

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch**

**County Convenience Store,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0245431**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance (“ROC”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against County Convenience Store (“Appellant”).

**ISSUE**

The purpose of this review is to determine whether the ROC took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on August 19, 2021.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

In a letter dated May 24, 2021, the ROC charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROC's charges in writing. The record reflects that the ROC received and considered the information provided prior to making a determination. The ROC determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROC concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROC issued a determination letter dated August 19, 2021. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROC considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROC determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On August 25, 2021, Appellant appealed the ROC's determination and requested an administrative review of this action. The appeal was granted.

### STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system** . . . . (Emphasis added.)

7 CFR § 278.6(a) states, in part:

Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification . . . . The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter . . .

7 CFR § 278.6(c) reads, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . .”

Also at 7 CFR § 271.2, eligible food is defined as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption . . .

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence ... that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

### **SUMMARY OF CHARGES**

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from December 2020 through March 2021. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Unusually large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

### **APPELLANT'S CONTENTIONS**

Appellant's responses regarding this matter are essentially as follows:

- The store is 1,500 square feet and sells a variety and quantity of staple food items.
- Appellant has not had any previous issues with SNAP compliance. USDA should take into account past compliance when assessing penalties.
- Appellant is located in an area with many SNAP participants.
- Most households redeem nearly all their benefits within the first two weeks of the month.
- SNAP participants are more likely to shop at small grocery stores and small grocery stores, and customers of these stores are among the most loyal customers.
- Large transactions are because SNAP participants are buying meats, sweetened beverages, vegetables, frozen prepared foods, prepared desserts, dairy products, breads, and other items sold by Appellant.
- Small grocery stores and similar stores had a 3% increase in customers over 2015.
- Not holding determinations in abeyance while a FOIA response is pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond.
- Appellant sells expensive items.
- Appellant is well stocked.
- Invoices, bank statements, and tax documents substantiate the level of SNAP activity at Appellant.
- The ALERT system has not been independently proven accurate in finding fraud. Data analysis is prone to error without accurate context. The analyst overly relied on the results of the ALERT system when issuing a charge of trafficking because of

confirmation bias. The analyst made incorrect assumptions about customer shopping patterns and circumstances and failed to take into account local differences.

- Recent administrative review cases discuss the precedent that should be considered in this case: *Howard's Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*. Appellant also included an excerpt from *Cardenes Market vs. Retailer Operations and Compliance* and stated this is standard form language in Administrative Review determinations to overturn disqualifications issued by ROC.
- USDA bears the burden of proof in administrative review, not Appellant.
- Appellant quoted studies that stated that superstores and supercenters accounted for 90% of redemptions, but in eight neighborhoods, small grocery stores accounted for 46% of SNAP redemptions.
- Households with particular demographic information are more likely to be disqualified which shows a bias against smaller grocers.
- USDA does not know the correlation coefficient between ALERT scans and trafficking. Appellant has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak.
- Appellant denies the allegations.
- If allegations were raised in cases that were reversed, Appellant can conclude those were the reasons accepted by USDA for the reversal, even though USDA did not cite those reasons for the reversal.
- There are no logistic barriers to the transactions included in the charge letter.
- Multiple transactions occurring over the span of hours are not inherently suspicious according to *Onukwughu v. U.S.*
- Back-to-back transactions are because households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time.
- Past Administrative Review Branch decisions have identified a number of certain explanations which adequately explain the presence of unusual transactions patterns in the charge letter.
- The store has two registers.
- There are 24 stores located within a mile of Appellant. The nearest is .15 miles away.
- Other stores are closer together creating more competition and less SNAP activity.
- SNAP participants shop at Appellant because it is more convenient and smaller.
- SNAP customers shop at Appellant because they lack consistent transportation.
- SNAP customers make back-to-back purchases at Appellant because they are unemployed and bored.
- A household could satisfy all their shopping needs at Appellant.
- Appellant requests a CMP.
- The decision adheres to the criteria set forth in *Skyson USA, LLC v. U.S.*
- SNAP participants make purchases for friends.
- Customer affidavits support that SNAP participants make large purchases at Appellant.

