from disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”

## **Government**

A decision by the Supreme Court on June 24, 2019, in *Food Marketing Institute v. Argus Leader*<sup>1</sup>, 139 S. Ct. 2356 (2019), addressed this exemption and the meaning of “confidential.” The Court held that, where commercial or financial information is treated as private by its owner and provided to the Government under an assurance of privacy, the information is considered “confidential” within the meaning of FOIA exemption 4. *Id.* at 2366.

Following the Supreme Court decision, the Department of Justice (DOJ) issued guidance<sup>2</sup> to USDA that the agency will follow when processing FOIA requests for SNAP data of this nature. The first step will be for the agency to determine whether the information requested is customarily kept private or closely-held by the submitter of the information. If yes, the second step is to determine whether the agency provided an express or implied assurance of confidentiality when the information was shared with the Government. If so, the information is confidential under exemption 4. This information, and other information provided to the agency by firms, may also fall under FOIA exemptions 3 and 6. These exemptions permit withholding of information prohibited

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<sup>1</sup> The Food Marketing Institute is a trade group representing grocery retailers, many of whom accept SNAP benefits, which argued store-level redemption data should be considered confidential.

<sup>2</sup> Exemption 4 after the Supreme Court's Ruling in *Food Marketing Institute v. Argus Leader Media*

from disclosure by a Federal statute and when the disclosure would constitute a clearly unwarranted invasion of personal privacy, respectively.

Because the Supreme Court has held that individual store data submitted to the agency is protected by Exemption 4, the agency may not release such data in response to a FOIA request. *See id.* at 2363 (noting that such data is provided by individual stores to USDA under a regulatory provision promising confidentiality and therefore is not subject to disclosure under Exemption 4).

One commenter suggested revamping FNS' current process of utilizing Administrative Review Officers (AROs) and replacing them with Administrative Law Judges (ALJs), with the reasoning that ALJs have considerably more authority to convene evidentiary hearings and discovery proceedings. Such an organizational change within the Department of Agriculture is not germane to this rulemaking as it is outside the scope of what was proposed and has no bearing on the processing of FOIA requests and appeals. As noted, discovery is a process that is already available to firms that remain aggrieved by an agency administrative action and choose to pursue judicial review.

Some commenters expressed concern that providing full access to records only during discovery proceedings at the judicial review stage is not a financially viable option for small retail food stores that are unlikely to pursue court proceedings. Congress recognized the need for a robust administrative due process when retailers are charged with program violations, which provides for stores of any size to present evidence if they disagree with the agency's determination. In most cases, retailers are allowed to continue

accepting SNAP benefits until after the final administrative determination is rendered, and multiple opportunities for retailers to rebut charges and administratively appeal agency determinations are provided by statute and regulation. The statute is clear, however, that when it comes to serious offenses warranting permanent disqualification, the disqualification must go into effect on the date of receipt of the notice of disqualification 7 U.S.C. 2023(a)(18). The FNS administrative due process is aligned with the FNA, and this rule ensures that the agency is in full compliance with its statutory mandate to expeditiously remove stores that have committed serious violations from the Program.

### **Using FOIA to Delay FNS' Administrative Actions**

Some commenters expressed concern with the alleged lack of support provided in the NPRM regarding FNS' statement that attorneys for some firms submit extensive and complex FOIA requests and appeals, and repeatedly request information that has been consistently denied when requested through FOIA. Commenters questioned FNS' concerns that the seeming intention of the attorneys was delaying FNS' final determination to disqualify or impose a civil money penalty against the respective firm.

