

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

Smith's Corner Store LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246367

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Smith's Corner Store LLC (hereinafter "Smith's Corner Store LLC" or "Appellant") by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Smith's Corner Store LLC.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[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 September 22, 2021, the Retailer Operations Division informed the Appellant that Smith's Corner Store LLC was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on September 24, 2021.

The record reflects that via telephone conversation with Retailer Operations Division staff on September 27, 2021, the Appellant requested an extension in time for providing a response to the letter of charges. Via letter of September 27, 2021, the Retailer Operations Division granted the Appellant's time extension request to October 15, 2021. The Appellant was informed in that letter that the time to request a civil money penalty in lieu of permanent disqualification and to provide documentation to support such a request could not be extended per SNAP regulations.

In responses to the Retailer Operations Division of September 27, 2021 and October 15, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 26, 2022, informing the Appellant that Smith's Corner Store LLC was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) in accordance with 7 CFR § 278.6(i) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked January 27, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated February 3, 2022. In email correspondences of February 23, 2022 and February 25, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a

finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

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(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

Trafficking means...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...

7 CFR § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2021 through June 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking took place.
- The transactions noted in the charge letter are the result of the store's business operations, business environment, SNAP household demographics and shopping habits, and the store's inventory.
- The Appellant measures 950 square feet and sells a variety and quantity of staple food items to the surrounding community such as beef, chicken, clams, pork, pollock, salmon, tuna, turkey, milk, cheese, sodas, bread, cereal, rice, pasta, and various fruits and vegetables. The vast majority of the store's offerings are qualified items under the SNAP. The store visit report notes that the firm is sufficiently stocked in all four staple food categories to account for the transactions listed in the charge letter.
- Inventory is replenished on a rolling basis and depending upon demand. Inventory at the beginning of the month is typically superior to inventory at the end of the month.
- The store visit was conducted on a Monday morning when the store's inventory is at its lowest.
- This business has never had a compliance problem with SNAP in the past.
- The firm's compliance policy is an important factor and should be taken into consideration as it could have a material impact on the transactions noted during the review period. It would defy logic for the store owner with a long history of compliance to suddenly start trafficking for the de minimus amounts set forth in the charge letter.
- Store visit reports that are considered for comparison stores should be near to the review period. Store visit reports that are a year or more separated from the review period should not be utilized—that much distance between a subject store and a review period is not permitted because of the presumption of outdated information and it would be prejudicial and biased to permit comparison store information to have a different information basis.

- Studies show that selecting comparison stores that are in different neighborhoods (sometimes just divided by a major road or geographic feature) can result in very different EBT transactions by the nature of differences in neighborhood shopping dynamics.
- The Appellant serves the surrounding community, which in pertinent part suffers from poverty at a high rate. The vast majority of local stores are small convenience, with a substantial portion of the population getting at least a portion of their groceries from stores like the Appellant. A substantial portion of the Appellant’s customers come from the surrounding neighborhoods and are SNAP participants.
- The Appellant is located in an economically depressed area, surrounded by poverty and many low-income families which draws, houses, or places a significant number of SNAP participants. In fact, the store is within walking distance of a high density of housing, and the store is located near a bus stop, a soup kitchen four blocks away, multiple churches, and the area has a higher concentration of homeless individuals.
- According to USDA’s *Profile of SNAP Households in 2018 for the 2nd Congressional District of Indiana*, 9% of the local households receive SNAP benefits.
- As noted in the April 2016 edition of *Single Store Owner* magazine, SNAP participants are more likely to shop at convenience stores and small grocery stores and customers of these stores are among the most loyal customers. Also, SNAP participants are more likely to shop regularly at small grocer/convenience stores than non-participants. Furthermore, SNAP households’ shopping habits are different than those of non-SNAP households.
- Households with particular demographic information and located in particular geographic areas are more likely to be disqualified which shows a bias towards smaller grocers. Regional differences in disqualification rates and shopping habits support this contention as well.
- Most visits to a store the size of the Appellant are made while the customer is on his/her way to work or school, or while running errands at night. Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning, or during the late evening.
- In support of the Appellant’s discussions regarding SNAP households’ shopping habits, the following studies were provided and/or cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014.
- The Appellant also cited the following studies with regard to changes in shopping behaviors due to the COVID-19 pandemic and its correlating closures: A study by Google, Inc., *3 Lasting Changes to Grocery Shopping After COVID-19*, Forbes Magazine, and *Grocery Retail to Lead Restaurants in Food Market Share Post-Pandemic*, Supermarket News.
- The transactions documented in Attachment 1 are the result of the store’s participant forgetting an item in his/her prior transaction, co-shopping, the participant making a purchase, returning home, and then returning to the store to make a second purchase, the store’s business practices, and a reflection of the normal shopping habits of SNAP participants.
- As stated in the court in *Onukwughu v. U.S.*, “multiple transactions occurring over the span of hours” are not “inherently suspicious” as it is not uncommon for a customer to make multiple trips to the same store on the same day (finding it unclear as to why FNS found certain close in proximity transactions to be consistent with patterns of trafficking “rather

than the innocent explanation of a shopper realizing he forgot something or, for example, one household member wanting to make a small purchase . . . while the other household member stays behind to complete a larger purchase).