In support of its contentions, Appellant provided the following documentation:

- Part of a report entitled *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017* by Insight Policy Research;
- A 38-page FMI report entitled *U.S. Grocery Shopping Trends, 2016*;
- Four pages of an April 2016 article entitled “Know Your Core, Protect Your Core”;
- An 11-page article entitled “What does SNAP benefit usage tell us about food access in low-income neighborhoods?”;
- A one-page profile of SNAP households in Appellant’s congressional district; and,
- A 49-page USDA report dated November 2016 entitled *Foods Typically Purchased by Supplemental Nutrition Assistance (SNAP) Households*<sup>1</sup>
- Approximately 29 pages of tax documents;
- Approximately 45 photos taken in and around Appellant;
- Approximately 36 pages of bank statements;
- Approximately 22 pages of EBT customer affidavits; and,
- Hundreds of pages of invoices.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

## ANALYSIS AND FINDINGS

Regarding Appellant’s denial of violations, this review examines the relevant information regarding the determination. Appellant asserts USDA bears the burden of proof in administrative review, not Appellant. Appellant is incorrect. Once the ROC establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant argues households with particular demographic information are more likely to be disqualified which shows a bias towards smaller grocers. It is unclear what evidence Appellant intended to rely on in support of this argument, as Appellant referenced Bates stamp numbers that were not present in its supplementary materials. Individuals are disqualified from the SNAP program by state agencies. The USDA disqualifies SNAP retailers. Appellant concludes that if households of particular ethnicities are more likely to be disqualified, all stores who serve these populations are more likely to be flagged for trafficking. This supposition is unsupported. Rather, stores that engage in trafficking (with households of any ethnicity) are more likely to be flagged for trafficking.

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<sup>1</sup> Appellant refers to some documents that it did not provide, including an ALERT Correlation Coefficient Calculation and “Shopping pattern and food purchase differences among Supplemental Nutrition Assistance Program (SNAP) households and Non-supplemental Nutrition Assistance Program households in the United States.” In addition, Appellant identified its evidence with Bates stamp numbers that do not appear in its supplementary information.

Appellant alleges not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond. Effective October 26, 2020, the changes to 7 CFR §278.6 and 7 CFR §279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in *Triple E Express* is based on outdated regulations.

### **Prior Administrative Reviews**

Appellant contends that the determinations should be reversed based on Final Agency Decisions in other cases. Appellant asserts that if allegations were raised in cases that were reversed, Appellant can conclude those allegations were the reasons accepted by USDA for the reversal, even though USDA did not cite those reasons for the reversal. Appellant asserts that an excerpt from *Cardenes Market vs. Retailer Operations and Compliance* is standard language in Final Agency Decision reversals.

Prior administrative review decisions are based on the specific circumstances of each case as documented by materials provided by the Appellant and the Office of Retailer Operations and Compliance. Administrative review decisions do not establish policy or supersede federal law, regulations or policy guidance. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. The language excerpted from *Cardenes Market* is not found in other Final Agency Decisions. Appellant implies its list of “acceptable explanations” were discussed in Final Agency Decisions that reversed prior EBT determinations. In fact, these are simply arguments made by Appellant’s attorney in those cases. Appellant undermines its credibility in the present case by its apparent willingness to manufacture precedent in previous administrative review decisions.

### **Earlier Court Decision**

Appellant contends this case relies on the analysis set forth in *Skyson USA, LLC v. U.S.* This case is not applicable to Appellant’s case. Contrary to Appellant’s contention that *Skyson USA, LLC* held that data compiled by ALERT was unreliable, the court analyzed all the evidence in support of the disqualification, including additional documents that had not been previously provided to USDA, and determined that the particular evidence in that case did not support a finding of trafficking. The evidence in *Skyson* differs significantly from the evidence in this case.

### **Store Characteristics**

In reaching a disqualification determination, the ROC considered information obtained during a March 10, 2021 store visit conducted by a USDA contractor to observe Appellant’s operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- Store size is approximately 1,500 square feet with no area of food storage outside of public view;
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store;
- Two cash registers and one electronic SNAP terminal device;
- No shopping carts or hand baskets;
- No scanners or conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered, small and surrounded by plastic barriers allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

Appellant argues it offers expensive items. There is no evidence that Appellant offered expensive items. On the day of the store visit, the store reviewer—in consultation with the store clerk—found identified the six most expensive items, which were priced for amounts between \$5.99 and \$11.99. If there were a few items over \$6 that were forgotten by the clerk, it is unlikely that these items were sold frequently at Appellant.

Appellant is correct that the firm was well stocked for a convenience store. Yet, there was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

### **Repeat Transactions by the Same Household**

Attachment 1 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account within a 47-hour period to avoid the detection of single, high-dollar trafficking transactions. There are 68 repeat transactions totaling \$3,296.55 included in this document.

Appellant's contention that there are no logistic barriers to the transactions included in the charge letter is incorrect. These transactions were conducted with implausible speed. Frequent and large transactions conducted quickly to purchase eligible foods at Appellant are highly unlikely given Appellant's low-dollar inventory and limited counter space. The firm does not maintain the logistical wherewithal required to rapidly process these transactions.