As is evident in agency FOIA logs<sup>3</sup>, a small cadre of attorneys regularly request FOIA information regarding SNAP firms. These attorneys often submit standard requests for information on behalf of one firm, receive a response from FNS protecting particular information under FOIA exemptions, and subsequently and repeatedly send equivalent requests on behalf of other firms. By law, the agency is obligated to respond

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<sup>3</sup> FNS FOIA logs: <https://www.fns.usda.gov/foia/electronic-reading-room>.

to each of these FOIA requests individually. Under current practice, the agency delays the respective administrative action while responding to each of the FOIA requests. In many instances, these attorneys go on to file appeals for firm after firm seeking the release of information that was previously denied under FOIA (e.g., a request for the name of an undercover investigator or confidential informant), or information that is of a completely different nature than the original request. These requests cause unnecessary delays in issuing a determination notice to the firm, as is evidenced by the data that follows.

From Fiscal Year (FY) 2015 to FY 2018, FNS issued close to 12,000 charge letters. Firms that did not file a FOIA request after receiving a charge letter had their notice of determination issued, on average, approximately six weeks later. The 1,550 firms that did file a FOIA request after receiving a charge letter were able to redeem benefits for an average of eight weeks before the agency could respond to the FOIA request. Of those, the 902 firms that then appealed the agency's FOIA response, however, were able to redeem benefits for an average of eighty weeks before final action could be taken on their respective cases.

This final rule will improve program integrity and reduce final action timeframes significantly by preventing a FOIA request and appeal from delaying administrative actions and allowing the agency to take timely action against firms that have been determined to have committed Program violations. This rule does not affect the right of firms charged with program violations to request information from FNS through FOIA and utilize the information provided by the agency in their case.

## **Mitigating Impact on the Populations Served by Small Retail Food Stores Who May Be Impacted by This Rule**

A few commenters expressed a general concern about the impact that removing a retail food store from the Program may have on the population served by that particular store.

SNAP regulations provide for a retail food store to pay a civil monetary penalty (CMP) in lieu of a time-limited or ‘term’ disqualification sanction when the agency determines that sanctioning the firm by removing it from the Program would cause hardship to participants. The charge letter describes this option and also informs the retailer of the CMP amount it would have to pay if determined to be eligible.

A hardship CMP generally may not be imposed in lieu of a permanent disqualification, such as for trafficking benefits. However, in certain circumstances described in 7 CFR 278.6(i), it is possible for a trafficking CMP to be imposed in these cases. For example, if the firm timely submits to FNS substantial evidence that demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations, a CMP, as opposed to permanent disqualification, may be warranted.

FNS understands the impact that removing an authorized retail food store for program violations, even temporarily, may have on SNAP participants. FNS provides ample consideration to SNAP participants’ ability to access and purchase an adequate variety of food items at other SNAP-authorized retail food stores in an area when making

administrative decisions. Firms impacted by this final rule will be afforded all of the appropriate considerations described here.

## **Summary**

As outlined in the rule, FNS will not delay administrative actions based on the receipt of FOIA requests. In cases where a firm submits a FOIA request, FNS will consider the firm's official response to the charge letter while simultaneously processing the firm's FOIA request. On completing the review of the firm's official response to the charges, FNS will issue a notice of determination. A firm may then submit additional information in support of its position to FNS or the court as part of its due process rights under administrative appeal or judicial review, including information provided by FNS' response to a FOIA request.

If a firm receives an adverse notice of determination for the most egregious violations, such as trafficking, the permanent disqualification sanction shall go into effect on the firm's receipt of the notice of determination per statute and regulation. In fiscal year 2018, of the 1,555 firms permanently disqualified, 1,552 were determined to have trafficked in SNAP benefits, two (2) falsified information, and one (1) was determined to have committed a third-strike violation warranting permanent disqualification.

