

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

**239 International Deli Discount Corp.,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0215895**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against 239 International Deli Discount Corp. (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By letter dated April 3, 2019, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in August 2018 through January 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in an undated response that was received on April 10, 2019, that did not request or provide any supporting documentation for a CMP. This response included a Freedom of Information Act (FOIA) request. USDA FNS responded to this request in a letter dated May 7, 2019. Prior representation subsequently requested an appeal of the content of the FOIA response on August 7, 2019. The final FOIA appeal reply was issued on February 17, 2021. A reminder of the opportunity to submit any new information following receipt of the FOIA appeal was sent to the previous representative on February 18, 2021.

The Office of Retailer Operations and Compliance notified Appellant's previous representative by letter dated September 16, 2021, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter postmarked September 27, 2021, Appellant, through current counsel, appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. Subsequent correspondence consisting of a brief dated November 1, 2021, and several exhibits was submitted by counsel via email.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW**

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

7 CFR § 278.6(a) states: "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."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other

than eligible food”. Trafficking includes “Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food”.

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . 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 of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of August 2018 through January 2019. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The 1,000 SF store is fully stocked with food inventory and has a reasonably sized storage area that is not open to the public. The store offers hot and cold foods and also has a meat market. Up to 25 percent of the food in the storage coolers/freezers are used for food preparation. Participants could easily spend their benefits based on the variety of products;
- The owner was never told of any policy restricting the number of times a customer can use their benefits in a day. Because of different issuance dates, there are many families that share their benefits with other family members and will make two purchases with one for themselves and one for a family member. Many of the transactions also result from phone orders from well-known customers. Additionally, up to 75 percent of the

- customers are SNAP dependents who account for multiple transactions;
- Although the store is only midsized, it carries an extensive inventory to fulfill customers' diverse requests. It's not unusual for customers to make purchases at the store several times in a day. Letters from customers support the reasons for the large purchases. Many, if not all of the flagged transactions, are normal in size considering the amount of merchandise carried by the store such as large bulk items which include 20 pound bags of rice, 10 gallon containers of cooking oils, baby formula usually sold by the case, and Ensure cans usually sold by the case;
- The store has encountered many issues with unreadable cards that would not allow the card to properly swipe. The store clerk will then manually enter the card information;
- Copies of tax returns demonstrate the store's large volume of sales with EBT sales constituting 60 percent of food sales;
- The owner holds annual training sessions to ensure employees are well versed in all aspects of the business and that they conform to SNAP regulations. These include the You Tube video, reading through the booklet, and discussing scenarios;
- The owner was deprived due process when his FOIA request was not fully completed; and,
- The owner is adamant that no fraudulent activity occurred at the store and that he would not jeopardize his business and livelihood in any way. The store is heavily impacted by the WIC and SNAP suspensions and any fines or disqualifications will result in a permanent shutdown.

Appellant submitted photos of the firm, letters from SNAP customers, tax returns, deposit reports, and invoices for inventory purchases in support of these contentions.

## **ANALYSIS AND FINDINGS**

Stores caught in trafficking violations consistently display particular, characteristic transaction patterns including those cited in the charge letter. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In the absence of evidence for the legitimacy of such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

## Store Characteristics

FNS initially authorized the firm on September 30, 2014, as a convenience store. In reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during an October 7, 2018, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. The store visit report documented the store size, description, and characteristics. The report also described the store's checkout counter space area and noted the effect of any limitations of the available surface area on placing large purchases or processing more than one customer at a time. The store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns.

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

The FNS store visit report showed that the firm was a small store of approximately 1200 SF located on a street corner in the Bronx. A significant proportion of the store was dedicated to the preparation and sale of hot and cold prepared foods that included a sizeable commercial kitchen and food prep area. The firm was not a specialty store and offered a very limited stock of staple foods consisting of traditional American brands and an extremely limited selection of Hispanic food products (Goya). A significant portion of inventory was in drinks, candy, snacks, and ineligible items that included a robust menu of hot foods. There were no shopping carts or handheld baskets severely limiting the amounts of food that could be moved to the small checkout area. No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase.