Appellant contends that back-to-back purchases are because SNAP customers lack access to transportation, and that SNAP participants shop at Appellant because it is more convenient. The record reflects that customers conducting rapid, repetitive, and large transactions at Appellant

frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

Appellant contends multiple transactions occurring over the span of hours are not inherently suspicious according to *Onukwugha v. U.S.* This case, which supported that the pattern of back-to-back transactions identified by FNS were indicative of trafficking, also stated that transactions “occurring in relatively quick succession” are “extremely suspicious.” It notes that this is especially the case when transactions are large and for identical amounts, but also cites as suspicious a variety of examples of back-to-back transactions—similar to those included in the charge letter in this case—that when considered together establish a pattern of trafficking.

Appellant states it is located in an area with many SNAP participants. While Appellant may located in an area with many SNAP participants, the Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant contends there are 24 stores located within a mile of Appellant, with the nearest being .15 miles away. Appellant also contends the store is located in an area without other nearby competitors which results in less competition and higher dollar volume. During the review period, there were 30 SNAP-authorized stores located within 1 mile of Appellant. The closest store was located .1 miles away, and a supermarket was located .1 miles away. Appellant’s unsubstantiated argument that its location results in less competition does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

The following examples from the ROC’s Case Analysis Document show households shopped at better stocked firms on or about the same day as conducting large transactions at Appellant:

#### **SNAP Household #1**

One day, this household made a transaction at Appellant for \$38.94, then made transactions at two superstores for \$183.24 and \$4.98, then returned to Appellant and made two more transactions for \$57.27 and \$16.50.

#### **SNAP Household #2**

One day, this household made a transaction at a superstore for \$101.72 followed by two transactions at Appellant for \$39.84 and \$19.82.

#### **SNAP Household #3**

This household made a transaction at a supermarket for \$252.03 followed by two transactions at Appellant 31 seconds apart for \$50 and \$45. Over the subsequent two days, this household made six more transactions at Appellant, all for exactly \$50.

Appellant argues households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time. That members of a household share the chore of grocery shopping (“co-shopping”) means that household members take turns doing the shopping, not that both shoppers shop on or about the same day. This would defeat the purpose of why households typically share the chore of grocery shopping. A household is one that purchases and prepares meals together, so there would be no need to split benefits. Households that purchase and prepare meals separately are considered separate households.

Appellant contends the back-to-back transactions are due to customers sharing benefits with others. Appellant has offered no evidence whatsoever that SNAP households share their cards with other household members, relatives, or friends. Appellant has also not provided any explanation for why, if such behavior was occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant contends SNAP customers make back-to-back purchases at Appellant because they are unemployed and bored, for convenience, or because customers return to the store to make a second purchase after going home. While there are legitimate reasons why a SNAP recipient might return to a small grocery store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a small grocery store. Spending sizable portions of one’s SNAP benefit allotment in a small grocery store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm’s explanation and evidence for why these transactions are occurring in a 24-hour period in a small grocery store should be both rational and compelling. Appellant's explanation is neither.

### **SNAP Benefit Depletions**

Appellant is correct that a government report on SNAP shopping patterns<sup>2</sup> indicates that after the first day of benefit issuance, on average, 80 percent of a household’s allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes 14 days to deplete 80 percent of one’s benefits, and 21 days to deplete 90 percent. Appellant implies that as most of the suspicious transactions occurred during this period of time this must reflect

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<sup>2</sup>U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

legitimate purchases. Yet, this report also revealed that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket. This is contrary to Appellant's conclusion that because the store stocks the majority of a SNAP household's preferred needs, it is reasonable to expect SNAP customers to spend the majority of their benefits at Appellant.

Appellant quoted studies that stated that superstores and supercenters accounted for 90% of redemptions, but in eight neighborhoods, small grocery stores accounted for 46% of SNAP redemptions. Appellant was not located in any of the neighborhoods highlighted in these studies nor does its location mirror the characteristics of the neighborhoods included in this study. In addition, there is a supermarket located .25 miles from Appellant.