Except for firms disqualified from SNAP because they were disqualified from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), which are not subject to administrative review by SNAP, firms will retain their right to administrative and judicial review of the determination made, in accordance with 7 CFR Part 279. If a firm receives an adverse notice of determination for non-permanent

disqualification violations, the sanctions outlined in the notice will be implemented once the firm has exhausted all due process proceedings. Firms determined to have committed offenses that warrant permanent disqualification will be permanently disqualified from the Program on delivery of the notice of determination. Through this final rule a retail food store's submission of a FOIA request or appeal would have no impact on when the agency takes administrative action. To clarify that a FOIA request or FOIA appeal is not a response to a letter of charges or a request for administrative review of the notice of determination, and to ensure that any request or appeal for records under the FOIA does not delay the effective date of the administrative determination, FNS is amending language at 7 CFR 278.6(p), 279.4(c), and 279.6(b). Removing retail food stores from the Program at the point FNS has determined, based on the evidence and a review of a firm's charge letter response (if provided), that a store engaged in a serious offense warranting permanent disqualification such as trafficking, is aligned with the FNA and helps ensure that the Program is conducted with integrity. Firms sanctioned for less serious, non-permanent disqualification violations will continue participating in SNAP, pending the outcome of any due process proceedings.

### **Procedural Matters**

#### **Executive Order 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 costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined to be significant. Accordingly, the rule has been reviewed by the Office of Management and Budget, in conformance with Executive Order 12866.

### **Executive Order 13771**

This final rule is considered neither an EO 13771 regulatory action nor an EO 13771 deregulatory action because it results in no more than *de minimis* costs.

### **Regulatory Impact Analysis**

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any one year). USDA does not anticipate this final rule is likely to have an economic impact of \$100 million or more in any one year, and therefore, does not meet the definition of “economically significant” under Executive Order 12866. The changes in this final rule are not anticipated to have any impacts on SNAP participation or benefit issuance; any costs or savings will be as the result of changes that impact retailers who are subject to sanctions as a result of failure to comply with the Food and Nutrition Act of 2008, as amended.

### **Economic Analysis of Processing FOIA Requests and Appeals Separately from Administrative Actions against SNAP Retailers**

#### Overview of the rule

The rule separates the process of disqualifying or imposing fines on retailers from the process of responding to Freedom of Information Act (FOIA) requests or appeals made by retailers.

Under current regulations, the process is as follows:

- FNS issues a charge letter to a retailer suspected of violating program rules. The letter describes the transactions that led to the charges and the possible sanctions that may be imposed as a result. Sanctions are not actually imposed at this point.
- The retailer has 10 days to respond to the charge letter.
- FNS examines evidence, including any response from the retailer, to determine whether the retailer violated program rules. If FNS determines that the retailer has violated program rules, FNS issues a notice of determination to the retailer, including a sanction if applicable.
  - For retailers determined to have committed violations warranting permanent disqualification, including trafficking, the sanction takes effect on receipt of the notice of determination.
- For non-permanent violations, the firm may be temporarily disqualified and/or pay a fine. These sanctions take effect 10 days from receipt of the notice of determination, unless a timely request for an administrative review is filed.
- The notice also informs retailers that they have 10 days to request administrative review. If the case involves a permanent disqualification, the retailer will be permanently disqualified on receiving the initial notice of determination and remain so during the administrative review. If a retailer files such a request in a non-trafficking case, the sanctions are held in abeyance while the review is performed. Retailers have the opportunity to provide additional information in support of their position in administrative review.

- FNS then makes a final determination based on the administrative review. If the retailer was permanently disqualified on receiving the original notice of determination and remained as such during administrative review, the permanent disqualification remains in effect if the final determination sustains the original determination. If the final determination is that the retailer committed non-permanent violations, sanctions go into effect 30 days after the final determination.
- Retailers who disagree with FNS' final determination may then file a complaint against the United States to obtain judicial review within 30 days. Retailers may submit new information to the reviewing court.

Retailers considered for disqualification or imposition of a fine, like any citizen or company, may submit FOIA requests. Under current practice, when a FOIA request is submitted, FNS' determination to disqualify or impose a fine against the firm is delayed until the agency has responded to the FOIA. Retailers may also appeal the agency's FOIA response; again, under current practice, the determination is delayed until the appeal is resolved. As noted elsewhere in the rule, some firms have used the FOIA and FOIA appeals process to stall the imposition of sanctions. For example, a lawyer who has handled multiple FOIA requests asks for the exact same information (such as the name of the investigator) that has been denied repeatedly in previous requests. As a result, current practice has resulted in a delay in taking administrative actions against retailers for SNAP violations. Although the timeframe for making a determination is

about 1.4 months when no FOIA request is made, that timeframe is extended, sometimes for 2 years or longer, when a FOIA/FOIA appeal is requested.

