



May 28, 2019

The Honorable Sonny Perdue
Secretary United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

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Food and Nutrition Service
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Re: Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program (SNAP)

Secretary Perdue:

On April 5, 2019, the United States Department of Agriculture's (USDA) Food and Nutrition Service (FNS) published a proposed rule titled: *Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program (SNAP)*.¹ This letter constitutes The Office of Advocacy's (Advocacy) thoughts and comments on the proposed rule. In summary, Advocacy urges the FNS to better consider the impacts of this rule on small food retailers and suppliers. We also suggest that FNS improve the Executive Order 12866 regulatory impact analysis (RIA) and the Regulatory Flexibility Act (RFA) initial regulatory flexibility analysis. This will support FNS' stated goal of providing flexibility to small food retailers while preserving SNAP participants' access to healthy food.

I. Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small

¹ 84 Fed. Reg. 13555 (April 5, 2019).



Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

In this rulemaking FNS proposes to make changes to the 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 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.

FNS also proposes to modify the definition of the term "variety" as it pertains to the stocking requirements for SNAP authorized retail food stores. The agency believes that the 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 2018.⁶ In fact, FNS states that the new requirements will require SNAP authorized retailers to carry six fewer items to their stock.⁷

In 2016 small convenience store retailers that participated in the SNAP program sought Advocacy's thoughts on the regulatory burdens associated with FNS' 2016 proposed rule titled, "*Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)*."⁸ On May 17, 2016, Advocacy filed comments on the proposed rule suggesting that FNS should improve its regulatory flexibility impact analysis which underestimated the costs to small food retailers and that the agency should consider reasonable regulatory alternatives that would minimize the impact of the rule on affected small businesses. In the final rule⁹ FNS acknowledged receiving Advocacy's comments which resulted in the agency reexamining the

² 5 U.S.C §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et. seq.).

⁴ Small Business Jobs Act of 2010 (Pub. L. 111-240) § 1601.

⁵ *Id.*

⁶ 81 Fed. Reg. 13560.

⁷ *Id.* at 13561.

⁸ 81 Fed. Reg. 8015. (February 17, 2016).

⁹ 81 Fed. Reg. 90675 (December 15, 2016).

assumptions in the RIA and RFA sections of the regulation.¹⁰ As a result, FNS noted that it made significant modifications to the 2016 proposed rule, most importantly the stocking requirement which was reduced from 168 items to 84 items.¹¹

Even with the changes contained in the 2016 final rule covered small entities had ongoing concerns with the required stocking requirements which they argued would impose significant economic burdens. That is why the same small entities, through their representatives at the National Association of Convenience Stores (NACS), encouraged Advocacy to re-review this recently published proposed rule.

II. Despite positive changes in the proposed rule, FNS should improve the RIA and RFA analyses which will make for a more transparent regulation.

It should be noted upfront that Advocacy applauds FNS for increasing the regulatory flexibility for small retailers in this proposed rule. NACS told Advocacy that the rule is a marked improvement on the 2016 final rule. However, Advocacy and NACS remain concerned about the agency's compliance with Executive Orders 12866¹², 13563¹³ and the RFA. Many of the underlying regulatory analytical requirements of the Executive Orders and the RFA are similar. EO 12866 direct federal agencies to assess all costs, benefits and available regulatory alternatives in the RIA if the rule is deemed to be a "significant" regulatory action. Section 603 of the RFA provides that any agency that publishes a proposed rule shall prepare an IRFA if the regulation is expected to have a significant impact on a substantial number of small entities.¹⁴ Section 603(b), contains a description of what should be included in the IRFA, and includes, among other things, a description and estimate of the number of small entities to which the rule will apply, a description of the projected reporting, recordkeeping and other compliance requirements, and description of any significant alternatives to the proposed rule that accomplish the stated objectives of the applicable statutes and minimizes any significant economic impacts on the affected small entities.

Interestingly, FNS acknowledges the importance of a properly performed regulatory flexibility analysis in this proposed rule. The 2016 final rule's regulatory flexibility analysis analyzed data from a nationally-representative sample of 1,392 SNAP authorized small format retail food stores. That analysis confirmed commenters' stocking concerns, and in response FNS provided small retailers with additional stocking flexibilities in the 2016 final rule.¹⁵ It is apparent that FNS continues to seek ways to provide even greater regulatory flexibilities to small food retailers as the agency has further reduced the stocking requirements in this proposed rule. Further, FNS asks for public comment on logical and implementable ways to modify the definition of "variety" so it can provide even more flexibility to stores, while also ensuring that SNAP recipients are assured access to a range of healthful food options.¹⁶ Improved RIA and RFA

¹⁰ *Id.* at 90696.

¹¹ *Id.* at 90697.

¹² Exec. Order 12,866 §3(f), 58 Fed. Reg. 51735 (September 30, 1993).

¹³ Exec. Order 13563, 76 Fed. Reg. 3821 (January 21, 2011).

¹⁴ 5 U.S.C. §603.

¹⁵ 84 Fed. Reg. 13556.

¹⁶ 84 Fed. Reg. 13560.

analyses will help covered entities comply with the rule and increase the odds that the public will provide FNS with responsive comments.

The RIA and RFA are deficient because they do not comply with EO 12866's and the RFA's regulatory analysis requirements.