- Past Administrative Review Branch decisions have identified a number of certain explanations which adequately explain the presence of Attachment 1 transactions. These cases (the Appellant cited numerous administrative review cases and numbers in support thereof) and explanations include: The significant presence of low-income population of SNAP residing near the retailer; absence of local SNAP retailers to compete with the subject store; significant inventory that encourages multiple shopping trips, like the presence of deli or meat by the pound; customer loyalty and loyalty programs; lack of transportation for local SNAP households; delivery services; bulk discounts on food purchases, especially expensive items and sodas (like Red Bull); and forgotten items.
- The pertinent factors in the above referenced cases which are also present in this case include low-income SNAP population near the retailer, absence of local competition, significant inventory with items contained in the top 100, customer loyalty, and lack of transportation for local SNAP participants.
- In Indiana, participant benefits are issued on the first two weeks of the month based on a combination of the type of case and the case name. USDA has previously conducted research into the standard practices of participants for food purchases, and purchases made within the first seven days after receiving benefits is not unusual. In fact, on a regular basis, the participants will make significant grocery purchases from the Appellant store within 48 hours of receiving the deposit in their accounts. Such patterns are supported by the *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017 (2020)* and *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report (2011)*. Here, almost all of the transactions set forth in Attachment 2 reflect this standard shopping habit and patterns of SNAP participants.
- It is important to consider the store's size, inventory, and operations. The store's inventory is sufficient to account for the transactions and greatly exceeds stores around it and has a greater quality and variety than your average convenience store.
- The Appellant uses a pricing strategy that sets many groups of items at the same price.
- The Appellant services a much higher African American and Hispanic population than the average SNAP retailer to whom their transactions are compared. The presence of a large African American SNAP household community increases the store's likelihood to make purchases on a more frequent basis. This community conducts more transactions more frequently at small stores so "multiple transactions in a set time" are likely to occur at the Appellant than a store located in a different area of town.
- Per USDA's *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017*, households with children are more likely to have Scan B2 and F transactions.
- Also, families (especially those with multiple parents/adults) are more likely to shop in higher frequency and produce Scan B2 transactions because their purchases tend to be higher. A significant portion of the local SNAP households that shop at the Appellant are families, many of which have multiple adults in the household.
- Many of the local SNAP household members are unemployed. To satiate their boredom, these participants will regularly shop at stores to find something to do.
- In some instances, the act of purchasing an item is pleasing, as much of the month they lack the financial ability to do so. So they will either shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so.

- Co-shopping is on the rise where both adult members are responsible for picking up groceries.
- The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items from time to time. In other cases, participants make purchases for friends, for large gatherings, or to satisfy needs that are not obvious.
- The store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Although the EBT transactions are processed consecutively over a matter of a few minutes, the calculations, bagging and gathering of items can take dozens of minutes if the participant chooses.
- From a physical transportation angle, the groceries are bagged, and often the customers carry the groceries by hand (using their children or friends to carry some items). On occasion, other items (like strollers) can be used to help transport the items out of the store. Nevertheless, they are bagged, by the store and physically carried out by the participants.
- Custom orders and delivery of those orders also impact these transactions in a material way. The customers order eligible food items they want (either for the store to purchase from their vendors or off the shelves) and deliver the order to the customers. These items are gathered from the respective vendors (as necessary), placed into boxes or bags and then the transactions are run when the customer reviews the delivery of the custom order along with the contents. These transactions are sometimes broken up into separate orders (and paid for separately) based upon where the groceries had come from or upon request by the participant. After they are paid for, the customer can take the boxes home or the store will schedule a delivery of the items.
- It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.
- The store is in an area with a higher per-capita population of households than the average store. According to USDA's SNAP Retailer Locator Tool, there are 10 which participate in the SNAP. However, not all retailers are created equally and many of these stores offer different inventories, services, and hours of availability.
- The nearest store is .33 miles away and three of the surrounding stores located within a mile are located on the other side of the Norfolk Southern railroad tracks and one store is located on the other side of the St. Joseph River and two more are close to the river's edge. Only one store is located even a half mile from the Appellant. None of these 10 stores are directly in the local community and serving the residents.
- Furthermore, many of these stores are stacked one upon another. This causes a reduction in flow of SNAP participants as they have more direct competition and a smaller portion of the overall business.
- Transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles (it is part of the SNAP participant's application requirements that they have only one vehicle at most), so trips to larger stores are

dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.

- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 2 transactions. Examples of acceptable explanations for excessively large purchase transactions include (the Appellant cited numerous administrative review cases and numbers in support thereof): Sufficient inventory to account for the transactions, as supported by invoices; sales tax documentation to support sales of food items in amounts to satisfy the transactions; large families shopping contemporaneously; presence of high dollar eligible foods in the store's inventory; presence of specialty or imported foods, which are expensive and not generally available elsewhere; miscategorization of the store, leading to inadequate comparisons of transaction sizes; sales of large quantities of soda; absence of local large SNAP retailers; presence of a large local SNAP population; and presence of bulk pricing or a reward system for larger purchases.
- The transactions documented in Attachment 2 are the result of co-shopping, the store's inventory, the local SNAP household's demographics and shopping habits, the store's pricing structure, reliance on the store as a primary grocer for some minutiae of local participants, or the general aberration and statistical outlier to the average whole.
- The Appellant offers its clientele a considerable inventory in breads, cereals, and meats.
- Though the reviewer focused largely on staple foods, the store carries a significant number of accessory food items typically purchased by SNAP households.
- According to USDA's research (*Foods Typically Purchased by SNAP Households*, 2016), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect customers to spend large amounts and/or the majority of their benefits at the Appellant on the inventory evidenced in the on-site inspection.
- Participants spend almost 62% of their monthly benefits on meats, sweetened beverages (sodas and energy drinks, Gatorade and the like), vegetables, frozen prepared foods, prepared desserts, high fat dairy/cheese and breads—in that order. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.
- According to the FMI *U.S. Grocery Shopping Trends* 2016 annual report, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage.
- Stores miscategorized as convenience stores are likely to have far higher Scan F hits.
- Households that conducted the transactions in Attachment 2 likely have a larger amount of SNAP residents residing in their homes, thus requiring a larger quantity of grocery products each month than those households with less participants.
- Certain household types are more likely to conduct transactions that fit the Scan F thresholds and would therefore generate hits in the Scan report. In particular, households with children and multiple adults tend to make much larger purchases on average. Households comprised of Hispanic members are far more likely to make large purchase transactions than households of other ethnicities. Furthermore, households with more than four members and correspondingly large monthly benefits, make much larger purchase transactions than the average SNAP household.
- Per USDA's *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017*, if a store is near a large number of Hispanic or African American SNAP households that are comprised of one adult and children, who have more than \$500.00 worth of benefits and four or more

household participants, the store is much, much more likely to be flagged through no fault of its own. This is especially true of Scan F transactions which takes into account far greater geographic areas than just the neighborhoods in which these documented transactions occurred.

- Also, households with more benefits are more likely to have Scan B2 and F transactions.
- The largest transaction is \$138.42 and the vast majority of Scan F transactions are less than \$60.00. Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip – and being transported by hand back to the store. The remainder of the transactions could easily be transported by two people.
- The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$10.00 each, six of such items would not be difficult to carry and could be placed on the given space set out in the store visit report.
- The physical ability to conduct these transactions was aided by households shopping in groups, brought their own portable carts, or who gathered their items in groups and brought them to the counter to be bagged and tabulated while they continued shopping.
- The inspector’s list of higher priced items was not exhaustive as there appears to be items in the inventory that were documented but not listed by price. These items include: Steak at \$13.97 per pound/\$26.12 to \$32.55 per pack, New York strip steak at \$32.55, ribeye that runs \$10.00 to \$30.00, chitlings at \$19.00, fresh pork chops at \$22.00, fresh and frozen shrimp at \$11.99 to \$15.99, pork ribs at \$12.55, oxtails at \$14.29 to \$17.56, chicken filet at \$9.99, chicken wings at \$15.99, catfish nuggets at \$7.99, Cornish hens at \$6.99, ramen noodles at \$8.00, and chicken thighs at nearly \$15.00.
- The Appellant seeks out what customers in the community want and specifically caters the store to the needs of the community.
- The submitted customer letters of support and inventory purchase invoices support the Appellant’s position that trafficking did not occur.
- Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.
- Because the Appellant is located much closer to the SNAP participants (who do not have regular access to transportation) and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course.
- Furthermore, the only other stores that are nearby do not have the inventory variety that the Appellant has. Accordingly, this store is going to have larger transactions than the average convenience store.
- USDA does not know the correlation coefficient between ALERT scans and trafficking. The 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. FNs does not know the correlation coefficient is between any of the ALERT Scans and trafficking in SNAP benefits.
- FNS has been adamant over the years that an EBT analysis case is not dependent upon any one particular component. As noted in *Arch Street Market vs. Retailer Operations Division*, the ALERT Scan categories (and the transactions which comprise them) are allegedly just one part of the overall analysis, which includes consideration of a series of factors.
- The ALERT system cannot identify fraud. It is designed to identify “suspicious behavior” at most, but the basis for the system is unknown. See *TG Mini Mart, Inc.* and *Lima Mini Mart Inc.*

- It is likely that the presence of a Confirmation Bias exists, as it does in many cases handled by FNS. The danger of Confirmation Bias is obvious: USDA starts with the theory that trafficking exists because that is allegedly what the ALERT patterns were designed to detect and if the store is flagged often enough, then the automatic hypothesis put forth by USDA that trafficking is occurring.
- The pertinent burden of proof of SNAP disqualification is the “preponderance of evidence” standard, which means that the evidence must be adequate enough which is a reasonable mind, considering the record as a whole, would accept as sufficient a conclusion that the matter is asserted more likely to be true than not true. See *L&M Grocery Market, Inc. vs. Retailer Operations and Compliance*. The Department bears the burden of proof, not the retailer. See *Cardenes Market vs. Retailer Operations and Compliance*.
- The transaction patterns identified have been explained by the Appellant as required in *Skyson USDA, LLC vs. U.S.*
- 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*.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond.
- A SNAP disqualification would impose a hardship on area SNAP customers who depend upon the Appellant as their primary source to obtain foods.
- A SNAP disqualification would impose a financial hardship on the Appellant.
- In the event that FNS determines that trafficking did occur, the firm requests imposition of a civil money penalty pursuant to 7 CFR § 278.6(i) which states that to be considered for a CMP, a retailer must demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations. Here, the effective compliance policy and program at the Appellant is reflected by the store’s significant compliance history since it became an authorized SNAP retailer. The Appellant has trained staff on the appropriate rules and regulations regarding EBT transactions and has made certain that each of the employees has an understanding of the rules and regulations prior to being permitted to operate the cash register without constant supervision. The store has always maintained a policy that SNAP violations will not be tolerated.