Under the final rule, retailers will no longer be able to use the FOIA process to delay FNS's administrative actions for SNAP violations. FNS will no longer delay the determination until after the FOIA request is processed. In instances where violations warrant permanent disqualification, the permanent disqualification will go into effect immediately on issuance of the notice of determination. This is in keeping with Congressional intent as specified at 7 U.S.C. 2023(a)(18). FOIA appeals will continue to be handled separately and in parallel with administrative due process remedies that retailers may pursue.

As a result of this change, firms found to have committed program violations, such as trafficking SNAP benefits, will be removed from the Program on a timelier basis. Firms that are determined to have committed program violations may avail themselves of administrative review and subsequent judicial review; sanctions for non-permanent violations would be held in abeyance during these additional proceedings as under current practice.

### Expected Impacts

In general, this final rule is expected to result in earlier implementation of sanctions against firms that violate program rules. As noted previously, there are no anticipated impacts on SNAP participation or on SNAP benefit issuance.

Between FY 2015 and FY 2018, 1,550 retailers that were charged with a violation submitted a FOIA request, and more than half (902) submitted a FOIA appeal.<sup>4</sup> During the time spent processing the FOIA request, which averaged two months, these retailers redeemed a total of more than \$44.25 million in SNAP. In addition, firms that submitted FOIA appeals continued to redeem SNAP benefits, on average, for another 20 months, and redeemed over \$222.45 million over the four-year period. In total, more than \$266.70 million was redeemed by stores charged with violations during the time spent processing FOIA requests and appeals.

Under this final rule, these retailers would not be able to use the FOIA process to delay final adjudication and thereby continue redeeming benefits. This loss of revenue caused by speedier disqualifications, and the subsequent inability to accept SNAP benefits, may result in some of these firms going out of business because of their violations.

Between FY 2015 and FY 2018, 272 retailers that were charged with non-permanent violations submitted a FOIA request. For these retailers, sanctions ranged from fines to term disqualification (temporary for a period of 6 months or more). Under this final rule, those firms would now see their sanctions implemented sooner than under current practice. However, because of the small number of retailers involved, the annual impact of imposing the sanctions earlier will be minor. There will be no permanent dollar loss of benefits for these retailers as the sanctions themselves are unchanged.

These changes may also result in fewer retailers submitting FOIA requests/appeals as a delaying tactic, which will reduce the amount of time the agency

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<sup>4</sup> USDA administrative data.

devotes to responding to these requests. As is the case under current rules, SNAP participants will be able to redeem their benefits at other authorized retailers. When a firms' non-permanent disqualification would cause a hardship to SNAP households because of limited food access, FNS may impose a fine in lieu of the non-permanent disqualification. Therefore, there is minimal impact on SNAP participants and the overall economy. There also is no impact on State agencies, as oversight of retailer operations is a Federal function.

**Table 1: FY 2015- FY 2018 FOIA and Benefit Redemption Data for Firms Issued Charge Letters**

<b>Charge Letter Group and FY</b>	<b>FOIA Requests</b>	<b>FOIA Appeals</b>	<b>\$ between FOIA Requests and Agency Response</b>	<b>\$ between FOIA Appeals and Agency Response</b>
<b>FY15</b>				
Permanent Disqualification	222	105	\$10,961,362	\$42,000,992
Non-Permanent Disqualification	30	8	\$3,313,239	\$3,005,438
<b>FY16</b>				
Permanent Disqualification	288	175	\$8,283,318	\$62,570,560
Non-permanent Disqualification	40	18	\$2,162,874	\$6,371,363
<b>FY17</b>				
Permanent Disqualification	349	211	\$10,062,273	\$47,128,737
Non-permanent Disqualification	92	38	\$1,001,022	\$6,853,157
<b>FY 18</b>				
Permanent Disqualification	419	289	\$6,136,318	\$46,114,839
Non-permanent Disqualification	110	58	\$2,334,029	\$8,401,981
<b>Sub-Totals</b>				
Permanent Disqualification	1,278	780	\$35,443,271	\$197,815,128
Non-permanent Disqualification	272	122	\$8,811,164	\$24,631,939