The store visit report was authorized and completed in conjunction with the store's owner. The report specifically stated that most food prices ended in .x9 cents and also contained a listing of the most expensive food items costing more than \$5.00 for sale in the store. This listing consisted of four items cited by the store owner: 10+ containers of Enfamil formula priced at \$19.99, 10+ containers of Similac formula priced at \$19.99, Boars Head deli turkey priced at \$7.99 per pound, and deli cheese priced at \$6.99 per pound. No other eligible food items were noted by the store owner as costing more than these four items. The store offered no fresh or frozen unprocessed meats or seafood and a very limited stock of processed meats or seafood. There also was a very limited stock of fresh fruits or vegetables and no frozen or dried fruits or vegetables. The store owner noted that the deli meat, deli cheese, vegetables, and bread products were used in the preparation of the hot/cold prepared foods. There were no frozen entrees or frozen dinners. The store visit report and photos stated that the store was very narrow with tall shelves and showed dust on some canned and packaged foods as well as some faded and/or missing labels indicating a slow turnover of stock.

While the firm did stock baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.

A previous FNS store visit was conducted on July 6, 2014. The store was far better stocked with a considerably greater quantity and variety of staple foods than during the 2018 visit. The store was also much more organized during the 2014 visit. The store had a much greater focus on the sale of hot/cold prepared foods during the October 7, 2018, store visit.

### **Unusual numbers of transactions ending in a same cents value**

This Attachment lists 1389 transactions ending in the same cents value of .00 cents. Transaction amounts range from \$9.00 up to \$265.00 and include an unusually high number of transactions for the exact same amount such as six transactions for \$75.00, six for \$70.00, six for \$60.00, seven for \$50.00, five for \$46.00, seven for \$42.00, seven for \$40.00, 10 for \$33.00, 11 for \$32.00, eight for \$31.00, and 12 for \$30.00 that are not supported by store inventory or pricing. When such repetitive patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits. The FNS store visit photos revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cents transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type of store.

Appellant did not address the same cents transactions.

The FNS store visit report, completed in conjunction with the store owner on October 7, 2018, noted that eligible food stock has pricing that ends in .x9 cents. A review of the many store visit photos showed a small number of items with different pricing such as single serving drinks with prices of \$2.00, \$2.50, \$3.00, and two for \$3.00 while some snack items were priced at \$0.50 each, but the vast majority of visible prices ended in .x9 cents. The purchase of multiple items with prices ending in .x9 cents would not result in a transaction total ending in a same cents value of .00 cents as multiples of .x9 (e.g. .09, .18, .27, etc.) seldom have a value ending in .00 cents making it statistically impossible that this many store transactions would end in .00 cents with legitimate food purchases. The purchase of a single item with a price ending in .x9 cents would also make it impossible for any transaction totals to end in .00 cents. Additionally, a review of the transactions in Attachment three shows that there are many transactions that do not end in .00 cents thus further refuting Appellant's claims.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lowest dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate.

### **Multiple transactions in unusually short time frames**

This Attachment documents 53 individual transactions in 24 sets of two or more transactions conducted by 11 different households in a short period of time. Individual transaction amounts range from \$21.00 to \$210.00 with 34 transactions for \$50.00 or more and four transactions exceeding \$100.00. There are transaction set totals as high as \$402.46, \$247.00, \$220.84, \$169.98, \$159.99, \$157.00, \$154.00, \$143.50, \$140.00, \$139.98, \$111.00, \$104.62, \$101.00, and \$100.00 to list some of the largest sets. The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 22 of the 24 sets. The subsequent transactions exceed \$30.00 in 22 of the sets and exceed \$59.99 in 10 sets. The span of time for transaction sets ranges from 25 seconds to more than 31 hours with nine of the 24 sets occurring over consecutive days. Only four of the 24 transaction sets occur in less than one hour and 58 minutes while 19 sets occur in more than four hours and 40 minutes. Two sets are comprised of four individual transactions and one of three transactions while the remaining 19 sets are comprised of two transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant's contentions regarding this charge have been previously cited and are addressed below.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item after checking out or of multiple members of the same household shopping together and making separate purchases using the same EBT card as 20 of the 24 transaction sets occur in one hour and 58 minutes or more time with only four sets occurring in less time. It makes no sense that a household would conduct as many as four separate sizeable transactions over a short period of time that total to a substantial part of the household's monthly SNAP allotment when that household is also shopping at many larger stores. The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts equaling or exceeding \$21.00 with 22 of the 24 sets having subsequent transactions of \$30.00 or more and as high as \$118.00, far more than the cost of a forgotten item or two. Appellant's contentions also provide no explanation as to why households would conduct two, three, or even four sizeable transactions at a very poorly stocked firm within a matter of hours. It is noted that the September 2020 FNS report on *Benefit Redemption Patterns in SNAP in FY 2017* states that while households on average did spend 77.6 percent of their benefits by mid-month with over half being expended in the first week after issuance, that 82.1 percent of all benefits were spent at a super store or supermarket. Only one percent of