In support of these contentions, the Appellant, through counsel, submitted the following information for review:

- Numerous inventory purchase invoices;
- Business bank statements for review period;
- Account transaction detail report for the review period;
- Undated food stock photos;
- 2020 U.S. Individual Tax Return for store owner;
- Affidavit of store owner dated October 15, 2021;
- Affidavit of Alex B. Bowling, Attorney, dated October 15, 2021;
- Six customer letters of support;
- *Profile of SNAP Households in 2018, Indiana Congressional District 2, USDA FNS*;
- *Benefit Redemption Patterns in the SNAP in FY 2017 Final Report, Insight Policy Research*;
- *Pearson Correlation Coefficient Calculator, Social Science Statistics*;

- *What Does SNAP Benefit Usage Tell Us About Food Access in Low-income Neighborhoods?* Social Science & Medicine, 2014;
- *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and
- *Foods Typically Purchased by SNAP Households*, FNS, November 2016.

ANALYSIS AND FINDINGS

SNAP Authorization

During the review period of January 2021 through June 2021, Smith’s Corner Store LLC was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP, the owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 3, 2021 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 950 square feet in size with approximately 260 square feet of additional storage area outside of public view which stocked nonfood items;
- Did not have storage coolers/freezers;
- Had empty/broken/unused coolers/freezers;
- Had some scantily-filled shelves;
- No shopping carts and 10 hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space which was surrounded by a Plexiglas barrier;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Did not have an optical scanner;
- Did not have a special pricing structure, such as prices ending in \$x.x9 or \$x.00;
- Did not round transactions up or down at the checkout counter;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;

- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Telephone and on-line orders were not taken;
- Delivery was not offered;
- The six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were ribeye steak at \$15.53/\$13.99 per 1 pound (1 unit in stock); sliced turkey at \$15.00 per 5 pounds (1 unit in stock: Note--The turkey appears to be a USDA donated commodity food which is not designed to be sold commercially); Gorton's pollock fillets at \$13.50 per 1 pound 3 ounces (1 unit in stock); Captain Bob's salmon at \$12.00 per 1 pound (1 unit in stock); Kroger ground beef at \$10.00 per 3 pounds (1 unit in stock); and Kroger chicken wings at \$10.00 per 2.5 pounds (2 units in stock);
- No fresh meats, poultry, or seafood;
- A limited variety and amount of frozen meats, poultry, and seafood;
- Frozen food stock included such items as individual sandwiches, ice cream, corn, and meals;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli or prepared food section and deli meats and cheeses were not sold by the pound;
- Meat items included units of canned fish, eggs, bacon, packaged lunch meat, canned/potted meat, and meat jerky;
- Dairy included milk, sour cream, margarine, and cheese;
- No fresh produce stock;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, flour, corn meal, corn tortillas, grits, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, sugar, snack foods, and cakes/pastries; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, gift items/souvenirs/party goods, clothing, and household items.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This charge letter Attachment documents 29 sets of transactions (63 total transactions) that total \$4,459.67 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 21 different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that FNS has previously conducted research (*Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017 (2020) and Benefit Redemption Patterns in the SNAP*, Final Report 2011) which indicates that purchases made within the first seven days after receiving benefits is not unusual. In fact, on a regular basis, the participants will make significant grocery purchases from the Appellant within 48 hours of receiving the deposit into their accounts. In some instances, the act of purchasing an item is pleasing, as much of the month they lack the financial ability to do so. So they will either shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

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 benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a moderate food stock, no fresh meats, poultry, or seafood, a limited variety and amount of frozen meats, poultry, and seafood, no fresh produce stock, and lacks an abundant depth and breadth of staple foods.

The February 2011 government report cited by the Appellant revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a convenience store like Smith's Corner Store LLC with a moderate selection of staple foods. While FNS acknowledges the cited *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017* report, it is important to note many of the statistics cited by the Appellant have little to no connection to the case against the subject firm. The subject firm is located in Elkhart, Indiana which is located in the Midwest region so household transaction activities in the other regions do not appear to be impactful on this particular case. In addition, there is nothing in this report supporting a finding that average SNAP households make multiple substantial (more than \$20.00) transactions in short periods, which exceeds the transaction amount for this store type (convenience store) average for the state and county (\$8.78 and \$9.38, respectively). Lastly, there is nothing in the study which would explain why households in the charge letter are traveling to the subject convenience store which has a moderate stock to complete repetitive and excessively large dollar transactions.

The Appellant contends that as was noted in the 2016 study conducted by the Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection.