<b>Totals (Permanent and Non-Permanent Disqualification)</b>	1,550	902	\$44,254,435	\$222,447,067
			<b>Total \$ redeemed during FOIA Actions (Permanent Disqualification)</b>	\$233,258,399
			<b>Total \$ redeemed during FOIA Actions (Non- permanent Disqualification)</b>	\$33,443,103
			<b>Total \$ redeemed during FOIA Actions (Permanent and Non-permanent Disqualification)</b>	\$ 266,701,502

Source: USDA administrative data.

### Alternatives

As discussed in the preamble of this rule, several commenters suggested alternative approaches to specific rule provisions. One such suggested alternative was that FNS provide all of the records related to the charges leveled against a firm in the charge letter, in order to reduce the delay in decision making resulting from FOIA requests and appeals. The agency is not adopting this suggestion for the following reasons. First, as described in the preamble, the agency believes that the charge letter already provides extensive information regarding the basis of the charges. Second, certain information is protected from disclosure under Federal law, including information

that would reveal methods used in analyzing data or in conducting an on-site investigation, and therefore it would not be appropriate to include in the charge letter.

The agency also considered allowing retailers determined to have committed a program violation that warranted non-permanent disqualification to hold the determination in abeyance pending the outcome of the FOIA response, but not any subsequent FOIA appeal. However, allowing firms that have been disqualified to remain on the Program pending outcome of the initial FOIA response would negate the purpose of this rule, which is to separate FNS' administrative action from the FOIA process. As previously stated, firms found to have violated program rules will continue to be afforded their full due process opportunities for administrative and judicial proceedings. As such, FNS is not adopting this alternative.

No consideration was given in allowing retailers determined to have committed the most egregious violations, such as trafficking, to continue to participate in SNAP, as doing so would not only negate the purpose of this rule, but negatively impact program integrity, add costs associated as provided in the aforementioned Economic Analysis, and not conform with Congressional intent to remove egregious violators expeditiously. The processing of FOIA requests and appeals during the administrative and judicial review process will have now have no impact on when the agency can take administrative action.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review,

it has been certified that this rule would not have a significant impact on a substantial number of small entities.

This rule regulates all SNAP-authorized retailers, not just those stores that are likely to fall under the Small Business Administration gross sales threshold to qualify as a small business for Federal Government programs. Small retailers (defined as small or medium-sized grocery stores, convenience stores, combination stores, specialty stores, and other retailers, but not supermarkets, super stores, or large groceries) represent 82 percent of all SNAP retailers. However, among these small retailers, SNAP redemptions accounted for less than one percent of all their retail sales in 2018.

**Table 2: Retail Revenue and Redemptions for Small SNAP-Authorized Retailers, by Retailer Type in 2018**

<b>Retailer Type</b>	<b>Number of Stores</b>	<b>Average Retail Sales</b>	<b>Average Redemption Amount</b>	<b>Percent of Sales from Redemptions</b>
Small Grocery	11,331	\$349,672	\$60,512	17.3
Medium Grocery	8,788	\$991,028	\$317,308	13.6
Convenience Store	115,456	\$3,636,610	\$28,294	0.8
Combination Retailer	58,785	\$14,456,598	\$56,660	0.4
Specialty Store	7,792	\$2,987,973	\$82,791	2.8
Other Retailer	8,181	\$4,250,786	\$12,217	0.3
<b>Overall Average</b>	<b>210,333</b>	<b>\$6,236,404</b>	<b>\$43,791</b>	<b>0.7</b>