households shopped exclusively at convenience stores while only 4.6 percent did not shop at a super store or supermarket. On average, households conducted 9.4 transactions per month that averaged \$27.36. Convenience store purchases accounted for 21.2 percent of all transactions, but the average purchase amount was only \$7.17. Accordingly, the transaction patterns contained in the charge letter Attachments are not typical, but are unusual and indicative of trafficking.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total \$79.98 or more when the comparable average convenience store SNAP transaction amount in Bronx County during the review period was \$8.92. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review. The Food and Nutrition Act of 2008, as amended, requires only one occurrence of trafficking to permanently disqualify a SNAP retailer.

The Office of Retailer Operations and Compliance's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to comparable or sometimes much greater amounts at a much smaller and very poorly stocked convenience store on the same day or within 24 hours. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

It is further noted that the number of "Multiple transactions in unusually short time frames" in this Attachment decreased by more than 50 percent in the six months following the firm's receipt of the FNS charge letter. The significant decrease in these transactions is substantial evidence that the unusual and suspicious transactions at the Appellant firm during the review period can most likely be attributed to trafficking of SNAP benefits.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.



## High Dollar Value Transactions

This Attachment lists 136 individual EBT transactions ranging from \$34.00 to \$265.00 with 75 transactions for \$50.00 or more and five transactions for more than \$100.00. The large number of high dollar transactions is uncharacteristic for a convenience store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. These transactions are also substantially higher than the average SNAP transaction amount of \$8.92 for this store type in the Bronx County during the review period. This is unusual and indicative of trafficking.

The evidence under review shows that many SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the firm. These high dollar value transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, often on the same day, or within 24-72 hours of purchases at larger food stores.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Office of Retailer Operations and Compliance shows that Attachment households are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the firm since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Appellant offered no justification as to why households would spend significant amounts of their limited SNAP benefits at Appellant's very poorly stocked convenience store within hours of having shopped at larger and better stocked stores that would have offered a greater selection of staple foods at lower prices. These suspicious transactions are indicative of trafficking at the Appellant firm. The Food and Nutrition Act of 2008, as amended, requires only one occurrence of trafficking to permanently disqualify a SNAP retailer.

Both the FNS 2011 and the 2020 reports titled "*Benefit Redemptions in the Supplemental Nutrition Assistance Program*" for fiscal years 2007 and 2017, respectively, show that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a super store or a supermarket. Participating households typically made several (just over nine on average) relatively small purchases (\$27.36 on average for 2017) with SNAP benefits each month. Making single or multiple transactions of large dollar amounts or cumulatively large dollar amounts, and/or depleting substantial amounts of one's allotment in a period of hours, leaving a marginal amount or no benefits for the rest of the month, is inconsistent with typical shopping behavior of SNAP benefit households. Rather,

transactions over a short period of time of large value, or large cumulative value, in which SNAP benefits are exhausted are an indicator of trafficking.

No explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater quantity and variety of SNAP eligible foods at lower prices and who apparently have no transportation limitations would be conducting high dollar transactions at a very poorly stocked convenience store. It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and other larger grocery stores the households in this Attachment were regularly shopping at and these stores would also likely have significantly lower food prices yet these households continued to spend large dollar amounts at a convenience store with a very limited stock of staple foods and no shopping carts that would be needed for the large transactions in this Attachment. There is no legitimate reason why these households would spend so much of their SNAP allotments at a very poorly stocked convenience store when they clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these households were trafficking SNAP benefits at the firm. Based on this discussion, trafficking is the most viable explanation for these irregular shopping patterns.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience or small grocery stores out of necessity, this is not the case when they have better alternatives. FNS records show there were at least 14 comparably sized or larger authorized retail food stores within a 0.24 mile radius of Appellant's location that included three super stores, two supermarkets, two large grocery stores, one medium grocery store, two small grocery stores, and four convenience stores. The nearest super store, the nearest large grocery store, and the medium grocery store are all located within approximately two blocks of the Appellant firm. There were many larger stores located slightly further away that includes super stores, supermarkets, and other larger grocery stores. The households listed in the charge letter Attachments regularly shopped at these larger stores as well as at additional larger stores located further away during the review period. These larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at Appellant's very poorly stocked convenience store.