FNS acknowledges the statement regarding small grocery/convenience store shoppers being some of the most loyal based on the supplied 2016 study and that customers often pick-up needed items on their way to or from work or school. However, no evidence was submitted by the Appellant to support the statement that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants. The Appellant's claim that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants is located nowhere in the supplied study. This study appears to refer to all types of customers. The consumer research on convenience store core shoppers cited in the 2016 study did not address SNAP redemptions or SNAP customers.

The Appellant contends that the store services a much higher African American and Hispanic population than the average SNAP retailer to whom their transactions are compared. The presence of a large African American SNAP household community increases the store's likelihood to make purchases on a more frequent basis. Also, households with children are more likely to have Scan B2 and F transactions and families (especially those with multiple parents/adults) are more likely to shop in higher frequency and produce Scan B2 transactions because their purchases tend to be higher.

However, there is no indication as to how these factors explain the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific diverse family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

In addition, there is nothing in the study cited by the Appellant (*Benefit Redemption Patterns in the SNAP in Fiscal Year 2017*) which indicates that African American communities are more likely to conduct Scan B2 transactions. This study noted that African American Non-Hispanic households averaged 9.9 transactions per month with an average EBT transaction of \$28.66 (as opposed to White Non-Hispanic households that averaged 8.5 transactions per month with an average transaction of \$29.95).

The Appellant contends that these transactions are the result of the participant forgetting an item in his/her prior transaction, the participant making a purchase, returning home, and then returning to the store to make a second purchase, the store's business practices, and a reflection of the normal shopping habits of SNAP participants. The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. Some participants make purchases for friends, for large gatherings or to satisfy needs that are not obvious. The store's inventory is sufficient to account for the transactions and greatly exceeds stores around it and has a greater quality and variety than your average convenience store.

However, the second and third transactions in each set are too large to consist of forgotten items. In addition, the report and photographs from the store visit as well as the stock photos submitted by the Appellant offer no explanation as to why SNAP customers would routinely shop at Smith's Corner

Store LLC multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. While the Appellant is correct in that the firm was sufficiently stocked in the four staple food categories at the time of the store visit, the majority of the store's food stock consists of generally low dollar items such as packaged food items, canned items, accessory food items, snacks, and beverages. The inventory purchase invoices provided by the Appellant confirm that purchases of these low dollar items are predominant and account for a considerable portion of the firm's overall SNAP sales.

The Appellant contends that custom orders and delivery of those orders also impact these transactions in a material way. However, the store visit report, which was completed in collaboration with and signed by the store owner, indicates that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores. The Appellant contends that it uses a pricing strategy that sets many groups of items at the same price. However, the store visit observations indicate that the firm did not have a special pricing structure, such as prices ending in \$.x9 or \$.00 and the firm did not round transactions up or down at the checkout counter.

FNS does not refute the Appellant's contention that it is easier for a customer to get through the spaces of a store like the subject firm than it is for them to go into a supermarket/super store. Nor does FNS refute the Appellant's claim that customers are more likely to come back for supplemental and quick shopping trips than they would at an average convenience store with an inferior inventory and a further distance from their homes. However, these contributing factors do not explain the multiple and often large transactions made at the Appellant from the same household in a short period of time.

The Appellant contends that the store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items.

However, the store visit observations indicate that the firm had a small checkout area with limited check-out counter space and the register was surrounded by a Plexiglas barrier, one cash register and one EBT POS device, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Elkhart, Indiana. If co-shopping truly impacted Smith's Corner Store LLC as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms

having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

No evidence was submitted to support the Appellant's contentions that these transactions are the result of unemployed local SNAP household members satiating their boredom by regularly shopping at stores to find something to do. If shopping due to boredom were a regular occurrence at the Appellant, this pattern would manifest itself in comparable firms having similar transaction patterns. But this is simply not the case. No evidence was submitted to support the Appellant's contention that area stores are stacked one upon another, causing a reduction in flow of SNAP participants. The Appellant's sales would also be impacted if its claim is true that the store is located in an area in which there is a reduction in flow due to more direct competition and a smaller portion of the overall business.

With regard to the Appellant's statements regarding vehicle restrictions in SNAP, households are eligible to receive SNAP benefits based on their income, not vehicle ownership. According to the USDA SNAP eligibility requirements, a vehicle may be counted as a resource (<https://www.fns.usda.gov/snap/recipient/eligibility>); resources are deducted from a household's gross income for the purpose of determining eligibility. However, a household may own one or more vehicles without them being counted as a resource or being subjected to the equity test based on the listed criteria.

The Appellant contends that the surrounding SNAP retailers operate in slightly different business environment conditions, or with material differences in operation, location and inventory. According to USDA's SNAP Retailer Locator Tool, there are 10 which participate in the SNAP. The nearest store is .33 miles away and three of the surrounding stores located within a mile are located on the other side of the Norfolk Southern railroad tracks and one store is located on the other side of the St. Joseph River and two more are close to the river's edge. Only one store is located even a half mile from the Appellant. None of these 10 stores are directly in the local community and serving the residents.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 16 SNAP authorized retailers of comparable or larger size located within a 1.0 mile radius of Smith's Corner Store LLC, including 1 small grocery store, 3 medium grocery stores, and 1 super store, which could meet the nutritional needs of SNAP customers. There were a total of 23 authorized SNAP stores located within a 1.5 mile radius of the Appellant, including 2 supermarkets and 2 super stores. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby. However, the record indicates that SNAP customers who shopped at Smith's Corner Store LLC during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 174 SNAP transactions, as large as \$138.42, that total \$13,063.85. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that the store sells a variety and quantity of staple food items and that it is sufficiently stocked in all four staple food categories to account for these transactions. The vast majority of the store's offerings are qualified items under the SNAP. The Appellant offers its clientele a considerable inventory in breads, cereals, and meats. The Appellant seeks out what customers in the community want and specifically caters the store to the needs of the community.