While all SNAP-authorized retailers are covered by this rule, the number of small businesses directly affected by this rule is expected to be small. This final rule only impacts those retail food stores that are charged with program violations, such as trafficking of benefits, and that submit FOIA actions to challenge penalties. Between

2015 and 2018, 7,235 firms were charged with trafficking; 7,230 were small retailers. Another 3,697 were charged with other violations; 3,663 were small retailers. During this four-year period, 1,550 of these firms submitted FOIA requests, averaging 388 per year, less than one-fifth of a percent of all SNAP-authorized retailers that are classified as small.

These firms had average annual redemptions of \$170,000 and average annual revenue of \$516,000, so their SNAP redemptions represented about a third of total revenue. Under this rule, retailers will experience a loss of revenue once the disqualification determination goes into effect. Revenue loss may result from lost SNAP sales as well as from reduced sales of items that, while not eligible for purchase using SNAP funds, were typically purchased in the same transaction using another tender type. USDA does not have data necessary to quantify the impact of this rule on revenue resulting from reduced non-SNAP purchases, only the impact on revenue resulting from lost SNAP purchases. While this impact would be significant for those affected, the number of affected retailers is not substantial: in an average year only 0.18 percent<sup>5</sup> of all SNAP-authorized small retailers submit FOIA requests after being charged with trafficking or another violation.

FNS also considered if the revenue lost from disqualification was large enough for the firm to exit the Program, and related economic impact. Of the 2,982 small firms temporarily disqualified between 2015 and 2018, FNS estimates that approximately 215

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<sup>5</sup> Calculated as 388 stores submitting FOIA requests in an average year divided by 210,333 small authorized SNAP retailers.

firms in an average year did not return to the Program. This represents .1 percent of all SNAP-authorized small retailers impacted for the period. For firms that are permanently disqualified, the intent is for the firms to remain off of the Program, so FNS has little data to indicate whether those stores remain in business after being removed from SNAP. However, in about one-third of these cases (representing 0.2 percent of authorized small retailers), firms were authorized to participate in SNAP under new ownership at the same location for this time period, which may be indicative that the penalized stores went out of business, but cannot be tied directly to the firm’s permanent disqualification from SNAP. Because the number of stores is quite small, and because this rule is expected to result in penalties being applied sooner (but not expected to change the determination or penalty), FNS estimates that regardless of length of disqualification, the overall economic impact would be minimal.

**Table 3: Firms Charged with Violations, Annual Average 2015-2018**

<b>Submitting FOIA Requests</b>	388
Average no. months Between FOIA Request and Agency Response	2
Average Redemption between FOIA Request & Agency Response	\$28,629
Average Annual Redemption, Firms Submitted FOIA Request	\$171,773
Average Annual Revenue, Firms Submitted FOIA Request	\$515,855
Redemptions as a Percentage of Revenue	33.3 %
<b>Submitting FOIA Appeals</b>	225
Average no. months Between FOIA Request and Agency Response	20
Average Redemption between FOIA Request & Agency Response	\$234,215
Average Annual Redemption, Firms Submitted FOIA Appeal	\$140,529
Average Annual Revenue, Firms Submitted FOIA Appeal	\$515,844
Redemptions as a Percentage of Revenue	27.2%

In its comments on the NPRM, the Small Business Administration’s Office of Advocacy (the “Office”) raised additional concerns on behalf of small businesses. First, the Office is concerned about the basis of the determination of whether a retailer has

violated SNAP rules. Some retailers have argued that they need to submit FOIA requests to better understand the charges against them. However, as described in more detail in the preamble, the charge letter details the suspected violations, the sanction(s) that may be imposed for these violations, and the steps that the firm must take if it wishes to challenge the charges. By regulation, FNS may issue a charge letter on the basis of evidence from an on-site investigation, inconsistent redemption data, or evidence obtained through electronic benefit system (EBT) transactions. EBT transactions are reviewed in relation to the store operation (including, but not limited to, size, inventory, sales practices). Firms are told in writing exactly which transactions are suspicious, when these transactions occurred, and why they are suspicious. Firms are given the opportunity to respond to these charges, and FNS carefully considers their official response before issuing a notice of determination. Even then, firms can file requests for administrative appeal and, if the determination is upheld, file a complaint through the judicial process.