The difference in the total SNAP transaction dollar volume, the total SNAP transaction count, and the average SNAP transaction amount for Bronx County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume is 49.82 percent larger than like type Bronx County stores and its total SNAP transaction count is 54.29 percent larger than the county average while its average SNAP transaction amount is 2.8 percent smaller than the county average. The high transaction volume and transaction count are abnormal based on the firm's very limited stock of staple foods. The very high volume and transaction count would be the expected result of a retailer excessively dividing a large number of high dollar trafficking transactions into smaller dollar value transactions in an attempt to avoid suspicion. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected

to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous Attachments do not represent legitimate food purchases. The Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in the Bronx County. A comparison of Appellant's redemption data to the average for county convenience stores using ten dollar increments shows that Appellant's transaction count was significantly higher than like type stores in all ranges up to the \$260.00-\$269.99 range at which point transactions stopped. It is very unusual that transactions at the Appellant firm stopped at the \$260.00-\$269.99 range while the transaction averages at like type stores dropped below one transaction after the \$110.00-\$119.99 range, more than double that of like type stores. The firm also had a spike in the transaction count and dollar volume in the \$70.00-\$79.99 range that is not explained by the firm's available food stock. This transaction pattern does not appear in the transaction patterns or in the transaction count averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Office of Retailer Operations and Compliance determined there was no credible reason for the firm to have transactions at these dollar levels given the very minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant is mistakenly equating a firm having sufficient stock to be qualified as a SNAP retailer with being a well-stocked store. While the Appellant firm does have adequate stock to qualify as a SNAP retailer, one has to look at the quantity and variety of a store's eligible food inventory before one can make a statement as to how well a store is stocked. A store can meet the minimum stocking criteria under Criterion A to become a SNAP retailer by offering for sale, on a continuous basis, no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each food variety, and at least one variety of perishable foods in at least two staple food categories. In other words, a store can qualify with as few as 36 units of staple foods.

Appellant's arguments supporting the legitimacy of the transactions listed in the charge letter Attachments are based on the Appellant firm being well-stocked. This is evidenced by Appellant's claims:

- Although the store is only midsized, it carries an extensive inventory to fulfill customers' diverse requests. Many, if not all of the flagged transactions, are normal in size considering the amount of merchandise carried by the store such as large bulk items which include 20 pound bags of rice, 10 gallon containers of cooking oil, baby formula usually sold by the case, and Ensure cans usually sold by the case.
- Participants could easily spend their benefits based on the variety of products.

Even a cursory review of the October 7, 2018, FNS store visit report and photos shows that the firm had a very limited staple food inventory with no fresh or frozen unprocessed meats or seafood and a very limited stock of processed meats or seafood. There also was a very limited

stock of fresh fruits or vegetables and no frozen or dried fruits or vegetables. The store owner noted that the deli meat, deli cheese, vegetables, and bread products were used in the preparation of the hot/cold prepared foods. There were also no frozen entrees or frozen dinners. No 20 pound bags of rice, 10 gallon containers of cooking oil, or cases of Ensure and infant formula were available for purchase as claimed by Appellant. A more detailed synopsis of the FNS store visit may be found at the beginning of the Analysis and Findings section of this Decision. This synopsis also includes a listing of the firm's most expensive items costing more than \$5.00 that was provided by the store owner during the FNS store visit. The firm's actual quantity and variety of staple food stock is very limited making it unlikely that any SNAP households would consider the firm to be their primary, or one of their primary, grocery stores and would likely only use the firm for small dollar value food purchases and possibly for purchases of ineligible items such as tobacco products, vape pens, or hot prepared foods. This is further supported by the fact that there are other larger stores, including a super store, located in close proximity of Appellant's location. Therefore, Appellant's claims regarding the store carrying an extensive inventory are baseless and without merit.

Although the subject store may have contained sufficient inventory to satisfy any single charge letter transaction, this does not explain why a SNAP household would spend up to \$265.00 in a single transaction at a very poorly stocked convenience store with a very limited stock of staple foods, that is not optimized for bulk sales, and that is located in proximity to superiorly stocked competitor stores. Even if a hypothetical SNAP household consisted of a large number of members, it would still be much more likely to make high dollar purchases at larger competitor stores, such as supermarkets or super stores, that would offer a superior quantity and variety of stock, lower pricing, and ease of both shopping and checkout.

