



June 19, 2019

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

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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)*.<sup>1</sup> On May 28, 2019, the Office of Advocacy's (Advocacy) filed comments on the proposed rule. In summary, Advocacy urged FNS to better consider the impacts of the proposed rule on small food retailers and suppliers. We also suggested that FNS improve the Executive Order 12866 regulatory impact analysis (RIA) and the Regulatory Flexibility Act (RFA) initial regulatory flexibility analysis. Advocacy noted that the transparency of the rule would be greatly increased if FNS provided the public with its RIA and RFA analyses which were supposed to be included in the proposed rule's docket but were unintentionally omitted by FNS. Because of this oversight FNS subsequently published the RIA and RFA analyses on June 14, 2019 and reopened the comment period to June 20, 2019.<sup>2</sup>

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<sup>1</sup> 84 Fed. Reg. 13555 (April 5, 2019).

<sup>2</sup> 84 Fed. Reg. 27743 (June 14, 2019).



## **I. Introduction**

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 Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,<sup>3</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

Advocacy commends the FNS for providing the public with these important regulatory analyses and for reopening the comment period so that affected small entities can file comments on FNS' data and assumptions. Advocacy reviewed the analyses and has these additional comments on the documents.

## **II. FNS should use a current regulatory impact baseline as its reliance on the 2016 final rule's baseline is inadequate.**

The recently published proposed rule relies heavily on economic analyses published in the 2016 final rule. On pages two and three of the RFA analysis FNS discusses how it used the Store Tracking and Redemption System (STARS) database to look at data on how the new authorization criteria established in the 2016 final rule was used by new applicant stores. FNS also reviewed a random sample of 313 firms denied SNAP authorization between January 17, 2018 and September 14, 2018 to determine the specific cause of denial of SNAP authorization for new applicant stores. FNS uses these data points to conclude that by adding greater flexibility to breadth of stock requirements it will make it easier for small food retailers to participate in the SNAP program.

Advocacy does not take issue with the conclusion that expanding the breadth of stock requirements will make it easier for SNAP authorized stores to participate in the program; however, under the analytical requirements of the Executive Order 12866 (RIA) and the RFA, FNS has a responsibility to provide the public with up-to-date information on how the proposed rule will impact their businesses if promulgated. Advocacy is concerned both with FNS' use of the 2016 rule as a baseline and the estimates adopted from the 2016 rule.

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<sup>3</sup> 5 U.S.C §601 et seq.

<sup>4</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et. seq.).

<sup>5</sup> Small Business Jobs Act of 2010 (Pub. L. 111-240) § 1601.

<sup>6</sup> *Id.*

- Using the 2016 final rule as a baseline is inappropriate given that FNS “does not know the extent to which retailers have already made adjustments to their stock in anticipation of reauthorization.”<sup>7</sup> The correct baseline is the state of the world without the current proposed regulation. In the absence of this regulation, retailers do not need to comply with the variety and breadth of stock requirements. If FNS has robust data on the current practice of retailers with respect to stocking the proposed varieties, then FNS could use that current practice as a baseline. As FNS suggests that it does not know the extent to which retailers have already adjusted their stock in anticipation of reauthorization, the best option would be to use a baseline that does not assume compliance with the suspended provisions.
- Some estimates for the current proposed rule draw from estimates in the 2016 final rule. In at least some cases, FNS has not updated those numbers. FNS should use current wage and price data, or at a minimum, adjust estimates for inflation.

### **III. Small retail food stakeholders continue to have concerns with the proposed rule’s regulatory analyses.**

- The National Association of Convenience Stores (NACS) reports that they had issues with the baseline and final costs that were calculated by FNS in the 2016 Final Rule. NACS believes that using the same baseline in this proposed rule is inherently problematic. In 2016 NACS commented that FNS had miscalculated and underestimated a variety of costs (e.g., costs of refrigeration, etc.) reported in the 2016 final rule’s RIA and RFA analyses. These comments were submitted to FNS along with a comparative economic analysis performed by NACS. Stakeholders told Advocacy that there is no indication that FNS addressed those industry concerns in the recently published proposed rule and many of the industry comments relative to the rule’s costs are not dealt with in the recently published RIA and RFA analyses.
- NACS suggests that the proposed rule continues to underestimate the administrative costs of compliance for small businesses who do not have benefit of counsel and are often owner operated. On page three of the proposed rule’s RFA analysis FNS discusses stocking, opportunity and administrative costs. In summary, FNS concludes that because the proposed rule will provide regulatory flexibility to retailers, regulatory costs will be reduced. The agency does not analyze those additional costs raised by NACS in its comments to the 2016 final rule.
- While FNS discusses regulatory alternatives in the RIA and RFA analyses, stakeholders believe that FNS failed to comply with the RFA’s requirement that it consider and discuss significant regulatory alternatives which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.<sup>8</sup> NACS suggests that FNS nominally referred to “alternatives” in Section IV of the RIA, but noted that, “FNS did not consider alternative definitions of

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<sup>7</sup> See page three of the Regulatory Impact Statement.

<sup>8</sup> 5 U.S.C. §603(c).

variety based on such factors.” Immediately FNS then suggests that they considered only doing two subdivisions for yogurt and ended up with three. Further, FNS says that it considered “revising the definition of retail store/depth of stock provision...” including to strike the “at least one variety of perishable...” FNS believes that this is not a legitimate “alternative” as the one variety of perishable in at least three staple food categories was mandated by Congress in the 2014 Farm Bill. NACS believes that based on these factors FNS did not truly consider or evaluate regulatory alternatives to the rule’s proposed provisions.

- NACS told Advocacy that they have discussed possible reasonable alternatives in meetings with FNS and that those alternatives were included in their recently filed comments on the proposed rule. They believe that a simpler definition for “variety” is that truly different or distinct items should count as separate varieties whether or not they come from the same species. Under this definition, bacon, sliced ham, and pork sausages – different types of pork that consumers would consider different items – would all count as different varieties. FNS should address this alternative in the final rule.

#### **IV. Conclusion**

Given that this rule has the potential to 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, including the use of a more current baseline. This is the only way that covered entities can determine whether FNS’ estimates on the rule’s economic impacts, including the potential for regulatory savings, are reasonable. Ultimately, this will make for a better regulation while allowing FNS to ensure that Americans make better food choices.

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](mailto: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