FNS reports cost savings of “\$16.1 million to retailers in fiscal year (FY) 2018 and approximately \$22.5 million over five years,”¹⁷ but provides no data or analysis to substantiate these estimates. In describing the costs and benefits of the regulation, a regulatory impact analysis should cite its data sources and present the analysis transparently. An appropriate RIA for this rule needs to address several issues:

- **Baseline.** Include a description and justification of an appropriate baseline, allowing for estimation of the incremental costs and cost savings of the rule. In the absence of this rule, retailers would not face the incremental costs of compliance. Even if FNS can justify the 2016 rule as an appropriate baseline, it would need to account for forgone benefits.
- **Citations and Assumptions.** Describe the specific assumptions and data behind the estimates
- **Costs.** Include costs to retailers to read, understand, and implement the rule. Estimate costs and cost savings over an appropriate time horizon. It seems unlikely that this rule would have either costs or cost savings in FY 2018, given that FY 2018 is in the past.
- **Reporting of Estimates.** Adjust estimates to current dollars. FNS refers to costs covered in the 2016 final rule analysis. Any estimates from 2016 used in a 2019 rule should be adjusted to current dollars. Use annualized estimates of costs and cost savings. The estimates reported in the RIA and RFA do not appear to be annualized, and it is unclear whether the estimates are in nominal or real terms.
- **Alternatives.** Include less stringent and more stringent alternatives.

Because FNS estimates that this rule will affect 187,000 small authorized retailers¹⁸ it is vitally important that those businesses be able to determine the costs associated with complying with this regulation. A compliant RFA is designed to provide the public with the information necessary to do just that.

- **Number and types of small businesses impacted.** The RFA requires that FNS identify the types of small businesses and an estimate of the number of small entities that will be impacted by a regulation. FNS should have disclosed how the 187,000 small retailer number was determined and whether any other small businesses sectors will have to comply with the rule. For example, small business representatives that discussed their concerns about the proposed rule with Advocacy noted that food suppliers will also likely

¹⁷ *Id.*

¹⁸ 84 Fed. Reg. 13561.

be impacted by this proposed rule. They believe that FNS should have analyze the impacts of the rule on that small business sector too.

- **The RFA requires an analysis of regulatory costs.** The 2016 proposed rule projected small food retailers would experience costs of approximately \$140 in the first year.¹⁹ The 2016 final rule’s cost estimates rose to \$245 in the first year and \$620 over five years per firm.^{20 21} FNS currently suggests that because of the greater flexibility afforded by this proposed rule the per firm costs are reduced to \$160 in the first year and \$500 over five years.²² These cost estimates are presented in a vacuum. While FNS states that the complete RIA and RFA data was published as part of the rule’s docket, Advocacy could not locate them. Those documents are important from a transparency perspective and to allow the public to review the data and related assumptions used by FNS to calculate costs. FNS should provide the documents in the final rule.
- **The RFA requires that FNS analyze projected administrative costs.** Many of the comments filed by small food retailers to the 2016 final rule involved the administrative burdens associated with the regulation’s requirements on the variety of products covered and how those products were to be stocked. While FNS is definitive that the proposed rule will only address the definition of “variety” the agency has an obligation under the RFA to analyze how any definitional change will impact covered small entities.
- **FNS’ RFA does not discuss reasonable alternatives.** FNS does not address or analyze any significant alternatives to the proposed rule that still allow the agency to comply with its statutory responsibilities under the Consolidated Appropriations Acts of 2017 and 2018.

Small food retailers wish to convey to FNS their concerns with this proposed rule.

Small food retailers believe that the regulation’s cost estimates do not include all the costs they will incur to comply. Given the lack of data and analysis contained in the proposal, they cannot determine which costs FNS included in the estimates underlying the rule. There are several kinds of costs that small entities will incur if this rule is finalized. FNS should estimate each of these costs, providing the assumptions, data, and analysis they used in each case:

- **Administrative costs.** Each business will need to determine whether individual products will count in the program. Small businesses do not have compliance officers or in-house counsel to help them to understand the new requirements, and they may spend a significant amount of time figuring out what changes must be made to comply with the regulation.

¹⁹ 81 Fed. Reg. at 8019.

²⁰ 81 Fed. Reg. at 90697.

²¹ Per FNS the cost projection increases were primarily due to its evaluation and inclusion of additional costs suggested by the public in comments to the proposed rule.

²² 84 Fed. Reg. 13561.

- **Compliance costs.** FNS included estimates of opportunity cost, spoilage costs, and shelf space costs in the 2016 Final Rule. It is unclear if or how these costs were included in the 2019 proposed rule.
- **Costs and cost savings of alternatives.** Though small businesses think the proposed rule is workable, the lack of transparency in estimates for the proposed rule and absence of estimates for alternative policies are inadequate. Even small changes in approach between the proposed and final rule could have significant impacts (both positive and negative) for small entities. For example, permitting different items from the same species would lower costs for small entities. The proposed rule should estimate the costs or cost savings of this or other potential alternatives.

III. Conclusion

Given that this rule has the potential to significantly impact an estimated 187,000 small food retail businesses, FNS should assess the degree of those impacts in the final rule through improved regulatory analyses. This is the only way that covered entities can determine, and provide comment on, FNS' estimates on the economic impacts associated with the rule and the reasonableness of the agency's conclusion that the rule would provide them with greater regulatory flexibilities. Ultimately, complying with the analytical requirements will make for a better regulation and allow FNS to meet its policy goals and legislative responsibilities.

If you have any questions or concerns, please do not hesitate to contact me or Linwood Rayford at (202) 205-6533, or linwood.rayford@sba.gov.

Sincerely yours,

/s/

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/s/

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Cc: Paul Ray, Acting Administrator Office of Information and Regulatory Affairs