However, the food stock and facilities of the 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. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Smith's Corner Store LLC to have purchases like those included in this Attachment to the charge letter.

The Appellant contends that the number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items and it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip. Given that a number of items are roughly \$10.00 each, six of such items would not be difficult to carry and could be placed on the given space set out in the store visit observations. In addition, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.

However, a review of the store visit report and photos as well as the stock photos provided by the Appellant indicates that Smith's Corner Store LLC is a convenience store offering a moderate variety and amount of staple food items and does not offer any specialty or ethnic food items that are not available at other area authorized retail food stores. The store visit observations indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals. In addition, the store had some scantily-filled shelves.

The stock photos submitted by the Appellant clearly show a staged freezer compared to the photos taken during the store visit. It appears that they were contrived in an effort to support its contentions that the firm is sufficiently stocked in staple food items to account for the large transactions noted in the charge letter. The Appellant's stock photos also do not show an extensive frozen food stock to assume that these items are being sought after by customers on a regular basis. It is also interesting to note that the Appellant's food stock photos were taken close-up making it difficult to determine

the overall food stock. It is possible that the photos were purposively taken this way to conceal inadequate food stock.

As noted previously, the firm had a small checkout area with limited check-out counter space with a Plexiglas barrier surrounding the register, one cash register and one EBT POS device, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. In addition, there were no shopping carts in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

The Appellant contends that the inspector's list of higher priced items was not exhaustive as there appear to be items in the inventory that were documented but not listed by price. These items include: Steak at \$13.97 per pound/\$26.12 to \$32.55 per pack, New York strip steak at \$32.55, ribeye that runs \$10.00 to \$30.00, chitlings at \$19.00, fresh pork chops at \$22.00, fresh and frozen shrimp at \$11.99 to \$15.99, pork ribs at \$12.55, oxtails at \$14.29 to \$17.56, chicken filet at \$9.99, chicken wings at \$15.99, catfish nuggets at \$7.99, Cornish hens at \$6.99, ramen noodles at \$8.00, and chicken thighs at nearly \$15.00. Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip.

The store visit report, which was completed in collaboration with and signed by the store owner, as well as the store photos noted that the six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were ribeye steak at \$15.53/\$13.99 per 1 pound; sliced turkey at \$15.00 per 5 pounds; Gorton's pollock fillets at \$13.50 per 1 pound 3 ounces; Captain Bob's salmon at \$12.00 per 1 pound; Kroger ground beef at \$10.00 per 3 pounds; and Kroger chicken wings at \$10.00 per 2.5 pounds and that five of the six items had only one unit (each) in stock and there were only two units of the sixth item in stock. However, even if there were a few food items not noted in the store visit report that are stocked by the store, the Appellant did not provide adequate evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions (see "Invoice" section of the Final Agency Decision). The store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit. The inventory purchase invoices provided by the Appellant also indicate that purchases of low dollar value foods, mainly inexpensive canned and packaged goods, snack foods, single-serving items and accessory foods, are predominant and account for a considerable portion of the firm's overall SNAP sales.

The Appellant contends that according to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.

It is acknowledged that the subject store does offer items that SNAP households would purchase; however, many of these items are accessory items that a SNAP customer would not purchase all the time. However, the key findings of the noted study indicate that there were no major differences in the expenditure patterns of SNAP and non-SNAP households, no matter how the data was categorized. The study noted that similar to most American households: About 40 cents of every

dollar of food expenditures by SNAP households was spent on basic items such as meat, fruits, vegetables, milk, eggs, and bread; another 20 cents out of every dollar was spent on sweetened beverages, desserts, salty snacks, candy and sugar; the remaining 40 cents was spent on a variety of items such as cereal, prepared foods, dairy products, rice, and beans; and the top 10 summary categories and the top 7 commodities by expenditure were the same for SNAP and non-SNAP households, although ranked in slightly different orders.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits and within walking distance of a high density of housing, located near a bus stop, soup kitchen, and multiple churches and in an area which has a higher concentration of homeless individuals, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that certain household types are more likely to conduct transactions that fit the Scan F thresholds and would therefore generate hits in the Scan report. In particular, households with children and multiple adults tend to make much larger purchases on average. However, the *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017* report cited by the Appellant does not state or suggest the finding that households with children are more likely to have Scan B2 or F transactions. Nothing in the report indicates that households with children were likely to seek out typically stocked convenience stores to complete repetitive and excessively large transactions. In fact, the report indicates that households with children spent 83.2% of their SNAP benefits on average at supermarkets and super stores. Also, households with children had an average transaction at convenience stores of just \$7.81 while their average transaction at supermarkets/super stores was \$48.00.