Information obtained during the October 7, 2018, FNS store visit on shows that the Appellant firm offers a very limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items, especially hot prepared foods. It is specifically noted that the firm had no fresh or frozen unprocessed meat or seafood, a very limited quantity and variety of processed meats and seafood, no frozen fruits or vegetables, and a very limited stock of fresh fruits and vegetables. The fact that tobacco, smoking accessories, vape pens, hot food/drinks, HBI, household products, paper products, pet products, diapers, clothing, ATM, lighter fluid, office supplies, incense, newspapers, and phones/phone cards are not eligible for purchase with SNAP benefits also provides no justification for the large transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food dollars, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm also had a small checkout area and no shopping carts or hand baskets available to customers thereby making it extremely difficult to

facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carried a very limited stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

The Office of Retailer Operations and Compliance analyzed the many invoices and printouts provided by Appellant after excluding: any ineligible items on individual invoices, the many invoices dated outside the review period, any duplicate invoices, and any incomplete or illegible invoices. The Loboy Inc. and AR cashing system printouts are not actual invoices and do not offer any evidence to explain the suspicious charge letter transactions so were not included in the invoice analysis. Appellant included a statement from Jetro Cash & Carry showing the total purchase amount of \$35,528.88 for all of 2019. This amount was adjusted to produce a monthly amount since only January 2019 was in the review period and also because Jetro sells a variety of ineligible items. A standard 40 percent markup was applied to the invoice total of \$2,813.56 resulting in potential eligible food sales of \$3,938.98. SNAP redemptions for the review period amounted to \$61,624.19 showing that the firm did not have sufficient food inventory to support its SNAP redemptions during the review period. This analysis did not consider any credit/debit/cash sales which would further widen the gap between the inventory and SNAP redemptions.

Appellant submitted 10 photos showing store layout and stock in support of its contentions. A comparison of these photos with those taken during the FNS store visit show a store with a newly remodeled interior that is significantly different from what existed during the period under review. Accordingly, these photos provide no meaningful evidence for the matter under review.

Based on these discussions, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

### **Other Contentions**

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or

disqualification from the SNAP. Additionally, a record of participation in 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. Appellant's other contentions are addressed in this section.

Regarding Appellant's deprivation of due process contentions relating to the initial FOIA response, the response to the FOAI appeal, and redactions, in particular, FOIA responses are governed by current FOIA rules and regulations and fall outside of the purview of this administrative review and so are not addressed further.

Appellant submitted statements by 10 purported SNAP households that regularly shopped at the Appellant firm. None of the letters contained SNAP recipient identifiable information. Retailer Operations staff searched the New York SNAP database and were able to identify seven of the 10 households. Four of the seven had no transactions at the Appellant firm and only two of the three households that did shop at the firm had transactions appearing on the charge letter Attachments. Both of the households with charge letter transactions had only two transactions each in the first Attachment with the amounts being \$13.50 and \$9.50 for one household and \$9.50 and \$9.00 for the second household. As is normally the case with household statements, much of the information claimed is exaggerated or untrue. That only two of the household statements actually had transactions listed on the charge letter with both being of minimal amounts shows that Appellant's statements have no evidentiary value in the matter under review. It is also noted that some statements referred to the firm as being The Alamo Delicatessen which is the name of the firm that is currently located at the Appellant firm's former location.

Appellant stated that the store has encountered many issues with customers coming in to make purchases with unreadable cards. Many times, due to a damaged, faded, or slightly bent magnetic strip that would not allow the card to properly swipe and get a read. In such circumstances, the store clerk usually enters the card's information manually. On occasion, the store clerk denies servicing the customer due to a poorly maintained illegible card. It is not known why this issue was included in Appellant's brief as manually keyed transactions were not included in the firm's charge letter.

The Appellant firm's tax returns for the years 2018 and 2019 do not provide strong evidence supporting the legitimacy of the charge letter transactions.

Appellant's reference to demographic data for the Bronx including Census Bureau statistics on poverty is noted. SNAP recipients are by definition low income and most cities and towns have low income neighborhoods so it is not unusual for SNAP authorized retail stores to be located in low income areas with many SNAP recipients. While these characteristics are common to many SNAP retailers, neither they nor the demographic data offered by Appellant provide a justification or explanation for the charge letter transactions.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators.

While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly 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, 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”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Office of Retailer Operations and Compliance staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 the most

serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall 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 and second chances are not an authorized option under existing regulations.

### **CIVIL MONEY PENALTY**

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request a CMP or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i) within the specified timeframe. Based on the above, the Office of Retailer Operations and Compliance’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

### **CONCLUSION**

The Office of Retailer Operations and Compliance presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the



discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

### **RIGHTS AND REMEDIES**

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

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

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

March 6, 2023