The Office's final concern is that small businesses will be forced to expend large sums of money seeking judicial review of the FNS determination. As noted above and elsewhere in the preamble of this rule, retailers will continue to be afforded their full due process opportunities for administrative and judicial proceedings as under current statute and regulations. Therefore, the Department does not believe that the proposed changes to the FOIA process will result in a change in the number of firms pursuing a judicial review.

#### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates 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 by State, local or tribal governments, in the aggregate, or 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 most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain 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. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### **Executive Order 12372**

The Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance under Number 10.551 and is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials.

### **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 Executive Order 13132.

The Department has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

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

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

### **Civil Rights Impact Analysis**

FNS has reviewed the final rule, in accordance with the Department Regulation 4300-004, "Civil Rights Impact Analysis" to identify and address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. The promulgation of this final rule may impact a small percentage of small retail food stores and the SNAP customers who usually shop at those stores, however the mitigation strategies outlined in the CRIA provide consideration to SNAP recipients' ability to access and purchase an adequate variety of food items at other SNAP-authorized retail food stores in an area when making administrative decisions. Further, FNS will monitor

incoming complaints from retailers and SNAP recipients to determine any civil rights impact on protected groups due to the final rule.

### **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. FNS holds regularly scheduled consultations with Tribal Organizations to discuss regulations. On August 15, 2018, February 14, 2019, and October 24, 2019, FNS consulted with Tribal communities regarding the rule. These sessions provided Tribal communities the opportunity to address any concerns related to the rule. Tribal communities identified no issues regarding the rule. FNS is unaware of any current Tribal laws that could conflict with the final rule.

### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency 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. This rule does not contain information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

## **E-Government Act Compliance**

The Department 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.

### **List of Subjects**

#### **7 CFR Part 278**

Participation of Retail Food Stores, Wholesale Food Concerns and Insured Financial Institutions

#### **7 CFR Part 279**

Administrative and Judicial Review—Food Retailers and Food Wholesalers

Accordingly, 7 CFR parts 278 and 279 are amended as follows:

### **PART 278-- PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS**

1. The authority citation for part 278 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

2. In §278.6, add paragraph (p) to read as follows:

**§278.6 Disqualification of retail food stores and wholesale food concerns, and imposition of civil money penalties in lieu of disqualifications.**

\* \* \* \* \*

(p) *Freedom of Information Act (FOIA) requests and appeals.* A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding

disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.

**PART 279—ADMINISTRATIVE AND JUDICIAL REVIEW—FOOD  
RETAILERS AND FOOD WHOLESALERS**

3. The authority citation for part 279 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

4. In §279.4, amend paragraph (c) by:

- a. Adding a new second sentence; and
- b. Removing the words “However, no” in the last sentence and adding in its place the word “No”.

The addition reads as follows:

**§279.4 Action upon receipt of a request for review.**

\* \* \* \* \*

(c) \* \* \* Additionally, FNS may not grant extensions of time or hold the administrative review process in abeyance solely on the basis of a pending FOIA request or appeal. \* \* \*

5. In §279.6, amend paragraph (b) by:

- a. Adding a new second sentence; and
- b. Removing the words “However, no” in the last sentence and adding in its place the word “No”.

The addition reads as follows:

**§279.6 Legal advice and extensions of time.**

\* \* \* \* \*

(b) \* \* \* Additionally, the designated reviewer may not grant extensions of time or hold the administrative review process in abeyance solely on the basis of a pending FOIA request or appeal. \* \* \*

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Stephen L. Censky  
Deputy Secretary  
Food, Nutrition, and Consumer Services

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