The Appellant provided statistics pertaining to the general demographic and noted that households that conducted these transactions have a larger amount of SNAP residents residing in their homes. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

The Appellant contends that households with particular demographic information and located in particular geographic areas are more likely to be disqualified which shows a bias towards smaller grocers. Regional differences in disqualification rates and shopping habits support this contention as well. However, the Retailer Operations Division does not complete disqualification actions against SNAP households. It reviews household shopping patterns, transaction data, store visit data, etc. The race of the store owner and SNAP recipients shopping at the firm is not part of the consideration given. With very few exceptions, the Retailer Operations Division does not have access to information with regard to household size. Similarly, the Retailer Operation Division does not have access to the ethnicity of the households shopping at the subject firm. All of this data is maintained and collected by state agencies. After taking permanent disqualification actions against

retailers (of any size), the Retailer Operations Division sends a referral to the state agency partners with a list of all transactions in the charge letter. The state agency then conducts their own investigations of SNAP households which the Retailer Operations Division does not take part of.

The Appellant's contention that stores miscategorized as convenience stores are likely to have far higher Scan F hits may be true. However, nothing in this case suggests the subject firm was miscategorized. Smith's Corner Store LLC was classified as a convenience store by FNS based on information the firm provided in its initial application and subsequent periodic reauthorization applications to SNAP. Factors considered when determining the store type include: how a store operates its business; the inventory observed and noted during the store visit conducted in connection with the store's authorization or reauthorization; its annual retail sales; food sales; the percentage of its staple foods; and under which criterion the store is determined eligible (Criterion A – staple food stock (offers for sale, on a continuous basis, a minimum of three stocking units of three varieties of foods in each of four staple food categories, including three stocking units of one variety of perishable foods in at least two of those categories) or Criterion B – staple food sales (a firm must have more than 50 percent of its total gross retail sales in staple foods. Often stores that specialize in one staple food category like a butcher shop or bakery). At the time of the May 3, 2021 store visit, the firm's stock met the criteria of a convenience and is therefore, categorized as such. It is also important to note that the three comparison authorized convenience stores noted below were also classified as convenience stores by FNS based on the information the firms provided in their initial applications and subsequent periodic reauthorization applications to SNAP and the factors previously noted.

The average SNAP transaction included in this Attachment is \$75.08. The large transactions documented in this Attachment are not consistent with a convenience store in Elkhart County, Indiana. During the review period, the average transaction amount for a convenience store in Elkhart County was \$9.38. The average transaction in this Attachment is eight times larger than the average purchase amount for this store type. Even the smallest transaction cited in charge letter Attachment 2 had an amount which is more than 3.5 times higher than the average SNAP purchase amount for Elkhart County. There is no evidence that the Appellant firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors.

The Retailer Operations Division compared the review period SNAP transaction activity of Smith's Corner Store LLC to that of three SNAP authorized convenience stores located within 0.65 miles of the Appellant. These three stores sell a comparable or larger variety of staple food items at comparable or better prices as compared to Smith's Corner Store LLC. During the review period, the Appellant's average purchase transaction amount, total purchase transaction count, and total purchase dollar volume were considerably higher as compared to the noted area convenience stores. The Appellant also had a higher ALERT rank average and conducted a considerably higher number of B2 and F Scan SNAP transactions as compared to the comparison convenience stores. In addition, the Appellant conducted a considerably higher number of transactions between \$40.00 and \$109.99 as compared to the comparison stores.

The Retailer Operations Division also compared the review period SNAP transaction activity of Smith's Corner Store LLC to the store type average for convenience stores located in Elkhart County. During the review period, the Appellant's average purchase transaction amount and total purchase dollar volume were considerably higher as compared to the store type average for the

county. These are all indicators that trafficking is more likely than not occurring at the Appellant firm.

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Elkhart, Indiana. If co-shopping truly impacted Smith's Corner Store LLC as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – excessively large purchase transactions made from recipient accounts. But this is simply not the case.

With regard to the owner, attorney (not the Appellant's current counsel), and customer (Note: Only two customer statements included the name of the customer/identifying information) affidavits provided by the Appellant which purport to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect owners or customers to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any owner or customer affidavit provided would attest to questionable transactions being legitimate.

The Appellant contends that the only stores that are nearby do not have the inventory and variety of the Appellant. Accordingly, this store is going to have larger transactions than the average convenience store. As noted previously, it is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 16 SNAP authorized retailers of comparable or larger size located within a 1.0 mile radius of Smith's Corner Store LLC, including 1 small grocery store, 3 medium grocery stores, and 1 super store, which could meet the nutritional needs of SNAP customers. There were a total of 23 authorized SNAP stores located within a 1.5 mile radius of the Appellant, including 2 supermarkets and 2 super stores. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that according to the 2016 *U.S. Grocery Shopping Trends Annual Report*, FMI, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage. FNS does not question the data in the report and acknowledges that it could be possible that some people shop at the subject store regularly. However, the Appellant is using this average and or overall data to attempt to explain the questionable transactions in the charge letter. This data, however, is not specific to the subject store. This report does not mention the number of SNAP recipients, if any, included in the survey. In addition, the survey participants were located in Seattle, Washington, while the subject firm is located in Elkhart, Indiana. As such, the referenced report does not substantiate that trafficking did not occur at the Appellant firm.