Appellant contends that SNAP participants are more likely to shop at small grocery stores and small grocery stores than non-SNAP participants, and customers of these stores are among the most loyal customers. The article Appellant provides in support of this statement ("Know your Core, Protect Your Core" from *Convenience Store News*) does say that that low income households shop at small grocery stores more than other households, but it does not specifically refer to SNAP households. The article states that the main reason (80.1%) these customers are likely to shop at the store is to buy gas. This not a SNAP-eligible purchase. Appellant also states that many of its customers do not own vehicles. While some of the less common reasons for making purchases at a small grocery store include making inexpensive purchases (e.g., snacks, beverages, gum), others are for purchases that SNAP benefits cannot be used (e.g., lottery tickets, cigarettes). The information included in this article does not support Appellant's conclusion regarding SNAP participants' shopping patterns at small grocery stores. Even if Appellant is correct, this article does not support that SNAP participants make large purchases at these smaller stores. If anything, it implies the opposite.

Appellant asserted small grocery stores and similar stores had a 3% increase in customers over 2015 (from 5% to 8%). Appellant cited a *2016 U.S. Grocery Shopper Trends* report which does not reflect the period covered by this investigation. This report also supports that customers are much more likely to shop at supermarkets and superstores.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a small grocery store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

### **Large Transactions**

Appellant contends a household could satisfy all their shopping needs at Appellant large transactions are because SNAP participants are buying meats, sweetened beverages, vegetables, frozen prepared foods, prepared desserts, dairy products, and breads. Appellant does not carry all

of these items. The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 2 to the charge letter. This attachment cites 182 EBT transactions during the four-month period of investigation of \$34.99 or more totaling \$9,054.87.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

### **No Applicable Mitigating Factors**

Appellant asserts that this is the first time there has been an issue related to SNAP and that the USDA should take into account past compliance when assessing penalties. USDA does take into account prior violations for lesser violations, such as the sale of nonfood items. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

## **Invoices**

Appellant submitted hundreds of pages of invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. The invoices are sufficient to demonstrate that Appellant purchased enough inventory to support the amounts of its SNAP transactions. Still, there is not enough information to determine whether they account for the sum of Appellant's SNAP and non-SNAP transaction activity. While the overall dollar amount of SNAP activity is relevant, the charge letter did not cite as evidence Appellant's SNAP sales total. Rather, the ROC identified a series of different suspicious transaction patterns.

## **Infant Formula**

Appellant contends that high transaction amounts are due in part to selling expensive infant formula. It would be unusual for a SNAP household to purchase baby formula with SNAP benefits, as households who participate in SNAP are eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation - and a higher participation rate of eligible participants - than SNAP. WIC provides participants with vouchers for baby formula as well as other staple items, such as orange juice and cereal. WIC participants would likely purchase all their infant formula, as well as other expensive staple goods, with their WIC benefits.

## **Customer Statements**

With regard to customer statements provided by Appellant that purport to establish that questionable transactions were legitimate and no trafficking occurred, the truth of such statements cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

However, ROC did identify 16 of the households who provided statements and conducted analyses of the shopping behaviors of these households. None of the large purchase claims in these statements were substantiated. Only one of these households made a transaction at Appellant over \$50.

## **Evidence of Trafficking**

Appellant argues the ALERT system has not been independently proven accurate in finding fraud, and the analyst overly relied on the results of the ALERT system when issuing a charge of trafficking because of confirmation bias. Appellant also contends that the analyst made incorrect assumptions about customer shopping patterns and circumstances and failed to take into account local differences. Appellant also stated there was an unsuccessful undercover investigation at Appellant. As previously stated, 7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts

established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system** . . . (Emphasis added.)

USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. Appellant stated that past reversals in administrative review prove that ALERT scans on their own are insufficient to support trafficking. This tool does not determine that trafficking has occurred. The ROC must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROC conclude whether questionable transactions were, more likely than not, the result of trafficking. Transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the suspicious patterns displayed and the other supporting evidence in the file - and in the absence of any reasonable explanations for such transaction patterns - the preponderance of the evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

Appellant argues that USDA does not know the correlation coefficient between ALERT scans and trafficking. Appellant asserts that it has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak. These contentions are pure conjecture on the part of Appellant. Appellant does not have the necessary data to perform a reliable correlation analysis.

### Summary

The ROC determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROC’s assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROC considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm’s staple food stock to support such large transactions;
- The availability and characteristics of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant’s customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not

convincingly rebutted the ROC's determination that Appellant most likely trafficked in SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS must disqualify the firm permanently.

### **CIVIL MONEY PENALTY**

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of May 24, 2021. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,

Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and,

Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2); and,

Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm . .

..

In support of Appellant's contention that it is eligible for a CMP, it provided no documents. In this regard, the various statements made by Appellant are not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations."

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is

not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

### **CONCLUSION**

The record has yielded no indication of error in the finding by the Office of Retailer Operations and Compliance that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against County Convenience Store from participating as an authorized retailer in SNAP is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

October 25, 2021