In support of the Appellant's contentions regarding SNAP households' shopping habits, the following studies were provided and/or cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; *What Does SNAP Benefit Usage Tell Us About Food*

Access in Low-Income Neighborhoods?, Social Science & Medicine, 2014; a study by Google, Inc.; *3 Lasting Changes to Grocery Shopping After COVID-19*, Forbes Magazine; and *Grocery Retail to Lead Restaurants in Food Market Share Post-Pandemic*, Supermarket News. While FNS does not dispute the findings of these studies, they do not provide any evidence that trafficking was not occurring at Smith's Corner Store LLC.

The Appellant contends that because the store is located much closer to the SNAP participants and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course. However, the Retailer Operations Division conducted a detailed analysis of three SNAP households (located 0.8, 0.3, and 1.1 miles from the subject firm, respectively) identified in the charge letter to analyze their shopping patterns at Smith's Corner Store LLC compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Smith's Corner Store LLC often within 24 hours of shopping at the larger stores where they conducted much smaller SNAP purchases. This strongly suggests that households are not using the subject firm as their primary shopping source. It is highly unlikely that a convenience store with moderate staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

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 super store. 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, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The 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 at other area stores, or special services rendered. The 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.

Evidence of Trafficking

Regarding the Appellant's contentions with respect to the reliability of the ALERT system and Confirmation Bias, USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of

evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

The Appellant argues that USDA does not know the correlation coefficient between ALERT scans and trafficking. The 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 the Appellant. The Appellant does not have the necessary data to perform a reliable correlation analysis.

Bank Statements/Transaction Detail Reports/Tax Records/Inventory Purchase Invoices

The Appellant contends that the submitted bank statements, account transaction detail reports, tax return, and inventory purchase invoices substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

The bank statements and account transaction detail reports submitted are within the review period and reflect activities such as withdrawals and deposits made by the Appellant. However, these documents do not provide detailed transactions that would allow FNS to evaluate the store's inventory. As such, this information provides little probative value.

The submitted 2020 U.S. Individual Income Tax Return for store owner does not contain sufficient detail for FNS to evaluate the store's inventory. They provide no insight into the inventory purchased by the store or the individual SNAP transactions that occurred during the review period. As such, this document does not offer additional insight as to what occurred during the charge letter transactions and do not validate that they were legitimate, bona-fide transactions.

The Retailer Operations Division conducted an analysis of the inventory purchase invoices provided for the review period. Invoices were excluded from the analysis which were unreadable, were duplicates, were not invoices, did not include a vendor name, were not itemized, did not include a date, and did not include necessary information for analysis, if applicable. Ineligible nonfood items were also excluded from the invoice totals. It is important to note that the inventory purchase invoices confirm that purchases of low dollar value foods, mainly inexpensive canned and packaged goods, snack foods, single-serving items and accessory foods, are predominant and account for a considerable portion of the firm's overall SNAP sales. Some of the invoices do show the purchase of frozen meals and some deli items as noted by the Appellant; however, these food items were purchased in minimal amounts. In fact, based on the invoices submitted, it appears the Appellant spent a very minimal amount on purchases of staple foods such as eggs, milk, some fresh produce, and deli meats.

With a 75 percent mark-up (the Appellant claimed that the mark-up percentage of most eligible food items is 50 to 75 percent), the invoice analysis indicates that the firm lacked sufficient purchased food stock to cover its SNAP redemptions for the review period. The analysis also does not account for any non-SNAP purchases (cash, credit and debit card, etc.) of food items at the Appellant. In sum, the invoices do not explain the questionable transactions at the Appellant.

Compliance History

The Appellant asserts that this firm has never had a compliance problem with SNAP in the past. The firm's compliance policy is an important factor and should be taken into consideration as it could

have a material impact on the transactions noted during the review period. It would defy logic for the store owner with a long history of compliance to suddenly start trafficking for the de minimus amounts set forth in the charge letter.

The Appellant is correct that the firm has not been cited for prior violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

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 nonmanagerial 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.

Case Laws and Past Administrative Reviews

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to the prior Final Agency Decisions cited by the Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

FOIA

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond. With regard to this contention, 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* was based on outdated regulations.

Customer Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose hardship on participating SNAP households, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

In the September 22, 2021 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "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, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the October 15, 2021 response to the letter of charges and in the February 23, 2022 response in support of the request for administrative review (i.e., past the 10 day required timeframe of receipt of the September 22, 2021 charge letter), the Appellant, through counsel, requested consideration for

the imposition of a civil money penalty in lieu of a permanent SNAP disqualification pursuant to 7 CFR § 278.6(i). Here, the effective compliance policy and program at the Appellant is reflected by the store's significant compliance history since it became an authorized SNAP retailer. The Appellant has trained staff on the appropriate rules and regulations regarding EBT transactions and has made certain that each of the employees has an understanding of the rules and regulations prior to being permitted to operate the cash register without constant supervision. The store has always maintained a policy that SNAP violations will not be tolerated.

However, the record supports that the Appellant did not submit a timely request and timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Smith's Corner Store LLC is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 6, 2022